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A comparative analysis of the treatment of NINA debtors in South Africa and Scotland during the COVID-19 pandemic

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Mini-dissertation submitted in partial fulfilment in requirement for the degree

Master of Laws

LLM In Insolvency Law (course work)

In the

FACULTY OF LAW

at the

UNIVERSITY OF PRETORIA

Supervised by

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October 2023

ACKNOWLEDGMENTS

I thank God for everything. I wish to thank my supervisor Dr Jani Sita Van Wyk for her assistance and guidance in preparing this dissertation. I wish to also thank my mother Elizabeth Khoza and granny Annah Ngomane for keeping me in their prayers through my academic journey. I am also thankful to my brother Ronald Ngwenya and sister Gugu Ngwenya for their motivations throughout this dissertation and throughout life. I also wish to show my gratitude to my friend Phemelo Malebo who assisted me with editing this dissertation and push me beyond my limits. To the rest of my family and friends not mentioned here, Thank you for everything.

DECLARATION OF ORIGINALITY

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ABSTRACT

The South African insolvency system remains pro-creditor regardless of the implications which were caused by COVID-19. Sequestration as dealt with in terms of the Insolvency Act 24 of 1936 is still the only procedure that provides for the discharge of pre-sequestration debts, and for this reason, it is referred to as the primary debt relief. The other two procedures which are the administration order in terms of the Magistrates' Court Act 32 of 1944 and the debt review in terms of the National Credit Act 34 of 2005 are referred to as secondary debt relief as they do not provide for any discharge of debts but are rather repayment plans. Debtors without income or assets are excluded from those procedures as they cannot prove any advantage to creditors, because of this exclusion the government introduced the debt intervention procedure through the National Credit Amendment Act.

This Act was signed by the government in 2019 but it is not yet operational, and this debt intervention measure is to address the issue of excluded NINA debtors by giving them access to the debt relief system through a mechanism that provides, amongst others, for a discharge of debts.

This dissertation deals with the debt intervention measure as a proposed debt relief measure to assist NINA debtors, while it compares and analyses the lessons that can be learned from international trends such as that of the debt relief system of Scotland. During COVID-19, Scotland proposed the CoronaVirus (Scotland)(no 2) Act 2020 to mitigate the consequences caused by the Virus to assist NINA debtors, and in the dissertation, the research emphasizes what South Africa can learn from Scotland to better the debt intervention procedure.

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CHAPTER 1: INTRODUCTION

1.1. Background to the study

2. COVID-19 has had a drastic effect on many sectors of the economy. This has negatively affected consumer-debtor. Due to the pandemic, the number of debtors increased because many people were retrenched and lost their mainstream income.[1] Businesses had to close because they could not function.[2] This logically led to the increase of debtors with no income and no assets (hereafter NINA debtors) locally and globally. NINA debtors are those debtors with no income and no assets whose access to the insolvency proceedings will yield no benefit for their creditors.[3]

The pandemic and subsequent measures taken by the government to curb its spread did not encourage the legislature to effect changes to the framework for debt relief in South Africa. Regardless of the implications of COVID-19, the South African debt relief system remained pro-creditor.[4] No changes were effected to the existing mechanisms to allow for easier access to the system for debtors, or a broader framework allowing for the discharge of debt. Sequestration remains the only procedure to provide for a discharge of debt, however, for the debtor to be able to access this procedure, the debtor must show that it will be to the advantage of the creditors which means it should entail a reasonable prospect pecuniary benefit accruing to the general body of creditors.[5] Assets are mainly considered to show a monetary benefit for creditors, although income is also considered.

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[1] Baboolal-Frank "The Implications of COVID 19 in the workplace in South Africa" 2021 *Journal of Legal, Ethical and Regulatory* 1 at 8.

[2] Baboolal-Frank *Journal of Legal, Ethical and Regulatory Issues* 8.

[3] Roestoff and Coetzee "Debt relief for South African NINA debtors and what can be learned from the European Approach" 2017 *CILSA* 251 at 251.

[4] Roestoff and Coetzee "A critical evaluation of consumer debt relief in South Africa – Lessons from the United States of America, England and Wales and suggestions for the way forward" 2012 *SA Merc LJ* 53 at 75.

[5] Kanamugire "The requirement of advantage to creditors in South African insolvency law – a critical appraisal" 2013 *Mediterranean Journal of Social Sciences* 19 at 19. See also Coetzee "*A comparative reappraisal of debt relief measures for natural person debtors in South Africa"* (LLD-thesis, University of Pretoria, 2015) 117. See also *Ex parte Bouwer* 2009 (6) SA 386 (GNP) 393 where the court started that the advantage for creditors is important in order to determine if a sequestration order should be granted.

Moreover, the alternative debt relief measures (debt review[6] and administration[7]) remain legislative schemes based on repayment plans requiring full payment to creditors – thus disallowing a discharge.[8] Income is essential for a repayment plan to be viable.[9] As such, to access any of these schemes and enjoy some of the benefits such as discharge or restriction creditor harassment, assets or income are needed.[10]

Prior to the pandemic, in 2019, the president signed into law the National Credit Amendment Act, which is not yet operational.[11] The Act introduced the debt intervention procedure, which is the government's response to the exclusion of NINA debtors from the debt relief framework.[12] This measure aims to address the issue of excluded NINA debtors by giving them access to the debt relief system through a mechanism that provides, amongst others, for a discharge of debts.[13] The mechanism also seeks to alleviate the over-indebtedness crisis faced by consumers in South Africa.[14]

2.1. Research problem

Regardless of the implications of COVID-19, and the increased number of NINA debtors due to the negative effects of COVID-19, the legal framework for insolvency law remained the same.[15] The number of NINA debtors has increased due to COVID-19 and yet NINA debtors are still excluded from accessing the formal debt relief system.[16] The reason for

[6]The National Credit Act 34 of 2005.
[7] The Magistrates' Courts Act 32 of 1944.
[8] Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* (LLD-thesis, University of Pretoria, 2015) 4.
[9] *Ibid.*
[10] *Ibid.*
[11] The National Credit Amendment Act 7 of 2019 (hereinafter referred to as the 2019 Amendment Act). The 2019 Amendment Act was assented to on 13 August 2019 but is yet to commence.
[12] Section 86A(1) of the 2019 National Credit Amendment Act.
[13] *Ibid.*
[14] The Memorandum on the Objects of the National Credit Amendment Bill, 2018 21-22.
[15] 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* 12.
[16] 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 *TSAR* 315 at 319.

this is that they cannot prove an advantage to creditors or that a payment plan is viable, mostly because they do not have sufficient income or assets to pay creditors.[17]

Prior to COVID-19, the government tried to rectify the exclusion of NINA debtors from accessing and benefitting from formal debt relief measures through the debt intervention process.[18] Whether this process will achieve its objectives is an open question. There are several flaws have been highlighted by scholars. For example, a debtor must access the office of the NCR in Gauteng regardless of his location, which will incur extra (and unavailable) transportation costs for a debtor outside the province.[19] Another example is that the measure is only available to debtors with a total of not more than R50, 000.00 in unsecured debts. This is flawed because it excludes debtors who have debts that exceed the prescribed amount but still not afford to pay their debts as they do not have any income or assets.[20]

2.2. Research questions

Against this background, the dissertation seeks to answer the following research questions:

- How are South African NINA debtors excluded from accessing and benefitting from formal debt relief measures?
- How does the debt intervention procedure aim to assist NINA debtors and does the process address the mechanisms of exclusion identified in the first research question?
- What laws did Scotland pass to assist NINA debtors post-COVID-19?

[17] *Ibid.*
[18] The 2019 Amendment Act that introduces the debt intervention procedure. It was signed into law by the President of the Republic of South Africa on 13 August 2019, however, it is not yet operational.
[19] Boterere *Debt relief as part of the social safety net: A comparative appraisal of the regulation of No Income No Asset debtors in Zimbabwe* (LLD thesis, University of Pretoria, 2022) 168.
[20] *Ibid.*

- Which lessons can be learned from Scotland to improve the South African framework?

2.3. Methodology and choice of comparative jurisdiction

The research will be conducted through desktop-based research considering primary and secondary legal sources with a comparative element. The specific approaches that will be employed include a descriptive analysis which will be used to describe and explain the three debt relief measures that regulate the insolvency system of South Africa and how NINA debtors are excluded from those measures. This approach will also be used to provide a brief overview of the proposed pre-liquidation composition. Critical analysis will also be employed to address the debt intervention procedure to determine how it aims to address the exclusion of NINA debtors.

Lastly, a comparative analysis will be relied upon to compare what measures the Scottish insolvency system has implemented during the COVID-19 to be able to assist NINA debtors and how such measures can be used in the South African Insolvency system for betterment of the debt intervention procedure. Moreover, in this dissertation, a masculine form will be used to also include a feminine form.

The Scottish insolvency system introduced measures to ensure that the NINA debtor is not disadvantaged.[21] The Bankruptcy (Scotland) Act of 2006 regulates debt relief. This legislation is responsible for the bankruptcy procedure in Scotland which protects every debtor regardless of his or her financial situation.[22] Debtors do not have to prove any advantage to creditors, nor do they have to have assets or income to access the system.[23]

Due to the COVID-19 pandemic and the effects that it had on debtors, the Scottish legislature introduced the CoronaVirus (Scotland)(No.2) Act 2020[24] in order to mitigate

[21] The Bankruptcy (Scotland) Act of 2006, see also Boterere 205.
[22] Boterere 185.
[23] *Ibid.*
[24] CoronaVirus (Scotland)(No.2) Act 2020.

the effects of the pandemic. This Act introduced procedures that make it easier for NINA debtors to access the debt relief system.

2.4. Breakdown of chapters

Chapter one, as the introductory chapter, provides the necessary background to the research topic, sets out the research problem and research questions, and describes how the dissertation will be structured.

Chapter two deals with the debt relief measures available in South Africa and also the proposed pre-liquidated composition. This chapter explains the broader scope of debt relief in South Africa and investigates how such relief measures do not cater for NINA debtors.

Chapter three discusses the debt intervention procedure introduced by the 2019 Amendment Act as a measure to provide access to debt relief for NINA debtors. This chapter builds on chapter two because it is the response of the government to accommodate NINA debtors. It should be noted that understanding the debt intervention and its purpose is important before focusing on Scotland's insolvency law and what can be learned from it.

Chapter four deals with the broader debt relief system of Scotland and investigates how it dealt with the issue of NINA debtors pre- and post-COVID 19.

Chapter five concludes the dissertation and reflects on the lessons learned from Scotland in order to propose reformations for South Africa.

CHAPTER 2: SOUTH AFRICAN DEBT RELIEF MEASURES

2.1. Introduction

The broader South African natural person insolvency system has remained creditor-orientated as it still does not cater to, and provide for a debt relief measure for, debtors without income or assets.[1] There are currently three debt relief measures in South Africa, namely the sequestration procedure in terms of the Insolvency Act,[2] debt review in terms of the National Credit Act[3] and the administration order in terms of the Magistrates' Courts Act.[4]

Sequestration is the only debt relief measure that for a discharge of debts[5] and it is for this reason that it is referred to as the primary (and preferred) South African natural person debt relief measure.[6] The discharge is not the main aim of the procedure but a consequence thereof.[7] However, sequestration has strict requirements entry requirements such as the advantage of creditors which must be proved by the applicant in order to qualify for such a procedure.[8] as a result, this leads to many debtors being excluded from the procedure.

The other two debt relief measures are referred to as secondary measures because they do not provide for a discharge of debts but full repayment of all debts by way of repayment plans.[9] Moreover, the administration order can only be accessible to debtors with less than R50 000 in outstanding debts, this means debtors with outstanding amount that exceed this threshold are excluded from the procedure.[10] The debt review procedure on the other hand also contains barriers for debtors as only credit agreements as defined in

[1] Boterere 11.
[2] 24 of 1936.
[3] 34 of 2005.
[4] 32 of 1944.
[5] 129(1)(b) of the Insolvency Act.
[6] Coetzee and Roestoff 2013 *Int Insolv Rev* 193.
[7] *ibid*
[8] Rochelle 1996 *TSAR* 315.
[9] Coetzee and Roestoff 2012 *SA Merc LJ* 69.
[10] Coetzee 2016 *Int Insolv Rev* 36.

the National Credit Act are subject to the procedure.[11] Agreements in terms of which credit providers have commenced individual enforcement procedures are excluded.[12] Those two secondary procedures require that the debtor have some form of disposable income and for this reason, NINA debtors are excluded from those procedures.[13]

Therefore, to determine the procedural requirements or other mechanisms that restrict the South African debt relief measures from catering to NINA debtors, it is of crucial importance to examine the available debt relief measures. This chapter therefore focuses on the available debt relief measures in South Africa and a brief discussion of the proposed pre-liquidated procedure.

2.2. Benchmarks for evaluating the South African debt relief mechanisms

Nina debtors are those debtors with no income and no assets whose access to the insolvency proceedings will yield no benefit for their creditors.[14] Because it is impossible for those debtors to pay their debts in a sustainable manner they become caught in a debt trap.[15] Once they get caught in such a debt trap, it becomes impossible for them to get out of debt because of the debt relief system which tends to accommodate creditors and requirements that make it impossible for them to access the debt relief procedures.[16]

The requirements that restrict the debtor to access the sequestration procedure include the issue of costs as application to this procedure can only be accepted if the debtor can prove that he is insolvent and that he has enough realisable assets to pay the costs of the sequestration process.[17] Moreover, it is impossible for NINA debtors to prove that they have sufficient assets as they lack assets at all and for this reason they cannot be able to access this procedure.[18] The issue of formal court based nature of the liquidation process

[11] 86(2) of the National Credit Act.
[12] *Ibid.*
[13] Coetzee 2016 *Int Insolv Rev* 36.
[14] Roestoff and Coetzee 2017 *CILSA* 251.
[15] *Ibid.*
[16] Coetzee and Roestoff 2013 *Int Insolv Rev* 188.
[17] Boterere 107.
[18] Coetzee "Is the Unequal Treatment of Debtors in Natural Person Insolvency Law Justifiable?: A South African Exposition" 2016 *Int Insolv Rev* 36 at 37.

also excludes NINA debtors to be able to access sequestration as court costs are too expensive for them to afford.[19] Moreover, the world bank reports further clarifies that court and judges are costly and they may be regarded as inaccessible and intimidating by individual debtors.[20]

Lots of delays may also be caused by the court-based system this is because of the limited ability of lower courts to address economic and social issues of debts.[21] The sequestration procedure also makes it difficult for NINA debtors from accessing this procedure because of the composition measure which is a debt restructuring arrangement between a debtor and his creditors.[22] NINA debtors cannot access this debt rearrangement as they do not have any income.[23]

The issue of debt restructuring is similar to that of court-sanctioned debt restructuring available in the debt review procedure.[24] NINA debtors are excluded to access this court-sanctioned debt restructuring as they do not have a stable income and they cannot afford to make periodic payments to creditors.[25] Lastly, the administration order also contains prerequisites that excludes NINA debtors as it is a repayment plan[26] that is available to debtors whose debt does not exceed the R50, 000,00 threshold.[27]

This administration order procedure excludes NINA debtors in the sense that a debtor must have excess income that can be utilised to offset his obligations and pay the administration costs and NINA debtors do not have income as such. According to the World Bank report, stigma is one of the issues which prevents debtors from getting a relief of their debts.[28] Debtors believe that the notion of announcing one's failure, either in

[19] Boterere 127.
[20] World Bank *Report on the Treatment of the Insolvency of Natural Persons* (2013) (hereafter "World Bank Report").
[21] World Bank Report para 165.
[22] Boterere 80.
[23] *Ibid.*
[24] Coetzee 208.
[25] *Ibid.*
[26] Section 74C(1)(a) of the Magistrates' Court Act.
[27] Section 74(1)(b) of the Magistrates' Court Act.
[28] World Bank Report para 120.

writing or in person before a public or private administrator is a deeply embarrassing and stigmatizing event.[29] And feelings such as guilt, shame and stigma are a powerful barrier to debtors considering seeking insolvency relief.[30] Because of those above-mentioned prerequisites, NINA debtors are excluded entirely in the debt relief system and as a results those debtors become trapped in debt.[31]

2.3. Sequestration

2.3.1. Overview

The sequestration procedure takes a pro-creditor approach.[32] In *Ex Parte Ford*,[33] the court held that the objective of the Insolvency Act is to benefit creditors and not to provide debt relief to debtors. The sequestration procedure is an asset liquidation measure that entails the liquidation of a debtor's assets to satisfy his debts.[34]

This procedure can be initiated by way of a voluntary surrender or compulsory sequestration application.[35] In terms of voluntary surrender, the application can be brought by the insolvent debtor, his agent or any person who has an interest in the administration of the estate of a deceased insolvent debtor or an insolvent debtor who is having difficulty in managing his affairs.[36]

The debtor who wishes to take this route must be able to prove that he is indeed insolvent, that he has sufficient assets to cover the costs of the sequestration process, and that such sequestration will be to the advantage of the creditors.[37] In *Epstein v Epstein*,[38] it

[29] World Bank Report para 121.
[30] *Ibid.*
[31] Roestoff and Coetzee 2017 *CILSA* 251.
[32] Boraine *et al* "The Pro-Creditor Approach in South African Insolvency law and the Possible impact of the Constitution" 2015 *NIBLeJ* 61.
[33] 2009 (3) SA 376 (WCC) para 383.
[34] Coetzee 3.
[35] Both the compulsory sequestration and the voluntary surrender processes are regulated by rule 6 of the High Court Rules.
[36] Section 3(1) of the Insolvency Act.
[37] Section 6(1) of the Insolvency Act.
[38] 1987 (4) SA 606 para 4.

was stated that voluntary surrender should be aimed at realising a non-negligible dividend for the debtor's creditors.

In terms of compulsory sequestration, the application is made by one or more of the debtor's creditors.[39] The court may grant an application for the sequestration of a debtor's estate if is it satisfied that a number of requirements have been met. Firstly, the applicant must have established that he has a liquidated claim of at least R100.00 against the insolvent debtor or, where two or more creditors apply jointly, the total claim in aggregate should at least be R200.00.[40]

Secondly, the applicant must be able to prove that the debtor has committed an act of insolvency or is insolvent[41] and, lastly, the applicant must prove that there is a reason to believe that the sequestration of the debtor's estate will be to the advantage of creditors.[42] A provisional sequestration order in the form of a rule *nisi* is granted, whereafter a final order is granted on the return date. The court can dismiss the application and set aside the order of provisional sequestration, or require further proof of the matters outlined in the application.[43]

As previously stated, the sequestration procedure is the primary debt relief measure because it is the only measure which provides for discharge of pre-sequestration debts once the debtor is rehabilitated.[44] It should however be noted that debts which came about through fraud on the side of the debtor are not discharged.[45] Moreover, one of the effects of rehabilitation is that the sequestration process is terminated and the debtor is granted a fresh start.[46] The discharge of the debts is not the aim of the sequestration procedure but mainly a consequence.[47] A debtor who is insolvent is automatically

[39] Section 9(1) of the Insolvency Act.
[40] *Ibid.*
[41] Section 12(1)(b) of the Insolvency Act.
[42] Section 12(1) of the Insolvency Act.
[43] Section 12(2) of the Insolvency Act.
[44] Coetzee 105.
[45] Section 129(1)(b) of the Insolvency Act.
[46] Bertelsmann *et al Mars: The law of insolvency in South Africa* (2008) 555.
[47] *Ex parte Ford* para 383.

rehabilitated after a lapse of ten years[48] and any interested party may apply to the court, with notice to the insolvent, before the expiry of ten years to prevent automatic rehabilitation.[49] In the alternative, the Insolvency Act provides for various grounds upon which the insolvent may approach the court to obtain an early rehabilitation through order of court.[50]

2.3.2. Access requirements

The most important requirement, and arguably most difficult to prove for NINA debtors when it comes to sequestration applications, is the advantage to creditors requirement.[51] Both voluntary surrender and compulsory sequestration require the applicant to show that the process holds advantage for the creditors, although the onus is less stringent in the case of compulsory sequestration than it is for voluntary surrender.[52]

Voluntary surrender requires actual proof of advantage for creditors[53] while compulsory sequestration requires only a reasonable prospect that it will be to the advantage of the creditors if the debtor's estate is sequestrated.[54] The reason for this is that the creditor in compulsory sequestration does not have the same personal knowledge of the debtor's financial affairs as the debtor himself would have in the case of voluntary surrender.[55]

The advantage for creditors requirement is not defined in the Insolvency Act, therefore case law must be relied upon to find a suitable explanation. In *London Estate (Pty) Ltd v Nair;*[56] the court stated that sequestration is only to the advantage of creditors when it results in some payment in respect of the claims of the creditors as a body, and there will be no advantage for creditors if no dividend or only a negligible dividend is available after

[48] Section 127A (1) of the Insolvency Act.
[49] *Ibid.*
[50] Boterere 120.
[51] Kanamugire 2013 *Mediterranean Journal of Social Sciences* 19.
[52] *Ex Parte Bouwer* 2009 6 SA 382 (GNP) para 393.
[53] Section 10(c) of the Insolvency Act.
[54] Section 3(1) of the Insolvency Act.
[55] Pepler *Advantage to creditors in South Africa Insolvency law - a comparative investigation* (LLM thesis, University of Pretoria, 2013) 18.
[56] 1957 (3) SA para 591.

the costs of sequestration have been met. In *Trust Wholesalers & Woollens (Pty) Ltd v Mackan,*[57] the court stated that the advantage to creditors principles implies that all the creditors involved should receive a non-negligible dividend after the liquidation of assets. It was also stated that the determination of the dividend will depend on the facts and circumstances of each case, as well as the attitude of the creditors.[58]

The court in *Meskin & Co v Friedman*,[59] had to deal with whether a right to an investigation by a trustee which follows upon sequestration constitutes an advantage, however the court held that such a right is not sufficient in itself to constitute the 'advantage' contemplated in insolvency legislation. In *Stratford v Investec Bank,*[60] the Constitutional court stated that an advantage for creditors is established where the applicant has proved that there is a reasonable prospect that is not too remote that some pecuniary benefit will accrue to creditors if his estate is liquidated.

The *Ex Parte Arntzen*[61] and the *Ex Parte Bouwer*[62] dealt with an interpretation of the advantage to creditor in terms of voluntary sequestration. In the *Ex parte Arntzen* the court emphasized the need for full and comprehensive disclosure from the debtor when dealing with voluntary surrender and further stated that the advantage to creditor is more common and dealt with strictly in voluntary than compulsory application.[63] Reason for this is that the is greater risk of abuse and the potential of undermining the creditors rights in a voluntary surrender of insolvent estate. [64]

In the *Ex parte Bouwer*, the applicant failed to provide required documentation for the application to prove he had sufficient assets for the application.[65] Therefore the reason the application why both cases were dismissed is because they cannot prove advantage to creditors. Moreover, NINA debtors do not have the income nor the assets to prove an

[57] 1954 (2) SA para 109.
[58] *Ibid.*
[59] 1948 (2) SA 555 (WLD) para 559.
[60] [2015] JOL 32695 (CC) para 45.
[61] 2013 (1) SA 49 (KZP).
[62] 2009 (6) SA 386 (GNP).
[63] 2013 (1) SA 49 (KZP) para 4.
[64] *Ibid.*
[65] 2009 (6) SA 386 (GNP) para 18.

advantage to creditors, they are unable to access the sequestration process.[66] Therefore, NINA debtors cannot be rehabilitated and obtain a discharge of debts.[67]

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In this case, the applicant received a provisional order sequestrating the first respondent's estate, along with a return date for the respondent to provide justification why a final order sequestrating his estate should not be granted.[68] The court first noted that a creditor's application for the sequestration of a debtor's estate is challenging to succeed; in order to do so, the creditor must prove that it has a claim worth at least R100 that the debtor is unable to dispute on reasonable and legitimate grounds.[69] This is so that the debtor has committed an act of insolvency and that there is reason to believe that it will be to the advantage of the creditors of the debtor should that estate be sequestrated.[70]

The court determined that the petitioner had fulfilled the requirements of section 12(1)(a) and (b) by proving that the respondent was insolvent and that the company owed the petitioner a sum of money equal to or greater than R100.[71] This is proven by the fact that the respondent remained indebted to the applicant in terms of suretyships agreement that he concluded in favour of the applicant.[72] Regarding advantage to creditors the court disagreed with the respondent when the respondent stated that the applicant failed to show what a dividend is in rand and cents.[73] Moreover, would be realized by the creditors if the estate of the respondent is finally sequestrated.[74]

As such the defendant was of the view that it would not be to the advantage of creditors should his estate be sequestrated.[75] The court argued that the applicant is not required

[66] Roestoff and Coetzee "Debt relief for South African NINA debtors and what can be learned from the European Approach" 2017 CILSA at 256.
[67] Boterere 112.
[68] [2023] ZAGPJHC 435 para 1.
[69] *Idem* para 10.
[70] *Ibid.*
[71] *Idem* para 16.
[72] *Ibid.*
[73] *Idem* para 24.
[74] *Ibid.*
[75] *Ibid.*

to demonstrate that the action will benefit or be advantageous to creditors, and that the applicant's creditors would receive a dividend in rand and cents in the event that the respondent's estate is sequestrated.[76]

The court was also in agreement with the *Meskin, Dunlop Tyres* and *Stratford* cases when they clarified that it is sufficient for the applicant to reasonably believe that it will be to the advantage of the creditors that the estate of the respondent be sequestrated.[77] The court held that although the respondent bears the evidentiary burden of proving that the order is being resisted on legitimate and reasonable grounds, it is his responsibility to show that the respondent is not insolvent and that his assets exceed the amount he owes his creditors.[78] The court also discovered that If an order sequestrating the estate of the debtors is granted whereas an advantage to creditors cannot be proved then such will narrow and rigid the interpretation of section 12(2) of the Act.[79]

Moreover, where a creditor has shown and proved that he is compliant with section 12(1)(a) and (b) of the Act wherein he or she still fail to satisfy the Court that the sequestration of the estate of a debtor will bring some pecuniary benefit to his creditors in a sense that the debtor does not have any realizable assets capable of affording a pecuniary benefit to his or creditor his estate can be sequestrated.[80] The court also stated how wrong it is to sequestrate estate of people who cannot prove an advantage to creditors as there will continue to course more debts.[81]

2.3.3. Costs

Voluntary surrender applications are expensive as high court applications are required.[82] Asset- and income-stricken NINA debtors do not have access to the funds necessary to

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[76] *Ibid* para 21.
[77] *Idem* para 21, see also *Meskin & Co v Friedman* 1948 (2) SA 555 (WLD); *Dunlop Tyres (Pty) Ltd v Brewit* 1999 (2) SA 580 (WLD); *Stratford and Others v Investec Bank Limited and Others* 2015 (3) SA (CC).
[78] *Ibid.*
[79] *Idem* para 25.
[80] *Ibid.*
[81] *Idem* para 33.
[82] Roestoff and Renke “Debt relief for consumers – the interaction between insolvency and consumer protection legislation (Part 2)” 2006 *Obiter* 98 at 99.

bring these applications. NINA debtors are further restricted from accessing the process as a result of costs as they cannot show that they have excess income or disposable assets to cover the costs of the liquidation process.[83] As indicated above, this is a requirement for a successful court application.

Section 6(1) of the insolvency Act[84] is of particular important when dealing with cost for sequestration, the section states that If the court determines that the debtor's estate is insolvent, that the debtor possesses sellable assets of adequate value to cover all the expenses associated with the sequestration as stipulated by this Act, and that the creditors would benefit from the debtor's estate being sequestrated, it has the authority to acknowledge the surrender of the debtor's estate and issue an order for its sequestration.

This section was dealt with in *Ex parte Arntzen*[85] case which stated that we should focus on two issues when dealing with the section, first, ascertain whether the applicant possesses real estate worth enough value to cover all sequestration expenses; second, ascertain whether the applicant's estate will be sequestrated to the advantage of creditors. It was also stated that without a full discloser the court cannot satisfied that those two issues can be resolved.[86] In instances where the estate is small and it is faced with the challenge that all the expenses of sequestration must be covered by the estate, it is still necessary to demonstrate that sequestration would benefit the creditors.[87]

As a result, a solution has emerged to minimize these expenses. In *Arntzen*, a friend or family member committed to covering the legal expenses of the applicant's attorney, and the attorney in question will not seek reimbursement from the estate.[88] This was believed it will assist the debtor to reduce cost for the sequestration procedure.[89]

[83] Roestoff and Coetzee 2017 *CILSA* 256.
[84] Section 6(1) of the Insolvency Act.
[85] 2013 (1) SA 49 (KZP) para 3.
[86] *Idem* para 5.
[87] *Idem* para 18.
[88] *Idem* para 11.
[89] *Ibid*.

However, the court stated it is not convinced that sequestrating the applicant's estate would benefit the creditors.[90] Since It cannot make favorable determinations on these matters, the question of exercising discretion does not come into play, as favorable findings on these issues are prerequisites for the exercise of any discretion. As a result, the sequestration was not granted.[91]

The cost for sequestration varies from court to court, for Gauteng in establishing advantage to creditors the following sequestration and administration costs will be assumed in an uncomplicated application.[92] The cost of the application is R17,100 (R15,000 + VAT). If a correspondent is used, the cost of the application is R22,800 (R20,000 + VAT) and proof of the applicant's attorney of record agreeing to fee limitation must be provided. [93]

The mentioned costs are expected to rise by R2,280 (R2,000 + VAT) for each postponement of the application, or if the provisional order needs to be provided to all known creditors, the mentioned costs are anticipated to increase to R2,280 (R2,000 + VAT).[94] The administration cost, with a minimum of R2,500, is calculated as follows: 1% plus VAT on cash or funds held in a financial institution, 3% plus VAT on immovable property and shares, and 10% plus VAT on movable property, including book debts.[95]

The mentioned cost excludes the cost related to realizing the asset. Unless evidence suggesting otherwise is presented to the court, it will be presumed that the cost of realizing immovable property is 6% of the selling price in addition to advertising fees.[96] Moreover, regarding all the mentioned cost the applicant must in the application set out a calculation indicating the probable dividend to concurrent creditors, which should be in excess of 20 cents/rand.[97]

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[90] *Idem* para 22.
[91] *Ibid.*
[92] Practice Manual – Gauteng Local Division: Johannesburg – February 2018 110.
[93] *Ibid.*
[94] *Ibid.*
[95] *Ibid.*
[96] I*bid.*
[97] *Ibid.*

In the Free State Court, the costs are as follows: in order to demonstrate to the court that sequestration would benefit the creditors, the applicant, with the assistance of her attorney, computed that a dividend of 20 cents for every Rand would be distributed to concurrent creditors after accounting for administration costs totaling R30,000.[98]

The mention of R30,000 originates from the Free State Practice Directives, notably Directive 9.4.1, which specifies that all applications for provisional sequestration and voluntary surrender will be assessed by this Court under the assumption that the total costs of sequestration and administration will be R30,000.[99] A 10% fee hike was implemented in November 2017, and it was anticipated that another increase would follow shortly. In the Courts opinion it's reasonable to consider R45,000 as a typical cost for sequestration proceedings by a single law firm in an unopposed application.[100]

The sequestration expenses are expected to surpass R45,000.[101] These costs encompass the trustee's compensation, Master's fees, security bond premium, advertising expenditures, bank charges, and various smaller expenses like postage and incidentals.[102] When all these are factored in, the total sequestration and administration costs may well exceed R50,000. Under the most favorable scenario for the applicant, with costs amounting to R50,000, the remaining free residue would be R17,000, resulting in a mere 9.3% dividend.[103]

2.3.4. Friendly sequestrations as an abuse of the process

Friendly sequestration is another way which a debtor can rely upon in order to have their insolvent estate sequestrated. This procedure usually occurs when a debtor who is seeking the discharge which is offered by the sequestration procedure apply to a compulsory sequestration through a friendly creditor.[104] Friendly sequestration is initiated

[98] [2018] ZAFSHC 131 para 17.
[99] Free State Practice Directives.
[100] [2018] ZAFSHC 131 para 18.
[101] *Ibid.*
[102] *Ibid.*
[103] *Ibid.*
[104] See *Esterhuizen v Swanepoel* 2004 (4) SA 89 (W); Mabe and Evans 2014 *SA Merc LJ* 658.

by a debtor's written notice which indicated that he is unable to pay his debt to a friendly creditor.[105] A friendly creditor can be a someone who is close to the debtor and according to the case of *Esterhuizen v Swanepoel & Sixteen others,*[106] the mere fact that a compulsory sequestration application was made by a creditor who is willing to co-operate with the debtor does not amount to a friendly sequestration.

This friendly sequestration procedure has widely been abused and as a result the court have an inherent jurisdiction to prevent the abuse of its processes.[107] Pepler states that friendly sequestration is an abuse of process as the creditor and debtor are colluding together to avoid the stringent requirement of the advantage for creditors by applying for a compulsory sequestration rather than applying for the voluntary surrender.[108]

The court in this regard has duty to take every friendly sequestration application with care in order to make sure that the advantage for creditors principle is complied with and the creditor is not prejudice.[109] This is proven by the *Brinkman v Botha[110] case* where the court did not confirm a provincial sequestration order because the facts provided stated that there was a collusion between the applicant and the responded to asset the letter to evade payment to his ex-wife of the amount due to her under a divorce settlement agreement. Before the court grants a friendly sequestration there must ensure that certain factors are met as it was stated in the *Mthimkhulu v Rampersad and Another*. [111]

Those factors include the *locus standi* of the creditor, the nature of the debt, documentary evidence provided by the creditor and also the full details of the debtor's assets which can be sold. Should those factors be met then the friendly sequestration can be granted.[112]

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[105] *Craggs v Dedekind* 1996 (1) SA 937 (C).
[106] 2004 (4) SA 89 (W) para 91.
[107] Meskin 2-23.
[108] Pepler 27.
[109] Roestoff and Coetzee 2012 *SA Merc LJ* 56.
[110] [2004] ZAWCHC 23.
[111] [2000] 3 All SA 512 (N) 514.
[112] *Nel v Lubbe* 1999 (3) SA 109 (W) 111.

2.3.5. Other considerations

The sequestration order is only granted if the application can show that all the requirements for the procedure are met and that the court is certain that there is no any form of any abuse in the procedure. Advantage to creditor for this procedure serves as a crucial requirement to ensure that the court can grant the sequestration procedure to the applicant. This procedure excludes the NINA debtors in all aspects, including access requirements and costs, which is an open list. For this reason, NINA debtors end up not being able to access this procedure

2.4. Debt review

2.4.1. Overview

The debt review procedure, sometimes referred to as debt counselling, is provided for in terms of section 86 of the National Credit Act.[113] This procedure is a debt restructuring process.[114] It was emphasized in *Collett v FirstRand Bank Ltd*,[115] that the purpose of debt review is not to relieve the consumer of his obligations but to achieve a voluntary debt re-arrangement or a debt re-arrangement endorsed by an order of a magistrates' court.

In terms of this procedure, a consumer who is of the view that he may be over-indebted may apply to a debt counsellor to be declared over-indebted.[116] A debtor must pay an application fee before the debt counsellor accepts the debt review application.[117] It is the responsibility of the debt counsellor who receives such an application to determine if the consumer is over-indebted, and if the consumer seeks a declaration of reckless credit granted or whether any of the consumer's credit agreements appear to be reckless.[118]

[113] Section 86 of the National Credit Act.
[114] Van Heerden and Boraine 2009 *PELJ* 1 at 22.
[115] 2011 (4) SA 508 (SCA) at 514.
[116] Section 86(1) of the National Credit Act.
[117] Section 86(3)(a) of the National Credit Act.
[118] Section 86(6)(a) of the National Credit Act.

If the debt counsellor finds that the debtor is not over-indebted, the application will be rejected by the debt counsellor regardless of the fact that credit was recklessly granted.[119] Debt counsellors may suggest that the consumer and the relevant credit providers voluntarily consider and agree on a plan of debt re-arrangement if they determine that the consumer is not over-indebted but is having, or is likely to have, trouble meeting all of his obligations under his credit agreements in a timely manner.[120]

If the debt counselor determines that the consumer is excessively burdened by debt, they can propose to the magistrates' court to issue one or both of the following orders: The first order involves declaring one or more of the consumer's credit agreements as reckless credit, while the second order entails restructuring one or more of the consumer's financial obligations. Restructuring can involve extending the agreement's duration and adjusting each payment amount accordingly. Deferring payment due dates for a specified period, extending the agreement's duration with a payment postponement during a specific period, or recalculating the consumer's obligations due to violations of the relevant chapters.[121]

2.4.2. Access requirements

The debt review procedure entails the repayment of debts in an affordable manner. It is thus of crucial importance that the debtor has a stable income to be able to repay the restructured debts obligations and afford the costs of the procedure.[122] The financial requirements exclude NINA debtors from using this procedure to obtain debt relief. In addition, and unlike the sequestration procedure, the debt review procedure does not provide for discharge of debts.[123]

[119] Section 87(7)(a) of the National Credit Act.
[120] Section 87(7)(b) of the National Credit Act.
[121] *Ibid.*
[122] Coetzee and Roestoff 2012 *SA Merc LJ* 69.
[123] Roestoff and Coetzee 2017 *CILSA* 251.

This procedure is further only accessible by debtors who are party to a credit agreement that is regulated under the National Credit Act.[124]

2.4.3. Costs

In 2007 the National Credit Act introduced debt counselling which is not provided free of charge and consumers should be aware of those required costs before they apply for debt counseling. It should be borne in mind that NINA debtors do not have any means to be able to cover the whole or partial part of the debt counselling as they lack the means to do so. In order to apply for the procedure an application fee of R50.00 is required prior to the commencing of the assessment paid upfront and full.[125]

The applicant is also required to pay an Administration fee of R300 upfront and full. The administration fee includes consultation with the consumer which includes an explanation of the process and fee disclosure.[126] Moreover, the administration process include form 17.1 which is a document utilized by Debt Counsellors to inform the different credit providers of a consumer's initiation of the debt counseling process and the commencement of a debt review, loading consumers on the Debt help system (DHS) form fall in this administration fee well as the rejection process.[127]

Restructuring fees also needs to be paid, this includes an amount that is equal to the distribution amount or a maximum fee of R8 000 whichever is less for one applicant and for consumers married in community of property, the fee is either equal to the distribution amount or a maximum fee of R9 000, whichever is less.[128] It should be noted that this fee is a once off payable in the first month after the debt counsellor has drafted and submitted

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[124] Stoop 2008 De Jure 352; Van Zyl "The scope of application of the National Credit Act" ch 4 and Otto "Types of credit agreement" ch 8.
[125] Debt counselling fee Guidelines 2021 https://www.ncr.org.za/ (assessed 29 October 2023).
[126] *Ibid.*
[127] *Ibid.*
[128] *Ibid.*

the restructuring documents and it is impossible for NINA debtors to be able to come with such amount in a month.[129]

A reckless lending fee of R1 500 is also required should the consumer or debt counsellor feels that the is reckless lending, and should be paid two months after completing the written outcome of the reckless lending assessment.[130] The consumer should also pay an after care fee which is equal to 5% of the distributable amount or a maximum fee of R450, whichever is less and such must be payable in every month after month 2 in which after care services are rendered.[131]

A NCT submission fee should also be submitted with an amount of R500 which exclude the NCT filing fee and is charged and payable in Month 2 after completion of the restructuring process.[132] Should the matter be taken to court, an attorney fee will be needed for the drafting of the court application and attendance at court.[133] This fee will be agreed by the attorney and communicated in writing to the consumer when applying for debt counselling.[134] Moreover, it is impossible for a NINA debtor to meet any of those costs required for the application of this procedure, for that reason they become excluded to apply for a debt review.[135]

2.4.4. Other Consideration

While the NCA's objective includes offering debt relief by means of restructuring in cases of excessive debt,[136] it's important to note that this objective is contingent upon the consumer fulfilling all their financial responsibilities. Hence, the debt review process does not provide the consumer with the chance to be released from their existing debts.[137]

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[129] *Ibid.*
[130] *Ibid.*
[131] *Ibid.*
[132] *Ibid.*
[133] *Ibid.*
[134] *Ibid.*
[135] *Ibid.*
[136] S 86(7)(c)(ii)(aa) of the NCA.
[137] Boterere 155.

Furthermore, there is no specific time constraint defined for the payment plan, which means a consumer could potentially be obligated to follow the plan for an extended duration, in contrast to bankruptcy (sequestration), where fixed timeframes are established.[138] NINA debtors on the other hand are excluded entirely from the debt review procedure.

2.5. The administration order

2.5.1. Overview

The administration order is provided for in section 74 of the Magistrates' Court Act.[139] Similar to the debt review procedure, the primary purpose of the order is to effect a statutory rescheduling of debts through a payment plan.[140] Boraine describes this order as a debt relief mechanism which is available to some debtors who find themselves in financial distress, and which affords them the opportunity to obtain a statutory rescheduling of debt sanctioned by a court order.[141]

It is difficult for NINA debtors to obtain a relief from their indebtedness by relying on this measure as they do not have the income or assets that can be sold in order for them to afford the repayment plan.[142] However it was stated in *Bafana Finance Mabopane v Makwakwa* ,[143] that one of the main purposes of an administration order is to protect poor and low-income people who cannot read or write and do not know much about the law. A debtor can file for an administration order if they have a judgment debt against them or if they are unable to pay their financial obligations and do not have enough assets to pay off their debts.[144]

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[138] *Ibid.*
[139] Section 74 of the Magistrates' Courts Act.
[140] Section 74C(1)(a) of the Magistrates' Court Act.
[141] Boraine "Some thoughts on the reform of administration orders and related issues" 2003 *De Jure* 217 at 217-218.
[142] *Ibid.*
[143] 2006 (4) SA 581 (SCA) para 583.
[144] Section 74(1)(a) of the Magistrates' Courts Act.

To get an administration order, you must file an application with the Magistrates' Court using the prescribed form and attach a complete statement of your financial affairs.[145] If a debtor's application for an administration order is successful, an administrator will be appointed to take charge of their finances and make payments to creditors until all debts and administration costs are paid off.[146]

The administrator then collects the payments in terms of the order and distributes them *pro rata* amongst creditors.[147] When all debts and administration costs have been paid, the administrator files a certificate with the clerk of the court, which ends the administration order.[148] After submitting an application for an administration order, the debtor must attend a hearing before a magistrate, either in person or with a legal representation.[149] The debtor's creditors may also attend the administration order hearing.[150]

In the course of the administration order hearing, the debtor may be questioned by the creditor or his attorney regarding his assets and liabilities, income both now and in the future, including that of his cohabiting wife, his standard of living, the possibility of making savings, and any other matter the court may find pertinent.[151]

The administrator may also keep a portion of the money they have collected to pay their expenses and fees, as well as any costs they may incur if the debtor defaults or disappears.[152] Moreover, NINA debtors cannot obtain a relief from this measure as it is a repayment plan and they do not have any income to satisfy the said payment plan. NINA debtors will also be excluded from this measure because of high administration cost, legal representation cost and also longer payment plan.[153]

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[145] Section 74A (1) of the Magistrates' Courts Act.
[146] Section 74E of the Magistrates' Courts Act.
[147] Section 74C(1)(b)(i) of the Magistrates' Courts Act.
[148] Section 74(1) read with section 74A (1) and (5) of the Magistrates Courts' Act; Mabe 2019 *PELJ* 1 at 8.
[149] Section 74 B (1)(a) of the Magistrates' Courts Act.
[150] Section 74A 5 of the Magistrates' Courts Act provides that the creditors may attend and sit in on the hearing irrespective of whether or not they have received notice.
[151] Section 74B (1)(e) of the Magistrates' Courts.
[152] Section 74L (1) of the Magistrates' Courts.
[153] Boterere 167.

The administration order lapses after the administration costs and all the listed creditors have been paid what is due to them in full.[154] There is no prescribed period in which the payment of the debts must occur.[155]

2.5.2. Access requirements

As the administration order is a repayment plan, the debtor should have income or disposable assets available to satisfy all their debts.[156] This is reminiscent of the advantage of creditors principle as NINA debtors are being excluded from the procedure because they do not have any income or disposable assets to satisfy the all their debts.[157] It should be noted there is no provision for statutory discharge of debts as the administration order only lapses once all the listed creditors and the administration costs are paid in full.[158]

In order to be eligible for this procedure, a debtor must have debts that do not exceed the prescribed amount of R50 000.[159] This excludes over-indebted debtors who have debts that exceed R50 000 from the procedure.[160] It should, however, be noted that future debts are excluded from the procedure.[161]

2.5.3. Costs and the instalment paid by the debtor

Debtors must also be able to pay for the cost of the procedure.[162] Boraine is against the R50 000 amount that a debt should not exceed in order to qualify for the administration order, he is of the view that such an amount is too low and create limitations.[163] Those

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[154] Section 74Q (5) of the Magistrates' Courts.
[155] Coetzee 174.
[156] Coetzee "Does the proposed pre-liquidation composition proffer a solution to the No Income No Asset (NINA) debtor's quandary and, what would?" 2017 *THRHR* 18 at 25.
[157] Coetzee 237.
[158] S 74U of the Magistrates' Court Act.
[159] Section 74(1)(b) of the Magistrates' Court Act.
[160] Coetzee 237.
[161] Van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa* (2011) 306-307.
[162] Coetzee 2017 *THRHR* 25.
[163] Boraine 2003 *De Jure* 219.

limitations can include the fact that they are numerous debtors who exceed this threshold amount in terms of the debts they owe and if the limit is regularly and automatically adjusted, such debtors can be given debt relief in terms of this procedure.[164] It is proposed by majority of commentators that it should be increased to R300 000.[165]

The issue of not having a discharge is also another issue regarding this procedure as now debtors become trapped in their debts for indefinite amount of time as the order only lapses once the costs of the administration and the listed creditors have been paid in full.[166] Many administrators are charging in excess of the tariff which adds on the debt burden and continuance of the trap.[167] What create further cost for the debtors is that they do not receive sufficient information regarding the administration order and as a result they have to pay high court fees, high administration fees and also they are not given notice whatsoever with what is given to creditors and this discourages them as they do not have any idea what is left from their debts.[168]

Another problem is that regarding the fee structure of administrator, according to the fee structure the administrator has the right to receive reimbursement for their expenses and compensation, but these reimbursements must not surpass 12.5% of the total funds received as part of the administration order.[169] In the review of administration orders project 127, it was proposed by HVDM Attorneys 12.5% appears significantly higher than the 5% an employer can claim for performing tasks that are less than 1% of what an administrator is required to do according to section 74. Why is there such a difference?[170]

This emphasizes the point that such percentages should be reduced. Moreover, to accommodate unexpected expenses that the administrator might face when the debtor fails to make the required payments under the administration order or disappears, the

[164] *Ibid.*
[165] Review of administration orders 2020 SALRC Home (justice.gov.za) (assessed 29 October 2023) at 166.
[166] Section 74Q (5) of the Magistrates' Courts.
[167] Review of administration orders 2020 148.
[168] Boraine 2003 *De Jure* 233.
[169] *Ibid.*
[170] Review of administration orders 2020 149.

administrator is allowed to withhold up to 25% of the amount collected.[171] However, the sum held by the administrator should never exceed R600 at any point.[172]

In *African Bank Ltd v Weiner and Others*[173] it was stated that the R600 merely permits the administrator to retain some money to help cover towards the costs actually incurred in the case of default or disappearance. For the above mentioned costs, many debtors including NINA debtors are left out of this procedure as they cannot survive the payment reschedule plan which is introduced by the procedure, even if they do they become trapped in debts for life as there is no limit on how a person can be on an administration order.[174] NINA debtors are also excluded from this procedure as there do not have any income to survive the procedure.[175]

2.5.4 Other Consideration

The administration process results in a restricted collective agreement of creditors, meaning that, in principle, creditors are prohibited from pursuing their individual debt collection actions.[176] Instead, they receive equal repayments in the form of distributions administered by the appointed administrator.[177] Nonetheless, the debtor is still obligated to repay the entire sum of the claims, including associated costs and interest.[178]

Considering the financial limit of R50,000, individuals who owe more than this amount are not eligible for this solution.[179] Nevertheless, it is important to acknowledge that, despite its imperfections and associated issues, administration can provide some relief in certain situations.[180] If the monetary limit were increased, it might also encompass those currently

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[171] *Idem* at 199.
[172] *Ibid.*
[173] 2004 (6) SA 570 (C) para 575.
[174] Boraine 2003 *De Jure* 218.
[175] *Ibid.*
[176] Boraine *et al* "A Comparison between Formal Debt Administration and Debt Review – The Pros and Cons of these Measures and Suggestions for Law Reform (Part 2)" 2012 *De Jure* 254 at 292.
[177] *Ibid.*
[178] *Ibid.*
[179] Boraine 2003 *De Jure* 218.
[180] Boraine *et al* 2012 *De Jure* 292.

ineligible for relief through rehabilitation after sequestration, as they cannot demonstrate a benefit to creditors as mandated by the Insolvency Act.[181] In this context, we will now look at the proposed pre-liquidated procedure.

2.6. The proposed pre-liquidation procedure

One of the first attempts by the legislature to address the issue of NINA debtors' inability to access debt relief is found in the 2015 Draft Insolvency Bill which introduced the pre-liquidation composition procedure.[182] The aim of this procedure is to provide a chance for debtors who are unable to utilize existing debt relief programs due to strict criteria, for instance, the need to demonstrate advantage to creditors, to find relief from their indebtedness.[183] This procedure is an out-of-court negotiated debt-rearranged settlement between the debtor and creditors.[184]

This aligns with global policies, principles, and guidelines since these arrangements help reduce the social stigma associated with heavily indebted consumers, and they offer greater flexibility compared to formal relief processes.[185] The issue with informal out-of-court proceedings is debtors are often pushed into accepting impractical and burdensome arrangements.[186] Therefore, it is proposed that negotiated settlements are a more efficient approach for those facing short-term financial crises or having low incomes, as this could enable them to meet the adjusted debt obligations.[187] However, the procedure is not available to debtors at present as the Bill is still amended from time to time and has thus not yet been reviewed by Parliament.[188]

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[181] *Ibid.*
[182] Clause 118 of the 2015 Draft Insolvency Bill.
[183] Coetzee and Roestoff 2020 *Int Insolv Rev* 98-99.
[184] Clause 118(1) of the 2015 Bill.
[185] World Bank Report 61 for a discussion of the challenges debtors might face in developing economies in relation to court-based insolvency regimes.
[186] Botere 163.
[187] Coetzee 2017 *THRHR* 25.
[188] *Ibid.*

According to the provisions of the Bill, if the debtor's total debt amounts to less than R200 000, the debtor can enter a pre-liquidation composition with the creditors.[189] Debtors are allowed to propose a debt settlement only once every six months. Once a settlement offer has been submitted, the debtor is prohibited from taking on additional debt without informing the potential creditor about the existing pending debt and providing the insolvency practitioners with details about this new debt.[190]

The debtor must lodge a signed copy of a suggested composition and a complete sworn statement that he has made reasonable efforts to reach an appropriate arrangement with his creditor, this is done with an administrator who will become the supervisor of the whole procedure.[191] It is also the role of the administrator to organise a hearing where the debtor will be asked about his financial circumstances before creditors can agree on the composition.[192] If the debtor and two-thirds of concurrent creditors agree on the amount of each instalment to be repaid by the debtor, then the composition will be binding.[193]

The administrator then sends a certificate to the Master after the hearing.[194] Once the certificate has been sent, the composition is binding on all creditors who received notice of or who have appeared at the hearing. However, this should be in line with international principles and guidelines.[195]

The aim of this procedure is to cater for debtors who cannot prove advantage to creditors and, in doing so, ensure that these debtors can partake in the debt relief system.[196] However, it has been indicated that it is impossible for such a procedure to achieve such a purpose because it is impractical for a debtor to enter into a negotiated repayment plan when he does not have any income or assets.[197]

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[189] Clause 118(1) of the 2015 Bill.
[190] Clause 118(3) of the 2015 Bill.
[191] Clause 118(1) of the 2015 Bill.
[192] Clause 118(10) of the 2015 Bill.
[193] Clause 118(17) of the 2015 Bill.
[194] Clause 118(17) of the 2015 Bill.
[195] *Ibid.*
[196] Explanatory report on the review of the law of insolvency: Draft memorandum insolvency Bill and explanatory memorandum 2014 at 208.
[197] Coetzee 2017 *THRHR* 25.

The major problem with the procedure in relation to NINA estates is that it does not make sense to force such debtors through its negotiation phase as they do not have any negotiating power.[198] Negotiations are anticipated to be successful primarily for debtors facing mild or short-term financial challenges, and NINA debtors do not fit into this group.[199] Within NINA situations, only the discharge aspect of the pre-liquidation process is applicable. However, this option is accessible solely through the negotiation stage of the process, which NINA debtors cannot financially manage. Moreover, attending a hearing and paying for this procedure will incur extra costs on the debtor which cannot be covered.[200]

2.7. Conclusion

This chapter provided an overview of the three debt relief measures available to debt a debtor in South Africa. The sequestration procedure is the only procedure that provides for the discharge of debts.[201] However, its requirements prevent debtors from accessing the process as they must prove advantage to creditors and it is impossible for NINA debtors to prove this as they do not have any income or assets.[202] The formal and legal nature of the liquidation process poses a barrier for NINA debtors, preventing them from pursuing sequestration due to the prohibitively high court costs.[203]

The World Bank reports highlight that court proceedings and judges come with substantial expenses and might appear daunting to individual debtors.[204] Additionally, the sequestration process is complicated for NINA debtors to navigate because of the income requirement associated with debt restructuring arrangements, which they cannot meet since they lack any source of income.[205]

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198 *Ibid.*
199 *Ibid.*
200 *Ibid.*
201 129(1)(b) of the Insolvency Act.
202 Boterere 95.
203 *Ibid.*
204 World Bank Report para 121.
205 Coetzee 208.

The debt review and administration order are payment plans which are only viable relief measures if the debtor has disposable income.[206] The Administration order process effectively leaves out NINA debtors because it requires debtors to have surplus income available for meeting their obligations and covering the administration costs, which NINA debtors lack.[207]

According to a World Bank report, stigma plays a significant role in preventing debtors from seeking debt relief. Debtors often feel that openly acknowledging their financial difficulties, whether in writing or in person before a public or private administrator, is an extremely embarrassing and stigmatizing experience.[208] At present, it seems as if there is no debt relief measure in South Africa that can cater for NINA debtors as all the relief measures have requirements that cannot be met by a NINA debtor. The debt invention process, which was introduced to rectify this issue of exclusion of NINA debtors, will be discussed in the next chapter.

[206] *Ibid.*
[207] *Ibid.*
[208] World Bank Report para 121.

CHAPTER 3: THE DEBT INTERVENTION PROCEDURE

3.1. Introduction

Requirements such as advantage to creditors and full satisfaction of debts, even where this is not possible, have ensured that the debt relief system remain creditor-oriented.[233] NINA debtors still have difficulty accessing such a system because they do not have income or assets to prove advantage to creditors or ultimately pay off all of their debts.[234] This leads to NINA debtors not having a discharge of their debts and as a result they become trapped in debt .[235]

In an attempt to rectify this situation, the Portfolio Committee on Trade and Industry published the Draft National Credit Amendment Bill of 2018 which was accompanied by a Memorandum on the Objects of the National Credit Amendment Bill.[236] These documents address the over-indebtedness crisis in South Africa. The Amendment Bill, which has since become the National Credit Amendment Act,[237] was signed into law by the President of the Republic of South Africa on 13 August 2019 but it is still not in force.

The Act aims to amend the National Credit Act by[238]

> "providing for debt intervention; to insert new definitions; to include the evaluation and referral of debt intervention applications as a function of the National Credit Regulator and to provide for the creation of capacity within the National Credit Regulator and logistics arrangements to execute this function; to include consideration of a referral as a function of the Tribunal; to provide for the record of information related to debt intervention; … to provide for a court to enquire into and either refer a matter for debt intervention or make an order related to debt intervention; … to provide for an application for debt intervention and the evaluation thereof; … to provide for orders

[233] Coetzee "Is the unequal treatment of debtors in natural person insolvency law justifiable?: A South African Exposition" 2016 *Int Insolv Rev* 36 at 37.
[234] Section 6(1) of the Insolvency Act.
[235] Roestoff and Coetzee 2017 CILSA 251.
[236] Memorandum on the Objects of the National Credit Amendment Bill, 2018.
[237] 7 of 2019.
[238] References to the National Credit Regulator will hereafter be "the NCR". See also section 12 of the National Credit Act which deals with the establishment of the NCR. References to the National Consumer Tribunal will hereafter be "the Tribunal"). See also the National Credit Act which deals with the establishment of the Tribunal.

related to debt intervention … to provide for offences related to debt intervention; … and to provide for matters connected therewith".[239]

This chapter focuses on the debt intervention procedure which was introduced into the National Credit Amendment Act through the National Credit Act.[240] The proposed procedure aims to address the issue of exclusion of NINA debtors from the debt relief system by granting them access to a special procedure and providing them with an option that enables the discharge of their debts.[241] The chapter first deals with the benchmarks for evaluating the debt intervention procedure, access requirements relating to the debt intervention measure and then explains the procedural requirements. Thereafter, the chapter discusses how the procedure provides for the discharge of debt. The chapter concludes with a number of observations about the procedure.

3.2. Benchmarks for evaluation the debt intervention procedure

In order to qualify for this procedure, the applicant must have a maximum unsecured debt owed to credit providers that does not exceed R50,000,[242] This limit could potentially leave out debtors who could have benefited from debt relief under the debt intervention measure but cannot receive assistance due to their debts exceeding this specified threshold.[243] The debt intervention procedure can be initiated through a debtor's application to the National Credit Regulator in contrast to the formal court processes that are inaccessible to NINA debtors.[244] The NCR plays a vital role in the debt relief process because it is better equipped to handle insolvency matters.[245] However, on the flip side, this can create a barrier for NINA debtors who must incur additional transportation expenses to reach the NCR's office situated in Midrand,

[239] The long title of the 2019 National Credit Amendment Act.
[240] Section 86A of the National Credit Act, inserted by the 2019 National Credit Amendment Act.
[241] Boterere and Boraine "South Africa's NINA Debtor Plight: Lessons from the Scottish Consumer Debt Relief System Post the COVID-19 Pandemic" 2023 (unpublished paper on file with author) 8.
[242] S 86A(1) of the 2019 National Credit Amendment Act.
[243] Boterere 168.
[244] Boterere and Boraine 8.
[245] *Ibid.*

Johannesburg.[246] Consequently, this situation marginalizes debtors with low or no income who are unable to access the NCR.

3.3. Access requirements

The debt intervention procedure is dealt with in section 86A of the National Credit Act. This section provides details on the eligibility requirements and the process that an applicant debtor must follow to be considered for the debt intervention procedure.[247]

The definition of the debt intervention applicant sets out requirements to be considered for such an application.[248] The legislation defines the applicant as follows:

> "[A] natural person or natural persons who own a joint estate, who on the date of submission of the application for debt intervention as contemplated in s 86A –
>
> (a) is a consumer under unsecured credit agreements, unsecured short-term credit transactions agreements or unsecured credit facilities only;
> (b) receives no income, or if he or she, or the joint estate, receives an income or has a right to receive an income, regardless of the source, frequency or regularity of that income, that gross income did not, on an average for the six months preceding the date of the application for debt intervention exceed R7500 or such an amount as may be prescribed in terms of section 171(2A)(a), per month;
> (c) is over-indebted, whether due to a change in personal circumstances or other circumstances; and
> (d) is not sequestrated or subject to an administration order".[249]

This procedure according to the definition apply to natural person or natural person who own a joint estate. With regards to the creditors listed in the definition of the debt intervention, unfortunately, there are credit agreements that do not qualify for debt intervention, such as developmental credit agreements.[250] Another credit agreement which is excluded is a credit agreement in respect of which the credit provider under the credit agreement, at the time of the application for the debt intervention, had

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[246] *Ibid.*
[247] Section 86A of the National Credit Act.
[248] Coetzee "An opportunity for no asset no income (NINA) debtors to get out of check? – An evaluation of the proposed debt intervention measure" 2018 THRHR 599.
[249] Section 1 of the National Credit Amendment Act.
[250] Section 86A(2)(a) of the National Credit Amendment Act.

already proceeded to take the steps contemplated in section 130 to enforce that agreement.[251]

Coetzee and Roestoff find it odd that only unsecured credit is mentioned and that secured credit is omitted from the definition which serves to set out the requirements for access to the procedure.[252] This means that debtors with secured debts cannot apply for the procedure as it is specifically stated in the definition that *only* debtors with unsecured credit may be considered.[253]

Regarding the R7 500 requirement, there is a significant portion of NINA debtors earns more than R7 500 per month but still cannot afford alternative debt relief options. This creates a 'missing-middle' category of debtors, who are considered 'too wealthy' for the debt intervention measure and simultaneously too financially constrained to access other debt relief programs.[254]

In order to be eligible for debt intervention, the debt intervention applicant must have a total amount comprising of unsecured debt owing to credit providers of no more than R50 000,[255] or such an amount as may be prescribed by the Minister in terms of section 171(2A)(b).[256] Boterere states that the prescribed amount of R50 000 will exclude debtors who have debts that exceed the threshold, but might have obtained relief from indebtedness through the debt intervention measure.[257]

The applicant must further be over-indebted, whether due to a change in personal circumstances or other circumstances.[258] The criteria for over-indebtedness are specified in section 79 which states that

[251] Section 86a(2)(b) of the National Credit Amendment Act.
[252] Coetzee and Roestoff "Rectifying an unconstitutional dispensation? A consideration of proposed reforms relating to no income no asset debtors in the South African insolvency system" 2020 *Int Insolv Rev.* 1 at 7.
[253] *Ibid.*
[254] Boterere and Boraine 9.
[255] Section 86A of the National Credit Act.
[256] In terms of section 171(2A)(b) of the National Credit Amendment Act, the Minister may annually adjust the amount in respect of the maximum gross income of a debt intervention applicant by considering the gross income required by a consumer to be an economically viable client for a debt counsellor as at the time of the proposed adjustment, the costs associated with an administration and sequestration order as at the time if the proposed adjustment and inflation.
[257] Boterere 167.
[258] Section 86A(2)(C) of the National Credit Amendment Act.

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

(a) financial means, prospects and obligations; and

(b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment".[259]

3.4. Procedural matters

It is the responsibility of the debt intervention applicant to apply to the NCR in order to start the debt intervention process.[260] After applying, the debtor may be declared over-indebted if all the requirements to determine over-indebtedness are complied with.[261] The NCR takes on the same role as the debt counsellor in the debt review process, which is to provide proof of receipt of the application to the consumer, and inform all the credit providers listed in the application and every registered credit bureau of the application.[262]

A debt intervention applicant and each credit provider who is listed in the debt intervention application must comply with any reasonable requests to facilitate the evaluation of the consumer's indebtedness, the prospects responsible for debt re-arrangement, and must participate in good faith.[263] When considering the application, the NCR must provide the applicant with counselling on financial literacy[264] and access to training to improve the debt applicant's financial literacy.[265]

It should be noted that mandatory counselling and financial training as provided by the Act is in line with international trends.[266] Moreover, Boterere states that this provision

[259] Section 79 of National credit Act.
[260] Section 86A (1) of the National Credit Amendment Act.
[261] *Ibid.*
[262] Section 86(4) of the National Credit Act. See also Section 86A(3) of the National Credit Amendment Act.
[263] Section 86(5) of the National Credit Act. See also Section 86A(4) of the National Credit Amendment Act.
[264] Section 86A(5)(a) of the National Credit Amendment Act.
[265] Section 86A(5)(b) of the National Credit Amendment Act.
[266] *Ibid.*

is important as there is a possibility that it might alleviate the over-indebtedness crisis in South Africa. Since all the debt intervention applicants will obtain the required knowledge, ability and opportunity to make sound decisions.[267] He goes further to state that financial literacy might also assist in ending the stigma associated with over-indebtedness.[268]

The NCR conclude the following after making an assessment: If the debt intervention applicant does not qualify for the debt intervention, it must reject the application.[269] The Act also state that "If NCR find that the debt intervention does not qualify for the debt intervention but he is experiencing or likely to experience difficulty in satisfying his debt intervention applicant's obligations under the credit agreement in a timely manner, the NCR must recommend that the debt intervention applicant and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement".[270]

When a credit agreement that was part of the application appears to be irresponsible lending, illegal credit agreement, or credit agreement stemming from banned activity, the NCR is required to refer the credit agreement to the Tribunal for an appropriate declaration.[271] The NCR shall refer the matter with a recommendation to the tribunal in the prescribed manner and form for an order stated in section 87(1A) if it determines that the debt intervention applicant qualifies for debt intervention and that the obligations of the debt intervention applicant can be rearranged within a period of five years or such longer period as may be prescribed.[272]

Lastly, the debt NCR must refer the matter with a recommendation to the tribunal in the prescribed manner and form for an order contemplated in section 87A if the debt intervention applicant qualifies for debt intervention, but the income and assets of the debt intervention applicant are insufficient to allow for the obligations of the debt

[267] Boterere 169.
[268] *Ibid.*
[269] Section 86A(6)(a) of the National Credit Amendment Act.
[270] Section 86A(6)(b) of the National Credit Amendment Act.
[271] Section 86A(6)(c) of the National Credit Amendment Act.
[272] Section 86A(6)(d) of the National Credit Amendment Act.

intervention applicant to be re-arranged during the period contemplated in paragraph (d).[273]

3.5. Discharge

As per section 86A(10)(a), the credit provider associated with the credit agreement has the option to issue a termination notice, following the specified timeframe, to the debt intervention applicant and the NCR if the debt intervention applicant defaults on a credit agreement included in their debt intervention application, as outlined in this section.[274] It should be known that once an application for debt intervention has been filed in the tribunal, then no credit provider is obligated to terminate such an application if it has been lodged in terms of this Act.[275]

If the credit provider, after receiving notice to terminate the debt intervention, persists in enforcing the agreement, the court or tribunal overseeing the case has the authority to decree that the debt intervention be reinstated under conditions it deems fair given the circumstances. Section 87A(1) specifies that a sole member of the Tribunal may evaluate the referral outlined in section 86A(6)(e), taking into account the documents included in the referral from the NCR as well as any representations contained therein.[276]

The Tribunal has the authority to issue a ruling disqualifying the debt intervention applicant and dismissing the application once it has assessed the data outlined in section (1) along with any pertinent information. Furthermore, the Tribunal can temporarily suspend some or all of the eligible credit agreements for a period of 12 months, which can potentially be extended for an additional 12 months. Additionally, the Tribunal may mandate that the debt intervention applicant participates in a financial literacy program.[277]

When evaluating the potential suspension or partial suspension of a credit agreement, the Tribunal must consider various relevant factors, including whether the debt

[273] Section 86A(6)(e) of the National Credit Amendment Act.
[274] Section 86A(10)(a) of the National Credit Amendment Act.
[275] Section 86A(10)(b) of the National Credit Amendment Act.
[276] Section 87A(1) of the National Credit Amendment Act.
[277] Section 87A(2)(b)(ii) of the National Credit Amendment Act.

applicant is a disabled individual, a minor responsible for a household, a woman leading a household, or an elderly person. Additionally, the Tribunal should consider whether the debt applicant has previously sought debt review, applied for a sequestration or administration order, or had any debt discharged through a court or tribunal order.[278]

The Tribunal must consider the circumstances of the debt intervention by the applicant.[279] Those include “the circumstances of the debt intervention applicant and any act or omission when entering into each qualifying credit agreement that makes up the total unsecured debt”.[280] The act or omission mentioned should have resulted in, or contributed to, the fact that the debt intervention applicant does not have sufficient income or assets to allow for the obligations of the debt intervention applicant to be rearranged during the period contemplated in section 85A(6)(d).[281] Lastly, Any action or inaction by the intervention applicant aimed at obtaining an income or improving their current income should be taken into account as a relevant factor.[282]

According to Section 87A(5)(a), once eight months have elapsed within the 12-month suspension period, the NCR is mandated to conduct a review of the financial situation of the debt intervention applicant. The objective of this review is to assess whether, at that point, the debt intervention applicant possesses adequate income or assets that would enable the restructuring of their obligations as specified in Section 86A(6)(d).[283]

If the debt intervention applicant possesses ample income or assets to enable the restructuring of obligations within the period specified in Section 86A(6)(d), the NCR is required to refer the case, along with a recommendation, to the Tribunal in the manner and form prescribed for an order described in Section 87(1A). In cases where the debt intervention applicant lacks sufficient income or assets to facilitate the rearrangement of obligations during the period outlined in Section 86A(6)(d), the NCR

[278] Section 87A(3)(a)(iii) of the National Credit Amendment Act.
[279] Section 87A(3)(b) of the National Credit Amendment Act.
[280] Section 87A(3)(b)(i) of the National Credit Amendment Act.
[281] Section 87A(3)(b)(ii) of the National Credit Amendment Act.
[282] Section 87A(3)(b)(iii) of the National Credit Amendment Act.
[283] Section 87A(5)(a) of the National Credit Amendment Act.

is obligated to refer the matter to the Tribunal for consideration of an extension of the suspension period, as outlined in subsection (2)(b)(i).[284]

If an extension of the suspension is ordered by the Tribunal, the NCR must repeat the same process stated above within a similar time period.[285] Although now it is determined during the eight-month review, that the applicant still does not have sufficient income or assets for a viable re-arrangement of his debt, Nevertheless, the case needs to be brought before the Tribunal so that it can decide whether to completely or partially erase the applicant's qualifying credit agreement debt.[286] Credit providers who are affected must be informed by the NCR of section 87A(5)(b)(ii) or (c)(ii) referrals with an invitation to make representations to the Tribunal.[287] Before any declaration, the Tribunal may make the referral contemplated in subsection 5(c)(ii).[288]

The Tribunal may also take into consideration the factors in subsections (7) and (8), declare the total of the amounts contemplated in section 101(1) under the qualifying credit agreements as extinguished, and conclude that the debt intervention applicant still does not have sufficient income or assets to allow for the obligations to be rearranged during the period considered in section 86A(6)(d).[289] Extinguishment may only be carried out partially and may only represent a portion of the total amount of debt under each credit agreement as specified in section 101(1). [290] It should be mentioned that all of the relevant credit agreements must have this percentage applied equally. The Tribunal must issue an order stating that the debt intervention applicant will only qualify to apply for credit agreements covered by section 60 of the National Credit Act following a minimum of six months from the date of the discharge[291].[292]

The total period of limitation on the debt intervention applicant’s right to apply for the credit may not exceed 12 months.[293] To consider the discretionary period which is

[284] Section 87A(5)(b)(ii) of the National Credit Amendment Act.
[285] Section 87A(5)(c)(i) of the National Credit Amendment Act.
[286] Section 87A(5)(c)(ii) of the National Credit Amendment Act.
[287] Section 87A(5)(d) of the National Credit Amendment Act.
[288] *Ibid.*
[289] Section 87A(6) of the National Credit Amendment Act.
[290] Section 87A(7)(a) of the National Credit Amendment Act.
[291] Section 87A(7)(b) of the National Credit Amendment Act.
[292] Section 87A(8) of the National Credit Amendment Act.
[293] Section 87A(9)of the National Credit Amendment Act.

below 12 months, factors such as the total unsecured debts,[294] the number of credit agreements that were submitted for the debt intervention,[295] the period of each qualifying credit agreement[296] and the debt intervention applicant's credit record should be considered.[297]

The NCR must inform the applicant, his credit provider and the registered credit bureau of an order in terms of section 87A.[298] In accordance with section 87A (11), the Tribunal may revoke or alter a debt intervention order if it receives information demonstrating that the debt intervention applicant was dishonest in their application or disregarded the requirements of the order.[299]

3.6. Conclusion

This chapter discussed the debt intervention procedure introduced by the National Credit Amendment Act 2019, *albeit* not yet operational. The main purpose and objective of this process is to address the plight of excluded NINA debtors by facilitating access to the debt relief system and affording the option of a much-needed discharge of debts.[300] In the chapter, the requirements necessary for a debtor to be considered for the procedure and the process itself were discussed.

This procedure is not pro-creditor as the interest of consumers are also taken into consideration. This is proven by the fact that you do not have to prove requirements such as advantage to creditors and this procedure will also increase access of debtors to the debt relief system, which as a result will provide them with a discharge.[301] This procedure provides a different viewpoint for NINA debtors compared to the pre-liquidation composition as there is no forced negotiations that will oppress the debtor in return.

[294] Section 87A(9)(a) of the National Credit Amendment Act.
[295] Section 87A(9)(b) of the National Credit Amendment Act.
[296] Section 87A(9)(c) of the National Credit Amendment Act.
[297] Section 87A(9)(d) of the National Credit Amendment Act.
[298] Section 87A(10) of the National Credit Amendment Act.
[299] Section 87A(11) of the National Credit Amendment Act.
[300] Section 86A(1) of the 2019 National Credit Amendment Act.
[301] Coetzee 2018 *THRHR* 610.

The procedure also aligns with global principles and standards for NINA debtors, which notably involve not automatically including creditors and minimizing court procedure and this will create less costs for the debtor.[302] Although the consumer will be required to travel to the NCR offices in Midrand, this oppresses the NINA debtor as they do not have any income so it will be a barrier for a NINA debtor to access the NCR offices.[303] Some access criteria, such as the maximum monthly gross income limit of R7,500 and the restriction allowing the procedure to be utilized only once in a lifetime, are justified and essential.[304]

These limitations aim to restrict the procedure to its intended beneficiaries and prevent potential misuse.[305] However, there are other criteria that require reconsideration. Some of the unfavorable conditions that require reconsideration, for example, the restriction that the procedure is solely applicable to eligible credit agreements falling under the NCA, provided that no enforcement proceedings have initiated, and that the consumer's total unsecured debt must be below R50,000.[306] The R50 000 excludes unfortunate debtors who have debts that are above that threshold.[307]

Regrettably, the procedure will not offer a remedy to all NINA debtors because some of its entry criteria will disqualify a significant number of debtors from its scope.[308] The next chapter will focus on the measures passed by the Scottish debt system to accommodate NINA debtor in the COVID-19 pandemic.

[302] *Ibid.*
[303] Boterere 167.
[304] Coetzee 2018 *THRHR* 599.
[305] *Ibid.*
[306] *Ibid.*
[307] Boraine 2003 *De Jure* 218.
[308] Boterere 167.

CHAPTER 4: SCOTLAND'S INSOLVENCY SYSTEM

4.1. Introduction

Regardless of the implications of COVID-19, such as an increase in the number of debtors due to loss of employment, the South African debt relief system remained pro-creditor and no reforms were put in place to rectify the exclusion of NINA debtors from the system.[309] In contrast, Scotland addressed this issue by introducing the Coronavirus (Scotland)(No.2) Act 2020,[310] which provided reforms to ensure that NINA debtors were provided protection from the effects of the COVID-19 pandemic.[311]

Before the Coronavirus Act was introduced, the Scottish insolvency system included the Bankruptcy (Scotland) Act,[312] which catered for all debtors regardless of their financial position. This Act put measures in place to cater for NINA debtors – such as the Minimal Asset process that facilitates access to the debt relief system and provides for a discharge of qualifying unsecured debts.[313]

This chapter intends to focus on the Scottish insolvency system by focusing mostly on the measures which were introduced during COVID-19 to provide solutions to NINA during such a difficult time. This chapter is relevant to the dissertation because it is a comparative study as it will provide solution on how the debt intervention procedure can be made better to accommodate NINA debtors. To do so, the chapter will explain the bankruptcy procedure of Scotland by discussing the Minimal Asset process and the Full Administration process to find solutions on how the Scottish insolvency system has reformed those procedures to accommodate all debtors. Lastly, a conclusion of findings will be presented.

[309] Boterere and Boraine Boterere and Boraine "South Africa's NINA Debtor Plight: Lessons from the Scottish Consumer Debt Relief System Post the COVID-19 Pandemic" 2023 (unpublished paper on file with author) 4.
[310] The Coronavirus (Scotland) (No 2) Act 2020.
[311] Boterere 185.
[312] The Bankruptcy (Scotland) Act 2016.
[313] Section 2(2) of the Bankruptcy Act of 2016.

4.2. Bankruptcy

There are two processes that cater for debtors and accommodate all debtors regardless of how dire their financial states are.[314] The first is the Minimal Asset Process (hereafter the MAP)[315] and the other is the Full Administration Process.[316] The MAP is the one that caters for NINA debtors whereas Full Administration is for debtors with disposable income and assets.[317] Although both relief measures have the same end result, the eligibility criteria to access each measure differ.[318]

4.2.1. Minimal Asset process

The purpose of the MAP is to address the needs of NINA debtors. This process was introduced in 2015 to cater for NINA debtors who, between 2007 and 2015, had been regulated by the Low-Income-Low-Asset procedure (hereafter the LILA procedure).[319] NINA debtors were not catered for at all before the LILA procedure was introduced.[320] All applications to this procedure are made to the Accountant in Bankruptcy (hereafter the AiB).[321] To add on the application, the debtor must submit a bankruptcy application, including a declaration from a money adviser, a statement of assets and liabilities, and a statement of undertakings to the AiB. A certificate for sequestration may be granted if the debtor cannot pay due debts. With the introduction of this procedure NINA debtors can now obtain a discharge which can be granted six months from the date on which the sequestration has lapsed.[322] It should be noted that this discharge does not impact a secured creditor's ability to enforce the security in relation to an obligation for which the debtor has been discharged.[323] After the discharge has been granted the debtor should still apply to the AiB to give an account in writing of his current state of affairs.[324]

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[314] Boterere 205.
[315] Section 2(2) of the Bankruptcy Act of 2016.
[316] Section 2(8) of the Bankruptcy Act 2016.
[317] Section 2(2) and section 2(8) of the Bankruptcy Act of 2016.
[318] Boterere and Boraine 2023 13.
[319] The Bankruptcy Act of 2016.
[320] Boterere 206.
[321] S 8(1) of the 2016 Bankruptcy Act.
[322] Section 140(1) of the Bankruptcy Act of 2016
[323] Section 140(5) of the Bankruptcy Act of 2016
[324] S 140(2) of the 2016 Bankruptcy Act.

The MAP is accessible to debtors who have been assessed by the common financial tool as required to make no debtor's contribution or who have been in receipt of payments for a period of at least 6 months ending with the day on which the debtor's application is made.[325] The prescribed threshold for a debtor to access this measure is that the total amount of the debtor's debts – which includes the interest at the date that the debtor application is made – is between GBP 1 500 and GBP 25 000.[326] The other cumulative requirements are:[327]

(i) "The total value of the debtor's assets on the date of the application may not exceed GBP 2 000 or such other amount as may be prescribed.
(ii) No single asset of the debtor may have a value which exceeds GBP 1 000 or such other amount as may be prescribed.
(iii) The debtor must not own land".

The eligibility criteria, which is found in the Coronavirus (Scotland)(No.2) Act (hereafter the Scotland COVID Act), were introduced with the intention of accommodating debtors who were affected by COVID-19.[328] This Act also effected temporary changes to the bankruptcy regulation by allowing electronic signatures[329] and the electronic service of documents;[330] by extending the deadline for the submission of Debtor Contribution Order proposals;[331] and allowing creditor meetings to occur virtually.[332] With regards to virtual creditor meetings, Boterere and Boraine state that such reform should be adopted in South Africa so that NINA debtors would not be pressured to incur extra transportation costs in order to attend meetings with creditors, or to file applications with NCR under the debt intervention measure.[333]

[325] Section 2(2) (a) of the Bankruptcy Act of 2016.
[326] Section 2(2)(b)(i)-(ii) of the Bankruptcy Act of 2016. GBP 1 500 to GBP 25 000 is equivalent to from ZAR 33805.86 to ZAR 563430.97.
[327] Section 2(2)(c)-(e) of the Bankruptcy Act of 2016.
[328] The Coronavirus (Scotland) (No 2) Act 2020.
[329] Section 13 of the Coronavirus (Scotland) (No 2) Act 2020.
[330] Section 8 of the Coronavirus (Scotland) (No 2) Act 2020.
[331] Section 11 of the Coronavirus (Scotland) (No 2) Act 2020.
[332] Section 12 of the Coronavirus (Scotland) (No 2) Act 2020.
[333] Boterere and Boraine 15.

Before the introduction of the Scotland COVID Act, the debt eligibility threshold was GBP 17 000 and the Act changed the threshold to GBP 25 000.[334] Student loans are no longer included in the eligibility calculation.[335] Reason for this increase in threshold according to the Policy Memorandum of the Corona Virus (Scotland) (No2) Bill[336] is to allow more individuals who decide to enter bankruptcy to do so in a way that minimizes the burden to them.[337] The debtor application fees also decreased from GBP 90 to GBP 50 for the MAP (whereas the application costs decreased from GBP 200 to GBP 150 for the Full Administration process, which is discussed hereafter).[338]

Although the legislature initially intended for the reforms to be temporary solutions, steps were recently taken to ensure that those reforms become permanent. The aim is to assist all debtors as COVID-19 have financially burden many debtors, mostly indigent debtors.[339] The Coronavirus (Recovery and Reform) Scotland Act (hereafter the Recovery and Reform Act) was recently passed by the legislature.[340] This Act aims to safeguard the country's healthcare and bankruptcy system – affected by COVID-19 – by reforming the Bankruptcy Act.[341]

The Recovery and Reform Act aims to enable virtual meetings of creditors[342] and amends the law when it comes to the serving of documents.[343] Moreover, the legislation aims to change the debt level specified in the definition of qualified creditors,[344] which is GBP 3 000 to GBP 5 000.[345]

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[334] Section 9(2) of the Coronavirus (Scotland) (No 2) Act 2020.
[335] *Ibid.*
[336] Policy Memorandum of the Corona Virus (Scotland) (No2) Bill.
[337] *Ibid* para 58.
[338] *Ibid.*
[339] The Coronavirus (Extension and Expiry) (Scotland) Act 2021.
[340] The Coronavirus (Recovery and Reform) Scotland Act 2022.
[341] Section 15(1) of the Coronavirus (Recovery and Reform) Scotland Act 2022.
[342] Section 17 of the Coronavirus (Recovery and Reform) Scotland Act 2022.
[343] Section 15(2) of the Coronavirus (Recovery and Reform) Scotland Act 2022.
[344] In terms of section 7(1), "qualified creditor" means a creditor who, at the date of the presentation of the petition, or as the case may be at the date the debtor application is made, is a creditor of the debtor in respect of relevant debts which amount (or of one such debt which amounts) to not less than £3,000 or such sum as may be prescribed, and "qualified creditors" means creditors who, at the date in question, are creditors of the debtor in respect of relevant debts which amount in aggregate to not less than £3,000 or such sum as may be prescribed.
[345] Section 16 of the Coronavirus (Recovery and Reform) Scotland Act 2022.

In terms of section 8 of the Bankruptcy Act, which deals with the procedural aspects of the MAP, all applications must be made to the AiB.[346] It should be noted that before submitting an application, a debtor must seek advice from a money adviser regarding their financial situation, the impact of the proposed sequestration, how to prepare the application, and any other matters that may be required.[347] The debtor must include a declaration that the required advice was sought and given, and specify the name and address of the money advisor.[348] Along with the application, the debtor must send a statement of assets and liabilities and a statement of undertaking to the AiB.[349] Section 228 of the Act defines a statement of undertakings as:

'statement of debtor undertakings sent to the debtor under section 51(14) or 54(4) or, in the case of a debtor application, given by the debtor in making the application'.[350]

A certificate of sequestration of the estate of a debtor may be granted by the money advisor upon application by the debtor.[351] Moreover, such a certificate may be granted by the money adviser if the debtor can demonstrate that the debtor is unable to pay debts as they become due.[352] NINA debtors have difficult financial circumstances and as a result, the AiB cannot appoint a trustee in this regard as he performs the functions or duties of the trustee.[353] Those duties include to recover, manage and realize the estate of the debtor, whether situated in Scotland or elsewhere,[354] it will be also the duty of the AiB to distribute the estate among the debtor's creditors according to their respective entitlements.[355] Moreover, the duties also includes to ascertain the reasons

[346] Section 8(1) of the Bankruptcy Act 2016.
[347] Section 4(1) of the Bankruptcy Act 2016.
[348] Section 8(2) of the Bankruptcy Act 2016.
[349] Section 8(3) of the Bankruptcy Act 2016.
[350] Section 228 of the Bankruptcy Act 2016; see also section 51(14) The trustee must, at the same time as notifying the debtor under subsection (13), send to the debtor for signature by the debtor a statement of undertakings in the form prescribed or 54(4) The interim trustee must, at the same time as notifying the debtor under subsection (3), send to the debtor for signature by the debtor a statement of undertakings in the form prescribed.
[351] Section 9(1)-(2) of the Bankruptcy Act 2016.
[352] *Ibid.*
[353] Schedule 1 para 1(2) of the Bankruptcy Act allows the AiB to perform the duties of the trustee.
[354] Section 50(1)(a) of the Bankruptcy Act 2016.
[355] Section 50(1)(b) of the Bankruptcy Act 2016.

for the debtor's insolvency and the circumstances surrounding it,[356] and also to ascertain the state of the debtor's liabilities and asset.[357]

According to Section 42 (1) of the Bankruptcy Act, a trustee is required to, to the extent that the information is within his knowledge, prepare a statement of the debtor's affairs. This statement must include a determination of whether the trustee believes the debtor's assets are unlikely to be sufficient to pay any dividends on the debtor's debts.[358] Furthermore, in cases where the AiB is responsible for carrying out these tasks, the AiB must draft a statement of the debtor's affairs and specify that creditors may not make claims against the NINA debtor's estate.[359]

In terms of MAP, NINA debtors may receive a discharge after six months from the date on which the sequestration has lapsed.[360] Before the discharge is granted, it is mandatory for the NINA debtor to account in writing of his current state of affairs to the AiB.[361] One of the consequences of the discharge is that the debtor may not incur debt for a further period of six months beginning on the date of the discharge.[362] Within this period, the debtor must inform any credit provider from whom he seeks credit of GBP 2 000 or more, or at the time of obtaining credit if the debtor has debts amounting to GBP 1 000, of his past sequestration and discharge.[363]

Additionally, the debtor is prohibited from operating a business under a name other than the one to which the discharge relates unless the debtor discloses the name of the business to which the discharge relates to anyone with whom the debtor transacts business.[364] Moreover, in terms of the MAP, the debtor remains under certain bankruptcy restrictions for a further six months regardless of whether he was

[356] Section 50(1)(c) of the Bankruptcy Act 2016.
[357] Section 50(1)(d) of the Bankruptcy Act 2016.
[358] Section 42(1) of the Bankruptcy Act 2016.
[359] Schedule 1 para 1(2)(1) of the Bankruptcy Act 2016.
[360] Section 140(1) of the Bankruptcy Act 2016.
[361] Section 116 of the Bankruptcy Act 2016.
[362] Boterere and Boraine 17.
[363] Sections 146(2), 146(3) and 146(6) of the Bankruptcy Act 2016.
[364] Section 140(4) and 140(5) of the Bankruptcy Act 2016.

discharged after six months.[365] Those restriction include that the debtor will be unable to access debt for a further period of six months beginning on the date of the discharge.

4.2.2. Full Administration process

This procedure is aimed at debtors who have assets and disposable income. In order to access the procedure, debtors must ensure that the total amount of their debts, calculated together with interest, at the date of the application is not less than GBP 3 000.[366] The Act further determines that an award of sequestration must not have been made against the debtor in the five years ending on the day before the date that the application by the debtor is made.[367] It is stipulates that the debtor must have obtained advice from the money adviser;[368] that the debtor should have provided a statement of undertakings;[369] and that the debtor appears to be apparently insolvent.[370]

The application process is similar to that of the MAP in the sense that the application should be directed to the AiB who will determine the outcome of the application after receiving it.[371] The AiB must award sequestration right away if it is satisfied that the

[365] Boterere and Boraine 2023 (this article is not yet published) 211.
[366] Section 2(8)(a) of the Bankruptcy Act 2016.
[367] Section 2(8)(b) of the Bankruptcy Act 2016.
[368] Section 2(8)(c) of the Bankruptcy Act 2016.
[369] Section 2(8)(d) of the Bankruptcy Act 2016.
[370] Section 2(8)(e)(i) of the Bankruptcy Act 2016; see also section 16 which defines apparent insolvent: according to the Act the apparent insolvency of a debtor is constituted, or where the debtor is already apparently insolvent again constituted, whenever— (a) the debtor's estate is sequestrated, (b) the debtor is adjudged bankrupt in England and Wales or in Northern Ireland, (c) the debtor gives written notice to the debtor's creditors that the debtor has ceased to pay the debtor's debts in the ordinary course of business (but the debtor must not, at the time notice is so given, be a person whose property— (i) is affected by a restraint order, (ii) is detained under or by virtue of a relevant detention power.
[371] Section 8(1) of the Bankruptcy Act 2016 (iii) is subject to a confiscation or charging order), (d) the debtor becomes subject to main proceedings in a member State other than the United Kingdom, (e) the debtor grants a trust deed, (f) following the service on the debtor of a duly executed charge for payment of a debt, the days of charge expire without payment (unless the circumstances are shown to be such as are mentioned in subsection (2)), (g) a decree of adjudication of any part of the debtor's estate is granted, either for payment or in security (unless the circumstances are shown to be such as are mentioned in subsection (2)), (h) a debt constituted by a decree or document of debt, as defined in section 10 of the 2002 Act, is being paid by the debtor under a debt payment programme under Part 1 of that Act and the programme is revoked (unless the circumstances are shown to be such as are mentioned in subsection (2)), or (i) a creditor of the debtor, in respect of a liquid debt which amounts to (or liquid debts which in aggregate amount to) not less than £1,500 or such sum as may be prescribed, serves on the debtor, by personal service by an officer of court, a demand in the prescribed form requiring the debtor either to pay the debt (or debts) or to find security for its (or their) payment and the condition set out in subsection (3) is met.

application was made in accordance with the 2016 Bankruptcy Act.[372] This should be done if the debtor meets the eligibility requirements, and complied with the procedural requirements in that the debtor provided the AiB with a statement of assets and liabilities of his estate.[373] In addition, the application should be successful if the sequestration application was not incomplete, and where it would not be inappropriate to grant the sequestration request.[374]

As the sequestration process may result in a conditional discharge of certain unsecured obligations, access to discharge through the full administration process is crucial.[375] Such discharge may only be granted twelve months after the date on which sequestration is awarded has lapsed, and it is signaled by the granting of a certificate of discharge by the AiB.[376] Whether the AiB acts as the trustee or not, the end result for the discharge remains similar.[377] It must however be noted that this full administration path is not for NINA debtors.

The alternative debt relief measures include the Voluntary Trust Deeds[378] and the Debt Arrangement Scheme.[379] Both of these relief measures do not cater for NINA debtors as it is required that the debtors should have some sort of disposable income or assets.

4.3. Conclusion

This chapter discussed the bankruptcy procedures of Scotland by focusing on the MAP and the Full Administration procedure. In terms of the MAP, the chapter clarified that reforms were made due to the adverse effects of COVID-19. This includes increasing the debt eligibility threshold from GBP 17 000 to GBP 25 000, and removing student loan debt from contributing to the eligibility calculation. The application fees for the MAP were reduced to GBP 50 from GBP 90 to ensure that debtors managed to afford the fee as their economic circumstances have changed. The application fees

[372] Section 22(1) and section 8(3)(a) of the Bankruptcy Act 2016.
[373] *Ibid.*
[374] *Ibid.*
[375] Boterere and Boraine 212.
[376] Sections 137(2) and Section 138(2) of the Bankruptcy Act 2016.
[377] Section 137 of the Bankruptcy Act 2016.
[378] Part 14 of the Bankruptcy Act 2016.
[379] Debt Arrangement and Attachment (Scotland) Act 2002.

for the Full Administration application were also reduced from GBP 200 to GBP 150. All this was done through the introduction of the Coronavirus (Scotland)(No.2) Act which also implemented changes to bankruptcy regulation by allowing electronic signatures, allowing electronic service of documents, allowing creditor meetings in bankruptcy to be carried out virtually, and increasing the deadline for submitting a Debtor Contribution Order proposal. Currently, the legislature intends to make all of these changes permanent as a method that will be able to cater for the needs of NINA debtors in a lasting manner.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1. Overview

The aim of this dissertation was to investigate the debt intervention measure as a proposed debt relief measure to assist NINA debtors in South Africa. The research further compared the South African Insolvency system with that of Scotland. The reason for the comparison was that Scotland had introduced measures during COVID-19 to ensure that unfortunate debtors were assisted. In South Africa, before the introduction of the debt intervention procedure, the debt relief system was creditor-orientated[1] as only the sequestration procedure under the Insolvency Act[2] could provide for a discharge of debt. To access this procedure, or any of the alternatives, the debtor should have, is income and disposable assets to satisfy the debts and provide for an advantage of creditors or full payment of the debt in accordance with a repayment plan.[3]

The other two relief measures, debt review in terms of the National Credit Act[4] and the administration order in terms of the Magistrates' Courts Act,[5] are referred to as secondary debt relief measures as they do not provide for a discharge of debts. However, the debtor should also income available to qualify for those measures as they provide for repayment plans.[6] In order to address this plight of excluded NINA debtors and facilitate access to the debt relief system,[7] the debt intervention procedure was introduced. The process is nevertheless not yet available as the legislation is yet to become operational.

Although this procedure was introduced to assist NINA debtors, it also hinders their access to the debt relief system. This is because of the extra transportation costs which will be required in order for the debtor to reach the NCR offices in Midrand to

[1] See para 3.1.
[2] Insolvency Act 24 of 1936.
[3] See para 2.2.
[4] National Credit Act 34 of 2005.
[5] Magistrates' Courts Act 32 of 1944.
[6] See para 2.5.
[7] The National Credit Amendment Act of 2019.

file their applications ~~and~~ by virtue of the fact that NINA debtors do not have sufficient funds to cover those transportation costs.[8]

Requirements to be considered for such a procedure includes that debtor must not receive an income which exceed the amount of R7 500 per month, and he must also not be sequestrated or be subject to an administration order.[9] Moreover, this measure will be accessible to debtors with a limited amount of R50 000 in unsecured debt.[10] This also creates restrictions in terms of access to the procedure as it falls under the NCA and allows only unsecured credit agreements.[11]

The R50 000 is another barrier as it excluded debtors who have debts of more than that amount due to the effects of COVID-19 but still cannot afford to pay their debts because they do not have any income or assets. Boterere explains this further by stating that this threshold might exclude debtors who might have obtained relief from indebtedness through the debt intervention measure but who cannot be assisted because their debts exceed the prescribed threshold of R50 000.[12]

An important change brought about by the debt intervention procedure is that the procedure can be initiated through a debtor's application to the National Credit Regulator in contrast to the formal court processes that are inaccessible to NINA debtors as they are expensive. Another important change is the fact that the NCR provides the applicant with counselling on financial literacy and ensures that he has access to training to improve financial literacy.[13] This is important to the extent that it provides the debtor with knowledge to be able to make proper financial decisions in the future and this will hopefully alleviate further over-indebtedness.[14] Moreover, another important feature of the debt intervention procedure is that it grants a discharge of debts to NINA debtors who successfully accesses the procedure.[15]

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[8] Boterere 167.
[9] See para 3.2.
[10] *Ibid.*
[11] Coetzee and Roestoff 2020 *Int Insolv Rev* 17.
[12] Boterere 23.
[13] See para 3.3.
[14] Boterere 167.
[15] *Ibid.*

The NCR must provide recommendations upon which grounds the Tribunal will suspended the debtor's qualifying debts for a period of twelve months, which might be extended for a further twelve months.[16] This extension can be granted if the examination of the debtor's affairs reveals that his position did not improve during the initial suspension period to warrant the drafting of a repayment plan.[17] Prior to the ending of the extended twelve month suspension, the NCR will re-examine the debtor's affairs and may thereafter propose that the Tribunal extinguish all of the debtor's qualifying unsecured debts.[18] The discharge may be obtained within the twenty-four months-period as it does not depend on the payment of debt – it is impossible for the financial circumstances of the debtor to change in such a short period.[19]

The debt intervention procedure can provide discharges to NINA and LILA debtors when it comes into force. Further reforms are nevertheless needed as COVID-19 has created a broader void in the debt relief system.

5.2. Recommendations

In terms of the Scotland debt relief system, reforms were brought about by the Coronavirus (Scotland)(No.2) Act 2020. However, the Bankruptcy Act is the primary source of insolvency legislation in Scotland.[20] This Act provides statutory protection to every debtor regardless of the debtor's financial circumstances, this is something not done in South Africa because of requirements such as advantage to creditors. To provide such protection, a specific bankruptcy procedure namely the Minimal Assess Process aims to assist debtors who do not have income or enough income, while another process, Full Administration, caters for debtors with assets and income.[21] It is recommended that South Africa include NINA-debtor specific procedures in the main insolvency legislation – which will hopefully be the case if the Uniform Insolvency Act is enacted.

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[16] *Ibid*.
[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid.*
[20] See para 4.1.
[21] See para 4.2.

The eligibility criteria were initially reformed in order to accommodate indigent debtors who have been adversely affected by COVID-19. As a result, the debt eligibility threshold was increased from GBP 17 000 to GBP 25 000 and student loan debt was removed from contributing to the eligibility criteria.[22] As these provisions are still in place, this allows access for a larger number of NINA debtors. In South Africa, it would thus be desirable if the debt intervention were to follow suit and the R50 000 threshold should be increased to allow more debtors to access the procedure.[23]

Because of the effects of COVID-19, the COVID Act implemented changes such as allowing electronic signatures, allowing electronic service of documents, allowing creditor meetings in bankruptcy to be carried out virtually, and increasing the deadline for submitting Debtor Contribution Order proposals.[24] If South Africa implemented similar changes in respect of the debt intervention process, it would mean that transport costs to access the NRC in order to file an application will no longer be an issue for the NINA debtor as everything will be done virtually.[25]

Accessing the office is a problem for a NINA debtor who resides outside of Gauteng and even those who are in Gauteng will have a difficulty to obtain transportation fees – for this reason, the debtor will have difficulty accessing the debt relief mechanism.[26] This recommendation will align with the Coronavirus (recovery and reform) Scotland Act that aims to permanently implement remote meetings of creditors and to amend the law regarding the servicing of documents.[27]

The debtor application fees were lowered from GBP 90 to GBP 50 for the MAP and from GBP 200 to GBP 150 for the Full Administration procedure.[28] This was done to ensure that NINA debtors are not left on their own after the adverse effects of COVID-19.

[22] See para 4.2.1.
[23] Boterere and Boraine 14.
[24] See para 4.3.
[25] Boterere and Boraine 15.
[26] See para 4.2.1.
[27] *Ibid.*
[28] *Ibid.*

Recently, the legislature has signalled its intention to ensure that such changes become permanent.[29] In terms of the debt intervention in order to qualify for this procedure, the applicant must have a maximum unsecured debt owed to the credit providers that does not exceed R50,000.00.[30]This limit could have potentially left out debtors who could have benefited from debt relief under the debt intervention measure but cannot receive assistance due to their debts exceeding this specified threshold.[31] This amount should however be increased.

Debtors may be discharged after six months from the date on which the sequestration process lapsed, and the debt intervention legislation should also be adapt to allow for a discharge in a shorter period of time – if there is no indication that the debtor's circumstances will change, the 24 months period is long and inconsiderate as it is unnecessary to keep a debtor within the system where there is no change forthcoming.[32]

The Scottish insolvency system is available for all deserving debtors who do not meet their financial obligations and should such ideology be applied to the debt intervention procedure. All credit agreements should be able to qualify for debt intervention, such as developmental credit agreements.

5.3. Conclusion

The exclusion of NINA debtors in South Africa is undoubtably a serious problem. NINA debtors have trouble accessing the debt relief system due to the requirements in place that intends to accommodate only creditors and well-endowed debtors. COVID-19 contributed to the increased of NINA debtors as more people lost their jobs, which means that they no longer have any income to be able to pay their debts.

Although the South African government is aware of this issue of exclusion of NINA debtors and introduced the debt intervention procedure with the aim of rectifying the adverse position of NINA debtors and providing them with a discharge, this procedure

[29] *Ibid.*
[30] S 86A(1) of the 2019 National Credit Amendment Act.
[31] Boterere 168.
[32] Boterere and Boraine 17.

is not yet operational. It will be wise for the legislature to draw lessons from the Scottish debt relief system in order to improve the debt intervention process before it comes into force, as Scotland has introduced measures and reforms in place to accommodate NINA debtors during and post COVID-19.

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