

**Alternative Measures for the Discharge of Debts for Over-Indebted
Persons Under Debt-Related Legislation in South Africa**



orcid.org/0000-0003-2055-752X

PC Mothibi

Dissertation submitted in fulfilment of the requirements for the degree Master of Laws
in Mercantile Law at the North-West University

Supervisor: Prof HT Chitimira

Co-supervisor: PT Magau

Student Number: 27789810

SOLEMN DECLARATION

I hereby declare that the dissertation entitled: **Alternative Measures for the Discharge of Debts for Over-Indebted Persons Under Debt-Related Legislation in South Africa**, is submitted in fulfilment of the requirements for the Master of Laws (LLM) degree is the product of my research and opinion with the exception of references of the sources acknowledged herein and that I have not at any prior time submitted it to any university or by any person for any qualification.

Signature of Candidate:

University Number:

Signed aton this day of 2020

Declared before me on this day of

Signature of Supervisor:

ACKNOWLEDGEMENTS

Firstly, I would like to thank God for giving me strength and wisdom.

I would like to acknowledge my supervisor Professor H Chitimira and my co-supervisor Mr PT Magau, for the passionate supervision they have offered me. I am genuinely grateful for their support and encouragement.

I would like to thank my family and friends for giving me the love, strength and support during stressful times I encountered throughout this project.

I also would like to thank the North-West University Faculty of Law for awarding me a bursary to complete my studies.

DEDICATION

This dissertation is dedicated to me, my family, friends and everyone who supported me throughout this project.

ABSTRACT

Debtors must be offered robust and comprehensive debt discharge measures. The *Insolvency Act* is the primary legislation that provides over-indebted natural person debtors with a formal statutory discharge of debts and the available debt-related legislation does not provide for comprehensive discharge of debt or no discharge at all. Over-indebted natural person debtors can make use of debt review in terms of the *National Credit Act* or administration orders in terms of the *Magistrates' Court Act* to circumvent the sequestration process. However, both debt review and administration orders do not provide for a discharge of debt but provide for debt-restructuring only, to eventually satisfy the creditor's claims. Moreover, debt intervention in terms of the *National Credit Amendment Act* is sought to provide a discharge of debt to debtors who are unable to meet the requirements of sequestration orders in terms of the *Insolvency Act*. The issue facing over-indebted natural person debtors in South Africa is not because there are no debt discharge measures available, but it is the fact that existing debt discharge measures under the *Insolvency Act* are not robust and comprehensive. Accordingly, many over-indebted natural person debtors are excluded from obtaining debt discharge in terms of the *Insolvency Act*. Most of these excluded over-indebted natural person debtors fall within the No Income and No Assets (NINA) category. This study discusses problems faced by all over-indebted persons who struggle to access adequate debt discharge in South Africa. Furthermore, the study investigates how the debt-related legislation in South Africa limit the chances of over-indebted persons to obtain debt discharge. Consequently, the study proposes law reform of the current debt discharge measures under *Magistrates' Courts Act*, *National Credit Act*, *National Credit Amendment Act*, *Consumer Protection Act*, *Debt Collectors Act*, *Prescription Act* and *Financial Sector Regulation Act* in order to provide more robust and comprehensive debt discharge measures for over-indebted persons.

Keywords: debt discharge, over-indebtedness, debt-related legislation, natural person debtors.

List of Abbreviations

FSCA	Financial Sector Conduct Authority
FSRA	<i>Financial Sector Regulation Act</i> 9 of 2017
Int Insolv Rev	International Insolvency Review
JBL	Journal of Business Law
LILA	Low Income Low Asset
NCA	<i>National Credit Act</i> 34 of 2005
NCR	National Credit Regulator
NINA	No Income No Asset
NIBLeJ	Nottingham Insolvency and Business Law eJournal
PER/PELJ	Potchefstroom Electronic Law Journal
SA Merc LJ	South African Mercantile Law Journal
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
St. Louis U. Pub	Saint Louis Public Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
INSOL	International Association of Restructuring, Insolvency &
SCA	Supreme Court of Appeal
GN	Government Notice
GG	Government Gazette

DEHT

Department of High Education and Training

TABLE OF CONTENTS

SOLEMN DECLARATION	i
ACKNOWLEDGEMENTS	ii
DEDICATION	iii
ABSTRACT	iv
LIST OF ABBREVIATIONS	v
TABLE OF CONTENTS	viii
CHAPTER ONE: RESEARCH OUTLINE AND CONTEXT	1
<i>1.1 Introduction.....</i>	<i>1</i>
<i>1.2 Background of the Study.....</i>	<i>3</i>
<i>1.3 Problem Statement.....</i>	<i>4</i>
<i>1.4 Aims and Objectives</i>	<i>8</i>
<i>1.4.1 Aims</i>	<i>8</i>
<i>1.4.2 Objectives.....</i>	<i>9</i>
<i>1.4 Research Question.....</i>	<i>9</i>
<i>1.5 Rationale of the Study.....</i>	<i>9</i>
<i>1.6 Literature Review</i>	<i>10</i>
<i>1.7 Assumptions and Hypothesis</i>	<i>13</i>
<i>1.7.1 Assumptions</i>	<i>13</i>
<i>1.7.2 Hypothesis.....</i>	<i>14</i>
<i>1.8 Limitations of the Study</i>	<i>15</i>
<i>1.9 Research Methodology</i>	<i>16</i>
<i>1.10 Statement Regarding Research Ethics.....</i>	<i>17</i>

1.11 Relevance for the Research Unit Theme	17
1.12 Structure of the Dissertation.....	18
CHAPTER TWO: HISTORICAL ASPECTS OF DEBT DISCHARGE MEASURES IN SOUTH AFRICA.....	20
2.1 Introduction.....	20
2.2 Debt Discharge Measures Prior to the Union of South Africa	21
2.2.1 Debt Discharge Measures Under the Roman-Dutch Law.....	21
2.2.2 The Amsterdam Ordinance of 1777	24
2.2.3 Cape Law.....	26
2.3 Debt Discharge Measures Under the Union of South Africa	31
2.3.1 Insolvency Act of 1916	31
2.4 Conclusion	33
CHAPTER THREE: DEBT DISCHARGE MEASURES UNDER THE INSOLVENCY ACT 24 of 1936	35
3.1 Introduction.....	35
3.2 Sequestration in terms of the Insolvency Act.....	36
3.3 Voluntary Surrender	38
3.4 Compulsory Sequestration	41
3.4.1 Advantage to Creditors in Compulsory Sequestration	42
3.5 Friendly Sequestration	46
3.6 Rehabilitation in terms of the Insolvency Act 24 of 1996	47
3.7 Advantages of Sequestration Order Under the Insolvency Act 24 of 1996.....	50
3.7.1 Rehabilitation and Debt Discharge	50
3.7.2 Composition and Debt Discharge.....	51
3.8 Disadvantages of a Sequestration Order Under the Insolvency Act.....	52
3.8.1 The Advantage to Creditor's Requirement	52

3.8.2 Absence of a Robust Legal Framework for Out of Court Debt Relief Measures.....	54
3.8.3 Absence of Alternative Debt Discharge Measures.....	53
3.7 The Link Between Debt Discharge Measures and the Constitutional Right to Equality	55
3.8 Conclusion	56
CHAPTER FOUR: ALTERNATIVE MEASURES FOR THE DISCHARGE OF DEBTS FOR OVER-INDEBTED PERSONS IN SOUTH AFRICA.....	57
4.1 Introduction.....	57
4.2 Administration Order in terms of Section 74 of the Magistrates' Courts Act	58
4.2.1 The Requirements for Access to the Administration Order.....	59
4.2.2 The Procedure for Obtaining the Administration Order.....	59
4.2.3 Advantages of the Administration Order.....	61
4.2.4 Disadvantages of an Administration Order.....	63
4.3 Debt review in terms of the National Credit Act	67
4.3.1 Overview of Debt Review.....	67
4.3.2 The Procedure for Obtaining Debt Review.....	69
4.3.3 Clearance Certificate after Rearrangement of Debts.....	70
4.4 Debt Intervention in terms of the National Credit Amendment Act.....	71
4.4.1 The objectives of the National Credit Amendment Act.....	71
4.4.2 The Requirements for Application for Debt Intervention.....	72
4.4.3 The Procedure for Obtaining Debt Intervention	73
4.4.1 Advantages of Debt Intervention	75
4.4.2 Disadvantages of Debt Intervention.....	77
4.5 Financial Literacy in terms of the Consumer Protection Act and Financial Sector Regulation Act	79

<i>4.6 Extinction of debts in terms of the Prescription Act</i>	<i>80</i>
<i>4.7 Debt Collection in terms of the Debt Collectors Act.....</i>	<i>82</i>
<i>4.8 Conclusion</i>	<i>83</i>
CHAPTER FIVE: RECOMMENDATIONS AND CONCLUSION.....	85
<i>5.1 Introduction.....</i>	<i>85</i>
<i>5.2 Recommendations</i>	<i>86</i>
<i>5.3 Conclusion</i>	<i>94</i>
BIBLIOGRAPHY.....	95

CHAPTER ONE

RESEARCH OUTLINE AND CONTEXT

1.1 Introduction

The levels of over-indebtedness in South Africa are high and catastrophic due to the lack of robust and comprehensive debt discharge measures that should ideally help debtors with debt discharge.¹ A debtor is deemed to be over-indebted when he is unable to satisfy all his credit agreements on time due to his/her financial means, obligations and debt repayment history.² The *Insolvency Act* is the primary legislation that provides over-indebted natural person debtors with a formal statutory debt discharge of debts and the available debt-related legislation does not provide for the discharge of debt.³ Many over-indebted natural person debtors are excluded from obtaining debt discharge in terms of the *Insolvency Act*.⁴ The majority of these excluded over-indebted natural person debtors fall within the No Income and No Assets (NINA) category.⁵ The NINA debtors are those debtors who do not qualify for the debt discharge in terms of any statutory debt discharge measures available to debtors in South Africa.⁶ Although the *Insolvency Act* provides for discharge of debts, it is worth noting that a discharge is not the main aim of the sequestration proceedings

¹ Nanziri EL and Leibbrandt M "Measuring and Profiling Financial Literacy in South Africa" 2018 *South African Journal of Economic and Management Sciences* 1; 6; Sibanda S and Sibanda T "Financial Education in South Africa Overview of Key Initiatives and Actors" 2016 *International Labour Organization* 1; 8.

² Section 79 of the National Credit Act 34 of 2005 (*National Credit Act*).

³ Section 129 of the *Insolvency Act* 24 of 1936 (*Insolvency Act*); Mabe Z "Alternatives to Bankruptcy in South Africa That Provides for a Discharge of Debts: Lessons from Kenya" 2019 *Potchefstroom Electronic Law Journal* 1, 2; Governder L *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* (LLM Dissertation University of Kwa-Zulu Natal 2017) 2.

⁴ Coetzee H and Roestoff M "Consumer Debt Relief in South Africa – Should the Insolvency System Provide for NINA Debtors? Lessons from New Zealand" 2013 22 *International Insolvency Review* 188, 189; Roestoff M "The Income of an Insolvent" 2017 *DHET* 1, 478; Asheela NV *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* (LLM dissertation University of Pretoria 2012) 13; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 10.

⁵ Coetzee and Roestoff 2013 *International Insolvency Review* 3; Coetzee H *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* (LLD thesis University of Pretoria 2015) 101; Coetzee and Roestoff 2013 *International Insolvency Review* 3.

⁶ Coetzee H "Does the Proposed Pre-Liquidation Composition Proffer a Solution to the No Income No Asset (NINA) Debtor's Quandary and If Not, What Would?" 2017 *Journal of Contemporary Roman-Dutch Law* 18; 18.

and is merely a consequence of the rehabilitation of the insolvent debtor.⁷ Accordingly, the main aim of the *Insolvency Act* is to ensure the orderly and equitable distribution of a debtor's assets where they are insufficient to meet the claims of all his creditors.⁸

Over-indebted natural person debtors can make use of debt review in terms of the *National Credit Act*⁹ or administration orders in terms of the *Magistrates' Court Act*¹⁰ to circumvent the sequestration process. However, both debt review and administration orders do not provide for a discharge of debt but provide for debt-restructuring only, to eventually satisfy the creditor's claims.¹¹ Moreover, debt intervention in terms of the *National Credit Amendment Act* is sought to provide a discharge of debt to debtors who are unable to meet the requirements of sequestration orders in terms of the *Insolvency Act*.¹² However, the monetary limit of R50 000 that is applicable in debt intervention prohibits many over-indebted persons from utilising it.¹³ As a result, there is a dire need for alternative debt discharge measures that over-indebted natural person debtors can use to discharge their debts.

Debtors must be offered robust and comprehensive debt discharge measures to discharge their debts.¹⁴ Robust and comprehensive debt discharge measures will save debtors who are excluded from the current debt discharge measure from being in a

⁷ Section 129 of the *Insolvency Act*; Coetzee and Roestoff 2013 *International Insolvency Review* 3; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 101.

⁸ Coetzee and Roestoff 2013 *International Insolvency Review* 3; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 101.

⁹ Section 85-87 of the *National Credit Act*; Nagel CJ, Barnard J, Boraine A, Delpont PA, Kern KM, Lötze DJ, Otto JM, Papadopoulos SM, Prozesky-Kuschke B, Roestoff M, Van Eck BPS, Van Jaarsveld SR *Commercial Law* 5th ed (Lexis Nexis Johannesburg 2015) 319-320; Mabe 2019 *PELJ* 2; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 6.

¹⁰ Section 74 of the *Magistrates' Courts Act* 32 of 1944 (*Magistrates' Courts Act*); Pete S, Hulme D, Palmer R, Sibanda O, Palmer T *Civil Procedure: A Practical Guide* 2nd ed (Oxford Cape Town 2013) 406-408; Mabe 2019 *PELJ* 2; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 6.

¹¹ Kanamugire JC "The Requirement of Advantage to Creditors in South African Insolvency Law – A Critical Appraisal" 2013 *Mediterranean Journal of Social Sciences* 19, 20; Mabe 2019 *PELJ* 2; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 2.

¹² Section 1(c) of the *National Credit Amendment Act* 7 of 2019 (*National Credit Amendment Act*).

¹³ Section 86A(1) of the *National Credit Amendment Act*; the R50000 monetary cap off is similar to the one applicable to an administration order under section 74(1) of the *Magistrates' Courts Act*.

¹⁴ Mabe 2019 *PELJ* 2; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 6.

debt trap by helping them to discharge all of their debts. Where debtors are unable to repay their debts, and are trapped in never-ending debts, this can contribute to high numbers of over-indebtedness in South Africa. This study is therefore vital for over-indebted consumers who seek to attain a discharge and being economically rehabilitated. It is of utmost importance that over-indebted debtors receive debt discharge measures that enable them to begin afresh, be free from past financial obligations and not suffer indefinitely.

1.2 Background of the Study

For the purpose of this study the history of debt discharge measures in South Africa, can be traced from the Roman-Dutch law in 17th century to date. Roman-Dutch law is an essential foundation of the South African insolvency law.¹⁵ The *Concurses creditorium* is a concept which emphasises the rights of group of creditors and requires that the assets of the insolvent be split proportionally amongst the creditors.¹⁶ *Concurses creditorium* was subsequently followed by a development of debt discharge measures that were utilised by debtors under Roman-Dutch law.¹⁷

The Amsterdam Ordinance of 1777 allowed the insolvent or any of his creditors to apply for the sequestration of the debtor's estate.¹⁸ The Amsterdam Ordinance recognised the principle of rehabilitation.¹⁹ Rehabilitation provided the debtor with an opportunity of a discharge from all pre-sequestration debt if the prescribed majority of the creditors voted in favour thereof.²⁰

¹⁵ Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 103; De Clercq B, Evans RG, Abrie W, Graham CR *Insolvent Estates* 7th ed (ProPlus Publishers 2011) 1; Abrie W, Gerrits HF *Estates: Planning and Administration* 4th ed (ProPlus Publishers 2000) 1.

¹⁶ De Clercq *et al Insolvent Estates* 1; Abrie *et al Estates: Planning and Administration* 1.

¹⁷ De Clercq *et al Insolvent Estates* 1; Abrie *et al Estates: Planning and Administration* 1.

¹⁸ Sections 41 and 42 of the Amsterdam Ordinance of 1777; Evans RG *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* (LLD thesis University of Pretoria 2008) 46; Levenstein E *An Appraisal of the New South African Business Rescue Procedure* (LLD thesis University of Pretoria 2008) 30.

¹⁹ Sections 41 and 42 of the Amsterdam Ordinance of 1777; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 9.

²⁰ Sections 41 and 42 of the Amsterdam Ordinance of 1777; Bertelsmann E, Evans R, Harris A, Kelly-Louw M, Loubser A, Roestoff M, Smith A, Stander L, Steyn L *Mars The Law of Insolvency in South Africa* 9th ed (Juta Cape Town 2008) 9.

From 1806 to 1843, various ordinances were passed in the Cape Colony.²¹ The Cape Ordinance 6 of 1843 was the most important of all ordinances.²² The Cape Ordinance 6 of 1843 abolished all debt discharge measures provided under Roman-Dutch law. Moreover, it provided for the rehabilitation of debts that were accepted by a specified majority of creditors.²³

In 1916, all insolvency statutes were repealed by the *Insolvency Act* 32 of 1916.²⁴ This *Act* made provision for the sequestration of the debtor's estate for the benefit of creditors.²⁵ The debtor received a discharge from all pre-sequestration debt without the court's involvement or any effect on his contractual capacity.²⁶

1.3 Problem Statement

The issue facing over-indebted natural person debtors in South Africa is not because there are no debt discharge measures available, but it is the fact that existing debt discharge measures under the *Insolvency Act* are not robust and comprehensive.²⁷ The *Insolvency Act* provides for the discharge of debts in terms of the sequestration proceedings.²⁸ However, the requirements to enter the sequestration proceedings in terms of the *Insolvency Act* are stringent and as a result many debtors do not have access to the proceedings.²⁹ Debt intervention measures in terms of the *National*

²¹ Magau PT *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* (LLM- dissertation North West University 2019) 20; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 105.

²² Cape Ordinance 6 of 1843; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 9; Magau *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 20; Bertelsmann *et al* *Mars The Law of Insolvency* 9; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 108.

²³ Section 117 and section 120 of the Cape Ordinance 6 of 1843; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 106; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 9.

²⁴ *Insolvency Act* 32 of 1916 (1916 Act); Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 12.

²⁵ Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 10.

²⁶ Section 126 of the 1916 Act; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 9.

²⁷ Mabe 2019 PELJ 2; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 11.

²⁸ Section 129 of the *Insolvency Act*; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 2; Mabe 2019 PELJ 2.

²⁹ Coetzee and Roestoff 2013 22 *International Insolvency Review* 189; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 2.

Credit Amendment Act also seeks to assist consumers who are unable to access existing insolvency measures.³⁰ Over-indebted debtors may use debt review under the *National Credit Act*³¹ or administration orders in terms of the *Magistrates' Court Act*³² to bypass the sequestration process. However, both debt review and administration orders do not provide for a discharge of debt but provide for debt-restructuring only, to ultimately meet the claims of creditors.³³ It is, therefore, submitted that debt review and administration orders are not robust and comprehensive.

The *Insolvency Act* provides over-indebted natural person debtors with debt discharge through sequestration proceedings.³⁴ There are two ways in which a debtor's estate may be sequestered. Firstly, the sequestration order may be obtained when the debtor himself or his agent applies to the High Court to have the debtor's estate sequestered in terms of voluntary surrender.³⁵ Secondly, it is the compulsory sequestration where the debtor's creditor or creditors can apply to the High Court to have the debtor's estate sequestered.³⁶ A debtor may arrange to apply for sequestration with a friend who is a creditor in what is commonly referred to as friendly sequestration.³⁷ Furthermore, friendly sequestration is not regarded as an independent sequestration form, as it is part of compulsory sequestration.³⁸ These debt discharge measures pose a challenge as the sequestration proceedings have limited scope in providing debt discharge because the advantage to creditors

³⁰ Section 86A of the *National Credit Amendment Act* 7; Kelly-Louw M and Stoop P "Prescription of Debt in the Consumer-Credit Industry" 2019 *Potchefstroom Electronic Law Journal* 2, 5.

³¹ Sections 85-87 of the *National Credit Act*; Mabe 2019 *PELJ* 2; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 6.

³² Section 74 of the *Magistrates' Courts Act*; Mabe 2019 *PELJ* 2; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 6.

³³ Kanamugire 2013 *Mediterranean Journal of Social Sciences* 20; Mabe 2019 *PELJ* 2; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 2.

³⁴ Roestoff M and Coetzee H "Consumer Debt Relief in South Africa; Lesson from America and England; and Suggestions for the Way Forward" 2012 24 *South African Mercantile Law Journal* 53, 55; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 19.

³⁵ Section 3(1) of the *Insolvency Act*; Sharrock J, Van der Linde K and Smith *A Hockly's Insolvency Law* 9th ed (Juta Cape Town 2012).

³⁶ Section 9(1) of the *Insolvency Act*; Sharrock et al *Hockly's Insolvency Law* 17.

³⁷ Sharrock et al *Hockly's Insolvency Law* 45; *Craggs v Dedekind*; *Baartman v Baartman & another*; *Van Jaarsveld v Roebuck*; *Van Aardt v Borrett* 1996 (1) SA 935 (C) 937.

³⁸ Mokgorwane T *The Interplay between National Credit Act 34 of 2005 and Insolvency Act 24 of 1936* (LLM dissertation University of Pretoria 2005) 22.

requirement hampers the granting of sequestration orders for many debtors.³⁹ This study submits that the exclusion of many overburdened consumer debtors from a discharge procedure could infringe their fundamental constitutional right of equality under the South African *Constitution*.⁴⁰ Debtors without assets that can be used to yield adequate proceeds to establish an advantage for creditors are barred from the discharge measures that the insolvency proceedings provide.⁴¹ The "advantage to creditor's" principle cause unequal treatment of debtors in that many are left without proper statutory discharge.⁴²

In terms of the *Insolvency Act*, a debtor may be sequestrated by voluntary sequestration, where a debtor makes an application to the High Court to surrender his or her estate to creditors.⁴³ Voluntary surrender applications allow the consumer to constructively petition for sequestration and receive a debt discharge from pre-sequestration debts.⁴⁴ However, there are drawbacks to this procedure which results in debtors not being able to acquire the sequestration order and thus obtain the sought debt discharge.⁴⁵ Firstly, suppose the debtor owns a realisable property of sufficient value to defray all expenses of the sequestration order which will be payable from the debtor's estate.⁴⁶ In that case, the court may approve the surrender of the debtor's estate.⁴⁷ In addition, for the voluntary surrender application to be approved, the court must be assured that the sequestration of the debtor's estate would be to

³⁹ Kanamugire 2013 *Mediterranean Journal of Social Sciences* 32; Coetzee H "Is the Unequal Treatment of Debtors in Natural Person Insolvency Law Justifiable? A South African Exposition" 2016 *International Insolvency Review* 36, 55.

⁴⁰ Section 9 of the *Constitution of the Republic of South Africa*, 1996; Boraine and Roestoff 2015 *NIBLeJ* 91; Coetzee 2016 *International Insolvency Review* 55.

⁴¹ Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 13; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 31; Levenstein *An Appraisal of the New South African Business Rescue Procedure* 27.

⁴² Boraine A and Roestoff M "The Pro-Creditor Approach in South African Insolvency Law and the Possible Impact of the Constitution" 2015 3 *NIBLeJ* 60, 91; Kok A "Not so Hunky-Dory: Failing to Distinguish Between Differentiation and Discrimination – *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd (No 1)*" 2011 *THRHR* 340, 343.

⁴³ Section 3(1) of the *Insolvency Act*; *Fisrt Bank v Engelbrecht* 2013 ZAGPJHC 15; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21.

⁴⁴ Boraine and Roestoff 2014 *THRHR* 541.

⁴⁵ Roestoff and Coetzee 2012 *SA Merc LJ* 55; Coetzee and Roestoff 2013 *International Insolvency Review* 189; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 2.

⁴⁶ Section 6(1) of the *Insolvency Act*; *Ex Parte Mathysen et uxor* 2003 (2) SA 308 (T) 311.

⁴⁷ Section 6(1) of the *Insolvency Act*; *Ex Parte Mathysen et uxor* 2003 (2) SA 308 (T) 311.

the benefit of the creditors.⁴⁸ Debtors who are unable to prove that the sequestration will yield sufficient proceeds to create an advantage to creditors are excluded from benefiting from the debt discharge measures that the *Insolvency Act* provides.⁴⁹

Creditors can make an application to the High Court to have a debtor declared insolvent in terms of compulsory sequestration.⁵⁰ The compulsory sequestration procedure and its requirements makes it difficult for debtors to get sequestrated.⁵¹ Firstly, the court can only accept the application for compulsory sequestration if the petitioning creditor has established a liquidated claim of at least R100, or R200 in aggregate for two or more creditors against the debtor.⁵² Secondly, the debtor should have committed an act of insolvency or is insolvent.⁵³ Lastly, there should be a reason to believe that the sequestration will be to the advantage of creditors.⁵⁴ This is problematic since the creditor typically has no idea of the precise position of the debtor's estate and it is challenging for him or her to have satisfactory evidence that creditors will benefit from the sequestration of the debtor's estate.⁵⁵ Thus, if the creditor fails to meet the advantage to creditor's requirement, the court will not grant the sequestration order, and as a result, the debtor will not be able to obtain debt discharge.⁵⁶

⁴⁸ Section 6(1) of the *Insolvency Act*; *Nell v Lubbe* 1999 (3) SA 109 (W) 111; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21.

⁴⁹ Roestoff M "The income of an Insolvent" 2017 *Department of High Education and Training* 1, 478; Asheela NV *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 13; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 31; Levenstein E *An Appraisal of the New South African Business Rescue Procedure* 27.

⁵⁰ Section 9(1) of the *Insolvency Act*; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 22; Roestoff 2017 *DHET* 478.

⁵¹ Boraine A and Roestoff M "Fresh Start Procedures for Consumer Debtors in South African Bankruptcy law" 2002 11 *International Insolvency Review* 1, 4.

⁵² Section 12(1)(a) of the *Insolvency Act*; *Meskin v Friedman* 1948 2 SA 55 (W) 45; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 22.

⁵³ Section 12(1)(b) of the *Insolvency Act*; *Abell v Els* 1976 2 SA 797 (T) 113; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 22.

⁵⁴ Section 10(1)(c) and 12(1)(c) of the *Insolvency Act*; Calitz J "Developments in the United States' Consumer Bankruptcy law: A South African Perspective" 2007 28 *Obiter* 397, 409; *London Estates (Pty) Ltd v Nair* 1957 3 SA 591 (D); *ABSA Bank Ltd v De Klerk* 1999 4 SA 835 (E); *Esterhuizen v Swanepoel* 2004 4 SA 89 (W) 102.

⁵⁵ *Amod v Khan* 1947 2 SA 432 (N) 438; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 22; Calitz 2007 *Obiter* 409; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 2.

⁵⁶ Section 12(1)(a) of the *Insolvency Act*; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 22.

A creditor may allege to have a legitimate claim against the debtor and applies for the sequestration of the debtor's estate due to non-payment in terms of friendly sequestration.⁵⁷ The heavy burden of proof on the applicant for voluntary surrender to establish an advantage to creditors is one of the reasons for the existence of friendly sequestration.⁵⁸ Friendly sequestrations are frequently used to obtain compulsory sequestration by abusing the court process.⁵⁹ Applicants may claim that they have received a letter from the debtor and that he/she is unable to satisfy his/her debts when they fall due.⁶⁰ However, also in friendly sequestration, the advantage to creditors is a criterion used to grant this order.⁶¹ Therefore, debtors will not be able to obtain debt discharge if the court denies the application for friendly sequestration.⁶²

1.4 Aims and Objectives

1.4.1 Aims

The aims of this study are as follows:

- (a) To examine whether the current debt-related legislation limits the chances of over-indebted natural person debtors to obtain a debt discharge for their debts.
- (b) To examine whether the exclusion of many over-indebted natural person debtors from debt discharge measures infringes their fundamental constitutional right of equality under the South African *Constitution*.

⁵⁷ Section 8(g) of the *Insolvency Act*; *Estate Logie v Priest* 1926 AD 312; Evans RG "Friendly Sequestrations, the Abuse of the Process of Court and Possible Solutions for Overburdened Debtors" 2001 13 *SA Merc LJ* 485, 508; Smith C *The Law of Insolvency* 3rd ed (Lexis Nexis Butterworths 1988) 74-77.

⁵⁸ Evans 2001 13 *SA Merc LJ* 485; Loubser A "Ensuring Advantage to Everyone in a Modern South African Insolvency law" 1997 9 *SA Merc LJ* 325, 328.

⁵⁹ *Mthimkhulu v Rampersad & Another* 2000 3 SA 512 (N) 514; Evans 2001 *SA Merc LJ* 508.

⁶⁰ Section 8(g) of the *Insolvency Act*; *R v Meer and Other* 1957 3 SA 614 (N) 75.

⁶¹ Evans RG and Hoskins ML "Friendly Sequestrations and the Advantage of Creditors" 1990 2 *SA Merc LJ* 246, 251; *Ex parte Heydenreich* 1917 TPD 657 658; *Ex parte Le Roux* 1996 2 SA 419 (C) 424.

⁶² Evans RG "Unfriendly Consequences of a Friendly Sequestration" 2003 15 *SA Merc LJ* 437, 447; *Mthimkhulu v Rampersad & Another* (BOE Bank Ltd, intervening creditor) 2000 3 All SA 512 (N) 514; *Beinash and Co v Nathan* (Standard Bank of South Africa Limited intervening) 1998 3 SA 540 (W).

1.4.2 Objectives

The objectives of this study are as follows:

- (a) To examine whether the current debt-related legislation provides comprehensive debt discharge measures for over-indebted persons.
- (b) To explore the need for alternative measures of debt discharge that could be utilised by over-indebted persons.

1.5 Research Question

This study seeks to address the following question:

Is the current debt-related legislation robust enough to provide comprehensive alternative measures for the discharge of over-indebted persons' debts in South Africa?

1.6 Rationale of the Study

This study is critical because it proposes alternative debt discharge measures for over-indebted persons in South Africa. With robust and comprehensive debt discharge measures in place, the levels of over-indebtedness in South Africa can be reduced. Debt discharge measures provided in terms of the sequestration proceedings have strict requirements in providing debt discharge.⁶³ Debtors are required to have adequate assets that can be used to yield sufficient proceeds to create an advantage to creditors that are excluded from benefiting from the discharge provided by the insolvency proceedings.⁶⁴ The advantage of creditor's principle is causing unequal treatment of debtors in that many are left without proper statutory discharge.⁶⁵

⁶³ Coetzee H "Is the Unequal Treatment of Debtors in Natural Person Insolvency Law Justifiable? A South African Exposition" 2016 *IIR* 36, 55; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 32; Roestoff and Coetzee 2012 *SA Merc LJ* 53.

⁶⁴ Roestoff 2017 *DHET* 478; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 13; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 31; Levenstein *An Appraisal of the New South African Business Rescue Procedure* 27.

⁶⁵ Boraine and Roestoff 2015 *NIBLeJ* 91; Kok 2011 *THRHR* 343; *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd (No 1)*.

Moreover, debtors in South Africa can make use of debt review in terms of the *National Credit Act*⁶⁶ or administration orders in terms of the *Magistrates' Court Act*⁶⁷ to circumvent the sequestration process. However, both debt review and administration orders do not provide for a discharge of debt but provide for debt-restructuring only, to eventually satisfy the creditor's claims.⁶⁸ This study is important because it discusses alternative measures for debt discharge that over-indebted persons can utilise to discharge their debts. Problems faced by over-indebted persons in South Africa prior to the discharge of their debts are discussed. Furthermore, this study investigates how the debt-related legislation in South Africa limit the chances of over-indebted persons to obtain debt discharge. Consequently, this study proposes law reform of the current debt discharge measures under *Magistrates' Courts Act*,⁶⁹ *National Credit Act*,⁷⁰ *National Credit Amendment Act*,⁷¹ *Consumer Protection Act*,⁷² *Debt Collectors Act*,⁷³ *Prescription Act*⁷⁴ and *Financial Sector Regulation Act*⁷⁵ to provide more robust and comprehensive debt discharge measures for over-indebted persons.

1.7 Literature Review

Boraine and Roestoff argue that the granting of discharge of debt in insolvency is determined by whether a system is pro-creditor or pro-debtor.⁷⁶ The South African consumer *Insolvency Act* provides for a discharge of debt obligations and the system is perceived as exceptionally pro-creditor.⁷⁷ The *Insolvency Act* requires evidence that

⁶⁶ Sections 85-87 of the *National Credit Act*; Mabe 2019 *PELJ* 2; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 6.

⁶⁷ Section 74 of the *Magistrates' Courts Act*; Mabe 2019 *PELJ* 2; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 6.

⁶⁸ Kanamugire 2013 *Mediterranean Journal of Social Sciences* 20; Mabe 2019 *PELJ* 2; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 2.

⁶⁹ Section 74 of the *Magistrates' Courts Act*.

⁷⁰ Section 79 of the *National Credit Act*.

⁷¹ Section 1(c) of the *National Credit Amendment Act*.

⁷² Section 3(1) (a)-(f) of the *Consumer Protection Act* 68 of 2008 (*Consumer Protection Act*).

⁷³ Section 19 of the *Debt Collectors Act* 114 of 1998 (*Debt Collectors Act*).

⁷⁴ Section 10-16 of the *Prescription Act* 68 of 1969 (*Prescription Act*).

⁷⁵ Section 57(b)(ii) of the *Financial Sector Regulation Act* 9 of 2017 (*Financial Sector Regulation Act*).

⁷⁶ Coetzee 2016 *International Insolvency Review* 55; Boraine and Roestoff 2015 *NIBLeJ* 77; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 32.

⁷⁷ Boraine and Roestoff 2014 *THRHR* 546; Coetzee 2016 *International Insolvency Review* 55.

creditors would benefit from sequestration.⁷⁸ As a result, our courts have generally shown an exceptionally unsympathetic approach to the needs of the debtors in sequestration applications to receive a discharge of pre-sequestration debt due to the misuse of the procedure.⁷⁹ Therefore, it is unclear whether the advantage to creditor's provisions can be questioned on the grounds of section 22 of the *Constitution*, which protects one's freedom to freely choose a trade, occupation or profession.⁸⁰

Mabe argues that alternatives to South Africa's sequestration process should preferably curtail the misuse of the sequestration process created by the advantage to creditor's requirement.⁸¹ Firstly, in the expectation of debt discharge, alternatives to the sequestration process should provide all debtors with ways to pay their creditors in an incentivised way.⁸² Secondly, reducing the insolvency period after the sequestration order, could free those debtors from their liabilities sooner.⁸³ Lastly, alternatives to the sequestration process should allow debtors a final opportunity to escape the sequestration process and stop the stigma that follows insolvency.⁸⁴ However, because only applicants who can demonstrate that sequestration would benefit creditors can enter the sequestration procedure, the advantage to creditor's requirement has remained a barrier preventing the sequestration of over-indebted individuals and thus obtaining a debt discharge.⁸⁵ Accordingly, this study submits that

⁷⁸ Sections 6(1), 10(1)(c) and 12(1)(c) of the *Insolvency Act*; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21; *London Estates (Pty) Ltd v Nair* 1957 3 SA 591 (D); *ABSA Bank Ltd v De Klerk* 1999 4 SA 835 (E); *Esterhuizen v Swanepoel* 2004 4 SA 89 (W) 102.

⁷⁹ Section 129(1)(b) *Insolvency Act*; Boraine and Roestoff 2015 *NIBLeJ* 78; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 13; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 31; Levenstein E *An Appraisal of the New South African Business Rescue Procedure* 27.

⁸⁰ Section 22 the *Constitution of the Republic of South Africa*, 1996; Boraine and Roestoff 2015 *NIBLeJ* 77.

⁸¹ Mabe 2019 *PELJ* 26; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 420.

⁸² Mabe 2019 *PELJ* 26; Asheela NV *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 13; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 31; Levenstein *An Appraisal of the New South African Business Rescue Procedure* 27.

⁸³ Section 124(1)-124(5) and 127A of the *Insolvency Act*; Bertelsmann *et al Mars The Law of Insolvency in South Africa* 555.

⁸⁴ Mabe 2019 *PELJ* 27; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 31; Levenstein *An Appraisal of the New South African Business Rescue Procedure* 27.

⁸⁵ Mabe Z "Notice of Intention to Surrender as an Abuse of the Sequestration Process: *Nedbank Limited v Malan*; In re: *Ex Parte Application of Malan* [2015] JOL 33458 (GP)" 2017 *THRHR* 695, 695; Coetzee *Comparative Reappraisal of Debt Relief Measures* 9; Roestoff 2017 *DHET* 478.

alternative debt discharge measures should ideally help over-indebted persons who are unable to access the sequestration process with a formal discharge of debts.

Asheela argues in favour of the relaxation of the advantage requirement in sequestration applications.⁸⁶ In sequestration applications, overburdened debtors pursuing debt discharge, that does not show the benefit of creditors are not considered.⁸⁷ While debt discharge is not the main goal of the *Insolvency Act*, when the insolvent debtor is rehabilitated, it is an indirect result of the sequestration process.⁸⁸ The *Insolvency Act* almost deals with every aspect of the other classes of creditors while there is no provision of the different classes of debtors who can and cannot prove an advantage to creditors.⁸⁹ This shows that an imbalance occurs between the interests of creditors and debtors.⁹⁰ In addition, Asheela contends that South Africa does not have the requisite appropriate debt discharge because, in addition to other deficiencies, the administration order in terms of the *Magistrates' Court Act* and debt review in terms of the *National Credit Act* do not provide debtors with a statutory discharge of debts.⁹¹

According to Roestoff and Coetzee, the primary goal of the South African *Insolvency Act* is to ensure an orderly and equal allocation of debtor's assets in situations where these assets are insufficient to meet all the claims of the creditors.⁹² As Erasmus J explained the position, in *BP Southern African (Pty) Ltd v Furstenburg*,⁹³ "the aim of *Insolvency Act* is to sequester the debtor's estate for the benefit of creditors".⁹⁴

⁸⁶ Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 2.

⁸⁷ Roestoff 2017 *DHET* 478; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 13; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 31; Levenstein *An Appraisal of the New South African Business Rescue Procedure* 27.

⁸⁸ Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 13.

⁸⁹ Roestoff 2017 *DHET* 478; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 13.

⁹⁰ Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 13.

⁹¹ Roestoff 2017 *DHET* 478; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 13.

⁹² Roestoff and Coetzee 2012 *SA Merc LJ* 53; Coetzee and Roestoff 2013 *International Insolvency Review* 189; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 10.

⁹³ *BP Southern African (Pty) Ltd v Furstenburg* [1966] 1 SA (O) 717 720.

⁹⁴ *BP Southern African (Pty) Ltd v Furstenburg* [1966] 1 SA (O) 717 720; Roestoff 2013 *22 International Insolvency Review* 189; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 10.

Accordingly, the advantage to creditor's requirement makes it difficult for over-indebted consumers to access the sequestration process and it is, therefore, difficult for these debtors to obtain debt discharge.⁹⁵ Furthermore, the over-indebted consumers have to wait an unnecessarily long period before they can be automatically discharged after they have entered the sequestration proceedings.⁹⁶ It, therefore, becomes clear that the *Insolvency Act* does not provide over-indebted consumers with adequate debt discharge and debt discharge is merely a consequence of the *Insolvency Act*.⁹⁷

Boraine and Roestoff argues that the advantage to creditor's requirement has been the major obstacle in the way of many South African debtors seeking debt discharge.⁹⁸ They submit that sequestration is an expensive process to pursue and that it can only be carried out in situations where it would be cost-effective to do so.⁹⁹ However, South African courts should follow a balanced approach when exercising their discretion to grant a sequestration order by taking into account the debtor's interests in the choice of debt discharge.¹⁰⁰ This study submits that debt discharge is one of the most prominent features of all modern insolvency systems, and yet it is only obtained by limited debtors seeking debt discharge.

1.8 Assumptions and Hypothesis

1.8.1 Assumptions

This study is based on the following assumptions:

⁹⁵ *BP Southern African (Pty) Ltd v Furstenburg* [1966] 1 SA (O) 717 720; Roestoff 2017 *DHET* 478; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21.

⁹⁶ Section 127A of the *Insolvency Act*; Mabe 2019 *PELJ* 2; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21.

⁹⁷ Roestoff and Coetzee 2012 *SA Merc LJ* 53; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 13; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 31; Levenstein *An Appraisal of the New South African Business Rescue Procedure* 27.

⁹⁸ Boraine & Roestoff 2014 77 *THRHR* 542; Roestoff 2017 *DHET* 478;

⁹⁹ Kanamugire 2013 *Mediterranean Journal of Social Sciences* 32; Asheela NV *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 13; Boraine and Roestoff 2015 3 *NIBLeJ* 91.

¹⁰⁰ Mabe and Evans 2014 *MERC LJ* 655; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 22.

- (a) The current debt-related legislation namely, *Magistrates' Courts Act*,¹⁰¹ *National Credit Act*,¹⁰² *National Credit Amendment Act*,¹⁰³ *Consumer Protection Act*,¹⁰⁴ *Debt Collectors Act*,¹⁰⁵ *Prescription Act*¹⁰⁶ and *Financial Sector Regulation Act*¹⁰⁷ do not provide robust and comprehensive measures for the discharge of over-indebted natural person debtors' debts in South Africa.
- (b) The exclusion of many over-indebted natural person debtors from debt discharge measures could infringe their basic constitutional right of equality under the South African *Constitution*.

1.8.2 Hypothesis

The *Insolvency Act* provides debt discharge measures in terms of sequestration processes.¹⁰⁸ However, many over-indebted natural person debtors are excluded from obtaining sequestration proceedings to be discharged from their pre-sequestration debts.¹⁰⁹ The debt discharge measures provided by the *Insolvency Act* limit the chances of over-indebted persons in different financial positions to obtain debt discharge.¹¹⁰ Debtors who do not have assets that can be used to yield sufficient proceeds to create an advantage to creditors are excluded from benefiting from the debt discharge that the insolvency proceedings provide.¹¹¹ The advantage to creditor's requirement has been the stumbling block in the way of many South African debtors

¹⁰¹ Section 74 of the *Magistrates' Courts Act*.

¹⁰² Section 79 of the *National Credit Act*.

¹⁰³ Section 1(c) of the *National Credit Amendment Act*.

¹⁰⁴ Section 3(1) (a)-(f) of the *Consumer Protection Act*.

¹⁰⁵ Section 19 of the *Debt Collectors Act*.

¹⁰⁶ Section 10-16 of the *Prescription Act*.

¹⁰⁷ Section 57(b)(ii) of the *Financial Sector Regulation Act*.

¹⁰⁸ Section 129 of the *Insolvency Act*; Mabe 2019 *PELJ* 2; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 10.

¹⁰⁹ Section 6(1) of the *Insolvency Act*; Section 10(1)(c) and 12(1)(c) of the *Insolvency Act*.

¹¹⁰ Roestoff and Coetzee 2012 *SA Merc LJ* 53; *BP Southern African (Pty) Ltd v Furstenburg* 1966 1 SA (O) 720; Roestoff 2017 *DHET* 478; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 13; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 31; Levenstein *An Appraisal of the New South African Business Rescue Procedure* 27.

¹¹¹ Roestoff 2017 *DHET* 478; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 13; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 31.

seeking debt discharge.¹¹² The exclusion of many overburdened consumer debtors from a discharge procedure could infringe their basic constitutional right of equality under the South African *Constitution*.¹¹³ Moreover, debt review and administration orders are more focussed on bringing relief to the debtor regarding his debts than on providing him with a discharge of his debts.¹¹⁴ Accordingly, over-indebted consumers are left out without comprehensive debt discharge measures to utilise. As a result, there should be alternative measures which provide over-indebted persons with more robust and comprehensive discharge of debt measures processes. What is needed in order to resolve the problem of over-indebtedness in South Africa is a process that addresses debt discharge measures that are not limiting and stringent.

1.9 Limitations of the Study

This study is mainly focuses on the applicable and relevant sections of the *Insolvency Act*,¹¹⁵ *Magistrates' Courts Act*,¹¹⁶ *National Credit Act*,¹¹⁷ *National Credit Amendment Act*,¹¹⁸ *Consumer Protection Act*,¹¹⁹ *Debt Collectors Act*,¹²⁰ *Prescription Act*¹²¹ and *Financial Sector Regulation Act*.¹²² This study focuses on natural person debtors and omits the inclusion of juristic person debtors. It also focuses on natural person debtors only because including juristic persons will result in the study being too broad. Emphasis is placed on the sequestration proceedings in South Africa since it is the process which over-indebted persons utilise to obtain a formal discharge of their debts in terms of the *Insolvency Act*.¹²³ Moreover, this study briefly discusses how does the

¹¹² Boraine and Roestoff 2014 *THRHR* 542; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 31; Levenstein *An Appraisal of the New South African Business Rescue Procedure* 27.

¹¹³ Section 9 of the *Constitution of the Republic of South Africa*, 1996; Boraine and Roestoff 2015 *NIBLeJ* 91.

¹¹⁴ Sections 85-87 of the *National Credit Act*; Section 74 of the *Magistrates' Courts Act*; Mabe 2019 *PELJ* 2; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 6.

¹¹⁵ Section 3-12 *Insolvency Act*; Sharrock *et al Hockly's Insolvency Law* 17-43.

¹¹⁶ Section 74 of the *Magistrates' Courts Act*.

¹¹⁷ Sections 85-87 of the *National Credit Act*.

¹¹⁸ Section 1(c) of the *National Credit Amendment Act*.

¹¹⁹ Section 3(1) (a)-(f) of the *Consumer Protection Act*.

¹²⁰ Section 19 of the *Debt Collectors Act*.

¹²¹ Section 10-16 of the *Prescription Act*.

¹²² Section 57(b)(ii) of the *Financial Sector Regulation Act*.

¹²³ Section 3(1), 9(1) and 8(1) of the *Insolvency Act*.

debt review and administration provide for debt-restructuring for over-indebted persons in order to eventually satisfy the creditor's claims.¹²⁴ This study discusses how debt intervention measures in terms of the *National Credit Amendment Act* aims to assist identified consumers for whom existing insolvency measures are not accessible to in practice.¹²⁵ Accordingly, the debt discharge measures that over-indebted persons can utilise to obtain a discharge of their debts are recommended. Furthermore, the debt discharge measures recommended by this study will serve as an alternative for over-indebted persons that are not regulated by debt-related legislation. Consequently, this study proposes the amendment of *Insolvency Act*,¹²⁶ *Magistrates' Courts Act*,¹²⁷ *National Credit Act*,¹²⁸ *National Credit Amendment Act*,¹²⁹ *Consumer Protection Act*,¹³⁰ *Debt Collectors Act*,¹³¹ *Prescription Act*¹³² and *Financial Sector Regulation Act*¹³³ to provide over-indebted debtors with debt discharge and also to regulate the provisions that reduce the levels of over-indebtedness in South Africa.

1.10 Research Methodology

The study applies the qualitative methodology based on literature review and the following research methods were used:

a) Primary and Secondary Sources

The primary sources included the *Constitution* of South Africa, legislation and relevant case law because they are credible sources. It is important to use credible sources in academic research to ensure that the claims that the study put forward are correct. The secondary sources consist of journal articles, books and internet sources relating

¹²⁴ Mabe 2011/9 PELJ 6; Kelly-Louw M and Stoop PN *Consumer Credit Regulation in South Africa* (Juta Cape Town 2012) 324; Kelly-Louw M "The Prevention and Alleviation of Consumer Over-indebtedness" 2008 SA Merc LJ 200-226; Boraine A, Van Heerden C and Roestoff M "A Comparison between Formal Debt Administration and Debt Review – The Pros and Cons of these Measures and Suggestions for Law Reform (Part 2)" 2012 *De Jure* 254, 271.

¹²⁵ Section 86A of the *National Credit Amendment Act*; Kelly-Louw and Stoop *PER* 5.

¹²⁶ Section 3-12 *Insolvency Act*; Sharrock *et al Hockly's Insolvency Law* 17-43.

¹²⁷ Section 74 of the *Magistrates' Courts Act*.

¹²⁸ Sections 85-87 of the *National Credit Act*.

¹²⁹ Section 1(c) of the *National Credit Amendment Act*.

¹³⁰ Section 3(1) (a)-(f) of the *Consumer Protection Act*.

¹³¹ Section 19 of the *Debt Collectors Act*.

¹³² Section 10-16 of the *Prescription Act*.

¹³³ Section 57(b)(ii) of the *Financial Sector Regulation Act*.

to the discharge of debt in order to have a broader range of information to enable the study to perform comprehensive research.

b) Relevant Legislation

This research focuses on the debt discharge measures provided by the *Insolvency Act*. This research will briefly discuss *Magistrates' Courts Act*,¹³⁴ *National Credit Act*,¹³⁵ the *National Credit Amendment Act*,¹³⁶ *Consumer Protection Act*,¹³⁷ *Debt Collectors Act*,¹³⁸ *Prescription Act*¹³⁹ and *Financial Sector Regulation Act*.¹⁴⁰

c) Relevant Case Law

This study used case law that is relevant to gain judicial clarification and establish legal principles which are unclear.

1.11 Statement Regarding Research Ethics

The study utilised a qualitative research method. All the primary and secondary sources used in this study were referenced. There are no individual or group interviews and questionnaires that were used as instruments of research to hold any discussions concerning any topic or issue that might be sensitive, embarrassing or upsetting to anyone. No criminal or other disclosures requiring legal action and having potentially adverse effects, risk or hazards for research participants were made in the course of the research. Accordingly, there is no need for arrangements to be made in respect of insurance and/or indemnity to meet the potential legal liability of the North-West University for harm to participants arising from the conduct of the research.

1.12 Relevance for the Research Unit Theme

This research focuses on the effectiveness of debt discharge measures in South Africa. Accordingly, the research falls under the Finance, Trade and Investment Research Unit of the Faculty of Law. The research examines the relevant sections of the *Insolvency*

¹³⁴ Section 74 of the *Magistrates' Courts Act*.

¹³⁵ Section 79 of the *National Credit Act*.

¹³⁶ Section 1(c) of the *National Credit Amendment Act*.

¹³⁷ Section 3(1) (a)-(f) of the *Consumer Protection Act*.

¹³⁸ Section 19 of the *Debt Collectors Act*.

¹³⁹ Section 10-16 of the *Prescription Act*.

¹⁴⁰ Section 57(b)(ii) of the *Financial Sector Regulation Act*.

Act that specifically deal with debt discharge measures. Moreover, this research discusses the relevant sections of the *Magistrates' Courts Act*,¹⁴¹ *National Credit Act*,¹⁴² *National Credit Amendment Act*,¹⁴³ *Consumer Protection Act*,¹⁴⁴ *Debt Collectors Act*,¹⁴⁵ *Prescription Act*¹⁴⁶ and *Financial Sector Regulation Act*.¹⁴⁷ This is done in order to identify the possible strengths and weaknesses of debt discharge measures. This study can benefit legal scholars and practitioners by providing them with an insight into the present challenges of debt discharge measures currently used in South Africa. The outcome of this study could subsequently lead to a modification of the processes of debt discharge in South Africa. It could ultimately influence the amendment of the sections of the *Insolvency Act* dealing with such processes.

1.13 Structure of the Dissertation

This study is structured and framed by the following chapters:

Chapter One: Research outline and context

This chapter consists of the problem statement, the study aims and objectives, research questions, scope and limitations, review of literature and case law, rationale and justifications of the research and research methodology.

Chapter Two: Historical aspects of debt discharge measures in South Africa

This chapter analyses the historical aspects of debt discharge in South Africa. It focuses on the debt discharge measures that were used in South Africa from the 17th century to date.

Chapter Three: Debt discharge measures under the *Insolvency Act*

¹⁴¹ Section 74 of the *Magistrates' Courts Act*.

¹⁴² Section 79 of the *National Credit Act*.

¹⁴³ Section 1(c) of the *National Credit Amendment Act*.

¹⁴⁴ Section 3(1) (a)-(f) of the *Consumer Protection Act*.

¹⁴⁵ Section 19 of the *Debt Collectors Act*.

¹⁴⁶ Section 10-16 of the *Prescription Act*.

¹⁴⁷ Section 57(b)(ii) of the *Financial Sector Regulation Act*.

This chapter discusses problems faced by over-indebted natural person debtors prior to the discharge of their debts in South Africa.

Chapter Four: Alternative measures for the discharge of debts for over-indebted persons in South Africa

This chapter discusses alternatives measures for the discharge of debts for over-indebted persons under different Acts namely: *Magistrates' Courts Act*, *National Credit Act*, *National Credit Amendment Act*, *Consumer Protection Act*, *Prescription Act*, *Debt Collection Act* and *Financial Sector Regulation Act*.

Chapter Five: Conclusion and Recommendations

This chapter recommends possible solutions concerning the challenges and problems faced by over-indebted natural person debtors.

CHAPTER TWO

HISTORICAL ASPECTS OF DEBT DISCHARGE MEASURES IN SOUTH AFRICA

2.1 Introduction

The history of debt discharge measures in South Africa, can be traced from the Roman-Dutch law in the 17th century to date. Roman-Dutch Law is an essential foundation of the South African insolvency law.¹⁴⁸ *Concurses creditorium* is a concept which emphasised the rights of a group of creditors and requires that the assets of the insolvent be split proportionally amongst the creditors.¹⁴⁹ *Concurses creditorium* was subsequently followed by a development of debt discharge measures, namely, *distractio bonorum*, *cessio bonorum* and *venditio bonorum*.

The Amsterdam Ordinance of 1777 allowed the insolvent or any of his creditors to apply for the sequestration of the debtor's estate.¹⁵⁰ The Amsterdam Ordinance recognized the principle of rehabilitation.¹⁵¹ Rehabilitation provided the debtor with an opportunity of a discharge from all pre-sequestration debt if the prescribed majority of the creditors voted in favour thereof.¹⁵² The primary object of the Amsterdam Ordinance was to secure the property of the insolvent debtor.¹⁵³ After that, the debtor could enter into negotiations with his creditors in a meeting of creditors.¹⁵⁴ The creditors had the duty to prepare an inventory of the estate and to take charge of the

¹⁴⁸ Coetzee H *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* (LLD thesis University of Pretoria 2015) 103; De Clercq B, Evans RG, Abrie W, Graham CR *Insolvent Estates* 7th ed (ProPlus Publishers 2011) 1; Abrie W, Gerryts HF *Estates: Planning and Administration* 4th ed (ProPlus Publishers 2000) 1.

¹⁴⁹ De Clercq *et al Insolvent Estates* 1; Abrie *et al Estates: Planning and Administration* 1.

¹⁵⁰ Evans RG *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* (LLD thesis University of Pretoria 2008) 46; Levenstein E *An Appraisal of the New South African Business Rescue Procedure* (LLD thesis University of Pretoria 2008) 30.

¹⁵¹ Asheela NV *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* (LLM dissertation University of Pretoria 2012) 9.

¹⁵² Bertelsmann E, Evans R, Harris A, Kelly-Louw M, Loubser A, Roestoff M, Smith A, Stander L, Steyn L *Mars The Law of Insolvency in South Africa* 9th ed (Juta Cape Town 2008) 9.

¹⁵³ Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 46; Calitz *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 26.

¹⁵⁴ Calitz *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 26; Temperman E *The Judiciary's Discretion in Sequestration* (LLM dissertation University of Pretoria 2014) 11.

estate.¹⁵⁵ If the debtor successfully enter into a composition that was confirmed by the chamber, within a month of his/her insolvency, he/she was then rehabilitated.¹⁵⁶

From 1806 to 1843, various ordinances were passed in the Cape Colony.¹⁵⁷ The Cape Ordinance 6 of 1843 was the most important of all ordinances .¹⁵⁸ The Cape Ordinance 6 of 1843 abolished all debt discharge measures provided under Roman-Dutch-Law. Moreover, it provided for the rehabilitation of debts that were accepted by specified majority of creditors.¹⁵⁹

In 1916, all insolvency statutes were repealed by the *Insolvency Act* 32 of 1916.¹⁶⁰ This Act made provision for the sequestration of the debtor's estate for the benefit of creditors.¹⁶¹ The debtor received a discharge from all pre-sequestration debt without the court's involvement or any effect on his contractual capacity.¹⁶²

This chapter seeks to investigate the origins of the current debt discharge measures. More importantly, the aim is to investigate and discuss how over-indebted persons obtained a discharge of their debts before the Union of South Africa and under the Union of South Africa.

2.2 Debt Discharge Measures Prior to the Union of South Africa

2.2.1 Debt Discharge Measures Under the Roman-Dutch Law

¹⁵⁵ Temperman *The Judiciary's Discretion in Sequestration* 11; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 46.

¹⁵⁶ Calitz *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 26; Temperman *The Judiciary's Discretion in Sequestration* 11.

¹⁵⁷ Magau PT *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* (LLM- dissertation North West University 2019) 20; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 105.

¹⁵⁸ Cape Ordinance 6 of 1843; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 9; Magau *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 20; Bertelsmann *et al Mars The Law of Insolvency* 9; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 108.

¹⁵⁹ Section 117 and section 120 of the Cape Ordinance 6 of 1843; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 106; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 9.

¹⁶⁰ Insolvency Act 32 of 1916 (1916 Act); Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 12.

¹⁶¹ Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 10.

¹⁶² Section 126 of the 1916 Act; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 9.

Concurses creditorium was a concept which emphasised the rights of a group of creditors and required that the assets of the insolvent be split proportionally amongst the creditors. *Concurses creditorium* was used under Roman-Dutch law where there was more than one creditor with a claim against the debtor, creditors could "cut shares" in the debtor's estate.¹⁶³ The debtor was considered insolvent in terms of the *concurses creditorium*, if he did not satisfy the claims of all the creditors.¹⁶⁴ To satisfy the claims of all creditors, the debtor's property was sold to the highest bidder, that is, the person who gave the creditors the highest dividend on their claims.¹⁶⁵ The buyer of the debtor's property prevailed in the whole estate sale and the proceeds were split according to a set order of choice between creditors and the debtor was finally released from all of his/her debts.¹⁶⁶

The *concurses creditorium* process was a complicated procedure, and only debtors of lower social status were affected by the adverse effects of this process.¹⁶⁷ Furthermore, if the proceeds of the agreement could not sufficiently meet the creditors' demands, the creditors could take steps to take back all the assets that the debtor had accumulated.¹⁶⁸ However, this was subject to a special privilege which granted the debtor a rehabilitation period of one year after the auction, during which he/she was safe from execution.¹⁶⁹ To some point, this was seen as a shift in policy towards a more humane view of the needs of debtors because debtors could no longer face imprisonment.¹⁷⁰ *Concurses creditorium* was a good debt discharge measure

¹⁶³ Lienne S "Protection Against Forced Sale of a Debtor's Home in the Roman Context" 2012 *DHET* 119, 126; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 26.

¹⁶⁴ Lienne 2012 *DHET* 126; Evans RG *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 26.

¹⁶⁵ Lienne 2012 *DHET* 126; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 8.

¹⁶⁶ Smith C *The Law of Insolvency* 3rd ed (Lexis Nexis Butterworths Durban 1988) 5; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 104.

¹⁶⁷ Lienne 2012 *DHET* 127; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 28.

¹⁶⁸ Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 31; Levenstein *An Appraisal of the New South African Business Rescue Procedure* 29; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 104.

¹⁶⁹ Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 31; Lienne 2012 *DHET* 127

¹⁷⁰ Levenstein *An Appraisal of the New South African Business Rescue Procedure* 28; Lienne 2012 *DHET* 127; Lienne 2012 *DHET* 127.

because it changed the landscape of the treatment that was subjected to debtors. *Concurses creditorium* recognised the interests of debtors by securing the debtor from being arrested for failing to pay creditors.

Cessio bonorum was a voluntary surrender of the debtor's estate to creditors.¹⁷¹ The transfer of the debtor's property to his/her creditors would exempt a debtor from loss of legal standing and personal seizure for any debts which remained unpaid.¹⁷² A debtor had to present a petition to court together with a list of his property and accounts of creditors.¹⁷³ The list and petition were then referred to the governing authority of the debtor's place of domicile in order for them to compile a report.¹⁷⁴ The court upon receipt of the report granted a rule calling upon persons interested to show cause before the judge why a writ of *cessio bonorum* provisionally issued should not be made final.¹⁷⁵ The writ of *cessio bonorum* had the benefit of freeing the insolvent from personal arrest and the concern of being sued.¹⁷⁶ The effect of granting the rule was to free the petitioner from future arrest while the effect of its confirmation was to stay all execution and place his/her property in the hands of a curator.¹⁷⁷ The curator under the Roman-Dutch law did not become the owner of the insolvent estate but only took over the control of the estate.¹⁷⁸ The benefit of *cessio bonorum* was virtually a voluntary surrender by an insolvent of all his/her estate for benefit of creditors.¹⁷⁹ The *cessio bonorum* was not a good debt discharge measure because it had some unpleasant experience for debtors as they had to stand for an hour on three

¹⁷¹ Lienne 2012 *DHET* 127; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 8.

¹⁷² Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 35; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 7.

¹⁷³ Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 105; Levenstein *An Appraisal of the New South African Business Rescue Procedure* 29.

¹⁷⁴ Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 42; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 8.

¹⁷⁵ Temperman E *The Judiciary's Discretion in Sequestration Applications* (LLM Dissertation University of Pretoria 2014) 10; Levenstein *An Appraisal of the New South African Business Rescue Procedure* 24.

¹⁷⁶ Calitz JC *Reformatory Approach to State Regulation of Insolvency Law in South Africa* (LLD thesis University of Pretoria 2009) 25; Lienne 2012 *DHET* 128.

¹⁷⁷ Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 42; Levenstein *An Appraisal of the New South African Business Rescue Procedure* 29.

¹⁷⁸ Temperman *The Judiciary's Discretion in Sequestration Applications* 10; Lienne 2012 *DHET* 128.

¹⁷⁹ Levenstein *An Appraisal of the New South African Business Rescue Procedure* 29; Calitz JC *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 25; Lienne 2012 *DHET* 128.

consecutive days before the surrender of their estates.¹⁸⁰ This treatment was inhuman and degrading because even debtors deserved to be treated with respect and have their dignity preserved.

After *cessio bonorum*, *venditio bonorum* took place.¹⁸¹ *Venditio bonorum* is a formal process of taking all property from an insolvent person and managing that estate to sell it as soon as possible and at the highest available price.¹⁸² The proceedings were to satisfy the claims of creditors and the debtor was subsequently discharged from all of his debts.¹⁸³ *Venditio bonorum* was not a good debt discharge measure because it did not provide a discharge unless the property ceded and was sufficient for the sequestration of the debtor's estate.¹⁸⁴ This resulted in many debtors left without debt discharge measures because they did not have sufficient property.¹⁸⁵

2.2.2 The Amsterdam Ordinance of 1777

The Amsterdam Ordinance of 1777 allowed the insolvent or any of his creditors to apply for the sequestration of the debtor's estate.¹⁸⁶ The commissioners of the debtor's estate proceeded to make an inventory of assets if creditors refused to make an arrangement.¹⁸⁷ The next step in the proceedings was to convene a creditors' meeting and to appoint a provisional administrator.¹⁸⁸ The debtor was given a month to enter into a payment agreement with his creditors and if not successful, he/she was then declared

¹⁸⁰ Temperman *The Judiciary's Discretion in Sequestration Applications* 10; Levenstein *An Appraisal of the New South African Business Rescue Procedure* 29; Calitz JC *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 25.

¹⁸¹ Lienne 2012 *DHET* 128; Temperman *The Judiciary's Discretion in Sequestration Applications* 10.

¹⁸² Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 35; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 104.

¹⁸³ Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 35; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 104.

¹⁸⁴ Lienne 2012 *DHET* 128; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 105.

¹⁸⁵ Lienne 2012 *DHET* 128; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 35.

¹⁸⁶ Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 46; Levenstein *An Appraisal of the New South African Business Rescue Procedure* 30.

¹⁸⁷ Temperman *The Judiciary's Discretion in Sequestration Applications* 11; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 46.

¹⁸⁸ Temperman *The Judiciary's Discretion in Sequestration Applications* 11; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 105.

to be insolvent.¹⁸⁹ The administrator was then appointed as the estate's official curator.¹⁹⁰ It is uncertain if the curator received ownership of the estate but a notable aspect was that the estate was managed according to the orders of creditors.¹⁹¹ The curator had to continue to liquidate the property and transfer the proceeds of the estate to the creditors after the creditors proved their claims against the debtor's estate.¹⁹²

In terms of the Amsterdam Ordinance of 1777 several commissioners were appointed in order to confirm or reject a debtor's request to be sequestrated.¹⁹³ The Commissioners' first responsibility was to take ownership of the estate, make an inventory of all movable property, and seal all property as required.¹⁹⁴ This constituted sequestration, which ended all executions against the estate, but did not prejudice the creditor's rights gained by execution before the sequestration.¹⁹⁵

The primary purpose of the 1777 Amsterdam Ordinance was to secure the insolvent debtor's property.¹⁹⁶ Thus, at a meeting of creditors, the debtor was able to enter into payment negotiations with his creditors.¹⁹⁷ In addition, it was the responsibility of the creditors to prepare an inventory of the assets and to take care of the estate.¹⁹⁸ If the debtor successfully entered into a payment agreement that was confirmed by the chamber within a month of his or her insolvency, the estate was released from

¹⁸⁹ Calitz *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 26; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 9.

¹⁹⁰ Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 46; Calitz *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 26

¹⁹¹ Temperman *The Judiciary's Discretion in Sequestration Applications* 11; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 46.

¹⁹² Calitz *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 26; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 46

¹⁹³ Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 45; Calitz *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 26; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 9.

¹⁹⁴ Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 45; Calitz *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 26.

¹⁹⁵ Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 45; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 9.

¹⁹⁶ Section 1 of the Amsterdam Ordinance of 1777; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 46; Calitz *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 26.

¹⁹⁷ Calitz *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 26; Temperman *The Judiciary's Discretion in Sequestration* 11.

¹⁹⁸ Temperman *The Judiciary's Discretion in Sequestration* 11; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 46.

sequestration.¹⁹⁹ The chamber declared the estate insolvent if no payment agreement was made.²⁰⁰ The Amsterdam Ordinance of 1777 required the insolvent to appear before the commissioners with all of his or her properties upon being declared insolvent.²⁰¹ The insolvent also had to declare that when he/she stopped payment to creditors, it means that he/she had no other assets.²⁰²

The debtor was entitled to be discharged from all debts that were due prior to insolvency, upon obtaining a certificate from creditors.²⁰³ The Amsterdam Ordinance of 1777 was not a good debt discharge measure because it required the certificate to be signed by the majority of creditors.²⁰⁴ As a result, for a debtor to obtain a debt discharge, it was solely depended on the creditors.²⁰⁵

2.2.3 Cape Law

2.2.3.1 Cape Ordinance of 1806

In 1806 the Cape was under British power, but this had no immediate effect on the legal developments in the Cape Law.²⁰⁶ The Ordinance stayed unchanged and it remained the main source of insolvency law in the Cape.²⁰⁷ In 1819 instructions were issued to the administrator and other functionaries of his department, and an

¹⁹⁹ Calitz *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 26; Temperman *The Judiciary's Discretion in Sequestration* 11.

²⁰⁰ Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 46; Calitz *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 26.

²⁰¹ Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 46; Calitz *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 26.

²⁰² Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 46.

²⁰³ Levenstein *An Appraisal of the New South African Business Rescue Procedure* 31; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 47.

²⁰⁴ Levenstein *An Appraisal of the New South African Business Rescue Procedure* 31; Calitz *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 26; Temperman *The Judiciary's Discretion in Sequestration* 11.

²⁰⁵ Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 46; Temperman *The Judiciary's Discretion in Sequestration* 11.

²⁰⁶ Cape Ordinance of 1806; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 49; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 105.

²⁰⁷ Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 49; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 105.

Ordinance was promulgated for the judicial administration of estates.²⁰⁸ The administrator of the debtor's estate was entrusted with all estates that were insolvent, un-administered or placed under curatorship as well as the execution of all civil sentences.²⁰⁹ The administration of the debtor's estate proved not to be a success, and on 31 December 1827, the office of the administrator was abolished.²¹⁰ The office of the administrator was replaced by a commissioner whose duty was to wind up the administrator's department and assess all matters associated with the administrator's office.²¹¹

2.2.3.2 Cape Ordinance 46 of 1828

A significant event took place with the passing of Cape Ordinance 46 of 1828, where it was mentioned for the first time that in future all insolvent estates had to be administered by an official referred to as the "Master of the Supreme Court".²¹² The Master took over the functions of the official administrator and also possessed many of the functions of the Amsterdam commissioners.²¹³ These two events, namely the introduction of the Charter of Justice and the passing of the Cape Ordinance of 1828, represented two critical milestones in the history of state regulation in South African insolvency law, as they signified the origin of the Master of the High Court as it is known today.²¹⁴

2.2.3.3 Cape Ordinance 64 of 1829

²⁰⁸ Calitz *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 26; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 49.

²⁰⁹ Calitz *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 26; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 49.

²¹⁰ Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 105; Calitz *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 26.

²¹¹ Calitz *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 26; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 49.

²¹² Cape Ordinance 46 of 1828; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 49; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 105.

²¹³ Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 105; Calitz *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 26.

²¹⁴ Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 105; Calitz *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 26.

Cape Ordinance 64 of 1829 followed, representing the first South African *Insolvency Act*, reflecting specific detailed provisions as they are known today.²¹⁵ A substantial number of Dutch principles were woven into the particular legislation and established most of the principles of our present insolvency practice.²¹⁶ Of significance was that the principle of transfer of ownership was established by Cape Ordinance 64 of 1829, which stated that after the granting of the sequestration order the insolvent was divested of his estate.²¹⁷ It was vested in the Master and thereafter in the trustee afterwards.²¹⁸ This was the first time where it was indicated clearly that the trustee became the owner of the debtor's estate.²¹⁹

2.2.3.4 Cape Ordinance 6 of 1843

The Cape Colony passed various ordinances the most important being Cape Ordinance 6 of 1843.²²⁰ The Cape Ordinance 6 of 1843 recognised the principles of voluntary and compulsory surrender of the debtor's estate.²²¹ A debtor could voluntarily surrender his or her estate to creditors.²²² Moreover, creditors could also call for surrender of the debtor's estate.²²³ The Cape Ordinance 6 of 1843 also provided for rehabilitation, where debts were discharged if accepted by a specified majority.²²⁴

²¹⁵ Cape Ordinance 64 of 1829; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 9; Levenstein *An Appraisal of the New South African Business Rescue Procedure* 24.

²¹⁶ Calitz *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 41.

²¹⁷ Calitz *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 41; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 9.

²¹⁸ Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 9; Levenstein *An Appraisal of the New South African Business Rescue Procedure* 24.

²¹⁹ Levenstein *An Appraisal of the New South African Business Rescue Procedure* 24; Calitz *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 41.

²²⁰ Section 2 of the Cape Ordinance 6 of 1843; Magau *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 20; Bertelsmann *et al Mars The Law of Insolvency* 9; Smith *The Law of Insolvency* 6; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 108; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 9.

²²¹ Section 2 and 5 of Ordinance 6 of 1843; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 105.

²²² Section 2 and 5 of Ordinance 6 of 1843; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 105.

²²³ Section 2 and 5 of Ordinance 6 of 1843; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 105.

²²⁴ Section 117 of Ordinance 6 of 1843; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 105.

The Cape Ordinance 6 of 1843 made provisions for the debtor's estate vested in the Master, provisional trustee or the trustee of the estate.²²⁵ The estate included all the property that belonged to the debtor.²²⁶ This included property which existed before the sequestration of the debtor's estate. However, Cape Ordinance also made provision for certain exempt property that was excluded from the insolvent estate.²²⁷ The income of the debtor and that of any of his family was excluded from the control of his/her trustee.²²⁸ Moreover, any damages claimable by reason of any personal wrong or injury against the debtor insolvent was also considered to be exempt property.²²⁹ Any property purchased with money obtained from the aforementioned exempt property was also excluded from the trustee's control.²³⁰ However, property acquired by the debtor from his/her work and labour after his sequestration was included in the administration of the debtor's estate.²³¹

The Cape Ordinance 6 of 1843 regulated the sale of the insolvent estate, and it expressly provided for exceptions from the sale of the property of certain items.²³² The wearing apparel, bedding, household furniture and the tools of the trade of the insolvent were exempted from sale.²³³ The master had the power to allow the debtor a moderate allowance for indispensable support of the debtor and his family out of the assets of the insolvent estate.²³⁴ If the allowance was granted before the second meeting of creditors, it had to be consented to by the creditors at a meeting held after

²²⁵ Section 48 of Ordinance 6 of 1843; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 53.

²²⁶ Section 48(a) of Ordinance 6 of 1843; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 53.

²²⁷ Section 49 of Ordinance 6 of 1843; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 53.

²²⁸ Section 49(d) of Ordinance 6 of 1843; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 53.

²²⁹ Section 49(d) of Ordinance 6 of 1843; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 53.

²³⁰ Section 49(d) of Ordinance 6 of 1843; *De Villiers v Gadow* 17 SC Rep 295; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 53.

²³¹ Section 127 of Ordinance 6 of 1843; *Bartholomew v Stableford* 17 SC Rep 84; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 53.

²³² Section 98 of Ordinance 6 of 1843; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 54.

²³³ Section 25 and 98(a)-(c) of Ordinance 6 of 1843; *Bernstein v Bernstein's Trustee* 14 SC Rep 161; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 54.

²³⁴ Section 59 of the Cape Ordinance 6 of 1843; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 54.

the second meeting of creditors.²³⁵ If a trustee made such an allowance to the debtor without the consent of the creditors, he had to report the amount and grounds of such allowance to the Master.²³⁶

The Cape Ordinance 6 of 1843 made provision for the voiding of *mala fide* and gratuitous alienating of assets when the insolvent's liabilities exceeded his assets.²³⁷ Gifts were included among these alienations that could be declared null and void.²³⁸ However, in respect of certain insurance policies, measures of protection were provided.²³⁹ This Act made provision for the situation where an ante-nuptial contract had been entered into in terms of which one of the spouses had covenanted and agreed.²⁴⁰ The agreement was in terms of the benefit of the other spouse, or for the benefit of children or descendants, to effect a policy of assurance upon the life of either of the spouses, or to cede and assign over.²⁴¹

If the estate of the spouse who had covenanted and agreed was then sequestrated, no payment of premiums made by the spouse were deemed or taken.²⁴² The practical application of this protective provision occurred in *Thorpe's Executors v Thorpe's Tutor*.²⁴³ Thorpe (T) and his wife were 36 years old, married out of community of property; in 1876 T insured his life for five hundred pounds.²⁴⁴ In 1879 he notified the insurance company that he had ceded the policy to his wife "for the benefit of herself

²³⁵ Section 59 of the Cape Ordinance 6 of 1843; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 54.

²³⁶ Section 59 of the Cape Ordinance 6 of 1843; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 54.

²³⁷ Section 83 of the Cape Ordinance 6 of 1843; Calitz *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 42; Levenstein *An Appraisal of the New South African Business Rescue Procedure* 24.

²³⁸ Section 83 of the Cape Ordinance 6 of 1843; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 54; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 105.

²³⁹ Section 6 of the Cape Ordinance 6 of 1843; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 54.

²⁴⁰ Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 54; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 105.

²⁴¹ Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 9; Temperman *The Judiciary's Discretion in Sequestration* 12.

²⁴² Section 83 and 84 of the Cape Ordinance 6 of 1843; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 105; Temperman *The Judiciary's Discretion in Sequestration* 12.

²⁴³ *Thorpe's Executors v Thorpe's Tutor* (1886) 4 SC 488 5.

²⁴⁴ *Thorpe's Executors v Thorpe's Tutor* (1886) 4 SC 488 5.

and our children”, who were minors.²⁴⁵ The wife died in 1882, at the date of the session T had been solvent, but he now suffered financial difficulties.²⁴⁶ The money was advanced by friend C, for payment of the premiums.²⁴⁷ Thereafter, with T’s consent, C took the policy and paid the premiums on behalf of the minor children and secure himself for his advances.²⁴⁸ T died in 1886, and without the policy his estate was insolvent.²⁴⁹ The court ruled that T’s children were entitled, as against T’s executors, to the amount of the policy, less the premiums paid by C, for which C had a lien on the policy.²⁵⁰

Rehabilitation afforded a debtor with an opportunity of a discharge of all their debts prior sequestration if this was agreed upon by a majority of creditors.²⁵¹ A discharge of pre-sequestration debts meant that a debtor was no longer obligated to pay the creditors that he/she owed before sequestration and he/she could then have financial freedom.²⁵² The Cape Ordinance was not a good debt discharge measure because that rehabilitation was only possible if the majority of creditors agreed to it. This showed that the debtor’s financial freedom was at the mercy of the creditors.²⁵³ Moreover, this shows that historically debtors have been given a little consideration when it comes to discharging of debts.

2.3 Debt Discharge Measures Under the Union of South Africa

2.3.1 Insolvency Act of 1916

In 1916 the parliament of the Union of South Africa repealed all of the existing statutes of the law of insolvency previously in force. It substituted these with the *Insolvency*

²⁴⁵ *Thorpe’s Executors v Thorpe’s Tutor* (1886) 4 SC 488 5.

²⁴⁶ *Thorpe’s Executors v Thorpe’s Tutor* (1886) 4 SC 488 5.

²⁴⁷ *Thorpe’s Executors v Thorpe’s Tutor* (1886) 4 SC 488 5.

²⁴⁸ *Thorpe’s Executors v Thorpe’s Tutor* (1886) 4 SC 488 5.

²⁴⁹ *Thorpe’s Executors v Thorpe’s Tutor* (1886) 4 SC 488 5.

²⁵⁰ *Thorpe’s Executors v Thorpe’s Tutor* (1886) 4 SC 488 5.

²⁵¹ Section 117 and section 120 of the Cape Ordinance 6 of 1843; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 106.

²⁵² Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 105; Evans *A critical analysis of problem areas in respect of assets of insolvent estates of individuals* 55.

²⁵³ Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 105.

Act of 1916.²⁵⁴ The *Insolvency Act* 32 of 1916 provided over-indebted persons with debt discharge measures in terms of sequestration processes.²⁵⁵ It provided two ways in which the estate of a debtor who is insolvent may be sequestrated. A debtor could voluntarily surrender his or her estate and creditors could petition for voluntary sequestration of the debtor's estate.²⁵⁶

The court accepted the surrender of the debtor's estate if it was satisfied that there was a sufficient free residue to defray all costs of sequestration.²⁵⁷ In terms of the 1916 *Act*, there was no need to prove any advantage to creditors for voluntary sequestration.²⁵⁸ The debtor could apply for voluntary surrender without an implication that surrender could be refused unless the creditors received a benefit.²⁵⁹ All that was required was proof of insolvency through no fault or dishonesty of the debtor and sufficient assets to cover sequestration costs.²⁶⁰ This was emphasised in *Ex parte Robinson*,²⁶¹ that the courts do not sit for the relief of reckless debtors and the surrender of an estate where the assets were worth £50 and liabilities nearly £23 000 was refused.²⁶² However, in *Ex parte Burger*²⁶³ as follows, the court held that courts should not be too astute to ascertain what benefit the creditors are going to derive, because very often it is a difficult thing to settle.²⁶⁴ Moreover, where the insolvent's conduct has been fair and reasonable, and where there are sufficient assets to pay for the costs of administration, the court usually accepted the surrender.²⁶⁵

²⁵⁴ *Insolvency Act* 32 of 1916; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 12.

²⁵⁵ Section 3(1) and 9(1) of the 1916 *Act*; *Ex parte Terblanche* 1923 (TPD) 168 170.

²⁵⁶ Section 3(1) and Section 9(1) of the 1916 *Act*; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 10.

²⁵⁷ Section 5 of the 1916 *Act*; *Ex Parte Mathysen et uxor* 2003 (2) SA 308 (T) 311; Section 3 of the 1916 *Act*; Kanamugire JC "The Requirement of Advantage to Creditors in South African Insolvency Law – A Critical Appraisal" 2013 *Mediterranean Journal of Social Sciences* 19, 32.

²⁵⁸ Section 3 of the 1916 *Act*; Magau PT *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 22; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 11.

²⁵⁹ section 3(a) of the 1916 *Act*; Magau PT *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 22; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 11.

²⁶⁰ Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 11.

²⁶¹ *Ex parte Robinson* 1921 CPD 450.

²⁶² *Ex parte Robinson* 1921 CPD 450.

²⁶³ *Ex parte Burger* 4 PH C 5 CPD/July 1924 (unreported).

²⁶⁴ *Ex parte Burger* 4 PH C 5 CPD/July 1924 (unreported).

²⁶⁵ *Ex parte Burger* 4 PH C 5 CPD/July 1924 (unreported).

A petition for compulsory sequestration was required to be accompanied by an affidavit stating, amongst others, that the creditor has a liquidated claim.²⁶⁶ A liquidated claim means that a claim had to be precisely determined by operation of law or by the terms and conditions of the agreement made by the debtor and creditor.²⁶⁷ Furthermore, an act of insolvency by the debtor or factual insolvency of the debtor's estate and that it will be to the advantage of creditors if the estate is placed under sequestration had to be proved.²⁶⁸ The 1916 Act did not provide robust and comprehensive debt discharge measures because it introduced the concept of the advantage of creditor's requirement in compulsory sequestration.²⁶⁹ This was problematic because the creditor normally had little knowledge of the exact position of the debtor's estate and it was difficult for him/her to provide satisfactory proof that the sequestration of the debtor's estate will be to the advantage of creditors.²⁷⁰ Thus, if the creditor failed to meet the advantage to creditor's requirement, the court did not grant the sequestration order and as a result, the debtor did not obtain debt discharge.

2.4 Conclusion

This chapter outlined the historical developments on how debt discharge measures were provided to over-indebted persons from the 17th century to date in South Africa. The history of the South African insolvency law indicated that earlier laws were aimed at the rights of creditors to the repayment of claims, without any reference to the debtor's rights. The above discussion clearly showed that debt discharge measures in South Africa always had a limited scope and strict access for debtors. The *cessio bonorum* was not a good debt discharge measure because it had some unpleasant experience for debtors as they had to stand for an hour on three consecutive days before the surrender of their estates.²⁷¹ *Venditio bonorum* did not provide a discharge

²⁶⁶ Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 10.

²⁶⁷ Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 10.

²⁶⁸ Section 9 of the 1916 Act; *Smiedt Bros v Fourie* NO 1915 OPD 53; *Nicholl v Nicholl* 1916 WLD 22; *Cragg v Scanlam* 1931 WLD 93.

²⁶⁹ Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 10.

²⁷⁰ *Amod v Khan* 1947 2 SA 432 (N) 438.

²⁷¹ Temperman *The Judiciary's Discretion in Sequestration Applications* 10; Levenstein *An Appraisal of the New South African Business Rescue Procedure* 29; Calitz *JC Reformatory Approach to State Regulation of Insolvency Law in South Africa* 25.

unless the property ceded and was sufficient for the purpose of the sequestration of the debtor's estate.²⁷² The Amsterdam Ordinance of 1777 required the certificate to be signed by the majority of creditors, which meant a debtor could not be discharged from all of his or her debts if the majority of creditors did not sign the certificate.²⁷³ The 1916 *Act* introduced the concept of the advantage of creditor's requirement in compulsory sequestration, which most of the creditors could not meet.²⁷⁴ Over-indebted persons are currently still excluded from debt discharge measures by debt-related legislation because they have a limited scope and are not comprehensive enough to discharge debtors from their debts. The *Insolvency Act*,²⁷⁵ *Magistrates' Courts Act*,²⁷⁶ *National Credit Act*,²⁷⁷ *National Credit Amendment Act*,²⁷⁸ *Consumer Protection Act*,²⁷⁹ *Debt Collectors Act*,²⁸⁰ *Prescription Act*²⁸¹ and *Financial Sector Regulation Act*,²⁸² do not provide robust and comprehensive alternative measures for discharge of over-indebted persons' debts. As a result, this leaves many over-indebted persons without a discharge of debts measures.

The next chapter discusses the debt discharge under the *Insolvency Act*. Chapter three discusses problems faced by over-indebted natural person debtors in South Africa before the discharge of their debts. It examines whether the requirements to enter the sequestration procedure in terms of the *Insolvency Act* are robust and comprehensive.

²⁷² Lienne 2012 *DHET* 128; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 105.

²⁷³ Levenstein *An Appraisal of the New South African Business Rescue Procedure* 31; Calitz *Reformatory Approach to State Regulation of Insolvency Law in South Africa* 26; Temperman *The Judiciary's Discretion in Sequestration* 11.

²⁷⁴ Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 10.

²⁷⁵ Section 3-12 *Insolvency Act* 24 of 1936 (*Insolvency Act*).

²⁷⁶ Section 74 of the *Magistrates' Courts Act* 32 of 1944 (*Magistrates' Courts Act*).

²⁷⁷ Sections 85-87 of the *National Credit Act* 34 of 2005 (*National Credit Act*).

²⁷⁸ Section 86A of the *National Credit Amendment Act* 7 of 2019 (*National Credit Amendment Act*).

²⁷⁹ Section 3(1)(a)-(f) of the *Consumer Protection Act* 68 of 2008 (*Consumer Protection Act*).

²⁸⁰ Section 19 of the *Debt Collectors Act* 114 of 1998 (*Debt Collectors Act*).

²⁸¹ Section 10-16 of the *Prescription Act* 68 of 1969 (*Prescription Act*).

²⁸² Section 26-28 of the *Financial Sector Regulation Act* 9 of 2017 (*Financial Sector Regulation Act*).

CHAPTER THREE

DEBT DISCHARGE MEASURES UNDER THE INSOLVENCY ACT 24 of 1936

3.1 Introduction

Over-indebted persons may obtain debt discharge by the sequestration proceedings in terms of the *Insolvency Act*.²⁸³ A debtor is over-indebted when he is unable to satisfy all his credit agreements on time due to his financial means, obligations and debt repayment history.²⁸⁴ A sequestration process refers to the sequestration of the debtor's estate to satisfy creditor's claims.²⁸⁵ There are two ways in which a debtor's estate may be sequestrated. Firstly, the sequestration order may be obtained when the debtor or his agent applies to the High Court to have the debtor's estate sequestrated in terms of voluntary surrender.²⁸⁶ Secondly, it is the compulsory sequestration where a debtor's creditor or creditors can apply to the High Court to have the debtor's estate sequestrated.²⁸⁷ A debtor may arrange with a friend who is a creditor to apply for a debtor's sequestration, through what is generally referred to as friendly sequestration.²⁸⁸ Friendly sequestration is not recognised as a standalone class of sequestration, because it forms part of compulsory sequestration.²⁸⁹ Voluntary surrender, compulsory sequestration and friendly sequestration all require the applicant to prove an advantage to creditors.²⁹⁰ These debt discharge measures have limited scope in providing discharge of the debt because the advantage to creditors

²⁸³ Section 129 of the *Insolvency Act* 24 of 1936 (*Insolvency Act*); Roestoff M and Coetzee H "Consumer Debt Relief in South Africa; Lesson from America and England; and Suggestions for the Way Forward" 2012 24 *SA Merc LJ* 53, 55; Coetzee H *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* (LLD thesis University of Pretoria 2015) 101.

²⁸⁴ Section 79 of the *National Credit Act* 34 of 2005 (*National Credit Act*).

²⁸⁵ Section 2 of the *Insolvency Act*; Chitimira H "Advantage to Creditors in Compulsory Sequestration Proceedings - *Body Corporate of Empire Gardens v Sithole* 2017 4 SA 161 (SCA)" 2019 *THRHR* 342, 342.

²⁸⁶ Section 3(1) of the *Insolvency Act*; Sharrock J, Van der Linde K and Smith A *Hockly's Insolvency Law* 9th ed (Juta Cape Town 2012) 17.

²⁸⁷ Section 9(1) of the *Insolvency Act*; Sharrock et al *Hockly's Insolvency Law* 17.

²⁸⁸ Sharrock et al *Hockly's Insolvency Law* 45; *Craggs v Dedekind*; *Baartman v Baartman & another*; *Van Jaarsveld v Roebuck*; *Van Aardt v Borrett* 1996 (1) SA 935 (C) 937.

²⁸⁹ Mokgorwane T *The Interplay between National Credit Act 34 of 2005 and Insolvency Act 24 of 1936* (LLM dissertation University of Pretoria 2005) 22.

²⁹⁰ Section 6(1); 10(1)(c) and 12(1)(c) of the *Insolvency Act*; *Ex Parte Mathysen et uxor* 2003 (2) SA 308 (T) 311; *Amod v Khan* 1947 2 SA 432 (N) 438.

requirement hampers the granting of sequestration orders for many debtors.²⁹¹ Debtors who do not have assets that can be used to yield sufficient proceeds to create an advantage to creditors are excluded from benefiting from the discharge measures that the insolvency proceedings provide.²⁹² The "advantage to creditor's" requirement is causing unequal treatment of debtors in that many are left without proper statutory discharge.²⁹³

This chapter discusses the debt discharge measures provided by the sequestration order in terms of the *Insolvency Act*. The strengths and weaknesses of the sequestration order in terms of the *Insolvency Act* are outlined.

3.2 Sequestration in terms of the *Insolvency Act*

The *Insolvency Act* provides for primary debt discharge measure through the sequestration process and it is the only statutory mechanism that provides for the discharge of pre-sequestration debts.²⁹⁴ The main aim of the sequestration process is to provide for an orderly and fair distribution of the debtor's assets to satisfy all the creditors' claims.²⁹⁵ The advantage to creditor's requirement in the *Insolvency Act* means that sequestration can only take place if it is proved to be to the "advantage

²⁹¹ Kanamugire JC "The Requirement of Advantage to Creditors in South African Insolvency Law – A Critical Appraisal" 2013 *Mediterranean Journal of Social Sciences* 19, 32; Coetzee H "Is the Unequal Treatment of Debtors in Natural Person Insolvency Law Justifiable? A South African Exposition" 2016 *International Insolvency Review* 36, 55.

²⁹² Roestoff M "The Income of an Insolvent" 2017 *DHET* 1, 478; Asheela NV *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* (LLM dissertation University of Pretoria 2012) 13; Evans RG *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* (LLD thesis University of Pretoria 2008) 31; Levenstein E *An Appraisal of the New South African Business Rescue Procedure* (LLD thesis University of Pretoria 2008) 27.

²⁹³ Boraine A and Roestoff M "The Pro-Creditor Approach in South African Insolvency Law and the Possible Impact of the Constitution" 2015 3 *NIBLeJ* 60, 91; Kok A "Not so Hunky-Dory: Failing to Distinguish Between Differentiation and Discrimination – *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd (No 1)*" 2011 *THRHR* 340, 343.

²⁹⁴ Section 129 of the *Insolvency Act* 24; Coetzee H and Roestoff M "Consumer Debt Relief in South Africa – Should the Insolvency System Provide for NINA Debtors? Lessons from New Zealand" 2013 22 *International Insolvency Review* 188, 189; Governder L *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* (LLM Dissertation University of Kwa-Zulu Natal 2017) 10.

²⁹⁵ Bertelsmann E, Evans R, Harris A, Kelly-Louw M, Loubser A, Roestoff M, Smith A, Stander L, Steyn L *Mars The Law of Insolvency in South Africa* 9th ed (Juta Cape Town 2008) 9; Sharrock, Smith & Van der Linde *Hockly's Insolvency Law* ed (Juta Cape Town 2006) 8; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 13.

of creditors".²⁹⁶ In *Walker v Syfret*,²⁹⁷ the court held that the rights of the general body of creditors had to be taken into account in sequestration.²⁹⁸ The court held that no creditor could request sequestration of the debtor's estate that prejudiced the general body of creditors.²⁹⁹ Generally, no creditor should obtain any undue advantage over other creditors.³⁰⁰ Accordingly, the term "advantage of creditors" means the orderly sharing of all assets of the debtor's insolvent estate to creditors.³⁰¹

A debtor's estate may be sequestrated by voluntary surrender where the debtor applies for the sequestration of his or her estate or through compulsory sequestration where one or more creditors makes an application for the sequestration of the debtor's estate.³⁰² Moreover, the debtor can use compulsory sequestration as a debt discharge measure in the form of the so-called "friendly sequestration".³⁰³ One of the reasons for this is that the onus of proof in friendly sequestration is much less burdensome as compared to the onus required in voluntary surrender.³⁰⁴ The sequestration procedure is used by debtors to be rehabilitated and subsequently obtain a discharge of pre-

²⁹⁶ Section 6(1), 10(1)(c) and 12(1)(c) of the *Insolvency Act*; *Venter v Volkskas Ltd* 1973 (3) SA 175 (T) 179; Bertelsmann *et al* *The Law of Insolvency in South Africa* 9.

²⁹⁷ *Walker v Syfret* 1911 AD 141.

²⁹⁸ *Walker v Syfret* 1911 AD 141; *O' Flaherty & Co v Meiklejohn* 1940 NPD 371; *Gardee v Dhanmanta Holdings and Others* 1978 1 SA 1066; *Richter v Riverside Estates (Pty) Ltd* 1946 OPD 209, 223; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 20; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 13.

²⁹⁹ *Walker v Syfret* 1911 AD 141; *O' Flaherty & Co v Meiklejohn* 1940 NPD 371; *Gardee v Dhanmanta Holdings and Others* 1978 1 SA 1066; *Richter v Riverside Estates (Pty) Ltd* 1946 OPD 209, 223; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 20.

³⁰⁰ *Walker v Syfret* 1911 AD 141; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 13; *Richter v Riverside Estates (Pty) Ltd* 1946 OPD 209, 223; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 20.

³⁰¹ *Walker v Syfret* 1911 AD 141; *Richter v Riverside Estates (Pty) Ltd* 1946 OPD 209, 223; *Gardee v Dhanmanta Holdings and Others* 1978 1 SA 1066; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 20.

³⁰² Section 3(1) and Section 9(1) of the *Insolvency Act*; Coetzee H "An opportunity for No Income No Asset (NINA) debtors to get out of check? – An evaluation of the proposed debt intervention measure" 2018 *THRHR* 1; 9; Temperman E *The Judiciary's Discretion in Sequestration Applications* (LLM Dissertation University of Pretoria 2014) 19; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 19; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 14.

³⁰³ Kanamugire 2013 *Mediterranean Journal of Social Sciences* 24; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 18; Temperman *The Judiciary's Discretion in Sequestration Applications* 34.; Coetzee 2018 *THRHR* 9.

³⁰⁴ Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 18; Temperman *The Judiciary's Discretion in Sequestration Applications* 17.

sequestration of debts.³⁰⁵ The effect of rehabilitation is that it discharges the debtor of all pre-existing debts and disabilities resulting from sequestration.³⁰⁶

3.3 Voluntary Surrender

In terms of the *Insolvency Act*, a debtor may be sequestrated by voluntary sequestration, where a debtor makes an application to the High Court to surrender his or her estate to creditors.³⁰⁷ Applications for voluntary surrender enables the consumer to proactively make sequestration application and get a debt discharge from pre-sequestration debts.³⁰⁸

A debtor should issue a notice of surrender in the Government Gazette, as well as in a newspaper circulating in the area where he resides.³⁰⁹ Furthermore, if the debtor is a trader, the notice must be published in a newspaper in the district where he has his principal place of business.³¹⁰ The notice must provide full details about the debtor, state the date upon which the application to surrender will be made to court and state where and the period the debtor's statement of affairs will lie for inspection.³¹¹ The notice serves the purpose of informing creditors of the fact the debtor wishes to surrender his estate.³¹² Publication of the notice to surrender must take place no more than thirty days and not less than fourteen days before the date stated in the notice

³⁰⁵ Kanamugire 2013 *Mediterranean Journal of Social Sciences* 19; Temperman *The Judiciary's Discretion in Sequestration Applications* 17.

³⁰⁶ Temperman *The Judiciary's Discretion in Sequestration Applications* 17; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 19.

³⁰⁷ Section 3(1) of the *Insolvency Act*; *Fisrt Bank v Engelbrecht* 2013 ZAGPJHC 15; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21.

³⁰⁸ Boraine A and Roestoff M "Revisiting the State of Consumer Insolvency in South Africa after Twenty Years: The Courts' Approach, International Guidelines and an Appeal for Urgent Law Reform" 2014 *THRHR* 527, 541; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 12.

³⁰⁹ Section 4 of the *Insolvency Act*; Magau PT *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* (LLM- dissertation North West University 2019) 27; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 14.

³¹⁰ Leatherern R *Consideration of the Proposed Debt Intervention Procedure from A Debt Relief Perspective* (LLM Dissertation 2018 University of Pretoria) 18; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21; Temperman *The Judiciary's Discretion in Sequestration Applications* 18; Magau *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 27.

³¹¹ Coetzee 2018 *THRHR* 10; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21.

³¹² Temperman *The Judiciary's Discretion in Sequestration Applications* 18; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21.

for bringing the application to court.³¹³ In *Ex parte Henning*,³¹⁴ it was emphasised that it is mandatory that the debtor must comply with the prescribed formalities before approaching the court with an application of voluntary surrender.³¹⁵ The applicant must also prepare a statement of affairs in accordance with Form B of the First Schedule to the Act and lodge it in duplicate at the Master of the High Court's office in the district where he resides or carries out business.³¹⁶ The statement of affairs must lie open for inspection for fourteen days before the advertised date of surrender.³¹⁷

3.3.1 Advantage to Creditors in Voluntary Surrender

The *Insolvency Act* makes provision for the acceptance of surrender of the debtor's estate by the court.³¹⁸ Firstly, the court may accept surrender of the debtor's estate if the debtor owns a realisable property of a sufficient value to defray all costs of the sequestration order, which will be payable out of the debtor's estate.³¹⁹ The court has to be satisfied that the sequestration of the debtor's estate will be to the advantage of the creditors for the voluntary surrender application to be accepted.³²⁰ In *Ex Parte Bergh*,³²¹ the court held that there are two major requirements in a voluntary surrender, "namely, that there must be sufficient reasonable assets to defray the costs of the sequestration, and that the surrender will be to the advantage of creditors".³²²

³¹³ Sharrock *et al* *Hockly's Insolvency Law* 8; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21; Temperman *The Judiciary's Discretion in Sequestration Applications* 18.

³¹⁴ *Ex parte Henning* 1981 (3) SA 843 (2).

³¹⁵ *Ex parte Henning* 1981 (3) SA 843 (2); Leatherern *Consideration of the Proposed Debt Intervention Procedure from A Debt Relief Perspective* 18; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21.

³¹⁶ Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 15; Temperman E *The Judiciary's Discretion in Sequestration Applications* 18.

³¹⁷ Section 4(6)4 of the *Insolvency Act*; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21; Leatherern *Consideration of the Proposed Debt Intervention Procedure from A Debt Relief Perspective* 18.

³¹⁸ Section 6(1) of the *Insolvency Act*; Boraine and Roestoff 2014 *THRHR* 541; *Fisrt Bank v Engelbrecht* 2013 ZAGPJHC 15.

³¹⁹ Section 6(1) of the *Insolvency Act*; Chitimira 2019 *THRHR* 342; *Ex Parte Mathysen et uxor* 2003 (2) SA 308 (T) 311; Mabe Z and Evans R "Abuse of Sequestration Proceedings in South Africa Revisited" 2014 26 SA *MERC LJ* 651; 654; *Body Corporate Palm Lane v Masinge* 2013 *JDR* 2332 (GNP).

³²⁰ Section 6(1) of the *Insolvency Act*; *Nell v Lubbe* 1999 (3) SA 109 (W) 111; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21.

³²¹ *Ex Parte Bergh* 1938 CPD 131.

³²² *Ex Parte Bergh* 1938 CPD 131; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21; Temperman *The Judiciary's Discretion in Sequestration Applications* 17.

Therefore, if there are not sufficient assets to pay all the costs of sequestration out of the realisable property, the court cannot accept the surrender.³²³ The court will also not accept the surrender of the debtor's estate if the surrender is not be to the advantage of creditors.³²⁴ If there are just sufficient assets to pay the costs of sequestration, *prima facie*, it will not be to the advantage of creditors.³²⁵ It is an important consideration whether the creditors will receive a dividend from the sequestration of the debtor's estate.³²⁶ However, the machinery of voluntary surrender was primarily designed for the benefit of creditors, and not for the release of harassed debtors.³²⁷ If there is not sufficient asset to pay all the costs of sequestration out of the realisable property, the court cannot accept the surrender.³²⁸

The debtor bears the onus of proof that the surrender will be to the advantage of creditors.³²⁹ In *Ex Parte Smith*,³³⁰ the applicant applied for the surrender of his/her estate as insolvent, and part of the free residue consisted of cash.³³¹ The court held that "the form of petition had to include a clear argument that the sequestration would be for the benefit of the creditors and not simply as an allegation that the plaintiff was able to surrender his or her estate for the benefit of his creditors".³³² The allegation should be amplified by its supporting facts, unless the figures speak for themselves.³³³ The court will not grant the application if the petition in itself does not show a benefit

³²³ Coetzee 2018 *THRHR* 10; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21.

³²⁴ Temperman *The Judiciary's Discretion in Sequestration Applications* 17; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21.

³²⁵ *Ex Parte Vane* 1956 4 SA 616 (O) 617G-H; Coetzee 2018 *THRHR* 10; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21.

³²⁶ Temperman *The Judiciary's Discretion in Sequestration Applications* 17; Coetzee 2018 *THRHR* 10.

³²⁷ *Mayet v Pillay* 1955 2 SA 309 (N) 311E; *Ex Parte Ford* 2009 (3) SA 376 (WCC); Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 10; Coetzee and Roestoff 2013 *International Insolvency Review* 189.

³²⁸ Section 6(1) of the *Insolvency Act*; *Nell v Lubbe* 1999 (3) SA 109 (W) 111; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21.

³²⁹ Section 6(1) of the *Insolvency Act*; Van Heerden C and Boraine A "The Interaction between the Debt Relief Measures in the *National Credit Act* and Aspects of Insolvency Law" 2009 *PELJ* 21, 43. Roestoff 2017 *DHET* 478; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21.

³³⁰ *Ex Parte Smith* 1958 3 SA 568.

³³¹ *Ex Parte Smith* 1958 3 SA 568; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21; Temperman *The Judiciary's Discretion in Sequestration Applications* 17.

³³² *Ex Parte Alberts* 1937 OPD 2, 4; *Ex Parte Smith* 1958 3 SA 568; Coetzee 2018 *THRHR* 10; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21.

³³³ *Ex Parte Alberts* 1937 OPD 2, 4; *Ex Parte Smith* 1958 3 SA 568; Temperman *The Judiciary's Discretion in Sequestration Applications* 17; Coetzee 2018 *THRHR* 10.

to creditors, unless there is only a bare allegation that the surrender will be to the advantage of creditors, unsupported by evidence or any facts.³³⁴

A debtor knows all about his/her affairs and can easily prove the advantage of creditors.³³⁵ However, this statement is correct for debtors who have sufficient assets to prove an advantage to creditors in the application for voluntary surrender of their estates.³³⁶ By contrast, in certain circumstances, some debtors are unable to prove advantage to creditors because they do not have enough assets to defray all costs of the sequestration process.³³⁷ Voluntary surrender is not a good debt discharge measure because debtors, who have inadequate assets to satisfy the court that sequestration will be to the advantage of creditors, cannot successfully surrender their estates.³³⁸ Poor debtors are left to the mercy of their creditors, while those with sufficient assets which can prove an advantage to creditors enjoy the benefit of statutory provisions of surrender.³³⁹ This study submits that the *Insolvency Act* needs to be amended to cater for the poorest debtors and provide them alternative debt discharge measures.

3.4 Compulsory Sequestration

³³⁴ *Ex Parte Alberts* 1937 OPD 4; *Ex Parte Smith* 1958 3 SA 568; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21; Temperman *The Judiciary's Discretion in Sequestration Applications* 17.

³³⁵ *Amod v Khan* 1947 2 SA 432 (N) 438; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21; Coetzee H *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* (LLD thesis University of Pretoria 2015) 101.

³³⁶ Bertelsman *et al The Law of Insolvency in South Africa* 74; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 2; Mabe Z "Alternatives to Bankruptcy in South Africa That Provides for a Discharge of Debts: Lessons from Kenya" 2019 *PELJ* 1; 5.

³³⁷ Mabe Z "Notice of Intention to Surrender as an Abuse of the Sequestration Process: *Nedbank Limited v Malan*; In re: *Ex Parte Application of Malan* [2015] JOL 33458 (GP)" 2017 *THRHR* 695, 695; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 2; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21.

³³⁸ Boraine and Roestoff 2015 *NIBLeJ* 91; Kok 2011 *THRHR* 343; Roestoff 2017 *DHET* 478.

³³⁹ Evans RG "Unfriendly Consequences of a Friendly Sequestration" 2003 15 *SA Merc LJ* 437, 447; Evans RG and Hoskins ML "Friendly Sequestrations and the Advantage of Creditors" 1990 2 *SA Merc LJ* 246, 251; Roestoff 2017 *DHET* 478.

Creditors can make an application to the High Court to have a debtor declared insolvent in terms of compulsory sequestration.³⁴⁰ Firstly, the sequestrating creditor has to approach the court twice to obtain a provisional order.³⁴¹ Secondly, the debtor should then show cause why the sequestration order should not be made final.³⁴² For a court to make a provisional sequestration order, all the requirements set in the *Insolvency Act* should be met.³⁴³ If the court is not so satisfied, it is obliged to dismiss the application for compulsory sequestration and discharge the provisional order.³⁴⁴ Before the application for compulsory sequestration may be heard, the creditor has to furnish security for costs including the fees and charges necessary for the finalisation of the sequestration proceedings.³⁴⁵ The applicant creditor must furnish a copy of the application to the debtor and also, where the debtor is an employer, to a registered trade union which represents any of the employees, and to employees and also to the South African Revenue Service.³⁴⁶

3.4.1 Advantage to Creditors in Compulsory Sequestration

In essence, the advantage to creditors requirement in compulsory sequestration entails that, in order to have access to the formal sequestration proceedings, a debtor's estate should yield a dividend to concurrent creditors.³⁴⁷ A creditor can apply

³⁴⁰ Section 9(1) of the *Insolvency Act*; Boraine A and Roestoff M "Fresh Start Procedures for Consumer Debtors in South African Bankruptcy law" 2002 11 *International Insolvency Review* 1, 4; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 22; Roestoff 2017 *DHET* 478.

³⁴¹ Section 10 of the *Insolvency Act*; Temperman *The Judiciary's Discretion in Sequestration Applications* 23; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 20; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 17.

³⁴² Section 11 of the *Insolvency Act*; Temperman *The Judiciary's Discretion in Sequestration Applications* 23; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 20.

³⁴³ Section 12(1)(a)(b)(c) of the *Insolvency Act*; Temperman *The Judiciary's Discretion in Sequestration Applications* 23; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 17.

³⁴⁴ Section 12(2) of the *Insolvency Act*; Temperman *The Judiciary's Discretion in Sequestration Applications* 23; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 20.

³⁴⁵ Section 9(3) of the *Insolvency Act*; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 17; Temperman *The Judiciary's Discretion in Sequestration Applications* 23.

³⁴⁶ 9(4A)(a)(i) - (iv) of the *Insolvency Act*; *Standard Bank of South Africa v Sewpersadh* 2005 4 SA 148; *Fisher v Pujol* 1972 2 SA 496 (T); Kanamugire 2013 *Mediterranean Journal of Social Sciences* 20.

³⁴⁷ Calitz 2007 *Obiter* 410; *London Estates (Pty) Ltd v Nair* 1957 3 SA 591 (D), *ABSA Bank Ltd v De Klerk and Related Cases* 1999 4 SA 835 (E); *Esterhuizen v Swanepoel and sixteen others* 2004 4 SA 89 (W) 102 D-G.

for the sequestration of a debtor's estate.³⁴⁸ Firstly, the court can only accept the application for compulsory if the petitioning creditor has established against the debtor a liquidated claim of at least R100, or R200 in aggregate for two or more creditors.³⁴⁹ Secondly, the debtor should have committed an act of insolvency or is insolvent.³⁵⁰ Lastly, there should be a reason to believe that the sequestration will be to the advantage of creditors.³⁵¹ For a debtor to succeed in compulsory sequestration, he or she must obtain a provisional and a final sequestration order.³⁵² The court considering the sequestration of the estate of a debtor must be of the opinion that there is reason to believe that it will be to the advantage of creditors.³⁵³ In *Botha v Botha*,³⁵⁴ the court explained that there should be a reason to believe that sequestration of the debtor's estate will be to the advantage of creditors and only a reasonable belief.³⁵⁵ However, the belief must be rational and the court must be furnished with sufficient facts to support it.³⁵⁶ The court has discretion to make an order sequestrating the estate of the debtor provisionally if all the requirements are met.³⁵⁷ If at the hearing of the final order of compulsory sequestration, the court is not satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor.³⁵⁸

³⁴⁸ Section 9 (1) of the *Insolvency Act*; Mabe and Evans 2014 26 SA *MERC LJ* 655; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 22.

³⁴⁹ Section 12(1)(a) of the *Insolvency Act*; Chitimira 2019 *THRHR* 343; *Meskin v Friedman* 1948 2 SA 55 (W) 45; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 22; Mabe and Evans 2014 26 SA *MERC LJ* 655.

³⁵⁰ Section 12(1)(b) of the *Insolvency Act*; *Abell v Els* 1976 2 SA 797 (T) 113; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 22.

³⁵¹ Section 10(1)(c) and 12(1)(c) of the *Insolvency Act*; Calitz J "Developments in the United States' Consumer Bankruptcy law: A South African Perspective" 2007 28 *Obiter* 397, 409; *London Estates (Pty) Ltd v Nair* 1957 3 SA 591 (D); *ABSA Bank Ltd v De Klerk* 1999 4 SA 835 (E); *Esterhuizen v Swanepoel* 2004 4 SA 89 (W) 102.

³⁵² Section 9 and 10 of the *Insolvency Act*; Boraine and Roestoff 2002 *International Insolvency Review* 4; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 22.

³⁵³ Section 10(1)(a)(b)(c) of the *Insolvency Act*; Mabe and Evans 2014 26 SA *MERC LJ* 655.

³⁵⁴ *Botha v Botha* 1990 4 SA 580 (W) 585.

³⁵⁵ *Botha v Botha* 1990 4 SA 580 (W) 585; Chitimira 2019 *THRHR* 345; Temperman *The Judiciary's Discretion in Sequestration Applications* 23.

³⁵⁶ *Botha v Botha* 1990 4 SA 580 (W) 585; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 17.

³⁵⁷ Section 10(1)(a)(b)(c) of the *Insolvency Act*; Boraine and Roestoff 2002 *International Insolvency Review* 4; Boraine and Roestoff 2015 *NIBLeJ* 78; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 22.

³⁵⁸ Section 12(2) of the *Insolvency Act*; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 23; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 18.

The phrase "reason to believe" as used in the *Insolvency Act* indicates that it is not necessary for the creditor to induce in the mind of the court a positive view that sequestration will be to the financial advantage of creditors.³⁵⁹ In *Amod v Khan*,³⁶⁰ concluded that "it is difficult for the debtor to provide satisfactory proof that the sequestration of the debtor's estate will be to the advantage of creditors".³⁶¹ Moreover, the phrase "reason to believe" indicates that it is not necessary, either at the first or at the final hearing, for the creditor to induce in the mind of the court a positive view that sequestration will be to the financial advantage of creditors.³⁶² The court held that "it must be persuaded by the evidence put before the court that there is a reasonable possibility that is not too far and any monetary benefit would be to the creditors".³⁶³ It is not necessary to prove that the insolvent has any assets. Even if there are no assets, there should be a reason to believe that some assets may be recovered for the benefit of creditors.³⁶⁴ Furthermore, the reason to believe must relate to the facts giving rise to such belief.³⁶⁵ The belief itself must be rational or reasonable, and to come to such a belief the court must be furnished with sufficient facts to support it.³⁶⁶ Investigation and interrogation of the insolvent and witnesses may reveal assets that have been disposed of, and therefore prove an advantage to creditors.³⁶⁷

³⁵⁹ Sections 10 and 12 of the *Insolvency Act*; *Meskin & Co v Friedman* 1948 2 SA 555 (W) 558; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 119.

³⁶⁰ *Amod v Khan* 1947 2 SA 432 (N) 438.

³⁶¹ *Amod v Khan* 1947 2 SA 432 (N) 438; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 22; Temperman *The Judiciary's Discretion in Sequestration Applications* 23.

³⁶² Kanamugire 2013 *Mediterranean Journal of Social Sciences* 22; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 17; Temperman *The Judiciary's Discretion in Sequestration Applications* 23.

³⁶³ *Meskin & Co v Friedman* 1948 2 SA 555 (W) 558, *Epstein v Epstein* 1987 4 SA 606; *London Estate (Pty) Ltd v Nair* 1957 3 SA 591 (D) 592G, 593 C; *Gardee v Dhanmanta Holdings and Others* 1978 1 SA 1066 (N) 1069 G 1070.

³⁶⁴ *Meskin & Co v Friedman* 1948 2 SA 555 (W) 559; *Pelunky & Co v Beiles and Others* 1905 TS 370; *Wilkins v Pieterse* 1937 CPD 165; Temperman *The Judiciary's Discretion in Sequestration Applications* 23.

³⁶⁵ *London Estates (Pty) Ltd v Nair* 1957 3 SA 591 (N) 592; Temperman *The Judiciary's Discretion in Sequestration Applications* 23.

³⁶⁶ *Dunlop Tyres (Pty) Ltd v Brewitt* 1999 2 SA 580 (W) 585; *Botha v Botha* 1990 4 SA 580 (W) 585 C-F; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 17.

³⁶⁷ Kanamugire 2013 *Mediterranean Journal of Social Sciences* 22; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 17.

At the final hearing of compulsory sequestration, the court must be "satisfied" that there is reason to believe that the sequestration of the debtor's estate will be to the advantage of creditors.³⁶⁸ The phrase "reason to believe" as used in the *Insolvency Act* must be rational or reasonable, and the court must be furnished with sufficient evidence to support it.³⁶⁹ In *Gardee v Dhanmanta Holdings and Others*,³⁷⁰ the court held that sequestration would only be to the advantage of creditors if it exceeds the likely proceeds of an ordinary execution.³⁷¹ In this case, the court dismissed the application for sequestration, as there was no reason to believe that sequestration would be more advantageous to creditors than execution.³⁷² Therefore, the applicant for compulsory sequestration needs to prove that it will be to the advantage of creditors.³⁷³ Accordingly, compulsory sequestration is not a good debt discharge measure because the creditor normally has little knowledge of the exact position of the debtor's estate and it is difficult for him or her to provide satisfactory proof that the sequestration of the debtor's estate will be to the advantage of creditors.³⁷⁴ Therefore, it is difficult for the creditor to provide satisfactory proof that the sequestration of the debtor's estate will be to the advantage of creditors.³⁷⁵ The petitioning creditor has to ascertain sufficient information about the debtor's estate to prove an advantage to creditors for him or her to succeed in compulsory sequestration. Thus, if the creditor

³⁶⁸ *Meskin & Co v Friedman* 1948 2 SA 555 (W) 558; *Epstein v Epstein* 1987 4 SA 606 (C) 609; *London Estate (Pty) Ltd v Nair* 1957 3 SA 591 (D) 592G, 593 C; *Gardee v Dhanmanta Holdings and Others* 1978 1 SA 1066 (N) 1069 G – 1070 A.

³⁶⁹ *Dunlop Tyres (Pty) Ltd v Brewitt* 1999 2 SA 580 (W) 585; *Botha v Botha* 1990 4 SA 580 (W) 585 C-F; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 17.

³⁷⁰ *Gardee v Dhanmanta Holdings and Others* 1978 1 SA 1066 (N) 1068 – 1970.

³⁷¹ *Gardee v Dhanmanta Holdings and Others* 1978 1 SA 1066 (N) 1068 – 1970; *Mamacos v Davids* 1976 1 SA 19 (C) 20C-D; *O' Flaherty & Co v Meiklejohn* 1940 NPD 371; *Stainer v Estate Bukes* 1933 OPD 86, 90; *Madari v Cassim* 1950 2 SA 35 (D) 38; Sharrock *et al* Hockly's *Insolvency Law* 39.

³⁷² *Gardee v Dhanmanta Holdings and Others* 1978 1 SA 1066 (N) 1068 – 1970; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 22; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 17.

³⁷³ *O' Flaherty & Co v Meiklejohn* 1940 NPD 371; *Gardee v Dhanmanta Holdings and Others* 1978 1 SA 1066 (N) 1068 – 1970; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 22.

³⁷⁴ *Amod v Khan* 1947 2 SA 432 (N) 438; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 22; Calitz 2007 28 *Obiter* 409.

³⁷⁵ Kanamugire 2013 *Mediterranean Journal of Social Sciences* 23; Mabe and Evans 2014 26 SA *MERC LJ* 655; Mabe 2019 *PELJ* 5.

fails to meet the advantage to creditor's requirement the court will not grant the sequestration order and as a result the debtor will not be able to obtain debt discharge.³⁷⁶

3.5 Friendly Sequestration

In friendly sequestration, a creditor may allege to have a valid claim against the debtor and apply for the sequestration of the debtor's estate due to non-payment.³⁷⁷ The heavy burden of proof on the applicant in voluntary surrender to benefit the creditors is one of the reasons for the nature of friendly sequestration.³⁷⁸ Friendly sequestrations are frequently used to obtain compulsory sequestration by abusing the court process.³⁷⁹ Applicants for friendly sequestration may claim that they have received a letter from the creditor that he or she is unable to pay his or her debts.³⁸⁰ However, the courts could guard against such abuse by paying more attention to the element of advantage to creditor's requirement in the petition for friendly sequestration.³⁸¹

In *Mthimkhulu v Rampersad and Another*,³⁸² the court recognised the abuse of the court process in friendly sequestrations.³⁸³ They were being used as a strategy to assist the debtors and delay sales-in-execution and were not concerned with the benefit to creditors.³⁸⁴ The court considered it desirable to set out certain practice guidelines as the minimum requirements for the application for friendly

³⁷⁶ Section 12(1)(a) of the *Insolvency Act*; Mabe and Evans 2014 *MERC LJ* 655; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 22.

³⁷⁷ Section 8(g) of the *Insolvency Act*; *Estate Logie v Priest* 1926 AD 312; Smith C *The Law of Insolvency* 3rd ed (Lexis Nexis Butterworths 1988) 74-77.

³⁷⁸ Loubser A "Ensuring Advantage to Everyone in a Modern South African Insolvency law" 1997 9 *SA Merc LJ* 325, 328; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 23.

³⁷⁹ *Mthimkhulu v Rampersad & Another* 2000 3 SA 512 (N) 514; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 23.

³⁸⁰ Section 8(g) of the *Insolvency Act*; *R v Meer and Other* 1957 3 SA 614 (N) 75; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 23.

³⁸¹ Kanamugire 2013 *Mediterranean Journal of Social Sciences* 23; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 10.

³⁸² *Mthimkhulu v Rampersad and Another* 2000 3 All SA 512 (N) 516.

³⁸³ *Mthimkhulu v Rampersad and Another* 2000 3 All SA 512 (N) 516; *Beinash and Co v Nathan* 1998 3 SA 540; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 10; Magau PT *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* (LLM- dissertation North West University 2019) 28.

³⁸⁴ Leathern *Consideration of the Proposed Debt Intervention Procedure from a Debt Relief Perspective* 17; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 23.

sequestrations.³⁸⁵ The court listed the minimum requirements for the application for sequestration of a debtor by a friendly creditor.³⁸⁶ Firstly, the applicants for friendly sequestration must have sufficient proof of the *locus standi*.³⁸⁷ Secondly, there must be sufficient documentary proof that the debtor owes a creditor.³⁸⁸ Thirdly, a reason should be given for the fact that the applicant had no security for the debt owed to the creditor.³⁸⁹ Fourthly, a full and complete list of the respondent's assets and acceptable evidence upon which the court could determine their true market value.³⁹⁰ Lastly, applicants should provide full and acceptable reasons on affidavits to be given for an application for the execution of a provisional order.³⁹¹ Also in this case, the advantage to creditors is a criterion used to grant this order.³⁹² Therefore, debtors will not be able to obtain debt discharge if the court denies the application for friendly sequestration.³⁹³ Friendly sequestration is not a good debt discharge measure because it is a frequently abused procedure, as a result the courts are reluctant and stringent to accept applications.³⁹⁴

3.6 Rehabilitation in terms of the Insolvency Act 24 of 1996

³⁸⁵ *Mthimkhulu v Rampersad and Another* 2000 3 All SA 517; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 23; Leathern *Consideration of the Proposed Debt Intervention Procedure from a Debt Relief Perspective* 17.

³⁸⁶ *Mthimkhulu v Rampersad and Another* 2000 3 All SA 517; Leathern *Consideration of the Proposed Debt Intervention Procedure from a Debt Relief Perspective* 17.

³⁸⁷ *Mthimkhulu v Rampersad and Another* 2000 3 All SA 517; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 23; Leathern *Consideration of the Proposed Debt Intervention Procedure from a Debt Relief Perspective* 17.

³⁸⁸ *Mthimkhulu v Rampersad and Another* 2000 3 All SA 517; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 23.

³⁸⁹ *Mthimkhulu v Rampersad and Another* 2000 3 All SA 517; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 23; Leathern *Consideration of the Proposed Debt Intervention Procedure from a Debt Relief Perspective* 17.

³⁹⁰ *Mthimkhulu v Rampersad and Another* 2000 3 All SA 517; Kanamugire 2013 *Mediterranean Journal of Social Sciences* 23.

³⁹¹ *Mthimkhulu v Rampersad and Another* 2000 3 All SA 517; Leathern *Consideration of the Proposed Debt Intervention Procedure from a Debt Relief Perspective* 17.

³⁹² Evans and Hoskins " 1990 *SA Merc LJ* 251; Leathern *Consideration of the Proposed Debt Intervention Procedure from a Debt Relief Perspective* 17.

³⁹³ Evans 2013 *SA Merc LJ* 447; Leathern *Consideration of the Proposed Debt Intervention Procedure from a Debt Relief Perspective* 17.

³⁹⁴ Evans 1990 2 *SA Merc LJ* 251; Leathern *Consideration of the Proposed Debt Intervention Procedure from a Debt Relief Perspective* 17; Evans 2013 15 *SA Merc LJ* 447.

The sequestration procedure provides debtors with a discharge of pre-sequestration debt through rehabilitation.³⁹⁵ The *Insolvency Act* provides for the rehabilitation of insolvent debtors by way of automatic rehabilitation or by way of a court order.³⁹⁶ Rehabilitation enables a debtor who has been sequestrated to make a fresh start, free from pre-sequestration debts and the restrictions placed on the insolvent by the sequestration.³⁹⁷

There are different circumstances within which an insolvent may make an application to the court for rehabilitation. An insolvent may bring an *ex parte* application for rehabilitation where an offer of composition has been made and accepted by the creditors.³⁹⁸ Moreover, the insolvent should have obtained a certificate from the Master of the High Court, provided that payment of the *ex parte* application for rehabilitation has been made not less than three weeks of notice of intention to make the application in the Gazette and to the trustees.³⁹⁹

An insolvent may apply for rehabilitation after ten years have elapsed since the confirmation by the Master of the first account in the estate.⁴⁰⁰ If the insolvent's estate has been previously sequestrated, the insolvent must wait for three years to elapse before applying for rehabilitation.⁴⁰¹ The *Insolvency Act* does not place a limitation on the number of times that a person can obtain a rehabilitation order.⁴⁰² However, an insolvent, that has been previously sequestrated has to wait for three years before

³⁹⁵ Section 129 of the *Insolvency Act*; Temperman *The Judiciary's Discretion in Sequestration Applications* 20.

³⁹⁶ Sharrock *et al Hockly's Insolvency Law* 208; Temperman *The Judiciary's Discretion in Sequestration Applications* 20.

³⁹⁷ Sharrock *et al Hockly's Insolvency Law* 208; Temperman *The Judiciary's Discretion in Sequestration Applications* 20.

³⁹⁸ Section 124(1) and section 119(7) of the *Insolvency Act*; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 18.

³⁹⁹ Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 18; Temperman *The Judiciary's Discretion in Sequestration Applications* 20.

⁴⁰⁰ Section 124(2)(a) of the *Insolvency Act*; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 142; Temperman *The Judiciary's Discretion in Sequestration Applications* 20.

⁴⁰¹ Section 124(2)(b) of the *Insolvency Act*; Mabe 2019 *PELJ* 2; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 18.

⁴⁰² Boraine A and Roestoff M "The Treatment of Insolvency of Natural Persons in South African Law – An Appeal for a Balanced and Integrated Approach" 2013 *SA Merc LJ* 1; 95.; Temperman *The Judiciary's Discretion in Sequestration Applications* 20.

reapplying for rehabilitation.⁴⁰³ The *Insolvency Act* provides that if the insolvent has been previously convicted of a fraudulent act concerning the existing or any previous insolvency, then he must wait for five years, to apply for rehabilitation, from the date of sequestration.⁴⁰⁴

A positive recommendation by the Master is required where an application is brought within four years.⁴⁰⁵ An insolvent is permitted to apply for rehabilitation after six months from the date of sequestration if no claim has been proved against his estate.⁴⁰⁶ Moreover, he or she must give not less than six weeks' notice of his intention to apply for rehabilitation to the Master and the trustee, in writing, and by advertisement in the Gazette.⁴⁰⁷ An insolvent 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.⁴⁰⁸ An insolvent may 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 insolvent's estate, together with interest thereon and all the costs of sequestration.⁴⁰⁹

An insolvent must not give less than three weeks of notice of his intention to apply for rehabilitation to the Master writing.⁴¹⁰ 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

⁴⁰³ Boraine and Roestoff 2013 *SA Merc LJ* 601; Temperman *The Judiciary's Discretion in Sequestration Applications* 20.

⁴⁰⁴ Section 124(2)(c) of the *Insolvency Act*; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 18.

⁴⁰⁵ Section 124(2) of the *Insolvency Act*; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 142.

⁴⁰⁶ Section 124(3) of the *Insolvency Act*; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 18; Temperman *The Judiciary's Discretion in Sequestration Applications* 20.

⁴⁰⁷ Section 124(2) and (3) of the *Insolvency Act*; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 142.

⁴⁰⁸ Section 124(5) of the *Insolvency Act*; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 18.

⁴⁰⁹ Section 124(5) of the *Insolvency Act*; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 18.

⁴¹⁰ Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 142; Temperman *The Judiciary's Discretion in Sequestration Applications* 20.

interested person opposing the rehabilitation of the insolvent.⁴¹¹ The effect of rehabilitation of an insolvent person is that it puts an end to his status as an insolvent.⁴¹² Moreover, 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.⁴¹³

However, the discharge of the debtor's pre-sequestration debts is not a guarantee and is only one of the effects of the debtor's rehabilitation.⁴¹⁴ The effect of rehabilitation, amongst others, is that sequestration is terminated and all pre-sequestration debts are discharged, thus affording the insolvent debtor a fresh start.⁴¹⁵ This means that the debtor is released from all debts which were provable in his insolvency.⁴¹⁶ As a result, the creditors enjoy no further right to enforce their claims against the debtor by means of any legal process.⁴¹⁷

3.7 Advantages of Sequestration Order Under the Insolvency Act 24 of 1996

3.7.1 Rehabilitation and Debt Discharge

The concept of rehabilitation is not expressly defined under the *Insolvency Act*, it is nonetheless statutorily provided for under this *Act*.⁴¹⁸ Rehabilitation is the only statutory method by which a natural person debtor may be lawfully discharged from pre-sequestration debts and other related debts of their creditors in terms of the

⁴¹¹ Section 127A(1) of the *Insolvency Act*; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 142.

⁴¹² Section 129(1) Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 18.

⁴¹³ Section 129 (1); Temperman *The Judiciary's Discretion in Sequestration Applications* 20.

⁴¹⁴ Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 142; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 18.

⁴¹⁵ Section 129 of the *Insolvency Act*; Mabe 2019 *PELJ* 2; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 18.

⁴¹⁶ Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 142; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 12.

⁴¹⁷ Boraine and Roestoff 2015 *NIBLeJ* 79; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 18.

⁴¹⁸ Section 124-130 of the *Insolvency Act*; Chitimira H and Magau PT "An Analytical Precis of Debt Relief Measures under the Insolvency Act 24 of 1936" 2020 *Euro Economica* 209; 215.

Insolvency Act.⁴¹⁹ The concept of rehabilitation of the insolvent debtors is primarily aimed at discharging debtors from all their pre-sequestration debts to afford debtors another chance to transact and do business normally, without any insolvency-related restrictions.⁴²⁰ The reason for rehabilitation is for debtors to officially terminate and remove the insolvency process and allow them to get a fresh start with regards to their businesses, contracts and other transactions.⁴²¹ Rehabilitation helps debtors to rebuild and reclaim their businesses without demands of debt repayment resulting from their creditors.⁴²²

3.7.2 Composition and Debt Discharge

Composition is an agreement among the creditors of an insolvent debtor to accept an amount less than they are owed, in order to receive immediate payment.⁴²³ Debt discharge means that when a debt is discharged, the debtor is no longer liable for the debt and the creditors are no longer allowed to make attempts to collect the debt.⁴²⁴ Composition is initiated by the insolvent debtor who is temporarily sequestrated and/or in financial difficulties to enter into an agreement with his or her creditors to prevent compulsory sequestration.⁴²⁵ The common law compromise is based on contractual principles and it requires the approval of all the creditors before it can be successfully utilised as a debt discharge measure by the insolvent debtor.⁴²⁶ The common law compromise is generally a safer solution for creditors since it might give them higher returns early, thus saving sequestration costs.⁴²⁷ To make the common law compromise attractive to their creditors, insolvent debtors typically agree to pay higher

⁴¹⁹ Roestoff M and Renke S "A Fresh Start for Individual Debtors: The Role of South African Insolvency and Consumer Protection Legislation" 2005 *International Insolvency Review* 93-109; Chitimira and Magau 2020 *Euro Economica* 215.

⁴²⁰ Section 129(1)(b) of the *Insolvency Act*; Boraine A and Roestoff M "Fresh Start Procedures for Consumer Debtors in South African Bankruptcy Law" 2002 *International Insolvency Review* 11 (1) 1-11.

⁴²¹ Section 129(1)(b) of the *Insolvency Act*; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 19.

⁴²² *Ex parte Moodley* 1955 1 SA 678 (T) 681; Roestoff M "Rehabilitation of an Insolvent and Advantage to Creditors under the Insolvency Act 24 of 1936": *Ex parte Purdon* 2014 JDR 0115 (GNP) 2018 *Journal of Contemporary Roman-Dutch Law* 306; 307.

⁴²³ Section 119 of *Insolvency Act*; *Mahomed v Lockhat Brothers & Co Ltd* 1944 AD 230 para 241.

⁴²⁴ Section 129(1)(b) of the *Insolvency Act*.

⁴²⁵ Section 119 of *Insolvency Act*; *Mahomed v Lockhat Brothers & Co Ltd* 1944 AD 230 para 241.

⁴²⁶ Chitimira and Magau 2020 *Euro Economica* 217.

⁴²⁷ Chitimira and Magau 2020 *Euro Economica* 217.

returns and higher cash sums.⁴²⁸ If all creditors effectively accept the offer of common law compromise, the insolvent debtor will be released and discharged from the debts without the sequestration of his or her estate.⁴²⁹ Thereafter, the insolvent debtor will also be able to continue with his or her trade and/or business if its beneficial to the creditors.⁴³⁰

3.8 Disadvantages of a Sequestration Order Under the Insolvency Act

3.8.1 The Advantage to Creditor's Requirement

The advantage to creditors requirement hampers the granting of sequestration orders for many debtors.⁴³¹ Debtors who do not have assets that can be used to yield sufficient proceeds to create an advantage to creditors are excluded from benefiting from the discharge measures that the insolvency proceedings provide.⁴³² The advantage to creditors requirement is very difficult to prove in sequestration proceedings for most insolvent debtors, especially the poor and low-income earners in South Africa. Accordingly, the advantage to creditor's requirement is strictly imposed on the debtors who want to apply for involuntary, friendly and compulsory sequestration under the *Insolvency Act*.⁴³³ It is more difficult to show the advantage to creditors requirement in voluntary surrender than in compulsory sequestration.⁴³⁴ Involuntary surrender is very difficult for debtors to provide a detailed account of their financial position and successfully prove that the voluntary surrender application will be to the advantage of creditors.⁴³⁵ To combat the misuse of sequestration procedures by dishonest debtors, the courts became more restrictive on the debtors' compliance with the advantage to creditors requirement in voluntary surrender.⁴³⁶ In this respect, whether it offers little or no value to all the concerned creditors, the courts would

⁴²⁸ Chitimira and Magau 2020 *ISSN Euro Economica* 217.

⁴²⁹ Chitimira and Magau 2020 *ISSN Euro Economica* 217.

⁴³⁰ Boraine and Roestoff 2002 *International Insolvency Review* 11.

⁴³¹ Kanamugire 2013 *Mediterranean Journal of Social Sciences* 32; Coetzee 2016 *International Insolvency Review* 55.

⁴³² Roestoff *DHET* 478; Asheela NV *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 13; Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 31.

⁴³³ Section 10(c) & 12(1) of the *Insolvency Act*; Chitimira 2019 *Journal for Contemporary* 352.

⁴³⁴ *Botha v Botha* 1990 4 SA 580 (W) para 581).

⁴³⁵ Chitimira and Magau 2020 *Euro Economica* 220.

⁴³⁶ *Stainer v Estate Bukes* 1933 OPD 86 para 90.

refuse the debtor's application for voluntary surrender.⁴³⁷ As a result, debtors with low-income and debtors that do not have sufficient assets or income will find it difficult to prove the advantage to creditor's requirement to obtain debt discharge under the voluntary surrender sequestration proceedings.⁴³⁸

In compulsory sequestration, the court will only grant a provisional or final sequestration order if it brings some advantage to the general body of creditors.⁴³⁹ It is very difficult for the creditor to prove that the compulsory sequestration proceedings will be to the advantage of all concerned creditors.⁴⁴⁰ As a result, creditors and debtors cannot utilise compulsory or friendly sequestration to obtain debt discharge if they are unable to prove that sequestration will be to the advantage of creditors.⁴⁴¹ The simple fact that after the payment of sequestration costs, there is a substantial sum of money left does not automatically mean that the compulsory or friendly sequestration would give all creditors a monetary benefit and allow the applicant to obtain debt discharge.⁴⁴² In compulsory and friendly sequestration, reliance on sequestration proceedings to obtain debt discharge is extremely problematic since the onus of showing the advantage to creditors is strictly and firmly put on creditors.⁴⁴³ In addition, the problem for debtors is compounded by the inability of the *Insolvency Act* to cater explicitly for multiple groups of debtors in to handle them accordingly due to their unique circumstances.⁴⁴⁴ Despite the apparent fact that the distinction between debtors may be considered unfair by some individuals, the *Insolvency Act* should be revised to specifically differentiate between poor, low-income earners and wealthier debtors to identify those who can effectively show and meet the creditor benefit criterion in insolvency proceedings for debt discharge purposes.⁴⁴⁵ This method could

⁴³⁷ *Stainer v Estate Bukes* 1933 OPD 86 para 90.

⁴³⁸ *Stainer v Estate Bukes* 1933 OPD 86 para 90.

⁴³⁹ Section 10(c) and 12(1)(c) of the *Insolvency Act*.

⁴⁴⁰ *Trust Wholesalers and Woollens (Pty) Ltd v Mackan* 1954 (2) SA 109 (N) para 111.

⁴⁴¹ *London Estate* case para 591; *Ex parte Steenkamp and Related Cases* 1996 3 SA 822 (W).

⁴⁴² Chitimira and Magau 2020 *Euro Economica* 220.

⁴⁴³ *Wilkins v Pieterse* 1937 CPD 165 para 170; *Ressel v Levin* 1964 (1) SA 128 (C); *Dunlop Tyres (Pty) Ltd v Brewitt* 1999 (2) SA 580 (W) para 583).

⁴⁴⁴ Evans RG "Friendly Sequestrations, the Abuse of the Process of Court, and Possible Solutions for Overburdened Debtors" 2001 *SA Merc LJ* 485-508.

⁴⁴⁵ Evans RG "Law Reform in Respect of Assets in Insolvent Estates in South Africa" 2010 *SA Mercantile Law Journal* 465-483; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 37.

raise the potential unlawful and unconstitutional consequences on the rigid application of the advantage to creditors requirement on natural person debtors who are low-income earners and poor in all South African insolvency proceedings.⁴⁴⁶

3.8.2 Absence of a Robust Legal Framework for Out of Court Debt Relief Measures

The *Insolvency Act* is silent on other alternative measures that may be used for debt discharge apart from voluntary surrender, friendly sequestration and compulsory sequestration proceedings..⁴⁴⁷ Accordingly, it is increasingly hard for debtors, especially the poor and low-income earners, to access debt discharge through the available sequestration proceedings under the *Insolvency Act*.⁴⁴⁸ In addition, debtors are currently obligated to file an application in the High Court for sequestration, which requires debtors to be legally represented.⁴⁴⁹ The applicant also needs to apply to the High Court for composition and rehabilitation in terms of the *Insolvency Act*.⁴⁵⁰ This obviously demonstrates that all sequestration proceedings are strictly court-driven and before debtors can effectively rely on sequestration proceedings to get debt discharge, the claimant needs to comply with restrictive advantage to creditor's requirement.⁴⁵¹ As a result, poor and low-income earners who are unable to meet the advantage to creditors requirement and other restrictive regulatory requirements under the *Insolvency Act* are not able to obtain debt discharge in sequestration proceedings.⁴⁵² In this regard, the *Insolvency Act* must not have strict court-driven debt relief mechanisms that give rise to multiple delays in securing debt discharge for the distressed debtors, which deprives them of a fresh start.⁴⁵³

3.8.3 Absence of Alternative Debt Discharge Measures

⁴⁴⁶ Coetzee 2016 *International Insolvency Review* 55.

⁴⁴⁷ Mabe Z 2019 *PELJ* 2.

⁴⁴⁸ Section 3-12 of the *Insolvency Act*.

⁴⁴⁹ Section 3-12 of the *Insolvency Act*.

⁴⁵⁰ Section 119-130 read with subsection 149 of the *Insolvency Act*.

⁴⁵¹ Section 6(1), 10(c) and 12 (1)(c) of the *Insolvency Act*.

⁴⁵² Section 6(1), 10(c) and 12 (1)(c) of the *Insolvency Act*.

⁴⁵³ Mabe 2019 *PELJ* 2.

The South African *Insolvency Act* does not stipulate any such alternative debt discharge measures.⁴⁵⁴ There is a dire need in insolvency legislation to regulate the provisions of alternate debt discharge measures to enable low-income earners and poor debtors to receive debt discharge immediately outside of sequestration proceedings.⁴⁵⁵ Furthermore, debt discharge for natural person debtors takes place only after the conclusion of all sequestration proceedings, which is a very long time.⁴⁵⁶ Consequently, alternative debt discharge measures could also help natural person debtors to deal with certain debts that are usually difficult to discharge, such as child support, student loans and criminal restitution fines.⁴⁵⁷

3.7 The Link Between Debt Discharge Measures and the Constitutional Right to Equality

The exclusion of many overburdened consumer debtors from a discharge procedure infringes their basic constitutional right of equality under the South African Constitution.⁴⁵⁸ The "advantage to creditor's" requirement is causing unequal treatment of debtors in that many are left without proper statutory discharge.⁴⁵⁹ Debtors who do not have assets that can be used to yield sufficient proceeds to create an advantage to creditors are excluded from benefiting from the discharge measures that the insolvency proceedings provide.⁴⁶⁰ Even though debtors have access to debt review in terms of the *National Credit Act*⁴⁶¹ and administration orders in terms of the *Magistrates' Court Act*,⁴⁶² these mechanisms do not offer a discharge of unpaid debts.⁴⁶³ As a result of this, many South Africans are stuck in a vicious cycle of over-

⁴⁵⁴ Mabe 2019 *PELJ* 2.

⁴⁵⁵ Chitimira and Magau 2020 *Euro Economica* 221.

⁴⁵⁶ Mabe 2019 *PELJ* 2.

⁴⁵⁷ Chitimira and Magau 2020 *Euro Economica* 221.

⁴⁵⁸ Section 9 of the *Constitution of the Republic of South Africa*, 1996; Boraine and Roestoff 2015 *NIBLeJ* 91.

⁴⁵⁹ Boraine and Roestoff 2015 *NIBLeJ* 91; Kok 2011 *THRHR* 343; *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd*.

⁴⁶⁰ Roestoff 2017 *DHET* 478.

⁴⁶¹ Sections 85-87 of the *National Credit Act*.

⁴⁶² Section 74 of the *Magistrates' Courts Act* 32 of 1944 (*Magistrates' Court Act*).

⁴⁶³ Mabe 2019 *PELJ* 2.

indebtedness. The debt discharge in South Africa occurs only after a long time, as in cases where the debtor must wait ten years from the date of the sequestration.⁴⁶⁴

3.8 Conclusion

South African *Insolvency Act* does not provide sufficient alternative debt discharge measures that will assist overburdened debtors with discharge of their debts. This study submits that the exclusion of many overburdened consumer debtors from a discharge procedure could infringe their fundamental constitutional right of equality under the South African *Constitution*. The insolvency system must abandon its creditor-orientated approach and must provide adequate debt relief and equal treatment to all insolvent and over-indebted individuals. Consequently, there is a dire need for alternative debt discharge which will either reduce the period of insolvency or provide debt discharge without experiencing all the limiting consequences of the sequestration process.

In the next chapter, the researcher analyses debt relief measures that assist over-indebted natural person debtors under the *National Credit Act*⁴⁶⁵; *Magistrates' Court Act*, *National Credit Amendment Act*.⁴⁶⁷ Moreover, the next chapter will consider the *Consumer Protection Act*,⁴⁶⁸ *Financial Sector Regulation Act*⁴⁶⁹ *Prescription Act*⁴⁷⁰ and *Debt Collectors Act*,⁴⁷¹ to search the gaps that may be found, which can be amended to assist over-indebted persons with debt discharge.

⁴⁶⁴ Section 127A of the *Insolvency Act*; Mabe 2019 *PELJ* 2.

⁴⁶⁵ Sections 85-87 of the *National Credit Act*; Nagel CJ, Barnard J, Boraine A, Delport PA, Kern KM, Lötze DJ, Otto JM, Papadopoulos SM, Prozesky-Kuschke B, Roestoff M, Van Eck BPS, Van Jaarsveld SR *Commercial Law* 5th ed (Lexis Nexis Johannesburg 2015) 319-320; Mabe 2019 *PELJ* 2; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 6.

⁴⁶⁶ Section 74 of the *Magistrates' Courts Act*; Pete S, Hulme D, Palmer R, Sibanda O, Palmer T *Civil Procedure: A Practical Guide* 2nd ed (Oxford Cape Town 2013) 406-408; Mabe 2019 *PELJ* 2; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 6.

⁴⁶⁷ Section 86A of the *National Credit Amendment Act* 7 of 2019 (*National Credit Amendment Act*).

⁴⁶⁸ Section 3(1)(a)-(f) of the *Consumer Protection Act* 68 of 2008 (*Consumer Protection Act*).

⁴⁶⁹ Section 57(b)(ii) of the *Financial Sector Regulation Act* 9 of 2017 (*Financial Sector Regulation Act*).

⁴⁷⁰ Section 10-16 of the *Prescription Act* 68 of 1969 (*Prescription Act*).

⁴⁷¹ Section 19 of the *Debt Collectors Act* 114 of 1998 (*Debt Collectors Act*).

CHAPTER FOUR

ALTERNATIVE MEASURES FOR THE DISCHARGE OF DEBTS FOR OVER-INDEBTED PERSONS IN SOUTH AFRICA

4.1 Introduction

Over-indebted persons may use debt review in terms of the *Magistrates' Court*,⁴⁷² debt review in terms of the *National Credit Act*,⁴⁷³ and debt intervention in terms of the *National Credit Amendment Act*,⁴⁷⁴ to circumvent the sequestration process in terms of the *Insolvency Act*.⁴⁷⁵ An administration order help debtors with debt restructuring and rearrangement of debts in terms of the *Magistrates' Court Act*.⁴⁷⁶ As such an administration order is mainly aimed at helping debtors who are in financial distress. Debt review is aimed at addressing consumer's over-indebtedness and preventing the granting of reckless credit.⁴⁷⁷ In terms of the *NCA*, a debtor is deemed to be over-indebted when he is unable to satisfy all his credit agreements on time due to his financial means, obligations, and debt repayment history.⁴⁷⁸ The *National Credit Amendment Act* was passed into law in August 2019 to provide a new debt relief measure to over-indebted persons who have no effective means of rescuing

⁴⁷² Section 74 of the *Magistrates' Courts Act* 32 of 1944 (*Magistrates' Courts Act*); Pete S, Hulme D, Palmer R, Sibanda O, Palmer T *Civil Procedure: A Practical Guide* 2nd ed (Oxford Cape Town 2013) 406-408; Mabe Z "Alternatives to Bankruptcy in South Africa That Provides for a Discharge of Debts: Lessons from Kenya" 2019 PELJ 1, 2; Governder L *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* (LLM Dissertation University of Kwa-Zulu Natal 2017) 6.

⁴⁷³ Sections 85-87 of the *National Credit Act* 34 of 2005 (*National Credit Act*); Nagel CJ, Barnard J, Boraine A, Delpont PA, Kern KM, Lötze DJ, Otto JM, Papadopoulos SM, Prozesky-Kuschke B, Roestoff M, Van Eck BPS, Van Jaarsveld SR *Commercial Law* 5th ed (Lexis Nexis Johannesburg 2015) 319-320; Mabe 2019 PELJ 2; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 6.

⁴⁷⁴ Section 86A of the *National Credit Amendment Act* 7 of 2019 (*National Credit Amendment Act*).

⁴⁷⁵ Section 129 of the *Insolvency Act* 24 of 1936 (*Insolvency Act*); Mabe 2019 PELJ 2; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 2.

⁴⁷⁶ *Madari v Cassim* 1950 (2) SA 35 (D) 38; *Weiner v Broekhuysen* 2003 4 SA 301 (SCA) at 305 E-F; Van Loggerenberg DE Jones and Buckle: *The Civil Procedure Practice of the Magistrates' Courts in South Africa* 9th ed (Juta Claremont 1997) 305.

⁴⁷⁷ Section 3(c)(ii) of the *NCA*; see *Ex Parte Ford* 2009 (3) SA 376 (WCC) 379; see also Van Heerden C and Boraine A "The Interaction Between the Debt Relief Measures in the National Credit Act 34 of 2005 and Aspects of Insolvency Law" 2009 PELJ 22, 24.

⁴⁷⁸ Section 80(1)(a) of the *NCA*.

themselves from their over-indebtedness.⁴⁷⁹ This new debt relief measure is known as debt intervention but it has not yet come into force because the *National Credit Amendment Act* does not have a commencement date yet. Debt intervention is defined as a measure that aims to assist identified consumers for whom existing natural person insolvency measures are not accessible in practice.⁴⁸⁰ Moreover, the researcher considered the *Consumer Protection Act*,⁴⁸¹ *Debt Collectors Act*,⁴⁸² *Prescription Act*⁴⁸³ and *Financial Sector Regulation Act*,⁴⁸⁴ to explore the gaps that may be found, which can be amended to assist over-indebted persons with debt discharge.

This chapter seeks to analyse the alternatives to insolvency that assist over-indebted natural person debtors under different Acts. This chapter discusses the advantages and disadvantages of alternatives to insolvency.

4.2 Administration Order in terms of Section 74 of the Magistrates' Courts Act

The *Magistrates Courts Act* provides for administration orders that over-indebted persons may utilise to restructure their debts.⁴⁸⁵ An administration is available to debtors that find themselves in financial distress and allows them to obtain a statutory rescheduling of debt sanctioned by a court order.⁴⁸⁶ An administration order is a modified form of insolvency which is intended to deal with smaller estates where the costs of sequestration proceedings would exhaust the estate.⁴⁸⁷ Moreover, an

⁴⁷⁹ Business Tech 2019 Ramaphosa Signs Controversial New Debt Relief Bill into Law <https://businesstech.co.za/news/finance/334963/ramaphosa-signs-controversial-new-debt-relief-bill-into-law-heres-what-it-means-for-you/> accessed 09 September 2019

⁴⁸⁰ Sections 1 and 86A of the *National Credit Amendment Act*; Coetzee H "An opportunity for No Income No Asset (NINA) debtors to get out of check? – An evaluation of the proposed debt intervention measure" 2018 *THRHR* 593, 597.

⁴⁸¹ Section 3(1) (a)-(f) of the *Consumer Protection Act* 68 of 2008 (*Consumer Protection Act*).

⁴⁸² Section 19 of the *Debt Collectors Act* 114 of 1998 (*Debt Collectors Act*).

⁴⁸³ Section 10-16 of the *Prescription Act* 68 of 1969 (*Prescription Act*).

⁴⁸⁴ Section 57(b)(ii) of the *Financial Sector Regulation Act* 9 of 2017 (*Financial Sector Regulation Act*).

⁴⁸⁵ Section 74 of the *Magistrates Courts' Act*; Coetzee H *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* (LLD thesis University of Pretoria 2015) 172; Magau PT *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* (LLM- dissertation North West University 2019) 39; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 366.

⁴⁸⁶ Section 74 of the *Magistrates Courts' Act*; Boraine A "Some Thoughts on the Reform of Administration Orders and Related Issues" 2003 *De Jure* 217-218.

⁴⁸⁷ Boraine 2003 *De Jure* 225; Pete S, Hulme *et al Civil Procedure: A Practical Guide* 406; *Fortuin v Various Creditors* 2004 (2) SA 570 (C) 573; *Ex parte August* 2004 (3) SA 268 (W) 271.

administration order constitutes a cheaper form of debt relief, which can be used as an alternative to sequestration proceedings to provide debt relief to over-indebted consumers.⁴⁸⁸ Therefore, an administration order allows debt restructuring and rearrangement which is facilitated by the Magistrate Court.⁴⁸⁹

4.2.1 The Requirements for Access to the Administration Order

Certain requirements that must first be complied with before utilising an administration order for debt relief, as such it is not guaranteed.⁴⁹⁰ Firstly, an administration order may be obtained by a debtor who cannot afford to pay the amount of a judgement debt against him, or who cannot meet his financial obligations or does not have enough assets to be attached to satisfy a judgement debt.⁴⁹¹ A judgement debt is any sum of money that a court of law orders the debtor to pay to the creditors.⁴⁹² Secondly, as a requirement, an administration order may only be granted in respect of a debtor whose debts do not exceed R50000.⁴⁹³ These requirements are further discussed below as part of the advantages and disadvantages of an administration order.

4.2.2 The Procedure for Obtaining the Administration Order

The administration order is obtained after an application to the Magistrates' Court in the prescribed form and a fully prepared statement of affairs is lodged with the clerk of the court.⁴⁹⁴ A copy of the application must also be delivered to all the creditors at least three days prior to the hearing of the application.⁴⁹⁵ Where a debtor has applied

⁴⁸⁸ Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 172; see also *African Bank Ltd v Weiner* 2005 (4) SA 363 (SCA) 366.

⁴⁸⁹ *Madari v Cassim* 1950 (2) SA 35 (D) 38; *Weiner v Broekhuysen* 2003 4 SA 301 (SCA) at 305 E-F; Van Loggerenberg *et al The Civil Procedure Practice of the Magistrates' Courts in South Africa* 305.

⁴⁹⁰ Magau *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 40.

⁴⁹¹ Section 74 (1)(a) of the *Magistrates' Courts Act*; see also Leathern R *Consideration of the Proposed Debt Intervention Procedure from a Debt Relief Perspective* (LLM-dissertation University of Pretoria 2018) 22.

⁴⁹² Section 74 (1)(a) of the *Magistrates' Courts Act*.

⁴⁹³ Section 74(1)(b) of the *Magistrates' Courts Act*; see Asheela NV *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* (LLM dissertation University of Pretoria 2012) 40; see also Mabe 2019 *PELJ* 7; in *Jacobs v African Bank* 2006 (5) SA 21 (T) 24, 25 and 29 the court held that the total amount of the judgment debt should be taken into account.

⁴⁹⁴ Section 74(1) read with section 74A (1) and (5) of the *Magistrates Courts' Act*; Mabe 2019 *PELJ* 1, 8.

⁴⁹⁵ Section 74(1) read with section 74A (1) and (5) of the *Magistrates Courts' Act*; Boraine A and Roestoff M "Fresh Start Procedures for Consumer Debtors in South African Bankruptcy Law" 2002 *International Insolvency Review* 1; 2.

successfully for an administration order, an administrator is appointed to take control and manage the payment of debts due to creditors until all the listed creditors and administration costs are paid in full.⁴⁹⁶ The administrator then collects the payments in terms of the order and distributes them *pro rata* amongst creditors.⁴⁹⁷ Once all the payments are made, the administrator lodges a certificate at the clerk of the court whereupon the order lapses.⁴⁹⁸ In *Bafana Finance Mabopane v Makwakwa*,⁴⁹⁹ the Supreme Court of Appeal stated that the main objectives of an administration order are, *inter alia*, to protect the poor and low-income earners who are illiterate and uninformed about the law.⁵⁰⁰ Accordingly, since an administration order is designed to assist debtors who have little assets and income, it is the most appropriate alternative statutory debt relief measure to help the low-income earners in South Africa.⁵⁰¹

After the application process, there must be a hearing about the application for an administration order which is held before the magistrate where the debtor is required to appear in person or with their legal representative.⁵⁰² The debtor's creditors may also sit in on the hearing for the application for an administration order.⁵⁰³ During the hearing for an administration order, *inter alia*, the court enquires about the debtor's financial position and any other matter the court deems necessary.⁵⁰⁴ The hearing and the enquiry are conducted for two primary purposes. Firstly, to investigate the circumstances which may have any bearing on the administration order. Secondly, to

⁴⁹⁶ Section 74C(1)(a) and 74E of the *Magistrates Courts' Act*; Mabe 2019 PELJ 8.

⁴⁹⁷ Section 74J of the *Magistrates Courts' Act*; Manyuni C *The Position of 'Low Income Low Asset' (LILA) Debtors in South Africa: The Need for Legislative Reform* (LLM-dissertation University of Kwa-Zulu Natal 2015) 20.

⁴⁹⁸ Section 74U of the *Magistrates Courts' Act*; Manyuni *The Position of 'Low Income Low Asset' (LILA) Debtors in South Africa: The Need for Legislative Reform* 20.

⁴⁹⁹ *Bafana Finance Mabopane v Makwakwa* 2006 (4) SA 581 (SCA) 583.

⁵⁰⁰ *Bafana Finance Mabopane v Makwakwa* 2006 (4) SA 581 (SCA) 583, the Supreme Court of Appeal held that the purpose of the administration order is to help the poor and low income earners who have no knowledge of the law.

⁵⁰¹ In *Bafana Finance Mabopane v Makwakwa* 2006 (4) SA 581 (SCA) 583.

⁵⁰² Section 74 B (1)(a) of the *Magistrates' Courts Act*; Pete et al *Civil Procedure: A Practical Guide* 407.

⁵⁰³ Section 74A 5 of the *Magistrates' Courts Act* provides that the creditors may attend and sit in on the hearing irrespective of whether or not they have received notice.

⁵⁰⁴ Section 74B (1)(e) of the *Magistrates' Courts Act*; see also *Els v Els* 1967 (3) SA 207 (T).

establish the amount of money which the debtor will be able to pay for the subsequent administration order when granted.

After the hearing, the Magistrates Court may grant an administration order which must be in a prescribed form and its content is governed by the *Magistrates Courts Act*.⁵⁰⁵ The critical aspects of the administration order are that, firstly, it must set out that the debtor's estate is placed under administration. Secondly, it must state that an administrator is appointed for the debtor's estate.⁵⁰⁶ Lastly, it must state the amount of money that the debtor must pay to the administrator and the payments can be made on a weekly or monthly basis.⁵⁰⁷

Once an administration order is granted, the Magistrate Court nominates and appoints an administrator.⁵⁰⁸ The administrator must then draw up a list of creditors whom the debtor owes.⁵⁰⁹ The debtor is usually required to pay the administrator the amounts stipulated in the administration order, and the administrator would then pay the creditors from the money received from the debtor.⁵¹⁰ In addition to payment of money meant for distribution to the creditors, the debtor must also pay an administration fee to the administrator. If the debtor fails to make his payments, the court will embark on an investigation into the debtor's failure to pay, and the debtor will be summoned to a hearing on his/her financial position.⁵¹¹

4.2.3 Advantages of the Administration Order

4.2.3.1 An Administration Order is Simple and Cheap

An administration order is one of the simplest and cheapest statutory debt relief measures available to debtors in South Africa.⁵¹² This makes the administration order

⁵⁰⁵ Section 74C(1)(a) of the *Magistrates' Courts Act*; Pete *et al Civil Procedure: A Practical Guide* 407.

⁵⁰⁶ Section 74C(1)(a) of the *Magistrates' Courts Act*; Van Loggerenberg Jones and Buckle 489-490; Pete *et al Civil Procedure: A Practical Guide* 407.

⁵⁰⁷ Section 74C(1)(a) of the *Magistrates' Courts Act*; Pete *et al Civil Procedure: A Practical Guide* 407.

⁵⁰⁸ Section 74E (1) of the *Magistrates' Courts Act*; see Boraine 2003 *De Jure* 217.

⁵⁰⁹ Section 74G (1) of the *Magistrates' Courts Act*; see Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 176.

⁵¹⁰ Theophilopoulos C, Van Heerden C, and Boraine A *Fundamental Principles of Civil Procedure* (LexisNexis Butterworths Durban 2015) 396.

⁵¹¹ Section 65 of the *Magistrates' Courts Act*; Pete *et al Civil Procedure: A Practical Guide* 407.

⁵¹² See *Fortuin v Various Creditors* 574; see also Ex parte August 272; Magau *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 42

more accessible to the poor and low-income earners who cannot cope with their financial burdens.⁵¹³ The simplicity of an administration order is further shown by the fact that the basis for granting it is on the debtor's inability to pay his debts.⁵¹⁴ Accordingly, debtors, are placed in an advantageous position because they do not have to prove any advantage to creditors. This is because proving the advantage to creditors is difficult for the poor and low-income earners to prove in sequestration process since such debtors do not have assets at all or sufficient assets to comply with this requirement.⁵¹⁵ Consequently, the researcher submits that the administration order, due to its simplicity and cheapness, it is a better option for debtors with low-income and no assets.

4.2.3.2 Only the Debtor Can Invoke the Application for an Administration Order

One of the primary purposes of an administration order is to protect debtors, particularly the illiterate, poor, and low-income earners with smaller estates.⁵¹⁶ Accordingly, the application process for an administration order can only be invoked or initiated by the debtor and not the creditors.⁵¹⁷ The researcher submits that this demonstrates some form of voluntariness and freedom for the debtor because an administration order cannot be done under anyone's compulsion. Nevertheless, creditors still have some involvement in the process of an administration order in that although they may not initiate the application process, they may still appoint an independent administrator and also get to interrogate the debtor on his financial position.⁵¹⁸ According to the World Bank, this creditor involvement falls short of the international standards for consumer insolvency which requires less consumer involvement.⁵¹⁹

⁵¹³ *Madari v Cassim* at para 38; see also *Weiner v Broekhuysen* 2003 4 SA 301 (SCA) at 305E-F.

⁵¹⁴ See Theophilopoulos *et al Fundamental Principles of Civil Procedure* 396; see also Leathern Consideration of the Proposed Debt Intervention Procedure 22.

⁵¹⁵ Borraine A and Van Heerden C "To Sequester or Not to Sequester in View of the National Credit Act 34 of 2005: A Tale of Two Judgments" 2010 *PELJ* 84, 88.

⁵¹⁶ *Bafana Finance Mabopane v Makwakwa* 2006 (4) SA 581 (SCA) 583 at para 38.

⁵¹⁷ Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 186.

⁵¹⁸ *Madari v Cassim* at para 38.

⁵¹⁹ World Bank Working Group on the Treatment of the Insolvency of Natural Persons Report on the Treatment of the Insolvency of Natural Persons (World Bank Washington DC 2013) para 421.

4.2.3.3 The Debtor Retains Control of his or her Estate

Unlike sequestration proceedings, an administration order poses an advantage to the debtor in that he/she gets to retain control of his estate, something which is certainly not available under sequestration proceedings.⁵²⁰ This follows the fact that the control of a debtor's estate under sequestration proceedings vests with the Master until the appointment of a trustee, of which this is not the case with a debtor whose estate is under administration. Under an administration order, the debtor's status and capacity are not restricted as under sequestration proceedings.⁵²¹ This follows the fact that a debtor who is undergoing sequestration has certain restrictions on his capacity. Such restrictions include prohibition from holding certain offices not being able to conduct business without the trustee's consent, and not being able to enter into certain contracts without the trustee's consent.⁵²² All these prohibitions and limitations are not applicable under an administration order. This gives the debtor under an administration order more control of his estate as opposed to a debtor who is under sequestration. The only effect of an administration order which has an impact on the debtor's status is that a debtor may not incur further debts without disclosing that he/she is subject to an administration as this would amount to an offence.⁵²³ Other than this offence, the debtor's status is not limited or curtailed in any other way under an administration order.

4.2.4 Disadvantages of an Administration Order

4.2.4.1 The Monetary Limit of R50000

⁵²⁰ See Coetzee A *Comparative Reappraisal of Debt Relief Measures in South Africa* 188.

⁵²¹ Section 20(1) of the *Insolvency Act*; see *Hobson NO v Abib* 1981 (1) SA 556 (N) 559-60; see also *Mahomed v Lockhat Brothers & Co Ltd* 1944 AD 230 241.

⁵²² Section 69 of the *Companies Act* 71 of 2008 (*Companies Act*) provides that an unrehabilitated insolvent person may not be a company director. An unrehabilitated insolvent may also not be a member of Parliament, see section 106(1)(c) of the Constitution of the Republic of South Africa, 1996. Furthermore, an insolvent who has not been rehabilitated may not be a liquidator of a company or a close corporation, see section 372(a) of the Companies Act and section 66(1) of the Close Corporations Act 69 of 1984 respectively. Lastly, an insolvent person may not be a trustee of an insolvent estate, see section 58(a) of the Insolvency Act

⁵²³ See section 74S(1) of the *Magistrates' Courts Act*; see also Leathern *Consideration of the Proposed Debt Intervention Procedure* 23.

The administration procedure is only available to estates whose debts or claims do not exceed R50 000.⁵²⁴ Administration procedure is not ideal for debtors with no income and no assets because the order's debt repayment plans are made on the considerations of the debtor's ability to pay in instalments.⁵²⁵ In other words, a debtor who wants to apply for an administration order must have a steady income.⁵²⁶ Malanje is of a view that if the monetary cap in administration orders was a bit higher, that could have also helped debtors who cannot access debt relief in the form of sequestration orders under the *Insolvency Act* owing to the advantage to creditors' requirement.⁵²⁷ Furthermore, debts that are payable by means of future instalments due in terms of an enforceable and existing contract for example, a mortgage agreement, are excluded from the administration order.⁵²⁸ Moreover, future debts are also not included in the administration order.⁵²⁹ Debtors may, therefore, be required to make other arrangements for such repayments. In practice, it is observed that most administration orders are unsuccessful because debtors do not keep up with the regular payments.⁵³⁰ In *Cape Town Municipality v Dunne*,⁵³¹ the court held that "the word "debts" in the provision of the *Magistrates' Courts Act* means debts which are due and payable but does not include an obligation to pay money in future".⁵³² This means that the debtor must make an alternative arrangement to satisfy debts that will be due and payable in future.⁵³³ The court ruled that "the success of an

⁵²⁴ Section 74(1) of the *Magistrates Courts' Act*; Magau *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 45; Mabe 2019 *PELJ* 7.

⁵²⁵ Leathern *Consideration of the Proposed Debt Intervention Procedure from a Debt Relief Perspective* 22; Mabe 2019 *PELJ* 8.

⁵²⁶ Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 40; Mabe 2019 *PELJ* 8.

⁵²⁷ Malanje NJ "The impact of administration orders as a redress mechanism for over-indebted consumers: a critical analysis" in Nejdett D et al *Globalizing businesses for the next century: visualizing and developing contemporary approaches to harness future opportunities* (2013) 626.

⁵²⁸ Leathern *Consideration of the Proposed Debt Intervention Procedure from a Debt Relief Perspective* 22; Mabe 2019 *PELJ* 8.

⁵²⁹ *Cape Town Municipality v Dunne* 1964 1 SA 741 (C) 746; Boraine and Roestoff 2002 *International Insolvency Review* 2.

⁵³⁰ Boraine and Roestoff 2002 *International Insolvency Review* 2; Mabe 2019 *PELJ* 8.

⁵³¹ *Cape Municipality v Dunne* 1964 1 SA 741 (C) 746 C.

⁵³² section 74 (1) of the *Magistrates' Courts Act*; *Cape Municipality v Dunne* 1964 1 SA 741 (C) 746 C.

⁵³³ *Cape Municipality v Dunne* 1964 1 SA 741 (C) 746 C.

administration order is severely compromised if reductions in subsequent instalments are not included in the administration order".⁵³⁴

4.2.4.2 There is no Debt Discharge in Terms of an Administration Order

No provision is made for a statutory discharge of debts since the order only lapses once all the listed creditors and the administration costs are fully paid.⁵³⁵ An administration order is a repayment plan, and unlike a sequestration order, it does not provide a debtor with a possibility of a debt discharge.⁵³⁶ This poses a disadvantage to debtors because they are required to make regular payments to the administrator for the administration order to be effective. Therefore, it follows, that an administration order requires a debtor to have a steady income to be able to make regular payments to the administrator for distribution to the creditors.⁵³⁷ The researcher submits that the over-indebted consumers who do not have income are prone to being in default concerning the repayments. As such, an administration order is not ideal for them. This is because the repayment plans are made based on the debtor's ability to keep on paying instalments.⁵³⁸ It is also important to note that future debts which are payable in instalments such as mortgage bonds are expressly excluded from an administration order. This has the potential to affect the success of an administration order because the debtor would have to service both future debts and make regular payments to the administrator. The researcher submits that exclusion of future debts from an administration order has the likelihood of leading debtors, particularly the poor and low-income earners, to be in default.

4.2.4.3 There is no Time Limit for the Repayment of Debts

There is no provision in the *Magistrates' Courts Act* that provides that the repayment of the debt must take place within a specific period, which means that many debtors

⁵³⁴ *Cape Municipality v Dunne* 1964 1 SA 741 (C) 746

⁵³⁵ Section 74U of the *Magistrates Courts' Act*; Mabe 2019 *PELJ*9; Magau *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 46.

⁵³⁶ *Coetzee A Comparative Reappraisal of Debt Relief Measures in South Africa* 185; Borraine 2003 *De Jure* 218.

⁵³⁷ *Fortuin v Various Creditors* 575; Theophilopoulos *et al Fundamental Principles of Civil Procedure* 396.

⁵³⁸ Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 40.

may remain trapped by their debt.⁵³⁹ The *Magistrates' Courts Act* does not contain any section which makes provision for the time frame within which the repayment of debt must be done. The researcher submits that there should be a time limit for the repayment of debt because without it, the debtor is placed at a disadvantage of potentially being under administration perpetually. The absence of a maximum time for which an administration order may last weakens this debt relief measure because there is a possibility that a debtor will fall under a debt trap given the interest rates and other costs involved.⁵⁴⁰ At present, an administration order terminates only upon the full settlement of administration fees and when all the creditors have been paid in full.⁵⁴¹ After the repayment has taken place, the administrator normally lodges a certificate to that effect with the clerk of court, and the same is sent to all the creditors.⁵⁴²

4.2.4.4 Lack of Out-of-Court Proceedings

For an administration order to take place a debtor must apply to the Magistrates' Court, and when the order is granted, the court appoints an administrator.⁵⁴³ A court-based approach curtails access to an administration order for the poor debtors because they do not have disposable income to can afford litigation costs and any other administration costs.⁵⁴⁴ Accordingly, the researcher submits that there should be provision for an out of court debt relief mechanism that is accessible to low-income earners who cannot afford litigation costs and administration fees.

4.2.4.5 Administration Costs and Administrator's Fees Burden on a Debtor's Income

⁵³⁹ Nel JM *An Analysis of the Legislative Mechanisms Available to Individual Debtors in terms of the South African Law* (LLM-dissertation University of South Africa 2006) para 2.6.

⁵⁴⁰ Boraine and Roestoff 2002 *International Insolvency Review* 2.

⁵⁴¹ Section 74U of the *Magistrates' Courts Act*; Kelly-Louw M "The Prevention and Alleviation of Consumer Over-indebtedness" 2008 SA Merc LJ 200, 222.

⁵⁴² Section 74U of the *Magistrates' Courts Act*.

⁵⁴³ Section 74(1)(b) of the *Magistrates' Courts Act*; see Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 174; see also Mabe 2019 *PELJ* 8-9.

⁵⁴⁴ Section 74(1)(b) of the *Magistrates' Courts Act*; Coetzee *A Comparative Reappraisal of Debt Relief in South Africa* 51.

The expenses and remuneration deductible by the administrator may usually not exceed 12.5% of the amount received from the debtor.⁵⁴⁵ Moreover, the administration costs and administrator's fees places an additional burden on a debtor's income, leaving less money available to distribute among the debtor's creditors.⁵⁴⁶ In *Weiner NO v Broekhuysen*,⁵⁴⁷ the court interpreted section 74L(2) of the *Magistrates' Courts Act* regarding remuneration and expenses of the administrator. It concluded that remuneration and expenses were subject to a maximum of 12.5 per cent of the money collected.⁵⁴⁸ Section 74J (1) requires a court granting an administration order to compel an administrator to collect payments and effect distributions to creditors at least once every three months.⁵⁴⁹ This may be departed from either where there is an agreement by the creditors or where the court orders otherwise, in any particular case.⁵⁵⁰ Moreover, the court held that an additional burden is imposed on the debtor as he or she has to pay the administrator's fees.⁵⁵¹

4.3 Debt review in terms of the National Credit Act

4.3.1 Overview of Debt Review

The primary objectives of the *National Credit Act* are to assist over-indebted debtors by re-arranging their financial obligations under a credit agreement, to eventually settle the debt.⁵⁵² The provision of debt review as a debt relief measure in terms of the *NCA* is aimed at achieving the primary objectives of the *NCA* which include addressing consumer's over-indebtedness and preventing the granting of reckless credit.⁵⁵³ Reckless credit-granting may occur in one of the following ways, firstly when

⁵⁴⁵ Section 74L (2) of the *Magistrates Courts' Act*; *African Bank Ltd v Weiner* 2005 4 SA 363 (SCA) 373 (hereafter *African Bank Ltd v Weiner*).

⁵⁴⁶ *African Bank Ltd v Weiner* 2005 4 SA 363 (SCA) 373; Nel *Analysis of the Legislative Mechanisms Available to Individual Debtors in terms of the South African Law* 5.

⁵⁴⁷ *Weiner NO v Broekhuysen* 2002 4 All SA 96 (SCA) para 26.

⁵⁴⁸ Section 74L (2) of the *Magistrates' Courts Act*; *Weiner NO v Broekhuysen* 2002 4 All SA 96 (SCA) para 26.

⁵⁴⁹ Section 74L (2) of the *Magistrates' Courts Act*; *Weiner NO v Broekhuysen* 2002 4 All SA 96 (SCA) para 26.

⁵⁵⁰ *Weiner NO v Broekhuysen* 2002 4 All SA 96 (SCA) para 26.

⁵⁵¹ *Weiner NO v Broekhuysen* 2002 4 All SA 96 (SCA) para 26.

⁵⁵² Sections 85-87 of the *National Credit Act* as amended by the *National Credit Amendment Act*; Nagel *et al Commercial Law* 320.

⁵⁵³ Section 3 of the *National Credit Act*; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 42.

the creditor has failed to conduct an assessment.⁵⁵⁴ Secondly, when the creditor has concluded the assessment as required by the *NCA* but still proceeded to grant credit despite the findings showing that the debtor did not understand the risks, costs, and obligations involved or that proceeding with the proposed credit agreement would lead to the debtor being over-indebted.⁵⁵⁵ In *Ex Parte Ford*,⁵⁵⁶ three applications for voluntary surrender were served in the Western Cape High Court.⁵⁵⁷ It appeared that a significant portion of each of the applicants' debts arose out of credit agreement, as intended by the *NCA*.⁵⁵⁸ There were substantial grounds for suspecting some degree of reckless credit extension.⁵⁵⁹ The court held that it could invoke the provision of section 85 of the *NCA* to declare and relieve over-indebtedness.⁵⁶⁰

Despite the above set objectives of the *NCA* in providing for debt relief, debt review has a limited scope of application.⁵⁶¹ This is because debt review only applies to credit agreements that fall under the ambit of the *NCA*.⁵⁶² Debts that do not fall under the ambit of the *NCA* are therefore excluded from debt review. The researcher submits that this limited scope of application of debt review makes it less viable for most debtors, including the low-income earners because most of their debts emanate from credit agreements which fall outside the definition of the *NCA*. Moreover, debt review does not apply in instances where the credit provider has already commenced with action to enforce the credit agreements.⁵⁶³

Debt review does not provide debtors with the opportunity for a debt discharge. It is merely a repayment plan and restructuring of the debt where debtors have to settle

⁵⁵⁴ Section 80(1)(a) of the *National Credit Act*.

⁵⁵⁵ Section 80(1)(b)(i)-(ii) of the *National Credit Act*; Nagel *et al Commercial Law*.

⁵⁵⁶ *Ex Parte Ford* and two similar cases 2009 3 SA 376 (WCC).

⁵⁵⁷ *Ex Parte Ford* and two similar cases 2009 3 SA 376 (WCC).

⁵⁵⁸ *Ex Parte Ford* and two similar cases 2009 3 SA 376 (WCC).

⁵⁵⁹ *Ex Parte Ford* and two similar cases 2009 3 SA 376 (WCC).

⁵⁶⁰ *Ex Parte Ford* and two similar cases 2009 3 SA 376 (WCC).

⁵⁶¹ Mokgorwane T *The Interplay between National Credit Act 34 of 2005 and Insolvency Act 24 of 1936* (LLM dissertation University of Pretoria 2005) 26.

⁵⁶² See section 4(1) and 8 of the *National Credit Act*; see also Nagel *et al Commercial Law* 296; Roestoff M and Coetzee H "Consumer Debt Relief in South Africa: Lessons from America and England; and Suggestions for the Way Forward" 2012 SA Merc LJ 53, 68.

⁵⁶³ Section 86(2) of the *National Credit Act* provides that an application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps to enforce such a credit agreement; see also section 130 of the *National Credit Act*.

their debts ultimately.⁵⁶⁴ The Supreme Court of Appeal in *Collett v FirstRand Bank*,⁵⁶⁵ stated that the purpose of debt review was not to provide debtors with any relief from their financial obligations, but merely to obtain debt rearrangement.⁵⁶⁶ The researcher submits that this poses a disadvantage to the consumers, particularly low-income earners because most of them do not have any income or assets that can be rearranged. An order for debt review can only be granted where it is believed that the debtor has some assets or income of significant value that can be rearranged.⁵⁶⁷ This approach impedes many debtors, particularly the poor and low-income earners who have no income or assets, and as such, it makes debt review less viable for such debtors as they derive no benefit from it.

The debt review procedure places no monetary limitation on the total outstanding debt.⁵⁶⁸ This allows more consumers to qualify for debt relief in terms of the *National Credit Act*.⁵⁶⁹ Secured credit agreements are also included in the review, but the Act does not provide any preference to the repayment thereof.⁵⁷⁰ Credit agreements where the creditors have proceeded to take steps to enforce them are also excluded from the debt review procedure.⁵⁷¹ The debt review process does not require the consumer to show an advantage to credit providers, it only assists the mildly over-indebted consumer, because the courts will confirm viable plan proposals only.⁵⁷²

4.3.2 The Procedure for Obtaining Debt Review

⁵⁶⁴ Kelly-Louw M and Stoop PN *Consumer Credit Regulation in South Africa* (Juta Cape Town 2012) 324.

⁵⁶⁵ *Collett v FirstRand Bank* 2011 4 SA 508 (SCA) 514; See *First Rand Bank Ltd v Olivier* 2009 3 SA 353 (SE) 357.

⁵⁶⁶ *Collett v FirstRand Bank* 2011 4 SA 508 (SCA) 514; See *First Rand Bank Ltd v Olivier* 2009 3 SA 353 (SE) 357.

⁵⁶⁷ Sections 85-88 of the *National Credit Act*; Van Heerden C and Lötze DJ "Over-indebtedness and Discretion of Court to Refer to Debt Counsellor: *Standard Bank of South Africa Ltd v Hales* 2009 (3) SA 315 (D)" 2010 *THRHR* 502-517.

⁵⁶⁸ Section 4 read with section 8 of the *National Credit Act*; Roestoff and Coetzee 2012 *SA Merc LJ* 68.

⁵⁶⁹ Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 42; Leathern *Consideration of the Proposed Debt Intervention Procedure from a Debt Relief Perspective* 26.

⁵⁷⁰ Roestoff and Coetzee 2012 *SA Merc LJ* 68; Manyuni *The Position of 'Low Income Low Asset' (LILA) Debtors in South Africa: The Need for Legislative Reform* 24.

⁵⁷¹ Section 130(1) of the *National Credit Act*; Mabe 2019 *PELJ* 6.

⁵⁷² Roestoff and Coetzee 2012 *SA Merc LJ* 68; Magau *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 52.

The process commences with the application of a consumer to a debt counsellor to be declared over-indebted and to be placed under debt review.⁵⁷³ A consumer who wishes to commence the debt review process must pay amongst other costs an application fee, a rejection fee if the application is rejected, and a restructuring fee less than or equal to the first instalment of the debt rearrangement plan.⁵⁷⁴ Once the debt review process is complete, a debt counsellor may recommend a magistrate's court order re-arranging the debtor's obligations.⁵⁷⁵ The debt counsellor has 30 business days to determine whether the consumer is over-indebted.⁵⁷⁶ A debt review order will be granted if it is believed that the debtor's financial affairs can be successfully re-arranged, for example, where the debtor receives a regular income or has assets to realise.⁵⁷⁷ If the court grants the order, the debtor will generally make monthly payments to a payment distribution agent that will distribute the amount among the credit providers.⁵⁷⁸

4.3.3 Clearance Certificate after Rearrangement of Debts

A consumer whose debts have been rearranged can be issued with a clearance certificate which will end his debt review but will not discharge his debts.⁵⁷⁹ A debtor can therefore be issued with a clearance certificate even if all his obligations under all the credit agreement that were subject to the debt re-arrangement have not been satisfied.⁵⁸⁰ Debt review can also be terminated.⁵⁸¹ In such an instance the debtor will no longer be under debt review but his debts will not be discharged and he will have

⁵⁷³ Section 86(1) of the *National Credit Act*; *BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 6 SA 63 (KZD) (2010) 31 Obiter 756; Magau *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 51.

⁵⁷⁴ Section 86(3)(a) and 86(4) of the *National Credit Act 34 of 2005*; Roestoff and Coetzee 2012 *SA Merc LJ* 67.

⁵⁷⁵ Section 86(7)(c)(ii) (aa) - 86(7)(c)(ii)(dd) of the *National Credit Act*; Leathern *Consideration of the Proposed Debt Intervention Procedure from a Debt Relief Perspective* 24.

⁵⁷⁶ Section 86(6) and 24(6) of the *National Credit Act*; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 42.

⁵⁷⁷ Sections 85-88 of the *National Credit Act*; Van Heerden 2010 *THRHR* 516.

⁵⁷⁸ Section 44A of the *National Credit Act*; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 42; Leathern *Consideration of the Proposed Debt Intervention Procedure from a Debt Relief Perspective* 25.

⁵⁷⁹ Section 71 of the *National Credit Act*; Section 21 of the *National Credit Amendment Act*.

⁵⁸⁰ Section 71 read with section 27 of the *National Credit Act*; Mabe 2019 *PELJ* 7.

⁵⁸¹ section 86(10) of the *National Credit Act*; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 42.

to continue paying as per the original credit agreement or as per the terms of the set-aside debt review order.⁵⁸² In *Collett v FirstRand Bank Ltd*,⁵⁸³ the court held that a referral of a debt review to the magistrate's court does not bar a credit provider from terminating the debt review.⁵⁸⁴ A credit provider may therefore terminate the process in respect of a specific agreement as soon as 60 business days have lapsed, irrespective of whether the matter is pending in court.⁵⁸⁵ The process of debt review has its setbacks. Debt review is of limited scope as it only provides debt relief in respect of debt which qualifies as "credit agreements" in terms of the *National Credit Act*. The Act furthermore does not provide for the possibility that the court could force a discharge of a part of the consumer's debt obligations on the debtor's creditors.

4.4 Debt Intervention in terms of the National Credit Amendment Act

4.4.1 The objectives of the National Credit Amendment Act

The *National Credit Amendment Act* proposes that the consumers should satisfy all their financial obligations where their financial position allows this to happen or where it is envisaged that they will be able to do so in the future.⁵⁸⁶ Progressively, this amendment is important in the debt relief arena in South Africa because the existing debt relief measures are difficult for low-income earners to access and utilise, thus amounting to unjustified and unfair discrimination.⁵⁸⁷ This is further cemented by the recognition in the preamble that there are categories of debtors who cannot access statutory debt relief measures due to, *inter alia*, the requirement of advantage to creditors or the costs involved in such measures.⁵⁸⁸

⁵⁸² Mabe 2019 *PELJ* 7; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 43.

⁵⁸³ *Collett v FirstRand Bank Ltd* 2011 (4) SA 508 (SCA) at 514.

⁵⁸⁴ *Collett v FirstRand Bank Ltd* 2011 (4) SA 508 (SCA) at 514; Roestoff and Coetzee 2012 SA *Merc LJ* 68.

⁵⁸⁵ Roestoff and Coetzee 2012 SA *Merc LJ* 68; Leathern *Consideration of the Proposed Debt Intervention Procedure from a Debt Relief Perspective* 32.

⁵⁸⁶ Section 3(g)-(i) of the *National Credit Amendment Act*.

⁵⁸⁷ Coetzee H "Is the Unequal Treatment of Debtors in Natural Person Insolvency Law Justifiable? A South African Exposition" 2016 *International Insolvency Review* 36, 55. Coetzee argues that the exclusion of some debtors from existing debt relief measures amounts to an unfair and unjustifiable discrimination which is unconstitutional.

⁵⁸⁸ Sections 3-12 of the *Insolvency Act* provides for sequestration proceedings, however it is difficult for debtors, particularly the low income earners to meet the requirement of advantage to creditors

The *National Credit Amendment Act* is aimed at, *inter alia*, providing appropriate debt intervention to qualifying consumers as well as promoting an efficient, effective, and accessible credit industry where consumers are protected.⁵⁸⁹ This follows the fact that South Africa is a credit-driven society where many of the households depend on credit to improve their wellbeing.⁵⁹⁰ Notwithstanding this, consumer credit is also a source of financial distress for many South African households. As such, an efficient, effective, and accessible debt relief measure is a need for all consumers, particularly the low-income earners.⁵⁹¹

4.4.2 The Requirements for Application for Debt Intervention

For a consumer to be able to access debt intervention, certain requirements need to be satisfied. The requirements for debt intervention are set out in the *National Credit Amendment Act* under the definition of debt intervention applicant.⁵⁹² Firstly, the applicant for debt intervention must be a natural person or consumer with an unsecured debt, which does not exceed R50000.⁵⁹³ The *National Credit Amendment Act* is silent on the rationale behind the R50000 cap off amount. The unsecured debt must be emanating from unsecured credit agreements, unsecured short term credit transactions, or unsecured credit facilities only.⁵⁹⁴ Secondly, the applicant for debt

as required by the *Insolvency Act*; section 74 the *Magistrates Courts Act* provides for an administration order, however, debtors whose debts exceed R50000 cannot utilise an administration order for debt relief; similarly, section 86 of the *NCA* provides for debt review, however, debtors whose debts emanate outside the ambit of the *NCA* cannot utilise debt review for debt relief.

⁵⁸⁹ See section 2 of the *NCA*; see also section 3(gA) of the *National Credit Amendment Act*; Go Legal 2019 Debt intervention Bill Signed into Law <https://www.golegal.co.za/debt-intervention-bill-consumers/> (accessed on 02 November 2019).

⁵⁹⁰ Boraine A, Van Heerden C and Roestoff M "A Comparison between Formal Debt Administration and Debt Review –The Pros and Cons of these Measures and Suggestions for Law Reform (Part 2)" 2012 *De Jure* 254, 255; see also Boraine A and Roestoff M "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)" 2014 *THRHR* 527, 528; Ssebagala R "Relieving Consumer Overindebtedness in South Africa: Policy Reviews and Recommendations" 2017 *Journal of Financial Counseling and Planning* 235, 236.

⁵⁹¹ See Ssebagala 2017 *Journal of Financial Counseling and Planning* 236; Archuleta KL, Dale A and Spann SM "College Students and Financial Distress: Exploring Debt, Financial Satisfaction, and Financial Anxiety" 2013 *Journal of Financial Counseling and Planning* 50, 52.

⁵⁹² See section 1(b) in the definition of "debt intervention applicant" paras (a)-(d) of the *National Credit Amendment Act*.

⁵⁹³ Section 86A(1) of the *National Credit Amendment Act*; the R50000 monetary cap off is similar to the one applicable to an administration order under section 74(1) of the *Magistrates' Courts Act*.

⁵⁹⁴ Section 1(b) in the definition of "debt intervention applicant" para (a) of the *National Credit Amendment Act*.

intervention must not be earning any income or have earned no more than R7 500 a month over the last six months on the date of submission of the application.⁵⁹⁵ This amount was determined on the basis that it is economically challenging for debt counsellors to rearrange the debts of a consumer who earns less than R7 500 per month. The two amounts, R50 000 and R7 500 are not mutually exclusive since a debtor can apply for debt intervention if they earn less than R7 500 a month or when his or her debts are not above R50 000. Thirdly, the applicant must be over-indebted.⁵⁹⁶ Lastly, the applicant must not be subject to sequestration proceedings under the *Insolvency Act* or an administration order under the *Magistrates' Courts Act*.⁵⁹⁷

4.4.3 The Procedure for Obtaining Debt Intervention

The application for debt intervention must be made to the National Credit Regulator (NCR) in a prescribed form and manner together with supporting documents and information to have the debtor declared over-indebted.⁵⁹⁸ Upon receipt of the application for debt intervention, the NCR must provide the applicant with counselling and access to training to improve the applicant's financial literacy.⁵⁹⁹ The cooperation of the applicant and the creditors in relation to the application for debt intervention is required to achieve the counselling on the financial literacy of the applicant for debt intervention.⁶⁰⁰ The introduction of the concept of financial literacy should be celebrated for being a step in the right direction.

The NCR may decide whether to accept or reject the application after assessing the application for debt intervention. An application would be rejected if the applicant does not qualify.⁶⁰¹ In an instance where the application is rejected, but the applicant is

⁵⁹⁵ Sections 1(b)(b), 86A(2)(b) and 86(2) of the *National Credit Amendment Act*; the R7500 amount was set because it is not financially viable for debt counsellors to help debtors earning an income less than R7500 per month.

⁵⁹⁶ Section 1(b)(c) of the *National Credit Amendment Act*.

⁵⁹⁷ Section 1(b)(d) of the *National Credit Amendment Act*.

⁵⁹⁸ Section 15A (2) of the *National Credit Amendment Act* empowers the National Credit Regulator (NCR) to help the applicant for debt intervention to be declared over indebted as well as to assist in rearranging the applicant's financial obligations.

⁵⁹⁹ See sections 86A (3) and (5) of the *National Credit Amendment Act*.

⁶⁰⁰ Section 86A (4) of the *National Credit Amendment Act*.

⁶⁰¹ Section 86A (6)(a) of the *National Credit Amendment Act*.

facing difficulties satisfying their financial obligations, the NCR would recommend that an agreement for rearrangement of payment be reached between the applicant and the creditors.⁶⁰² The World Bank has since argued that voluntary agreements between consumers and creditors for debt repayment are not easy to conclude because creditors are always looking out for their interests.⁶⁰³ In light of this, the researcher submits that the effectiveness of this proposition by the *National Credit Amendment Act* remains to be seen. Another possibility in the application procedure is that where the credit agreement is deemed to form part of reckless credit, unlawful credit, or prohibited conduct, the NCR must refer it to the National Consumer Tribunal (NCT) for an appropriate decision.⁶⁰⁴

If the NCR concludes that the applicant qualifies for debt intervention after assessing the application for debt intervention, the applicant's debts will be rearranged within five years. After that the matter would be referred to the NCT for an appropriate recommendation to be made.⁶⁰⁵ The NCT hears the recommendation with regard to; *inter alia*, the debtor's financial means, prospects, and obligations.⁶⁰⁶ The NCT may still reject the application at this stage declare the credit agreement reckless,⁶⁰⁷ make an order for debt rearrangement and determine the charges, fees, or interest which can be set at a maximum of zero.⁶⁰⁸

The most significant part about debt intervention is the fact that it provides consumers with a possibility of discharge. The *National Credit Amendment Act* allows consumers who qualify for debt intervention but have insufficient income or assets to be rearranged to have their debt suspended in part or in full for up to twenty-four months.⁶⁰⁹ The NCR must conduct an assessment to check if the applicant's financial

⁶⁰² Section 86A (6)(b) of the *National Credit Amendment Act*.

⁶⁰³ World Bank Working Group on the Treatment of the Insolvency of Natural Persons Report on the Treatment of the Insolvency of Natural Persons (World Bank Washington DC 2013) para 409.

⁶⁰⁴ Section 86A (6)(c) of the *National Credit Amendment Act*.

⁶⁰⁵ Sections 86A (6)(d) and 87(1A) of the *National Credit Amendment Act*.

⁶⁰⁶ Section 87(1A) of the *National Credit Amendment Act*.

⁶⁰⁷ Section 87(A1) (a)(b)(i) of the *National Credit Amendment Act*.

⁶⁰⁸ Section 87(A1) (b)(ii)(dd) of the *National Credit Amendment Act*.

⁶⁰⁹ See section 87A(2)(b)(i) of the *National Credit Amendment Act*; see also Business Tech 2019 Ramaphosa Signs Controversial New Debt Relief Bill into Law <https://businesstech.co.za/news/finance/334963/ramaphosa-signs-controversial-new-debt-relief-billinto-law-heres-what-it-means-for-you/> accessed 09 September 2019

situation has improved after eight months.⁶¹⁰ If the debtor's financial situation has improved, a debt rearrangement plan will be negotiated.⁶¹¹ However, if the financial situation has not improved, the period for suspension will be extended by twelve more months.⁶¹² The NCR will then have to conduct an assessment again after eight months to determine whether the applicant has sufficient income or assets to be rearranged.⁶¹³ If the applicant's financial circumstances still have not improved, the debt may then be extinguished altogether.⁶¹⁴

4.4.1 Advantages of Debt Intervention

4.4.1.1 Discharge of Debt and Rehabilitation

One of the most prominent provisions of the procedure for debt intervention is the extinguishing of debt.⁶¹⁵ In terms of the *National Credit Amendment Act*, if the debt intervention applicant does not have sufficient assets or income for his obligations to be rearranged over five years, the NCR may refer the matter to the Tribunal for the debt to be extinguished in part or altogether.⁶¹⁶ The extinguishment must be ordered on all qualifying credit agreements.⁶¹⁷ The Tribunal must also prohibit the debt intervention applicant from incurring any further credit agreements for a fair and reasonable period, six months from the date an extinguishment is ordered.⁶¹⁸

The extinguishment, as introduced for debt intervention is a progressive move and a positive step in the right direction towards accommodation of low-income earners and providing them with debt relief. Presently, consumers are only afforded debt discharge

⁶¹⁰ Section 87A(5)(a) of the *National Credit Amendment Act*.

⁶¹¹ Section 87A(5)(b)(i) of the *National Credit Amendment Act*.

⁶¹² Section 87A(5)(b)(ii) of the *National Credit Amendment Act*.

⁶¹³ Section 87A(5)(c)(i) of the *National Credit Amendment Act*.

⁶¹⁴ Section 87A(6)(c) of the *National Credit Amendment Act*; see also Business Tech 2019 Ramaphosa Signs Controversial New Debt Relief Bill into Law <https://businesstech.co.za/news/finance/334963/ramaphosa-signs-controversial-new-debt-relief-bill-into-law-heres-what-it-means-for-you/> accessed 09 September 2019.

⁶¹⁵ Section 1(c) of the *National Credit Amendment Act* defines to "extinguish" as the cessation of all rights and/or obligations which are inherent to, or resulting from, a credit agreement. This is for rights or obligations that may arise in law, whether statutory or otherwise; Magau *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 60.

⁶¹⁶ Section 87A(5)(c)(ii) of the *National Credit Amendment Act*.

⁶¹⁷ Section 87(7)(a) and (b) of the *National Credit Amendment Act*.

⁶¹⁸ Section 87A (8) of the *National Credit Amendment Act*.

when utilising discharge envisaged under the debt intervention is not earned because it is offered when the consumer's financial circumstances do not improve. However, sequestration proceedings are difficult for consumers, particularly low-income earners, to access and utilise due to the requirement for advantage to creditors.⁶¹⁹ For quite a long time, this requirement has prevented low-income earners who cannot prove a pecuniary benefit to creditors from obtaining debt discharge because such debtors often find it difficult to prove this requirement.⁶²⁰ This is because most debtors, including low-income earners, do not have sufficient assets or disposable income available for distribution to creditors.⁶²¹

4.4.1.2 Financial Literacy

One of the advantages of the *National Credit Amendment Act* is that it seeks to address the problem of financial illiteracy, which might be a contributing factor to consumer over-indebtedness. Financial literacy is defined as the knowledge, ability and opportunity to make sound money management choices.⁶²² Put differently, financial literacy refers to the ability to make well-informed judgements and decisions about the management of one's finances taking into account any change that could occur in economic events and/or related aspects.⁶²³ On the contrary, financial illiteracy is defined as the inability of the consumer to manage their cash and payments as well as their future financial needs.⁶²⁴ From a debt relief perspective, financial literacy is important in that it inculcates the notion of financial responsibility on the consumers.

⁶¹⁹ Boraine and Van Heerden 2010 *PELJ* 84, 88.

⁶²⁰ Bertelsman E Evans R, Harris A, Kelly-Louw M, Loubser A, Roestoff M, Smith A, Stander L, Steyn L *The Law of Insolvency in South Africa* 9th ed (Juta Cape Town 2008) 74; Mabe Z "Notice of Intention to Surrender as an Abuse of the Sequestration Process: *Nedbank Limited v Malan*; *In re: Ex Parte Application of Malan* [2015] JOL 33458 (GP)" 2017 *THRHR* 695, 695.

⁶²¹ Kanamugire JC "The Requirement of Advantage to Creditors in South African Insolvency Law – A Critical Appraisal" 2013 *Mediterranean Journal of Social Sciences* 19, 20.

⁶²² Section 1 of the *National Credit Amendment Act*.

⁶²³ Chitimira H, Animashaun O and Magau P "The Challenges Affecting Financial Inclusion in South Africa" Unpublished contribution delivered at Nelson Mandela University Private Law and Social Justice Conference (19-20 August 2019 Port Elizabeth); Zait and Berteau " 2014 *Journal of Accounting and Management* 38.

⁶²⁴ Emmons WR "Consumer-Finance Myths and Other Obstacles to Financial Literacy" 2005 *Louis U. Pub. L. Rev.* 335, 353; Zait and Berteau 2014 *Journal of Accounting Management* 38.

In addition, financial literacy enlightens consumers to understand how they can reduce their over-indebtedness.⁶²⁵

4.4.1.3 Limited Court Involvement

The *National Credit Amendment Act* makes a decisive break from having much court involvement in debt relief offered under debt intervention. Sequestration proceedings, debt review, and administration orders are accessed by way of court procedures.⁶²⁶ Currently, the *Insolvency Act*, *Magistrates' Courts Act*, and the *NCA* do not make any provision for an out of court debt relief mechanism.⁶²⁷ Under the *National Credit Amendment Act*, both the Tribunal and the Magistrate's Court are authorised to rearrange the debtor's financial obligations.⁶²⁸ Previously, only the Magistrate's Court could rearrange the debtor's obligations.⁶²⁹ With debt intervention, the Tribunal or a single member of the Tribunal may conduct the hearing for a debt intervention application and also refer the matter to the NCR.⁶³⁰ Direct application to the Magistrate's Court can only be made when the NCR has rejected the application for debt intervention.⁶³¹ The introduction of an out-of-court debt relief measure in the form of debt intervention complies with norms in the international community, which favours utilising other extrajudicial institutions like the NCR to promote flexibility, save costs and time for the consumers.⁶³²

4.4.2 Disadvantages of Debt Intervention

From the above requirements, it is clear that not all debtors who face financial distress will be able to utilise debt intervention for debt relief. A debtor who cannot satisfy the

⁶²⁵ Gathergood J "Self-Control, Financial Literacy and Consumer Over-Indebtedness" 2011 *Journal of Economic Psychology* 1, 3.

⁶²⁶ See sections 3-12 of the *Insolvency Act*; sections 85-87 of the *NCA*; section 74 of the *Magistrates' Courts Act*; Pete et al Civil Procedure: A Practical Guide 406-409.

⁶²⁷ See Coetzee *A Comparative Reappraisal of Debt Relief in South Africa* 51, for a discussion for calls to have an out-of-court debt relief system. See also Manyuni *The Position of 'Low Income Low Asset' Debtors in South Africa* 2.

⁶²⁸ Section 87 of the *National Credit Amendment Act*.

⁶²⁹ Section 87 of the *NCA*.

⁶³⁰ Section 87A (1) of the *National Credit Amendment Act*.

⁶³¹ Section 86A (7) of the *National Credit Amendment Act*.

⁶³² See Coetzee H "An Opportunity for No Income No Asset (NINA) Debtors to get out of check? – An Evaluation of the Proposed Debt Intervention Measure" 2018 THRHR 593, 609; see also World Bank Report para 179.

requirement for advantage to creditors under sequestration proceedings and who cannot utilise an administration order or debt review, will not only be excluded from such measures but also from employing a debt intervention where his debts exceed R50 000.⁶³³ The monetary ceiling is not in check with the reality of many South African consumers who are over-indebted with debts exceeding the monetary threshold. It is conceivable and highly probable that given South African households' reliance on credit and lack of financial literacy, there are consumers whose debts exceed R50 000.⁶³⁴ Unfortunately, such debtors cannot benefit from any of the existing debt relief measures, and they will certainly not benefit from debt intervention as well. To this end, the researcher submits that there should be no monetary limit regarding debts that should be set as a requirement to utilise debt relief measures.⁶³⁵ This helps most debtors to access debt relief measures, particularly the low-income earners who find it difficult to circumvent the monetary ceiling as an entry requirement for debt relief.

Another disadvantage relating to access is that a debt intervention is only applicable to unsecured credit agreements.⁶³⁶ Put differently, secured debts and any other debts which arise outside the scope of the *NCA* are excluded from debt intervention.⁶³⁷ Similar to debt review, debt intervention does not cover all types of debt including municipal fees, water and electricity, clothing accounts, and school fees.⁶³⁸ The researcher submits that debt intervention will not achieve the objective of addressing the over-indebtedness of consumers because it does not cover most of the debts which the low-income earners have.

An additional disadvantage of debt intervention is that it excludes debtors who are subject to sequestration proceedings and administration orders.⁶³⁹ Accordingly, not

⁶³³ Section 86A(1) of the *National Credit Amendment Act*; the R50000 monetary cap off is similar to the one applicable to an administration order under section 74(1) of the *Magistrates' Courts Act*.

⁶³⁴ Boraine, Van Heerden and Roestoff 2012 *De Jure* 255; see also Boraine and Roestoff 2014 *THRHR* 528.

⁶³⁵ Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 178.

⁶³⁶ Section 1(b) of the *National Credit Amendment Act*.

⁶³⁷ Section 86A (2)(b) of the *National Credit Amendment Act*.

⁶³⁸ Section 3 of the *NCA*; Asheela *The Advantage Requirement in Sequestration Applications* 42; Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 212.

⁶³⁹ Section 1 (b)(d) of the *National Credit Amendment Act*, provides a definition of debt intervention applicant and that excludes someone who is subject to sequestration proceedings or an administration order.

only debtors whose debts exceed the monetary threshold and whose debts emanate outside the *NCA* will be excluded from utilising debt intervention, but also those who employed other statutory debt relief measures for debt relief. The researcher submits that the legislature should reconsider this approach because it is undesirable in that it excludes other debtors from utilising debt intervention for debt relief.

4.5 Financial Literacy in terms of the Consumer Protection Act and Financial Sector Regulation Act

One of the objectives of the *Consumer Protection Act* is to curb the challenges related to financial literacy.⁶⁴⁰ Financial literacy is the possession of the set of skills and knowledge that allows an individual to make informed and effective decisions with all of their financial resources.⁶⁴¹ The *Consumer Protection Act* was enacted to ensure consumer protection in South Africa.⁶⁴² Outlined in the *Consumer Protection Act* are the consumer's right to be heard, to safety, to redress, to be informed and to access consumer education.⁶⁴³ The regulation also ensures that pricing is transparent, non-discriminatory and non-exploiting. Institutions with a mandate for consumer protection have established a Consumer Protection Forum (CPF).⁶⁴⁴ The forum is dedicated to the protection of consumer rights and interests in South Africa. Institutions that are part of the CPF include the Department of Trade and Industry, nine Provincial Consumer Affairs Directorates, the Council for Medical Aid Schemes, Independent Communications Authority of South Africa and other regulators.⁶⁴⁵ The CPF also runs campaigns aimed at educating consumers of their rights and inform them of available recourse mechanisms.⁶⁴⁶ Communication with consumers is done through press releases, online resources available on their websites and awareness campaigns. At the provincial level, there are also various consumer protection structures.

⁶⁴⁰ Section 3(1) (a)-(f) of the *Consumer Protection Act*.

⁶⁴¹ Sibanda S and Sibanda T "Financial Education in South Africa Overview of Key Initiatives and Actors" 2016 *International Labour Organization* 1; 1.

⁶⁴² Section 3(1) (a)-(f) of the *Consumer Protection Act*.

⁶⁴³ Section 3(1)(a)-(f) of the *Consumer Protection Act*.

⁶⁴⁴ Sibanda and Sibanda 2016 *International Labour Organization* 8.

⁶⁴⁵ Sibanda and Sibanda 2016 *International Labour Organization* 8.

⁶⁴⁶ Sibanda and Sibanda 2016 *International Labour Organization* 8.

Similarly, the *Financial Sector Regulation Act* was also enacted to provide consumers with financial literacy to avoid over-indebtedness through the Financial Sector Conduct Authority (FSCA).⁶⁴⁷ In addition to this, the *NCA* also established the NCR to implement financial literacy programs to enlighten consumers to make well-informed financial decisions.⁶⁴⁸

Despite these legislative measures being in place, the levels of over-indebtedness for low-income earners in South Africa are still high and catastrophic.⁶⁴⁹ Moreover, only about fifty percent of the adult population in South Africa is financially literate, and the low-income earners form a fraction of this percentage.⁶⁵⁰ Several studies indicate that South Africans are highly indebted.⁶⁵¹ The *NCA* provides that consumer is over-indebted if the preponderance of available information at the time of determination is made suggests that the particular consumer is, or will be unable to satisfy on time all the obligations under all the credit agreements to which the consumer is a party.⁶⁵² The researcher submits that the regulations dealing with financial literacy in terms of the *NCA*, *CPA*, and *FSRA* are not robust enough to promote financial responsibility and avoid over-indebtedness. As a result, there must be clear regulation and promotion of financial literacy to address over-indebtedness.

4.6 Extinction of debts in terms of the Prescription Act

The *Prescription Act* regulates provisions for the extinction of debts by prescription of debts.⁶⁵³ Extinctive prescription entails that if a creditor neglects to claim payment on a debt for a certain period, the debt will ultimately be extinguished.⁶⁵⁴ A debtor may acquire rights or be released from obligations over time.⁶⁵⁵ The objective of

⁶⁴⁷ Section 57(b)(ii) of the *FSRA*; Godwin A "Introduction to Special Issue – The Twin Peaks Model of Financial Regulation and Reform in South Africa" 2018 *Law and Financial Markets Review* 151, 152.

⁶⁴⁸ section 12(1), 12(2) and 16(1)(a)-(b) of the *NCA*.

⁶⁴⁹ Nanziri EL and Leibbrandt M "Measuring and Profiling Financial Literacy in South Africa" 2018 *South African Journal of Economic and Management Sciences* 1; 6

⁶⁵⁰ Nanziri and Leibbrandt 2018 *South African Journal of Economic and Management Sciences* 6.

⁶⁵¹ Sibanda and Sibanda 2016 *International Labour Organization* 8.

⁶⁵² Section 79 of the *NCA*; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 42.

⁶⁵³ Section 10-16 of the *Prescription Act*.

⁶⁵⁴ Section 10-16 of the *Prescription Act*.

⁶⁵⁵ Kelly-Louw M and Stoop P "Prescription of Debt in the Consumer-Credit Industry" 2019 *PER* 2; Kelly-Louw and Stoop 2019 *PER* 2.

prescription is to achieve legal certainty and finality in the relationship between a debtor and a creditor, with the focus on protecting a debtor against the unfairness of having to defend old claims.⁶⁵⁶ This prevents a situation where the payment of a debt is demanded from a debtor many years later, when the liability for the debt arose so long ago that there is little to no evidence available to prove or disprove the existence of the debt.⁶⁵⁷ It also encourages creditors to generally exercise their rights, specifically to collect their debts timeously and without unnecessary delay.⁶⁵⁸ Prescription is aimed "at enhancing judicial economy and efficiency in the administration of justice" which is best achieved when parties are forced to have "their disputes adjudicated upon promptly, while evidence is available and the memory of the witnesses is still fresh."⁶⁵⁹

The *Prescription Act* requires the consumer to be aware of prescription and specifically raise it as a defence when faced with a demand for payment to reap its benefits.⁶⁶⁰ Not being aware of their rights in this regard, consumers in practice often failed to raise the defence of prescription, resulting in their paying on the prescribed debts and/or signing acknowledgements of debt for the prescribed debts and thereby "reactivating" them.⁶⁶¹

Generally, prescription commences only once "the debt is due" in other words, when it is recoverable or enforceable.⁶⁶² However, if the consumer intentionally prevents the credit provider from coming to know of the existence of the debt, prescription does not begin to run until the credit provider becomes aware of the existence of the debt.⁶⁶³ Furthermore, debt is not deemed to be due until the credit provider knows

⁶⁵⁶ Kelly-Louw and Stoop 2019 *PER* 2; *Gaoshubelwe v Pieman's Pantry (Pty) Limited* 2018 5 BCLR 527 (CC) paras [50].

⁶⁵⁷ *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 1 SA 571 (A) 578F-H; and *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2017 3 All SA 739 (SCA) para 13.

⁶⁵⁸ *Road Accident Fund v Mdeyide* 2011 2 SA 26 (CC) para 2.

⁶⁵⁹ Loubser MM "JC de Wet and the Theory of Extinctive Prescription" in Du Plessis J and Lubbe G (eds) *A Man of Principle – The Life and Legacy of JC de Wet / 'n Man van Beginsel – Die Lewe en Nalatenskap van JC de Wet* 2013 *Juta Claremont* 397-428.

⁶⁶⁰ Section 17 of the *Prescription Act*.

⁶⁶¹ Kelly-Louw and Stoop 2019 *PER* 5.

⁶⁶² Section 12(1) of the *Prescription Act*; *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd* 2017 1 SA 185 (SCA).

⁶⁶³ Section 12(2) of the *Prescription Act*.

the identity of the consumer and the facts from which the debt arises; provided that the credit provider is deemed to have such knowledge if he obtained it by exercising reasonable care.⁶⁶⁴

The extinction of debts in terms of the *Prescription Act* has setbacks. Currently, prescription generally needs to be raised in pleadings as a defence.⁶⁶⁵ This means that if a debtor does not raise prescription in pleadings as a defence he or she will remain trapped in debt. The debtor bears the onus of proving that the debt has prescribed.⁶⁶⁶ This means that if the debtor fails to prove that the debt has prescribed he or she will remain trapped in debt and this will lead to the debtor being over-indebted. As a result, the regulation of extinction of debts should be amended in order to curb over-indebtedness.

4.7 Debt Collection in terms of the Debt Collectors Act

The *Debt Collectors Act* provides provisions for the recovery of money from debtors to creditors.⁶⁶⁷ Debt collection is the process of pursuing payments of debts owed by individuals or businesses.⁶⁶⁸ An organisation that specialises in debt collection is known as a collection agency or debt collector. Most collection agencies operate as agents of creditors and collect debts for a fee or percentage of the total amount owed.

Upon request by a debtor and against payment of any prescribed fee, the clerk of the Magistrate's Court or a costs committee of a provincial law society may tax or assess any account or statement of costs, interest and payments claimed to be owed by a debtor to a debt collector or his or her client.⁶⁶⁹ The provisions of subsection two of the *Act* shall not be construed as preventing the taxation or assessment of any further account or statement of costs reflecting further amounts which become payable by the debtor to the debt collector or his or her client, which arise from the same cause of debt as that from which amounts reflected in an already taxed or assessed account

⁶⁶⁴ Section 12(3) of the *Prescription Act*; and see *Motokonya v Minister of Police* 2018 5 SA 22 (CC).

⁶⁶⁵ Section 17 of the *Prescription Act*.

⁶⁶⁶ Section 16 of the *Prescription Act*.

⁶⁶⁷ Section 19 of the *Debt Collectors Act*.

⁶⁶⁸ Section 19 of the *Debt Collectors Act*.

⁶⁶⁹ Section 19(2) of the *Debt Collectors Act*.

or costs arose.⁶⁷⁰ Moreover, the debt collector shall deliver to the debtor, upon request and against payment of a prescribed fee, a settlement account containing a complete exposition of all debits and credits in connection with a specific collection. The debtor shall be entitled to request a settlement account free of charge once in every six months.⁶⁷¹

The *Debt Collectors Act* does not provide for debt discharge. The *Debt Collectors Act* only deals with the collection of payments of debts owed by debtors to creditors.⁶⁷² However, the debt collecting process is not ideal for some debtor and they may fail to pay because of a lack of financial planning or over-commitment on their part. The failure of debtors to pay their debts only lead to over-indebtedness and debtors trapped in never-ending debts. As a result, the researcher submits that the *Debt Collectors Act* should have provisions which regulate debt discharge. The provision of debt discharge in the *Debt Collectors Act* will save many debtors from over-indebtedness by providing them with a formal statutory discharge of their debts.

4.8 Conclusion

The administration procedure has a limited scope, since it is only available to debtors whose claims do not exceed R50 000.⁶⁷³ Debtors with no income and whose debts are beyond the R50000 monetary ceiling cannot access and utilise an administration order for debt relief.⁶⁷⁴ Moreover, the administration procedure does not provide for a discharge of debts.⁶⁷⁵ The administration order only lapses once the cost of administration and the listed creditors have been paid in full. Furthermore, there is also no time limit for the repayment plan, and this means that there is a potential that the debtor may be trapped in their debt forever.⁶⁷⁶ Debt review has a limited scope of application in that it applies only to credit agreements as defined by the *NCA*, and it

⁶⁷⁰ Section 19(3) of the *Debt Collectors Act*.

⁶⁷¹ Section 19(4) of the *Debt Collectors Act*.

⁶⁷² Section 19 of the *Debt Collectors Act*.

⁶⁷³ GN R217 in GG 37477 of 27 March 2014; Mabe 2019 *PELJ* 9; see Boraine 2003 *De Jure* 218; see also Asheela *The Advantage Requirement in Sequestration Applications* 40.

⁶⁷⁴ GN R217 in GG 37477 of 27 March 2014; Mabe 2019 *PELJ* 9; see Boraine 2003 *De Jure* 218; see also Asheela *The Advantage Requirement in Sequestration Applications* 40.

⁶⁷⁵ Mabe 2019 *PELJ* 2.

⁶⁷⁶ See Mabe 2019 *PELJ* 8; see also Nel *An Analysis of the Legislative Mechanisms Available to Individual Debtors in terms of the South African Law* para 2.6.

is not applicable when a debtor has commenced enforcement of debt.⁶⁷⁷ Furthermore, debt review is just a restructuring plan, and it does not afford consumers any debt discharge.⁶⁷⁸ Debt intervention has monetary limitations set at R50 000, which exclude debtors with debts above this limit. Moreover, debt intervention is only applicable to debtors with unsecured credit agreements, as defined by the *NCA*.⁶⁷⁹ If a debtor's debts emanate outside the ambit of the *NCA*,⁶⁸⁰ they cannot utilise debt intervention for debt relief. Furthermore, debtors who are subject to sequestration proceedings or subject to an administration order cannot use debt intervention for debt relief. The sections dealing with financial literacy in terms of the *NCA*,⁶⁸¹ *CPA*,⁶⁸² and *FSRA*⁶⁸³ are not robust enough to promote financial responsibility and avoid over-indebtedness. The *Prescription Act*,⁶⁸⁴ has some setback that may lead debtors to be trapped in debts and thus over-indebted. Lastly, the *Debt Collectors Act*⁶⁸⁵ does not provide for debt discharge but only for the collection of debts.

In the next chapter, the researcher proposes recommendations that can improve the current debt discharge measures in South Africa to help excluded over-indebted natural person debtors to obtain debt discharge. This research recommends *inter alia*, that the advantage to creditor's requirement under sequestration proceedings should be relaxed. Moreover, the pre-liquidation composition should be adopted into South African law. Furthermore, the no asset procedure and summary instalment order should be adopted into South African law to assist over-indebted persons in discharging their debts.

⁶⁷⁷ Mokgorwane *The Interplay between National Credit Act 34 of 2005 and Insolvency Act 24 of 1936* 26.

⁶⁷⁸ Mabe 2019 *PELJ* 2.

⁶⁷⁹ Section 4(1) and 8 of the *National Credit Act*;

⁶⁸⁰ Sections 85-87 of the *National Credit Act*.

⁶⁸¹ Sections 85-87 of the *National Credit Act*.

⁶⁸² Section 3(1) (a)-(f) of the *Consumer Protection Act*.

⁶⁸³ Section 57(b)(ii) of the *Financial Sector Regulation Act*.

⁶⁸⁴ Section 10-16 of the *Prescription Act*.

⁶⁸⁵ Section 19 of the *Debt Collectors Act*.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

5.1 Introduction

It is vital that over-indebted consumers be offered robust and comprehensive debt discharge measures. Many over-indebted persons in South Africa are excluded from the current debt discharge measures. The current debt discharge measures have limited scope in providing discharge of debt to over-indebted persons. Over-indebted persons should be offered debt discharge measures that cater for all debtors in different financial positions. As with the sequestration process in terms of the *Insolvency Act* the "advantage to creditor's" hampers many over-indebted natural person debtors from accessing the procedure and thus exclude them from obtaining debt discharge.⁶⁸⁶ Moreover, debt review in terms of the *National Credit Act*⁶⁸⁷ and administration orders in terms of the *Magistrates' Court Act*⁶⁸⁸ do not provide for a discharge of debt but provide for debt-restructuring only.⁶⁸⁹ Furthermore, debt intervention in terms of the *National Credit Amendment Act* has a monetary ceiling of R50 000 which will hamper many over-indebted persons from obtaining debt

⁶⁸⁶ Section 6(1), Section 10(1)(c) and 12(1)(c) of the *Insolvency Act* 24 of 1936 (*Insolvency Act*); Boraine A and Roestoff M "The Pro-Creditor Approach in South African Insolvency Law and the Possible Impact of the Constitution" 2015 3 *NIBLeJ* 60, 91; Kok A "Not so Hunky-Dory: Failing to Distinguish Between Differentiation and Discrimination – *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd (No 1)*" 2011 *THRHR* 340, 343.

⁶⁸⁷ Sections 85-87 of the *National Credit Act* 34 of 2005 (*National Credit Act*); Nagel CJ, Barnard J, Boraine A, Delpont PA, Kern KM, Lötze DJ, Otto JM, Papadopoulos SM, Prozesky-Kuschke B, Roestoff M, Van Eck BPS, Van Jaarsveld SR *Commercial Law* 5th ed (Lexis Nexis Johannesburg 2015) 319-320; Mabe 2019 *PELJ* 2; Governder L *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* (LLM-Dissertation University KwaZulu-Natal 2017) of 6.

⁶⁸⁸ Section 74 of the *Magistrates' Courts Act* 32 of 1944 (*Magistrates' Courts Act*); Pete S, Hulme D, Palmer R, Sibanda O, Palmer T *Civil Procedure: A Practical Guide* 2nd ed (Oxford Cape Town 2013) 406-408; Mabe 2019 *PELJ* 2; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 6.

⁶⁸⁹ Kanamugire JC "The Requirement of Advantage to Creditors in South African Insolvency Law – A Critical Appraisal" 2013 *Mediterranean Journal of Social Sciences* 19, 20; Mabe Z "Alternatives to Bankruptcy in South Africa That Provides for a Discharge of Debts: Lessons from Kenya" 2019 *PELJ* 1, 2; Governder *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* 2.

discharge.⁶⁹⁰ The sections dealing with financial literacy in terms of the *NCA*,⁶⁹¹ *CPA*,⁶⁹² and *FSRA*⁶⁹³ are not robust enough to promote financial responsibility and avoid over-indebtedness. The *Prescription Act*⁶⁹⁴ has some setback that may lead debtors to be trapped in debts and thus causing them to be over-indebted.⁶⁹⁵ Lastly, the *Debt Collectors Act*⁶⁹⁶ does not provide for debt discharge but for the collection of debts only. As a result, there is a dire need for alternative debt discharge measures that over-indebted natural person debtors can utilise to discharge their debts.

5.2 Recommendations

The researcher provides the following recommendations that provide over-indebted debtors with robust and comprehensive debt discharge measures that are aimed at helping the over-indebted debtors to obtain debt discharge. Accordingly, the researcher recommends that:

a) The Advantage to Creditor's Requirement Under Sequestration Proceedings Should be Relaxed

In all applications for a sequestration order, a debtor must prove that the sequestration of his or her insolvent estate will be to the advantage of creditors.⁶⁹⁷ It is not easy to prove the advantage of the creditor's requirement because it requires a financial enquiry into the finances of the insolvent.⁶⁹⁸ Disclosure of all relevant facts is required and the applications are followed by the expert's valuations where the debtor has

⁶⁹⁰ Section 86A(1) of the *National Credit Amendment Act* 7 of 2019 (*National Credit Amendment Act*) see also section 74(1) of the *Magistrates Courts Act*, the R50000 monetary cap off is similar between debt intervention and an administration order.

⁶⁹¹ Sections 85-87 of the *NCA*.

⁶⁹² Section 3(1) (a)-(f) of the *Consumer Protection Act* 68 of 2008 (*Consumer Protection Act*).

⁶⁹³ Section 57(b)(ii) of the *Financial Sector Regulation Act* 9 of 2017 (*Financial Sector Regulation Act*).

⁶⁹⁴ Section 10-16 of the *Prescription Act* 68 of 1969 (*Prescription Act*); Kelly-Louw M and Stoop P "Prescription of Debt in the Consumer-Credit Industry" 2019 *PER* 2; 29.

⁶⁹⁵ Section 10-16 of the *Prescription Act*.

⁶⁹⁶ Section 19 of the *Debt Collectors Act* 114 of 1998 (*Debt Collectors Act*).

⁶⁹⁷ Chitimira H "Advantage to Creditors in Compulsory Sequestration Proceedings - *Body Corporate of Empire Gardens v Sithole* 2017 4 SA 161 (SCA)" 2019 *THRHR* 342,342; Magau PT *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* (LLM dissertation North West University 2019) 52.

⁶⁹⁸ Boraine A and Van Heerden C "To Sequester or Not to Sequester in View of the National Credit Act 34 of 2005: A Tale of Two Judgments" 2010 *PELJ* 84, 88, Magau *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 70.

property.⁶⁹⁹ Moreover, sequestration is for the benefit of creditors only if there is a reasonable possibility that the general body of creditors will benefit financially.⁷⁰⁰ It is therefore submitted that the debtors with no assets sufficient to constitute an advantage to creditors are excluded from the opportunity of debt discharge. The advantage requirement thus continues to be a significant obstacle for debtors wishing to use the debt discharge in terms of the sequestration process.

In South African insolvency law, the advantage to creditor's requirement is of great importance since it extends to all sequestration proceedings instituted in South Africa.⁷⁰¹ Unfortunately, the advantage of creditor's requirement in terms of sequestration proceedings poses difficulties for debtors.⁷⁰² This follows the reality that the majority of over-indebted clients do not have adequate assets or income available to meet the advantage to creditor's requirement.⁷⁰³ Moreover, the advantage to creditor's requirement excludes over-indebted persons who cannot prove that a financial benefit will be made to creditors.⁷⁰⁴ Accordingly, sequestration proceedings discriminate between those debtors who have assets and income and those who have nothing to offer.⁷⁰⁵ This differentiation is unjust, because it is inconsistent with the constitutional right to equality.⁷⁰⁶ Accordingly, the researcher submits that this requirement should be relaxed to enable over-indebted persons to utilise sequestration proceedings for debt discharge.

⁶⁹⁹ Kanamugire 2013 *Mediterranean Journal of Social Sciences* 20; Magau *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 52.

⁷⁰⁰ Kanamugire 2013 *Mediterranean Journal of Social Sciences* 20; Chitimira 2019 *THRHR* 342.

⁷⁰¹ Kanamugire 2013 *Mediterranean Journal of Social Sciences* 20; Chitimira 2019 *THRHR* 342.

⁷⁰² Boraïne and Van Heerden 2010 *PELJ* 88; Magau *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 70.

⁷⁰³ Kanamugire 2013 *Mediterranean Journal of Social Sciences* 20; Magau *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 70.

⁷⁰⁴ Bertelsmann E, Evans R, Harris A, Kelly-Louw N, Loubser A, Roestoff M, Smith A, Stander L, Steyn L Mars *The Law of Insolvency* 9th ed (Juta Cape Town 2008) 74; Mabe Z "Notice of Intention to Surrender as an Abuse of the Sequestration Process: *Nedbank Limited v Malan*; In re: *Ex Parte Application of Malan* [2015] JOL 33458 (GP)" 2017 *THRHR* 695, 695.

⁷⁰⁵ Sections 6(1) and 12(1) of the *Insolvency Act*; Kok 2011 *THRHR* 343.

⁷⁰⁶ Section 9 of the Constitution of the Republic of South Africa, 1996 (Constitution); See Coetzee H "Is the Unequal Treatment of Debtors in Natural Person Insolvency Law Justifiable? A South African Exposition" 2016 *International Insolvency Review* 36, 55. Coetzee argues that the exclusion of some debtors from existing debt relief measures amounts to an unfair and unjustifiable discrimination which is unconstitutional.

b) Pre-Liquidation Composition Should be Adopted into South African Law

The Draft Insolvency Bill proposes the pre-liquidation compositions.⁷⁰⁷ 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 process.⁷⁰⁸ The pre-liquidation composition is aimed at negotiated agreements between parties.⁷⁰⁹ Natural persons whose debts do not exceed R200 000 and those who are unable to pay their debts are entitled to obtain the pre-liquidation composition.⁷¹⁰ The composition becomes binding on all creditors if it is accepted by the majority of the concurrent creditors who vote on the composition.⁷¹¹ This is in contrast with the common law compromise where full cooperation is required from all the creditors for the compromise to be binding.⁷¹² If the majority of the creditors do not approve the composition and the debtor is not able to pay more than what he/she offered in the proposed composition, the proceedings will cease and the debtor will be in the position that they were in before the commencement of the procedure.⁷¹³ The debtor may consequently seek the discharge of debts other than guaranteed or desired debts from the Master of the High Court.⁷¹⁴ 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. Therefore, the debtor will qualify for pre-liquidation composition.⁷¹⁵ Pre-liquidation composition affords debtors who do not qualify for liquidation an opportunity for a fresh start which entails

⁷⁰⁷ Draft Insolvency Bill 2015; Mabe 2019 *PELJ* 17.

⁷⁰⁸ Boraine and Roestoff 2002 *INSOL* 8; Mabe 2019 *PELJ* 17.

⁷⁰⁹ Boraine Roestoff 2002 *INSOL International Insolvency Review* 8; Steyn L "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); *Firststrand Bank Ltd v Evans* 2011 4 SA 597 (KZD) and *Firststrand Bank Ltd v Janse Van Rensburg* 2012 2 All SA 186 (ECP) *Potchefstroom Electronic Law Journal* (2012) 190, 221.

⁷¹⁰ Section 118(1) of the *Draft Insolvency Bill*; Boraine and Roestoff 2002 *INSOL International Insolvency Review* 8.

⁷¹¹ Section 118(17) of the *Draft Insolvency Bill*; *Firststrand Bank Ltd v Evans* 2011 4 SA 597 (KZD) and *Firststrand Bank Ltd v Janse Van Rensburg* 2012 2 All SA 186.

⁷¹² Boraine Roestoff 2002 *INSOL International Insolvency Review* 8; Mabe 2019 *PELJ* 17.

⁷¹³ Section 118(22) (a) of the *Draft Insolvency Bill*; *Firststrand Bank Ltd v Evans* 2011 4 SA 597 (KZD); *Firststrand Bank Ltd v Janse Van Rensburg* 2012 2 All SA 186.

⁷¹⁴ Boraine Roestoff 2002 *INSOL International Insolvency Review* 8; Mabe 2019 *PELJ* 17.

⁷¹⁵ Section 118(22) (b) of the *Draft Insolvency Bill*; Boraine Roestoff 2002 *INSOL International Insolvency Review* 8.

a discharge of debts.⁷¹⁶ The pre-liquidation composition will allow debtors, with little or no income, an opportunity to obtain a discharge, without entering into the formal sequestration process.⁷¹⁷ An advantage of the proposed pre-liquidation composition is that it would apply to all types of debts and not be limited to debts arising out of credit agreements.⁷¹⁸

c) The no Asset Procedure Should be Adopted into South African Law

The no asset procedure is the best debt discharge for debtors who fall outside the insolvency requirements.⁷¹⁹ No procedure in South African law gives a discharge to debtors with no assets.⁷²⁰ South African law should consider including a no asset procedure to enable debtors in all financial positions to become economically capable by a discharge.⁷²¹ The proposed no asset procedure should, however, prohibit a debtor who has been admitted to the process from obtaining more credit altogether, and not only where the debtor has not informed the credit provider.⁷²² The penalty for contravening such a prohibition should be more stringent, to serve as a deterrent. In addition, a debtor should not be excluded from admission in to the process because the creditor intends to petition for the debtor to be declared insolvent.⁷²³

d) Summary Instalment Order Should be Adopted into South African Law

⁷¹⁶ *Firststrand Bank Ltd v Evans* 2011 4 SA 597 (KZD); *Firststrand Bank Ltd v Janse Van Rensburg* 2012 2 All SA 186.

⁷¹⁷ Boraine Roestoff 2002 *INSOL International Insolvency Review* 8; Mabe 2019 *PELJ* 17.

⁷¹⁸ *Firststrand Bank Ltd v Evans* 2011 4 SA 597 (KZD); *Firststrand Bank Ltd v Janse Van Rensburg* 2012 2 All SA 186.

⁷¹⁹ Mabe 2019 *PELJ* 17; Coetzee H *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* (LLD thesis University of Pretoria 2015) 336; Manyuni *The Position of 'Low Income Low Asset' (LILA) Debtors in South Africa: The Need for Legislative Reform* 50

⁷²⁰ Manyuni *The Position of 'Low Income Low Asset' (LILA) Debtors in South Africa: The Need for Legislative Reform* (LLM Dissertation University of Kwa-Zulu Natal 2015) 50; Mabe 2019 *PELJ* 17.

⁷²¹ Manyuni *The Position of 'Low Income Low Asset' (LILA) Debtors in South Africa: The Need for Legislative Reform* 50; Mabe 2019 *PELJ* 15.

⁷²² Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 336; Manyuni *The Position of 'Low Income Low Asset' (LILA) Debtors in South Africa: The Need for Legislative Reform* 50; Mabe 2019 *PELJ* 17.

⁷²³ Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 336; Manyuni *The Position of 'Low Income Low Asset' (LILA) Debtors in South Africa: The Need for Legislative Reform* 50.

A summary instalment order allows a debtor to pay his debts in full or in instalments, upon application by a debtor or creditor with the debtor's consent.⁷²⁴ If the debtor defaults on payment, a summary instalment order has the effect of stopping and staying all litigation against a debtor in respect of his bankruptcy.⁷²⁵ The debtor's supervisor shall submit a notice of the summary payment order to any proven creditor whose name appears on the debtor's application and those creditors shall be included in the debtor's estate administration under the summary instalment order.⁷²⁶ A creditor who proves a claim after the summary instalment order has been made may elect to be included in the administration of the debtor's estate.⁷²⁷ However, a dividend can be paid to such a creditor only after the previous creditors have been paid.⁷²⁸ Should the debtor fail to pay, all stayed proceedings resume and the supervisor is required to notify the creditors.⁷²⁹ The summary instalment order may give instructions concerning the future income of the debtor or the disposition of his assets.⁷³⁰

e) Individual Voluntary Arrangements should be Adopted into South African Law

A debtor who wants to propose individual voluntary arrangements to his creditors may make an interim application to the court⁷³¹ If the debtor is an undischarged insolvent, a notice must first be given to the creditors before the interim application.⁷³² While the temporary application is pending, the court may forbid the debtor's property from being sold and may stop any action, execution or other legal proceedings against the

⁷²⁴ Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 332; Mabe 2019 *PELJ* 15.

⁷²⁵ Mabe 2019 *PELJ* 17; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 332.

⁷²⁶ Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 332; Mabe 2019 *PELJ* 17.

⁷²⁷ Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 332; Mabe 2019 *PELJ* 17.

⁷²⁸ Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 332.

⁷²⁹ Mabe 2019 *PELJ* 17; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 332.

⁷³⁰ Mabe 2019 *PELJ* 17; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 332.

⁷³¹ Mabe 2019 *PELJ* 17; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 332.

⁷³² Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 332; Mabe 2019 *PELJ* 17.

debtor's property.⁷³³ The proposal of individual voluntary arrangements must provide for a person to be a supervisor of the voluntary arrangement.⁷³⁴ The court may grant an order to convene the creditors' meeting in the view that it will help facilitate the consideration and implementation of the proposal.⁷³⁵ At the meeting of creditors, the proposal will be approved by a majority of votes in number in value of the creditors present.⁷³⁶ If it is in the best interests of the debtor and creditors, the judge can issue the acceptance of the proposal or any other order it considers fit.⁷³⁷ While preferential and unsecured creditors have not accepted the plan, the court may accept it, provided that it was approved by a majority of secured creditors, did not discriminate against dissenting parties, and the interests of preferential creditors were respected over those of unsecured creditors.⁷³⁸ Once approved, the proposal becomes a voluntary arrangement and binds the debtor and creditors and the provisional supervisor of the debtor becomes the supervisor of the arrangement.⁷³⁹ The approval dismisses all petitions for bankruptcy against the debtor that were pending or stayed.⁷⁴⁰

f) The R50 000 Monetary Ceiling Required for debtors to Utilise Administration Order and Debt Intervention should be Abolished Under the Magistrates' Court Act and National Credit Amendment Act

⁷³³ Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 332; Mabe 2019 *PELJ* 17.

⁷³⁴ Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 332; Mabe 2019 *PELJ* 17.

⁷³⁵ Mabe 2019 *PELJ* 17; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 332.

⁷³⁶ Mabe 2019 *PELJ* 17; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 332.

⁷³⁷ Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 332; Mabe 2019 *PELJ* 17.

⁷³⁸ Manyuni *The Position of 'Low Income Low Asset' (LILA) Debtors in South Africa: The Need for Legislative Reform* 53; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 332.

⁷³⁹ Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 332; Manyuni *The Position of 'Low Income Low Asset' (LILA) Debtors in South Africa: The Need for Legislative Reform* 53.

⁷⁴⁰ Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 332; Manyuni *The Position of 'Low Income Low Asset' (LILA) Debtors in South Africa: The Need for Legislative Reform* 53.

For a debtor to utilise an administration order or debt intervention, his or her debts must not exceed R50 000.⁷⁴¹ The R50 000 is unfair to debtors who are over-indebted with debts exceeding this monetary limit.⁷⁴² Many South Africans are over-indebted due to reliance on credit and lack of financial literacy. Consequently, there are debtors whose debts exceed R50 000.⁷⁴³ As a result, debtors cannot benefit from an administration order as well as debt intervention because of this R50 000 limit. Accordingly, there should be no monetary cap on debts that should be laid down as a condition.⁷⁴⁴ This would enable most debtors, especially low-income earners, who cannot meet the monetary limit required to access administration order and debt intervention.⁷⁴⁵

g) Debt Discharge Should be Made Available Under Administration Order, Debt Review and Debt Collection Measures

Debt discharge is only available under sequestration proceedings and debt intervention.⁷⁴⁶ However, debtors who cannot meet the advantage to creditor's requirement are excluded from utilising sequestration proceedings and from obtaining discharge available under sequestration proceedings. Furthermore, debtors whose debts exceed R50 000 limit or their debts fall outside the scope of the *NCA*, cannot obtain debt discharge under debt intervention in terms of the *National Credit Amendment Act*.⁷⁴⁷ Debt review and administration orders are merely repayment

⁷⁴¹ Section 86A(1) of the *National Credit Amendment Act*; see also section 74(1) of the *Magistrates Courts Act*, the R50000 monetary cap off is similar between debt intervention and an administration order; Magau *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 71.

⁷⁴² Section 86A(1) of the *National Credit Amendment Act*; Magau *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 71.

⁷⁴³ Boraine and Roestoff 2014 *THRHR* 528; Magau *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 71.

⁷⁴⁴ Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 178; Magau *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 71.

⁷⁴⁵ Magau *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 71; Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 178.

⁷⁴⁶ Sections 87A(5)(c)(ii) and 87(7)(a)(b) of the *National Credit Amendment Act*; Magau *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 72.

⁷⁴⁷ Section 86A of the *National Credit Amendment Act*; Magau *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 71.

plans, and they do not offer debtors any discharge of debt.⁷⁴⁸ The debtor must ultimately pay off their debts when they are subject to debt review or administration order and thus would not benefit from a discharge available under sequestration proceedings or debt intervention. Moreover, the *Debt Collectors Act* does not provide for debt discharge. The *Debt Collectors Act* only deals with a collection of payments of debts owed by debtors to creditors.⁷⁴⁹ However, the debt collecting process is not ideal for some debtors and they may fail to pay because of a lack of financial planning or over-commitment on their part. The failure of debtors to pay their debts only lead to over-indebtedness and debtors trapped in never-ending debts. In this regard, the researcher recommends that provisions of an administration order, debt review and debt collection measures should be amended to offer discharge of debt in the same way as sequestration proceedings and debt intervention.

h) There Must be Clear Regulation and Promotion of Financial Literacy to Address Over-Indebtedness

There is inadequate regulation of financial literacy in South African legislation.⁷⁵⁰ The levels of over-indebtedness will continue to rise if there is no clear regulation and promotion of financial education, and debtors will continue to make poor money choices, thus continue to be over-indebted.⁷⁵¹ Accordingly, financial literacy is important because it teaches debtors to be financially responsible.⁷⁵² Furthermore, financial literacy facilitates the cessation of consumer over-indebtedness arising from economic and financial illiteracy.⁷⁵³ The *FSRA* was enacted to, *inter alia*, provide consumers with financial literacy to avoid over-indebtedness through the *FSCA*.⁷⁵⁴

⁷⁴⁸ Section 74 of the *Magistrates' Courts Act* and sections 85-87 of the *NCA*; Roestoff M and Coetzee H "Debt Relief for South African NINA Debtors and What Can Be Learned from the European Approach" 2017 *Comparative and International Law Journal of Southern Africa* 251, 255.

⁷⁴⁹ Section 19 of the *Debt Collectors Act*.

⁷⁵⁰ Magau A *Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 73.

⁷⁵¹ Magau A *Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 73.

⁷⁵² Zait A and Berteau PE "Financial Literacy – Conceptual Definition and Proposed Approach for a Measurement Instrument" 2014 *Journal of Accounting and Management* 37, 38; Magau A *Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* 74.

⁷⁵³ Gathergood J "Self-Control, Financial Literacy and Consumer Over-Indebtedness" 2011 *Journal of Economic Psychology* 1, 3.

⁷⁵⁴ Section 57(b)(ii) of the *FSR Act*; Godwin A "Introduction to Special Issue – The Twin Peaks Model of Financial Regulation and Reform in South Africa" 2018 *Law and Financial Markets Review* 151, 152.

Similarly, the *CPA* seeks to reduce financial literacy challenges for debtors.⁷⁵⁵ Despite these legislative measures being in place, the levels of over-indebtedness in South Africa remains high.⁷⁵⁶ As a result, there must be clear regulation and promotion of financial literacy to reduce the high levels of over-indebtedness in South Africa.

i) The Regulation of Extinction of Debts Should be Amended to Curb Over-Indebtedness

The extinction of debts in terms of the *Prescription Act* has setbacks.⁷⁵⁷ Currently prescription generally needs to be raised in pleadings as a defence.⁷⁵⁸ This means that if a debtor does not raise prescription in pleadings as a defence he/she will remain trapped in debt.⁷⁵⁹ As regulated in the *NCA*, a presiding officer has the discretion to consider prescription as a defence without its being specifically raised if "the consumer would reasonably have raised the defence of prescription had the consumer been aware of such a defence".⁷⁶⁰ Accordingly, The Draft Prescription Bill aims to change the need to specifically raise the defence of prescription and for a court during judicial proceedings to consider if a debt has prescribed.⁷⁶¹ A court, therefore, has to consider the question of prescription without a party specifically raising it. Moreover, the debtor bears the onus of proving that the debt has prescribed.⁷⁶² This means that if the debtor fails to prove that the debt has prescribed he/he will remain trapped in debt that would have been extinguished by prescription. Accordingly, the *Prescription Act* must be amended to shift the onus to the creditor to prove that a debt has not prescribed.

5.3 Conclusion

The South African debt-related legislation needs to be amended to afford over-indebted persons debt discharge measures that are robust and comprehensive. The

⁷⁵⁵ See section 3(1)(a)-(f) of the *CPA*; Godwin 2018 *Law and Financial Markets Review* 152.

⁷⁵⁶ Nanziri EL and Leibbrandt M "Measuring and Profiling Financial Literacy in South Africa" 2018 *South African Journal of Economic and Management Sciences* 1, 6.

⁷⁵⁷ Section 10-16 of the *Prescription Act*; Kelly-Louw and Stoop 2019 *PER* 29.

⁷⁵⁸ Section 17 of the *Prescription Act*.

⁷⁵⁹ Section 17 of the *Prescription Act*.

⁷⁶⁰ of section 126B(b)(ii) of the *NCA*; Kelly-Louw and Stoop 2019 *PER* 29.

⁷⁶¹ Draft Prescription Bill; Kelly-Louw and Stoop 2019 *PER* 29.

⁷⁶² Section 16 of the *Prescription Act*; Kelly-Louw and Stoop 2019 *PER* 29.

advantage of creditors requirement in sequestration procedure hampers debtors with insufficient assets or income in that many are left without proper relief in the form of a statutory discharge.⁷⁶³ Accordingly, the requirement of advantage to creditors should be relaxed to enable over-indebted persons to utilise sequestration proceedings for debt discharge. The pre-liquidation composition should be adopted into South African law. Pre-liquidation compositions will be beneficial to debtors who are unable to meet the "advantage to creditors" requirement.⁷⁶⁴ The no asset procedure, summary instalment order and individual voluntary arrangements should be adopted into South African law. These procedures will be able to afford over-indebted persons with no assets, a discharge of debts. The monetary ceiling of R50000 that is applicable under administration orders and debt intervention should be abolished to allow debtors whose debts exceed this monetary threshold to access debt intervention and administration order for debt relief. The scope of application for debt intervention and debt review should be expanded so that they do not only apply to credit agreements as defined by the *NCA* so that more consumers can access debt relief for debts emanating outside the scope of the *NCA*. Debt discharge should be made available under administration order, debt review and debt collection measures to afford over-indebted persons with debt discharge. Lastly, there must be precise regulation and promotion of financial literacy to address over-indebtedness.

⁷⁶³ Kanamugire 2013 *Mediterranean Journal of Social Sciences* 32; Coetzee 2016 *IIR* 55.

⁷⁶⁴ Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* 172. Borraine 2002 *INSOL International Insolvency Review* 8.

BIBLIOGRAPHY

Literature

Abrie *et al Insolvent Estates*

Abrie W, Graham CR *Insolvent Estates* 7th ed (ProPlus Publishers 2011)

Archuleta, Dale and Spann 2013 *Journal of Financial Counseling and Planning*

Archuleta KL, Dale A and Spann SM "College Students and Financial Distress: Exploring Debt, Financial Satisfaction, and Financial Anxiety" 2013 *Journal of Financial Counseling and Planning* 50-52

Asheela *The Advantage Requirement in Sequestration Applications*

Asheela NV *The Advantage Requirement in Sequestration Applications: A Call For Relaxation* (LLM dissertation University of Pretoria 2012)

Bertelsmann *et al* (eds) *Mars The Law of Insolvency*

Bertelsmann E, Evans R, Harris A, Kelly-Louw M, Loubser A, Roestoff M, Smith A, Stander L, Steyn L Mars *The Law of Insolvency* 9th ed (Juta Cape Town 2008)

Boraine and Roestoff *INSOL International Insolvency Review*

Boraine A & Roestoff M "Fresh Start Procedures for Consumer Debtors in South African Bankruptcy Law" (2002) 11 *INSOL International Insolvency Review* 1-11

Boraine 2003 *De Jure*

Boraine A "Some Thoughts on the Reform of Administration Orders and Related Issues" 2003 *De Jure* 217-251

Boraine and Roestoff 2017 *Nottingham Insolvency and Business Law e-Journal*

Boraine A and Roestoff M "The Pro-Creditor Approach in South African Insolvency Law and the Possible Impact of the Constitution" 2017 *Nottingham Insolvency and Business Law e-Journal* 59-92

Boraine and Roestoff 2014 *THRHR*

Boraine A and Roestoff M "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)" 2014 *THRHR* 527-546

Boraine and Roestoff 2013 *SA Merc LJ*

Boraine A and Roestoff M "The Treatment of Insolvency of Natural Persons in South African Law – An Appeal for a Balanced and Integrated Approach" 2013 *SA Merc LJ* 1-95

Boraine, Van Heerden and Roestoff 2012 *De Jure*

Boraine A, Van Heerden C and Roestoff M "A Comparison between Formal Debt Administration and Debt Review – The Pros and Cons of these Measures and Suggestions for Law Reform (Part 2)" 2012 *De Jure* 254-271

Boraine and Van Heerden 2010 *PELJ*

Boraine A and Van Heerden C "To Sequester or Not to Sequester in View of the National Credit Act 34 of 2005: A Tale of Two Judgments" 2010 *PELJ* 84-88

Calitz 2007 *Obiter*

Calitz J "Developments in the United States' Consumer Bankruptcy law: A South African Perspective" 2007 28 *Obiter* 397-409

Chitimira 2019 *THRHR*

Chitimira H "Advantage to Creditors in Compulsory Sequestration Proceedings - *Body Corporate of Empire Gardens v Sithole* 2017 4 SA 161 (SCA)" 2019 *THRHR* 342-342

Chitimira, Animashaun and Magau 2014 *Journal of Accounting and Management*

Chitimira H, Animashaun O and Magau P "The Challenges Affecting Financial Inclusion in South Africa" Unpublished contribution delivered at Nelson Mandela University Private Law and Social Justice Conference (19-20 August 2019 Port Elizabeth); Zait and Berteau" 2014 *Journal of Accounting and Management* 38-40

Chitimira and Magau 2020 *Euro Economica*

Chitimira H and Magau PT "An Analytical Precis of Debt Relief Measures under the Insolvency Act 24 of 1936" 2020 *Euro Economica* 209-215

Coetzee *A Comparative Reappraisal of Debt Relief Measures*

Coetzee H *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* (LLD thesis University of Pretoria 2015)

Coetzee 2018 *THRHR*

Coetzee H "An opportunity for No Income No Asset (NINA) debtors to get out of check? – An evaluation of the proposed debt intervention measure" 2018 *THRHR* 1-9

Coetzee 2017 *Journal of Contemporary Roman-Dutch Law*

Coetzee H "Does the Proposed Pre-Liquidation Composition Proffer a Solution to the No Income No Asset (NINA) Debtor's Quandary and If Not, What Would?" 2017 *Journal of Contemporary Roman-Dutch Law* 18-18

Coetzee 2016 *IIR*

Coetzee H "Is the Unequal Treatment of Debtors in Natural Person Insolvency Law Justifiable? A South African Exposition" 2016 *IIR* 36-55

Coetzee and Roestoff 2013 *International Insolvency Review*

Coetzee H and Roestoff M "Consumer Debt Relief in South Africa – Should the Insolvency System Provide for NINA Debtors? Lessons from New Zealand" 2013 *22 International Insolvency Review* 188-189

De Clercq *et al Insolvent Estates*

De Clercq B, Evans RG, Abrie W, Graham CR *Insolvent Estates* 7th ed (ProPlus Publishers 2011)

Emmons 2005 *Louis U. Pub. L. Rev*

Emmons WR "Consumer-Finance Myths and Other Obstacles to Financial Literacy" 2005 *Louis U. Pub. L. Rev.* 335-353

Evans *A Critical Analysis of Problem Areas in Respect of Assets*

Evans RG *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* (LLD thesis University of Pretoria 2008)

Evans 2001 *SA Merc LJ*

Evans RG "Friendly Sequestrations, the Abuse of the Process of Court and Possible Solutions for Overburdened Debtors" 2001 13 *SA Merc LJ* 485-508

Evans 2010 *SA Mercantile Law Journal*

Evans RG "Law Reform in Respect of Assets in Insolvent Estates in South Africa" 2010 *SA Mercantile Law Journal* 465-483

Evans 2003 *SA Merc LJ*

Evans RG "Unfriendly Consequences of a Friendly Sequestration" 2003 15 *SA Merc LJ* 437-447

Evans and Hoskins 1990 *SA Merc LJ*

Evans RG and Hoskins ML "Friendly Sequestrations and the Advantage of Creditors" 1990 2 *SA Merc LJ* 246-251

Gathergood 2011 *Journal of Economic Psychology*

Gathergood J "Self-Control, Financial Literacy and Consumer Over-Indebtedness" 2011 *Journal of Economic Psychology* 1-3

Godwin 2018 *Law and Financial Markets Review*

Godwin A "Introduction to Special Issue – The Twin Peaks Model of Financial Regulation and Reform in South Africa" 2018 *Law and Financial Markets Review* 151-152

Governder *Discharge Principles Applicable in South African Law*

Governder L *Discharge Principles Applicable in South African Law: An Analysis in Light of International Trend and Guidelines* (LLM Dissertation University of Kwa-Zulu Natal 2017)

Kanamugire 2013 *Mediterranean Journal of Social Sciences*

Kanamugire JC "The Requirement of Advantage to Creditors in South African Insolvency Law – A Critical Appraisal" 2013 *Mediterranean Journal of Social Sciences* 19-20

Kelly-Louw 2008 *SA Merc LJ*

Kelly-Louw M "The Prevention and Alleviation of Consumer Over-indebtedness" 2008 *SA Merc LJ* 200-226

Kelly-Louw and Stoop 2019 *PER*

Kelly-Louw M and Stoop P "Prescription of Debt in the Consumer-Credit Industry" 2019 *PER* 2-5

Kelly-Louw and Stoop *Consumer Credit Regulation in South Africa*

Kelly-Louw M and Stoop PN *Consumer Credit Regulation in South Africa* (Juta Cape Town 2012)

Kok 2011 *THRHR*

Kok A "Not so Hunky-Dory: Failing to Distinguish Between Differentiation and Discrimination – *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd (No 1)*" 2011 *THRHR* 340-346

Lienne 2012 *DHET*

Lienne S "Protection Against Forced Sale of a Debtor's Home in the Roman Context" 2012 *DHET* 119-126

Leatherern Consideration of the Proposed Debt Intervention Procedure

Leatherern R *Consideration of the Proposed Debt Intervention Procedure from A Debt Relief Perspective* (LLM Dissertation 2018 University of Pretoria)

Levenstein *An Appraisal of the New South African Business*

Levenstein E *An Appraisal of the New South African Business Rescue Procedure* (LLD thesis University of Pretoria 2008)

Loubser 1997 9 *SA Merc LJ*

Loubser A "Ensuring Advantage to Everyone in a Modern South African Insolvency law" 1997 9 *SA Merc LJ* 325-328

Loubser 2013 *Juta Claremont*

Loubser MM "JC de Wet and the Theory of Extinctive Prescription" in Du Plessis J and Lubbe G (eds) *A Man of Principle – The Life and Legacy of JC de Wet / 'n Man van Beginsel – Die Lewe en Nalatenskap van JC de Wet* 2013 *Juta Claremont* 397-428

Mabe 2019 *PELJ*

Mabe Z "Alternatives to Bankruptcy in South Africa That Provides for a Discharge of Debts: Lessons from Kenya" 2019 *PELJ* 1-2

Mabe 2017 *THRHR*

Mabe Z "Notice of Intention to Surrender as an Abuse of the Sequestration Process: *Nedbank Limited v Malan; In re: Ex Parte Application of Malan* [2015] JOL 33458 (GP)" 2017 *THRHR* 695-695

Mabe and Evans 2014 *SA MERC LJ*

Mabe Z and Evans R "Abuse of Sequestration Proceedings in South Africa Revisited" 2014 26 *SA MERC LJ* 651-654

Magau A *Statutory Analysis of Debt Relief Measures*

Magau PT *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa* (LLM- dissertation North West University 2019)

Malanje 2013 *Globalizing businesses for the next century: visualizing and developing contemporary approaches to harness future opportunities*

Malanje NJ "The impact of administration orders as a redress mechanism for over-indebted consumers: a critical analysis" in Nejdett D 2013 *Globalizing businesses for the next century: visualizing and developing contemporary approaches to harness future opportunities* 626-627

Manyuni *The Position of 'Low Income Low Asset' (LILA) Debtors in South Africa*

Manyuni C *The Position of 'Low Income Low Asset' (LILA) Debtors in South Africa: The Need for Legislative Reform* (LLM-dissertation University of Kwa-Zulu Natal 2015)

Mokgorwane *The Interplay between National Credit Act and Insolvency Act*
Mokgorwane T *The Interplay between National Credit Act 34 of 2005 and Insolvency Act 24 of 1936* (LLM dissertation University of Pretoria 2005)

Nagel *et al Commercial Law*

Nagel CJ, Barnard J, Boraine A, Delport PA, Kern KM, Lötze DJ, Otto JM, Papadopoulos SM, Prozesky-Kuschke B, Roestoff M, Van Eck BPS, Van Jaarsveld SR *Commercial Law* 5th ed (Lexis Nexis Johannesburg 2015)

Nanziri and Leibbrandt 2018 *South African Journal of Economic and Management Sciences*

Nanziri EL and Leibbrandt M "Measuring and Profiling Financial Literacy in South Africa" 2018 *South African Journal of Economic and Management Sciences* 1- 6

Nel *An Analysis of the Legislative Mechanisms*

Nel JM *An Analysis of the Legislative Mechanisms Available to Individual Debtors in terms of the South African Law* (LLM-dissertation University of South Africa 2006)

Pete *et al Civil Procedure: A Practical Guide*

Pete S, Hulme D, Palmer R, Sibanda O, Palmer T *Civil Procedure: A Practical Guide* 2nd ed (Oxford Cape Town 2013)

Roestoff 2018 *Journal of Contemporary Roman-Dutch Law*

Roestoff M "Rehabilitation of an Insolvent and Advantage to Creditors under the Insolvency Act 24 of 1936": *Ex parte Purdon* 2014 JDR 0115 (GNP) 2018 *Journal of Contemporary Roman-Dutch Law* 306-307

Roestoff 2017 *DHET*

Roestoff M "The Income of an Insolvent" 2017 *DHET* 1-478

Roestoff and Coetzee 2012 *SA Merc LJ*

Roestoff M and Coetzee H "Consumer Debt Relief in South Africa; Lesson from America and England and Suggestions for the Way Forward" 2012 24 *SA Merc LJ* 53-55

Roestoff and Renke 2005 *International Insolvency Review*

Roestoff M and Renke S "A Fresh Start for Individual Debtors: The Role of South African Insolvency and Consumer Protection Legislation" 2005 *International Insolvency Review* 93-109

Sharrock *et al Hockly's Insolvency Law*

Sharrock J, Van der Linde K and Smith *A Hockly's Insolvency Law* 9th ed (Juta Cape Town 2012)

Sibanda and Sibanda 2016 *International Labour Organization*

Sibanda S and Sibanda T "Financial Education in South Africa Overview of Key Initiatives and Actors" 2016 *International Labour Organization* 1- 8

Smith *The Law of Insolvency*

Smith C *The Law of Insolvency* 3rd ed (Lexis Nexis Butterworths 1988)

Ssebagala 2017 *Journal of Financial Counseling and Planning*

Ssebagala R "Relieving Consumer Overindebtedness in South Africa: Policy Reviews and Recommendations" 2017 *Journal of Financial Counseling and Planning* 235-236

Steyn 2011 *ZAECPEHC*

Steyn L "Sink or swim? Debt review's ambivalent "lifeline" – a second sequel to...a tale of two judgments" *Nedbank v Andrews* (240/2011) 2011 *ZAECPEHC* 29-30

Temperman *The Judiciary's Discretion in Sequestration Applications*

Temperman E *The Judiciary's Discretion in Sequestration Applications* (LLM Dissertation University of Pretoria 2014)

Theophilopoulos *et al A Fundamental Principles of Civil Procedure*

Theophilopoulos C, Van Heerden C, and Boraine *A Fundamental Principles of Civil Procedure* (LexisNexis Butterworths Durban 2015)

Van Heerden and Boraine 2009 *PELJ*

Van Heerden C and Boraine A "The Interaction between the Debt Relief Measures in the National Credit Act 34 Of 2005 and Aspects of Insolvency Law" 2009 *PELJ* 21-43

Van Heerden and Lötzt 2010 *THRHR*

Van Heerden C and Lötzt DJ "Over-indebtedness and Discretion of Court to Refer to Debt Counsellor: *Standard Bank of South Africa Ltd v Hales* 2009 (3) SA 315 (D)" 2010 *THRHR* 502-517

Van Loggerenberg DE Jones and Buckle *The Civil Procedure Practice of the Magistrates' Courts in South Africa*

Van Loggerenberg DE Jones and Buckle: *The Civil Procedure Practice of the Magistrates' Courts in South Africa* 9th ed (Juta Claremont 1997)

Case Law

Aardt v Borrett 1996 (1) SA 935 (C) 937

Abell v Els 1976 2 SA 797 (T) 113

ABSA Bank Ltd v De Klerk 1999 4 SA 835 (E)

African Bank Ltd v Weiner 2005 4 SA 363 (SCA) 373

Amodt v Khan 1947 2 SA 432 (N) 438

Bafana Finance Mabopane v Makwakwa 2006 (4) SA 581 (SCA) 583

Bartholomew v Stableford 17 SC Rep 84

Beinash and Co v Nathan 1998 3 SA 540 (W)

BMW Financial Services (SA) (Pty) Ltd v Donkin 2009 6 SA 63 (KZD)' (2010)

Body Corporate Palm Lane v Masinge 2013 JDR 2332 (GNP)

Botha v Botha 1990 4 SA 580 (W) 585

BP Southern African (Pty) Ltd v Furstenburg [1966] 1 SA (O) 717 720
Cape Town Municipality v Dunne 1964 1 SA 741 (C) 746
Cragg v Scanlam 1931 WLD 93
Collett v FirstRand Bank 2011 4 SA 508 (SCA) 514
De Villiers v Gadow 17 SC Rep 295
Dunlop Tyres (Pty) Ltd v Brewitt 1999 2 SA 580 (W) 585
Els v Els 1967 (3) SA 207 (T)
Epstein v Epstein 1987 4 SA 606
Estate Logie v Priest 1926 AD 312
Esterhuizen v Swanepoel 2004 4 SA 89 (W) 102
Ex Parte Alberts 1937 OPD
Ex parte Burger 4 PH C 5 CPD/July 1924 (unreported)
Ex Parte Ford 2009 (3) SA 376 (WCC)
Ex Parte Henning 1981 (3) SA 843 (2)
Ex parte Heydenreich 1917 TPD 657 658
Ex parte Le Roux 1996 2 SA 419 (C) 424
Ex Parte Mathysen et uxor 2003 (2) SA 308 (T) 311
Ex parte Moodley 1955 1 SA 678 (T) 681
Ex Parte Smith 1958 3 SA 568
Ex parte Terblanche 1923 (TPD) 168 170
Ex Parte Vane 1956 4 SA 616 (O) 617G-H
Fisrt Bank v Engelbrecht 2013 ZAGPJHC 15
First Rand Bank Ltd v Olivier 2009 3 SA 353 (SE) 357
Gaoshubelwe v Pieman's Pantry (Pty) Limited 2018 5 BCLR 527 (CC) paras 50
Gardee v Dhanmanta Holdings and Others 1978 1 SA 1066

Hobson NO v Abib 1981 (1) SA 556 (N) 559-60

Jacobs v African Bank 2006 (5) SA 21 (T) 24

KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd 2017 3 All SA 739 (SCA) para 13

London Estates (Pty) Ltd v Nair 1957 3 SA 591 (D)

Madari v Cassim 1950 2 SA 35 (D) 38

Mahomed v Lockhat Brothers & Co Ltd 1944 AD 230

Mamacos v Davids 1976 1 SA 19 (C) 20C-D

Mayet v Pillay 1955 2 SA 309 (N) 311E

Meskin v Friedman 1948 2 SA 55 (W) 45

Motokonya v Minister of Police 2018 5 SA 22 (CC)

Mthimkhulu v Rampersad & Another 2000 3 SA 512 (N) 514

Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality 1984 1 SA 571 (A) 578F-H

Nell v Lubbe 1999 (3) SA 109 (W) 111

Nicholl v Nicholl 1916 WLD 22

O' Flaherty & Co v Meiklejohn 1940 NPD 371

Pelunky & Co v Beiles and Others 1905 TS 370

R v Meer and Other 1957 3 SA 614 (N) 75

Road Accident Fund v Mdeyide 2011 2 SA 26 (CC) para 2

Ressel v Levin 1964 (1) SA 128 (C)

Richter v Riverside Estates (Pty) Ltd 1946 OPD 209

Smiedt Bros v Fourie NO 1915 OPD 53

Stainer v Estate Bukes 1933 OPD 86

Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd (No 1)

Thorpe's Executors v Thorpe's Tutor (1886) 4 SC 488 5

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

Walker v Syfret 1911 AD 141

Weiner v Broekhuysen 2003 4 SA 301 (SCA) at 305 E-F

Constitutions

Constitution of the Republic of South Africa, 1996

Legislation

Companies Act 71 of 2008 98

Consumer Protection Act 68 of 2008

Debt Collectors Act 114 of 1998

Financial Sector Regulation Act 9 of 2017

Insolvency Act 24 of 1936

Insolvency Act 32 of 1916

Magistrates' Courts Act 32 of 1944

National Credit Act 34 of 2005

National Credit Amendment Act 7 of 2019

Government publications

GN B30 in GG 41274 of 24 (National Credit Amendment Bill) November 2017

Draft Insolvency Bill 2015

Draft Prescription Bill 2019

Internet sources

Business Tech 2019 Ramaphosa Signs Controversial New Debt Relief Bill into Law
<https://businesstech.co.za/news/finance/334963/ramaphosa-signs-controversial-new-debt-relief-billinto-law-heres-what-it-means-for-you/> accessed 09 September 2019