DISCHARGE PRINCIPLES APPLICABLE IN SOUTH AFRICAN LAW: AN ANALYSIS IN LIGHT OF INTERNATIONAL TRENDS AND GUIDELINES

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Submitted in partial fulfilment for the degree

Masters of Laws in Business Law

In the

College of Law and Management Studies

School of Law

At the

University of KwaZulu-Natal

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December 2017

I certify that the whole research paper, unless specifically indicated to the contrary in the text, is my own work. It is submitted as part of a research component in partial fulfilment for the degree of Masters in Business Law (LLMBL) in the School of Law, University of KwaZulu-Natal, 2017.

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ACKNOWLEDGEMENTS

The journey to complete my dissertation has been a long and tiresome one. What seemed impossible was only made possible thanks to the endless support from my friends and family.

Firstly, I would like to thank my supervisor, Prof L Steyn, without which none of this would have been possible. I thank you for your guidance, patience, motivation and kind words through every step of the way. This has not been an easy journey but you assured me that it was possible and you kept me on track. For that I am so grateful.

To my father, Chin Govender, who pushed me to succeed even when I thought it was impossible, who motivated me through the many sleepless nights and whose words encouraged me to reach my full potential.

To my mother, Sheila Govender, and sister, Neriscia Govender, for their endless love and support.

To my friend Terricia Govender, all those long phone calls when I needed the motivation have not gone unnoticed. To my friend Kaashifa Ally, who reminded me that I was not alone in this. And to all my friends who were there for me through this journey, I am eternally grateful for each and every one of you.

ABSTRACT

South Africa has three statutory debt relief mechanisms in place to assist over-indebted consumers. These include debt review in terms of the National Credit Act 34 of 2005, administration orders in terms of the Magistrates' Courts Act 32 of 1944 and sequestration in terms of the Insolvency Act 24 of 1936. Of these three mechanisms, sequestration in terms of the Insolvency Act is the only mechanism in South Africa which provides for the statutory discharge of unpaid debts. However, the requirements to enter into this procedure are stringent and as a result many debtors do not have access to the procedure. It is therefore important to compare South Africa's natural persons' insolvency regime to international best practices and guidelines, to establish which discharge principles can be incorporated or adopted into South Africa's insolvency regime. This paper will examine the effectiveness of the discharge principles in South Africa, in light of the World Bank Report on the Treatment of the Insolvency of Natural Persons and the discharge principles applicable in foreign jurisdictions. South Africa's debt relief mechanisms will be compared to the United States of America, England and Wales, New Zealand, Ireland and Japan. The discharge principles applicable in these foreign jurisdictions will be highlighted in order to establish which practices South Africa can adopt into its insolvency regime, in order to better assist over-indebted consumers to obtain a fresh start and a better financial future.

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CHAPTER ONE: INTRODUCTION

'Society should not reward the cautious man who buries his talent and takes no chances; it most emphatically should do everything in its power to assist the man who creates jobs – the man who strives to turn his one talent into ten – even if he fails in the attempt.'[1]

1.1 Background

According to the World Bank Report on the Treatment of the Insolvency of Natural Persons,[2] 'one of the principal purposes of an insolvency system for natural persons is to re-establish the debtor's economic capability, in other words, *economic rehabilitation.*'[3] This can be achieved through an effective personal insolvency regime that assists over-indebted consumers to return to a productive economic life.[4] The most effective way to provide relief to debtors is through the discharge of unpaid debts.[5]

Rehabilitation after sequestration is the only mechanism in South Africa that provides debtors with the discharge of pre-sequestration debts.[6] However, discharge is merely a consequence of rehabilitation and it is not guaranteed.[7] Sequestration is regulated by the Insolvency Act,[8] and has remained largely creditor-orientated despite the worldwide trend to accommodate over-indebted consumers.[9] This is clear from the entry requirements for the sequestration

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[1] M Rochelle 'Lowering the Penalties for failure: Using the Insolvency Law as a Tool for Spurring Economic Growth; the American Experience, and Possible uses for South Africa' *J. S. Afri. L*. (1996) 315.

[2] Working Group on the Treatment of the Insolvency of Natural Persons *Report on the treatment of the insolvency of natural persons* (Insolvency and Creditor/Debtor Regimes Task Force World Bank) available at *http://siteresources.worldbank.org/INTGILD/Resources/WBInsolvencyOfNaturalPersonsReport_01_11_13.pdf* accessed on 10/07/2017. Hereinafter referred to as 'the World Bank Report' or 'Report'.

[3] Ibid para 359.

[4] J M Garrido 'The Role of Personal Insolvency Law in Economic Development: An Introduction to the World Bank Report on the Treatment of the Insolvency of Natural Persons' in Hassane Cisse, N R Madhava Menon, Marie-Claire Cordonier Segger, Vincent O Nmehielle (eds) *The World Bank Legal Review, Volume 5: Fostering Development through Opportunity, Inclusion, and Equity* (2013) 111.

[5] *The World Bank Report* (note 2 above) para 360.

[6] A Boraine and M Roestoff 'The Treatment of Insolvency of Natural Persons in South African Law – An Appeal for a Balanced and Integrated Approach' in Hassane Cisse, N R Madhava Menon, Marie-Claire Cordonier Segger, Vincent O Nmehielle (eds) *The World Bank Legal Review, Volume 5: Fostering Development through Opportunity, Inclusion, and Equity* (2013) 95. See also M Roestoff 'Rehabilitasie in die Suid-Afrikaanse verbruikersinsolvensiereg: internasionale tendense en riglyne' *LitNet Akademies* (2016) 600.

[7] H Coetzee 'A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa' LLD thesis University of Pretoria (2015) available at *https://repository.up.ac.za/bitstream/handle/2263/52372/Coetzee_Comparative_2015.pdf?sequence=1* accessed on 25/08/2017, 142.

[8] Act 24 of 1936. Hereinafter referred to as the Insolvency Act.

[9] M Roestoff and H Coetzee 'Consumer Debt Relief in South Africa: Lessons from America and England; and suggestions for the Way Forward' *SA Merc LJ* (2012) 53.

procedure, which includes sequestration having to be to the 'advantage of creditors.' According to Roestoff and Coetzee, 'the primary object of the South African Insolvency Act is to ensure an orderly and fair distribution of the debtor's assets in circumstances where these assets are insufficient to satisfy all the creditors' claims.'[10] As Erasmus J explained the position, in *BP Southern African (Pty) Ltd v Furstenburg*: '[T]he whole tenor of the Act, inasmuch as it directly relates to sequestration proceedings, is aimed at obtaining a pecuniary benefit for creditors.'[11] As a result of this 'advantage of creditors' requirement, it is difficult for over-indebted consumers to access the sequestration process in terms of the Insolvency Act and it is therefore difficult for these consumers to obtain debt relief. Furthermore, once they have entered the sequestration proceedings, the over-indebted consumer has to wait an unnecessarily long period before they can be automatically discharged. It therefore becomes clear that the Insolvency Act does not provide over-indebted consumers with adequate debt relief and debt relief is merely a consequence of the Insolvency Act. [12]

While the debtor also has access to other debt relief mechanisms, namely debt review in terms of the National Credit Act[13] and administration orders in terms of section 74 of the Magistrates' Courts Act,[14] these procedures do not provide for the automatic discharge of unpaid debts. According to a research report on Administration Orders compiled by the Centre for Advanced Corporate and Insolvency Law at the University of Pretoria, 'due to its stringent requirements for sequestration on the one hand, and due to the limited alternatives to sequestration available on the other hand, the formal discharge is only available to an exclusive few.'[15] This means that 'low income low asset' (LILA) and 'no income no asset' (NINA) debtors in South Africa have limited options with regard to debt relief and are exclude from most of the statutory debt relief mechanisms.

According to the World Bank Report, there are three elements necessary for an effective rehabilitation procedure: 'First, the debtor has to be freed from excessive debt… Second, the

[10] Roestoff and Coetzee (note 9 above) 55.
[11] *BP Southern African (Pty) Ltd v Furstenburg* [1966] 1 SA (O) 717, 720.
[12] Roestoff and Coetzee (note 9 above) 55.
[13] Act 34 of 2005. Hereinafter referred to as the NCA.
[14] Act 32 of 1944. Hereinafter referred to as the MCA.
[15] Centre for Advanced Corporate and Insolvency Law – University of Pretoria *Interim Research Report on the Review of Administration Orders in terms of Section 74 of the Magistrates' Courts Act 32 of 1944* (May 2002) 83. See also in this regard M Roestoff and S Renke 'Debt Relief for consumers – the interaction between insolvency and consumer protection legislation' (part 2) *Obiter* (2006) 98, 100.

debtor should be treated on an equal basis with non-debtors after receiving relief (the principle of non-discrimination). Third, the debtor should be able to avoid becoming excessively indebted again in the future, which may require some attempt to change debtors' attitudes concerning proper credit use.'[16]

The World Bank Report recommends the 'fresh start' principle, or straight discharge, as being the most effective form of relief.[17] This fresh start principle should entail both the discharge of pre-insolvency debt and provision for debtors of prospects of an improved financial future.[18] According to the Second Principle, established in the *INSOL International Consumer Debt Report II*, a fresh start is 'based on the principle that the debtor should be able to begin afresh, free from past financial obligations and should not suffer indefinitely.'[19] The World Bank Report also envisages an 'earned new start' through repayment plans that last for a period of three to five years.[20] The World Bank Report however points out that certain courts, which are not specifically identified in the Report, have found these minimum payments, which are required by the repayment plan, 'to be discriminatory against debtors with little or no means.'[21]

A study of the insolvency laws available in South Africa compared to other countries, such as the United States of America (USA), England and Wales, New Zealand, Ireland and Japan, indicate that these countries' insolvency laws are more debtor-friendly and the debt relief offered to indebted consumers are more in line with the World Bank Report's recommendations.

The question that therefore arises is whether the discharge principles, which are applicable in South African law, provide debtors with adequate debt relief and whether they are consistent with the discharge principles envisaged in the Report. South African insolvency law is outdated[22] and South Africa can learn from other jurisdictions in order to better assist over-

[16] *The World Bank Report* (note 2 above) para 359.
[17] Ibid para 360.
[18] Roestoff (note 6 above) 596.
[19] INSOL International *Consumer Debt Report II: Report of findings and recommendations* (2011) 15.
[20] *The World Bank Report* (note 2 above) para 361.
[21] Ibid para 362.
[22] A Boraine and M Roestoff 'Revisiting the state of consumer insolvency in South Africa after twenty years: The courts' approach, international guidelines and an appeal for urgent law reform' (Part 1) *77 THRHR* (2014) 351, 352.

indebted consumers to obtain a fresh start and to become productive, educated members of society.

1.2 Statement of purpose and research questions

The purpose of this paper is to analyse South Africa's personal insolvency and consumer debt relief regimes and to look at whether the discharge principles in place offer appropriate relief to over-indebted consumers. This will be carried out in light of the World Bank Report and the international trends and guidelines applicable in other jurisdictions. A comparative analysis of the discharge principles in place in the USA, England and Wales, New Zealand, Ireland and Japan will take place. This paper will look at whether South Africa can implement or adopt some of these principles in order to better assist over-indebted consumers.

The questions which I will need to ask in order to achieve this purpose are:

1. What are the current discharge principles applicable in South African insolvency law and how are these principles applied by South African courts?
2. Do the discharge principles offered by South African insolvency law offer appropriate debt relief to over-indebted consumers?
3. What recommendations does the World Bank Report make with regard to discharge principles?
4. How do foreign jurisdictions deal with the discharge of debts?
5. Which discharge principles can South Africa introduce or adopt from foreign jurisdictions to bring South Africa in line with the World Bank Report's recommendations?

1.3 Limitations

The institutionally restricted length of this short dissertation does not allow for an in-depth analysis of the procedural requirements for each debt relief measure offered in each jurisdiction. Furthermore, while LILA and NINA debtors are mentioned, this aspect will not be discussed in great detail due to imposed length constraints. Therefore, the main focus will be on the discharge principles applicable and the basic principles relating to access requirements.

1.4 Rationale for the study

The number of over-indebted consumers in South Africa has increased over the last few decades as a result of the increase in credit lending.[23] Many debtors get caught in a vicious cycle of having to pay off their debts and turn to sequestration as a form of relief. However, the sequestration process has stringent creditor-orientated requirements which are unattainable for many debtors and as a result these debtors are unable to obtain a discharge of debts. Furthermore, South African case law has confirmed that debt relief is not a main aim of the Insolvency Act and that the discharge of pre-sequestration debts is merely a consequence of rehabilitation.[24] This creditor-oriented approach is in contrast with the 'world-wide trend to provide debt relief to "honest but unfortunate debtors".'[25]

This study is therefore vital for over-indebted consumers, for creditors and for society, which would benefit from over-indebted consumers attaining a discharge and being economically rehabilitated. Where debtors are unable to repay their debts, and are trapped in never-ending debt, this can contribute to an economic meltdown.[26]

According to Boraine and Roestoff, many debtors are treated unequally and are left without recourse in the form of a statutory discharge.[27] Rochelle suggests that a fresh start policy is an effective tool to improve economic growth and development.[28] It is therefore of utmost importance that South African citizens are offered adequate debt relief which enables them to escape from the debt trap in which they are stuck, but which will also educate them to not repeat the same mistakes again.

1.5 Research methodology

A qualitative approach will be adopted for this paper and it will make reference to legislation, literature and reported judgments. Reference to legislation will include both the debt relief

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[23] P N Stoop 'South African Consumer Credit Policy: Measures Indirectly Aimed at Preventing Consumer Over-indebtedness' *SA Mercantile L.J* (2009) 365.

[24] Boraine and Roestoff (note 22 above) 355.

[25] A Boraine and M Roestoff 'Revisiting the state of consumer insolvency in South Africa after twenty years: The courts' approach, international guidelines and an appeal for urgent law reform' (Part 2) *77 THRHR* (2014) 527, 542.

[26] World Development Movement 'Third world debt' available at *http://www.wdm.org.uk/category/issues/third-world-debt* accessed on 15/07/2017.

[27] Boraine and Roestoff (note 6 above) 109.

[28] Rochelle (note 1 above) 315.

legislation in place in South Africa, as well as in foreign jurisdictions including USA, England and Wales, New Zealand, Ireland and Japan. Reference will also be made to the World Bank Report throughout this paper.

1.6 Conceptual framework

The Insolvency Act is the only mechanism that offers over-indebted consumers debt relief in the form of an automatic discharge. The Insolvency Act however has an 'advantage of creditors' requirement which creates an obstacle for debtors who wish to use the sequestration process as a debt relief measure. Furthermore, the period to be discharged is unnecessarily long and the debtor still has to pay off a portion of their debt before they can obtain a discharge. Debtors may also enter into a repayment plan in terms of the NCA and the MCA, but these mechanisms do not specify a time period which means that it could take years before the debtor obtains a discharge. South Africa also does not offer a debt relief mechanism that caters specifically for low, or no, income earners. It is thus imperative to study the World Bank Report and the law in foreign jurisdictions in order to look at the worldwide trends which can be adopted into South African insolvency law. Over-indebted consumers in South Africa should be afforded a level of mercy which would enable them to be rehabilitated and to be productive citizens of society once again.

1.7 Overview of chapters

This, the first chapter, introduces the topic and gives a brief background of insolvency law in South Africa. The second chapter will deal with the debt relief mechanisms available in South Africa, with particular emphasis on the discharge principles involved. It looks at the common law compromise, administration orders in terms of the MCA, debt review in terms of the NCA and sequestration in terms of the Insolvency Act. It will also discuss the courts' approach to rehabilitation and the proposed amendments to legislation that provides for South Africa's debt relief measures. Chapter Three will discuss the debt relief mechanisms available in USA, England and Wales, New Zealand, Ireland and Japan, focusing on the discharge principles applicable. Chapter Four will compare South Africa's discharge principles to those applicable in foreign jurisdictions. The final chapter will consist of a conclusion as well as recommendations for the way forward in South Africa.

CHAPTER TWO: DISCHARGE PRINCIPLES APPLICABLE IN SOUTH AFRICA

2.1 Introduction

As previously indicated, there are three statutory debt relief mechanisms available for natural persons in South Africa, namely the NCA, the MCA and the Insolvency Act. The common law compromise is also available for debtors. In this chapter, each of these debt relief measures will be discussed. First, the common law compromise will be discussed briefly. The administration procedure in terms of the MCA, debt review in terms of the NCA and the sequestration procedure in terms of the Insolvency Act will then be outlined. This chapter will then go on to discuss how rehabilitation is dealt with by the South African courts. Finally, it will look at any proposals put forward in an attempt to improve debt relief in South Africa.

2.2 The common law compromise

The common law compromise is based on the contractual principle of consent and is a debt restructuring plan that is entered into between the debtor and his creditors.[29] The parties reach a compromise with regard to the debtor's payment options and, depending on the terms of the agreement, the parties may agree on the full or partial settlement of the debtors' obligations.[30] In order to be effective, all of the creditors must accept the compromise.[31] A common law compromise may be entered into after a provisional order of sequestration has been granted, but this is conditional upon the provisional order being discharged.[32]

While the common law compromise may be a viable option for the debtor in theory, it is not a realistic option as many debtors may not be in a financial position to pay off their debts. Furthermore, creditors are not always willing to agree on an unregulated common law compromise due to the risks involved. The common law compromise is also not attractive to debtors as it does not provide them with a discharge of unpaid debts.

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[29] Boraine and Roestoff (note 6 above) 105.
[30] R H Christie and GB Bradfield *Christie's The Law of contract in South Africa* 6th ed Lexis Nexis Butterworths (2011) 473.
[31] Coetzee (note 7 above) 290.
[32] E Bertelsmann et al *Mars: The Law of Insolvency in South Africa*, 9th ed Juta & Co Ltd (2008) 547.

2.3 Administration Order in terms of section 74 of the Magistrates' Courts Act

Section 74 of the MCA enables a debtor to apply for an administration order, provided that he is unable to pay the amount of any judgment issued against him, or to meet his financial obligations, and provided that he has insufficient assets to satisfy the judgment debt or obligations.[33] This procedure is only available for debtors whose debts do not exceed R50 000.[34] The effect of an administration order is that the creditors will be compelled to accept a debt rearrangement in terms of which the debtor will pay his debts in instalments.[35] Once an administration order has been granted by the magistrate's court the debtor must make regular payments to an administrator, who then uses the amounts received to pay the creditors.[36] The order lapses, or is discharged, once the debtor has paid the administration costs, all debts subject to the administration order and the interest thereon.[37]

This debt relief mechanism does not specify a certain repayment period and it does not provide debtors with any automatic discharge of unpaid debts.[38] In order to earn their discharge, the debtor has to make all payments in terms of the administration order. This may cause the debtor to become 'locked into the process indefinitely.'[39] Boraine and Roestoff argue that the lack of discharge and maximum repayment period, as well as the administration costs and interest involved, may 'cause the amount of debt to escalate to such an extent that many debtors never get out of debt.'[40] Furthermore, debtors who owe more than R50 000 do not have access to this debt rearrangement plan[41] so only a limited number of debtors may access this mechanism. Malanje submits that a higher monetary cap would include those debtors that are excluded from the Insolvency Act and thus from rehabilitation.[42] Boraine and Roestoff further state that the debtor must have a regular

[33] MCA S74(1)(a).
[34] Ibid S74(1)(b).
[35] Ibid S74(1).
[36] Ibid S74I & 74J.
[37] Ibid S74U.
[38] A Boraine, C Van Heerden and M 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* (2012) 80, 92.
[39] Ibid.
[40] Boraine and Roestoff (note 6 above) 100.
[41] Boraine, Van Heerden and Roestoff (note 38 above) 92.
[42] N J Malanje 'The impact of administration orders as a redress mechanism for over-indebted consumers: a critical analysis' in Nejdat D et al *Globalizing business for the next century: visualizing and developing contemporary approaches to harness future opportunities* (2013) 629.

income in order to enter into the administration proceedings because a monthly payment has to be made to the administrator.[43] This means that people with low or no income would not obtain debt relief from the administration order which necessitates the debtor having a steady income in order to pay the debts in full over an extended period.

2.4 Debt review in terms of the National Credit Act

The objective of the NCA is to provide debt relief to over-indebted consumers.[44] The purpose of the NCA, as set out in section 3, is to address and prevent over-indebtedness of consumers, and to provide mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations.[45] The NCA addresses over-indebtedness by providing a system of debt restructuring in order to ensure the satisfaction of consumer obligations under credit agreements.[46] Therefore the purpose of the NCA is the full satisfaction of debts and not to offer a discharge of unpaid debts.[47]

Section 86 of the NCA enables debtors to initiate debt review proceedings by applying to a debt counsellor for the purposes of being declared over-indebted. If the debt counsellor reasonably concludes that the consumer is over-indebted, the debt counsellor may make a recommendation to the magistrates' court that one or more of the consumer's obligations, in terms of a credit agreement, be re-arranged.[48] This debt rearrangement plan enables the debtor to pay off his debts over an extended period of time.[49]

The NCA has also introduced consumer counselling, but this does not offer traditional consumer education to debtors and the role of the debt counsellor is limited.[50] Debt counselling in terms of the NCA is also not linked to sequestration proceedings.[51]

Debt review has a number of problems. Much like the administration order, the NCA does not provide debtors with any discharge of unpaid debts and is not subject to a maximum payment

[43] Boraine and Roestoff (note 6 above) 100.
[44] C Van Heerden and A Boraine 'The Interaction between the Debt Relief Measures in the National Credit Act 34 of 2005 and Aspects of Insolvency Law' *Potchefstroom Electronic Law Journal* (2009) 22, 22.
[45] NCA S 3(g).
[46] Ibid S 3(i).
[47] Boraine and Roestoff (note 6 above) 101.
[48] NCA S 86(7)(c)(ii).
[49] Ibid S 86(7)(ii)(aa).
[50] J Calitz 'Developments in the United States' Consumer Bankruptcy Law: A South African Perspective' *Obiter* (2007) 397, 414.
[51] Ibid.

period.[52] This is in accordance with the NCA's objective of addressing and preventing debt relief subject to the principle 'of satisfaction by the consumer of all responsible financial obligations'.[53] The absence of discharge provisions in the NCA has led to criticism of the debt review process due to 'its inability to provide effective and efficient debt relief to over-indebted consumers'.[54] Furthermore, the lack of time periods may cause the debtor to remain in debt indefinitely.[55] Boraine and Roestoff describe the procedure as being 'cumbersome, costly, and slow.'[56] The procedure is also restricted to debts incurred under a credit agreement.

2.5 Sequestration in terms of the Insolvency Act

2.5.1 Introduction

Sequestration in terms of the Insolvency Act is the primary debt relief mechanism in South Africa and is the only statutory mechanism that provides for the discharge of pre-sequestration debts.[57] Discharge is however not the main aim and is merely a consequence of sequestration.[58] In *Ex Parte Ford and Two Similar Cases*,[59] the Court stated that the primary objective of the Insolvency Act is to benefit the creditors and not to grant debt relief to harassed debtors. Mabe and Evans describe the Insolvency Act as being 'creditor friendly' and 'static.'[60] Roestoff and Coetzee point out that even though it is not a primary objective, debt relief is a consequence of the Insolvency Act, because 'rehabilitation in terms of the Act results in a discharge of all pre-sequestration debts.'[61]

2.5.2 Advantage of creditors

The Insolvency Act provides debt relief through sequestration of the debtor's estate. There are two ways in which a natural person's estate may be sequestrated, namely voluntary

[52] M Roestoff 'Ferris v Firstrand Bank Ltd 2014 3 SA 39 (CC)' *De Jure* (2016) 134.
[53] NCA S 3(g).
[54] Roestoff (note 52 above) 135.
[55] Boraine and Roestoff (note 6 above) 104.
[56] Ibid.
[57] H Coetzee and M Roestoff 'Consumer Debt Relief in South Africa – Should the Insolvency System Provide for NINA Debtors? Lessons from New Zealand' *22 Int. Insolv. Rev.* (2013) 188, 189.
[58] Ibid.
[59] 2009 (3) SA 376 (WCC), para 21.
[60] Z Mabe and RG Evans 'Abuse of Sequestration Proceedings in South Africa Revisited' *SA Merc LJ* (2014) 652, 665.
[61] Roestoff and Coetzee (note 9 above) 55.

surrender or compulsory sequestration. An application for voluntary surrender is initiated by the debtor himself, while an application for compulsory sequestration is brought by one or more creditors. The High Court has jurisdiction to hear both these applications. If the court grants the sequestration order, the estate of the debtor vests in the Master, and thereafter in the trustee upon appointment.[62] The order creates a stay on all civil proceedings and affects the status of the debtor in that he may not hold various offices.[63]

In an application for voluntary surrender, the applicant must satisfy the court that it will be to the advantage of creditors that his estate is sequestrated.[64] This is a more stringent requirement to prove than with an application for compulsory sequestration where the creditor merely has to show that 'there is reason to believe' that the sequestration will be to the advantage of creditors.[65] A possible reason for this is that a debtor can be expected to have access to a detailed account of his financial position, whereas a creditor would not.[66] Another reason for the more stringent requirement is to prevent debtors from abusing the process and using it as a way to escape liability.[67]

The 'advantage of creditors' requirement creates a stumbling block to debtors who have to prove that the sequestration will 'yield at least a not negligible dividend.'[68] On the other hand, all the creditor has to prove to bring an application is 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.'[69] Coetzee and Roestoff describe these entry requirements as being 'of such a nature that most debtors are effectively excluded and therefore bound to their desperate plight.'[70] This requirement prevents many debtors from entering the sequestration process and therefore creates a barrier for their rehabilitation. It is not clear what dividend would constitute an 'advantage of creditors' but in *Ex parte Ogunlaja*[71] and in

[62] Bertelsmann et al (note 32 above) 17.
[63] Coetzee (note 7 above) 108.
[64] Insolvency Act S 6(1).
[65] Ibid S 12(1)(c).
[66] *Hillhouse v Stott; Freban Investments (Pty) Ltd v Itzken; Botha v Botha* 1990 (4) SA 580 (W) 581.
[67] R Sharrock et al *Hockley's Insolvency Law* 9th ed Juta & Co Ltd (2012) 20.
[68] *Ex parte Steenkamp* 1996 (3) SA 822 (W); *Meskin and Co v Friedman* 1948 2 SA 555 (W) 559.
[69] *Meskin v Friedman* 1948 (2) SA 555 (W).
[70] Coetzee and Roestoff (note 57 above) 189.
[71] 2010 JDR 0035 (GNP).

Ex parte Cloete,[72] it was held that in the North Gauteng High Court the dividend should be at least 20 cents in the rand for each concurrent creditor.

2.5.3 Excluded property

Property exemptions also offer relief to debtors wishing to obtain a fresh start after undergoing sequestration.[73] Generally, all property belonging to the debtor, at the date of sequestration, forms part of the insolvent estate.[74] This includes property which the insolvent may acquire or which may accrue to him during sequestration.[75] The Insolvency Act, however, provides that the wearing apparel, bedding, household furniture, tools and other essential means of subsistence are excluded from sequestration.[76] According to Roestoff, '[h]ierdie uitsluitings bevorder die uitendelike rehabilitasie van die insolvente vir sover dit hom of haar in staat stel om minstens 'n basiese lewenstandaard te handhaaf en om die pad van finansiële herstel aan te pak…'[77] The insolvent may also keep any pension he is entitled to,[78] any compensation for loss or damage which he may have suffered,[79] and any remuneration or reward for work done prior to sequestration.[80]

2.5.4 Rehabilitation

It has been mentioned that rehabilitation, after sequestration, is the only way in which a debtor can obtain the discharge of unpaid debts.[81] The Insolvency Act provides for the rehabilitation of insolvent debtors by way of automatic rehabilitation or by way of a court order.[82]

There are different circumstances within which an insolvent may make an application to court for rehabilitation. Section 124(1) allows an insolvent to bring an immediate *ex parte* application for rehabilitation where an offer of composition has been made and accepted by the creditors, as envisaged by section 119(7), and after obtaining a certificate from the Master

[72] [2013] ZAFSHC 45.
[73] *The World Bank Report* (note 2 above) para 123.
[74] Insolvency Act S 20(2)(a).
[75] Ibid S 20(2)(b).
[76] Ibid S 82(6).
[77] Roestoff (note 6 above) 602.
[78] Insolvency Act S 23(7).
[79] Ibid S 23(8).
[80] Ibid S 23(9).
[81] See 1.1 above.
[82] Sharrock et al (note 67 above) 208.

to that effect, provided that payment has been made and that not less than three weeks' notice of intention to make the application was given in the Gazette and to the trustees.

An insolvent who does not qualify for rehabilitation in terms of section 124(1) may make an application in terms of section 124(2). Section 124(2)(a) permits an insolvent to apply for rehabilitation after twelve months have elapsed since the confirmation by the Master of the first account in the estate. If the insolvent's estate has been previously sequestrated, the insolvent must wait for three years to elapse before applying for rehabilitation in terms of section 124(2)(b). Roestoff notes that South Africa does not place a limitation on the number of times that a person can obtain a rehabilitation order, under the Insolvency Act.[83] However, an insolvent, that has been previously sequestrated, has to wait a period of three years before reapplying for rehabilitation.[84] Section 124(2)(c) provides that if the insolvent has been previously convicted of a fraudulent act in relation to the existing or any previous insolvency, then he must wait five years, from the date of sequestration, to apply for rehabilitation. A positive recommendation by the Master is required where an application is brought within four years.[85] Section 124(3) permits an insolvent to apply for rehabilitation after six months from the date of sequestration if no claim has been proved against his estate, if his estate has not been previously sequestrated and if he has not been convicted of any fraudulent act in relation to the existing insolvency. Section 124(2) and (3) of the Insolvency Act provides that the insolvent must give not less than six weeks' notice of his intention to apply for rehabilitation to the Master and to the trustee, in writing, and by advertisement in the Gazette. The debtor may apply to the court for rehabilitation at any time after the Master has confirmed a plan of distribution which provides for the full payment of all claims as well as interest thereon and the costs of sequestration.[86]

Section 124(5) permits the insolvent to apply for rehabilitation after confirmation by the Master of a plan of distribution providing for the payment in full of all claims proved against the insolvents estate, together with interest thereon and all the costs of sequestration. The

[83] Roestoff (note 6 above) 601.
[84] Ibid.
[85] Insolvency Act S 124(2).
[86] Ibid S 124(5).

insolvent must give not less than three weeks' notice of his intention to apply for rehabilitation to the Master and to the trustee, in writing.

An insolvent that has not been rehabilitated within ten years from the date of sequestration of his estate shall be deemed to be rehabilitated after the expiry of such a period unless an application is brought by an interested person opposing the rehabilitation of the insolvent.[87]

The effect of rehabilitation of an insolvent person is that it puts an end to his status as an insolvent, it relieves the insolvent of every disability which resulted from the sequestration and it discharges all debts of the insolvent, which were due or which arose before the sequestration, save for any debts which arose out of any fraud on the part of the insolvent.[88] The debtor is also not discharged from paying maintenance.[89] According to Bertelsmann *et al,* the wording of section 129(1) of the Insolvency Act suggests that a complete discharge of all pre-sequestration debts is afforded to the debtor.[90]

2.5.5 The courts' approach

The courts' approach when deciding whether to grant rehabilitation orders to insolvent debtors may be described as 'one of greater tolerance'.[91] An insolvent does not have a right to rehabilitation and the court has discretion to refuse, postpone or grant the application for rehabilitation, either unconditionally or subject to certain conditions.[92] 'The essential enquiry is whether in the light of all the relevant facts – ie, the applicant's interests, the creditors' interests, whether or not they have proved claims, and the commercial public at large – the insolvent is a fit and proper person to participate in commercial life free of any constraints and disabilities.'[93]

In *Ex Parte Harris*[94] Gamble J refers to the test formulated by Wessels J, stating that an applicant wishing to be rehabilitated must 'satisfy the court that he is a fit and proper person to be permitted to trade with the public on the same basis as any other honest business

[87] Insolvency Act S 127A(1).
[88] Ibid S 129 (1).
[89] Boraine and Roestoff (note 6 above) 98.
[90] Bertelsmann et al (note 32 above) see footnote 417.
[91] Ibid 575.
[92] Insolvency Act S 127(7). See also *Ex parte Snooke* 2014 (5) SA 426 (FB).
[93] *Ex parte Snooke* 2014 (5) SA 426 (FB) para 33.
[94] *Ex parte Harris (Fairhaven Country Estate (Pty) Ltd as intervening party*) [2016] 1 All SA 764 (WCC).

person.'[95] This means that if the applicant conducted himself in a negligent manner then he ought not to be rehabilitated unless he can show his intention to adopt better methods.[96]

The Court is thus not only concerned with the interests of past creditors but is also concerned with the applicant's future behaviour.[97] 'The effect of rehabilitation is to restore him fully to the marketplace and, more importantly, to the obtaining of credit'.[98]

2.6 Law reform initiatives

2.6.1 Draft Insolvency Bill

The South African Law Reform Commission (the Commission) recognised the need for change in South African insolvency law and in 2000 they published a report, including a Draft Insolvency Bill.[99] In 2010, the Department of Justice and Constitutional Development completed a working document which contained the Draft Insolvency Bill.[100] If this Draft Insolvency Bill is enacted, it will replace the current Insolvency Act in South Africa.[101]

One of the proposals put forward in the Draft Insolvency Bill, is for the inclusion of a pre-liquidation composition which will serve as an alternative debt relief procedure.[102] Pre-liquidation compositions are beneficial to debtors who are unable to prove the stringent 'advantage of creditors' requirement and are thus excluded from the sequestration

[95] *Ex parte Harris* (see note 94 above) para 84.
[96] Ibid.
[97] *Ex parte Le Roux* 1996 (2) SA 419 (C).
[98] Ibid.
[99] South African Law Reform Commission Project 63 *Report on the review of the law of insolvency: Draft Insolvency Bill and explanatory memorandum* (2000) Volume 1: Explanatory Memorandum; Volume 2: Draft Insolvency Bill, available at *http://www.justice.gov.za/salrc/reports/r_prj63_insolv_2000apr.pdf* accessed on 20/11/2017. Boraine and Roestoff (note 25 above) 527.
[100] Ibid. The most recent unofficial version of the Draft Insolvency Bill is a working document compiled by Tienie Cronje in February 2015.
[101] Department of Justice and Constitutional Development 'Draft Insolvency Bill Under Construction' available at *http://www.sabinetlaw.co.za/justice-and-constitution/articles/draft-insolvency-bill-under-construction* accessed on 20/11/2017.
[102] An unofficial working copy of the proposed *Insolvency Bill*, containing an *explanatory memorandum*, is on file with the author and is available, upon request, from Mr MB (Tienie) Cronje (mccronje@justice.gov.za), researcher at the Department of Justice and Constitutional Development (Department of Justice and Constitutional Development *Unofficial working draft*) (Hereinafter referred to as '*Draft Insolvency Bill*' and '*Explanatory memorandum*' respectively). Boraine and Roestoff (note 25 above) 527. See also Coetzee (note 7 above) 247.

process.[103] According to Coetzee, 'the procedure is aimed at negotiated settlements between parties.'[104]

Pre-liquidation compositions are available to natural persons whose debts do not exceed R200 000 and who are unable to pay their debts.[105] The composition becomes binding on all creditors if it is accepted by the majority in number and two-thirds in value of the concurrent creditors who vote on the composition.[106] This is in contrast with the common law compromise where full cooperation is required from all the creditors in order for the compromise to be binding.[107]

If the composition is not accepted by the majority of the creditors, and the debtor is not able to pay more than what he offered in the proposed composition, the proceedings will cease and the debtor will be in the position that they were in prior to the commencement of the procedure.[108] The debtor may thereafter apply to the Master for a discharge of debts, other than secured or preferred debts, if the Master is satisfied that the administrator and the creditors were given notice of the application, the proposed composition was the best offer which the debtor could make, the debtor's inability to pay his debts in full is not due to criminal or inappropriate behaviour, and the debtor does not qualify for an administration order under section 74 of the MCA.[109] According to the explanatory memorandum, this provision affords debtors 'who do not qualify for liquidation an opportunity for a fresh start which entails a discharge of debts.'[110] If enacted, the Draft Insolvency Bill would allow debtors, with little or no income, an opportunity to obtain a discharge, without entering into the formal sequestration process. Steyn submits that one advantage of the proposed pre-liquidation composition is that it would apply to all types of debts and it would not be limited to debts arising out of credit agreements.[111]

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[103] Coetzee (note 7 above) 247.
[104] Ibid 250.
[105] *Draft Insolvency* Bill (note 102 above) S 118(1).
[106] Ibid S 118(17).
[107] See 2.2 above.
[108] *Draft Insolvency* Bill (note 102 above) S 118(22)(a).
[109] Ibid S 118(22)(b).
[110] *Explanatory memorandum* (note 102 above*)* 208.
[111] L Steyn 'Sink or swim? Debt review's ambivalent "lifeline" – a second sequel to "…a tale of two judgments" *Nedbank v Andrews* (240/2011) 2011 ZAECPEHC 29 (10 May 2011); *Firstrand Bank Ltd v Evans* 2011 4 SA 597 (KZD) and *Firstrand Bank Ltd v Janse Van Rensburg* 2012 2 All SA 186 (ECP)' *Potchefstroom Electronic Law Journal* (2012) 190, 221.

It is also worth mentioning that the Draft Insolvency Bill retains the 'advantage of creditors' requirement[112] and there is no mention of reducing the discharge period for debtors who undergo liquidation. The reason that the Commission puts forward, in the explanatory memorandum, for not reducing the discharge period is as follows:

> The period of 10 years is somewhat arbitrary as would be any other period substituted for it. The only guideline is a vague feeling about what a proper period should be. Other countries have reduced their periods for "automatic" rehabilitation. Conceptually it makes sense to provide for different periods for different scenarios. However, simplicity is desirable in this regard and it is advisable for a simple rule that rehabilitation takes place after a fixed number of years unless there is a court order. In the light of the limited comments in this regard and the fact that the 10 year period in the present legislation has become relatively well-known, no shortening of the period is proposed.[113]

2.6.2 Proposed Debt Relief Bill

The National Assembly has recently granted the Trade and Industry Portfolio Committee (the Committee) permission to introduce a bill that will amend the National Credit Act.[114] The Committee recognises that over-indebtedness is a challenge in South Africa and many people cannot afford to undergo debt review.[115] They recognise that the current debt relief mechanisms in place in South Africa exclude vulnerable consumers, such as debtors in lower income groups.[116] One of the objects of the proposed Debt Relief Bill is to provide debt relief to debtors who are unable to access any of the debt relief mechanisms currently in place in South Africa.[117]

Part E of the proposed Debt Relief Bill provides relief, in the form of Debt Intervention, for debtors with no income, or with an income not exceeding R7500 per month, with no

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[112] *Draft Insolvency* Bill (note 102 above) S 3(8)(a)(ii).
[113] *Explanatory memorandum* (note 102 above) 197.
[114] 'Debt Forgiveness' available at *https://pmg.org.za/page/Debtforgiveness* accessed on 20/10/2017.
[115] The Department of Trade and Industry 'Presentation to Portfolio Committee on the Proposed Draft National Credit Policy Review for Debt Relief and the National Credit Amendment Bill, 2017 Developed by the Portfolio Committee on Trade and Industry' available at *https://www.thedti.gov.za/parliament/2017/Debt_Relief.pdf* accessed on 20/10/2017, 5.
[116] Memorandum on the Objects of the National Credit Amendment Bill, 2018 (GN 922, *Government Gazette* 41274, 24 November 2017) 36.
[117] Ibid.

realisable assets and who are not subject to debt review.[118] It also provides relief for disabled persons as well as minor or woman-headed households.[119] The applicants total unsecured debts must not exceed an amount of R50 000.[120] A debtor may only apply once for Debt Intervention.[121] If the debtor qualifies for Debt Intervention, the Tribunal will suspend all qualifying credit agreements, in part or in full, for one year.[122] This period can be extended for a further year, depending on the financial circumstances of the debtor.[123] If, during the period of Debt Intervention, the financial position of the applicant has not sufficiently improved, the Tribunal will extinguish, in part or in full, the qualifying debts of the applicant.[124] A debt intervention applicant may apply, at any time, for a rehabilitation order, provided that the applicant has fulfilled the obligations in terms of the debt intervention order.[125] The Tribunal will grant the rehabilitation order if the applicant has shown that his financial position has improved.[126] The proposed Debt Relief Bill also makes provision for the Minister to establish a financial literacy and budgeting skills programme to assist consumers in managing their financial position.[127] The proposed Debt Relief Bill further makes it mandatory for consumers to take out credit life insurance where they enter into credit agreements exceeding six months and where the principal debt is less than R50 000.[128]

2.7 Conclusion

Of the three debt relief mechanisms available in South Africa, only the Insolvency Act provides debtors with a discharge of unpaid debts. Discharge is however only a consequence of rehabilitation in terms of the Insolvency Act. Furthermore, it is difficult for many consumers in South Africa, especially consumers with little or no income, to access sequestration as a debt relief measure, due to the 'advantage of creditors' requirement. Even though debtors have access to debt review in terms of the NCA and administration orders in terms of the MCA, these mechanisms do not offer a discharge of unpaid debts and there is no limit on how

[118] National Credit Amendment Bill (GN 922, *Government Gazette* 41274, 24 November 2017) S 88A(1)(a).
[119] Ibid S 88A(1)(a).
[120] Ibid S 88A(2).
[121] Ibid S 88A(2).
[122] Ibid S 88C(3)(a).
[123] Ibid S 88C(3)(a)(i).
[124] Ibid S 88C(4).
[125] Ibid S 88E(2).
[126] Ibid S 88E(6)(b).
[127] Ibid S 171(bA).
[128] Ibid S 17(b).

long the repayment plan will last for. As a result of this, South Africans are stuck in a vicious cycle of debt. Van Heerden and Boraine suggest that South African law needs to find a suitable alternative debt relief measure to insolvency law that will provide for the discharge of debts.[129] If the proposals put forward in the Draft Insolvency Bill and Debt Relief Bill are enacted, this may offer alternative relief for LILA and NINA debtors. Pre-liquidation Compositions in terms of the Draft Insolvency Bill and Debt Intervention in terms of the Debt Relief Bill also provide a discharge of unpaid debts without having to undergo sequestration. However, the current rehabilitation provisions under the Insolvency Act will remain largely unchanged which means that debtors still have to wait long periods of time to obtain a discharge.

[129] Van Heerden and Boraine (note 44 above) 53.

CHAPTER 3: DISCHARGE PRINCIPLES IN FOREIGN JURISDICTIONS

3.1 Introduction

The World Bank, in January 2011, convened its Insolvency and Creditor/Debtor Regimes Task Force (Task Force), to consider the insolvency of natural persons.[130] The World Bank and Task Force created a working group of experts to investigate the issue and to consider worldwide trends.[131] The Report reflects these investigations. This chapter will discuss the World Bank Report's findings on international trends and guidelines relating to the discharge of debts. It will then examine the debt relief mechanisms in the USA, England and Wales, New Zealand, Ireland and Japan, and how these countries deal with the discharge of debts.

3.2 The World Bank Report on the Treatment of the Insolvency of Natural Persons

According to the Report, discharge of debts is one of the most important characteristics of an insolvency regime for natural persons.[132] One of the main aims of an insolvency system for natural persons is economic rehabilitation.[133] This includes three elements. The first element is to free the debtor from excessive debt.[134] The Report points out that 'discharge is a very effective incentive for debtors to produce value to share with creditors.'[135] According to the Report, the most effective form of debt relief is a 'fresh start'.[136] This refers to a straight discharge which enables debtors to be discharged from their debt obligations without undergoing a payment plan.[137] The Report however recognises that many jurisdictions reject the notion of a straight discharge, opting rather for an 'earned new start' in terms of which the debtor is required to pay part of their debts in terms of a payment plan.[138] These payment plans require partial payment or a debt rearrangement plan that regulates the debtors payments over a period of time, as a prerequisite for discharge.[139]

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[130] *The World Bank Report* (note 2 above*)* para 4.
[131] Ibid para 8.
[132] Ibid para 449.
[133] Ibid para 359.
[134] Ibid para 359.
[135] Ibid para 65.
[136] Ibid para 360.
[137] Ibid para 360.
[138] Ibid para 361.
[139] Ibid para 361.

The Report envisages a repayment plan that lasts between three and five years.[140] According to Boraine and Roestoff, systems that have repayment plans spanning over long periods of time, repress the returns that a creditor can obtain and creates a disincentive for debtors.[141] Payment plans that last longer than three years have been shown to be unsuccessful.[142] On the other hand, a limited payment term can also lead to a lack of motivation by the debtor which will delay his rehabilitation.[143] According to the Report, a more attainable goal for a repayment plan would be to encourage responsible payment and to educate debtors.[144] Payment plans should also offer incentives to debtors, in the form of a discharge of unpaid debts.[145]

The second element is the principle of non-discrimination, in terms of which, debtors who have obtained debt relief should not be discriminated against. [146] The third element is the financial education of debtors so that they learn how to use credit properly and they do not become 'excessively indebted' again.[147] One way to discourage debtors from becoming indebted again, after obtaining relief, is by placing a prohibition on repeat filing for debt relief.[148] Prior negotiations and debt counselling also have an educational value.[149] Denying a discharge to debtors who abuse the system, or who incur debt in a fraudulent or unscrupulous manner, also ensures that only 'unfortunate but honest debtors' obtain relief.[150]

The Report also points out that in order for a discharge to be more effective, the discharge should include as many debts as possible.[151] Common exclusions include claims for maintenance, fines, taxes, student loans and post-commencement debts.[152]

According to Boraine and Roestoff, 'South Africa has noticeably fallen behind the rest of the world'[153] with regard to their discharge principles. It is therefore vital to consider the

[140] *The World Bank Report* (note 2 above) para 361.
[141] Boraine and Roestoff (note 25 above) 545.
[142] Ibid.
[143] *The World Bank Report* (note 2 above) para 263.
[144] Ibid para 264.
[145] Ibid para 281.
[146] Ibid para 359.
[147] Ibid para 359.
[148] Ibid para 366.
[149] Ibid para 368.
[150] Ibid para 370, 371.
[151] Ibid para 372.
[152] Ibid para 373 – 381.
[153] Boraine and Roestoff (note 25 above) 546.

discharge trends applicable in foreign jurisdictions to consider which principles can be adopted into South African insolvency law. A discussion of the debt relief measures in other jurisdictions will now take place.

3.3 Debt relief measures in foreign jurisdictions

3.3.1 The United States of America

3.3.1.1 Background

One of the main aims of American bankruptcy law is the discharge of debts, which results in a fresh start.[154] This aim is emphasised in the case of *Local Loan Co v Hunt*[155] where the court stated that: 'One of the primary purposes of the Bankruptcy Act is to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes…"'

American bankruptcy law seeks to advance two goals. Firstly, it seeks to provide the 'honest but unfortunate debtor' with a fresh start.[156] According to Calitz 'the underlying philosophy of this approach is that the debtor is a victim to unforeseen circumstances and should promptly be allowed back into society without the millstone of perpetual indebtedness.'[157] The second goal is to treat creditors fairly.[158] The equal treatment of creditors ensures that creditors share the debtor's financial value in an equitable manner. This equal treatment discourages 'overly aggressive collection efforts' by creditors.[159] The introduction of the Bankruptcy Abuse Prevention and Consumer Protection Act 2005 (BAPCPA) has however represented a shift away from a fresh start policy which favours debtors.[160]

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[154] RG Evans 'A critical analysis of problem areas in respect of assets of insolvent estates of individuals' LLD thesis University of Pretoria (2008) available at *https://repository.up.ac.za/bitstream/handle/2263/24939/Complete.pdf?sequence=7* accessed on 20/11/2017, 151. Roestoff and Coetzee (note 9 above) 71.

[155] 292 US 234 (1934).

[156] JT Ferriell and EJ Janger *Understanding Bankruptcy* 2nd ed Lexis Nexis (2007) 1.

[157] Calitz (note 48 above) 400.

[158] Ferriell and Janger (note 150 above) 1.

[159] Ibid 2.

[160] Calitz (note 50 above) 405.

3.3.1.2 Bankruptcy

The Bankruptcy Reform Act 1978 (Bankruptcy Code) offers two forms of debt relief to debtors, namely liquidation proceedings in terms of Chapter 7 and a debt-adjustment repayment plan in terms of Chapter 13. A reorganisation in terms of Chapter 11 is also available for insolvent individuals, but this procedure is expensive and complicated and, therefore, is generally utilised by businesses and not individual persons.[161]

Chapter 7 liquidations seek to advance two goals, namely, to liquidate the debtor's assets and to discharge unsecured debts.[162] This procedure can be entered into either voluntarily, by the debtor, or involuntarily, by the creditor. This procedure entails the collection and realisation of the debtor's assets by the trustee, who then distributes the realised assets to the creditors.[163] Certain property is exempt from this procedure and this exempt property differs from state to state.[164] Evans believes that the preservation of these, non-exempt, assets assist the debtor to obtain a 'fresh start'.[165] Debtors who successfully enter into and complete the Chapter 7 process receive an automatic discharge of most of their debts.[166] There is however a limitation with regard to who qualifies for a discharge. The court will not grant a discharge to debtors who have previously been granted a Chapter 7 discharge eight years before the new filing.[167] Debts that are exempt from being discharged include obligations to pay child support or alimony, certain tax obligations, student loans, debts obtained by fraud or theft, fines owed to government and debts owing for wilful and malicious injury.[168] The discharge of debts relates only to the unsecured debts and not to the amount which the debtor pays to the creditor.[169]

Chapter 13 of the Bankruptcy Code provides a procedure for the rescheduling of debts. This procedure can be entered into voluntarily by the debtor who must file a proposed repayment

[161] INSOL International *Consumer Debt Report II: Report of findings and recommendations* (2011) 302. Roestoff and Coetzee (note 9 above) footnote 161.
[162] Roestoff and Coetzee (note 9 above) 72.
[163] J Calitz (note 50 above) 402.
[164] INSOL International *Consumer Debt Report II: Report of findings and recommendations* (2011) 304.
[165] RG Evans 'A brief explanation of consumer bankruptcy and aspects of the bankruptcy estate in the United States of America' *The Comparative and International Law Journal of Southern Africa* (2010) 346.
[166] J Calitz (note 50 above) 402.
[167] Bankruptcy Code S 727(a)(8).
[168] INSOL International *Consumer Debt Report II: Report of findings and recommendations* (2011) 308 – 309.
[169] Roestoff and Coetzee (note 9 above) 72.

plan,[170] have a regular source of income[171] and whose debts must not exceed $394, 725.[172] The debtors' disposable income is used to fund the repayment plan for the total or partial satisfaction of the creditors' claims.[173] A debtor who enters into this procedure does not receive an automatic discharge and the debtor has to complete the required payments under the plan before they can receive a discharge.[174] The period of the repayment plan is usually three years, but it may continue for a maximum of five years, with the courts approval.[175] A debtor may, however, request a Chapter 13 'hardship discharge' which the court may grant if it is satisfied that the failure of the debtor to complete the plan is due to circumstances for which the debtor should not justly be held accountable, the amount received by the creditors on their unsecured claims is not less than the liquidation value, and it is not practical to modify the payment plan.[176] According to Coetzee, the purpose of the hardship procedure is to assist debtors who have entered into a repayment plan, and who have subsequently become NINA debtors.[177] The debts that are not subject to discharge are similar to the non-dischargeable debts in terms of Chapter 7, save for debts arising from wilful and malicious injuries and debts owed to the government.[178]

Unlike the Chapter 7 proceedings where the assets of the debtor are liquidated, debtors subject to a repayment plan may retain their valuable assets and pay the creditors out of their future income.[179] Debt repayment plans, under Chapter 13, were designed to avoid the stigma attached to liquidation proceedings under Chapter 7 and it avoids the feeling of guilt by debtors who are able to offer some form of payment to their creditors.[180] The Bankruptcy Code also contains a provision which specifically protects debtors under the Bankruptcy Code against discrimination. Section 525(a) of the Bankruptcy Code prevents governmental units

[170] INSOL International *Consumer Debt Report II: Report of findings and recommendations* (2011) 302.
[171] Roestoff and Coetzee (note 9 above) 72.
[172] 'Federal Register/Vol. 81, No 34/ Monday, February 22, 2016/ Notices' available at *http://bankruptcy.cooley.com/wp-content/uploads/sites/245/2016/02/Fed-Reg-Dollar-Amount-Adjustments-20161.pdf a*ccessed on 06/10/2017.
[173] Roestoff and Coetzee (note 9 above) 72.
[174] Ibid.
[175] Ibid.
[176] Bankruptcy Code S 1328 (b).
[177] Coetzee (note 7 above) 45.
[178] INSOL International *Consumer Debt Report II: Report of findings and recommendations* (2011) 309.
[179] Calitz (note 50 above) 402.
[180] INSOL International *Consumer Debt Report II: Report of findings and recommendations* (2011) 311.

from denying, revoking, suspending or refusing to renew a license, or similar grant, and from denying, terminating or discriminating with regard to employment of the debtor or bankrupt, while Section 525(b) prevents private employers from terminating or discriminating with regard to employment of the debtor or bankrupt.

The BAPCPA, which amended the Bankruptcy Code, introduced a 'means test', which determines for which debt relief procedure a debtor will qualify.[181] Prior to the introduction of the BAPCPA, debtors were able to unconditionally discharge certain debts without having to pay off at least a portion of the debt through a repayment plan.[182] The BAPCPA represents a shift away from the 'fresh start' policy[183] and debtors are now required to undergo a 'means test' to determine whether they are able to pay a portion of their debt from future income.[184] Where the means test is applied and it is found that the debtor has sufficient disposable income, the debtor is precluded from using the Chapter 7 process.[185] This means test was introduced as a solution to combat abuse of the procedure.[186]

The BAPCPA also introduced mandatory credit counselling and debtor education as a prerequisite for entering into bankruptcy proceedings.[187] This includes a briefing from an approved non-profit budget and credit counselling agency that assists the consumer in performing a budget analysis and educates them about available credit counselling.[188] This process encourages out-of-court negotiations between the debtor and creditor, without having to pursue the formal Chapter 7 or Chapter 13 procedure.[189] Debtors are also required to complete an 'instructional course concerning personal financial management' pursuant to a discharge in terms of Chapter 7 or Chapter 13.[190]

The introduction of the BAPCPA has been widely criticised. According to Kilborn, the introduction of the means test has burdened debtors with loads of paperwork and has

[181] Roestoff and Coetzee (note 9 above) 73.
[182] MA DeFalaise 'Means Testing and Preventing Abuse by Consumer Debtors' United States Attorneys' Bulletin (2006) available at *https://www.justice.gov/sites/default/files/usao/legacy/2006/09/07/usab5404.pdf* accessed on 10/10/2017.
[183] Calitz (note 50 above) 405.
[184] Roestoff and Coetzee (note 9 above) 73.
[185] Calitz (note 50 above) 406.
[186] Ibid.
[187] Ibid.
[188] Ibid 407.
[189] Ibid 407.
[190] BAPCPA S 727(a)(11).

burdened administrators who have to monitor compliance.[191] Calitz criticises the mandatory credit counselling and debtor education as an added expense that is difficult to implement.[192]

3.3.1.3 Alternatives

An alternative to debt relief under Chapter 7 or Chapter 13 of the Bankruptcy Code is voluntary settlement or a 'debt management plan'.[193] These plans are however costly and often fail to offer relief to debtors.[194] They also do not provide reprieve to the debtor through the discharge of unpaid debts.

3.3.2 England and Wales

3.3.2.1 Background

Personal insolvency law in England and Wales consists of both statutory and non-statutory procedures.[195] The statutory procedures available include bankruptcy, Debt Relief Orders, Individual Voluntary Arrangements, County Court Administration Orders and Debt Management Arrangements. These measures are regulated by the Insolvency Act 1986 (IA), the Enterprise Act 2002 (EA) and the Insolvency Rules 1986 (IR), with 2010 amendments.[196] The common law Debt Management Plan is also available to debtors seeking debt relief.[197]

3.3.2.2 Bankruptcy

According to Walters, bankruptcy, in terms of the IA, 'amounts to a statutory bargain that seeks to balance the interests of debtors and creditors.'[198] A petition for bankruptcy may be brought by a creditor or by the debtor him or herself,[199] and there are no strict entry requirements.[200] Upon entering into the procedure, all non-exempt property is surrendered by the debtor and the debtor may keep exempt property including tools of trade and any items

[191] JJ Kilborn 'Still Chasing Chimeras but Finally Slaying Some Dragons in the Quest for Consumer Bankruptcy Reform' *Consumer Law Review* (2012) 6.
[192] Calitz (note 50 above) 408.
[193] INSOL International *Consumer Debt Report II: Report of findings and recommendations* (2011) 312.
[194] Ibid.
[195] Ibid 112.
[196] Ibid 112.
[197] Ibid 112.
[198] A Walters 'Individual Voluntary Arrangements: A "Fresh Start" for Salaried Consumer Debtors in England and Wales?' *International Insolvency Review* (2009) 5, 14.
[199] IA S 264.
[200] IA S 265.

necessary for their domestic needs.[201] The IA also offers some protection to debtors, and to their families, with regard to their home.[202] The debtor is automatically discharged after one year,[203] but he may be discharged sooner upon notice by the Official Receiver that an investigation into the affairs and conduct of the debtor is unnecessary or have been concluded.[204] McKenzie Skene and Walters note that the reason for the reduction of the discharge period was to 'encourage honest but failed entrepreneurs to re-engage in risk-taking by providing a quick, comprehensive discharge and by reducing the stigma attaching to bankruptcy…'.[205] Coetzee however notes that this shorter discharge period does not serve an educational purpose as it will not encourage the responsible use of credit amongst consumers and may even lead to possible abuses of the procedure.[206] The discharge period may be suspended by the court if the court is satisfied that the debtor has failed or is failing to comply with his obligations.[207] This is in line with the Report which encourages 'good behaviour' as a prerequisite to the discharge of debts.[208] The discharge does not release the debtor from debts owing to secured creditors, debts incurred in respect of fraud or fraudulent breach of trust, fines imposed for an offence, liability for damages, debts that arose in terms of the Child Support Act 1991 or any debts that were not provable in bankruptcy.[209]

3.3.2.3 Alternatives

England and Wales offers the possibility of a Debt Relief Order to NINA debtors, whose total liabilities do not exceed £15 000, whose surplus income does not exceed £50 and whose assets do not exceed £300.[210] The debtor must not have previously been admitted to the proceedings for six years prior to the application.[211] This procedure is less costly than bankruptcy as there is no court involvement.[212] A Debt Relief Order places a moratorium on

[201] IA S 283(2).
[202] IA S 283A.
[203] IA S 279(1).
[204] IA S 279(2).
[205] D McKenzie Skene and A Walters 'Consumer Bankruptcy Law Reform in Great Britain' *American Bankruptcy Law Journal* (2006) 482.
[206] Coetzee (note 7 above) 422.
[207] IA S 279(4).
[208] *The World Bank Report* (note 2 above) para 189.
[209] IA S 281.
[210] Roestoff and Coetzee (note 9 above) 74.
[211] 'The Feasibility of a Debt Forgiveness Programme in South Africa' (2015) available at *https://www.thedti.gov.za/parliament/2016/Debt_Forgiveness_Report.pdf* accessed on 15/10/2017, 13.
[212] Roestoff and Coetzee (note 9 above) 74.

the qualifying debts of the debtor for a period of one year[213] after which the debtor is discharged from all qualifying debts.[214] The debtor is not discharged for any debts arising as a result of fraud or fraudulent breach of trust to which the debtor was party.[215]

Individual Voluntary Arrangements allow debtors to avoid bankruptcy by making a proposal to their creditors in order to reach a binding agreement with regard to the payment of their debts.[216] In order to be binding the proposal has to be accepted by 75 percent of the creditors.[217] This procedure offers some sort of debt relief to debtors who can agree on a discharge with their creditors.[218] Whist legislation does not specify the duration of the period for which the procedure must run, in practice it generally runs for at least five years.[219] This process is a good alternative to bankruptcy as it avoids the 'greater publicity and perceived stigma associated with bankruptcy.'[220]

The County Court Administration Order is available to debtors whose total debts do not exceed £5000.[221] McKenzie Skene and Walters describes this process as a 'court-based debt management solution designed to provide relatively small debtors who have some income but limited assets with respite from enforcement coupled with rescheduled and consolidation of their debts.'[222] This process offers some sort of debt relief to debtors where the parties agree that the debtor will only be required to pay a portion of the debt and the balance of their debts will be discharged.[223]

Debt Management Arrangements are also available for debtors 'who have a regular source of surplus income.'[224] However, this process offers very little relief to debtors and it may run for a long period of time.[225]

[213] IA S 251H(1).
[214] IA S 251I(1).
[215] IA S 251((3).
[216] Walters (note 198 above) 18.
[217] Ibid.
[218] McKenzie Skene and Walters (note 205 above) 485.
[219] Walters (note 198 above) 18.
[220] McKenzie Skene and Walters (note 205 above) 485.
[221] Ibid 487.
[222] Ibid 487.
[223] Ibid 488.
[224] McKenzie Skene and Walters (note 205 above) 488.
[225] Ibid 489.

3.3.3 New Zealand

3.3.3.1 Background

New Zealand's personal insolvency regime is regulated by the Insolvency Act 2006[226] (IANZ). This Act provides for a bankruptcy process[227] and alternative debt relief measures, namely, the No-Asset Procedure, proposals and Summary Instalment Orders.[228] Of these four procedures, only the bankruptcy process and the No-Asset Procedure allow for the automatic discharge of debts.

3.3.3.2 Bankruptcy

A creditor may apply to the court[229] and a debtor may apply to the Assignee to enter into bankruptcy proceedings.[230] In order to enter into the proceedings, the debtor has to have combined debts of $1000.[231] All provable debts[232] that a bankrupt owes at the time of adjudication or after adjudication but before discharge,[233] are included in the procedure and are automatically discharged after three years,[234] save for certain exceptions.[235] Alternatively, the bankrupt may at any time apply to the court for an order to be discharged, unless an application for discharge has previously been refused, in which case the bankrupt may only apply again after a specified date.[236] The Assignee must summon the bankrupt concerning his or her discharge and the court must conduct a public examination in certain circumstances.[237] The court may grant or refuse the discharge, having regard to all the circumstances of the case.[238] The bankrupt is not released from any debt incurred by fraud,[239] debt for which the bankrupt has obtained forbearance through fraud to which the bankrupt was a party,[240] any

[226] The Public Act 2006 No 55.
[227] IANZ S 7.
[228] Ibid S 8.
[229] Ibid S 13 – 15.
[230] Ibid S 45 – 49.
[231] Ibid S 45.
[232] Ibid S 231.
[233] Ibid S 232(1).
[234] Ibid S 290.
[235] Ibid S 304.
[236] Ibid S 294.
[237] Ibid S 295(1).
[238] Ibid S 298.
[239] Ibid S 304(2)(a).
[240] Ibid S 304(2)(b).

judgment debt,[241] any amount payable under a maintenance order[242] or any amount payable under the Child Support Act 1991.[243] The Assignee or a creditor may apply to have an absolute discharge reversed two years after the discharge[244] or two years after the discharge takes effect, in the case of a conditional or suspended discharge.[245] The court may reverse the discharge if it is satisfied that new facts have arisen since the order of discharge was made[246] and that, had the court known of the new facts, the court would have been justified in refusing the discharge.[247]

3.3.3.3 Alternatives

An alternative to bankruptcy is the No-Asset Procedure which offers debt relief to debtors who have no realisable assets.[248] This procedure has strict entry requirements and a debtor must show that he or she has no realisable assets[249] and that his or her total debts (excluding student loans) are between NZ$1000 and NZ$47 000.[250] The debtor must also not have previously been admitted into the No-Asset Procedure[251] or been adjudicated bankrupt[252] and the debtor must not have the means to repay the debt.[253] Maintenance orders, amounts payable under the Child Support Act 1991 and student loans are excluded from this procedure.[254] The debtor's participation in the No-Asset Procedure is terminated by the Assignee when the debtor applies for adjudication or when a creditor applies for the debtor's adjudication as a bankrupt.[255] If the procedure is not terminated in one of these ways then the debtor is automatically discharged 12 months after being admitted to the No-Asset Procedure.[256] The Assignee may however extend this 12 month period.[257] Telfer notes that

[241] Ibid S 304(2)(c).
[242] Ibid S 304(2)(d).
[243] IANZ S 304(2)(e).
[244] Ibid S 300(1)(a).
[245] Ibid S 300(1)(b).
[246] Ibid S 301(1)(b)(i).
[247] Ibid S 301(1)(b)(ii).
[248] Ibid S 361.
[249] Ibid S 363(1)(a).
[250] Ibid S 363 (1)(d).
[251] Ibid S 363(1)(b).
[252] Ibid S 363(1)(c).
[253] Ibid S 363 (1)(e).
[254] Ibid S 369(2).
[255] Ibid S 372.
[256] Ibid S 377(1).
[257] Ibid S 377(2).

due to the No-Asset Procedure having a shorter discharge period than the bankruptcy proceeding, this may lead to an abuse of the No-Asset Procedure.[258] Upon discharge, the debtor's debts are cancelled, including any penalties and interest that may have accrued.[259] Debts incurred by fraud, or debts for which the debtor has obtained forbearance through fraud, to which the debtor was a party are however excluded from discharge.[260] Keeper notes that the No-Asset Procedure does not have debt education as a prerequisite of discharge.[261] This is not in line with the Report and may be detrimental to debtors in the future.

An insolvent person may, as an alternative to bankruptcy proceedings, make a proposal to creditors for the payment or satisfaction of the insolvent's debts.[262] The proposal has to be accepted by three-quarters in value and the majority in numbers of creditors in order to be binding.[263] Alternatively, the debtor or creditor, with the debtor's consent,[264] may apply to the Assignee for a Summary Instalment Order whereby the debtor will pay his debts in instalments, or otherwise.[265] This procedure may only be used if the debtors total unsecured debts (excluding student loans) do not exceed NZ$47 000.[266] A Summary Instalment Order takes place over a period of three years, but may be extended to five years under special circumstances.[267] This is in line with the payment period envisaged in the World Bank Report.[268] Both the proposal and summary instalment order procedures do not provide for the discharge of unpaid debts.

3.3.4 Ireland

3.3.4.1 Background

Ireland's personal insolvency regime has recently undergone a complete overhaul with the introduction of the Personal Insolvency Act 2012 (PIA) which became effective in 2013. This

[258] TGW Telfer 'New Zealand bankruptcy law reform: The new role of the official assignee and the prospects for a no-asset regime' in Niemi-Kiesilainen J, Ramsay I and Whitford WC (eds) *Consumer bankruptcy in global perspective* Oxford and Portland Oregan: Hart Publishing (2003) 265-266.
[259] IANZ S 377A(1).
[260] Ibid S 377A(2).
[261] T Keeper 'New Zealand's No-Asset Procedure: A fresh start at no cost?' *14 QUT Law Review* (2014) 91.
[262] IANZ S 326.
[263] Ibid S 331(3).
[264] Ibid S 341.
[265] Ibid S 340.
[266] Ibid S 343 (1).
[267] Ibid S 349.
[268] See 3.2 above.

change has brought Ireland's personal insolvency regime in line with the main themes of the World Bank Report.[269] Irish bankruptcy law envisions an earned fresh start that requires debtors to make some sort of payment over a period of time.[270] The Irish law also gives the court discretion to decide the amount of the payment that the debtor has to make.[271] One significant change that has been brought about as a result of the PIA is the change from the twelve-year discharge period in the bankruptcy proceedings, to a three-year discharge period. According to the Law Reform Commission of Ireland, the discharge period of twelve years, which was previously in place in Ireland, is 'excessively long and contrasts sharply with the fresh start principle which characterises modern insolvency codes'.[272] Kilborn notes that the discharge requirements that are now in place in Ireland are innovative and introduce 'effective relief where none had existed before'.[273] The PIA provides four statutory debt relief mechanisms, namely, bankruptcy, Debt Relief Notices, the Debt Settlement Arrangement and the Personal Insolvency Arrangement.

3.3.4.2 Bankruptcy

Bankruptcy proceedings may be entered into against the debtor, whose debts exceed €20 000,[274] upon petition to the court by the creditor[275] or the debtor himself.[276] Irish bankruptcy law favours out-of-court negotiations between debtors and creditors,[277] and as a result, debtors have to earn their discharge when petitioning for an order of bankruptcy. In order to enter into bankruptcy proceedings, the debtor has to state in a sworn affidavit that he has 'made reasonable efforts to reach an appropriate arrangement with his creditors.'[278] Kilborn notes that the World Bank Report tries to encourage out-of-court negotiated

[269] JJ Kilborn 'Reflections of the World Bank's Report on the Treatment of the Insolvency of Natural Persons in the Newest Consumer Bankruptcy Laws: Columbia, Italy, Ireland' *Pace International Law Review* Vol 27 (2015) 338.
[270] Ibid 341.
[271] PIA S 157 (adding S 85D(1) to the Bankruptcy Act 1988). See also Kilborn (note 269 above) 341-342.
[272] Law Reform Commission of Ireland 'Consultation Paper: Personal Debt Management and Debt Enforcement' (2009), available at *http://www.lawreform.ie/_fileupload/consultation%20papers/Consultation%20Paper%20on%20Personal%20Debt%20Management%20and%20Debt%20Enforcement_FINAL%20DRAFT.pdf* accessed on 11/11/2017, 116.
[273] Kilborn (note 269 above) 338.
[274] PIA S 145 (amending Bankruptcy Act 1988 S 11).
[275] Irish Bankruptcy Act 1988 S 11(1).
[276] PIA S 145 (amending Bankruptcy Act 1988 S 11).
[277] Kilborn (note 269 above) 338.
[278] PIA S 145 (amending Bankruptcy Act 1988 S 11).

workouts in order to avoid the costs involved with formal intervention.[279] I submit that this pre-requisite to enter into bankruptcy proceedings would show a genuine effort on the part of the debtor and would assist in preventing abuse of the process. This would also assist courts as they will not have to hear unnecessary applications where the debtor has not attempted to negotiate with their creditors.

The debtor is automatically discharged on the third anniversary of the adjudication order and this discharge is not subject to the courts discretion.[280] The unrealised property of the debtor remains vested in the Official Assignee for the benefit of the creditors.[281] Kilborn describes the change from a twelve-year discretionary discharge period to a three-year non-discretionary discharge period as being a real innovation that offers effective relief.[282] The debtor is entitled to an order of discharge sooner than after a period of three years where he has paid the full amount of the debt, including interest, as the court may allow, or he has obtained the written consent of all his creditors.[283] Another way in which Irish law has tried to encourage out-of-court negotiations is by allowing the debtor to make an application to court, to grant a stay on the realisation of his estate, to enable him to make an offer of composition to his creditors.[284] Upon payment of the amount agreed upon in the composition, the debtor may apply to court to be discharged.[285]

3.3.4.3 Alternatives

The Debt Relief Notice procedure is available to low income debtors whose debts do not exceed €20 000.[286] The debtor's net disposable income may not exceed €60 a month[287] and their assets may not exceed €400.[288] The Debt Relief Notice procedure is administrative in nature and places a moratorium on any legal proceedings, enforcement procedures or any steps taken to recover the qualifying debt.[289] The Debt Relief Notice remains in effect for a

[279] Kilborn (note 269 above) 312.
[280] PIA S 157 (amending Bankruptcy Act 1988 S 85).
[281] Ibid.
[282] Kilborn (note 269 above) 338.
[283] PIA S 157 (amending Bankruptcy Act 1988 S 11).
[284] Bankruptcy Act 1988 S 38.
[285] Ibid S 41.
[286] PIA S 26(2)(a).
[287] Ibid S 26(2)(b).
[288] Ibid S 26(2)(c).
[289] Ibid S 35.

period of three years,[290] but this period may be extended upon application by the Insolvency Service.[291] After the three-year period the debtor is discharged of all qualifying debts, including interest, penalties and other sums which have become payable in relation to those debts.[292] The debtor's name is also removed from the Register of Debt Relief Notices, the creditors are notified of the discharge and a Debt Relief Certificate is issued to the debtor.[293] The debtor may be discharged of all their qualifying debts sooner where they pay an amount of not less than 50 per cent of their qualifying debts.[294]

The Debt Settlement Arrangement and Personal Insolvency Arrangement are also available for insolvent debtors in Ireland. The Debt Settlement Arrangement does not have strict entry requirements[295] and it allows the debtor to make a proposal to one or more of his creditors in respect of the payment of his debts.[296] The Personal Insolvency Arrangement allows a debtor, whose debts do not exceed €30 000,[297] to make a proposal to one of more of his creditors in respect of the payment of his debts.[298] Both these procedures require the majority of creditors, representing more than 65 percent in value of the total debts of the debtor, to accept the proposal in order for it to be binding.[299]

3.3.5 Japan

3.3.5.1 Background

Personal insolvency law in Japan consists of two types of proceedings, namely, liquidation in terms of the Bankruptcy Act[300] and rehabilitation in terms of the Civil Rehabilitation Act.[301]

[290] Ibid S 34(1).
[291] PIA S 34(2).
[292] Ibid S 46(1).
[293] Ibid S 46(2).
[294] Ibid S 37(2).
[295] Ibid S 57.
[296] Ibid S 55(1).
[297] Ibid S 91(1)(a).
[298] Ibid S 89(1).
[299] Ibid S 73(6) and S 110(a).
[300] No. 75 of 2004.
[301] No. 225 of 1999.

3.3.5.2 Bankruptcy

An application for liquidation under the Bankruptcy Act is deemed to be a filing for discharge.[302] In terms of this procedure, the debtor pledges their non-exempt assets which will be sold in execution and distributed to the creditors.[303] Exempt assets include the debtor's household furniture, goods and appliances, cash of up to ¥990 000 and unpaid salary of up to ¥330 000 per month.[304] After the proceeds have been distributed, the debtor is able to apply for a discharge, regardless of whether the entire debt has been paid off.[305] The discharge is however discretionary and the debtor is not automatically discharged.[306] Furthermore, the debtor may not be discharged if he was previously discharged within seven years of the new filing.[307] The discharge excludes debts arising from taxes, compensation for damages as a result of wilful tort, wages, penalties and fines, personal injury or death caused by an intentional or reckless act of the debtor and debts for alimony, maintenance or support of the debtor's spouse or child.[308] A debtor will only be granted a discharge if they have assets in their estate.[309] This means that there must be some form of advantage to creditors otherwise the procedure will be terminated.[310] Regardless of whether these conditions are met, the court has the right to grant a discharge if there is financial failure by the debtor.[311]

3.3.5.3 Alternatives

An alternative to liquidation is the special civil rehabilitation procedure which is available for debtors whose debts do not exceed ¥50 million.[312] In terms of this procedure, the debtor and creditor agree on a repayment plan in terms of which the debtor will pay a portion of their future income monthly to their creditors.[313] The repayment plan is over a period of three years, but may be extended to up to five years.[314] This procedure does not offer the debtor a

[302] J Matsushita 'Japan's Personal Insolvency Law' 42 *Texas International Law Journal* 765, 772 (2007) 767.
[303] 'The Feasibility of a Debt Forgiveness Programme in South Africa' (note 211 above) 14.
[304] Matsushita (note 302 above) 766.
[305] 'The Feasibility of a Debt Forgiveness Programme in South Africa' (note 211 above) 14..
[306] Ibid.
[307] Matsushita (note 302 above) 767.
[308] Ibid.
[309] '*The Feasibility of a Debt Forgiveness Programme in South Africa'* (note 211 above) 15.
[310] Ibid.
[311] Ibid. Matsushita (note 302 above) 767.
[312] Matsushita (note 302 above) 768.
[313] '*The Feasibility of a Debt Forgiveness Programme in South Africa'* (note 211 above) 15.
[314] Matsushita (note 302 above) 768.

discharge of unpaid debts and the debtor has to comply with the repayment plan before obtaining a discharge.

3.4 Conclusion

According to the World Bank Report, the three most important aspects of the rehabilitation include discharge, non-discrimination and debtor education. After considering the insolvency laws in USA, England and Wales, New Zealand, Ireland and Japan, it is apparent that the principles relating to the discharge of debts in most of these jurisdictions are in line with the Report. While some of these debt relief measures are flawed and may not be quite so straight forward in practice, South Africa is still able to learn from the worldwide trend of inclusivity and offering debtors a fresh start. It is important now to compare the debt relief measures applicable in these jurisdictions with the mechanisms in place in South Africa, in order to determine which principles, relating to the discharge of debts, South Africa can adopt into its insolvency regime.

CHAPTER FOUR: COMPARATIVE ANALYSIS

4.1 Introduction

According to Roestoff, 'South Africa has fallen behind the rest of the world and reform of the system's income restructuring measures, to bring them in line with modern trends, is vital.'[315] It is therefore useful to obtain insights by drawing comparisons between South Africa and USA, England and Wales, New Zealand, Ireland and Japan. This chapter will draw comparisons in order to determine which aspects can be adopted into South Africa's insolvency law, in order to bring it in line with the World Bank Report.

4.2 Comparative analysis

South Africa's debt relief mechanisms are substantially different from USA's bankruptcy laws. Firstly, it must be noted that the main aim of South Africa's Insolvency Act is for the sequestration to bring about an 'advantage of creditors.'[316] This is in contrast to USA's debtor friendly system where the main aim of bankruptcy law is to provide relief to the 'honest but unfortunate debtor'.[317] The BAPCPA has, however, represented a shift away from this approach and debtors no longer have a choice between Chapter 7 and Chapter 13 bankruptcy proceedings.[318] Chapter 7 liquidations are similar to sequestration under the Insolvency Act in that both processes provide for the liquidation of the debtor's assets and for a discharge of debts.[319] However, unlike South Africa, where the debtor must have sufficient assets to pay the creditor a 'not negligible dividend',[320] the Chapter 7 liquidation proceedings are available to debtors who do not have sufficient disposable income.[321] This means that debtors with little or no income have access to Chapter 7 liquidations. Discharge in terms of Chapter 7 liquidations are also immediate and the debtor does not have to wait unnecessarily long periods to obtain a discharge.[322] In South Africa, the debtor has to wait ten years before receiving an automatic discharge.[323] With regard to repeat filing, a South African debtor, who

[315] Roestoff (note 52 above) 148.
[316] See 2.5.2 above.
[317] See 3.3.1.1 above.
[318] See 3.3.1.2 above.
[319] Ibid.
[320] See 2.5.2 above.
[321] See 3.3.1.2 above
[322] Ibid.
[323] See 2.5.4 above.

has previously been rehabilitated, has to wait a period of three years to be able to apply for rehabilitation again.[324] This is in contrast to Chapter 7 liquidations under the Bankruptcy Code, where debtors who have previously been granted a discharge have to wait eight years before being able to reapply for a discharge.[325] In the USA, the list of property, which is excluded from being discharged, is a lot more extensive than that in South Africa.[326] In the USA, while student loans are excluded from being discharged, a forgiveness scheme has been introduced to assist debtors with their student debt obligations.[327]

Chapter 13 of the Bankruptcy Code is similar to debt review in terms of the NCA and administration orders offered by section 74 of the MCA.[328] The NCA places a restriction on the type of debts[329] and section 74 of the MCA limits the amount of debts required to qualify for the payment plan.[330] Similarly, Chapter 13 bankruptcy restricts the amount of debt required to qualify for the payment plan.[331] Repayment plans in both jurisdictions are not available to NINA debtors who do not have sufficient income to make payments in terms of a payment plan. Unlike the NCA and MCA, Chapter 13 places a restriction on the period of the payment plan. Payment plans in terms of Chapter 13 span three to five years, which is in line with the Report.[332] Another distinction is that Chapter 13 offers debtors a discharge in the form of a 'hardship discharge' for debtors who are unable to fulfil their commitments in terms of the payment plan.[333] Repayment plans in South Africa offer no discharge of unpaid debts to debtors and they span over long periods of time.[334]

The BAPCPA in the USA requires debtors to undergo mandatory credit counselling and debtor education in order to enter into bankruptcy proceedings.[335] In South Africa, there is no specific requirement in the Insolvency Act for debtor education. The NCA is the only mechanism which requires debtors to see a debt counsellor before entering into a payment

[324] See 2.5.4 above.
[325] See 3.3.1.2 above.
[326] See 2.5.3 and 3.3.1.2 above.
[327] '*The Feasibility of a Debt Forgiveness Programme in South Africa*' (note 211 above) 10.
[328] See 2.3, 2.4 and 3.3.1.2 above.
[329] See 2.4 above.
[330] See 2.3 above.
[331] See 3.3.1.2 above.
[332] Ibid.
[333] Ibid.
[334] See 2.3 and 2.4 above.
[335] See 3.3.1.2 above.

plan.[336] The Debt Intervention procedure that has been proposed in the Debt Relief Bill makes provision for the establishment of a financial literacy and budgeting skills programme, but it is not yet certain how this programme will operate.[337] The debtor education requirement, in terms of the BAPCPA, is costly and time-consuming and it is uncertain whether South Africa will benefit from a provision similar to this.[338]

Bankruptcy proceedings in England and Wales are also similar to sequestration in South Africa, where the assets of the debtor are liquidated and the debtor is discharged after a certain period of time.[339] However, unlike sequestration in South Africa, bankruptcy proceedings do not have the stringent 'advantage of creditors' requirement.[340] The discharge period of one year under bankruptcy proceedings is also significantly less than that in South Africa.[341] Discharge, in terms of the bankruptcy process, is dependent upon the good behaviour of the debtor during bankruptcy proceedings, which is an attractive reason to offer a shorter discharge period, however the one year period could lead to an abuse of the bankruptcy procedure.[342] The list of debts that are exempt from being discharged under bankruptcy proceedings are wider than the exempt debts under sequestration.[343]

There are many different alternative debt relief mechanisms in place in England and Wales that cater for different classes of debtors. England and Wales offer NINA debtors relief in the form of a Debt Relief Order.[344] Debt Relief orders provide NINA debtors with a discharge of debts after one year.[345] In South Africa there is no mechanism that offers specific relief to this class of debtors. If the proposed Debt Relief Bill is enacted this will be the only statutory debt relief mechanism in South Africa that caters specifically for NINA debtors.[346] The Individual Voluntary Arrangement procedure in England and Wales can be compared to the proposed pre-liquidation composition in South Africa and both these procedures rely on

[336] See 2.4 above.
[337] See 2.6.2 above.
[338] See 3.3.1.2 above.
[339] See 3.3.2.2 above.
[340] Ibid.
[341] See 2.5.4 and 3.3.2.2 above.
[342] Coetzee (note 7 above) 403. See 3.3.2.2 above.
[343] See 2.5.3 and 3.3.2.2 above.
[344] See 3.3.2.3 above.
[345] See 3.3.2.3 above.
[346] See 2.6.2 above.

acceptance by the majority of creditors.[347] Unlike the proposed pre-liquidation composition, Individual Voluntary Arrangements do not have a limit on the amount of debts required to enter into the procedure.[348] County Court Administration Orders and Debt Management Arrangements are similar to the repayment plans available in South Africa, and offer very little relief to debtors.[349]

Bankruptcy proceedings in New Zealand are also similar to the sequestration proceedings under South Africa's Insolvency Act in that both procedures provide for the liquidation of the debtor's assets and for the discharge of debts.[350] The entry requirements however differ.[351] With regard to New Zealand's bankruptcy proceedings, there is a monetary cap on the amount of debts that the debtor must have in order to enter into the proceedings,[352] while for sequestration in South Africa, there is an 'advantage of creditors' requirement.[353] The discharge period applicable in New Zealand's bankruptcy process is three years,[354] as opposed to South Africa's ten-year discharge period.[355] New Zealand, unlike South Africa, also offers a procedure for NINA and LILA debtors in the form of the No-Asset Procedure.[356] The No-Asset Procedure has a limitation on the total debts that the debtor must have and repeat filing of the procedure is not allowed.[357] The debts are discharged after one year, which may be seen as being too short a period.[358] Summary Instalment Orders, in place in New Zealand, are similar to South Africa's debt review process and administration orders, which equates to a repayment plan with no forced discharge.[359] These mechanisms do not offer relief to debtors earning little or no income. One difference is that the Summary Instalment Order specifies a period for the payment plan,[360] unlike debt review and administration orders where the repayment plan continues for an indefinite period.[361] Proposals, provided for in New

[347] See 2.6.1 and 3.3.2.3 above.
[348] See 2.6.1 and 3.3.2.2 above.
[349] See 2.3, 2.4 and 3.3.2.3 above.
[350] See 2.5 and 3.3.3.1 above.
[351] See 3.3.3.2 above.
[352] Ibid.
[353] See 2.5.2 above.
[354] See 3.3.3.2 above.
[355] See 2.5.4 above.
[356] See 3.3.3.3 above.
[357] Ibid.
[358] Ibid.
[359] See 2.3, 2.4 and 3.3.3.3 above.
[360] See 3.3.3.3 above.
[361] See 2.3 and 2.4 above.

Zealand's insolvency law, are similar to the proposed pre-liquidation composition in South Africa.[362] Coetzee notes that the pre-liquidation composition, which has been proposed in South Africa, can draw from the proposal procedure in New Zealand.[363] Firstly, he states that the title used in New Zealand does not create the impression that the composition is a pre-liquidation requirement.[364] Secondly, there is no monetary threshold to enter into proposals.[365]

Ireland's bankruptcy proceedings are similar to sequestration in terms of the Insolvency Act and both entail the liquidation of the debtor's assets followed by the discharge of debts.[366] However, instead of the 'advantage of creditors' requirement, entry into the bankruptcy proceedings require the debtors' debts to exceed €20 000.[367] This excludes many people from using this mechanism. Ireland's bankruptcy proceedings also require debtors to attempt to negotiate with their creditors as a pre-requisite to enter into the proceedings.[368] In South Africa, out-of-court negotiations are not a pre-requisite to enter into the sequestration process.[369] The discharge period has also been reduced in Ireland, from twelve years to three years.[370] This is in contrast to South Africa's ten-year discharge period.[371]

Ireland offers relief to LILA debtors, in the form of a Debt Relief Notice.[372] The Debt Relief Notice offers a discharge of unpaid debts after three years.[373] In South Africa, LILA debtors are often unable to access the available statutory debt relief mechanisms and there are no procedures that specifically offer relief to this class of debtors. If enacted, the proposed Debt Relief Bill will offer debt relief to LILA debtors in South Africa.[374] Ireland also offers Debt Settlement Arrangements and Personal Insolvency Arrangements, which are similar to the proposed pre-liquidation composition in South Africa.[375]

[362] See 2.6 above.
[363] Coetzee (note 7 above) 348.
[364] Ibid.
[365] Ibid.
[366] See 2.5 and 3.3.4.2 above.
[367] See 3.3.4.2 above.
[368] Ibid.
[369] See 2.5 above.
[370] See 3.3.4.1 and 3.3.4.2 above.
[371] See 2.5.4 above.
[372] See 3.3.4.3 above.
[373] Ibid.
[374] See 2.6.2 above.
[375] See 2.6.1 above.

Liquidation in terms of Japan's Bankruptcy Act is similar to sequestration proceedings in terms of South Africa's Insolvency Act.[376] Both these mechanisms offer debt relief in the form of liquidation of the debtors' estate and a discharge of debts. Both procedures also have strict entry requirements.[377] However, even though Japan has strict entry requirements, the debtor does not have to wait unnecessarily long periods before obtaining a discharge.[378] The discharge under Japan's Bankruptcy Act takes place almost immediately, at the court's discretion.[379] The Bankruptcy Act also has an educational purpose for debtors who have to wait seven years before filing for a new discharge.[380] This is in contrast to South Africa where the debtor only has to wait three years before reapplying for a discharge.[381] This longer waiting period could serve an educational purpose, which is in line with the World Bank Report.[382]

Special Civil Rehabilitation, offered in Japan, is similar to the debt review process in terms of the NCA.[383] However, Special Civil Rehabilitation restricts the repayment plan to a period of three to five years, unlike the NCA where the repayment plan could continue indefinitely.[384] Both mechanisms do not provide debtors with any forced discharge.

4.3 Conclusion

In stark contrast to South Africa, many foreign jurisdictions are debtor friendly and give debtors the opportunity to obtain a straight discharge, without having to prove stringent entry requirements. Furthermore, many of the jurisdictions offer specific debt relief measures that cater for LILA and NINA debtors. The discharge periods applicable in these jurisdictions are also significantly less than the discharge period offered in South Africa, which is more in line with the World Bank Report's recommendations. The repayment plans also have maximum time periods, which could be beneficial in South Africa where the debtor is unable to obtain a discharge and is stuck in the repayment plan for years. In the next chapter, the

[376] See 2.5 and 3.3.5.2 above.
[377] See 2.5.2 and 3.3.5.2 above.
[378] See 2.5.4 and 3.3.5.2 above.
[379] See 3.3.5.2 above.
[380] Ibid.
[381] See 2.5.4 above.
[382] See 3.2 above.
[383] See 2.4 and 3.3.5.3 above.
[384] Ibid.

threads will be tied together and recommendations will be given as to which debt relief measures will be best suited for adoption in South Africa.

CHAPTER 5: CONCLUSION

> 'Providing a fresh start to a debtor who cannot reasonable repay all of his pre-existing debts is the recognition by society that over-indebtedness is, in many cases excusable. It is the key-element of any consumer debtor insolvency law or rehabilitation procedure, based on the principle that it is in society's interest that the debtor should be able to begin afresh, free from past financial obligations and not suffer indefinitely. It is the distinction between punishment of yesteryear and the economic reality of the twenty-first century.'[385]

5.1 Conclusion

The objective of this dissertation was to assess the current debt relief mechanisms available to South African debtors and to examine whether the discharge principles applicable are in line with appropriate discharge principles as envisaged by the World Bank Report and with international trends and guidelines. It was seen from the outset that economic rehabilitation is one of the principle purposes of any insolvency regime.[386] Kilborn points out that one of the overarching themes of the Report is for debtors to obtain debt relief through a forced discharge of a portion, or all, of their debts.[387] This is in keeping with the 'fresh start' principle. It has been mentioned in Chapter one that South Africa's Insolvency Act offers over-indebted consumers a 'fresh start' in the form of a forced discharge, without having to undergo a repayment plan.[388] Rehabilitation, through sequestration, is however the only statutory mechanism, in South Africa, which a debtor can use to secure the discharge of unpaid debts.[389] Furthermore, the debtor, upon entering into the sequestration proceedings, has to wait ten years before obtaining an automatic discharge.[390] The discharge is, however, subject to the discretion of the court and there is no guarantee that the debtor will obtain a discharge.[391] The debtor may apply to be discharged earlier if he fulfils certain requirements.[392] The Insolvency Act is creditor friendly and in order to enter into the

[385] N Maghembe and M Roestoff 'Bankruptcy and alternative debt relief for consumers in Tanzania – a comparative investigation' *Comparative and International Law Journal of Southern Africa* (2010) 316.
[386] See 1.1 above.
[387] Kilborn (note 269 above) 312.
[388] See 1.1 above.
[389] See 1.1 and 2.5.4 above.
[390] See 2.5.4 above.
[391] Ibid.
[392] Ibid.

sequestration proceedings, the debtor has to prove the stringent 'advantage of creditors' requirement in terms of which liquidation of the debtor's assets must yield a not-negligible dividend.[393] This creates a barrier for many debtors wishing to use the mechanism.

South African insolvency law also provides for debt review in terms of the NCA[394] and administration orders in terms of the MCA.[395] However, these statutory mechanisms do not provide the debtor with any discharge of unpaid debts, and the debtor has to make payments in terms of a repayment plan before he can obtain a discharge. It has been established that debt review in terms of the NCA, requires the debtor to satisfy his debt obligations in full.[396] An administration order in terms of the MCA also requires the debtor to pay all his debts before obtaining a discharge.[397] Furthermore, these repayment plans do not provide for a maximum time period within which the payment must be made and the debtor may be locked in the repayment plan indefinitely.[398] The World Bank Report envisages a repayment plan that lasts between three and five years and considers any repayment plan that exceeds five years as being irresponsible.[399] There are also a number of limitations with regard to South Africa's payment plans. Administration orders, for example, have a monetary cap of R50 000, while debt review is only available to debtors whose debts arose as a result of a credit agreement.[400]

Another challenge which South African debtors face is that there is no debt relief measure that caters for NINA or LILA debtors. Debtors with little or no income are unable to access the sequestration process as they are unable to satisfy the 'advantage of creditors' requirement.[401] NINA debtors are also unable to use debt review or administration orders as a form of debt relief as both these mechanisms require the debtor to have a monthly income.[402] The only mechanism that is currently in place, which can assist NINA debtors, is

[393] See 2.5.2 above.
[394] See 2.4 above.
[395] See 2.3 above.
[396] See 2.4 above.
[397] See 2.3 above.
[398] See 2.3 and 2.4 above.
[399] See 3.2 above.
[400] See 2.3 and 2.4 above.
[401] See 2.5.2 above.
[402] See 2.3 and 2.4 above.

the common law compromise, however, creditors are often hesitant to enter into a compromise with debtors.[403]

If the proposed Draft Insolvency Bill is enacted, the proposed pre-liquidation composition will provide LILA and NINA debtors with an alternative procedure to sequestration and will enable them to obtain a discharge of debts, and thus a fresh start.[404] Roestoff however notes that the pre-liquidation compositions will do little to provide NINA debtors with appropriate relief, as these debtors have no assets or income to offer their creditors.[405] Coetzee states that while the pre-liquidation composition is meant to cater for lower income groups, it is not suitable for NINA debtors, who do not have anything valuable to offer to their creditors and thus will not have any bargaining power.[406] This procedure does however provide debtors with an alternative mechanism to apply for a discharge of debts where the composition is not accepted by the majority of the creditors.[407] The proposed Draft Insolvency Bill has retained the 'advantage of creditors' requirement and the discharge period of ten years remains unchanged.[408]

The Debt Intervention procedure, proposed in the Debt Relief Bill, may however be a step in the right direction.[409] It is submitted that, if enacted, this new procedure would offer relief, in the form of a full or partial discharge, to a class of debtors that are currently excluded from formal debt relief intervention. There are no strict entry requirements for this proposed procedure, however, there is a monetary cap of R50 000.[410] This means that not all LILA and NINA debtors would have access to this procedure. Despite this limitation, the proposed procedure is commendable and would bring South Africa's insolvency regime in line with international trends.

South African law governing debt relief measures needs to be reassessed. Calitz submits that South Africa has ignored international trends in consumer insolvency law.[411] In Chapter Three, the insolvency laws of the USA, England and Wales, New Zealand, Ireland and Japan were

[403] See 2.2 above.
[404] See 2.6.1 above.
[405] Roestoff (note 6 above) 621.
[406] Coetzee (note 7 above) 254.
[407] See 2.6.1 above.
[408] Ibid.
[409] See 2.6.2 above.
[410] Ibid.
[411] Calitz (note 50 above) 397.

examined. In comparing these jurisdictions to South Africa, it became clear that most of these jurisdictions were more debtor friendly and were more in line with the World Bank Report's recommendations.

In the USA, the insolvency law is underpinned by the fresh start principle, where 'honest but unfortunate debtors' are able to obtain a discharge almost immediately, upon entering into the Chapter 7 liquidation proceedings.[412] Chapter 13 of the Bankruptcy Code also offers debt relief to debtors with a steady source of income and offers a discharge to debtors, in the form of a 'hardship discharge', to debtors who enter into the procedure but subsequently become NINA debtors.[413] The introduction of the BAPCPA introduced a shift away from the fresh start principle and now requires the debtor to undergo a means test to determine whether they qualify to enter into Chapter 7 or Chapter 13 proceedings.[414]

In England and Wales, there are various procedures in place which cater for different classes of debtors. The entrance requirements for debtors wishing to apply for bankruptcy are straight forward and the debtor is discharged after just one year.[415] However, the court has the power to suspend the discharge period if the debtor fails to comply with his obligations.[416] The Debt Relief Order is available to NINA debtors and the debtor is automatically discharged after one year.[417] Individual Voluntary Arrangements is a good alternative to bankruptcy and offers a mechanism to debtors who do not wish to be associated with the stigma attached to bankruptcy.[418] This procedure allows debtors to reach an agreement with their creditors, regarding their debt. County Court Administration Orders and Debt Management Arrangements are also available to debtors wishing to rearrange their debts.[419]

Bankruptcy proceedings in New Zealand, regulated by the Insolvency Act 2006, offer debtors debt relief in the form of a discharge which takes place automatically after three years.[420] New Zealand also offers relief to NINA debtors in the form of the No-Asset Procedure.[421] This

[412] See 3.3.1.2 above.
[413] Ibid.
[414] Ibid.
[415] See 3.3.2.2 above.
[416] Ibid.
[417] See 3.3.2.3 above.
[418] Ibid.
[419] Ibid.
[420] See 3.3.3.2 above.
[421] See 3.3.3.3 above.

procedure has strict entry requirements, in order to prevent abuses and the debtor is automatically rehabilitated one year after entering into the No-Asset Procedure.[422] Summary Instalment Orders allow the debtor to pay his debts in instalments and operate for a period of three to five years.[423]

Irish insolvency law, which recently underwent a complete overhaul, is now in line with the main themes of the Report.[424] The discharge principles in place are modern and assist the debtor in their economic rehabilitation. As a pre-requisite to enter into bankruptcy proceedings, the debtor has to make a genuine effort to reach an arrangement with his creditors.[425] The debtor qualifies for an automatic discharge, three years after being declared bankrupt, and the discharge is not subject to the courts discretion.[426] The Debt Relief Notice procedure provides relief to LILA debtors and discharges the debtor after a three-year period.[427] Debt Settlement Arrangements and Personal Insolvency Arrangements allow the debtor to pay his debts in monthly instalments, however, both these mechanisms do not provide an automatic discharge of debts.[428]

Bankruptcy, under Japan's Bankruptcy Act, has strict entry requirements, but allows the debtor to apply for a discharge almost immediately.[429] The discharge is subject to the court's discretion and there is a waiting period of seven years if the debtor was previously discharged and wishes to be discharged again. Special civil rehabilitation allows the debtor to agree on a repayment plan with his debtor.[430] This procedure lasts for three to five years and does not offer any discharge of unpaid debts to the debtor.[431]

5.2 Recommendations

In order to bring South Africa's debt relief mechanisms in line with recommended discharge principles, as envisaged by the World Bank Report, and with international trends, South

[422] Ibid.
[423] Ibid.
[424] See 3.3.4.1 above.
[425] See 3.3.4.2 above.
[426] Ibid.
[427] See 3.3.4.3 above.
[428] Ibid.
[429] See 3.3.5.2 above.
[430] See 3.3.5.3 above.
[431] Ibid.

African insolvency law needs a complete overhaul.[432] The following recommendations are submitted as a way for debtors to obtain a fresh start and to undergo economic rehabilitation, as envisaged by the World Bank Report.

The first barrier which South African insolvency law faces is the creditor-orientated approach which prevents debtors from accessing the sequestration process, and thus obtaining a discharge.[433] This creditor-orientated approach is in contrast to the approach used in the USA, where the primary purpose of the Bankruptcy Act is to offer relief to the 'honest but unfortunate debtor.'[434] Roestoff and Coetzee suggest that South African courts should do away with the creditor-orientated approach, in favour of an assets-based procedure which requires the court to consider the interests of the debtor when exercising its discretion.[435] This is similar to the approach used in England and Wales.[436] This balanced approach will still give the court the power to use their discretion to prevent people, wishing to abuse the process, from entering into the proceedings. In this way, more honest debtors will be able to undergo sequestration and qualify for a discharge of unpaid debts. It is further submitted, that South Africa should adopt the stance used in Ireland, with regard to out-of-court negotiations.[437] South African debtors should be required to take reasonable steps to negotiate with their creditors, before applying for sequestration. This would lessen the courts workload, avoid costs of formal intervention and will ensure that the debtor has considered all alternatives before applying for sequestration. Out-of-court negotiations will also be appropriate for LILA debtors, who are often excluded from the sequestration proceedings.

In order to create more inclusion for debtors with little or no income, South Africa should have debt relief mechanisms in place that specifically cater for NINA or LILA debtors. If the proposed Debt Relief Bill is enacted, this will provide NINA and LILA debtors with a route to obtain a discharge of debts after a period of one year.[438] The Debt Intervention procedure however has a monetary cap of R50 000.[439] It is submitted that this monetary cap should be

[432] Boraine and Roestoff (note 25 above) 541. Mabe and Evans (note 60 above) 666.
[433] See 2.5.2 above.
[434] See 3.3.1.1 above.
[435] Roestoff and Coetzee (note 9 above) 76.
[436] See 3.3.2.2 above.
[437] See 3.3.4.2 above.
[438] See 2.6.2 above.
[439] Ibid.

increased or disposed of so that more LILA and NINA debtors may access the procedure. It is further submitted that the suggested one-year discharge period should be extended to three years to avoid possible abuses of the system.[440] The extended period will also serve an educational purpose and encourage better credit behaviour amongst low and no income earners.[441] If the proposed Draft Insolvency Bill is enacted, it will also provide LILA and NINA debtors with an alternative debt relief mechanism.[442] The pre-liquidation composition however has a monetary cap of R200 000. As per Coetzee's suggestion, the pre-liquidation composition should draw from the proposal procedure in New Zealand, where there is no restriction on the amount of debt required to use the procedure.[443]

In bringing South Africa's Insolvency Act in line with the World Bank Report, it is recommended that South Africa should shorten the period for which an insolvent must wait before obtaining an automatic discharge. According to the Irish Law Reform Commission, a discharge period of twelve years is 'excessively long and contrasts sharply with the fresh start principle which characterises modern insolvency codes'.[444] South Africa's Insolvency Act imposes an unduly restrictive and long discharge period of ten years.[445] Even if the debtor complies with all the requirements necessary to be discharged, the High Court still has discretion on whether to allow the discharge. It is submitted that the ten-year discharge period is too long a period for a debtor to be subjected to the stigmatising status of insolvency and the restrictions that come with it. It is therefore recommended that South Africa should adopt the stance assumed in New Zealand and Ireland, whereby the debtor is automatically rehabilitated after a period of three years. This period is long enough to have an educational value but short enough to ensure that the debtor is not stuck with the insolvency status for a long period of time. It is further submitted that the discharge period should be suspended if the debtor fails to comply with his obligations. This is the position in England and Wales, and it encourages good behaviour, which is in line with the Report.

[440] See discussion on NO-Asset Procedure under 3.3.3.3 above.
[441] See 3.3.2.2 above.
[442] See 2.6.1 above.
[443] See 3.3.3.3. and 4.2 above.
[444] 'Consultation Paper: Personal Debt Management and Debt Enforcement' (note 266 above) 117.
[445] See 2.5.4 above.

As previously mentioned, South Africa has two alternative debt relief mechanisms, namely debt review in terms of the NCA and administration orders in terms of the MCA.[446] It is recommended that South Africa can learn from Chapter 13 of USA's Bankruptcy Code[447] and Special Civil Rehabilitation in terms of Japans Bankruptcy Act,[448] where the repayment plan continues for a period of three years, but may be extended to five years, with the courts approval.[449] The provisions of the NCA should be relaxed and section 74 of the MCA should be amended, to allow for the debtor to receive a discharge after three years, or after five years upon application by the creditor. This will create an incentive for debtors to enter into repayment plans and will assist in preventing abuse of the sequestration proceedings.

The World Bank Report points out that debtors who have obtained debt relief should not be discriminated against.[450] There is no provision in South African insolvency law which specifically protects debtors against discrimination. It is therefore submitted that the South African Insolvency Act should specifically protect debtors, who have entered into the sequestration process, against discrimination. A provision, similar to that in section 525 of USA's Bankruptcy Code should be introduced.[451]

In order to ensure that debtors avoid becoming excessively indebted in the future, the Report recommends debtor education and counselling.[452] However, while these measures appear to be straight forward in theory, practically it is difficult to implement, as demonstrated by the mandatory debtor education introduced in the USA.[453] The proposed Debt Relief Bill has made provision for the Minister to establish a financial literacy and budgeting skills programme.[454] It is still unclear how this proposed programme would operate in practice but, if it is well executed it will assist debtors to manage their financial affairs in order to avoid over-indebtedness in the future. The Report also recommends the prohibition of repeat filing as a way to deter debtors from becoming indebted again in the future.[455] In South Africa, the

[446] See 2.3 and 2.4 above.
[447] See 3.3.1.2 above.
[448] See 3.3.5.2 above.
[449] See 3.3.1.2 above.
[450] See 3.2 above.
[451] See 3.3.1.2 above.
[452] See 3.2 above.
[453] See 3.3.1.3 above.
[454] See 2.6.2 above.
[455] See 3.2 above.

insolvent has to wait a period of three years before they can reapply for a discharge.[456] It is submitted that this period is too short to serve any educational value and thus to deter debtors from incurring debt again in the future. South Africa should adopt the stance taken in Japans bankruptcy laws, which requires the debtor to wait a period of seven years before filing for a discharge again.[457]

According to the Report, as many debts as possible should be included in the discharge in order to be more effective.[458] In South Africa, there are a wide range of debts included in the discharge.[459] It is submitted that South Africa should not discharge debts arising from tax obligations. The Report states that evading this responsibility is unjustified.[460] Fines and debts arising as a consequence of a crime should also be excluded from being discharged. This would prevent debtors from using the sequestration process to avoid criminal sanctions. Debts owing to secured creditors should also be excluded from being discharged, as seen in chapter 7 of USA's Bankruptcy Code and Bankruptcy under the Insolvency Act (England and Wales).[461]

If the South African legislature implements all of these recommendations, it would bring South Africa's debt relief mechanisms in line with the discharge principles envisaged by the World Bank Working Group in its Report. This would be a step in the right direction for South Africa and South African debtors would not be trapped in a plight of debt. This would facilitate debtors' economic rehabilitation to become productive members of society once again.

[456] See 2.5.4 above.
[457] See 3.3.5.2 above.
[458] See 3.2 above.
[459] See 2.5.3 above.
[460] *The World Bank Report* (note 2 above) para 377.
[461] See 3.3.1.2 and 3.3.2.2 above.

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