

The interface between the Insolvency Act 24 of 1936 and the National
Credit Act 34 of 2005

by

Kereen Rampersad

Submitted in partial fulfilment of the requirements for the degree

Masters in Business Law

in the

School of Law

at the

University of KwaZulu-Natal

Howard College

Supervisor: Professor Lienne Steyn

January 2013

ACKNOWLEDGMENTS

Firstly I would like to express my gratitude to God for providing me with strength and confidence during the process of completing my dissertation, and for always guiding me through life.

I am truly grateful to my supervisor, Professor Lienne Steyn. Even though she has a very demanding career and a very busy life due to her meetings and workshops, she made me her priority when I needed guidance and had always shown interest in me. Thank you Professor Steyn for all the guidance and support, you are truly amazing.

I am thankful to my parents for supporting and encouraging me throughout the year. I am especially grateful to my dad, Mr H Rampersad, for providing me with the opportunity of furthering my studies and for always being my pillar of strength. I love and adore you both very much.

I thank my best friend, my fiancé, Sherwin Munsamy for always believing in my capabilities and for always supporting and encouraging me. Thank you for being beside me through my trying times and for always lifting my spirit. I am truly grateful to have you in my life.

ABSTRACT

The Insolvency Act 24 of 1936 regulates the debtor's estate when sequestrated for the benefit of creditors. The debtor must prove that sequestration will be to the advantage creditors and as such creates a stumbling block in the way of the debtor when applying for the voluntary surrender of his estate. Sequestration is viewed as a drastic measure due to the consequences attached to it. The sequestration procedure is often used by debtors as a form of debt relief as, subsequent to the sequestration procedure, the debtor may become rehabilitated. The effect of rehabilitation is that it discharges the debtor of all pre-existing debts and disabilities resulting from sequestration. Compulsory sequestration is often used as a debt relief measure by the debtor in the form of the so-called 'friendly sequestration'. One of the reasons for this is that the onus of proof is much less burdensome as compared to the onus required in voluntary surrender by the debtor of his estate.

South African law provides for alternative debt relief measures falling outside the scope of the Insolvency Act, including debt rearrangement in terms of section 86(7)(b) or debt restructuring in terms of section 86(7)(c) as a result of debt review in terms of the National Credit Act 34 of 2005 (NCA). However this procedure does not offer the debtor the opportunity of any discharge from his debts as the order expires only after the administration costs and all of the listed creditors have been paid in full. Further the NCA does not mention the Insolvency Act and this has led to problems in the application of both Acts and inconsistencies between them. An application for debt review by the debtor has been held to constitute an act of insolvency. Thus the creditor can use this very act of the debtor to have the debtor's estate sequestrated. This is possible as an application for the sequestration of the debtor's estate is not considered to be an enforcement of a debt by legal proceedings for the purposes of section 88(3) of the NCA and such actions by the creditor are not prohibited by the NCA. This was stated in *Investec Bank Ltd v Mutemeri* 2010 (1) SA 265 (GSJ) and was subsequently confirmed by *Naidoo v ABSA Bank* 2010 (4) SA 597. The consequence of this is that a debtor's estate may be sequestrated even where he has applied for debt review. Currently, as stated by Van Heerden and Boraine, there is no explicit regulation by the legislature of the interaction between the provisions of the Insolvency Act and the NCA. In terms of *FirstRand Bank v Evans* 2011 (4) SA 597

(KZD) a debtor's estate may be sequestrated even after a debt rearrangement order has been confirmed by a court in terms of the NCA. This clearly operates to the disadvantage of a debtor.

Comparing the position with that in foreign jurisdictions such as the United States of America and England and Wales shows a lack of balance between the interests of the creditor and the debtor. South African insolvency law is not aligned with internationally acceptable standards because it is too creditor orientated and debtors are not provided with effective remedies to deal with their financial difficulties.

This research paper will focus on reform in South African law to assist debtors in need of debt relief. There is a need for a system to be put into place to regulate application for debt review by a debtor and the application for the sequestration of the debtor's estate by the creditor. In addition there is a need for the introduction of new legislation or amendment to the NCA which could be effective in redressing the current situation.

TABLE OF CONTENTS

Acknowledgment	i
Abstract	ii
CHAPTER 1 INTRODUCTION	1
1.1 Background	1
1.2 Statement of purpose	4
1.3 Research methodology	5
CHAPTER 2 THE INSOLVENCY ACT 24 OF 1936	6
2.1 Background	6
2.2 Sequestration	7
2.2.1 Procedure and requirements	8
2.2.1.1 Voluntary surrender	8
2.2.1.2 Compulsory sequestration	10
2.2.2 Effects of sequestration	12
2.2.3 Rehabilitation of the insolvent debtor	13
2.3 Topical issues in the law of insolvency	14
2.3.1 Advantage of creditors	14
2.3.2 Acts of insolvency	16
2.4 Conclusion	17
CHAPTER 3 THE NATIONAL CREDIT ACT 34 OF 2005	19
3.1 Background	19
3.2 Over-indebtedness	19
3.3 Debt relief for over-indebtedness	20
3.4 Debt review	20
3.5 Debt restructuring	21
3.6 Debt enforcement	22
3.7 Conclusion	23

CHAPTER 4 THE INTERFACE BETWEEN THE INSOLVENCY ACT AND THE NATIONAL CREDIT ACT	24
4.1 Background	24
4.2 Does an application for compulsory sequestration amount to enforcement of a credit agreement ?	24
4.2.1 Investec Bank v Mutemeri	24
4.2.2 Naidoo v ABSA bank	26
4.3 Impact of section 8(g) of the Insolvency Act on the National Credit Act	28
4.3.1 Background	28
4.3.2 FirstRand Bank v Evans	29
4.3.2.1 Facts and issues	29
4.3.2.2 Decision	30
4.3.3 Collett v FirstRand Bank	31
4.3.4 FirstRand Bank v Janse van Rensburg	33
4.3.4.1 Facts and issues	33
4.3.4.2 Decision	33
4.4 Conclusion	34
CHAPTER 5 COMPARATIVE COMMENTS AND RECOMMENDATIONS FOR SOUTH AFRICAN LAW REFORM	38
5.1 Background	38
5.2 Comparative comments	38
5.2.1 The United States of America	38
5.2.2 England and Wales	41
5.3 Recommendations for South African law reform	44
CHAPTER 6 CONCLUSION	48
BIBLIOGRAPHY	50

CHAPTER 1

INTRODUCTION

1.1 Background

The main aim of the Insolvency Act 24 of 1936 (hereafter referred to as 'the Insolvency Act') is to regulate the debtor's estate when sequestrated, for the 'advantage of creditors'. Section 2 of the Insolvency Act defines a sequestration order to mean 'an order made by the court whereby an estate is sequestrated'. The purpose of a sequestration order is to secure an equitable distribution in a predetermined order of the debtor's assets among all creditors. South African insolvency law recognises two methods in which a debtor's estate may be sequestrated. The first is voluntary surrender where the debtor himself applies to the court for the surrender of his¹ estate. The second is compulsory sequestration in which case one or more creditors of the debtor apply for the sequestration of the debtor's estate. It should be noted that the burden of proof between these two methods differs in that the onus of proof is much stricter in the case of voluntary surrender. This will be discussed further in 2.2.1.

South African insolvency law requires the satisfaction of 'advantage of creditors' as a requirement for sequestration of the debtor's estate. As a result it places a 'stumbling block' in the path of debtors who wish to use sequestration as a means of debt relief. When courts exercise its discretion in making a decision as to whether or not a debtor's estate should be sequestrated, the requirement of 'advantage of creditors' is important.²

Sequestration is viewed as a drastic measure. South African law provides for alternative debt relief measures which fall outside the range of the Insolvency Act. Such alternative measures may include making use of debt repayment plans with creditors, debt rearrangement in terms of section 86(7) (b) or debt restructuring in terms of section 86(7) (c) as a result of debt review under the National Credit Act 34 of 2005 (hereafter referred to as the NCA) which will be discussed further in chapter

¹ Please note that the word 'his' connotes 'her' and the word 'he' connotes 'she'.

² Boraine and Roestoff (1993) *De Jure* 229 235-241.

3.³ Other alternatives are administration orders in terms of the Magistrates' Courts Act.⁴ The debtor may apply in terms of section 74 of the Magistrates' Courts Act to a magistrate for an administration order. This is subject to the debtor's debts not exceeding R50 000. This procedure, however, does not offer the debtor a discharge from his debts because it is only after all listed creditors and administration costs have been paid in full that the order expires. Consequently it prevents the debtor being rehabilitated. In addition once the debtor has applied for an administration order and notified all creditors, the creditor is not prohibited from applying for the debtor's estate to be sequestrated. A debtor, who applies for an administration order is obliged to state that he is unable to pay any of his debts. Hence the debtor commits an act of insolvency.⁵

Goosen J stated in the case of *FirstRand Bank v Janse van Rensburg*, that the application to be placed under administration required for example, a submission of a detailed statement of affairs setting out the financial affairs of the applicant in addition to the delivery of a notice of the application to creditors. The application itself meets the particular requirements of section 8(g) of the Insolvency Act, namely, notice in writing delivered to a creditor in which the debtor states that he or she is unable to meet his financial obligations.⁶

According to Van Heerden and Boraine, the debt restructuring process creates many problems owing to a lack of procedural clarity. Van Heerden and Boraine state further that the purpose of debt restructuring is fulfilment of financial obligations and without any time limit being specified or the possibility of discharge, a credit might have no other choice but to accept the payments according to the proposed restructuring order even if it means that the restructuring of debts has the effect of taking the whole of the debtor's lifetime to settle.⁷

³ Boraine and Van Heerden 'To sequester or not to sequester in view of the National Credit Act 34 of 2005: a tale of two judgments' 2010 13(3) *PELJ* 84.

⁴ Magistrates' Courts Act 32 of 1944.

⁵ *Volkswagen Bank v Pietersen* 1993 (1) SA 312 (C) 316; Sharrock, Smith & Van der Linde *Hockly's Insolvency Law* 8 ed (2006) ch 3.

⁶ *FirstRand Bank v Janse van Rensburg* 2012 (2) All SA 186 (ECP) (hereafter referred to as *FirstRand Bank v Janse van Rensburg*) par 23-24.

⁷ Van Heerden and Boraine 'The interaction between the debt relief measures in the National Credit Act 34 of 2005 and aspects of Insolvency Law' 2009 12(3) *PELJ* 31.

The NCA is a comprehensive piece of legislation which introduces into South African law, new methods for protecting credit debtors.⁸ In terms of section 3 of the NCA, the purposes are 'to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect debtors. Some of the aims of the NCA are to discourage reckless credit granting as provided for in section 80 and 81, to address and prevent over-indebtedness of debtors, and to provide methods for resolving over-indebtedness based on the principle of satisfaction of all financial obligations. This is achieved through the application for debt review by the debtor as provided for by sections 86 of the NCA.

However, an application for debt review by the debtor has been held to constitute an act of insolvency under the Insolvency Act.⁹ Thus the creditor can use this very act of the debtor to have the debtor's estate sequestrated. This would be possible since an application to have the debtor's estate sequestrated is not considered to be an enforcement of a debt by legal proceedings for the purposes of the NCA¹⁰ and such actions by the creditor are not prohibited. This was stated in *Investec Bank Ltd v Mutemeri*¹¹ and was subsequently confirmed by *Naidoo v ABSA Bank*.¹² It is submitted that as a result of this, a debtor's estate may be sequestrated even if he has applied for debt review. Consequently, there is a need for the regulation of applications for sequestration when a debtor has applied for debt review. It is submitted that, currently there, is no explicit regulation by the legislature of the interaction between the provisions of the Insolvency Act and the NCA.

Section 2(1) of the NCA provides that the Act must be interpreted in a manner that 'gives effect to the purposes of the Act'. Section 2(7) of the NCA provides that 'except as specifically set out in or implied by the Act, its provisions should not be construed as limiting, amending, repealing or otherwise altering any provision of any other Act'. It is submitted that the NCA does not make mention of the Insolvency Act. Schedule 1 of the NCA sets out rules regarding conflicting legislation and no mention

⁸ Otto & Otto *The National Credit Act Explained* 2 ed (2010) Lexis Nexis p 4.

⁹ Please refer to discussion on s 8 of the Insolvency Act in ch 2, par 2.3.2 below.

¹⁰ See s 88(3) of the NCA.

¹¹ *Investec Bank v Mutemeri* 2010 (1) SA 265 (GJ) (hereafter referred to as *Investec Bank v Mutemeri*).

¹² *Naidoo v ABSA Bank* 2010 (4) SA 597 (hereafter referred to as *Naidoo v ABSA Bank*).

of the Insolvency Act is made. Van Heerden and Boraine state that had the legislature intended for the provisions of the NCA to prevail over conflicting provisions of the Insolvency Act, then the legislature would have expressly stated so in Schedule 1.¹³

A further aspect is that, in terms of *FirstRand Bank v Evans*,¹⁴ a debtor's estate may be sequestrated even after a debt rearrangement order has been confirmed by a court in terms of the NCA. The sequestration order may be granted on the basis that the debtor committed an act of insolvency by his very act of applying for debt review under the NCA. This clearly operates to the disadvantage of a debtor. The debtor resorts to a debt relief measure that the NCA affords him, only to find that he has placed himself in the position where it is much easier for the creditor to obtain a sequestration order against him. His act of seeking debt relief under the NCA forms the very basis of the sequestration proceedings.

A comparative study with foreign jurisdictions such as the United States of America (USA) and England and Wales shows a lack of balance in South Africa between the interests of the creditor and the debtor. Insufficient attention is being given to the need for debt relief measures that operate in the interests of debtors. In addition South African insolvency law is not aligned with internationally acceptable standards because it is too creditor orientated and debtors are not provided with effective remedies to deal with their financial difficulties.

1.2 Statement of Purpose

The purposes of this study are as follows.

- This study seeks to address an apparent undue advantage given to the creditor by the Insolvency Act. Such an undue advantage is that the creditor is entitled to apply for an order to have the debtor's estate sequestrated upon the debtor's application for, and while under, debt review in terms of the NCA. An application for debt review, in terms of the NCA, has been held not to preclude a creditor from applying for and obtaining an order for the

¹³ Van Heerden and Boraine 'The interaction between the debt relief measures in the National Credit Act 34 of 2005 and aspects of insolvency law' 2009 12 (3) *PELJ* 36.

¹⁴ *FirstRand Bank v Evans* 2011 (4) SA 597 (KZD) (hereafter referred to as '*FirstRand Bank v Evans*') pars 24 -26.

sequestration of the debtor's estate. This is unsatisfactory from the debtor's perspective due to the severe consequences of a sequestration order. The sequestration order does not only affect the debtor in a harsh and adverse manner but also his or her family and dependants.

- This study seeks also to consider the need for the Insolvency Act and the NCA to become aligned with each other so that the debtor is not deprived by the creditor of the relief offered by the NCA and thus leaving the debtor in a worse off situation.
- Further, the purpose of the research is also to provide comparative comments on the systems in England and Wales and in the USA in order to consider appropriate reforms which could be brought about in South Africa to ensure a more debtor friendly approach.

1.3 Research methodology

The research methodology for this dissertation is desk-top based. It will involve locating and researching case law and journal articles dealing with the interface between the Insolvency Act and the NCA. This dissertation will consist of research on articles providing discussion of whether the Insolvency Act and the NCA are in line with each other or not. Research will also consist of comparisons being drawn between the South African insolvency and consumer-debtor legislation and the systems in the USA and England and Wales.

CHAPTER 2

THE INSOLVENCY ACT 24 OF 1936

2.1 Background

The primary objective of the Insolvency Act is not to grant relief to the debtor. This was stated in the case of *R v Meer*,¹⁵ where the court stated that ‘the Insolvency Act was passed for the benefit of creditors and not for the relief of harassed debtors’. Further, in section 6 and section 10 of the Insolvency Act, one of the requirements which must be met in order for the debtor’s estate to be sequestrated, is that it must be to the ‘advantage of creditors’. Thus South African insolvency law is very creditor orientated.

The debtor himself or his agent may apply to the court for the voluntary surrender of his estate or a creditor or creditors may apply to the court for the compulsory sequestration of the debtor’s estate. The purpose of a sequestration order is to ‘secure an equitable distribution in a predetermined order of the debtor’s assets among all of creditors’.¹⁶ Section 8 of the Insolvency Act provides for acts of insolvency which, once committed by the debtor, entitles a creditor to apply for the compulsory sequestration of the debtor’s estate without proving actual insolvency.

Section 124 of the Insolvency Act allows an insolvent to apply for rehabilitation. Section 129(1) of the Insolvency Act provides that rehabilitation of an insolvent offers him a discharge from pre-sequestration debts, except those arising out of fraud on his part. It also relieves him of every disability resulting from sequestration.

This chapter will provide a brief overview on the sequestration procedures that are available under the Insolvency Act. Further the chapter will provide an explanation of how rehabilitation of an insolvent debtor is granted and its effect. This chapter will provide an analysis of the requirement ‘advantage of creditors’ and whether or not it operates unfairly towards the insolvent debtor. Finally this chapter will provide an

¹⁵ *R v Meer* 1957 (3) SA 614 (N) at 619 (hereafter referred to as *R v Meer*).

¹⁶ Sharrock, Smith & Van der Linde Hockly’s *Insolvency Law* 8 ed (2006) ch 2.

overview of the acts of insolvency as provided in section 8 of the Insolvency Act. Focus will be specifically on section 8(g).

2.2 Sequestration

The Insolvency Act regulates the sequestration of the debtor's estate. The main aim of the sequestration process is to provide for a 'collective debt collection process,¹⁷ by ensuring an orderly and fair distribution of the debtor's assets in circumstances where these assets are insufficient to satisfy all the creditors' claims'.¹⁸ For the purposes of sequestration proceedings the legal test for insolvency is namely, 'whether or not the debtor's liabilities, fairly estimated, exceed his assets, fairly valued'.¹⁹

A requirement of the Insolvency Act is that sequestration can only take place if it is proved to be to the 'advantage of creditors', as the very purpose of the Insolvency Act is to secure an advantage for creditors. The law proceeds from the principle that once a sequestration order is granted, a '*concursum creditorum*' is established and the interests of all the creditors as a group enjoy preference above the interests of individual creditors.²⁰

In *Walker v Syfret*,²¹ the court explained the legal position as follows:

The object of the Insolvency Act is to ensure a due distribution of assets among creditors in order of their preference. The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body.

¹⁷ Steyn *Statutory regulation of forced sale of the home in South Africa* (Doctor of Laws thesis, University of Pretoria, 2012) 14-15; The terms 'collective debt collection process' and 'collective debt enforcement process' are commonly used by many authors, for example Bertelsman *et al Mars* and refers to the insolvency process. In South Africa, these terms are given a meaning that is known to be wrong, in light of the decision in *Investec Bank Ltd and Another v Mutemeri* the court held that sequestration does not amount to an 'enforcement' of a credit agreement for the purposes of s 88(3) of the NCA.

¹⁸ Bertelsmann *et al Mars The Law of Insolvency* 9 ed (2008) ch 1; Sharrock, Smith & Van der Linde Hockly's *Insolvency Law* 8 ed (2006) ch 1.

¹⁹ *Venter v Volkskas Ltd* 1973 (3) SA 175 (T) 179.

²⁰ Bertelsmann *et al Mars The Law of Insolvency* 9 ed (2008) ch 1; Sharrock, Smith & Van der Linde Hockly's *Insolvency Law* 8 ed (2006) ch 1.

²¹ *Walker v Syfret* 1911 AD 141 (hereafter referred to as '*Walker v Syfret*').

A debtor's estate may be sequestrated in one of two ways in terms of the Insolvency Act. This is either through voluntary surrender by the debtor of his estate or through compulsory sequestration by one or more creditors of the debtor. The sequestration procedure is often used by debtors as a form of debt relief because, subsequent to the sequestration procedure, the debtor becomes rehabilitated. The effect of rehabilitation is that it discharges the debtor of all pre-existing debts and disabilities resulting from sequestration. Compulsory sequestration is commonly used as a debt relief measure by the debtor in the form of the so-called 'friendly sequestration'. One of the reasons for this is that the onus of proof is much less burdensome as compared to the onus required in voluntary surrender by the debtor of his estate. Courts have thus become wary of possible abuse of the sequestration procedure in the form of friendly sequestration.²²

It has been stated that sequestration would not be possible if the debtor's assets will be consumed by sequestrating the estate and nothing will be left for creditors. Courts will only grant a sequestration order if the result of the sequestration would be an 'appreciable dividend' for creditors.²³ Further the sequestration process was not meant for the benefit of debtors; however the sequestration procedure has this effect as it relieves the debtor from legal proceeding by creditors. This means that once the sequestration procedures have commenced, it has the effect of staying all legal proceedings against the debtor by creditors. In addition, in terms of section 129(1) (b) of the Insolvency Act, the debtor, through rehabilitation becomes free of all pre-sequestration debts.²⁴

2.2.1 Procedure and requirements

2.2.1.1 Voluntary surrender

Section 3(1) of the Insolvency Act provides that the debtor or his agent may apply to court for acceptance of the surrender of his estate. Section 6(1) of the Insolvency Act provides the requirements which must be satisfied when an application for the voluntary surrender of the debtor's estate is made. Section 6(1) of the Insolvency Act

²² Boraine and Roestoff (1993) *De Jure* 229 235-241.

²³ Sharrock, Smith & Van der Linde Hockly's *Insolvency Law* 8 ed (2006) p 4.

²⁴ Sharrock, Smith & Van der Linde Hockly's *Insolvency Law* 8 ed (2006) p 4.

provides that the court may accept the surrender of the debtor's estate only if the court is satisfied that:

- the debtor's estate is factually insolvent, that is the debtor's liabilities must exceed his assets;
- the debtor owns realisable property of sufficient value to cover all administration costs which will be payable out of the free residue²⁵ of his estate in terms of the Insolvency Act;
- the sequestration will be to the 'advantage of creditors'; and
- all the formalities set out in section 4 of the Insolvency Act have been complied with.

It should be noted that the debtor bears the onus of proof. Section 4 of the Insolvency Act, sets out the steps which must be followed by the debtor before applying for the surrender of his estate.

Notice of intention to surrender:

The first step is to publish a notice of surrender in the Government Gazette, as well as in a newspaper circulating in the area where he resides. Further if the debtor is a trader, the notice must be published in a newspaper in the district where he has his principal place of business. The notice must provide full details about the debtor, state the date upon which the application to surrender will be made to court and state where and the period the debtor's statement of affairs will lie for inspection. The notice serves the purpose of alerting creditors to the fact the debtor wishes to surrender his estate. Publication of the notice to surrender must take place no more than 30 days and not less than 14 days before the date sated in the notice for bringing the application to court.²⁶

Notice to creditors and other parties:

The debtor must provide a copy of the notice of intention to surrender to creditors and other parties within 7 days after the publication of the notice. In terms of section 4(2) (a) of the Insolvency Act, 'the debtor must deliver or post a copy of the notice to each

²⁵ S 2 of the Insolvency Act defines 'free residue' as 'that portion of the estate which is not subject to any right of preference by reason of any special mortgage, legal hypothec, pledge or right of retention'.

²⁶ Sharrock, Smith & Van der Linde Hockly's *Insolvency Law* 8 ed (2006) p 18.

creditor whose address he knows or can ascertain'. It is submitted that the object of this requirement is to ensure the creditors' interests are protected. Section 4(2) (b) (i) of the Insolvency Act requires that the debtor post a copy of the notice to every registered trade union which represents his employees. Further section (2) (b) (iii) of the Insolvency Act requires that the debtor send a copy of the notice by post to the South African Revenue of Services.²⁷

Section 4(3) of the Insolvency Act requires that the statement of affairs of the debtor together with supporting documentation must be lodged in duplicate at the Master's office. The statement of affairs must lie at all times during the office hours for a period of 14 days in order for creditors to inspect them. This is required by section 4(6) of the Insolvency Act. It should be noted that although a court may be satisfied that the requirements have been met and formalities have been adhered to, the court still has discretion to reject the surrender of the debtor's estate in terms of section 6(1) of the Insolvency Act.²⁸

2.2.1.2 Compulsory sequestration

Section 9(1) of the Insolvency Act provides that a creditor (or his agent) may apply to the court to have the debtor's estate sequestrated. The court must be satisfied that:

- the applicant has established a claim which in terms of section 9(1) of the Insolvency Act entitles him to do so;
- the debtor has committed an act of insolvency²⁹ or is insolvent;³⁰
- there is reason to believe that the sequestration will be to the advantage of creditors if his estate is sequestrated in terms of section 10 of the Insolvency Act.³¹

²⁷ Sharrock, Smith & Van der Linde Hockly's *Insolvency Law* 8 ed (2006) p 19.

²⁸ Sharrock, Smith & Van der Linde Hockly's *Insolvency Law* 8 ed (2006) p 22-27.

²⁹ S 8 of the Insolvency Act deals with acts of insolvency and list eight acts which once performed by the debtors is conclusive that the debtors is insolvent. For example, s 8(g) provides that a debtor commits an act of insolvency 'if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts'.

³⁰ In the case of *Venter v Volksskas* 1973 (3) SA 175 (T) 179, the court held that the legal test for insolvency is namely, whether or not the debtor's liabilities, fairly estimated, exceed his assets, fairly valued.

³¹ Sharrock, Smith & Van der Linde Hockly's *Insolvency Law* 8 ed (2006) p 38.

In compulsory sequestration, the creditor bears the onus of satisfying the court that the requirements are met. The court must be satisfied that there is reason to believe that the sequestration will be to the advantage of creditors. It must be shown that creditors are actually going to get some money from the sequestration and not just a negligible dividend.³²

In a case of compulsory sequestration, the sequestrating creditor will have to appear before the court twice. In the first instance, the sequestrating creditor will have to apply for a provisional order for sequestration in terms of section 10 of the Insolvency Act. For a provisional order, a prima facie case must be established. The purpose of the second appearance before the court is to have the provisional order confirmed and made final in terms of section 12 of the Insolvency Act. For a final order, proof is required on a balance of probability.³³

Friendly sequestrations

It has become a common practice for debtors to arrange with a family member or a friend to whom he owes money, to have his estate sequestrated. Commonly both parties may agree that the debtor will write a letter indicating that he cannot meet his financial obligations with respect to the debt owed and as such the other person would then apply for the sequestration of the debtor's estate on the basis that the debtor committed an act of insolvency. It has been stated that friendly sequestrations are not illegal in nature but nevertheless open the door for collusion and other malpractices and thus courts are wary of this.³⁴

In the case of *Mthimkhulu v Rampersad*,³⁵ the court described the manner in which sequestration procedures may be abused. From the judgment it is evident that friendly sequestrations are often brought with the aim of obtaining a stay in civil proceedings and the stay of a sale in execution. The debtor resorts to friendly sequestration instead of voluntary surrender because it may be obtained on an urgent basis without having to satisfy the preliminary requirements or giving creditors notice. Further it involves a

³² Sharrock, Smith & Van der Linde Hockly's *Insolvency Law* 8 ed (2006) p 38.

³³ S 10 and 12 of the Insolvency Act; Sharrock, Smith & Van der Linde *Hockly's Insolvency Law* 8 ed (2006) ch 2.

³⁴ Sharrock *Business Transactions Law* 8 ed (2011) p 799.

³⁵ *Mthimkhulu v Rampersad* (2000) 3 All SA 512 (N) 514.

less stringent onus as the creditor merely has to establish that there is reason to believe that sequestration will be to the advantage of creditors and not that it will be.³⁶

Nevertheless, case law reveals that the court has a duty to scrutinize and examine the application for friendly sequestration with diligence, to establish advantage of creditors and, to prevent them from being prejudiced.³⁷

2.2.2 Effects of sequestration

Sequestration is viewed as a very drastic measure in South African insolvency law. As a result alternative methods to sequestration would be applied and considered. These are means provided in terms of the NCA such as debt review. Sequestration is seen as a last resort due to its harsh consequences, not only for the insolvent himself but also for his spouse.³⁸

In the case of *Spencer v Standard Building Society*³⁹ the court held, ‘sequestration of the debtor’s estate imposes upon him a form of reduction in status, which as a result curtails his capacity to contract, earn a living, to litigate and hold office’.

Some of the consequences of sequestration on the debtor are as follows:

- According to section 23(3) of the Insolvency Act, during the sequestration of the debtor’s estate, he may not, without the trustee’s written consent, carry on, or be employed in any capacity or have any direct or indirect interest in the business of a trader.
- Upon the sequestration of the insolvent debtor’s estate, the insolvent is disqualified from holding various positions. For example, in terms of section 55(a) of the Insolvency Act, the insolvent cannot be appointed as a trustee in an insolvent estate if he is already a trustee when his estate is sequestrated. Section 58(a) of the Insolvency Act requires that the insolvent vacate his office.

³⁶ Sharrock, Smith & Van der Linde Hockly’s *Insolvency Law* 8 ed (2006) ch 3.

³⁷ *Craggs v Dedekind* 1996 1 SA 935 (C), *Ex Parte Steenkamp* 1996 3 SA 822 (W).

³⁸ See s 21 of the Insolvency Act.

³⁹ *Spencer v Standard Building Society* 1931 TPD 481 484.

2.2.3 Rehabilitation of the insolvent debtor

Section 127A of the Insolvency Act provides that if an insolvent is not rehabilitated by a court within the period of 10 years from the date on which his estate was sequestrated, he is deemed to be rehabilitated unless, upon the application by an interested, the court orders otherwise. The consequence of the rehabilitation of the insolvent debtor is that he regains his solvent status.⁴⁰

The circumstances in which a court may rehabilitate an insolvent debtor are the following:

a) in terms of section 124(1), a statutory composition in terms of which the dividend to concurrent creditors of at least 50cents in the rand has been paid or security has been given;

b) in terms of section 124(2)(a) an insolvent may apply to the Court after twelve months have expired from the confirmation by the Master of the trustee's first account in the insolvent debtor's estate subject to the following:

- The current sequestration should be the first in the insolvent debtor's history;
- The insolvent debtor should not have been convicted of a fraudulent act or offence under the Insolvency Act; and
- He must have the recommendation of the Master where, at the date of the grant of the application, four years from the date of sequestration of his estate have not elapsed;

c) the insolvent debtor may apply to Court after the expiration of six months from the date of sequestration if no claim has been proved against his estate, and his estate has not been previously sequestrated;

d) section 124(5) allows the insolvent debtor to apply to the Court for rehabilitation any time after confirmation by the Master of a distribution plan providing for payment in full of all claims proved against the estate with interest and of all the costs of sequestration.

Once the insolvent debtor is rehabilitated, whether it is automatic (after 10 years) or granted by the Court, the result is that, it eliminates the debtor's status as an insolvent, it puts an end to sequestration and relieves the insolvent of all disabilities resulting

⁴⁰ Sharrock *Business Transactions Law* 8 ed (2011) p 856; *INSOL International Consumer Debt Report II* 277-279.

from sequestration. It also discharges each of the debtor's debts existing at the date of sequestration.⁴¹

2.3 Topical issues in the law of insolvency

Discussions in the law of insolvency have centred on the requirement of 'advantage of creditors'. Advantage of creditors as a requirement for sequestration applications creates difficulties for debtors that wish to make use of sequestration as a debt relief measure. The Insolvency Act ensures creditors benefit and as such the requirement of 'advantage of creditors' cannot be separated from the Insolvency Act. Further, acts of insolvency, especially section 8(g), have captured much attention as it is commonly used during an application for the so-called 'friendly sequestration'. An understanding of section 8(g) is important as its relationship with the NCA is considered below.⁴²

2.3.1 Advantage of creditors

South African insolvency law requires the satisfaction of 'advantage of creditors' as a requirement for the sequestration of the debtor's estate. As a result it places a 'stumbling block' in the way of the debtor.⁴³ It is submitted that the Insolvency Act makes certain that the sequestration will be to the 'advantage of creditors' and as such this requirement cannot be separated from the Insolvency Act.

In the case of *Lotzof v Raubenheimer*⁴⁴ the court held that the word 'creditors' meant 'all or at least the general body of creditors'. In the case of *Walker v Syfret*⁴⁵ the court held that 'the sequestration order crystallises the insolvent's position. As such the hand of the law is placed upon the estate, and the rights of the general body of creditors have to be considered'. The court stated that it is often on the basis of 'advantage of creditors' that a court will refuse to grant an order for sequestration despite all the other requirements been satisfied. It is important to note that the 'advantage of creditors' requirement is more strict in an application for voluntary surrender than in compulsory sequestration. In compulsory sequestration, the applicant merely has to allege that 'there is reason to believe that it will be to the

⁴¹ Sharrock *Business Transactions Law* 8 ed (2011) p 861.

⁴² Please refer to ch 4, subheading 4.3 for further discussion.

⁴³ Boraine and Roestoff (1993) *De Jure* 229 235-241.

⁴⁴ *Ltozof v Raubenheimer* 1959 (1) SA 90 (0) 94.

⁴⁵ *Walker v Syfret* 1911 AD 141.

advantage of his creditors' as provided for in section 10 of the Insolvency Act. However in voluntary surrender the court must be satisfied that 'it will be to the advantage of the creditors' if the debtor's estate is sequestrated as provided for in section 6 of the Insolvency Act.⁴⁶ In the case of *Ex Parte Bergh*⁴⁷ it was stated that 'there are two key requirements in a voluntary surrender, namely that there must be sufficient reasonable assets to defray the costs of the sequestration, and that the surrender will be to the advantage of creditors'.

According to Meskin,⁴⁸ a civilised system of law which allows the obtaining of credit, must provide a means to help a debtor that is harassed by unpaid creditors, particularly where the cause of his financial crisis is not dishonesty but due to misfortune.

In the case of *Trust Wholesalers and Woollens (Pty) Ltd v Mackan*⁴⁹ the court held that in establishing 'advantage of creditors' the question to ask is 'whether a 'substantial portion' of the creditors will derive a benefit from sequestration of the debtor's estate?'. It was stated further that for sequestration to be to the advantage of creditors it must 'yield at the least, a non negligible dividend'. In *Ex parte Steenkamp and related cases*⁵⁰ the court held that, if after the costs of sequestration have been met, there is no payment to creditors, or, if there is payment' it is only a negligible one, then there is no advantage to creditors.⁵¹

The case of *Nedbank v Thorpe*⁵² dealt with the expression of 'advantage of creditors'. *Nedbank v Thorpe* has made mention of two important cases mentioned below. It was stated in *Nedbank v Thorpe* that the leading case is *Meskin & Co v Friedman*⁵³ where Roper J stated as follows:

⁴⁶ Van Heerden and Boraine "The interaction between the debt relief measures in the National Credit Act 34 of 2005 and aspects of Insolvency Law" 2009 12(3) *PELJ* 43.

⁴⁷ *Ex Parte Bergh* 1938 CPD 131.

⁴⁸ Meskin, PM "Advantage to creditors: a misconceived requirement" Unpublished conference paper presented at the Annual Banking Law Update, held at Rand Afrikaans University, Johannesburg, August (1995).

⁴⁹ *Trust Wholesalers and Woollens (Pty) Ltd v Mackan* 1954 (2) SA 109 (N) 111.

⁵⁰ *Ex parte Steenkamp and related cases* 1996 (3) SA 822 (W).

⁵¹ Sharrock, Smith & Van der Linde Hockly's *Insolvency Law* 8 ed (2006) ch 3.

⁵² *Nedbank v Thorpe* (7392/2007) [2008] ZAKZHC 72 (26 September 2008) (available at <http://www.safli.org/za/cases/ZAKZHC/2008/72.html>) hereafter referred to as *Nedbank v Thorpe*.

⁵³ *Meskin & Co v Friedman* 1948 (2) SA 555 (W) 558 559.

Sequestration confers upon the creditors of the insolvent certain advantages which, though they tend towards the ultimate pecuniary benefit of the creditors, are not in themselves of a pecuniary character...In my opinion, the facts put before the Court must satisfy it that there is a reasonable prospect - not necessarily a likelihood, but a prospect which is not too remote - that some pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of enquiry under the Act some may be revealed or recovered for the benefit of creditors that are sufficient.⁵⁴

The expression 'advantage of creditors' is regarded as a 'misconceived' requirement for sequestration by many academics, including Meskin. It should be noted that advantage of creditors is not a requirement in the winding up of a company. In such a case the court considers advantage of creditors in the exercise of its discretion, but does not and cannot refuse to grant a winding up order merely on the grounds that there will be no advantage of creditors. It is submitted that what this expression entails is that the court must utilise its discretion, upon investigation into the debtor's affairs to determine whether granting the sequestration will be to the advantage of creditors. It is submitted further that the requirement of 'advantage of creditors' is a clear indication of the creditor orientated approach that is followed by South Africa. It is submitted that honest and poor debtors that wish to use sequestration procedures as a form of debt relief are saddled with having to satisfy the 'advantage of creditors' requirement in order to have their estate sequestrated.

2.3.2 Acts of insolvency

The legislature has designated certain acts or omissions by a debtor as 'acts of insolvency' in section 8 of the Insolvency Act. This was done because it is possible that a creditor may have grounds to believe that the debtor is insolvent but may not be in a position to prove that the debtor is insolvent. If a creditor is able to show that the debtor has committed an act of insolvency, the creditor may seek an order to have the

⁵⁴ *Nedbank v Thorpe* (7392/2007) [2008] ZAKZHC 72 (26 September 2008) par 38.

debtor's estate sequestrated without having to prove actual insolvency.⁵⁵ In the case of *DP du Plessis Prokureurs v Van Aarde*⁵⁶ the court stated that 'the debtor's estate may be sequestrated even if he is theoretically solvent'.

For purposes of this paper, the focus will be on section 8(g) of the Insolvency Act. In terms of this subsection, a debtor commits an act of insolvency 'if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts'. Section 8(g) requires inability to pay any single debt.⁵⁷ The debtor does not commit an act of insolvency merely by notifying the creditor orally that he is incapable of paying his debts.⁵⁸ In the case of *Court v Standard Bank of SA Ltd; Court v Bester*⁵⁹ the court held that 'when a debtor gives notice of inability to pay to the creditor, the court must consider whether a reasonable person in the position of the receiver who had knowledge of the relevant circumstances would have interpreted the notice to mean that the debtor could not pay his debts'.

A common occurrence of a section 8(g) notice is where the debtor or his attorney writes a letter to the creditor which informs the creditor that the debtor is presently unable to pay the debt and offers to pay it in instalments.⁶⁰ If further information indicates, from the debtor's circumstances that he is not unable to pay, but simply unwilling to pay his debts, then on such basis the debtor does not commit an act of insolvency.⁶¹

2.4 Conclusion

It is submitted that South African insolvency law is very creditor orientated. It is submitted further that the sequestration procedures are mainly in place to ensure that creditors benefit and that their interests are protected. Courts have become aware of possible abuse of sequestration proceedings when brought as a friendly sequestration and as a result are stricter when considering such an application. Sequestration does

⁵⁵ *De Villiers v Maursen Properties (Pty) Ltd* 1983 (4) SA 670 (T) 676; Sharrock, Smith & Van der Linde *Hockly's Insolvency Law* 8 ed (2006) ch 3.

⁵⁶ *DP du Plessis Prokureurs v Van Aarde* 1999 (4) SA 1333 (T) 1335; R D Sharrock, A D Smith & K Van der Linde *Hockly's Insolvency Law* 8 ed (2006) ch 3.

⁵⁷ *Optima Fertilizers (Pty) Ltd v Turner* 1968 (4) SA 29 (D) 32-33.

⁵⁸ *Patel v Sandy* 1936 CPD 466 469.

⁵⁹ *Court v Standard Bank of SA Ltd; Court v Bester* 1995 (3) SA 123 (A) 133.

⁶⁰ *Goldblatt's Wholesalers (Pty) Ltd v Damalis* 1953 (3) SA 730 (O) 732.

⁶¹ *Barlow's (Eastern Province) Ltd v Bouwer* 1950 (4) SA 285 (E) 390.

have a negative impact on the debtor. For example, it affects the debtor's status, as stated above.

It is submitted further that the requirement of 'advantage of creditors' creates a challenge for debtors who wish to use sequestration as a debt relief mechanism. It is submitted that in satisfying this requirement, there are difficulties faced by poor and honest debtors that experience financial crisis due to misfortune and are unable to account for administration costs in proving advantage of creditors.

It is submitted that because of the requirement of 'advantage of creditors' being a pre-requisite for sequestration of the debtor's estate, poor or underprivileged debtors are unable to obtain sequestration orders.

It is of interest to note that the unofficial working draft of a proposed Insolvency and Business Recovery Bill 2010⁶² does not include the 'advantage of creditors' as a requirement for sequestration. This can be viewed as a positive step as it will facilitate even poor debtors to successfully apply for sequestration, regardless of their wealth. However, this also has a negative effect, such as the abuse of procedure by dishonest debtors. As such, measures should be introduced to prevent dishonest debtors from obtaining rehabilitation until they have paid all their previous debts. However it is submitted that to reach a conclusion as to whether or not a debtor is dishonest may be difficult.

⁶² A copy of the latest version of the Bill is on file with the author and is available upon request from Mr MB Cronje, of the Department of Justice and Constitutional Development, who was the researcher responsible for the South African Law Reform Commission's review into the law of insolvency, completed in 2000.

CHAPTER 3

THE NATIONAL CREDIT ACT 34 OF 2005

3.1 Background

Section 3 of the NCA states the purpose of the NCA. For example, section 3(g) of the NCA state that it attempts to deal with over-indebtedness through debt review. This method is based on the principle of ‘full satisfaction of the debtor's financial obligations’. The debtor may, through debt review, obtain a rescheduling of his debt, either by voluntary rearrangement plan⁶³ including all of his credit providers or as ordered by a court.⁶⁴ Section 86 (c) (ii) of the NCA provides that rescheduling of the debt due may involve a rearrangement of the debtor's obligations. This is done by extending the payment period and accordingly reducing the amount of each payment due.

Otto and Otto state that, the NCA introduces extremely important new provisions into South African law which aim at granting debtors who are over-committed with a ‘second chance’ by being declared over-indebted with rescheduling of their debt payments.⁶⁵ In the case of *FirstRand Bank Ltd v Olivier*⁶⁶ the court held that the purpose of the NCA is:

‘to provide for debt reorganisation of a person who is over-indebted, thereby affording that person to survive the immediate consequences of his financial distress and to achieve a manageable financial position.’

3.2 Over-indebtedness

According to section 79(1) of the NCA a debtor is over-indebted ‘if the preponderance of available information at the time the determination is made, indicates that the debtor is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the debtor is a party’. Consideration of the debtor’s financial means, prospects and obligations and possible tendency to satisfy in a timely manner all obligations under credit agreements are

⁶³ S 86(7) (b) of the NCA.

⁶⁴ S 86(7) (c) of the NCA.

⁶⁵ Otto & Otto *The National Credit Act Explained* 2 ed (2010) Lexis Nexis 58.

⁶⁶ *FirstRand Bank Ltd v Olivier* 2009 (3) SA 353 (SECLD) 357.

taken into account.⁶⁷ According to Van Heerden and Boraine, over-indebtedness does not only relate to existing incapability to fulfil obligations but, extends to future or immediate inability. Hence the use of the words ‘or will be unable to satisfy’ in section 79(1).⁶⁸

3.3 Debt relief for over-indebtedness

When a debtor finds himself to be in a position where he is over-committed and unable to satisfy his financial obligations, he may make use of the debt relief mechanism provided by the NCA. A purpose of the NCA, as stated in section 3(g), is to address and prevent over-indebtedness of debtors and provide methods for resolving over-indebtedness. The section 86 of the NCA offers debtors who are in financial difficulty the option of debt review. Section 86(1) of the NCA allows a debtor to apply to a debt counsellor to have himself declared over-indebted.⁶⁹

3.4 Debt review

Section 86 of the NCA, read simultaneously with regulations 24 to 26, sets out the procedure for debt review. Debt review generally consists of two different stages. Firstly, in terms of section 86 (1) of the NCA debt review, takes place before the debt counsellor who reviews the debtor’s credit agreements and makes a determination as to whether the debtor is over-indebted or whether credit was granted recklessly. Secondly, in terms of section 138 of the NCA, the debtor files a voluntary repayment plan with the court as a consent order or in terms of section 85 of the NCA⁷⁰ in court proceedings. At this stage it is alleged that a debtor is over- indebted. The court may

⁶⁷ S 79(3) of the NCA.

⁶⁸ Van Heerden and Boraine ‘The interaction between the debt relief measures in the National Credit Act 34 of 2005 and aspects of Insolvency Law’ 2009 12(3) *PELJ* 22.

⁶⁹ Van Heerden and Boraine ‘The interaction between the debt relief measures in the National Credit Act 34 of 2005 and aspects of Insolvency Law’ 2009 12(3) *PELJ* 25; Otto & Otto *The National Credit Act Explained* 2 ed (2010) 59.

⁷⁰ S 85 of the NCA: ‘Court may declare and relieve over-indebtedness despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may-

(a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of s 86 (7); or

(b) declare that the consumer is over-indebted, as determined in accordance with this Part, and make any order contemplated in s 87 to relieve the consumer's over-indebtedness’.

either refer the matter to a debt counsellor for evaluation and recommendation, or the court itself may declare the debtor over-indebted.⁷¹

In terms of section 88(3) of the NCA, while a debt review is pending, litigation by the credit provider against the debtor is suspended. However this suspension is subject to a number of exceptions.⁷² Therefore, while the debtor is under debt review, the credit provider is not entitled to enforce his rights under the agreement by means of litigation.⁷³ A debtor who applies for debt review is prohibited from incurring further charges under a credit facility or entering into further credit agreement with any credit provider.⁷⁴ It is submitted that this section grants some sort of relief to the debtor in the sense that debtors are generally harassed by their creditors for payment of debts.

3.5 Debt restructuring

As pleasing as the debt restructuring procedure sounds, it raises several problems due mainly to 'lack of procedural clarity'. For example, the NCA does not impose any time limitation with regard to the payment period and thus has the effect that restructuring orders granted by the court may sometimes run over unreasonably long periods of time. In addition, there is no discharge of debt after a certain period of payment of the original debt. Without any time limit or possibility of a discharge, the proposed restructuring order of a debt may take the whole of the debtor's lifetime to pay off. It has been stated by authors that although one of the aims of the NCA is to provide debt relief through debt re-structuring in cases where the debtor is of over-indebted, this aim is still subject to the principle of 'satisfaction by the creditor of all responsible financial obligations'. It has been stated further that the debt review

⁷¹ Boraine, Van Heerden and Roestoff 'A comparison between formal debt administration and debt review - the pros and cons of these measures and suggestions for law reform (Part 1)' 44 vol (1) 2012 p 94-95; Otto & Otto *The National Credit Act Explained* 2 ed (2010) 58-60; Van Heerden and Boraine 'The interaction between the debt relief measures in the National Credit Act 34 of 2005 and aspects of Insolvency Law' 2009 12(3) *PELJ* 28.

⁷² Otto & Otto *The National Credit Act Explained* 2 ed (2010) 62.

⁷³ Van Heerden and Boraine 'The interaction between the debt relief measures in the National Credit Act 34 of 2005 and aspects of Insolvency Law' 2009 12(3) *PELJ* 22-23.

⁷⁴ Boraine, Van Heerden and Roestoff 'A comparison between formal debt administration and debt review - the pros and cons of these measures and suggestions for law reform (Part 1)' 44 vol (1) 2012 101.

procedure does not offer the debtor the opportunity to obtain a discharge from pre-existing indebtedness.⁷⁵

3.6 Debt enforcement

When a credit agreement⁷⁶ is breached by the debtor, the credit provider is entitled under the NCA to have the agreement enforced. The two most important sections of the NCA in this regard are section 129 and section 130. Debt enforcement is provided for in the NCA in two stages: firstly, the required procedures prior to debt enforcement; and, secondly, debt procedures in court. Section 129(1) of the NCA is very important in the enforcement of credit agreements as it introduced a novel procedure prior to debt enforcement. According to section 129 of the NCA, when a debtor defaults under a credit agreement, the credit provider has a duty to bring the default to the attention of the debtor in writing and recommend that the debtor seek debt counselling. This enables the parties to the credit agreement to resolve any dispute under the credit agreement and agree on a payment plan. Section 129(1) (b) of the NCA, read together with section 130(1) and 130(3) (a) of the NCA, in essence requires a credit provider to deliver a notice in terms of section 129(1) (a) of the NCA to the debtor prior to enforcement of a credit agreement to which the NCA applies. The provisions of section 129 and section 130 of the NCA are cast in mandatory terms. It is clear that the section 129(1) (a) notice presents a debtor with certain alternatives that he or she may consider prior to debt enforcement, in order to deal with the debt, alternatives which, if successful, might obviate the need for costly and often protracted litigation.⁷⁷

With regard to the application for debt review by the debtor and the application for the enforcement of debt by the creditor, there are a few important considerations to note. Where the credit provider has already proceeded with the enforcement of the credit agreement due to the debtor's default, the debtor will not be allowed to apply for a debt review in respect of the credit agreement.⁷⁸ According to Otto and Otto,

⁷⁵ Borraine, Van Heerden and Roestoff 'A comparison between formal debt administration and debt review - the pros and cons of these measures and suggestions for law reform (Part 1)' 44 vol (1) 2012 102-103.

⁷⁶ S 1 of the NCA defines 'credit agreement' to mean 'an agreement that meets all the criteria set out in s 8'.

⁷⁷ Van Heerden and Borraine 'The Conundrum of the Non-compulsory Compulsory Notice in terms of Section 129(1) (a) of the National Credit Act' (2011) 23 SA Merc LJ 45-63.

⁷⁸ See s 129 of the NCA.

debt review is prohibited by section 86(2) of the NCA only to the extent that the credit provider 'has proceeded to take steps contemplated in section 129 of the NCA to enforce that agreement'.⁷⁹

3.7 Conclusion

As indicated above, the NCA introduces important new forms of protective measures for debtors in South Africa. The aim of the provisions of the NCA is to grant financially distressed debtors with a 'second chance' by rescheduling their debt payments. Further, the NCA is more user-friendly and better worded than the previous pieces of legislation, thus allowing debtors to understand the NCA more effectively and make use of it.⁸⁰ It is submitted, however, that despite the welcoming of the NCA and the tremendous impact the NCA has on debtor debt legislation, difficulties exist. It is submitted that due to lack of clarity in procedural requirements, as stated above, debtors are unable to effectively resolve their financial situation.

Further, it is submitted that the NCA impacts on other legislation, such as the Insolvency Act. Schedule 1 of the NCA contains rules regulating conflicting legislation but does not mention the Insolvency Act. This omission by the legislature has led to challenges and problems which are disadvantageous to the debtor who makes use of the debt relief mechanisms provided by the NCA. The next chapter will provide a discussion on the interface between the Insolvency Act and the NCA.

⁷⁹ Otto & Otto *The National Credit Act Explained* 2 ed (2010) Lexis Nexis 99-100.

⁸⁰ Otto & Otto *The National Credit Act Explained* 2 ed (2010) Lexis Nexis 4.

CHAPTER 4

THE INTERFACE BETWEEN THE INSOLVENCY ACT AND THE NATIONAL CREDIT ACT

4.1 Background

A current issue in insolvency law relates to whether or not being under debt review should bar sequestration proceedings by way of an application for the compulsory sequestration by the creditor of a debtor's estate. This part of the paper will be based on a discussion of *Investec Bank v Mutemeri* and *Naidoo v ABSA Bank*.⁸¹

4.2 Does an application for compulsory sequestration amount to an enforcement of a credit agreement?

For one to have an understanding of whether an application for compulsory sequestration would amount to an enforcement of a credit agreement, it is important to consider the cases of *Investec v Mutemeri* and *Naidoo v ABSA Bank* and the reasoning provided by the courts.

4.2.1 Investec Bank v Mutemeri

The applicants applied for the compulsory sequestration of the respondents common estate who were deemed to be married to each other in community of property. The debt resulted from credit agreements in terms of the NCA. The respondents applied for debt review in terms of section 86 and were declared over-indebted. The respondents gave notice to the creditors and subsequently applied for their debts to be restructured in terms of sections 86 and 87 of the NCA. The respondents argued that until the hearing of their debt-restructuring application, no legal proceedings could be instituted against them for enforcement of claims under the credit agreements and, the application for sequestration amounted to debt enforcement proceedings and was barred by the NCA.⁸²

⁸¹ See also Maghembe 'The Appellate Division has spoken – Sequestration Proceedings to Enforce a Credit Agreement under the National Credit Act 34 of 2005: *Naidoo v ABSA Bank* 2010 4 SA 597' 2011 14(2) *Potchefstroom Electronic Law Journal* p 171-180.

⁸² *Investec Bank v Mutemeri* par 1-2.

The application was based on a section 8(g) act of insolvency.⁸³ The court stated that the real legal issue which had to be answered in this case ‘was whether an application for compulsory sequestration of the estate of a debtor amounted to ‘an order to enforce a credit agreement’ within the meaning of section 130(1) of the NCA’.⁸⁴

Trengove AJ stated in *Investec Bank v Mutemeri*:⁸⁵

... It does not apply to an application by a credit provider for the sequestration of a consumer’s estate based on a claim in terms of a credit agreement between them. Such an application is not one for an order enforcing the credit provider’s claim against the consumer. Section 9(2) of the Insolvency Act indeed makes it clear that the sequestration creditor’s claim need not even be due, that is, need not yet be enforceable. An application for sequestration may be made on the strength of a claim which is not yet enforceable, because a sequestration order is not an order for enforcement of the claim. Its purpose and effect are merely to bring about a convergence of the claims in an insolvent estate to ensure that it is wound up in an orderly fashion and that creditors are treated equally...I conclude that an application for sequestration is not an application for enforcement of the sequestrating creditor’s claim and is thus not subject to the requirements of section 130(1) of the National Credit Act.

Trengove AJ referred to the case of *Collett v Priest* which made the following very significant statement on the nature of sequestration proceedings:

Sequestration proceedings are instituted by a creditor against a debtor not for the purpose of claiming something from the latter, but for the purpose of setting the machinery of the law in motion to have the debtor declared insolvent...there is no claim by the creditor against the debtor to pay him what is due nor is the court asked to give any judgment, decree or order against the debtor upon any such claim.⁸⁶

⁸³ *Investec Bank v Mutemeri* par 11.

⁸⁴ *Investec Bank v Mutemeri* par 26.

⁸⁵ *Investec Bank v Mutemeri* par 19-20.

⁸⁶ *Investec Bank v Mutemeri* par 29.

Thus from the above statements made by Trengove AJ it can be stated that the outcome of the case is that an order to have the debtor's estate sequestrated is not considered to be an order for the enforcement of the claim arising out of the credit agreement by the sequestrating creditor. Sequestration of the debtor's estate is not a legal proceeding to enforce an agreement in terms of the NCA.

4.2.2 Naidoo v ABSA Bank

The appellant failed to meet his payments in terms of sale agreements and home loan agreements. As a result a sequestration order was sought against the debtor's estate.⁸⁷ The appellant argued that the respondent was allowed to institute proceedings for his sequestration without complying with the procedure provided for in section 129(1) (a) of the NCA.⁸⁸

In this case Cachalia JA agreed with Trengove AJ and stated 'that an order for the sequestration of a debtor's estate is not an order for the enforcement of the sequestrating creditor's claim, and sequestration is thus not a legal proceeding to enforce an agreement'. Cachalia JA stated further that the appellant had conceded carefully that 'sequestration proceedings are instituted by a creditor against a debtor not for the purpose of claiming something from the latter, but for the purpose of setting the machinery of the law in motion to have the debtor declared insolvent they are not proceedings for the recovery of a debt'. The court described a sequestration order as a 'species of execution', stating that 'it is not an ordinary judgment entitling a creditor to execute against a debtor'.⁸⁹

The court held that from the language used in section 130 (3) (a) it is clear that the proceedings referred to do not extend the ambit of section 129 as argued by appellant.⁹⁰ Therefore Cachalia JA held that 'sequestration proceedings are not legal proceedings to enforce the agreement within the meaning of section 129(1) (b) of the NCA'.

⁸⁷ *Naidoo v ABSA Bank* 2010 4 SA 597 (SCA) par 1.

⁸⁸ *Naidoo v ABSA Bank* 2010 4 SA 597 (SCA) par 2.

⁸⁹ *Naidoo v ABSA Bank* 2010 4 SA 597 (SCA) par 4.

⁹⁰ *Naidoo v ABSA Bank* 2010 4 SA 597 (SCA) par 6.

According to Maghembe⁹¹ Cachalia JA made the correct decision in confirming that sequestration proceedings are not ‘legal proceedings to enforce the agreement’ within the meaning of section 129(1) of the NCA and that section 130(3) does not extend the ambit of section 129.

It is submitted that the views expressed by Maghembe are correct as Cachalia JA had reached a correct decision which was supported by strong authority. It is further submitted that the concerns that developed as a result of this decision should be addressed immediately as it has a negative impact on the purpose and function of the NCA. These concerns have also been raised by many academics such as Kupiso as to how this precedent, that does not give the debtor the option to continue with debt review when he is sequestrated, will affect the effectiveness of the NCA.⁹²

As stated above, in terms of section 3 of the NCA, its purpose is ‘to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers’. One way in which this is attained, for example, is stated in section 3(g) of the NCA. This is by addressing and preventing over-indebtedness of debtors and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the debtor of all responsible financial obligations.⁹³

Maghembe submits correctly that the debtor by fulfilling his financial obligations, avoids becoming insolvent and remains a useful member of society. Maghembe states further that a debtor should not forcefully lose his assets and be subjected to social stigma without being given a chance to choose between insolvency and alternative debt relief. Maghembe states that the decision in *Naidoo v ABSA* is inconsistent with this goal as the debtor’s choice to have his financial responsibilities fulfilled and avoid becoming insolvent may now be taken away by a credit provider who applies for sequestration directly. Maghembe believes that once debt restructuring has been

⁹¹ Maghembe ‘The Appellate Division has spoken – Sequestration Proceedings to Enforce a Credit Agreement under the National Credit Act 34 of 2005: *Naidoo v ABSA Bank* 2010 4 SA 597’ 2011 14(2) *Potchefstroom Electronic Law Journal* p 171-180.

⁹² See Kupiso ‘Can Debt Enforcement Procedures Be Circumvented by Insolvent Proceedings?’ *De Rebus* November 2011 pg 26. Kupiso questioned whether the debt relief mechanism is circumvented by the insolvency law, which is an important question yet to be fully answered.

⁹³ See section 3 of the NCA.

granted, this should prohibit credit providers from proceeding with sequestration proceedings against the debtor.⁹⁴

It is submitted that this view expressed by Maghembe is correct, logical and fair towards debtors, giving them an opportunity to resolve their financial situation rather than being sequestrated and being subject to social stigma. It was correctly stated that allowing sequestration applications against a debtor who is under debt review is not consistent with the principle of encouraging debtors to pay off their debts.⁹⁵

It is submitted that the decision of *Naidoo v ABSA* has an impact on the NCA which is unfavourable towards the debtor. The result is that the debtor is given a helpline to deal with his financial difficulty but that is taken away by application of the Insolvency Act's compulsory sequestration process. This is possible since sequestration proceedings are not 'legal proceedings to enforce the agreement within the meaning of section 129(1) (b) of the NCA'.⁹⁶ As a result the creditor is not prohibited from applying for the debtor's estate to be sequestrated even after the debtor gives the creditor notice that he is under debt review. It is submitted that this conflict between the NCA and the Insolvency Act has drastic consequences for the debtor. It is submitted that specific sections of the NCA should be amended or there should exist another viable option available to a debtor who finds himself in financial difficulty.

4.3 Impact of section 8(g) of the Insolvency Act on the National Credit Act

4.3.1 Background

An important issue in insolvency law deals with the relationship between the Insolvency Act and the NCA. Some of the main considerations in this regard revolve around the application for debt review in terms of the NCA, acts of insolvency (specifically section 8(g) of the Insolvency Act), compulsory sequestration by the

⁹⁴ Maghembe 'The Appellate Division has spoken – Sequestration Proceedings to Enforce a Credit Agreement under the National Credit Act 34 of 2005: *Naidoo v ABSA Bank* 2010 4 SA 597' 2011 14(2) *PELJ* 178.

⁹⁵ Maghembe 'The Appellate Division has spoken – Sequestration Proceedings to Enforce a Credit Agreement under the National Credit Act 34 of 2005: *Naidoo v ABSA Bank* 2010 4 SA 597' 2011 14(2) *PELJ* 176-178.

⁹⁶ *Investec Bank v Mutemeri* 2010 (1) SA 265 (GSJ) par 19-20.

creditor of the estate of the debtor who commits section 8(g) act of insolvency and the concept of reckless credit granting by the creditor. Such issues have been the subject of discussion in recent case law⁹⁷ as well as numerous academic articles.⁹⁸

4.3.2 FirstRand Bank v Evans

4.3.2.1 Facts and issue(s)

Evans borrowed substantial amounts from First National Bank (FNB), a division of the applicant, First Rand Bank Limited. In 2005 he acknowledged his indebtedness, in an amount of R1 200 000, in a mortgage bond registered over his property. In 2006 he acknowledged a further indebtedness of R1 000 000, in a subsequent mortgage bond over the same property. In 2007 he entered into a Commercial Property Finance Loan Agreement under which he borrowed a further amount of R724 500. Overall by June 2009 he owed FNB some R2 800 000 which gave rise to the application for the provisional sequestration of his estate. The application was brought on two bases namely, Evans had committed a section 8(g) the act of insolvency by giving written notice of his inability to pay his debts and he was factually insolvent.⁹⁹

Evans made an application for debt review on 29 January 2009 and FNB was subsequently notified of this through a letter. Thereafter on 18 May 2009 FNB gave notice in terms of section 86(1) of the NCA that it was terminating the debt review in respect of the 'account/s in our books which are now in arrears'.¹⁰⁰ FNB launched the application for the sequestration of Evans' estate on 8 April 2010. FNB contended that the NCA did not preclude an application for sequestration of a debtor's estate and that insofar as the judgment debt was concerned the debt review process had been

⁹⁷ *FirstRand Bank Ltd v Evans* 2011 (4) 597 (KZD); *Collett v FirstRand Bank Ltd and Another* 2011 (4) SA 508 (SCA), *FirstRand Bank Ltd v Janse van Rensburg and a related matter* [2012] 2 All SA 186 (ECP).

⁹⁸ Van Heerden and Boraine 'The interaction between the debt relief measures in the National Credit Act 34 of 2005 and aspects of insolvency law' 2009 *PELJ* 22; Boraine and Van Heerden "To sequester or not to sequester in view of the National Credit Act 34 of 2005: a tale of two judgments" 2010 *PELJ* 84; Maghembe 'The Appellate Division has spoken – sequestration proceedings do not qualify as proceedings to enforce a credit agreement under the *National Credit Act 34 of 2005*: *Naidoo v ABSA Bank* 2010 (4) SA 597' 2011 *PELJ* 171; and Steyn 'Sink or Swim? Debt review's ambivalent 'Lifeline'...a second sequel to '... A tale of two judgments' *Nedbank v Andrews and another* (240/2011) [2011] ZAECPHC 29 (10 May 2011); *FirstRand Bank Ltd v Evans* 2011 (4) 597 (KZD) and *FirstRand Bank Ltd v Janse van Rensburg and a related matter* [2012] 2 All SA 186 (ECP)' 2012 *PELJ* (15)4 189-231.

⁹⁹ *FirstRand Bank v Evans* par 1.

¹⁰⁰ *FirstRand Bank v Evans* par 3.

terminated.¹⁰¹ From a reading of the facts of the case it is clear that there were disputes regarding the proper amount of indebtedness by Evans.¹⁰² FNB however continued to seek a provisional sequestration order.¹⁰³

4.3.2.2 Decision

In this case the letter relied on by FNB as constituting an act of insolvency indicated that Evans was under debt review in terms of section 86(1) of the NCA. It was stated that the reason for applying for debt review was to obtain a declaration that he was over-indebted. It was stated by the court that what comprises over-indebtedness for the purpose of the NCA is that a debtor informs his creditor that he has applied for debt review, and is essentially notifying the creditor that he is over-indebted and unable to pay his debts.¹⁰⁴

According to Wallis J, the approach that must be taken in determining 'whether a letter constitutes a notice of inability to pay in terms of section 8(g) of the Insolvency Act is to consider how it would be understood by a reasonable person in the person of the creditor receiving the letter'.¹⁰⁵ Wallis J further stated that the question to be asked is 'what does the notice mean to the recipient at the time of its receipt?' In the view of Wallis J, 'a notice of inability to pay debts does not cease to be an act of insolvency as a result of circumstances obtaining subsequently to the giving thereof...'. At the time FNB received the notice from Evans the most pertinent fact known to FNB was that Evans was significantly in default of his obligations under both bonds and the loan agreement.¹⁰⁶

It was argued on behalf of Evans that the letter conveyed an intention to have Evans' debts rearranged in terms of section 87 of the NCA. It was further pointed out that the purpose of the NCA is that the debtor should discharge his debts lawfully owed by him. It was argued that, once the debtor's debts have been rearranged by an order of court under section 87(1) (b) (ii) of the NCA, the debtor is then only obliged to make

¹⁰¹ *FirstRand Bank v Evans* par 7,8.

¹⁰² *FirstRand Bank v Evans* par 10.

¹⁰³ *FirstRand Bank v Evans* par 11.

¹⁰⁴ *FirstRand Bank v Evans* par 14.

¹⁰⁵ *FirstRand Bank v Evans* par 15 with reference to *Court v Standard Bank of SA Ltd; Court v Bester No & others* 1995 (3) SA 123 (A) 133. Please refer to chapter 2, subheading 2.3.2.

¹⁰⁶ *FirstRand Bank v Evans* par 16-17.

payments in terms of that order. Wallis J stated that the points made on behalf of Evans may be valid but they do not alter the fact that Evans wrote the letter ‘unequivocally conveying’ to FNB that he was at that time unable to pay his debts. Wallis J stated that the requirements of section 8(g) are satisfied when the notice given by the debtor to the creditor conveys that the debtor is at present unable to pay his debts. The debtor’s willingness to attempt to pay the debts in future is not relevant. A distinction must be drawn between an inability to pay and an unwillingness to pay. If a reasonable person in the position of the creditor to whom the notice is addressed would understand the notice to mean that while the debtor was unwilling to pay his debt forthwith he could nonetheless do so if pressed, then the notice will not constitute an act of insolvency.¹⁰⁷ Wallis J held that the letter relied on by FNB constituted an act of insolvency by Evans in terms of section 8(g) of the Insolvency Act.¹⁰⁸

It is submitted that the above decision is unfavourable to many debtors who wish to make use of the debt review process. This is because a notification to the creditor by the debtor, that he is applying or under debt review would in effect constitute an act of insolvency. It is submitted further that despite the ‘novel concepts’ introduced by the NCA to assist financially distressed debtors, such measures are restricted by the application of the Insolvency Act by the creditor.

4.3.3 Collett v FirstRand Bank

In this case the appellant was in default with her repayments under the bond and, due to her failure to pay, the whole outstanding amount became payable. The appellant applied for debt review in terms of section 86(1) of the NCA and the respondent was notified. A debt-restructuring proposal was made available to all the appellant's creditors including the respondent. However the proposal was not accepted by any of the creditors. The appellant subsequently applied to court for an order to be declared over-indebted and for her debt to be rearranged.¹⁰⁹

¹⁰⁷ *FirstRand Bank v Evans* par 18-20.

¹⁰⁸ *FirstRand Bank v Evans* par 23.

¹⁰⁹ *Collett v FirstRand Bank Ltd and Another* 2011 (4) SA 508 (SCA) (hereafter referred to as *Collett v FirstRand Bank*) pars 1-4.

The court held that an application for debt review, to be declared over-indebted, and to have debts rearranged are novel concepts introduced by the NCA. The purposes of these concepts are to assist not only debtors who are over-indebted, but also those who find themselves in 'strained' circumstances. It was held that a debtor who finds himself in any of these circumstances may apply for debt review in terms of section 86(1) of the NCA. The court stated that the approach of the NCA to 'over-indebtedness is based on the principle of satisfaction of all responsible consumer obligations'. It was held that by providing for a harmonised system of debt relief, the NCA 'places priority on the eventual satisfaction of all responsible consumer obligations'.¹¹⁰

It is submitted that the above case provides an indication of the importance of the NCA in assisting a debtor to solve his financial situation. It is submitted further, *Collett v FirstRand Bank* clearly provides that the debtor does not have to be over-indebted in order to utilise the NCA. The NCA would apply to debtors that are financially strained but not over-indebted. It is submitted that this case emphasises that the aim of the NCA is to ensure that the debtor meets his financial obligations by making use of the means provided by the NCA, such as debt review. It is submitted that the importance of the NCA is clearly appreciated and recognised. Debtors are provided with measures which may effectively help them solve their financial crisis. It is submitted however, that due to the fact that the NCA did not exclude the Insolvency Act in schedule 1, a creditor is entitled, through the application of the Insolvency Act to apply for the debtor's estate to be sequestrated even if the debtor applies for debt review. It is submitted that this is clearly a problem which requires urgent rectification.

In a more recent case, *FirstRand Bank v Janse van Rensburg*, the court referring to *Collett v FirstRand Bank*, clarified the decision made in *FirstRand Bank v Evans*. *FirstRand Bank v Janse van Rensburg* will now be considered.

¹¹⁰ *Collett v FirstRand Bank* par 9-10.

4.3.4 FirstRand Bank v Janse van Rensburg

4.3.4.1 Facts and issues

The applicant's application for a provisional sequestration order was based solely upon the alleged commission of a section 8(g) act of insolvency of the Insolvency Act. It was alleged that each of the respondents had made an application for an order in terms of section 86(7) (c) of the NCA for a declaration of over-indebtedness. The applicant relied upon a consumer profile report issued by a Credit Bureau, reporting that the respondents applied for debt review.¹¹¹

The credit bureau reports reflected merely that the consumer had applied for debt rehabilitation or to be placed under debt review with a registered debt counsellor and that no further details were supplied except that application had been made on 23 March 2011. The court required counsel to address the question as to whether an application for debt review constituted an act of insolvency and whether the applicant had established that a section 8(g) act of insolvency of the Insolvency Act had been committed.¹¹²

4.3.4.2 Decision

Goosen J held that the *FirstRand Bank v Evans* judgment is not authority for the general proposition that an application for debt review constitutes compliance with the provisions of section 8(g) of the Insolvency Act. The finding that an act of insolvency had been committed by the respondent in the *FirstRand Bank v Evans* matter turned upon the delivery by the respondent to the creditor of a written notice drawing to the attention of the applicant that the respondent was under debt review, and, given the particular facts of *FirstRand Bank v Evans*, the reasonable interpretation of that written notice by the applicant creditor. Goosen J pointed out that Wallis J did not find that notice of the mere fact of an application for debt review constitutes written notice of inability to pay a debt as required by section 8(g). The application for debt review in terms of section 86 accordingly does not involve a notice given by the debtor to the creditor in which the debtor declares an inability to pay one or more of his or her debts. A notice of inability to pay a debt envisaged by section 8(g) must be given deliberately and with the intention of giving such notice.

¹¹¹ *FirstRand Bank v Janse van Rensburg*; par 1-5.

¹¹² *FirstRand Bank v Janse van Rensburg*; par 6-7.

The notice must be such that upon its receipt the recipient creditor can reasonably conclude that the debtor is unable to pay his or her debts. If the words of the notification do not convey an unequivocal statement of inability to meet a debtor's obligation, the fact that the creditor may have construed the notice in that manner does not render the notice one in terms of section 8(g) of the Insolvency Act.¹¹³ It is submitted that this decision is welcomed as it clarifies the true position.

4.4 Conclusion

The aims of the NCA are largely attained by 'encouraging consumers to fulfil the financial obligations under credit agreements for which they are responsible'. One of the main aims of the Insolvency Act however is the 'beneficial distribution of an insolvent's estate to various creditors'. It is submitted that the differences in the aims of the Acts stands to reason that conflicts are bound to rise during the application of the Acts. An over-indebted debtor may have the financial potential to overcome his debt if given assistance, and may consequently use the processes of the NCA to avoid becoming insolvent and having the stigma arising out of this title attached to him. However, any potential that the debtor may have in fulfilling his financial responsibility may be weakened by a credit provider who applies directly for sequestration.¹¹⁴

According to Otto and Otto,¹¹⁵ Van Heerden pointed out that a debtor's application for debt review may in itself constitute an act of insolvency entitling a creditor to apply for the debtor's sequestration. Otto also argues that the NCA provides for a unique procedure, namely debt review and the consequent rearrangement of debts, and that this well-intentioned legislative initiative will become frustrated if sequestration is allowed to follow upon an application for debt review. Otto states that the NCA should enjoy preference over the Insolvency Act and insolvency law in this particular instance. Otto further states that an application for sequestration is not barred by the NCA, even if the debtor has already referred his matter to a debt

¹¹³ *FirstRand Bank v Janse van Rensburg*; par 16, 17, 18, 28.

¹¹⁴ Jordaan 'The NCA v the Insolvency Act: a need for reconciliation in a consumer friendly society' available at <http://www.polity.org.za>, accessed on 10 July 2012.

¹¹⁵ Otto & Otto *The National Credit Act Explained* 2 ed (2007); with reference to Van Heerden and Boraine 'The interaction between the debt relief measures in the National Credit Act 34 of 2005 and aspects of Insolvency Law' 2009 12(3) *PELJ* 22.

counsellor. An application for sequestration does not constitute enforcement of a debt, nor does it constitute litigation or a judicial process to enforce any right or security.¹¹⁶

It is submitted that it is correct that sequestration proceedings do not qualify as enforcement of debts as stated above. However, by allowing a debtor's estate to be sequestrated by a creditor while the debtor is under debt review goes against the main purpose of the NCA, that is, to provide debt relief to financially distressed debtors to help remedy their situation.

With regard to the impact of section 8(g) of the Insolvency Act on the NCA, the decision of *FirstRand Bank v Janse van Rensburg* is welcomed as it clearly indicates and explains instances in which a notice given by the debtor to the creditor would constitute an act of insolvency for the purpose of section 8(g) of the Insolvency Act. The judgment also clarifies the main issue that existed in this context which improves the decision in the case of *FirstRand Bank v Evans*. It is submitted that the result of the decision is that it brings about certainty when dealing with notices given by the debtor to the creditor that he is undergoing debt review as provided for by the NCA.

According to Steyn,¹¹⁷ following the decision in *FirstRand Bank v Janse van Rensburg*, significant points may be made. First, the fact that a debtor has applied for debt review in terms of the NCA does not *per se* constitute the commission of an act of insolvency as envisaged by section 8(g) of the Insolvency Act. It is submitted, as indicated by Steyn, that this is the appropriate view because in the case of *Collett v FirstRand Bank* that when the debtor applies for debt review it does not necessarily mean that the debtor is unable to pay his debts. The NCA introduces 'novel concepts'

¹¹⁶ Otto & Otto *The National Credit Act Explained* 2 ed (2007) 133-134.

¹¹⁷ Steyn 'Sink or Swim? Debt review's ambivalent 'lifeline'...a second sequel to '... A tale of two judgments' *Nedbank v Andrews and another* (240/2011) [2011] ZAECPEHC 29 (10 May 2011); *FirstRand Bank Ltd v Evans* 2011 (4) 597 (KZD) and *FirstRand Bank Ltd v Janse van Rensburg and a related matter* [2012] 2 All SA 186 (ECP) 2012 *PELJ* (15)4 189-231. The second point made by Steyn is that there are substantial differences between an application for an administration order in terms of section 74 of the Magistrates' Courts Act and an application for debt review in terms of s 86 of the NCA. These differences exist not only in the procedure required for each type of application but also in the policies reflected in the NCA and the Insolvency Act respectively. Therefore, precedent relevant to applications for administration orders in terms of s74 of the Magistrates' Courts Act should not be applied automatically, in cases concerning the NCA and its interface with the Insolvency Act, to hold that an application for debt review amounts to an act of insolvency in terms of s 8(g) of the Insolvency Act. Steyn submits that this was correctly pointed out by Goosen J in *FirstRand Bank v Janse van Rensburg* pars 25 and 26.

with the aim of assisting debtors. It was also stated in this case that it is possible that the debtor finds himself in a position where he is financially ‘strained’ and as a result needs to undergo debt review for the purpose of rearrangement of his debts in order to meet his obligations under the credit agreement.¹¹⁸

In *FirstRand Bank v Janse van Rensburg* the applicant failed to establish that written notice had been given by the debtors to any of their creditors indicating that they were unable to pay any of their debts. The reason for this was because the court did not regard a report issued by a credit bureau, reflecting that they had ‘applied for a debt rehabilitation or to be placed under debt review with a registered debt counsellor’, as being sufficient evidence of the commission of an act of insolvency as envisaged by section 8(g) of the Insolvency Act. In addition, no other evidence was advanced to establish that the respondents had been declared over-indebted nor whether their debts had been re-arranged by the court in consequence of the debt review process. Further, as Goosen J pointed out, for any notification by a debt counsellor to the creditors to constitute an act of insolvency in terms of section 8(g) of the Insolvency Act, it would have to be authorised by the debtor in order to be regarded as binding on the latter.¹¹⁹ It is submitted that insufficient attention has been given to the need for debt relief measures that operate in the interests of debtors. There is a need for a system to be put into place to regulate application for debt review by a debtor and the application for the sequestration of the debtor’s estate by the creditor. Due to the fact that there are glaring inconsistencies between the NCA and the Insolvency Act, there is a need for law reform, which would be effective in redressing the current situation.

It is further submitted that the South African insolvency law should reflect a balance between the interests of all affected persons. Such interests include human rights, contractual and commercial interests of the parties, the interests of dependants of the debtor, where the debtor is the sole provider, and other interests of society generally. There should be no bias suffered by one party due to the inconsistencies between the Insolvency Act and the NCA.

¹¹⁸ Please refer to ch 4, subheading 4.3.3.

¹¹⁹ Steyn ‘Sink or Swim? Debt review’s ambivalent ‘lifeline’...a second sequel to ‘... A tale of two judgments’ *Nedbank v Andrews and another* (240/2011) [2011] ZAECPEHC 29 (10 May 2011); *FirstRand Bank Ltd v Evans* 2011 (4) 597 (KZD) and *FirstRand Bank Ltd v Janse van Rensburg and a related matter* [2012] 2 All SA 186 (ECP) 2012 *PELJ* (15)4 189-231.

The following chapter involves comparative comments between South Africa and the United States of America (USA) and England and Wales and recommendations for the improvement of the current position in South Africa with regard to insolvency legislation and consumer debt legislation.

CHAPTER 5

COMPARATIVE COMMENTS AND RECCOMENDATIONS FOR SOUTH AFRICAN LAW REFORM

5.1 Background

South African insolvency law is creditor orientated and has been criticised by many academics on this basis. Other jurisdictions have brought about significant reform in their insolvency systems to assist debtors in need of debt relief. In the discussion that follows, I will provide an overview of the insolvency law in the USA as well as in England and Wales and I will provide a brief account of how the laws in these jurisdictions have been reformed to assist debtors. I will thereafter make recommendations for the reform of South African law.

5.2 Comparative comments

5.2.1 The United States of America

In the USA, the first permanent bankruptcy law was the Bankruptcy Act 1898. The bankruptcy law in the USA has been amended on several occasions and was changed substantially by the Bankruptcy Reform Act of 1978 (commonly referred to as ‘The Bankruptcy Code’).¹²⁰

The American insolvency system has been widely accepted as leading the way because it accepts debt relief by means of a ‘processual discharge’ and as a result enables a debtor to make a fresh start. The American insolvency system is not only regarded as a collective debt-counselling instrument but it is also accepted that it has an important social support role to fulfil.¹²¹ The American bankruptcy system is termed pro-debtor or debtor orientated.¹²² It is submitted that this approach is the total opposite to the approach followed in the South African insolvency law. It is submitted that South African insolvency law is very creditor orientated. The opportunity for a debtor to obtain relief from indebtedness and begin anew as a productive member of

¹²⁰ Ferriell & Janger *Understanding Bankruptcy* 2 ed (2007) Lexis Nexis ch 3.

¹²¹ Bertelsmann *et al Mars The Law of Insolvency* 9 ed (2008) 4.

¹²² Boraine and Roestoff ‘Developments in American consumer Bankruptcy Law: Lessons for South Africa’ (part 1) 2000 *Obiter* (vol 1) 33.

society and the concept of 'fresh start' have been central to American insolvency law.¹²³

A 'fresh start' is available for an honest but unfortunate debtor. In terms of the concept, the debtor surrenders his non-exempt assets to the trustee and receives a second chance. Once the debtor's estate is administered and debts are discharged the debtor is given, and begins, a new financial life, unencumbered by his previous debts. The ability to obtain a discharge and to retain exempt property has been the essence of debtor protection in the USA.¹²⁴

The term 'fresh start' is derived from the case of *Local Loan Co v Hunt*¹²⁵ where the court held that 'bankruptcy gives the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt'. This fresh start is provided by the discharge from debts and the ability to retain limited 'exempt' property.¹²⁶ According to Calitz¹²⁷ it is stated that 'the underlying philosophy of this approach is that the debtor is a victim of unforeseen circumstances and should promptly be allowed back into society without the millstone of perpetual indebtedness'.

Boraine and Roestoff¹²⁸ point out that it is not the prime object of South African insolvency law to grant the debtor a discharge of debts. They further state that a discharge is only available as a consequence of sequestration, once the debtor is rehabilitated. As a result, debtors tend to make use of 'friendly sequestration' to force a discharge on their creditors.

The American bankruptcy law offers two principal alternatives for treating the over-indebtedness of natural persons. These are liquidation bankruptcy under Chapter 7 of

¹²³ Boraine and Roestoff 'Developments in American consumer Bankruptcy Law: Lessons for South Africa' (part 1) 2000 *Obiter* (vol 1) 34.

¹²⁴ Ferriell & Janger *Understanding Bankruptcy* 2 ed (2007) Lexis Nexis ch 3.

¹²⁵ *Local Loan Co v Hunt* 292 U.S 234, 244 (1934).

¹²⁶ Ferriell & Janger *Understanding Bankruptcy* 2 ed (2007) Lexis Nexis ch 3.

¹²⁷ Calitz 'Developments in the United States consumer bankruptcy law: A South African perspective' (2007) 28 *Obiter* 397, 409-410.

¹²⁸ Boraine and Roestoff 'Developments in American consumer Bankruptcy Law: Lessons for South Africa' (part 1) 2000 *Obiter* (vol 1) 35.

the Bankruptcy Code or a debt-adjustment repayment plan under Chapter 13. The requirements for opening a case under Chapter 7 or Chapter 13 are the same. If the debtor files a voluntary petition for relief, that alone is sufficient, and the debtor need not technically be, or indicate that he is, insolvent or over-indebted as required by South African insolvency law.¹²⁹

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) is the amendment made to the Bankruptcy Code. BAPCPA brought about significant changes in the role that bankruptcy plays in the lives of debtors. Most significant and important is that it imposes a strict 'means test' which blocks access to Chapter 7 liquidation bankruptcy for debtors and thus prevents potential abuse of the procedure.¹³⁰

Chapter 7 of the Bankruptcy Code provides for 'liquidation', that is, the sale of a debtor's non-exempt property and the division of the profits to creditors. Chapter 13 of the Bankruptcy Code provides for alteration of debts of an individual with standard income allowing a debtor to keep property and pay debts over a specified period of time. To qualify as a debtor under Chapter 13, he must be an individual with a stable and regular source of income whose debt liability does not exceed \$1 081 400 in secured claims and \$360 475 in unsecured claims. The purpose of the 'means test' is to determine whether debtors are eligible for Chapter 7 liquidation relief or must pursue relief via a Chapter 13 payment plan. Section 1322(b) (2) of the Bankruptcy Code allows for the modification of the rights of both secured and unsecured creditors. This can occur in three ways: through an extension of the time period for the creditors' claims to be paid, through a reduction of the amount due to creditors' and through the reduction of interest payable to creditors'. There are certain restrictions to this. For example, section 1322(b) (2) of the Code prevents debtors from modifying the rights of holders of a mortgage on the debtor's residential property.¹³¹

¹²⁹ *INSOL International Consumer Debt Report II* 302.

¹³⁰ Ferriell & Janger *Understanding Bankruptcy* 2 ed (2007) Lexis Nexis ch 3.

¹³¹ Ferriell & Janger *Understanding Bankruptcy* 2 ed (2007). Lexis Nexis ch 3.

Chapter 13 further allows for the modification of debts whereas the NCA does not allow this unless a credit agreement has been declared to be reckless. The scope of Chapter 13 is much wider when compared with administration order which has a debt limit of R50 000 and the application of the NCA is limited only to credit agreements.¹³² It is submitted that in comparison to South African law it is clear that Chapter 13 allows a discharge to the debtor after a set period of time, unlike the administration order and the debt rearrangement under the NCA as they both do not provide time periods after which the debtor will be discharged. It is submitted that a comparison with the American system shows a lack of balance, in South Africa, between the interests of creditors and debtors. Insufficient attention is being given to the need for debt relief measures that operate in the interests of debtors. This has led to the need for reform to assist debtors in need of debt relief. Comparative study of the system in South Africa and the USA, shows that South African insolvency law and consumer legislation, that is, the NCA, which comprises of debt review and debt restructuring procedures, are not in line with internationally recognised principles.

It appears from the draft Insolvency Bill that was published in 2000 that the South African Law Reform Commission (SALRC) had taken cognisance of international developments in insolvency law such as the Bankruptcy Reform Act 1978 in the USA. The SALRC recognized that a *bona fide* debtor should be afforded the chance of making a new start and that a balance should be struck between the interests of debtors and creditors.¹³³ It is submitted that the approach taken by the SALRC is a step in the right direction. This is because, since South African insolvency law is creditor orientated, and in light of the difficulties faced by honest debtors in seeking debt relief, there exists an urgent need for a balance to be struck between the rights of the creditors and debtor.

5.2.2 England and Wales

In England and Wales, insolvency of individuals is now governed by the Insolvency Act 1986, some parts of which have been amended by the Enterprise Act 2002. In England and Wales over-indebted debtors are provided with ‘diverse and complex

¹³² Ferriell & Janger *Understanding Bankruptcy* 2 Ed (2007). Lexis Nexis ch 3.

¹³³ Review of the Law of Insolvency *South African Law Commission Report Project 63* (2000) vol 1: *Explanatory Memorandum 17*; Bertelsmann Mars *The Law of Insolvency* 9 ed (2008) 4-5.

options for dealing with their financial and debt difficulties'. There are two optional groups available: formal options under the Insolvency Act 1986, including bankruptcies and individual voluntary arrangements (IVAs); and informal options which are available outside the insolvency system, including debt management plans and various forms of refinancing.¹³⁴ IVAs were introduced by the Insolvency Act 1986 Act and deeds of arrangement by the Deeds of Arrangement Act 1914, which enables debtors to reach an agreement with their creditors less formally.¹³⁵

Walters states that IVAs in theory have many advantages for debtors in contrast to bankruptcy. He states that an approved IVA will always provide for a stay on legal proceedings and freeze interest on debts owing. The IVAs offer debtors debt composition and conditional discharge. In an approved IVA, a debtor agrees to repay what he can reasonably afford over a certain period of time in return for the creditor's agreement to accept less than 100 pence in the pound in full and final settlement subject to performance of the IVA terms. He states further that debtors will thereafter be released from all of the debts contained in their IVA, if they comply fully or substantially with their IVA obligations. IVAs therefore offer the prospect of the debt relief without the debtor having to petition for bankruptcy.¹³⁶

In comparison, in South Africa, even though debtors are provided with the option of rearranging their debts, they still have to pay the full amount owing, as well as interest, and no time limit is provided. Thus payment by the debtor of his debts could extend over a long period of time and the debtor does not receive any discharge of debts.

Walters states that under part IX of the Insolvency Act 1986 a 'bankruptcy amounts to a statutory bargain that seeks to balance the interests of debtors and creditors'. He states further that 'the bankruptcy order stays individual enforcement by creditors against the debtor and as a result prevents and stops creditor harassment'. It is

¹³⁴ Walters 'Individual Voluntary Arrangements: A "Fresh Start" for Salaried Consumers Debtors in England and Wales' 2009 *International Insolvency Review* 14.

¹³⁵ Individual insolvency in England and Wales available at <http://webarchive.nationalarchives.gov.uk/+http://www.insolvency.gov.uk/otherinformation/statistics/historicdata/HDmenu.htm>, accessed on 12 July 2012.

¹³⁶ Walters 'Individual Voluntary Arrangements: A "Fresh Start" for Salaried Consumers Debtors in England and Wales' 2009 *International Insolvency Review* 19-21.

submitted that this is similar to South Africa as the start of proceedings or the order itself stays legal proceedings against the debtor. Walters states that ‘a bankruptcy order is made by the petition of the debtor or his creditor(s) when the court is satisfied that there is no prospect of the debt being paid’. No later than a year from the date of the bankruptcy order, the debtor becomes discharged automatically. The effect of the discharge is to release the bankrupt debtor from his debts. The debtor is released from the debts which existed at the commencement of bankruptcy.¹³⁷

The insolvency law in England and Wales includes many ‘beneficent purposes’. These are based on the proposal that the debtor’s interest and as well as the interest of society are protected by the legal procedure which aims to alleviate the debtor from the increasing burden of debts to which he has no practical prospect of repaying. As a result of this rehabilitation is offered to the debtor.¹³⁸

A second form of formal relief is available through ‘debt relief orders’ (DRO).¹³⁹ A DRO serves as an alternative to bankruptcy for those of low income, with little or no assets and unsecured debts owed amounting to no more than £15 000 and for those who have assets totalling less than £300 and a disposable income of no more than £50 per month. If these requirements are satisfied, the debt relief order will be granted and the debts will be discharged after a period of twelve months. According to Fletcher, ‘the object of the debt relief order is to provide debt relief for people who owe relatively little, have no assets and no income to repay what they owe and cannot afford the cost of petitioning for their own bankruptcy adjudication’. An individual who is unable to pay his debts is allowed to use the procedure provided for in Part 7A, read together with schedules 4ZA and 4ZB of the Insolvency Act 1986 to apply for a DRO.¹⁴⁰

According to Fletcher, the debt relief procedure is therefore ‘designed to operate without the involvement of the court unless an interested party invokes its intervention on one of the grounds which are specified’ in the Insolvency Act 1986.

¹³⁷ Walters ‘Individual Voluntary Arrangements: A “Fresh Start” for Salaried Consumers Debtors in England and Wales’ 2009 *International Insolvency Review* 14-15.

¹³⁸ Fletcher *The Law of Insolvency* 4 ed (2009) ch 3.

¹³⁹ Fletcher *The Law of Insolvency* 4 ed (2009) ch 3.

¹⁴⁰ Fletcher *The Law of Insolvency* 4 ed (2009) ch 3, 12.

The aim of this approach is to decrease court involvement.¹⁴¹ Roestoff and Renke submit that the ‘no income-no assets’ (NINA) proposal could offer guidance to South African law reform regarding debt relief for debtors. Further it would not require any court intervention, making ‘NINA’ more efficient and cost-effective.¹⁴²

5.3 Recommendations for South African law reform

In 1987 the SALRC embarked on an investigation into the insolvency law leading to a variety of reports and eventually concluding in the publication of the draft Bill in 2000.¹⁴³ From the Bill it appears that the SALRC took cognisance of international developments in insolvency law such as the Bankruptcy Reform Act 1978 in the United States of America. The SALRC recognized that *bona fide* debtors should be afforded the chance of making a new start and that a balance should be struck between the interests of debtors and creditors. This is aligned with the foreign policy of ‘fresh start’ as established in the Bankruptcy Reform Act 1978 in the USA.¹⁴⁴

It should be noted, however, that foreign legislation should not be imported into the South African system.¹⁴⁵ It is submitted that South Africa would be best advised to reconsider its own insolvency laws and consumer debt legislation and improve on them by, *inter alia*, removing existing inconsistencies between the Insolvency Act and the NCA.

It is submitted that in order for reform of the South African insolvency law to be effective, serious consideration should be given to amending certain sections of the NCA in order to clarify the relationship between the NCA and the Insolvency Act and to preclude an application being brought for the sequestration of the debtor’s estate once he has applied for debt review and after a debt restructuring order has been issued. It is submitted further that by making the required amendments, both Acts will be more aligned with each other.

¹⁴¹ Fletcher *The Law of Insolvency* 4 ed (2009) ch 3, 12.

¹⁴² Roestoff and Renke ‘Debt relief for consumers – The interaction between insolvency and consumer protection legislation’ (Part 2) *Obiter* 2006 107-110.

¹⁴³ Review of the Law of Insolvency *South African Law Commission Report Project 63* (2000) vol 2: *Draft Bill*.

¹⁴⁴ Review of the Law of Insolvency *South African Law Commission Report Project 63* (2000) vol 1: *Explanatory Memorandum 17*; E Bertelsmann Mars *The Law of Insolvency* 9 ed (2008) 4-5.

¹⁴⁵ Calitz ‘Developments in the United States consumer bankruptcy law: A South African perspective’ (2007) 28 *Obiter* 416-417.

Steyn submits that the consumer debt relief system that is provided by the NCA, comprising debt review and a debt restructuring procedure, is not in line with internationally recognised principles and recommendations for rehabilitation procedures as alternatives to liquidation procedures.¹⁴⁶ For example, according to the ‘first principle’ established in the *INSOL International Consumer Debt Report II*, it is suggested that a debtor should be free to choose between a liquidation procedure and a rehabilitation procedure which include debt restructuring procedure. In addition, once the debtor has been completely rehabilitated, the debtor should receive a measure of discharge from liability that has been approved by a majority of creditors.¹⁴⁷

Steyn submits that consideration should be given to modifying section 118 of the unofficial working draft of a proposed Insolvency and Business Recovery Bill, compiled in 2010.¹⁴⁸ Section 118 of the unofficial working draft of a proposed Insolvency and Business Recovery Bill provides for pre-liquidation composition with creditors. Section 118(1) states that ‘any debtor other than a company who cannot pay his debts and who wants to offer his creditors a composition, may lodge a signed copy of the composition and a complete sworn statement in the form prescribed in the Annexure with the magistrate's court in the district where he normally resides or carries on business’.¹⁴⁹

According to Steyn this must be done in order to create a more efficient system of debt relief which will be accessible by means of a single insolvency statute which must include liquidation and debt restructuring processes. Steyn submits that by having a single insolvency statute a more effective balance may be achieved between

¹⁴⁶ Steyn ‘Sink or Swim? Debt review’s ambivalent ‘Lifeline’...a second sequel to ‘... A tale of two judgments’ *Nedbank v Andrews and another* (240/2011) [2011] ZACPEHC 29 (10 May 2011); *FirstRand Bank Ltd v Evans* 2011 (4) 597 (KZD) and *FirstRand Bank Ltd v Janse van Rensburg and a related matter* [2012] 2 All SA 186 (ECP) 2012 PELJ (15)4 217.

¹⁴⁷ *INSOL International Consumer Debt Report II*.

¹⁴⁸ A copy of the latest version of the Bill is on file with the author and is available upon request from Mr MB Cronje, of the Department of Justice and Constitutional Development, who was the researcher responsible for the South African Law Reform Commission’s review into the law of insolvency, completed in 2000.

¹⁴⁹ S 118 of the draft of a proposed Insolvency and Business Recovery Bill, compiled in 2010.

the interests of debtors and creditors in the consumer debt relief systems and processes available in South African Insolvency Law.¹⁵⁰

There are also academics, such as Maghembe,¹⁵¹ who suggest that amendments should be made to sections in the NCA at this point in time until the proposed Insolvency and Business Recovery Bill is given the force of law when enacted. It is submitted that such recommendations appears to be the only viable temporary option until the proposed Insolvency and Business Recovery Bill is passed into legislation. Maghembe submitted further that, ‘once debt restructuring has been granted, credit providers should not be allowed to proceed with sequestration proceedings against the debtor. Allowing sequestration applications against a consumer under debt review is not consistent with the principle of encouraging consumers to pay off their debts’.

Maghembe¹⁵² submits amendments which should be made by the legislator to overcome the problems. These include:

- Section 129 should be amended by the words in italics as follows:
 - (1) If the consumer is in default under a credit agreement, the credit provider-
 - (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date.
 - (b) may not commence *an application for sequestration or* legal proceedings to enforce the agreement before
 - (i) first providing notice to the consumer, as contemplated in paragraph (a)...

¹⁵⁰ Steyn ‘Sink or Swim? Debt review’s ambivalent ‘Lifeline’...a second sequel to ‘... A tale of two judgments’ Nedbank v Andrews and another (240/2011) [2011] ZAECPEHC 29 (10 May 2011); *FirstRand Bank Ltd v Evans* 2011 (4) 597 (KZD) and *FirstRand Bank Ltd v Janse van Rensburg and a related matter* [2012] 2 All SA 186 (ECP) 2012 *PELJ* (15)4 221.

¹⁵¹ Maghembe ‘The Appellate Division has spoken – Sequestration Proceedings to Enforce a Credit Agreement under the National Credit Act 34 of 2005: *Naidoo v ABSA Bank* 2010 4 SA 597’ 2011 14(2) *PELJ* p 178.

¹⁵² Maghembe ‘The Appellate Division has spoken – Sequestration Proceedings to Enforce a Credit Agreement under the National Credit Act 34 of 2005: *Naidoo v ABSA Bank* 2010 4 SA 597’ 2011 14(2) *PELJ* p 178-179.

- Section 88(3) should be amended by the words in italics as follows:

Subject to section 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4) (b) (i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement *or apply for the compulsory sequestration of the relevant consumer's estate until....*

CHAPTER 6

CONCLUSION

South African insolvency law is clearly creditor orientated as the Insolvency Act was enacted for the sole benefit of creditors. As a consequence, debtors are in a disadvantageous position. Although debtors tend to make use of the sequestration procedures which the Insolvency Act provides as a method of debt relief, a debtor is challenged with having to satisfy the court that the sequestration of his estate will be to the advantage of creditors. This prevents honest and poor debtors from having their estate sequestrated and thus being rehabilitated.¹⁵³

It is submitted that, when the NCA was enacted, one of the main aims was to provide debtors with the option of undergoing debt review in order to be declared over-indebted and to have their debts rearranged in order to meet their financial obligations. However, the NCA did not exclude the application of the Insolvency Act. This has led to a variety of problems. One of these is that, even though a debtor applies for debt review, the creditor is allowed within a certain period to terminate the debt review. This leaves the debtor in a very difficult position as the relief provided to him by the NCA is taken away by the creditor through the application of the Insolvency Act when the creditor applies for compulsory sequestration of the debtor's estate. This is possible since sequestration proceedings are not regarded as legal proceedings to enforce debts in terms of the NCA, as stated above, and consequently such conduct is not prohibited by the NCA. These issues have thus given rise to the need for South African insolvency law to be reformed.¹⁵⁴

There is a need for a system to be put into place to regulate application for debt review by a debtor and the application for the sequestration of a debtor's estate by the creditor. Due to the fact that there are glaring inconsistencies between the NCA and the Insolvency Act, there exists a need for alternative means of which debtors may avail themselves when they find themselves in a financially stressed situation. In addition there is a need for the introduction of new legislation, or the amendment of the NCA, in order to redress the current situation.

¹⁵³ Please refer to ch 1- 2.

¹⁵⁴ Please refer to ch 3.

It is submitted that, as proposed by Steyn and others, a unified piece of legislation, providing for liquidation as well as debt relief including debt restructuring for debtors will bring more certainty and clarity to South African insolvency law. Current issues relating to the discrepancies between the NCA and the Insolvency Act might be resolved. It is submitted that this could be a positive step in the reform of South African insolvency law.¹⁵⁵

It is submitted that comparison with foreign systems shows a lack of balance, in South Africa, between the interests of creditors and debtors. Insufficient attention is being given to providing debt relief measures that operate in the interests of debtors. It is further submitted that the South African insolvency law should reflect a balance between the interests of all affected persons. There should be no bias suffered by one party due to the inconsistencies between the Insolvency Act and the NCA.¹⁵⁶

It is submitted that in order for reform in South African insolvency law to be effective, it needs to become more 'debtor' friendly and to provide 'honest' debtors with effective relief as provided in the USA and England and Wales. These measures include a fresh start to honest debtors, individual voluntary agreements entered into between the debtor and creditor prior to liquidation and debt relief orders, as explained above. It should be noted, however, that foreign legislation should not be imported into the South African system.¹⁵⁷ It is submitted that South Africa would be best advised to reconsider its own insolvency laws and consumer debt legislation and improve on them by, *inter alia* removing existing inconsistencies between the Insolvency Act and the NCA. It is submitted that at the moment the only viable reform will be the amendment suggested by Maghembe¹⁵⁸ until the proposed Insolvency and Business Recovery Bill comes into effect.

¹⁵⁵ Please refer to ch 5, par 5.3.

¹⁵⁶ Please refer to ch 5.

¹⁵⁷ Calitz 'Developments in the United States consumer bankruptcy law: A South African perspective' (2007) 28 *Obiter* 416-417.

¹⁵⁸ Please refer to ch 5, par 5.3.

BIBLIOGRAPHY

List of abbreviations

BAPCPA	Bankruptcy Abuse Prevention and Consumer Protection Act
ch	chapter
DRO	debt relief order
Ed	Edition
IVAs	individual voluntary arrangements
NCA	National Credit Act
par	paragraph
pars	paragraphs
p	page
PELJ	Potchefstroom Electronic Law Journal
s	section
SA Merc LJ	South African Mercantile Law Journal
subsec	subsection
SALRC	South African Law Reform Commission
USA	United States of America
vol	volume

Primary Sources

Statutes

South Africa

Insolvency Act 24 of 1936

Magistrates' Courts Act 32 of 1944

National Credit Act 34 of 2005

United States of America

The Bankruptcy Act 1898

The Bankruptcy Reform Act of 1978 (commonly referred to as 'The Bankruptcy Code')

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

Wales and England

The Deeds of Arrangement Act 1914

The Insolvency Act 1986

The Enterprise Act 2002.

Cases

South Africa

Amod v Khan 1947 (2) SA 432 N 438.

Barlow's (Eastern Province) Ltd v Bouwer 1950 (4) SA 285 (E).

Collett v FirstRand Bank Ltd and Another 2011 (4) SA 508 (SCA).

Court v Standard Bank of SA Ltd; Court v Bester No & others 1995 (3) SA 123 (A).

Craggs v Dedekind 1996 1 SA 935 (C).

De Villiers v Maursen Properties (Pty) Ltd 1983 (4) SA 670 (T) 676.

DP du Plessis Prokureurs v Van Aarde 1999 (4) SA 1333 (T) 1335.

Ex Parte Bergh 1938 CPD 131.

Ex parte Steenkamp and related cases 1996 (3) SA 822 (W).

FirstRand Bank v Evans 2011 (4) SA 597 (KZD).

FirstRand Bank v Janse van Rensburg 2012 (2) All SA 186 (ECP).

FirstRand Bank Ltd v Olivier 2009 (3) SA 353 (SECLD).

Goldblatt's Wholesalers (Pty) Ltd v Damalis 1953 (3) SA 730 (O).

Investec Bank v Mutemeri 2010 (1) SA 265 (GSJ).

Ltozof v Raubenheimer 1959 (1) SA 90 (0) 94.

Meskin & Co v Friedman 1948 (2) SA 555 (W) 558.

Mthimkhulu v Rampersad (2000) 3 All SA 512 (N) 514.

Naidoo v ABSA Bank 2010 (4) SA 597.

Nedbank v Thorpe (7392/2007) [2008] ZAKZHC 72 (26 September 2008).

Optima Fertilizers (Pty) Ltd v Turner 1968 (4) SA 29 (D).

Patel v Sandy 1936 CPD 466.

R v Meer 1957 (3) SA 614 (N).

Spencer v Standard Building Society 1931 TPD 481.

Trust Wholesalers and Woollens (Pty) Ltd v Mackan 1954 (2) SA 109 (N) 111.

Venter v Volkscas Ltd 1973 (3) SA 175 (T) 179.

Walker v Syfret 1911 AD 141.

United States of America

Local Loan Co v Hunt 292 U.S 234, 244 (1934).

Secondary Sources

Books

Bertelsmann *et al Mars The Law of Insolvency* 9 ed (2008).

Ferriell & Janger *Understanding Bankruptcy* 2 ed (2007) Lexis Nexis.

Fletcher *The Law of Insolvency* 4 ed (2009).

Sharrock, Smith & Van der Linde *Hockly's Insolvency Law* 8 ed (2006).

Sharrock *Business Transactions Law* 8 ed (2011).

Otto & Otto *The National Credit Act Explained* 2 ed (2010) Lexis Nexis.

Journal articles and unpublished papers

Boraine and Roestoff (1993) *De Jure* 229.

Boraine and Van Heerden 'To sequestrate or not to sequestrate in view of the National Credit Act 34 of 2005: a tale of two judgments' 2010 13(3) *Potchefstroom Electronic Law Journal* 84.

Boraine, Van Heerden and Roestoff 'A comparison between formal debt administration and debt review - the pros and cons of these measures and suggestions for law reform (Part 1)' *De Jure* 45 (1) 2012 p 62-80.

Calitz 'Developments in the United States' consumer bankruptcy law: A South African perspective' (2007) 28 *Obiter* 397.

Kupiso 'Can Debt Enforcement Procedures Be Circumvented by Insolvent Proceedings?' *De Rebus* November 2011 26.

Maghembe ‘The Appellate Division has spoken – Sequestration Proceedings to Enforce a Credit Agreement under the National Credit Act 34 of 2005: *Naidoo v ABSA Bank* 2010 4 SA 597’ 2011 14(2) *Potchefstroom Electronic Law Journal* p 171-180.

Meskin, ‘Advantage to creditors: a misconceived requirement’ Unpublished conference paper presented at the Annual Banking Law Update, held at Rand Afrikaans University, Johannesburg, August (1995).

Roestoff and Renke ‘Debt relief for consumers – The interaction between insolvency and consumer protection legislation’ (Part 2) *Obiter* 2006.

Steyn ‘Sink or Swim? Debt review’s ambivalent ‘lifeline’...a second sequel to ‘... A tale of two judgments’ *Nedbank v Andrews and another* (240/2011) [2011] ZAECPEHC 29 (10 May 2011); *FirstRand Bank Ltd v Evans* 2011 (4) 597 (KZD) and *FirstRand Bank Ltd v Janse van Rensburg and a related matter* [2012] 2 All SA 186 (ECP)’ 2012 *Potchefstroom Electronic Law Journal* (15)4 189-231.

Van Heerden and Boraine ‘The interaction between the debt relief measures in the National Credit Act 34 of 2005 and aspects of Insolvency Law’ 2009 12(3) *Potchefstroom Electronic Law Journal* 22.

Van Heerden and Boraine ‘The Conundrum of the Non-compulsory Compulsory Notice in terms of Section 129(1) (a) of the National Credit Act’ (2011) 23 *SA Merc LJ*.

Walters ‘Individual Voluntary Arrangements: A “Fresh Start” for Salaried Consumers Debtors in England and Wales’ 2009 *International Insolvency Review* 14.

Thesis

Steyn *Statutory regulation of forced sale of the home in South Africa* (Doctor of Laws thesis, University of Pretoria, 2012).

Reports and draft Bills

INSOL International Consumer Debt Report II, Report of Findings and Recommendations, 2011.

South African Law Reform Commission *Report on the Review of the Law of Insolvency: Draft Insolvency Bill and Explanatory Memorandum* (Project 63) 2000.
Available at http://www.justice.gov.za/salrc/reports/r_prj63_insol_2000apr.pdf

Unofficial working draft of a proposed Insolvency and Business Recovery Bill (compiled in 2010); available from Mr MB (Tienie) Cronje (mcronje@justice.gov.za) at the Department of Justice and Constitutional Development , Pretoria, South Africa.

Internet sources

<http://www.saflii.org/za/cases/ZAKZHC/2008/72.html>

<http://www.sabinet.co.za/>

Jordaan ‘The NCA v the Insolvency Act: a need for reconciliation in a consumer friendly society’ available at <http://www.polity.org.za>, accessed on 10 July 2012.

Individual insolvency in England and Wales available at:

<http://webarchive.nationalarchives.gov.uk/+http://www.insolvency.gov.uk/otherinformation/statistics/historicdata/HDmenu.htm>, accessed on 12 July 2012