# A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa


orcid.org/0000-0002-1971-3401

**PT Magau**

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Supervisor: Prof HT Chitimira

Graduation Ceremony: April 2020

Student Number: 26217058

## SOLEMN DECLARATION

I **Phemelo Theophilus Magau**, hereby declare that the dissertation entitled: **A Statutory Analysis of Debt Relief Measures for Low-income Earners 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.

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Declared before me on this ..... day of .....

Signature of Supervisor.....

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"…He who promised is faithful."

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## DEDICATION

This dissertation is dedicated to my loving family, friends and everyone who supported me on the journey towards its completion.

## ABSTRACT

Debt relief is important in the current credit-driven society where consumers live off credit for their day-to-day needs in South Africa. Currently, there are three statutory debt relief measures at the disposal of insolvent debtors in South Africa. These are the sequestration proceedings in terms of the *Insolvency Act*, the administration order in terms of the *Magistrates Courts Act,* and the debt review in terms of the *National Credit Act*. The fourth debt relief measure, namely debt intervention, has recently been introduced by the *National Credit Amendment Act* but it has not yet come into place. The problem faced by low-income earners in South Africa is that the available debt relief measures are not viable and accessible to them. There is a multiplicity of regulators, entry requirements and decision making forums that are involved in the debt relief measures, thus making access to such measures difficult for low-income earners. This research addresses the strengths and weaknesses of sequestration proceedings, debt review, debt intervention and administration order with a view of promoting access to such debt relief measures by low-income earners. Moreover, this research intends to provide practical insights towards the progressive realisation of debt relief measures that are accessible and viable to low-income earners in South Africa. This, essentially, is done through a call for law reform of the debt relief sections in terms of the *Insolvency Act*, the *Magistrates Courts Act,* and the *NCA* in order to provide a more robust and accessible debt relief to help low-income earners in South Africa.



**Keywords:** debt relief, low-income, over-indebtedness, debt discharge, consumer credit.

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# CHAPTER ONE

# RESEARCH OUTLINE

## *1.1 Introduction*

Poverty and consumer over-indebtedness continue to be a challenge affecting the social and economic welfare of the majority of South African households.[1] This is because most consumers, particularly low-income earners, rely on credit for survival and to attain most of their basic needs in South Africa.[2] Moreover, low-income earners find it difficult to manage or improve their financial position. In this regard, access to suitable and effective debt relief measures for low-income earners is important to help such consumers and to curb over-indebtedness. Low-income earners refer to the indigent debtors who earn less than R7500 per month and have few assets.[3]

Debt relief measures that are accessible to all consumers are important because they lead to the promotion and advancement of the socio-economic welfare of South African households.[4] In addition, they lead to the promotion of a sustainable, efficient and accessible credit market industry.[5] Moreover, access to debt relief measures leads to poverty reduction and bridge the gap between the rich and the poor, and thus leading to economic transformation.[6]

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1 Meiring T, Kannemeyer C and Optimeter E "The Gap between Rich and Poor: South African Society's Biggest Divide Depends on Where You Think You Fit in" 2018 *South African Labour and development Research Unit Working Paper Series Number 20 Version 1* 1, 15.

2 Ssebagala R "Relieving Consumer Over-indebtedness in South Africa: Policy Reviews and Recommendations" 2017 *Journal of Financial Counseling and Planning* 235, 235 and 236.

3 Coetzee H *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* (LLD thesis University of Pretoria 2015) 5 on the discussion of Low Income Low Asset (LILA Debtors and No Income No Asset (NINA) debtors; Leathern R *Consideration of the Proposed Debt Intervention Procedure from a Debt Relief Perspective* (LLM-dissertation University of Pretoria 2018) 8; Geldenhuys 2018 https://www.moonstone.co.za/low-income-earners-spending-more/, the amount of R7500 was determined on the basis that most debt counsellors have stated that persons earning below this amount are economically not viable clients for them.

4 Ulriksen M "How social security policies and economic transformation affect poverty and inequality: Lessons for South Africa" in *Overcoming Inequality and structural poverty in South Africa; Towards inclusive growth and development Conference* (20-22 September 2010 Johannesburg) 1, 2.

5 Calitz J "Some thoughts on state regulation of South African insolvency law" 2011 *De Jure* 290, 291.

6 Calitz J "Developments in the United States' Consumer Bankruptcy Law: A South African Perspective" 2007 *Obiter* 397, 416.

Currently, there are three statutory debt relief measures at the disposal of insolvent debtors in South Africa. These are the sequestration proceedings in terms of the *Insolvency Act*,[7] the administration order in terms of the *Magistrates' Courts Act;*[8] and the debt review and restructuring procedure in terms of the *National Credit Act*.[9] The fourth debt relief measure, namely, debt intervention, as introduced by the *Credit Amendment Act,* has not yet come into enforcement. Low-income earners find it difficult to access and utilise the existing debt relief measures in South Africa.

### *1.2 Background to the study*

Debt relief is important in the current credit-driven society where consumers live off credit for their day-to-day needs in South Africa.[10] In recent years, consumer credit has become an integral part of the well-being of many South African households.[11] This follows the fact that at the end of September 2019, the credit bureaus had records of more than 54.79 million individuals on their databases in South Africa.[12] From these records, there were 25.14 million (45.89%) credit-active consumers.[13] Credit-active consumers are consumers who are obligated by authorities such as the National Credit Regulator to pay creditors.[14] Consumer credit enhances spending and consumption of money on goods through credit by many South African households.[15] These statistics

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7 Sections 3-12 of the *Insolvency Act* 24 of 1936 (*Insolvency Act*); Sharrock R, Van der Linde K and Smith A *Hockly's Insolvency Law* 9th ed (Juta Cape Town 2012) 17-59.

8 Section 74 of the *Magistrates' Courts Act* 32 of 1944 (*Magistrates' Courts Act*); see also Pete S, Hulme D, Palmer R, Sibanda O, Palmer T *Civil Procedure: A Practical Guide* 2nd ed (Oxford Cape Town 2013) 406-408.

9 Sections 85-87 of the *National Credit Act* 34 of 2005(*NCA*), as amended by the *National Credit Amendment Act* 7 of 2019 (*Credit Amendment Act*); see sections 86A-88 of the *Credit Amendment Act*; see also Nagel CJ, Barnard J, Boraine A, Delport PA, Kern KM, Lötz 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.

10 Ssebagala 2017 *Journal of Financial Counseling and Planning* 235-236; see also Boraine, Van Heerden and Roestoff 2012 *De Jure* 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.

11 Ssebagala 2017 *Journal of Financial Counseling and Planning* 235-236.

12 National Credit Regulator *Credit Bureau Monitor Report* Third Quarter September 2019 (2019) 2 available at http://www. https://www.ncr.org.za/documents/CBM/CBM%20Q3%202019.pdf accessed 16 February 2020.

13 National Credit Regulator *Credit Bureau Monitor Report* 2019 2.

14 National Credit Regulator *Credit Bureau Monitor Report* 2019 8.

15 Ssebagala 2017 *Journal of Financial Counseling and Planning* 235; see also related 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.

indicate that there is a need to have a debt relief mechanism in place that will be accessible to all consumers, including low income earners, so as to help those who find themselves in financial distress due to consumer credit. Through credit agreements, consumers are able to spend more than what their disposable income allows.[16] However, for many of these households, consumer credit also remains a source of financial distress for those with little or no income at all in that they become susceptible to becoming insolvent and over-indebted.[17] Accordingly, equal debt relief must be made available by the legislature to all debtors and the opportunity to access statutory debt relief should be afforded to all debtors, including low-income earners.[18]

Debt relief measures still need to be researched fully to establish adequate mechanisms to deal with any debt recovery related issues to help low-income earners in South Africa.[19] Essentially, this analysis into the sequestration proceedings, administration order, and debt review needs to be done to propose ways on how to make these debt relief measures accessible and viable to the low-income earners.[20] This follows the plight of low-income earners who find it difficult to utilise any of the debt relief measures due to the stringent requirements that makes it difficult for them to comply with.[21] Debt relief measures in South Africa are immaterial to low income earners as they offer little or nothing at all to such debtors, since they are accessible only to certain debtors.[22] To this end, the researcher submits that debt relief sections in terms

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16 Ssebagala 2017 *Journal of Financial Counseling and Planning* 236.

17 Archuleta, Dale and Spann 2013 *Journal of Financial Counseling and Planning* 52; Ssebagala 2017 *Journal of Financial Counseling and Planning* 236.

18 Boraine and Roestoff 2014 *THRHR* 541; 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.

19 Van Heerden C and Boraine A "The Interaction between the Debt Relief Measures in the National Credit Act 24 of 2005 and Aspects of Insolvency Law" 2009 *PELJ* 22, 58.

20 Coetzee *A Comparative Reappraisal of Debt Relief in South Africa* 28; Van Heerden and Boraine 2009 *PELJ* 58.

21 Mokgorwane T *The Interplay between National Credit Act 34 of 2005 and Insolvency Act 24 of 1936* (LLM dissertation University of Pretoria 2005) 29.

22 Evans RG "A Brief Explanation of Consumer Bankruptcy and Aspects of the Bankruptcy Estate in the United States of America" 2010 *The Comparative and International Law Journal of Southern Africa* 337, 337. See also 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) 3.

of the *Insolvency Act*,[23] the *Magistrates' Courts Act*[24] and the *NCA*[25] need to be revised to provide a more robust and accessible debt relief to help low-income earners.

### *1.3 Statement of problem*

The problem faced by low-income earners in South Africa is that the available debt relief measures are not viable and accessible to them.[26] The problem emanates from the fact that there is a multiplicity of regulators,[27] intermediaries,[28] entry requirements, procedures, and decision making forums[29] that are involved in the debt relief measures that are available. The multiplicities mentioned above complicate the whole debt relief system in a sense that ease of access to debt relief measures is curtailed. It is submitted that owing to this array of regulators, intermediaries, and access requirements, authorities exclude low-income earners from accessing the statutory debt relief measures.

Sequestration proceedings, as suggested by Coetzee,[30] constitute a primary debt relief measure for over-indebtedness to natural persons in South Africa.[31] This is due to the fact that sequestration proceedings are the only debt relief measure that offers a debt discharge to debtors.[32] The requirement of proving an advantage to creditors in terms of sequestration proceedings often poses a difficulty to debtors, especially low-income earners, to comply with.[33] Moreover, this requirement prevents low-income earners who cannot prove a pecuniary benefit to creditors from obtaining debt discharge because

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23 Sections 3-12 of the *Insolvency Act*; Sharrock R *et al Hockly's Insolvency Law* 17-43.

24 Section 74 of the *Magistrates' Courts Act*; Pete S et al Civil Procedure: A Practical Guide 406-408.

25 Section 86 of the *NCA*; Van Heerden and Boraine 2009 *PELJ* 58.

26 Mabe Z "Alternatives to Bankruptcy in South Africa That Provides for a Discharge of Debts: Lessons from Kenya" 2019 *PELJ* 1, 2.

27 Sections 12 and 86 of the *NCA*; section 4 of the *Insolvency Act*; see also Coetzee H and Roestoff M "Consumer Debt Relief in South Africa - Should the Insolvency System Provide for NINA Debtors? Lessons from New Zealand" 2013 *International Insolvency Review* 188, 193.

28 Section 86 of the *NCA*; section 74U of the *Magistrates' Courts Act*; section 18 *Insolvency Act*; Coetzee and Roestoff 2013 *International Insolvency Review* 193.

29 Section 26 of the *NCA;* see Sharrock R *et al Hockly's Insolvency Law* 9; Coetzee and Roestoff 2013 *International Insolvency Review* 193.

30 Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 101.

31 See Coetzee and Roestoff 2013 International Insolvency Review 193; Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 101.

32 Section 129(1)(b) of the *Insolvency Act*; Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 145.

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

such debtors often find it difficult to prove this requirement.[34] This is because most debtors, including low-income earners, do not have sufficient assets or disposable income available for distribution to creditors.[35] In this way, sequestration proceedings differentiate between creditors based on those who have something to offer and those who have nothing to offer.[36] The latter category is that of low-income earners.[37] This distinction is unfair, and it does not meet the constitutional muster of the right to equality.[38]

The *Magistrates' Courts Act* empowers the Magistrate's Court to make an order for the administration of a debtor's estate[39] and appoint an administrator to take control and manage payment of debts due to creditors.[40] As a requirement, an administration order is only available to debtors with debts not exceeding R50 000[41] as prescribed by the Minister of Justice and Constitutional Development.[42] Therefore, this poses a challenge to debtors, including low-income earners, whose outstanding debts are more than R50 000 because this requirement limits access to administration order for such debtors.[43] To that end, the researcher submits that concerning access to debt relief provided by

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34 Bertelsman E *et al Mars 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.

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

36 Sections 6(1) and 12(1) of the *Insolvency Act*; 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.

37 Roestoff and Coetzee 2012 *SA Merc LJ* 53; Coetzee and Roestoff 2013 *International Insolvency Review* 188.

38 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.

39 Section 74(1)(b) of the *Magistrates' Courts Act*; Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 174.

40 Section 74U of the *Magistrates' Courts Act*; Mabe 2019 *PELJ* 9.

41 The debt amount is determined by the Minister of Justice and Constitutional Development from time to time and is currently set at R50000, see GN 217 of 27 March 2014: Determination of monetary jurisdiction for causes of action in respect of courts for districts.

42 Section 74(1)(b) of the *Magistrates' Courts Act*. See Coetzee H *A Comparative Reappraisal of Debt Relief Measures in South Africa* (LLD thesis University of Pretoria 2015) 174; see also Mabe 2019 *PELJ* 8-9.

43 Section 74(1)(b) of the *Magistrates' Courts Act* read together with GN 217 of 27 March 2014 makes provision for a R50000 cap off amount. Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 174; Mabe 2019 *PELJ* 8-9.

administration orders, low-income earners derive no benefit from this measure because it is just a repayment plan with no discharge of debt.[44]

Debt relief in the form of a debt review as regulated by the *NCA* has a limited scope of application. Firstly, debt review is only applicable to credit agreements that have been entered into in terms of the *NCA*.[45] This is problematic since debtors cannot benefit from debt review for debt relief if they entered into debts which fall outside the ambit of credit agreements in terms of the *NCA*.[46] Secondly, an order for debt review can only be granted to debtors whose financial affairs can be re-arranged by a debt counsellor, for example, where a debtor has a regular income or realisable assets.[47] This is a problem in that low-income earners who do not have a steady income cannot benefit from debt review.[48] These requirements, due to their onerous nature, preclude the low-income debtors from accessing debt relief in the form of debt review.

The *NCA* also regulates debt intervention, which is a new debt relief measure that is yet to come into enforcement. Although debt intervention is an innovative debt relief measure since it seeks to introduce debt extinguishment,[49] debt intervention has a limited scope of application. It has onerous access requirements, which make it difficult to access.[50] For instance, debt intervention only applies to debtors whose debts do not exceed R50000,[51] and it resorts under the *NCA* and apply to credit agreements as defined by the *NCA*.[52] Debt intervention is not available to consumers who are subject to sequestration proceedings and/or administration order.[53] This is a limitation owing to

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44 Section 74(1)(b) of the *Magistrates' Courts Act*. See Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 178; Mabe 2019 *PELJ* 9.

45 Section 4 of the *NCA*; see also Nagel *et al Commercial Law* 296.

46 Section 4 of the *NCA*; see also Nagel *et al Commercial Law* 296.

47 Sections 86(2) and 129 of the *NCA*; Nagel *et al Commercial Law* 319-320.

48 Sections 85-88 of the *NCA*; Mabe 2019 *PELJ* 8; Van Heerden C and Lötz 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, 516.

49 Section 1(c) of the *Credit Amendment Act* defines to "extinguish" as the cessation of all rights and obligations which are inherent to, or resulting from, a credit agreement. The cessation of any rights or obligations may arise in law, whether statutory or otherwise prospectively from the date on which the act of extinguishment becomes effective.

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

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

52 Sections 4 and 8 of the *NCA*; 1(b)(a) of the *Credit Amendment Act.*

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

the fact that a debtor who is undergoing administration order, which currently does not offer debt discharge, will not have an opportunity to benefit from debt extinguishment available under debt intervention.

### *1.4 Aims and Objectives*

#### *Aims*

This research seeks to:

(a) examine whether the debt relief provisions of the *Insolvency Act*, the *Magistrates Courts Act,* and the *NCA* are robust enough to provide debt relief measures and ensure that the poor and low-income earners in South Africa have access to such measures.

(b) investigate the possible challenges and flaws under the debt relief provisions of *the Insolvency Act*, the *Magistrates Courts Act,* and the *NCA*.

#### *Objectives*

To achieve the aims mentioned above, the following objectives are set and accordingly the researcher:

a) examines whether the debt relief provisions of the *Insolvency Act*, the *Magistrates' Courts Act* and the *NCA* provide meaningful debt relief to cover low income earners and debtors who have no assets at all or sufficient assets to cover sequestration costs and/or prove an advantage to the creditors.

b) assesses whether the current debt relief measures in terms of the *Insolvency Act*, the *Magistrates' Courts Act* and the *NCA* are accessible and viable to the low-income earners and debtors who have no assets at all or sufficient assets to cover sequestration and prove benefit to the creditors.

### *1.5 Research question*

This research seeks to address the following question:

Are the debt relief measures in terms of the *Insolvency Act,*[54] the *Magistrates' Courts Act,*[55] and the *National Credit Act*[56] adequate and accessible to low-income earners South Africa?

This follows the fact that the current debt relief measures under the above Acts are very difficult to access for low-income earners in South Africa.

### *1.6 Rationale of the study*

This research investigates whether the debt relief measures in terms of the *Insolvency Act,* the *Magistrates' Courts Act,* and the *NCA* are adequate and accessible to the low-income earners in South Africa. Firstly, the researcher addresses the strengths and weaknesses of the sequestration proceedings in promoting low-income earners' access to debt relief available in terms of the *Insolvency Act.* Secondly, the research analyses how debt review is utilised and enforced under the *NCA.* It also discusses the possible advantages and disadvantages of debt review and debt intervention, with the aim to strengthen such measures because they have limited application as they apply only to credit agreements as defined by the *NCA*.[57] Lastly, this research analyses the administration order in terms of the *Magistrates' Courts Act,* which is of limited scope, because it applies only to debtors whose debts do not exceed R50000.[58] Particular attention is paid to the requirements and possible advantages and disadvantages of the administration order to make it an accessible and viable debt relief measure that helps low-income earners in South Africa. Furthermore, this research intends to provide practical insights towards the progressive realisation of a debt relief system that is accessible and viable to the low-income earners in South Africa. This, essentially, is done through a call for law reform of the debt relief sections in terms of the *Insolvency*

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54 Sections 3-12 of the *Insolvency Act*; Sharrock *et al Hockly's Insolvency Law* 17-43.

55 Section 74 of the *Magistrates' Courts Act* 32 of 1944 (*Magistrates' Courts Act*); see also Pete *et al Civil Procedure: A Practical Guide* 406-408.

56 Sections 85, 86, 87 and 88 of the *NCA*.

57 Section 4(1) and 8 of the NCA; Mokgorwane *The Interplay between National Credit Act and Insolvency Act* 26.

58 Boraine 2003 *De Jure* 218.

*Act*,[59] the *Magistrates' Courts Act,*[60] and the *NCA*[61] in order to provide a more robust and accessible debt relief to low-income earners.

### *1.7 Literature review*

Coetzee argues that there is need for a total reappraisal of the whole debt relief measures in South Africa.[62] Coetzee submits that the entire debt relief measures should be reviewed to provide robust debt relief to the No Income No Asset (NINA) debtors, who like low-income earners, find it difficult to access such measures.[63] This same view is held by the researcher that there must be law reform and reconsideration of the current debt relief measures at the disposal of debtors in South Africa, namely, sequestration proceedings,[64] debt review[65] and administration orders[66] in order to help the low-income earners. For a debtor to utilise the statutory debt relief measures offered by the *Insolvency Act,* the *NCA,* and the *Magistrates' Courts Act*, certain requirements must be met.[67] The researcher submits that such requirements are difficult for low-income earners to prove and as a result, low-income earners are excluded by the authorities from having access to debt relief measures.[68] Therefore, the lawmakers need to reconsider the legal framework regulating debt relief measures in South Africa to enable the low-income earners to have access to such measures.[69]

Roestoff and Coetzee argue that the administration order and debt review are secondary debt relief measures because, unlike the sequestration proceedings, the former pair does not offer a discharge of debt.[70] This is true because the administration

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59 Sections 3 – 12 of the *Insolvency Act*; Sharrock *et al Hockly's Insolvency Law* 17-43.

60 Section 74 of the *Magistrates' Courts Act*; Pete S *et al Civil Procedure: A Practical Guide* 2nd ed (Oxford Cape Town 2013) 406-408.

61 Section 86 of the *NCA*; Van Heerden and Boraine 2009 *PELJ* 58.

62 Coetzee *A Comparative Reappraisal of Debt Relief Measures* 11. See also Fletcher IF *The Law of Insolvency* (Sweet and Maxwell Londen 4th ed 2009) 27.

63 Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 30; Mabe 2019 *PELJ* 20.

64 Section 3-12 *Insolvency Act*; Sharrock R et al *Hockly's Insolvency Law* 17-45.

65 Section 86 of the *NCA*; Van Heerden and Boraine 2009 *PELJ* 58.

66 Section 74 of the *Magistrates' Courts Act*; Pete *et al Civil Procedure: A Practical Guide* 408.

67 Mokgorwane *The Interplay between National Credit Act and Insolvency Act* 22-24.

68 Van Heerden and Boraine 2009 *PELJ* 58; Coetzee and Roestoff 2013 *International Insolvency Review* 195.

69 Coetzee and Roestoff 2013 *International Insolvency Review* 195.

70 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.

order and debt review measures are merely about rearranging repayment of debts and not necessarily discharging or relieving the debtor of his debts. Mabe and Evans argue that a debt discharge is one of the objectives that a debtor wants to achieve when seeking debt relief since a discharge of debt means that a debtor is freed from his debts.[71] However, debt review and administration order are merely repayment plans of the consumer's debts because ultimately, the consumer has to pay off the creditors, without an option of a discharge, as is the case with sequestrations proceedings.[72]

Sequestration proceedings, debt review, and administration orders are accessed by way of court procedures.[73] Currently, the *Insolvency Act*, *Magistrates' Courts Act,* and the *NCA* do not make any provision for an out of court debt relief mechanism.[74] 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. At present, for an insolvent debtor to be sequestrated, they must lodge an application in the High Court, which requires money for court proceedings.[75] Similarly, for an administration order to take place a debtor must apply to the Magistrates' Court[76] and when the order is granted, the court appoints an administrator.[77] For a debt review to take place, a debt counsellor must make a recommendation on behalf of the debtor to the Magistrates' Court for a court order rearranging the debtor's financial obligations.[78] In this way, low income earners are excluded from benefiting from any of the three statutory debt relief measures because such debtors do not have disposable income

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71 Mabe Z and Evans RG "Abuse of Sequestration Proceedings in South Africa Revisited" 26 2014 *SA Merc LJ* 651, 656; Sharrock *et al Hockly's Insolvency* 33.

72 Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* paras 4.2 and 4.3; see also Coetzee and Roestoff 2013 *International Insolvency Review* 188.

73 See sections 3-12 of the Insolvency Act; sections 85-87 of the NCA; section 74 of the Magistrates' Courts Act. See also Roestoff and Coetzee 2017 *Comparative and International Law Journal of Southern Africa* 255; Pete *et al Civil Procedure: A Practical Guide* 406-409.

74 See Coetzee *A Comparative Reappraisal of Debt Relief in South Africa* 51, for a discussion on 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.

75 Section 3 of the *Insolvency Act*; see also Sharrock *et al Hockly's Insolvency Law* 7, for a discussion on jurisdiction of the High Court.

76 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.

77 Section 74 E (1) of the *Magistrates' Courts Act*.

78 Section 86(7)(c)(ii)(aa)-86(7)(c)(ii)(dd) of the *NCA* provides for methods of restructuring allowed in terms of the *NCA*; see also Mabe 2019 *PELJ* 6.

with which they can afford litigation costs and any other administration costs related to gaining access to debt relief measures.[79]

### *1.8 Assumptions and Hypothesis*

#### *Assumption*

This research is based on the following assumption:

a) the current legal framework for debt relief measures is not easily accessible to low-income earners in South Africa. This is owing to the assumption that the debt relief provisions of the *Insolvency Act*, the *Magistrates' Courts Act,* and the *NCA* are not robust enough to provide debt relief to the poor and low-income earners in South Africa due to various access requirements which are difficult for such debtors to prove.

#### *Hypothesis*

The problem faced by low-income debtors in South Africa is not that there are no debt relief measures in place, but that the available debt relief measures do not provide meaningful relief for low income earners facing over-indebtedness.[80] This is owing to the assumption that the current legal framework for debt relief measures is not adequate and accessible to the low-income earners in South Africa. Furthermore, it is assumed that the debt relief provisions of the *Insolvency Act*, the *Magistrates' Courts Act,* and the *NCA* are not robust enough to provide debt relief to the poor and low-income earners in South Africa due to various access requirements which are difficult for such debtors to prove. Even when low-income earners may fulfil the criteria for qualifying, the relief, for example, under the *Magistrates' Courts Act* is not meaningful, for instance there is no debt discharge. Accordingly, through a statutory analysis of debt relief measures in South Africa, the researcher through each of the substantive chapter outlines the strengths and weaknesses of the sequestration proceedings as well as the possible advantages and disadvantages of debt review and administration in a

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79 See section 3 of the *Insolvency Act*; see also Coetzee *A Comparative Reappraisal of Debt Relief in South Africa* 51; Manyuni *The Position of 'Low Income Low Asset' Debtors in South Africa* 2.

80 Mabe 2019 *PELJ* 2.

way to help low-income earners to have access to debt relief measures. In this regard, the researcher explores the significance of having robust debt relief measures that are viable and accessible to the poor and low-income earners in South Africa by providing recommendations for law reform into the current statutory debt relief measures.

### *1.9 Limitations of the study*

This research mainly focuses on the relevant sections of the *Insolvency Act*,[81] the *Magistrates' Courts Act,* [82] and the *NCA*[83] dealing with debt relief measures in South Africa. The researcher places a special emphasis on the position of low-income earners in South Africa to ameliorate their position and help them to have access to the statutory debt relief measures, namely sequestration proceedings, administration order, and debt review. The current position of low-income earners is that they have limited access to debt relief measures in South Africa.[84] The research does not discuss the position of other categories of debtors such as those who have sufficient assets or disposable income available for distribution to creditors. This is because such debtors already have access to the current debt relief measures as they can easily meet the access requirements to such measures through either assets or income.[85] Accordingly, the research discusses the viability and accessibility of statutory debt relief measures from the position of low-income earners in order to help them to have access to such measures.

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

82 Section 74 of the *Magistrates' Courts Act*; Pete *et al Civil Procedure: A Practical Guide* 406-409.

83 Sections 85-87 of the *NCA*; See Nagel *et al Commercial Law* 319-320.

84 Roestoff M and Renke S "Debt Relief for Consumers - the Interaction between Insolvency and Consumer Protection Legislation (part 2)" 2006 *Obiter* 98, 108; see also Coetzee and Roestoff 2013 *International Insolvency Review* in general.

85 See Coetzee *A Comparative Reappraisal of Debt Relief in South Africa* 16; see also Kok 2011 *THRHR* 242-244.

### *1.10 Research Methodology*

The research utilises a qualitative methodology based on literature review. The following research methods were used:

a) Primary and secondary sources

This research analysed the relevant data in existing primary and secondary sources. The primary sources include the Constitution of South Africa, legislation and relevant case law. The secondary sources consist of journal articles, books and other Internet sources relating to debt relief. For purposes of this research, the North-West University *Potchefstroom Electronic Law Journal* Referencing style was utilised.

b) Relevant legislation

The debt relief measures provided in terms of the *Insolvency Act*, the *Magistrates' Courts Act,* and the *NCA* were analysed to establish whether or not they are robust enough to provide debt relief to the poor and low-income earners in South Africa.

c) Relevant case law

Case law that is applicable to statutory debt relief measures was utilised in the research for reference purposes.

### *1.11 Statement regarding research ethics*

The research employs a qualitative research method. All the primary and secondary sources used in this research were referenced. The primary sources include the *Constitution*, legislation and relevant case law dealing with debt relief measures in South Africa. The secondary sources consist of journal articles, books and other internet sources relating to debt relief measures. 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 potential 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 relief 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 Act*, the *Magistrates' Courts Act* and the *NCA* that specifically deal with debt relief measures. The latter was done in order to identify the possible strengths and weaknesses of debt relief measures with the aim of recommending law reform to foster access to these measures to low-income earners. It is hoped that the findings of this research will be contained in the final LLM-dissertation and be published as book chapters or journal articles.

### *1.13 Structure of the dissertation*

This research has six chapters:

Chapter One provides an introduction to the research. This chapter contains the problem statement, research question, scope and limitations of the study, rationale and justifications of the research, aims and objectives of the study, research methodology, and literature review.

Chapter Two deals with the historical aspects of debt relief measures in South Africa. This chapter focuses on different methods and approaches to debt relief that were used in South Africa, as well as the strengths and weaknesses of those measures. Furthermore, this chapter will show that even historically, the accessibility and viability of debt relief measures by low-income earners has been insufficient.

Chapter Three discusses the statutory sequestration order in terms of the *Insolvency Act.* This is done to outline the strengths and weaknesses of the statutory sequestration order in terms of the *Insolvency Act*.

Chapter Four analyses the administration order under the *Magistrates' Courts Act*. Particular attention is paid to the requirements and possible advantages and

disadvantages of the administration order as a debt relief measure. The accessibility and viability of this measure to low-income earners in South Africa are also discussed in this chapter.

Chapter Five provides an overview and the effect of debt review under the *NCA* from a debt relief perspective in South Africa. Furthermore, chapter five assesses the possible advantages and disadvantages of debt intervention under the *Credit Amendment Act* as it is the most recent development concerning debt relief in South Africa.

Chapter Six gives a conclusion of the study and proposes recommendations to improve the current legal framework of statutory debt relief measures in South Africa.

## CHAPTER TWO

## HISTORICAL ASPECTS OF DEBT RELIEF MEASURES IN SOUTH AFRICA

### *2.1 Introduction*

The foundation of South African debt relief measures is rooted in the Roman-Dutch law and the English law, since the modern South African law has been influenced and shaped by both the English law and Roman law.[86] For the purposes of this research, the history of statutory debt relief measures in South Africa was traced from 1777 to date. This is because in 1777, the Amsterdam Ordinance of 1777 was passed into law, and it played a cardinal role in the modelling and formal development of the South African insolvency law, including debt relief measures.[87] There were two debt relief measures available in terms of the Roman-Dutch law in South Africa, namely, *surchéance van betaalinge* and *cessio bonorum*.[88] *Surchéance van betaalinge* was a moratorium providing for the postponement of payment by debtors who could not pay their creditors timeously owing to circumstances not of their own doing.[89] *Cessio bonorum* was a way in which a debtor could obtain debt relief through the benefit or relief of cession of goods and property by surrendering his estate to his creditors in the place of execution against his body or person.[90] *Surchéance van betaalinge* and *cessio bonorum* continued to exist until they were both repealed by the passing of the Cape Ordinance 6 of 1843 which had its basis in English law.[91]

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86 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, 62; Calitz J "Historical Overview of State Regulation of South African Insolvency Law" 2010 *Fundamina* 1, 9; PhJ Thomas, CG Van der Merwe and BC Stoop *Historical Foundations of South African Private Law* 2nd ed (Lexis Nexis Durban 2000) 15.

87 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) 9; *Fairlie v Raubenheimer* 1935 AD 135 at 146.

88 Bertelsmann *et al Mars The Law of Insolvency* 9; Smith C *The Law of Insolvency* 3rd ed (Lexis Nexis Butterworths Durban 1988) 6; Coetzee H *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* (LLD thesis University of Pretoria 2015) 108.

89 Henning JJ "Aspects of *Surcheance van Betaalinge* in Moratory Law and the Law of Insolvency" 1991 *THRHR* 526, 526.

90 Bertelsmann *et al Mars The Law of Insolvency* 9; Smith The Law of Insolvency 6; Coetzee A Comparative Reappraisal of Debt Relief Measures 108.

91 See section 2 of the Cape Ordinance 6 of 1843; *Newcombe v O'Brien* 20 EDC 296; Bertelsmann *et al* Mars *The Law of Insolvency* 9; Smith The Law of Insolvency 6; Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 108.

In 1843 when the Cape Ordinance was passed, it made provision for voluntary surrender of the debtor's estate[92] as well as compulsory sequestration by the creditor for the benefit of the debtor's creditors.[93] Voluntary surrender and compulsory sequestration continued to remain in force until they were adopted into law under the Union of South Africa.

Shortly after the Union of South Africa was formed in 1910, the British government repealed all insolvency statutes and debt relief measures in all provinces, and it enacted the *Insolvency Act* 32 of 1916.[94] Although the 1916 Act repealed all insolvency statutes in all provinces, it maintained voluntary surrender of the estate by the debtor himself.[95] Moreover, compulsory sequestration on a petition by creditors was also retained.[96] Debt relief measures under the 1916 Act was called statutory 'boedelafstand'.[97] However, this debt relief measure was abused by debtors, and its applicability was only limited to 1916.[98]

Following the repeal of the 1916 Act, various statutes such as the *Insolvency Act* 24 of 1936,[99] the *Magistrates' Courts Act,*[100] and the *National Credit Act*[101] have since been enacted for the regulation of statutory debt relief measures in South Africa. These three pieces of legislation are the ones currently regulating debt relief measures in South Africa, and they form a great part of the discussions of debt relief measures in this research. This research aims to explore the possible challenges and flaws affecting the enforcement of debt relief provisions of the *Insolvency Act*, the *Magistrates' Courts Act,* and the *NCA*. Moreover, this research aims to explore whether the current debt relief measures in South Africa are robust enough to provide debt relief to the poor and low-

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92 Section 2 of Ordinance 6 of 1843; Roestoff M *'n Kritiese Evaluasie van Skuldverligtingsmaatreëls vir Individue in die Suid-Afrikaanse Insolvensiereg* (LLD-dissertation University of Pretoria 2002) 323.

93 Section 5 of Ordinance 6 of 1843; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 9; Nathan M *South African Insolvency Law* (3rd ed Hortors Johannesburg 1928). Evans RG "Friendly Sequestrations, the Abuse of the Process of Court and Possible Solutions for Overburdened Debtors" 2001 *SA Merc LJ* 485.

94 *Insolvency Act* 32 of 1916 (1916 Act).

95 Section 3 of the 1916 Act.

96 Section 9 of the 1916 Act.

97 Roestoff *'n Kritiese evaluasie* 327; Bertelsmann *et al Mars The Law of Insolvency* 12.

98 Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 42.

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

100 *Magistrates' Courts Act* 32 of 1944 (*Magistrates' Courts Act*), see section 74; Pete et al *Civil Procedure: A Practical Guide* 406-409.

101 34 of 2005 (*NCA*), see sections 85-87; Nagel *et al Commercial Law* 319-320.

income earners. Before delving into this exploration, it is necessary, for the purposes of providing context, that this research discusses the historical aspects of debt relief measures in South Africa.

This chapter seeks to trace the history of how debt relief was conducted in the past in South Africa. It provides an explanation of how debtors were relieved of their debts in the past. This is done by discussing the methods and approaches to debt relief that were used in the past as well as the strengths and weaknesses of those measures.

## *2.2 Debt relief prior Union of South Africa legal framework*

### *2.2.1 Debt relief measures which were available under the Roman – Dutch Law*

South African insolvency law regarding debt relief measures has its basis on the Roman – Dutch law, particularly the Amsterdam Ordinance of 1777,[102] which is viewed as the foundation of South African insolvency law.[103] Since it regards debt relief measures, the Amsterdam Ordinance is essential because it established two debt relief measures available in terms of the Roman – Dutch law, namely, *surchéance van betaalinge* and *cessio bonorum*.[104] The *surchéance van betaalinge* and *cessio bonorum* debt relief measures were primarily administered by the *Desolate Boedelkamer,* which was an institution that dealt with administrating sequestrated estates.[105]

The right of *surchéance van betaalinge* broadly referred to a favour which the state would grant a debtor to have payment of their debts suspended for a year.[106] Put differently, *surchéance van betaalinge* was a moratorium providing for the postponement of payment by debtors who could not pay their creditors timeously owing

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102 *Fairlie v Raubenheimer* 1935 AD 146; sections 41 and 42 of the Amsterdam Ordinance of 1777 gave recognition to the concept of rehabilitation. Rehabilitation afforded the debtor a chance of obtaining a discharge from all his or her pre-sequestration debt where majority of the creditors agreed to it.

103 Smith *The Law of Insolvency* 6; *Fey NO and Whiteford NO v Serfontein* 1993 (2) SA 605 (A); Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 106.

104 Bertelsmann *et al Mars The Law of Insolvency* 9; Smith *The Law of Insolvency* 6; Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 108.

105 Coetzee *A Comparative Reappraisal of Debt Relief Measures in South* Africa 105.

106 Bertelsmann *et al Mars The Law of Insolvency* 9; Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 106.

to circumstances, not of their own doing.[107] Henning points out that *surchéance van betaalinge* have survived several reforms and codifications in the Dutch insolvency law.[108] Moreover, *surchéance van betaalinge* was developed as a viable alternative to sequestration to provide debt relief by means other than sequestration.[109]

One of the strengths of the right of *surchéance van betaalinge* was that, when the debtor's financial position did not improve after the moratorium, the debtor was granted a discharge from their debts.[110] As was intended by this measure, the suspension of payment of debts for a year was essentially done to allow a debtor to improve their financial position to enable them to pay their creditors.[111] *Surchéance van betaalinge* was, however, later abused by dishonest debtors who wanted to avoid payment of their debts even when they had the means to do so.[112]

*Cessio bonorum* did not provide a debtor with a discharge of debts but rather exempted him from being arrested, imprisoned, or being subjected to slavery and shame.[113] The process of obtaining debt relief through *cessio bonorum* entailed a debtor making a declaration or letter directed to his creditors to inform them of his intention to avail himself to benefit from the cession of his estate to gain relief.[114] When comparing the effect of the cession of one's goods on the one hand, and the shame of imprisonment and slavery on the other, the researcher submits that *cessio bonorum* was more dignified.

One of the flaws of *cession bonorum* was that it did not provide the debtor with a discharge of his debts.[115] The ffailure to provide a discharge of debt to a debtor created uncertainty because it was not clear if the debtor could obtain credit in the future without having been discharged from their debts.[116] Moreover, it was not clear if the

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107 See Henning "Aspekte van surchéance van betaalinge in die respyt- en insolvensiereg" 1991 *THRHR* 526-528 for a discussion on the right of *surchéance van betaalinge*.
108 Henning 1991 *THRHR* 523.
109 Henning 1991 *THRHR* 526.
110 Henning 1991 *THRHR* 526.
111 Henning 1991 *THRHR* 526.
112 Henning 1991 *THRHR* 526; Bertelsmann *et al Mars The Law of Insolvency* 6.
113 Bertelsmann *et al Mars The Law of Insolvency* 6.
114 Bertelsmann *et al Mars The Law of Insolvency* 7.
115 Bertelsmann *et al Mars The Law of Insolvency* 6.
116 Bertelsmann *et al Mars The Law of Insolvency* 6.

debtor was indeed free from financial distress by surrendering his estate to his creditors. Ideally, any form of debt relief afforded to a debtor should relieve him from financial distress.

### *2.2.2 Debt relief measures under the Cape Ordinance 6 of 1843 based on the English Law*

From 1826 to 1831, a number of ordinances were passed in the Cape Colony. All of those ordinances that were passed during that period kept alive the two debt relief measures available at the time, namely, *surchéance van betaalinge* and *cessio bonorum*.[117] It was until the passing of the Cape Ordinance 6 of 1843 that *surchéance van betaalinge* and *cessio bonorum* remained in force as debt relief measures.[118] Ordinance 6 of 1843 repealed both the right of *surchéance van betaalinge*[119] and *cessio bonorum.*[120] The reasons behind the repeal of the *surchéance van betaalinge* and *cessio bonorum* were mainly because the Colony wanted the insolvent estates to be administered under one uniform system of law.[121] The Ordinance made it possible for a debtor to obtain a voluntary surrender of his or her estate.[122] In addition to this, the Ordinance permitted compulsory sequestration by the creditors for their benefit.[123] According to Bertelsmann, this Ordinance is often viewed as a breakthrough in the South African law of insolvency.[124] To this end, it was adopted in the other provinces, including Natal, Transvaal and Orange Free State.[125]

One of the strengths of the Cape Ordinance was that, in addition to the introduction of voluntary surrender of a debtor's estate and compulsory sequestration by creditors, it

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117 Bertelsmann et al Mars The Law of Insolvency 9; Smith The Law of Insolvency 6; Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 108.

118 Bertelsmann et al Mars The Law of Insolvency 11; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 9.

119 See *Newcombe v O'Brien* 20 EDC 296.

120 Section 2 of Ordinance 6 of 1843.

121 Roestoff 'n Kritiese evaluasie 323.

122 Section 2 of Ordinance 6 of 1843.

123 Section 5 of Ordinance 6 of 1843; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 9. Nathan M *South African Insolvency Law* (3rd ed Hortors Johannesburg 1928); Evans RG "Friendly Sequestrations, the Abuse of the Process of Court and Possible Solutions for Overburdened Debtors" 2001 *SA Merc LJ* 485.

124 Bertelsmann et al, Mars *The Law of Insolvency* 11; Coetzee *A Comparative Reappraisal of Debt Relief Measures* 105.

125 Bertelsmann et al Mars *The Law of Insolvency* 11.

also made provision for rehabilitation.[126] 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[127] or through statutory composition.[128] A discharge of pre-sequestration debts meant that a debtor was no longer obligated to pay the creditors that which they owed before sequestration and they could then have financial freedom.[129] The fact that rehabilitation was possible if the majority of creditors agreed to it shows that the debtor's financial freedom was at the mercy of the creditors.

The fact that rehabilitation was possible if the majority of creditors agreed to it shows that the debtor's financial freedom was at the mercy of the creditors.[130] The Ordinance required that both voluntary surrender and compulsory sequestration be for the benefit of the creditors. This requirement of benefit to creditors stood as an insurmountable hurdle preventing access to debt relief for debtors who could not prove advantage or benefit for creditors.

### *2.3 Debt relief under the Union of South Africa*

#### *2.3.1 Insolvency Act of 1916*

After the Union of South Africa was formed in 1910, the British government embarked on a process of repealing all insolvency statutes in all provinces, and it enacted and passed the *Insolvency Act* 32 of 1916.[131] The hand of the Cape Ordinance was extended into the 1916 Act. This was evidenced by the strong similarities that these two pieces of law had regarding sequestration of an insolvent estate.[132] Accordingly, the 1916 Act maintained voluntary surrender of estate by the debtor himself[133] as well as

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126 Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 106; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 9.

127 Section 117 and section 120 of the Cape Ordinance 6 of 1843; Coetzee *A Comparative Reappraisal of Debt Relief Measures* 106.

128 Section 106 of the Cape Ordinance 6 of 1843; Coetzee *A Comparative Reappraisal of Debt Relief Measures* 106; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 9.

129 *Fey N.O. and Another v Serfontein and Another* (244/92) [1993] ZASCA 8; [1993] 2 All SA 137 (A) (26 February 1993).

130 Bertelsmann *et al Mars The Law of Insolvency* 11.

131 *Insolvency Act* 32 of 1916 (1916 Act).

132 Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 106.

133 Section 3 of the 1916 Act.

compulsory sequestration on a petition by creditors.[134] The 1916 Act also made provision for a debt relief measure, namely, statutory 'boedelafstand'. Statutory 'boedelafstand' in terms of the 1916 Act was misused by debtors; hence, it does not form part of the current Insolvency Act of 1936.[135] Consequently, statutory *boedelafstand* was not considered to form part of the current *Insolvency Act* of 1936.[136]

One crucial and noteworthy feature of the 1916 Act was the fact that there was no need to prove any advantage to creditors for the purposes of voluntary sequestration.[137] The courts viewed this development as a true debt relief measure at the time.[138] The exclusion of proof of advantage to creditors in the 1916 Act was a clear demonstration that the Act sought to provide access to debt relief for the low-income earners who did not have property or income to prove an advantage to creditors. Consequently, the researcher submits that the 1916 Act was, to a certain extent, considerate of the need for low-income earners who could not prove an advantage to creditors in order to access debt relief. In contrast to the voluntary surrender which did not require proof of advantage to creditors, compulsory sequestration required that there be proof of advantage to creditors for a debtor to be sequestrated.[139] Notably, the advantage requirement featured for the first time in a statute in South African law under the 1916 Act.[140] Although the negative effect of the advantage requirement was not apparent before 1936 plausibly because low-income earners could rely on voluntary surrender for debt relief, this requirement has become a problem for low-income earners today. It, therefore, suffices to say that some of the reasons debtors who cannot prove an advantage to creditors are excluded from sequestration proceedings today, emanated from the 1916 Act.

Further interesting attributes of the 1916 Act were that it did not require the creditors to vote on whether the debtor qualified for rehabilitation[141] and the creditors' majority

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134 Section 9 of the 1916 Act.
135 Coetzee A *Comparative Reappraisal of Debt Relief Measures in South Africa* 106.
136 Coetzee *A Comparative Reappraisal of Debt Relief Measures* 106.
137 Section 3 of the 1916 Act.
138 *Ex parte Terblanche* 1924 TPD 172.
139 Section 9 of the 1916 Act.
140 Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 10.
141 Section 108 of 1916 Act.

vote instead of a statutory composition was relaxed.[142] The exclusion of a requirement of obtaining a majority vote of creditors for rehabilitation was a positive development for debtors who had obtained a sequestration order through voluntary surrender of their estates.[143] This meant that debtors, including low-income earners, could easily obtain rehabilitation without being at the mercy of creditors to vote for the debtor's rehabilitation. In the same sense, debtors could also enter into statutory composition and avoid sequestration proceedings, which ordinarily take long to come to an end and ultimately rehabilitate a debtor.

Another important and positive development of the 1916 Act was the fact that it made no provision for civil imprisonment of debtors who were not rehabilitated.[144] Accordingly, debtors, including low-income earners who were not rehabilitated were not susceptible to being imprisoned for not paying off their debts which were due to creditors.

### *2.4 Conclusion*

From the above discussion, the researcher seeks to show the historical developments on how debt relief was conducted in the past up to date in South Africa. From a historical point of view, lack of robust and inclusive debt relief measures has always been a plight of low-income earners. Historically, complex and strict access requirements to debt relief measures that were used in the past have rendered those debt relief measures inaccessible and untenable to low-income earners who could not satisfy those requirements. The poor and low-income earners continue to be excluded by authorities even in the contemporary time to access debt relief.

In the next chapter, the researcher discusses the statutory sequestration order in terms of the *Insolvency Act.*[145] This is done to outline the advantages and disadvantages of a statutory sequestration order under the *Insolvency Act* from a debt relief perspective. Moreover, the next chapter aims to suggest possible improvements to make debt relief

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142 Section 105 of the 1916 Act.

143 Section 3 of the 1916 Act excluded the advantage requirement for obtaining a sequestration order by means of a debtors' voluntary surrender of his estate.

144 Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 106.

145 Sections 3-12 of the *Insolvency Act*; Sharrock R, Van der Linde K and Smith A *Hockly's Insolvency Law* 9th ed (Juta Cape Town 2012) 17-59.

more accessible and viable to low-income earners to help them utilise sequestration order for debt relief. This is owing to the fact that in practice, sequestration proceedings offer little or no relief at all.

## CHAPTER THREE

## DEBT RELIEF MEASURES UNDER THE INSOLVENCY ACT 24 of 1936

### *3.1 Introduction*

The *Insolvency Act*[146] makes provision for a debtor's estate to be sequestrated in terms of a sequestration order. A sequestration order as defined by the *Insolvency Act* refers to an order of the court in terms of which an estate is sequestrated and includes a provisional order when it has not been set aside. [147] Accordingly, there are two ways in which a debtor's estate may be sequestrated. First, it is the voluntary surrender in which a sequestration order may be obtained if the debtor himself or his agent applies to the High court to have the debtor sequestrated.[148] Secondly, it is the compulsory sequestration wherein a debtor's creditor or creditors can apply to the High court to have the debtor's estate sequestrated.[149] Currently, it has become a common practice for a debtor to arrange with a friend who is a creditor to apply for a debtor's sequestration, through what is generally referred to as friendly sequestration.[150] Friendly sequestration is not recognised as a standalone class of sequestration, because it forms part of compulsory sequestration.[151] Voluntary surrender[152] and compulsory sequestration[153] can be classified as debt relief measures because they afford the debtor a certain form of relief from their debts by providing him/her with a debt discharge from pre-sequestration debts and subsequent rehabilitation.[154]

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146 *Insolvency Act* 24 of 1936 (Insolvency Act).

147 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.

148 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.

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

150 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.

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

152 Sections 3 to 7 of the *Insolvency Act*; Temperman E *The Judiciary's Discretion in Sequestration Applications* (LLM-dissertation University of Pretoria 2014) 17-23.

153 Sections 9 to 12 of the *Insolvency Act*; Temperman *The Judiciary's Discretion in Sequestration Applications* 23-29.

154 Evans RG "Friendly Sequestrations, the Abuse of the Process of Court, and Possible Solutions for Overburdened Debtors" 2001 *SA Merc LJ* 485, 486; *Vermeulen v Hubner* TPD case no1165/1990.

For a debtor to utilise a sequestration order for debt relief, there are certain requirements that have to be met. Whether the debtor obtains a sequestration order voluntarily by surrendering his or her estate or through the creditor applying for the debtor's sequestration, in either case, a sequestration order cannot be granted in South Africa unless it is proven that it is advantageous to creditors.[155] Moreover, an application for sequestration order can only be instituted by way of application to the High court.[156] Therefore, it suffices to say that this makes sequestration even more expensive for debtors, including low-income earners who often have no assets at all or sufficient assets to cover sequestration costs and/or prove advantage to the creditors.

In this chapter, the researcher discusses the statutory sequestration order in terms of the *Insolvency Act.* This is done to outline the strengths and weaknesses of the statutory sequestration order in terms of the *Insolvency Act*.

## *3.2 Voluntary surrender*

A sequestration order may be obtained through a voluntary surrender of the debtor's estate. The *Insolvency Act* affords a debtor or his agent the possibility to apply to the High Court for the acceptance of the surrender of a debtor's estate.[157] It should, however, be noted that before the court may grant a sequestration order, all the procedural and substantive requirements for a voluntary surrender of a debtor's estate must be met.[158] The substantive requirements are, firstly, that the debtor must be insolvent.[159] Secondly, the debtor should own realisable property sufficient to defray the sequestration costs payable out of the free residue of the estate.[160] Thirdly, the

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155 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) paras 3.30 and 5.35; see also Mabe Z "Alternatives to Bankruptcy in South Africa That Provides for a Discharge of Debts: Lessons from Kenya" 2019 *PELJ* 1, 4.

156 Section 149(1) of the *Insolvency Act* sets out that the High Court has jurisdiction to grant sequestration orders; the position is also regulated by Rule 6 of the Uniform Rules of the High Court.

157 Section 3(1) of the *Insolvency Act*; Sharrock *et al Hockly's Insolvency Law* 17.

158 Section 6(1) of the *Insolvency Act*; Meskin PM and Kunst JA *Insolvency Law* (Lexis Nexis Durban 2014) para 3.2.

159 The debtor is said to be insolvent when his liabilities exceed his assets; see *Ex parte Harmse* 2005 1 SA 323 (N) 325; *Venter v Volkskas Ltd* 1973 3 SA 175 (T) 179.

160 Section 2 of the *Insolvency Act* defines free residue as the unencumbered portion of assets of the estate; section 97 of the *Insolvency Act* provides that sequestration costs includes both the costs of the surrender as well as the general costs of administration.

sequestration will be to the advantage of creditors.[161] Lastly, the court should also satisfy itself that all the formalities in terms of section 4 of the *Insolvency Act* have been complied with. The preliminary formalities set out in section 4 of the *Insolvency Act* are procedural in nature.[162] The formalities are the notice of intention to surrender,[163] notice to creditors and other parties[164] and preparation and lodging of the statement of affairs.[165] The onus of proving the requirements for a voluntary surrender of the debtor's estates lies on the debtor who is applying for a voluntary surrender.[166]

### *3.3 Compulsory sequestration*

The other way in which a debtor's estate may be sequestrated and debt relief is subsequently offered under the *Insolvency Act* is compulsory sequestration.[167] The difference between a compulsory sequestration and a voluntary sequestration is that on the one hand, an application for a voluntary surrender is made by the debtor himself or his agent, and on the other hand an application for a compulsory sequestration is made by one or more of the debtor's creditors.[168]

Before the court makes an order for compulsory sequestration of the debtor's estate, it must be satisfied that the requirements for the granting of such a sequestration order have been met. The requirements for a compulsory sequestration order are, firstly, that the applicant should be a creditor with a liquidated claim against the debtor of no less than R100, or two or more creditors who have liquidated claims against the debtor to an aggregate amount no less than R200.[169] Secondly, the debtor should have

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161 Section 10(c) of the *Insolvency Act*; Temperman *The Judiciary's Discretion in Sequestration Applications* 24-25.

162 Mokgorwane *The Interplay between National Credit Act and Insolvency Act* 23.

163 Section 4(1) of the *Insolvency Act*; Sharrock *et al Hockly's Insolvency Law* 20; Meskin and Kunst *Insolvency Law* para 3.2.

164 Section 4(2) of the *Insolvency Act*; Sharrock *et al Hockly's Insolvency Law* 21; Meskin and Kunst *Insolvency Law* para 3.2.

165 Section 4(3) of the *Insolvency Act*; Sharrock *et al Hockly's Insolvency Law* 22 Meskin and Kunst *Insolvency Law* para 3.2.

166 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.

167 Sharrock *et al Hockly's Insolvency* Law 33.

168 Sharrock *et al Hockly's Insolvency Law* 33.

169 Sections 9(1) and 9(3) of the *Insolvency Act*; see *Meyer v Batten* 1999 1 SA 1041 (W).

committed an act of insolvency.[170] Thirdly, there must be a reason to believe that sequestration will be to the advantage of creditors.[171] Lastly, there must be compliance with the prescribed formalities in terms of the *Insolvency Act*.[172]

### *3.4 Friendly sequestration*

Another way in which a debtor may have his or her insolvent estate sequestrated is by means of a friendly sequestration. Essentially, friendly sequestration is a way by which a debtor can release himself or herself from his or her debts.[173] Friendly sequestration occurs when a debtor agrees to have his or her estate sequestrated by an amicable creditor.[174] For instance, the debtor may arrange with a friend whom he owes a debt and who is unable to pay that the debtor will commit an act of insolvency so that the creditor may apply for compulsory sequestration on the basis thereof. However, the mere fact that a compulsory sequestration application was made by a creditor who is willing to co-operate with the debtor does not amount to a friendly sequestration.[175]

When enforcing friendly sequestrations, the courts have to guard against the abuse of friendly sequestration by the applicants concerned who may want to avoid civil proceedings. Put differently, the courts have to scrutinize friendly sequestrations to ensure that they ascertain the benefits to the creditors and prevent any prejudice to creditors.[176] Accordingly, as was set out in *Mthimkhulu v Rampersad and Another,*[177] courts must verify certain factors before granting an order for friendly sequestration. These factors include, *inter alia*, the locus standi of the creditor, the nature of the debt, documentary evidence provided by the creditor, and full details of the debtor's assets

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170 See section 8 of the *Insolvency Act* which provides for various instances which constitute an act of insolvency.

171 Section 12(1) of the *Insolvency Act*; Meskin and Kunst *Insolvency Law* para 3.2.

172 Section 9 of the *Insolvency Act*.

173 *Estate Logie v Priest 1926* AD 312, 319; Evans RG "Friendly sequestrations, the abuse of the process of court, and possible solutions for overburdened debtors" (2001) 13 SA Merc LJ 485; Smith C *The Law of Insolvency* 3rd ed (1988) 74 – 77.

174 *Smith v Porrit & Others* 2008 (6) SA 303 (SCA) 308.

175 *Esterhuizen v Swanepoel & Sixteen other cases* 2004 (4) SA 89 (W) 91.

176 Boraine A & Roestoff M "Fresh Start Procedures for Consumer Debtors in South African Bankruptcy Law" (2002) 11 *INSOL International Insolvency Review* 1, 6; *Epstein v Epstein* 1987 4 SA 606 (C), *Graggs v Dedekind* 1996 1 SA 935 (C), *Ex Parte Steenkamp* 1996 3 SA 822 (W); *Van Eck v Kirkwood* 1997 1 SA 289 (SE); *Greub v The Master and Others* 1999 1 SA 746 (C).

177 *Mthimkhulu v Rampersad & Another (BOE Bank Ltd, intervening creditor)* 2000 3 All SA 512 (N) 514; see also *Beinash and Co v Nathan (Standard Bank of South Africa Limited intervening*) 1998 3 SA 540 (W).

which can be sold.[178] Where a creditor proves to the courts that the parties concerned in a proposed friendly sequestration are acting collusively to his detriment, the courts will not approve the application for such a friendly sequestration.[179]

### *3.5 Advantages of a sequestration order under the Insolvency Act*

#### *3.5.1 Rehabilitation and Discharge of debt*

A person's sequestration comes to an end upon his rehabilitation. The *Insolvency Act* does not define the concept of rehabilitation. Amongst other things, rehabilitation allows the insolvent person to make a fresh start, free from all his pre-sequestration debts as well as the restrictions placed on him upon sequestration.[180] Rehabilitation of an insolvent person may take place automatically after ten years from the date of sequestration[181] or earlier when the insolvent person applies to the High Court.[182] It must be noted that even where the provisions of the *Insolvency Act*, which regulate rehabilitation have been complied with, a court may still refuse to grant rehabilitation.[183] In other words, the insolvent person does not have a right to rehabilitation because rehabilitation is dependent on the exercise of the court's discretion.[184] The court's discretion is exercised based on whether or not the insolvent person is worthy of being allowed to trade like any other honest person.[185]

The circumstances, under which the insolvent person seeks an order of rehabilitation within ten years, include when such an insolvent person has received a certificate from

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178 *Nel v Lubbe* 1999 (3) SA 109 (W) 111.

179 See *Mthimkhulu v Rampersad & Another (BOE Bank Ltd, intervening creditor)* 2000 3 All SA 512 (N) 514; *Kuhn v Karp* 1948 4 SA 825 (T) 827; see also Smith C *The Law of Insolvency* 3rd ed (Lexis Nexis Butterworths Durban 1988), Collusion consists of an agreement between the sequestration creditor and the debtor to suppress facts or to put false evidence before the court or to manufacture evidence in order to make it appear to the court that one of the parties has a cause of action or a ground of defence which, in fact, he has not.

180 Section 129(1)(b) of the *Insolvency Act*; Asheela NV *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* (LLM dissertation University of Pretoria 2012) 19.

181 Section 127A (1) of the *Insolvency Act*; *Sharrock et al Hockly's Insolvency Law* 208. The ten-year period runs from the date of provisional sequestration, see *Grevler v Landsdown en 'n ander NNO* 1991 (3) SA 175 (T).

182 Section 124(3)(b) of the *Insolvency Act*; Sharrock *et al Hockly's Insolvency Law* 208.

183 Section 127(2) of the *Insolvency Act*; *Ex parte Woolf* 1958 (4) SA 190.

184 *Ex parte Hittersay* 1974 (4) SA 326 (SWA); see also *Ex parte Fourie* [2008] 4 All SA 340 (D) where the court (at para 39) stated that 'frankness and a full disclosure of all relevant facts' are required.

185 Bertelsmann *et al Mars The Law of Insolvency* 575; see also *Ex parte Heydenreich* 1917 TPD 657 658 and *Ex parte Le Roux* 1996 2 SA 419 (C) 424.

the Master to the effect that creditors have agreed to enter into a composition of not less than 50 cents in the rand for the concurrent proven claim against the estate.[186] An insolvent person can also apply for an order of rehabilitation twelve months after confirmation by the Master of the first account in the estate,[187] unless he has been sequestrated before or has been convicted of a fraudulent activity related to his insolvency.[188] An insolvent person can apply for rehabilitation six months after sequestration if no claim has been proved against his estate,[189] or he has not been convicted of any offence and he has not been sequestrated before.[190] An insolvent person may apply for an order for rehabilitation if all the proven claims against the estate have been paid in full.[191]

Sequestration proceedings constitute a primary debt relief measure because it is the only form of debt relief that offers a discharge of debt.[192] A debt discharge refers to the provision of some form of discharge of indebtedness, rehabilitation or a fresh start for the debtor.[193] Debt discharge is the most significant strength of a sequestration order and rehabilitation in terms of the *Insolvency Act*. One of the effects of a debtor's rehabilitation is the discharge of all his pre-sequestration debts.[194] The meaning of a debt discharge is that if there is any balance payable to the creditors after deducting the dividends for creditors by the trustee, the creditors cannot enforce any further payment against the debtor by means of any legal process.[195] In other words, rehabilitation has the effect of putting an end to sequestration of a debtor's estate and

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186 Section 124(1) of the *Insolvency Act*; Sharrock *et al Hockly's Insolvency Law* 209.

187 Section 124(2)(a) of the *Insolvency Act*; Sharrock *et al Hockly's Insolvency Law* 217.

188 Section 124(2)(c) of the *Insolvency Act* provides that where an insolvent has been convicted of fraud related to his insolvency, or of an offence under section 132, 133 or 134 of the *Insolvency Act*, he must wait for a period of five years from the date of his conviction before he can apply for rehabilitation.

189 Section124(3)(b) of the *Insolvency Act*; Leathern R *Consideration of the Proposed Debt Intervention Procedure from a Debt Relief Perspective* (LLM-dissertation University of Pretoria 2018) 19.

190 Section 124(3) of the *Insolvency Act*; Sharrock *et al Hockly's Insolvency* Law 208.

191 Section 124(5) of the *Insolvency Act*; *Ex parte Oosthuizen* (unreported, NWM case no 607/12, 12 July 2012); see also *Ex parte van Zyl* 1991 (2) SA 313 (C).

192 Coetzee H *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* (LLD thesis University of Pretoria 2015) 142 and 101.

193 INSOL *International Consumer Debt Report II* (INSOL London 2011) 13; Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 36; see also Leathern *Consideration of the Proposed Debt Intervention Procedure* 15.

194 Section 129(1)(b) of the *Insolvency Act*; Leathern *Consideration of the Proposed Debt Intervention Procedure* 19.

195 Fletcher IF *The Law of Insolvency* (Sweet and Maxwell London 4th ed 2011) 48.

relieving him of every condition which came as a result of sequestration.[196] Moreover, upon rehabilitation, a debtor can be reinvested of his estate where a composition provides for this[197] and where rehabilitation order was granted because there were no proven claims within six months of sequestration.[198] Coetzee notes that debt discharge is not a guarantee but merely an effect of an order for rehabilitation.[199] Therefore, it suffices to submit that since debt discharge is only incidental to rehabilitation, it is not the main aim of a sequestration order.[200]

Rehabilitation and debt discharge in terms of the *Insolvency Act* show that to a certain extent the South African insolvency law is in compliance with principles of insolvency as espoused by the World Bank which, among other things, include to re-establish the debtor's economic capability and thus, afford them an economic rehabilitation.[201] Although rehabilitation and debt discharge are noted as the strengths of a sequestration order in this study, access to these remains a challenge for low-income earners who cannot prove advantage to creditors, contrary to international principles of consumer insolvency.

### *3.6 Disadvantages of a sequestration order in terms of the Insolvency Act*

#### *3.6.1 The requirement for proving advantage to creditors is difficult for consumers to comply with*

The concept of advantage to creditors is an important aspect of the South African insolvency law, in that it applies to all sequestration proceedings that are instituted in South Africa.[202] Consequently, the *Insolvency Act* requires that there should be proof of

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196 Section 129(1) of the *Insolvency Act*; Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 144; Sharrock *et al Hockly's Insolvency Law* 217.

197 Section 120(2) of the *Insolvency Act*; Sharrock *et al Hockly's Insolvency Law* 217.

198 Section 129(2) of the *Insolvency Act*; Sharrock *et al Hockly's Insolvency Law* 217.

199 Coetzee *A Comparative Reappraisal of Debt Relief Measures in South* Africa 101.

200 See *Ex parte Pillay; Mayet v Pillay* 1955 (2) SA 311 (N); other related cases include *Fesi v Absa Bank Ltd* 2000 (1) SA 502 (C); *Ex parte Ford* 2009 (3) SA 383 (WCC) and *Ex parte Shmukler-Tshiko* 2013 JOL 2999 (GSJ) in general. 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* 351, 365 and 371 for a discussion of the latter case.

201 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 359.

202 Chitimira 2019 *THRHR* 342.

advantage to creditors in voluntary surrender and the petitioning creditor must show a reasonable belief that sequestration will be to the advantage to creditors for compulsory sequestration.[203] Notwithstanding the significance of the requirement of advantage to creditors in sequestration proceedings, the *Insolvency Act* does not expressly define what this requirement entails. The focus of this paper, however, is concerned with the meaning of the requirement of advantage to creditors in as far as access to sequestration proceedings by low-income earners in South Africa is concerned.

Under voluntary surrender, a debtor is required to prove that sequestration will be to the advantage of creditors.[204] This requirement is more difficult to prove in voluntary surrender than in compulsory sequestration.[205] The reasons for this are, first, that the debtor may be required to provide a detailed account of his financial position to prove that voluntary surrender will be advantageous to creditors. Secondly, to reduce the risk of abuse of sequestration proceedings by the debtor, where it is believed that sequestration will not be of real benefit to creditors. In that case, the courts are likely to reject the debtor's application if it is of little or no benefit to creditors.[206]

In compulsory sequestration, the court may not grant a provisional or final sequestration order unless it is of a view that there is a reason to believe that, if granted, sequestration of the debtor's estate will be to the advantage of creditors.[207] To establish whether sequestration will indeed be to the advantage of creditors, it must yield or be likely to yield some dividends towards the creditors.[208] Put differently, the requirement for advantage to creditors will be met if the court is satisfied that there will

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203 Sections 6(1), 10(c) and 12(1)(c) of the *Insolvency Act*; see also Kanamugire 2013 *Mediterranean Journal of Social Sciences* 28.

204 Section 6(1) read with section 3(1) of the *Insolvency Act*; *Sharrock et al Hockly's Insolvency Law* 19; Chitimira 2019 *THRHR* 343.

205 Boraine A and Roestoff M "Developments in American consumer bankruptcy law: lessons for South Africa (Part Two)" 2000 *Obiter* 241, 261; *Botha v Botha* 1990 (4) SA 580 (W) 581; *Sharrock et al Hockly's Insolvency Law* 20.

206 See *Stainer v Estate Bukes* 1933 OPD 86 90, where it was held that there are certain indirect advantages that could accrue to creditors. See also Kanamugire 2013 *Mediterranean Journal of Social Sciences* 25-26, for a discussion on indirect advantages of sequestration.

207 Section 10(c) and 12(1)(c) of the *Insolvency Act*; Temperman E *The Judiciary's Discretion in Sequestration Applications* (LLM-dissertation University of Pretoria 2014) 26; Loubser A "Making friends with Friendly Sequestrations" 1991 *Codicillus* 23; Boraine and Roestoff 2000 Obiter 261.

208 *Trust Wholesalers and Woollens (Pty) Ltd v Mackan* 1954 (2) SA 109 (N) 111; *Ex pater Bouwer and similar applications 2009* (6) SA 382 (GNP)386.

be some pecuniary benefit to the creditors.[209] Consequently, if after sequestration costs have been defrayed, there is no dividend available for the creditors, then there is no advantage to creditors.[210] The mere fact that there is a large amount of money left after payment of sequestration costs does not, in essence, mean that sequestration will be to the advantage of creditors.[211] In other words, there will be no advantage to creditors if sequestration of the debtor's estate does not result in a greater dividend than otherwise would be the case if there was no sequestration.[212] The onus of establishing an advantage to creditors is on the sequestrating creditors for compulsory sequestration proceedings.[213]

In proving the advantage to creditors, it is not necessary to provide proof that the debtor has any assets, however, it must at least be proven that the debtor either receives an income that can be made available to creditors[214] or that there is a reasonable prospect that the trustee might recover some assets which will yield a pecuniary benefit to creditors.[215] Although there may be some leniency by not requiring that there should be proof of having assets in satisfying the advantage to creditors, this leniency is short-lived in that a debtor must receive an income of which substantial portions thereof are to satisfy the pecuniary benefit of creditors. Consequently, the low-income earners who do not have both assets and any excess income which might be made available for distribution to creditors are bound to find it difficult to benefit from any debt relief in the form of a sequestration order because their sequestration will not yield any benefit to the creditors. In *Meskin & Co v Friedman,*[216] the court held that it must be satisfied that there is a reasonable prospect and not necessarily likelihood, with a prospect that is not too remote, that there will be some pecuniary benefit to

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209 *Fesi & another v Absa bank Ltd* 2000 1 Sa 499 (C) 505.

210 *London Estates (Pty) Ltd v Nair 1957* (3) SA 591 (D) 591; *Ex parte Steenkamp and related cases* 1996 (3) SA 822 (W).

211 *Lynn & Main Inc v Naidoo* 2006 1 SA 59 (N); see also Sharrock et al Hockly's Insolvency Law 43.

212 Pepler JJ *Advantage for Creditors in South African Insolvency Law – A Comparative Investigation* (LLM dissertation University of Pretoria 2013) 21-26.

213 *Wilkins V Pieterse* 1937 CPD 165.

214 Section 23(5) of the *Insolvency Act*; see also *Ressel v Levin* 1964 (1) SA 128 (C).

215 *Walker v Walker* [1998] 2 All SA 382 (W) 387; *Dunlop Tyres (Pty) Ltd v Brewitt* 1999 (2) SA 580 (W) 583; *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd*; *Commissioner, South African Revenue Services* v *Hawker Aviation Partnership & others* 2006 (4) SA 292 (SCA) 306.

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

creditors.[217] For low-income earners who have low income and have low assets, the prospect might be too remote and difficult to satisfy the *reason to believe* that there will be some pecuniary benefit to creditors, which will result in the sequestration of their estates.

In *BP Southern Africa (Pty) Ltd v Furstenburg,*[218] the court held that the purpose of the *Insolvency Act* insofar as sequestration proceedings are concerned, is aimed at obtaining a pecuniary benefit for the creditors.[219] For low-income earners who are in desperate need of debt relief in the form of a sequestration order, the same pecuniary benefit that is advantageous to the creditors is unfortunately disadvantageous to such low-income earners. This viewpoint was also highlighted in *Ex parte Pillay*[220] where the court stated that the purpose of a voluntary surrender is not for relief to the harassed debtors. Accordingly, the Supreme Court of Appeal in *Nel NO v Body Corporate of the Seaways Building*[221] held that the purpose of the *Insolvency Act* is not to deprive the creditors of their claims but merely to regulate the manner and extent of payments to such creditors.

In connection with this, Bertelsmann J made a remark in *Ex parte Ogunlaja*[222] in the context of the plight of the poor and low-income earners' inaccessibility of debt relief in the form sequestration orders. He stated that unless the *Insolvency Act* is amended, the South African insolvency law requires the advantage to creditors as a prerequisite of sequestration. Although the troubled economic times might prompt sympathy for the poor and low-income earners whose financial obligations have become too much to bear, the insolvency law remains protective of the interests of creditors to the extent that it requires proof of advantage to creditors before a sequestration order may be granted. It, therefore, suffices to submit that debt relief for the poor and low-income earners is not a primary consideration under a sequestration order because it is

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217 *Meskin & Co v Friedman* 1948 (2) SA 555 (W) 559.
218 *BP Southern Africa (Pty) Ltd v Furstenburg* 1966 1 SA 717 (O) 720.
219 *BP Southern Africa (Pty) Ltd v Furstenburg* 1966 1 SA 717 (O) 720; Coetzee *A Comparative Reappraisal of Debt Relief in South Africa* 4.
220 *Ex parte Pillay; Mayet v Pillay* 1955 2 SA 309 (N).
221 *Nel NO v Body Corporate of the Seaways Building* 1996 (1) SA 131 (A) 138.
222 *Ex parte Ogunlaja* [2011] JOL 27029 (GNP).

primarily aimed at obtaining advantage to creditors.[223] Accordingly, Evans submits that although the *Insolvency Act* does not expressly provide for different classes of debtors to be treated differently, it makes a differentiation between those who have something to offer to the creditors and those who do not.[224] Consequently, the *Insolvency Act* differentiates between the rich debtors who can prove the advantage to creditors and the poor who cannot.[225]

In the context of access requirements, the poor and low-income earners are excluded by the legislature from benefitting from debt relief in the form of a sequestration order merely because they do not have sufficient assets to prove the advantage to creditors.[226] Coetzee submits that this exclusion is discriminatory and unconstitutional.[227] This follows her argument that if all debtors are susceptible to become insolvent, it does not then make sense to enquire whether a debtor has sufficient means to 'buy' access. Accordingly, the requirement of advantage to creditors conflicts with the Constitution,[228] and it amounts to discrimination.[229]

### *3.6.2 Lack of out-of-court proceedings*

The requirement for advantage to creditors, as discussed above, is not the only barrier making it difficult for debtors, particularly the poor and low-income earners, to access debt relief in form of sequestration orders. This follows the fact that the *Insolvency Act*

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223 Asheela *The Advantage Requirement in Sequestration Applications* 37.

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

225 Evans RG "Law reform in respect of assets in insolvent estates in South Africa" 2010 *SA Merc LJ* 465-451; Asheela *The Advantage Requirement in Sequestration Applications* 37.

226 Evans RG "A brief explanation of consumer bankruptcy and aspects of the bankruptcy estate in the United States of America" 2010 *CILSA* 339; Leathern *Consideration of the Proposed Debt Intervention Procedure* 20.

227 Coetzee *A Comparative Reappraisal of Debt Relief in South Africa* 246.

228 Section 9 of the *Constitution of the Republic of South Africa*, 1996; 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; Coetzee *A Comparative Reappraisal of Debt Relief in South Africa* 246.

229 In *Harksen v Lane* 1998 (1) SA 300 (CC), the Constitutional Court set out a constitutional test of discrimination and differentiation. It was held that even in circumstances where the differentiation bears a logical connection that justifies a legitimate government purpose, such differentiation can still be equated to a discrimination.

does not make provision for an out-of-court debt relief mechanism.[230] Currently, for an insolvent debtor to be sequestrated, they must lodge an application in the High Court which requires one to have legal representation, which is often costly.[231] Furthermore, the process for rehabilitation in terms of the *Insolvency Act* must also be initiated in the High Court.[232] In this way, low-income earners are excluded from benefiting from or utilising a sequestration order for debt relief because such debtors do not have disposable income with which they can afford litigation costs and any other administration costs related to a sequestration order.[233]

The guidelines for modern debt relief measures, as supported by the World Bank require that there must be open and automatic access to debt relief.[234] Open access generally entails that an insolvent individual must gain access to an insolvency procedure that permits an ultimate discharge of debts.[235] Although this is the requirement adopted by the international community, sequestration order in terms of the *Insolvency Act* still falls short of this required standard. Other than proving the advantage to creditors,[236] access to debt relief in the form of a sequestration order is also curtailed by the fact that the proceedings are court-based. In theory, one can represent themselves in a court of law. However, in practice, this is not feasible because one would naturally have to seek legal representation, which further increases the cost for a sequestration order.[237]

Sequestration proceedings are, by nature, court-driven throughout from lodging an application for sequestration of a debtor's estate to rehabilitation of a debtor. This does

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230 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.

231 Section 3 of the *Insolvency Act*; see also Sharrock *et al Hockly's Insolvency Law* 7, for a discussion on jurisdiction of the High Court.

232 Section 149(1) of the *Insolvency Act* sets out which court has jurisdiction; the position is also regulated by Rule 6 of the HC Rules; see Manyuni *The Position of 'Low Income Low Asset' Debtors in South Africa* 10; Leathern *Consideration of the Proposed Debt Intervention Procedure* 18.

233 Section 125 *Insolvency Act* requires that the insolvent must provide security for the rehabilitation application, which creates a further financial impediment.

234 World Bank *Report* para 418; Leathern *Consideration of the Proposed Debt Intervention Procedure* 20.

235 World Bank *Report* para 18.

236 Sections 6(1), 10(c) and 12(1)(c) of the *Insolvency Act*; see also Kanamugire 2013 *Mediterranean Journal of Social Sciences* 28

237 Manyuni *The Position of 'Low Income Low Asset' Debtors in South Africa* 10; Leathern *Consideration of the Proposed Debt Intervention Procedure* 18.

not only have financial implications on the debtor, but there are also other considerations such as time and inconvenience caused to the debtor.[238] Although courts may have some advantages,[239] the World Bank notes that the court-based approach to debt relief has significant delays owing to issues such as case-flow management in courts as well as lack of specialization and ability to address socio-economic issues of debt.[240] In addition to access being curtailed by the court's discretion to either grant a sequestration order or not, the creditors are involved through participation in all the proceedings leading to the granting of a sequestration order, and they can oppose the application for sequestration. This is in contrast with the international guidelines on consumer insolvency which require less creditor involvement and participation in debt relief measures.[241] Therefore, from a debt relief perspective, unless an out-of-court debt relief measure is legislated, debtors, including low-income earners, will always be at the mercy of courts' discretion and their creditors in attaining debt relief in the form of sequestration orders.

## *3.7 Conclusion*

Statutory debt relief in the form of sequestration order as provided for in the *Insolvency Act* poses difficulties for debtors, including low-income earners, to prove the requirements. This is because, for voluntary surrender, the debtor must prove the advantage to creditors, and in compulsory sequestration (which includes friendly sequestration), there must be a reasonable belief that sequestration will be to the advantage of creditors. The requirement for advantage to creditors makes access difficult for low-income earners because most of those debtors have no assets or sufficient assets to prove this requirement. The *Insolvency Act* does not make provision for an out-of-court debt relief mechanism.[242] The fact that sequestration proceedings only take place in a court setting further makes debt relief in the form of a sequestration order more expensive and difficult to access.

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238 Leathern *Consideration of the Proposed Debt Intervention Procedure* 18.

239 World Bank *Report* para 162 states that courts can be beneficial in natural person insolvency because judges are trusted decision-makers and impartial.

240 World Bank *Report* para 163.

241 World Bank *Report* para 421.

242 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.

From the previous discussion on the advantages and disadvantages of the sequestration order in terms of the *Insolvency Act* in South Africa, it is clear that the weaknesses outweigh the strengths, and thus low-income earners find themselves excluded from benefitting from sequestration orders for debt relief. Despite the weaknesses allied with a sequestration order, rehabilitation has been identified as the positive aspect of sequestration proceedings because one of the effects thereof is a debt discharge for debtors. [243]

In the next chapter, the researcher analyses the administration order in terms of the *Magistrates' Courts Act* and pays particular attention to the requirements and possible advantages and disadvantages of the administration order as a debt relief measure in South Africa. The next chapter also discusses the accessibility and viability of the administration order to low-income earners in South Africa.

[243] Section 129(b) of the *Insolvency Act*; 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, 43*;* Coetzee *A Comparative Reappraisal of Debt Relief in South Africa* 101.

## CHAPTER FOUR

## DEBT RELIEF MEASURES UNDER THE MAGISTRATES COURTS ACT 32 OF 1944

### *4.1 Introduction*

The *Magistrates Courts Act*[244] provides for a statutory debt relief measure in the form of an administration order.[245] 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.[246] As such, an 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.[247] An administration order is also a debt relief measure aimed at helping debtors who are in financial distress whereby a *concursus creditorium* is created easily. Therefore, an administration order allows debt restructuring and rearrangement which is facilitated by the Magistrate Court.[248] In *Bafana Finance Mabopane v Makwakwa*,[249] 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. 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.

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244 *Magistrates' Courts Act* 32 of 1944 (*Magistrates' Courts Act*).

245 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.

246 Boraine A "Some Thoughts on the Reform of Administration Orders and Related Issues" 2003 *De Jure* 217, 225; Pete S, Hulme D, Palmer R, Sibanda O, Palmer T *Civil Procedure: A Practical Guide* 2nd ed (Oxford Cape Town 2013) 406; *Fortuin v Various Creditors* 2004 (2) SA 570 (C) 573; *Ex parte August* 2004 (3) SA 268 (W) 271.

247 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.

248 *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.

249 In *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.

This chapter provides an analysis of the administration order in terms of the *Magistrates Courts Act* and pays particular attention to the requirements and possible advantages and disadvantages of the administration order as a debt relief measure in South Africa. The chapter also discusses the accessibility and viability of this debt relief measure to the low-income earners in South Africa. This is done to look at possible gaps and flaws under the *Magistrates Courts Act,* which can be amended to help the low-income earners to utilise administration order for debt relief.

## *4.2 Access requirements for the administration order*

Although an administration order was enacted in the public interests to protect debtors with relatively small estates,[250] access to debt relief in the form of an administration is not guaranteed because there are certain requirements that must first be complied with before utilising an administration order for debt relief. 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[251] or does not have enough assets to be attached to satisfy a judgement debt.[252] Secondly, as a requirement, an administration order may only be granted in respect of a debtor whose debts do not exceed R50000.[253] These requirements are further discussed below as part of the advantages and disadvantages of an administration order.

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250 *Madari v Cassim* 1950 (2) SA 35 (D) 38; *Fortuin v Various Creditors* 2004 (2) SA 570 (C) 573; *Ex parte August* 2004 (3) SA 268 (W) 271.

251 Paterson TJM *Eckard's Principles of Civil Procedure in the Magistrates' Courts* 5th ed (Juta Cape Town 2005) 318.

252 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.

253 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 Z "Alternatives to Bankruptcy in South Africa That Provides for a Discharge of Debts: Lessons from Kenya" 2019 *PELJ* 1, 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.

### *4.3 The procedure for obtaining the administration order*

The application for an administration order requires a debtor to lodge a statement of affairs[254] and an affidavit made under oath with the clerk of the court to confirm the correctness of such a statement of affairs.[255] In the case of an illiterate debtor, a clerk of court must provide him or her with assistance in the completion of the statement of affairs.[256] The creditors are also involved in the procedure for obtaining an administration order in that the debtor is required to deliver a copy of the administration order together with a statement of affairs to the creditors.[257]

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.[258] The debtor's creditors may also sit in on the hearing for the application for an administration order.[259] During the hearing for an administration order, *inter alia*, the court enquires about the debtor's financial position and any other matter the court deem necessary.[260] The hearing and the enquiry are done for two primary purposes. Firstly, to investigate the circumstances which may have any bearing on the administration order. Secondly, to 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*.[261] The key aspects of the administration order are, firstly, that it must set out that the debtor's estate is placed under administration. Secondly, the administration order must

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254 Section 74 (1) read with sections 74A (1) and 5 of the *Magistrates Courts Act*; see also 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) 19.

255 Section 74A (3) of the *Magistrates' Courts Act*; see Manyuni *The Position of 'Low Income Low Asset' (LILA) Debtors in South Africa* 19.

256 Section 74A (4) of the *Magistrates' Courts Act*; see Leathern *Consideration of the Proposed Debt Intervention Procedure* 22.

257 Section 74 A (5) of the *Magistrates' Courts Act*; see Pete *et al Civil Procedure: A Practical Guide* 406; see also Manyuni *The Position of 'Low Income Low Asset' (LILA) Debtors in South Africa* 19.

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

259 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.

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

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

state that an administrator is appointed for the debtor's estate.[262] Lastly, the administration order must state the amount of money that the debtor must pay to the administrator and that such payments can be made on a weekly or monthly basis.[263]

Once an administration order is granted, the Magistrate Court nominates and appoints an administrator.[264] The administrator must then draw up a list of creditors whom the debtor owes.[265] 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.[266] In addition to payment of money meant for distribution to the creditors, the debtor must also pay the administrator an administration fee. 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 into his financial position. [267]

### *4.4 Advantages of the administration order*

#### *4.4.1 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.[268] This follows the fact that a *concursus creditorium* is easily and expeditiously met under an administration order. This makes the administration order more accessible to the poor and low-income earners who cannot cope with their financial burdens.[269] 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 and not proof of advantage to creditors.[270] Accordingly, debtors, particularly

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

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

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

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

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

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

268 See *Fortuin v Various Creditors* 574; see also *Ex parte August* 272.

269 *Madari v Cassim* at para 38; see also *Weiner v Broekhuysen* 2003 4 SA 301 (SCA) at 305E-F; Van Loggerenberg *Jones and Buckle* 305.

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

low-income earners, are placed in an advantageous position because they do not have to prove any advantage to creditors. This is owing to the fact that proving the advantage to creditors is difficult for the poor and low-income earners since such debtors do not have assets at all or sufficient assets to comply with this requirement.[271] Consequently, the researcher submits that the administration order, due to its simplicity and cheapness, it is more viable and worthwhile for low-income earners.

### *4.4.2 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.[272] Accordingly, the application process for an administration order can only be invoked or initiated by the debtor and not the creditors.[273] 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.[274] According to the World Bank, this creditor involvement falls short of the international standards for consumer insolvency which requires less consumer involvement.[275]

### *4.4.3 The debtor retains control of his estate*

Unlike sequestration proceedings, an administration order poses an advantage to the debtor in that the debtor gets to retain control of his estate, something which is certainly not available under sequestration proceedings.[276] This follows the fact that the control of a debtor's estate under sequestration proceedings vests with the Master until

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

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

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

274 *Madari v Cassim* at para 38.

275 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.

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

the appointment of a trustee,[277] 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.[278] 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,[279] not being able to conduct business without the trustee's consent,[280] and also not being able to enter into certain contracts without the trustee's consent.[281] 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 is subject to an administration as this would amount to an offence.[282] Other than this offence, the debtor's status is not limited or curtailed in any other way under an administration order.

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277 Section 20(1) of the *Insolvency Act* (*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.

278 See *Spencer v Standard Building Society* 1931 TPD 481 484.

279 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*.

280 Section 23(3) of the *Insolvency Act* provides that an insolvent may not carry on business as a trader who is a general dealer or manufacturer without the consent of his trustee; see *S v Van der Merwe* 1980 (3) SA 406 (NC).

281 Section 23(2) of the *Insolvency Act* provides that an insolvent may not deal with his assets or enter into contracts which may adversely affect his estate without the consent of his trustee as such contracts are voidable at the instance of the trustee; see *W L Carroll & Co v Ray Hall Motors (Pty) Ltd* 1972 (4) SA 728 (T).

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

### *4.5 Disadvantages of an administration order*

#### *4.5.1 The monetary cap off of R50000 under an administration order curtails access to consumers whose debts exceeds this cap off*

Access to debt relief in the form of an administration order is only available to debtors whose debts do not exceed R50000.[283] Consequently, debtors whose debts are more than the R50000 are excluded by the legislators from utilising an administration order for debt relief. Thus, the poor and low-income earners who cannot prove the advantage to creditors in applying for sequestration proceedings are also excluded from benefiting from an administration order if their debts are more than R50000.[284] Although an administration order is meant to assist the poor and low-income earners with smaller estates,[285] it turns out that it is not an ideal debt relief measure because of the R50000 cap off amount which gives it a limited scope of application.[286] 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*[287] owing to the advantage to creditors' requirement.[288]

Consumer credit is an integral part of many of South African households' well-being,[289] and it also remains a source of financial distress for those with little or no income at all in that they become susceptible to being insolvent and over-indebted.[290] Given the excessive reliance on credit by consumers in South Africa, the possibility of a low-income earner accumulating a debt exceeding R50000 cannot be ruled out. Accordingly, it is highly probable that a poor and low-income debtor might have accumulated debt in

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283 Section 74 of the *NCA* read with GN R217 in *GG* 37477 of 27 March 2014, the debt amount is set by the Minister of Justice and is currently set at R50000; see Mabe 2019 *PELJ* 9.

284 Asheela *The Advantage Requirement in Sequestration Applications* 40.

285 *Madari v Cassim* 1950 (2) SA 35 (D) 38; Van Loggerenberg *Jones and Buckle* 489-490.

286 See Boraine 2003 *De Jure* 218.

287 Sections 3-12 of the *Insolvency Act*; Sharrock R, Van der Linde K and Smith A *Hockly's Insolvency Law* 9th ed (Juta Cape Town 2012) 17-43.

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

289 Ssebagala R "Relieving Consumer Overindebtedness in South Africa: Policy Reviews and Recommendations" 2017 *Journal of Financial Counseling and Planning* 235, 235 and 236.

290 Archuleta, Dale and Spann 2013 Journal of Financial Counseling and Planning 52; Ssebagala 2017 *Journal of Financial Counseling and Planning* 236.

excess of R50000.[291] If then indeed this is the case, the R50000 cap off amount will preclude the poor and low-income earners from utilising administration order for debt relief. It suffices to submit that an administration order is not suitable to help the poor and low-income earners seeking relief from financial distress owing to the monetary cap, which serves as an obstacle towards access to administration orders for such debtors.

The recently adopted *National Credit Amendment Act*,[292] which provides for debt intervention, like administration orders excludes debtors whose debts are more than R50000. Thus a debtor who seeks debt relief and discharge of debt but cannot prove the advantage to creditors as required by the *Insolvency Act* is still in the same position they were in before the *Credit Amendment Act* was adopted.[293] The detailed discussion of this new Act is in the next chapter of this research. The researcher merely highlighted the similarity between an administration order and debt intervention in terms of the monetary cap.

### *4.5.2 There is no debt discharge in terms of an administration order*

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.[294] This poses a disadvantage to debtors because they are required to make regular payments to the administrator for the administration order to be effective. It follows, therefore 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.[295] The researcher submits that the poor and low-income earners who do not have income are prone to being in default with regard to the repayments, and 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

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291 Manyuni *The Position of 'Low Income Low Asset' (LILA) Debtors in South Africa* 23.

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

293 Mabe 2019 *PELJ* 20; see also 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.

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

295 *Fortuin v Various Creditors* 575; Theophilopoulos, Van Heerden and Boraine *Fundamental Principles of Civil Procedure* 396.

keep on paying instalments.[296] Moreover, 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.[297] This has the potential to affect the success of an administration order because the debtor would have to service both future debts and also make regular payments to the administrator.[298] 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 being in default.

### *4.5.3 There is no time limit for the repayment of debts*

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[299] given the interest rates and other costs involved.[300] At present, an administration order terminates only upon the full settlement of administration fees and when all the creditors have been paid in full.[301] 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.[302]

### *4.5.4 Lack of out-of-court proceedings*

For an administration order to take place a debtor must apply to the Magistrates' Court[303] and when the order is granted, the court appoints an administrator.[304] This

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296 Asheela *The Advantage Requirement in Sequestration Applications* 40.

297 Sections 74 (1) and 74A (2) (e) 74C (2) of the *Magistrates' Courts Act*; *Fortuin v Various Creditors* 746; Greig MA "Administration Orders as Shark Nets" 2000 *South African Law Journal* 622, 622.

298 Greig 2000 South African Law Journal 625.

299 Boraine A and Roestoff M "Fresh Start Procedures for Consumer Debtors in South African Bankruptcy Law" 2002 *International Insolvency Review* 1, 2.

300 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* 351, 354 and 358.

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

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

court-based approach curtails access to an administration order for the poor and low-income earners because such debtors do not have disposable income with which they can afford litigation costs and any other administration costs.[305] Accordingly, the researcher submits that there should be provision for an out of court debt relief mechanism that will be accessible to low-income earners who cannot afford litigation costs and administration fees.

### *4.6 Conclusion*

An administration order constitutes a simple and cheap statutory debt relief measure at the disposal of debtors in South Africa.[306] An administration order is aimed at the protection of over-indebted creditors who are poor, illiterate, and have smaller estates.[307] Accordingly, only a debtor can initiate the application process to have their estate being placed under administration.[308] Essentially, a debtor has more control of his estate when undergoing administration in that there are no strenuous effects that curtail his status other than him being prohibited from incurring debts while under administration.[309] Therefore, an administration order may be seen as a modified form of insolvency as well as an alternative to sequestration proceedings, which is aimed at helping the poor and low-income earners without exhausting their estates.[310]

Despite the above mentioned advantages of an administration order, it is not without flaws because it has a limited scope of application since it only applies to debtors whose debts do not exceed R50000.[311] Accordingly, the poor and low-income earners whose debts are beyond the R50000 monetary ceiling cannot access and utilise an

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303 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.

304 Section 74 E (1) of the *Magistrates' Courts Act*.

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

306 See *Fortuin v Various Creditors* 574; see also *Ex parte August* 272.

307 See *Bafana Finance Mabopane v Makwakwa* 587-588; see also *Coetzee v Government of the Republic of South Africa*; *Matiso v Commanding Officer, Port Elizabeth Prison* 1995 (4) SA 631 (CC) 641.

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

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

310 See Van Loggerenberg *Jones and Buckle* 305; see also *Bafana Finance Mabopane v Makwakwa 38; Fortuin v Various Creditors* 574; *Ex parte August* 272.

311 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.

administration order for debt relief. Another disadvantage of an administration order is that it does not provide debtors with an opportunity for a debt discharge. 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.[312] All these disadvantages of an administration order make it less viable to the poor and low-income earners who are in desperate need of debt relief due to their excessive reliance on credit for survival.

In the next chapter, which is the penultimate chapter of this research, the researcher discusses how the debt rearrangement and debt review measures are utilised and enforced under the *National Credit Act.*[313] Possible advantages and disadvantages of debt rearrangement and debt review measures in terms of the *NCA* are further discussed. Furthermore, the chapter discusses the *Credit Amendment Act,* which is the most recent development concerning debt relief measures in South Africa. This follows the fact that the *Credit Amendment Act* has introduced a new debt relief measure known as debt intervention. The researcher examines what debt intervention entails and what value does it add to the debt relief arena in South Africa. Moreover, the researcher also focuses on the meaning of debt intervention for the poor and low-income earners who find it difficult to access and utilise sequestration proceedings, administration order and debt review in South Africa.

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312 See Mabe 2019 *PELJ* 8; see also 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.

313 Sections 85-87 of the *National Credit Act* 34 of 2005 (*NCA*); see also Nagel CJ, Barnard J, Boraine A, Delport PA, Kern KM, Lötz 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.

## CHAPTER FIVE

## DEBT RELIEF MEASURES UNDER THE NATIONAL CREDIT ACT 34 OF 2005

### *5.1 Introduction*

The primary objectives of the National Credit Act,[314] are *inter alia,* to address consumer over-indebtedness[315] and to ensure the prevention of reckless granting of credit in South Africa.[316] To achieve these objectives, the *NCA* provides debtors with an opportunity for debt review[317] and restructuring, to afford them debt relief. However, debt review is of limited application since it is only available to debtors whose debts are from credit agreements and it is not applicable when enforcement action has commenced. Furthermore, a major shortcoming of debt review is that it does not afford debtors with a debt discharge. Accordingly, debt review in terms of the NCA is not an effective debt relief measure for the low-income earners in South Africa because of its restrictive criteria.

In August 2019, the *Credit Amendment Act* was passed into law to provide a new debt relief measure to over-indebted persons who have no effective means of extracting themselves from their over-indebtedness.[318] This new debt relief measure is known as debt intervention but it has not yet come into force because the *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.[319] The researcher submits that this definition is

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314 Sections 85-87 of the *National Credit Act* 34 of 2005 (*NCA*) as amended by the *National Credit Amendment Act* 7 of 2019 (*Credit Amendment Act*); see also Nagel CJ, Barnard J, Boraine A, Delport PA, Kern KM, Lötz 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.

315 Section 3(g) of the *NCA*.

316 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.

317 Section 3(i) of the *NCA*.

318 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

319 Sections 1 and 86A of the *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.

worded correctly and it is gives hope that the plight of low-income earners, the identified consumers, will come to an end since they currently struggle to access debt relief measures. However, for reasons which will become apparent in this chapter,[320] the researcher also submits that even with debt intervention being introduced, there are still debtors who will, in practice, find it difficult to access the debt relief measures including debt intervention.

In this chapter, the researcher discusses how debt review is utilised and enforced under the *NCA.* Possible advantages and disadvantages of debt review in terms of the *NCA* are further discussed. Furthermore, the researcher discusses the meaning and the impact of debt intervention on the low-income earners in their quest to have a debt relief measure that is accessible and viable to them.

## *5.2 Debt review under the NCA*

### *5.2.1 Overview of debt review*

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.[321] Accordingly, 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.[322] Reckless credit-granting may occur in one of the following ways, firstly when the creditor has failed to conduct an assessment.[323] 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

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320 Sections 86A; 1(b) and 1(b)(d) of the *NCA*. The disadvantages of debt intervention include the fact that it does not apply to consumers whose debts exceed R50000, it applies only to credit agreements and it does not apply to consumers who are subject to sequestration proceedings and/or administration order.

321 Section 3 of the *NCA*; Asheela NV *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* (LLM dissertation University of Pretoria 2012) 42.

322 Section 79 of the *NCA*; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 42.

323 Section 80(1)(a) of the *NCA*.

obligations involved or that proceeding with the proposed credit agreement would lead to the debtor being over-indebted.[324]

Despite the above set objectives of the *NCA* in providing for debt relief, debt review has a limited scope of application.[325] This is because debt review only applies to credit agreements that fall under the ambit of the *NCA*.[326] Debts that do not fall under the ambit of the *NCA* are therefore excluded from debt review. Such debts include delictual costs, municipal fees and costs for professional services.[327] 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.[328]

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 their debts ultimately.[329] The Supreme Court of Appeal in *Collett v FirstRand Bank*[330] 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.[331] 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

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324 Section 80(1)(b)(i)-(ii) of the *NCA*; Nagel *et al Commercial Law*

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

326 See section 4(1) and 8 of the *NCA*; see also Nagel CJ, Barnard J, Boraine A, Delport PA, Kern KM, Lötz DJ, Otto JM, Papadopoulos SM, Prozesky-Kuschke B, Roestoff M, Van Eck BPS, Van Jaarsveld SR *Commercial Law* 5th ed (Lexis Nexis Johannesburg 2015) 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.

327 Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* (LLD thesis University of Pretoria 2015) 212.

328 Section 86(2) of the *NCA* 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 *NCA*.

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

330 *Collett v FirstRand Bank* 2011 4 SA 508 (SCA) 514.

331 See *First Rand Bank Ltd v Olivier* 2009 3 SA 353 (SE) 357.

debtor has some assets or income of significant value that can be rearranged.[332] 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.

### *5.2.2 Effect of debt review on the low income earners in South Africa*

The limited scope of application of debt review makes it less viable to the low-income earners in South Africa. Even though there is no monetary cap off that has been fixed for accessing debt review and that no advantage to creditors is required,[333] debt review only applies to credit agreements as defined by the NCA. Furthermore, where the credit provider has commended with an action to enforce the credit agreements, debt review does not apply. More disheartening is the fact that debt review is only a mere repayment plan and it does not offer debtors with a discharge. For a debt review to take place, a debt counsellor must make a recommendation on behalf of the debtor to the Magistrates' Court for a court order rearranging the debtor's financial obligations.[334] In this way, low income earners are excluded from benefiting from either of the three statutory the debt relief measures because such debtors do not have disposable income with which they can afford litigation costs and any other administration costs related to gaining access to debt relief measures.[335]

## *5.3 Nature of debt intervention in terms of the Credit Amendment Act*

### *5.3.1 Purpose of the Credit Amendment Act*

The long title and preamble to the *Credit Amendment Act* provide that the purpose of this *Credit Amendment Act* is to promote and advance the social and economic welfare

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332 Sections 85-88 of the *NCA*; Van Heerden C and Lötz 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

333 See Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 214, where Coetzee argues that although debt review does not require advantage to creditors, it is not feasible to debtors who do not have assets or income for a Magistrate Court to order a financially feasible restructuring plan.

334 Section 86(7)(c)(ii)(aa)-86(7)(c)(ii)(dd) of the *NCA* provides for methods of restructuring allowed in terms of the *NCA*; see also Mabe Z "Alternatives to Bankruptcy in South Africa That Provides for a Discharge of Debts: Lessons from Kenya" 2019 *PELJ* 1,6.

335 See section 3 of the Insolvency Act. See also Coetzee *A Comparative Reappraisal of Debt Relief in South Africa* 51; Manyuni *The Position of 'Low Income Low Asset' Debtors in South Africa* 2.

of South Africans by amending the *NCA* to provide for debt intervention.[336] Accordingly, the *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 the consumer will be able to do so in the future.[337] 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.[338] 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.[339]

The *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.[340] This follows the fact that South Africa is a credit-driven society[341] where many of the households depend on credit to improve their wellbeing.[342] Notwithstanding this, consumer credit is also a source of financial distress for many South African households, and as such, an

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336 See para 1 of the Preamble to the *Credit Amendment Act*; see also the long title to the *Credit Amendment Act*.

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

338 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.

339 Sections 3-12 of the *Insolvency Act* 24 of 1936 (*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 as required by the *Insolvency Act*; section 74 the *Magistrates Courts Act* 32 of 1944 (*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.

340 See section 2 of the *NCA*; see also section 3(gA) of the *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).

341 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.

342 Ssebagala R "Relieving Consumer Overindebtedness in South Africa: Policy Reviews and Recommendations" 2017 *Journal of Financial Counseling and Planning* 235, 236.

efficient, effective, and accessible debt relief measure is a need for all consumers, particularly the low-income earners.[343]

### *5.4 Access requirements and application for debt intervention*

For a consumer to be able to access debt intervention, there are certain requirements that would have to be satisfied. The requirements for a debt intervention are set out in the *Credit Amendment Act* under the definition of debt intervention applicant.[344] Firstly, the applicant for debt intervention must be a natural person or consumer with an unsecured debt, which does not exceed R50000.[345] The *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.[346] Secondly, the applicant for debt intervention must not be earning any income or have earned no more than R7500 a month over the last six months on the date of submission of the application.[347] This amount was determined on the basis that it is economically difficult for deb counsellors to rearrange the debts of a consumer who earns less than R7500 per month. The two amounts, R50000 and R7500 are not mutually exclusive since a debtor can apply for debt intervention as long as they earn less than R7500 a month or when his or her debts are not above R50000. Thirdly, the applicant must be over-indebted.[348] Lastly, the applicant must not be subject to sequestration proceedings under the *Insolvency Act* or an administration order under the *Magistrates' Courts Act*.[349]

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343 See Ssebagala 2017 *Journal of Financial Counseling and Planning* 236; see related 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.

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

345 Section 86A(1) of the *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*.

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

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

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

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

### *5.5 The procedure for obtaining debt intervention*

In addition to the above requirements, there is an application procedure that needs to be followed by the applicant for debt intervention. Accordingly, the application for debt intervention must be made to the National Credit Regulator[350] in a prescribed form and manner together with supporting documents and information to have the debtor declared over-indebted.[351] 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.[352] 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[353] of the applicant for debt intervention.[354] The introduction of the concept of financial literacy should be celebrated for being a step in the right direction. This is discussed further below.

The NCR may decide whether to accept the application or to reject the application after assessing the application for debt intervention. An application would be rejected where the applicant does not qualify.[355] In an instance where the application is rejected, but the applicant is 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.[356] 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.[357] In light of this, the researcher submits that the effectiveness of this proposition by the *Credit Amendment Act* remains to be seen. Another possibility in the application procedure is

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350 Section 15A (2) of the *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.

351 See section 86A (1) of the *Credit Amendment Act*.

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

353 Section 1 of the *Credit Amendment Act* defines financial literacy as the consumer's knowledge, ability and opportunity to make sound money management choices; see Zait A and Bertea PE "Financial Literacy – Conceptual Definition and Proposed Approach for a Measurement Instrument" 2014 *Journal of Accounting and Management* 37, 38.

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

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

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

357 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.

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[358] for an appropriate decision.[359]

Where 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, and after that the matter would be referred to the NCT for an appropriate recommendation to be made.[360] The recommendation is heard by the NCT with regard to; inter alia, the debtor's financial means, prospects, and obligations.[361] The NCT may still reject the application[362] at this stage and declare the credit agreement reckless[363] and make an order for debt rearrangement and determine the charges, fees, or interest which can be set at a maximum of zero.[364]

The most significant part about debt intervention is the fact that it provides consumers with a possibility of discharge. The *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.[365] The NCR must conduct an assessment to check if the applicant's financial position has improved after eight months.[366] If the debtor's financial position has improved, a debt rearrangement plan will be negotiated.[367] However, if the financial position has not

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358 National Consumer Tribunal (NCT) was established through section 26 of the *NCA*. It has jurisdiction throughout South Africa and is a juristic person and tribunal of record. It exercises functions in accordance with the *NCA* and other legislation; section 26(1). According to section 27, the NCT (or a member of the NCT acting alone in terms of either the NCA or the *Consumer Protection Act* 68 of 2008) may adjudicate any application made to it in terms of the *NCA* and make any order provided for in the *NCA*. It may also adjudicate accusations of prohibited conduct by determining whether it occurred and if so impose a remedy in terms of the *NCA*. It may further grant cost orders as provided for by the *NCA* and exercise any other power as conferred on it by law.

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

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

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

362 Section 87 (1A) (a) of the *Credit Amendment Act*.

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

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

365 See section 87A(2)(b)(i) of the *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.

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

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

improved, the period for suspension will be extended by twelve more months.[368] 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.[369] If the applicant's financial circumstances still have not improved, the debt may then be extinguished altogether.[370]

### *5.6 Effects of debt intervention*

Like other statutory debt relief measures that are currently at the disposal of debtors in South Africa, such as sequestration proceedings, administration order, and debt review, debt intervention also affects the consumer or the applicant. The effect of debt intervention is that the applicant for debt intervention is prohibited from incurring any further credit agreements other than the agreement for consolidation with the creditor.[371] Consequently, if the applicant for debt intervention applies for or enters into any further credit agreement contrary to this prohibition, debt intervention will not apply to such an agreement.[372] The researcher notes that the effect of debt intervention, unlike the effect of the sequestration order, does not affect the debtor's control of estate or status. A debtor who is undergoing sequestration has certain restrictions such as being prohibited from holding certain offices,[373] not being able to conduct business without the trustee's consent[374] and also not being able to enter into certain contracts without the trustee's consent.[375] All these prohibitions and limitations

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

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

370 Section 87A(6)(c) of the *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.

371 Section 88A of the *Credit Amendment Act*.

372 Section 88A (5) of the *Credit Amendment Act*.

373 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*.

374 Section 23(3) of the *Insolvency Act* provides that an insolvent may not carry on business as a trader who is a general dealer or manufacturer without the consent of his trustee; see *S v Van der Merwe* 1980 (3) SA 406 (NC).

375 Section 23(2) of the *Insolvency Act* provides that an insolvent may not deal with his assets or enter into contracts which may adversely affect his estate without the consent of his trustee as such

do not apply to debt intervention. The only prohibition imposed on the debtor under debt intervention is that he may not conclude further credit agreements while undergoing or anticipating a debt intervention.[376]

There are exceptions where a debtor may conclude further credit agreements, and they include, firstly, when the NCR has rejected the application for debt intervention and the period for direct application by the applicant to the Magistrate Court has passed.[377] Secondly, where the Tribunal has determined that the applicant is not over-indebted, or has rejected the proposal of the NCR or the debt intervention applicant's application.[378] Thirdly, where the Tribunal has made an order, or there was an agreement with the creditors for rearrangement of the debtor's obligations and such an order have been fulfilled, except where the obligations were fulfilled by way of a consolidation agreement.[379] The effect on the creditor is that once he gets notice for an application for debt intervention, he may not enforce or exercise any new credit agreement by litigation or any other court process.[380] This is safe for anyone of the aforementioned exceptions occurring[381] or the applicant has defaulted on any obligation in terms of a re-arrangement agreed between the debt intervention applicant and credit providers, or ordered by the Tribunal.[382] If the creditor enters into any further credit agreement with the applicant for debt intervention, while the prohibition discussed above still applies, such a credit agreement will be regarded as reckless credit.[383] The effect of a debt intervention is further discussed below under the advantages and disadvantages of this measure.

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contracts are voidable at the instance of the trustee; see *W L Carroll & Co v Ray Hall Motors (Pty) Ltd* 1972 (4) SA 728 (T).

376 Section 88A of the *Credit Amendment Act*; Coetzee 2018 *THRHR* 605.

377 Section 88A (1)(a) of the *Credit Amendment Act*.

378 Section 88A (1)(b) of the *Credit Amendment Act*.

379 Section 88A (1)(c) of the *Credit Amendment Act*.

380 Section 88A (3) of the *Credit Amendment Act*.

381 Section 88A (3)(b)(i) of the *Credit Amendment Act*.

382 Section 88A (3)(b)(ii) of the *Credit Amendment Act*.

383 See section 88A (4) of the *Credit Amendment Act*; see also section 80(1) of the *NCA*.

## *5.7 Advantages of debt intervention*

### *5.7.1 Discharge of debt and Rehabilitation*

One of the most prominent provisions of the procedure for debt intervention is the extinguishing of debt.[384] In terms of the *Credit Amendment Act*, if the debt intervention applicant does not have sufficient assets or income for his obligations to be rearranged over five years,[385] the NCR may refer the matter to the Tribunal for the debt to be extinguished in part or altogether.[386] The extinguishment must be ordered on all qualifying credit agreements.[387] 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.[388]

Quite significantly, 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 when utilising sequestration proceedings. However, sequestration proceedings are difficult for consumers, particularly low-income earners, to access and utilise due to the requirement for advantage to creditors.[389] 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.[390] This is owing to the fact that most debtors, including low-income earners, do not have sufficient assets or disposable income available for distribution to creditors.[391] Unlike in sequestration proceedings, the

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384 Section 1(c) of the *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.

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

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

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

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

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

390 Bertelsman E *et al Mars 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.

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

discharge envisaged under the debt intervention is not earned because it is offered when the consumer's financial circumstances do not improve.[392]

Although the discharge afforded to consumers under a debt intervention is a celebrated move, this move was not accepted and celebrated by everyone as it raised concerns from the business community. In particular, the Banking Association of South Africa (BASA) expressed its contentions against the discharge stating that consumers will be unable to access credit.[393] BASA is of a view that the banks are likely to increase the rates and make the conditions for attaining credit tighter and thus potentially leading to financial exclusion of the poor and low-income earners.[394] Financial exclusion refers to the removal, exclusion or prohibition of certain persons from accessing financial products and services such as loans, credit and bank accounts by relevant financial services providers.[395]

With regards to rehabilitation, the *Credit Amendment Act* provides that the debt intervention applicant may apply to the NCR to be rehabilitated by the NCT.[396] The application for rehabilitation must be accompanied by supporting documents and proof that the debtor has paid their debts[397] or that he or she entered into a settlement agreement with the creditors.[398] When considering the application for rehabilitation, both the NCR and the NCT must look at whether the debtor's financial position has improved[399] and whether the debtor has completed the financial literacy[400] programme

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392 Leathern *Consideration of the Proposed Debt Intervention* Procedure 50.

393 The Banking Association of South Africa (BASA) 2018 "Annexure A – Draft NCA Bill: Legal and Operational Concerns Comments Matrix on the 3 clauses" https://bit.ly/ 2Bn523w (accessed 8 September 2019); Mail and Guardian 2019 *Debt Act not Relief for Everyone* https://mg.co.za/article/2019-08-23-00-debt-act-not-a-relief-for-everyone accessed 07 September 2019.

394 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.

395 Warsame MH *The Role of Islamic Finance in Tackling Financial Exclusion in the UK* (Doctoral thesis Durham University 2009) 17; Mohammed JI, Mensah L and Gyeke-Dako A "Financial Inclusion and Poverty Reduction in Sub-Saharan Africa" 2017 *The African Finance Journal* 1, 2.

396 Section 88B(1) and 88C(2) of the *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, 608.

397 Section 88B(2) of the *Credit Amendment Act*; Coetzee 2018 *THRHR* 608.

398 Section 88B(2)(b) of the *Credit Amendment Act*; Coetzee 2018 *THRHR* 608.

399 Section 88B(3)(a) of the *Credit Amendment Act*.

400 Sections 1 and 88B(3)(b) of the *Credit Amendment Act*.

in order to be able to participate in the credit market again. Once the application for rehabilitation has been received by the NCR, all creditors must be notified that the application has been made[401] and they must also be notified of the date on which the application will be considered. After considering the application, the NCR will decide whether to grant the application or to reject it. In an event where the application is rejected by the NCR, the applicant may apply directly to the NCT for rehabilitation [402] Where the application has been granted, the order to that effect made be made by the NCR and all creditors must be notified that the debtor has been rehabilitated.[403]

### *5.7.2 Financial literacy*

Progressively, one of the advantages of the *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.[404] 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.[405] On the converse, financial illiteracy is defined as the inability of the consumer to manage their cash and payments as well as managing their future financial needs.[406] From a debt relief perspective, financial literacy is important in that it inculcates the notion of financial responsibility on the consumers.[407] Financial literacy enlightens consumers to understand how they can reduce their over-indebtedness.[408]

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401 Sections 88B(4) - (6) of the *Credit Amendment Act*.
402 Section 88B(5) of the *Credit Amendment Act*.
403 Section 88B(8) and (9) of the *Credit Amendment Act*.
404 Section 1 of the *Credit Amendment Act*.
405 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 Bertea " 2014 *Journal of Accounting and Management* 38.
406 Emmons WR "Consumer-Finance Myths and Other Obstacles to Financial Literacy" 2005 *Louis U. Pub. L. Rev.* 335, 353; Zait and Bertea 2014 *Journal of Accounting Management* 38.
407 Zait and Bertea 2014 Journal of Accounting Management 38.
408 Gathergood J "Self-Control, Financial Literacy and Consumer Over-Indebtedness" 2011 *Journal of Economic Psychology* 1, 3.

Currently, financial literacy statutory framework in South African include the *NCA*, the *Consumer Protection Act*[409] and the *Financial Sector Regulation Act*.[410] The *NCA* was enacted with one of the objectives being to balance the negotiating power between the consumers and the creditors though consumer education in order to help consumers to make better financial decisions and avoid over-indebtedness.[411] In addition to this, the *NCA* also established the NCR to implement financial literacy programs to enlighten consumers to make well-informed financial decisions.[412] Notwithstanding this, 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.[413] The *CPA* is aimed at curbing the challenges related to financial literacy, which makes it difficult for the low-income earners to access financial services.[414] The *FSRA* was also enacted to provide consumers with financial literacy to avoid over-indebtedness through the Financial Sector Conduct Authority (FSCA).[415] Despite these legislative measures being in place, the levels of over-indebtedness for low-income earners in South Africa are still high and catastrophic. [416] The researcher submits that the sections dealing with financial literacy in terms of the *NCA*, *CPA*, and *FSRA* are not robust enough to promote financial responsibility and avoid over-indebtedness.

Financial education is provided in two stages under the *Credit Amendment Act*. The first stage is when the NCR is considering the application for debt intervention.[417] The second stage is when the Tribunal makes a suspension order,[418] and it requires the debtor to complete a programme on financial literacy.[419] To this end, the researcher submits that the introduction of financial literacy under the *Credit Amendment Act* is

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409 *Consumer Protection Act* 68 of 2008 (*CPA*), see section 3(1)(a)-(f).

410 *Financial Sector Regulation Act* 9 of 2017 (FSRA), see section 57.

411 Section 3(e) of the *NCA*; Atkinson A and Messy F "Promoting Financial Inclusion through Financial Education: OECD/INFE Evidence, Policies and Practice" 2013 *OECD Working Papers on Finance, Insurance and Private Pensions* 1, 15.

412 See section 12(1), 12(2) and 16(1)(a)-(b) of the NCA.

413 Nanziri EL and Leibbrandt M "Measuring and Profiling Financial Literacy in South Africa" 2018 *South African Journal of Economic and Management Sciences* 1, 6.

414 See section 3(1)(a)-(f) of the *CPA*.

415 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.

416 Nanziri and Leibbrandt 2018 *South African Journal of Economic and Management Sciences* 6.

417 Section 86A (5)(a) and (b) of the *Credit Amendment Act*.

418 Section 87A(2)(b) of the *Credit Amendment Act*.

419 Section 87A (2) (b(ii) of the *Credit Amendment Act*.

laudable, although the standard of training to be provided is not outlined in the Act. Moreover, the infrastructure to carry out this obligation is also not in place at present.[420] Leathern argues that the omission of the explanation of the standard of training required might be a challenge because consumers have different backgrounds and varying levels of education.[421] The researcher agrees with this argument and submits that this is an unclear policy design. Moreover, this research has noted that the *Credit Amendment Act* is silent on how financial literacy will be monitored. The unclear policy design poses a looming deadlock with the successful promotion and regulation of financial education. However, it is hoped that given the extensive definition of financial literacy under the *Credit Amendment Act*,[422] financial training will be implemented when debt intervention comes into force and this will curb debt, reckless spending, and predatory lending.[423]

### *5.7.3 Limited court involvement*

The *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.[424] Currently, the *Insolvency Act*, *Magistrates' Courts Act,* and the *NCA* do not make any provision for an out of court debt relief mechanism.[425] Under the *Credit Amendment Act*, both the Tribunal and the Magistrate's Court are authorised to rearrange the debtor's financial obligations.[426] Previously, only the Magistrate's Court could rearrange

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420 The *Credit Amendment Act* has not yet commenced, accordingly debt intervention has not yet come into force because the NCR does not have capacity to carry out the obligations in terms of this new debt relief measure as yet.

421 Leathern R *Consideration of the Proposed Debt Intervention Procedure from a Debt Relief Perspective* (LLM-dissertation University of Pretoria 2018) 65.

422 Section 1 of the *Credit Amendment Act* defines financial literacy as the knowledge, ability and opportunity to make sound money management choices.

423 Chitimira, Animashaun and Magau "The Challenges Affecting Financial Inclusion in South Africa"; Leathern *Consideration of the Proposed Debt Intervention Procedure* 65.

424 See sections 3-12 of the *Insolvency Act*; sections 85-87 of the *NCA*; section 74 of the *Magistrates' Courts Act.* See also Roestoff and Coetzee 2017 *Comparative and International Law Journal of Southern Africa* 255; Pete *et al Civil Procedure: A Practical Guide* 406-409.

425 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.

426 Section 87 of the *Credit Amendment Act*.

the debtor's obligations.[427] With debt intervention, the Tribunal or a single member of the Tribunal may conduct the hearing for a debt intervention application[428] and also refer the matter to the NCR.[429] Direct application to the Magistrate's Court can only be made when the NCR has rejected the application for debt intervention.[430] 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 extra-judicial institutions like the NCR to promote flexibility, save costs and time for the consumers.[431]

### *5.8 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 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 R50000.[432] The monetary ceiling is not in check with the reality of many of 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[433] and lack of financial literacy, there are consumers whose debts exceed R50000. 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.[434] This will help most debtors to access debt relief measures, particularly the low-income earners

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427 Section 87 of the *NCA*.
428 Section 87(1A) of the *Credit Amendment Act*.
429 Section 87A (1) of the *Credit Amendment Act*.
430 Section 86A(7) of the *Credit Amendment Act.*
431 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.
432 Section 86A(1) of the *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*.
433 Boraine, Van Heerden and Roestoff 2012 *De Jure* 255; see also Boraine and Roestoff 2014 *THRHR* 528.
434 Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 178.

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.[435] Put differently, secured debts and any other debts which arise outside the scope of the *NCA* are excluded from debt intervention.[436] Similar to debt review, debt intervention does not cover all types of debt including municipal fees, water and electricity, delictual claims, clothing accounts, and school fees.[437] The researcher submits that debt intervention will not achieve the objective of addressing 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.[438] Accordingly, not 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.

### *5.9 Debt intervention viewed from an international approach*

The World Bank report[439] and the INSOL Consumer report[440] makes provision for measuring compliance of any debt relief measure with the principles of consumer insolvency and international trends. The international standards for debt relief measures at an international level are that debt relief measures should provide consumers with a

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435 Section 1(b) of the *Credit Amendment Act*.

436 Section 86A (2)(b) of the *Credit Amendment Act*.

437 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.

438 Section 1 (b)(d) of the *Credit Amendment Act,* provides a definition of debt intervention applicant and that excludes someone who is subject to sequestration proceedings or an administration order.

439 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).

440 INSOL International *Consumer Debt Report* (INSOL London 2001); INSOL International *Consumer Debt Report II* (INSOL London 2011).

discharge[441] and economic rehabilitation. The law of insolvency has changed over the years from being creditor-oriented to being protective of the interests of the consumers who usually have less bargaining power in credit agreements.[442] In South Africa this wave of change towards protecting the interests of consumers was recognised in 1987 when the South African Law Reform initiated the process of reviewing insolvency laws although that did not bring any significant changes.[443] Following the initial introduction of the *NCA* in 2005 which also did not bring any robust changes to consumer protection, the adoption of debt intervention is a laudable positive step in the right direction towards meeting the international approaches to consumer insolvency. According to the international approaches on consumer insolvency, all honest but unfortunate debtors should have access to debt relief measures.[444] Therefore, debt intervention should be a celebrated development in that it recognises that some consumers, particularly the low income earners, struggle to utilise any of the existing debt relief measures and that the law should protect such consumers.[445] Furthermore, debt intervention should be celebrated for offering consumers a debt discharge[446] and giving the consumers access to debt relief without the court's involvement.[447]

## *5.10 Conclusion*

From the above discussion, the researcher analysed debt review and debt intervention as statutory debt relief measures. It was clear from the above discussion that debt review has a limited scope of application in that it applies only to credit agreements as defined by the *NCA*, and it is not applicable when a debtor has commenced enforcement of debt. Furthermore, debt review is just a restructuring plan, and it does not afford consumers any debt discharge.

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441 INSOL C*onsumer debt report II* 9; Roestoff and Coetzee "Debt relief for South African NINA debtors" 2017 *CILSA* 252.

442 Calitz J "Developments in the United States' Consumer Bankruptcy Law: A South African Perspective" 2007 *Obiter* 397, 397.

443 See South African Law Commission *Report on the review of the law of insolvency* which contained the 2000 draft Insolvency Bill in general.

444 See World Bank Working Group on the Treatment of the Insolvency of Natural Persons *Report on the Treatment of the Insolvency of Natural Persons* 83; INSOL C*onsumer debt report II* 9; Roestoff and Coetzee 2017 *CILSA* 252.

445 Preamble to the *Credit Amendment Act*.

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

447 See Coetzee 2018 *THRHR* 609.

Similarly, debt intervention which is a fairly infant debt relief measure which is yet to commence and be enforceable has limitations which make it difficult for debtors, particularly low-income earners to utilise. These limitations include the fact that there is a monetary ceiling set at R50000, thus excluding debtors with debts above this limit. On top of this, debt intervention is only applicable to debtors with unsecured credit agreements, as defined by the *NCA*. If a debtor's debts emanate outside the ambit of the *NCA*, they cannot utilise debt intervention for debt relief. Additionally, debtors who are subject to sequestration proceedings or subject to an administration order cannot utilise debt intervention for debt relief. Accordingly, although debt intervention should be celebrated as a positive step towards providing debtors with access to all debt relief, it still does not address the plight of debtors in South Africa, particularly low-income earners who struggle to utilise any of the existing debt relief measures.

In the next chapter, the researcher proposes recommendations to improve the current legal framework of statutory debt relief measures in South Africa in order to help the poor and low-income earners to have access to efficient and effective debt relief.

## CHAPTER SIX

## RECOMMENDATIONS AND CONCLUSION

### *6.1 Introduction*

Access to debt relief is vital in the current credit-driven society where consumers live off credit for their day-to-day needs in South Africa.[448] Consumer credit is an integral part of many South African households' wellbeing because it enhances spending and consumption of goods.[449] This is owing to the fact that most consumers are poor and low income earners who have limited disposable income, if any at all.[450] However, for many of these households, particularly the low-income earners, consumer credit also remains a source of financial distress.[451] Accordingly, equal debt relief measures must be made available to all debtors by the legislature and other relevant authorities such as the National Credit Regulator (NCR) and the National Consumer Tribunal (NCT). More pertinently, the opportunity to access statutory debt relief measures should be afforded to all debtors, including low-income earners.[452] Currently, there are three statutory debt relief measures at the disposal of insolvent debtors in South Africa. Firstly, the sequestration proceedings are available in terms of the *Insolvency Act*.[453] Secondly, the administration order is available in terms of the *Magistrates Courts Act*,[454] and lastly, the debt review and restructuring procedure are available in terms of the

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448 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; 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.

449 Ssebagala R "Relieving Consumer Over-indebtedness in South Africa: Policy Reviews and Recommendations" 2017 *Journal of Financial Counseling and Planning* 235, 236.

450 Abrahams R "Financial inclusion in South Africa: A review of the literature" 2017 *Southern African Accounting Association* 632, 642; Kessler K *et al* "Improving Financial Inclusion in South Africa" *The Boston Consulting Group* (11 April 2017).

451 Ssebagala 2017 *Journal of Financial Counseling and Planning* 236; see related 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.

452 Boraine and Roestoff 2014 *THRHR* 541; Boraine, Van Heerden and Roestoff 2012 *De Jure* 254.

453 Sections 3-12 of the *Insolvency Act* 24 of 1936 (*Insolvency Act*); Sharrock R, Van der Linde K and Smith A *Hockly's Insolvency Law* 9th ed (Juta Cape Town 2012) 17-43.

454 Section 74 of the *Magistrates Courts Act* 32 of 1944 (*Magistrates Courts Act*); see also Pete S, Hulme D, Palmer R, Sibanda O, Palmer T *Civil Procedure: A Practical Guide* 2nd ed (Oxford Cape Town 2013) 406-408.

*National Credit Act*.[455] The fourth debt relief measure, which has not yet commenced, is debt intervention under the *Credit Amendment Act.*[456] The problem faced by low-income earners in South Africa is that the available debt relief measures are not viable and accessible to them due to strict access requirements which are difficult to satisfy.[457]

## *6.2 Recommendations*

The researcher provides some recommendations that are aimed at helping the low-income earners to gain access to debt relief measures in South Africa. Accordingly, the researcher recommends that:

### *a) the requirement for advantage to creditors under sequestration proceedings should be relaxed*

The concept of advantage to creditors is of great significance in the South African insolvency law because it applies to all sequestration proceedings instituted in South Africa.[458] Unfortunately, the requirement of proving an advantage to creditors in terms of sequestration proceedings poses a difficulty to debtors, especially low-income earners, to comply with.[459] This follows the fact that most low-income earners do not have sufficient assets or disposable income available for distribution to creditors in order to satisfy the advantage of creditors' requirements.[460] Moreover, the requirement for advantage to creditors prevents low-income earners who cannot prove a pecuniary benefit to creditors from obtaining rehabilitation and debt discharge because such debtors find it difficult to satisfy this requirement.[461] Thus, sequestration proceedings

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455 Sections 85-87 of the *National Credit Act* 34 of 2005 (*NCA*) as amended by the *National Credit Amendment Act* 7 of 2019 (*Credit Amendment Act*); see also Nagel CJ, Barnard J, Boraine A, Delport PA, Kern KM, Lötz 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.

456 Section 86A of the *National Credit Amendment Act* 7 of 2019 as amended by the *National Credit Amendment Act* 7 of 2019 (*Credit Amendment Act*).

457 Mabe Z "Alternatives to Bankruptcy in South Africa That Provides for a Discharge of Debts: Lessons from Kenya" 2019 *PELJ* 1, 2.

458 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.

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

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

461 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

differentiate between creditors based on those who have something to offer to the creditors and those who have nothing to offer.[462] This distinction is unfair, and it does not meet the constitutional muster of the right to equality.[463] Accordingly, the researcher submits that this requirement should be relaxed to enable low-income earners to utilise sequestration proceedings for debt relief.

### *b) the R50000 monetary ceiling required for one to utilise administration order and debt intervention should be abolished*

For a debtor to utilise an administration order or debt intervention, his or her debts must not exceed R50000.[464] This monetary ceiling is not in check with the reality of many South African consumers who are over-indebted with debts exceeding this monetary threshold. It is conceivable and highly probable that given South African households' reliance on credit[465] and lack of financial literacy, there are consumers whose debts exceed R50000. Unfortunately, such debtors cannot benefit from an administration order as well as debt intervention. 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.[466] This will help most debtors to access debt relief measures, particularly the low-income earners who find it difficult to meet the monetary ceiling as an entry requirement for debt relief.

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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.

462 Sections 6(1) and 12(1) of the *Insolvency Act*; 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.

463 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.

464 See section 86A(1) of the *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.

465 Boraine, Van Heerden and Roestoff 2012 *De Jure* 255; see also Boraine and Roestoff 2014 *THRHR* 528.

466 Coetzee H *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* (LLD thesis University of Pretoria 2015) 178.

### *c) Debt discharge should be made available under both administration order and debt review measures*

Debt discharge is only available under sequestration proceedings[467] and debt intervention.[468] However, if one cannot meet the advantage to creditors, they are excluded from utilising sequestration proceedings and attaining discharge available under sequestration proceedings. Moreover, if a debtor does not meet the requirements of a debt intervention, for example, when his or her debts exceed R50000 or when his or her debts emanate outside the ambit of the *NCA*, such a debtor cannot obtain extinguishment of debt under the *Credit Amendment Act*.[469] Debt review and administration orders are merely repayment plans,[470] and they do not offer debtors any discharge of debt. The consumer 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. In this regard, the researcher recommends that provisions for both administration order and debt review measures be amended to offer discharge of debt in the same way sequestration proceedings and debt intervention do.

### *d) the role of courts in statutory debt relief measures should be reconsidered*

The current existing debt relief measures which are in force are only accessible through courts.[471] Sequestration proceedings, debt review and administration orders are accessed by way of court procedures.[472] The *Insolvency Act*, *Magistrates Courts Act,* and the *NCA* do not make any provision for an out of court debt relief measure.[473] For

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467 Section 129(1)(b) of the *Insolvency Act*; Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 145.

468 Sections 87A(5)(c)(ii) and 87(7)(a) and (b) of the *Credit Amendment Act*.

469 Section 86A of the *Credit Amendment Act*.

470 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.

471 See sections 3-12 of the *Insolvency Act*; sections 85-87 of the *NCA*; section 74 of the *Magistrates Courts Act*.

472 See sections 3-12 of the *Insolvency Act*; sections 85-87 of the *NCA*; section 74 of the *Magistrates Courts Act*. See also Roestoff and Coetzee 2017 *Comparative and International Law Journal of Southern Africa* 255; Pete *et al Civil Procedure: A Practical Guide* 406-409.

473 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 C *The Position of 'Low Income Low Asset'*

an insolvent debtor to be sequestrated, he or she must lodge an application in the High Court, which requires money for court proceedings.[474] Similarly, for an administration order to take place a debtor must apply to the Magistrates' Court[475] and then when the order is granted, the court appoints an administrator.[476] For a debt review to take place, a debt counsellor must make a recommendation on behalf of the debtor to the Magistrates' Court in order to obtain a court order rearranging the debtor's financial obligations.[477] In this way, low-income earners are excluded from benefiting from either of the three statutory the debt relief measures because such debtors do not have disposable income with which they can afford litigation costs and any other administration costs related to gaining access to debt relief measures.[478]

Quite progressively and innovatively, debt intervention under the *Credit Amendment Act* has taken an out of court approach, which is administrative in nature. *The Credit Amendment Act* empowers both the Tribunal and the Magistrate's Court to rearrange the debtor's financial obligations.[479] Before the *Credit Amendment Act* was passed into law in 2019, only the Magistrate's Court could rearrange the debtor's obligations.[480] With debt intervention, the Tribunal or a single member of the Tribunal may conduct the hearing for an application for debt intervention[481] and also refer the matter to the NCR.[482] Direct application to the Magistrate's Court can only be made when the NCR has rejected the application for debt intervention.[483] The World Bank is of the view that litigation costs are an obstacle that makes access to debt relief measures difficult for

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*(LILA) Debtors in South Africa: The Need for Legislative Reform* (LLM-dissertation University of Kwa-Zulu Natal 2015) 2.

474 Section 3 of the *Insolvency Act*; see also Sharrock *et al Hockly's Insolvency Law* 7, for a discussion on jurisdiction of the High Court.

475 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.

476 Section 74 E (1) of the *Magistrates' Courts Act*.

477 Section 86(7)(c)(ii)(aa)-86(7)(c)(ii)(dd) of the *NCA* provides for methods of restructuring allowed in terms of the *NCA*; see also Mabe 2019 *PELJ* 6.

478 See section 3 of the *Insolvency Act*; see also Coetzee *A Comparative Reappraisal of Debt Relief in South Africa* 51; Manyuni *The Position of 'Low Income Low Asset' Debtors in South Africa* 2.

479 Section 87 of the *Credit Amendment Act*.

480 Section 87 of the *NCA*.

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

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

483 Section 86A (7) of the *Credit Amendment Act.*

low-income earners.[484] Accordingly, the researcher recommends that sequestration proceedings, debt review and administration orders be amended to be like debt intervention in order to help the low-income earners to have access to a variety of debt relief measures out of court.

### *e) there must be clear regulation and promotion of financial literacy to address over-indebtedness*

Financial literacy is poorly regulated in various pieces of legislation in South Africa. Without clear regulation and promotion of financial education, consumers will continue to transact with no proper knowledge, ability, and opportunity to make sound money management choices. This, unfortunately, may lead to a problem of consumer over-indebtedness. From a debt relief perspective, financial literacy is important because it helps consumers to be financially responsible.[485] Financial literacy promotes the alleviation of consumer over-indebtedness which results from financial illiteracy.[486]

The *Insolvency Act*, which regulates sequestration proceedings,[487] does not contain any provision relating to the promotion and regulation of financial literacy for consumers. The researcher submits that as a primary debt relief measure,[488] sequestration proceedings should contain provision for the promotion and regulation of financial education. It would be ideal if a consumer were to obtain financial education together with rehabilitation[489] and the subsequent discharge of debt under sequestration proceedings.[490] In the long run, this would help to curb consumer over-indebtedness

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484 World Bank Working Group *Report on the Treatment of the Insolvency of Natural Persons* (World Bank Washington DC 2013) para 300; 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 2)" 2014 *THRHR* 527, 546.

485 Zait A and Bertea PE "Financial Literacy – Conceptual Definition and Proposed Approach for a Measurement Instrument" 2014 *Journal of Accounting and Management* 37, 38.

486 Gathergood J "Self-Control, Financial Literacy and Consumer Over-Indebtedness" 2011 *Journal of Economic Psychology* 1, 3.

487 Sections 3-12 of the *Insolvency Act*; Sharrock R, Van der Linde K and Smith A *Hockly's Insolvency Law* 9th ed (Juta Cape Town 2012) 17-43.

488 Coetzee H and Roestoff M "Consumer Debt Relief in South Africa - Should the Insolvency System Provide for NINA Debtors? Lessons from New Zealand" 2013 *International Insolvency Review* 188, 193; Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 101.

489 Section 129(1)(b) of the *Insolvency Act*; Asheela NV *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* (LLM dissertation University of Pretoria 2012) 19

490 Section 129(1)(b) of the *Insolvency Act*; Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 145.

because consumers will have the knowledge, ability and opportunity to make the right choices regarding their finances.[491]

Similarly, the *Magistrates Courts Act*, which regulates administration orders,[492] does not make any provision for the promotion and regulation of financial education to avoid over-indebtedness of consumers, particularly the low-income earners. Debt intervention and administration order are mutually exclusive, and as such a debtor cannot benefit from both of them at the same time.[493] This means that a debtor who is subject to an administration order cannot obtain financial training and counselling that is imposed on a debt intervention applicant.[494] Accordingly, the researcher submits that the legislature should amend the *Magistrates Courts Act* so that it can provide for financial literacy in order to help consumers who are subject to administration order.

One of the objectives of the *NCA*[495] is to balance the negotiating power between the consumers and creditors through the promotion of financial education.[496] However, the researcher submits that the high levels of over-indebtedness indicate that the promotion and regulation of financial education under the *NCA* is unclear and inconsistently applied. Accordingly, the legislature should scrutinize this aspect and adopt robust financial literacy programs through the NCR in order to help the consumers and curb over-indebtedness.

Financial education is provided in two stages under the *Credit Amendment Act*. For instance, when the NCR is considering the application for debt intervention,[497] and when the National Consumer Tribunal (NCT) makes a suspension order[498] where it

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491 Section 1 of the *Credit Amendment Act*; Zait and Bertea 2014 *Journal of Accounting and Management* 37.

492 Section 74 of the *Magistrates Courts Act*; see also Pete *et al Civil Procedure: A Practical Guide* 406-408.

493 Section 1(b)(d) of the *Credit Amendment Act* prides that a debt intervention applicant should not be someone subject to sequestration proceedings or administration order.

494 Sections 86A(5)(a) and (b), 87A(2)(b) and 87A(2)(b)(ii) of the *Credit Amendment Act*.

495 Sections 85-87 of the *NCA*; see also Nagel *et al Commercial Law* 319-320.

496 Section 3(e) of the *NCA*; Atkinson A and Messy F "Promoting Financial Inclusion through Financial Education: OECD/INFE Evidence, Policies and Practice" 2013 *OECD Working Papers on Finance, Insurance and Private Pensions* 1, 15; see also Pearson G, Stoop PN and Kelly-Louw M "Balancing Responsibilities-Financial Literacy" 2017 *PER* 1, 21.

497 Section 86A (5)(a) and (b) of the *Credit Amendment Act*.

498 Section 87A(2)(b) of the *Credit Amendment Act*.

requires the debtor to complete a programme on financial literacy.[499] To this end, the introduction of financial education under the *Credit Amendment Act* is laudable. However, the regulation and promotion of financial education remain tentative in disarray because the *Credit Amendment Act* does not outline the standard of training to be provided to the debt intervention applicant.[500] This poses a challenge of practical feasibility owing to the fact that consumers have different backgrounds and varying levels of education.[501] Moreover, the infrastructure to carry out financial education under the *Credit Amendment Act* is also not in place at present.[502] Therefore, the unclear regulation and promotion of financial education under the *Credit Amendment Act* necessitates a call for further scrutiny by the legislature.

Legislative measures that do not provide any debt relief measures but regulate financial education include the *Financial Sector Regulation Act*[503] and the *Consumer Protection Act*.[504] The *FSRA* was enacted to, inter alia, provide consumers with financial literacy to avoid over-indebtedness through the Financial Sector Conduct Authority (FSCA).[505] The *CPA* is aimed at minimizing the problems related to financial literacy, which makes it difficult for low-income earners to access financial services.[506] Despite these legislative measures being in place, the levels of over-indebtedness for low-income earners in South Africa remain high.[507]

The successful implementation of financial literacy across the nine provinces in South Africa would require the establishment of capacity building programs and initiatives which would have financial and logistical implications on the NCR. Therefore, given

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499 Section 87A (2) (b(ii) of the *Credit Amendment Act*.

500 See section 1(b) (a)-(d) of the *Credit Amendment Act* for a definition of a debt intervention applicant.

501 Leathern R *Consideration of the Proposed Debt Intervention Procedure from a Debt Relief Perspective* (LLM-dissertation University of Pretoria 2018) 65.

502 The *Credit Amendment Act* has not yet commenced, accordingly debt intervention has not yet come into force because the NCR does not have capacity to carry out the obligations in terms of this new debt relief measure as yet.

503 *Financial Sector Regulation Act* 9 of 2017 (*FSRA*), see section 57.

504 *Consumer Protection Act* 68 of 2008 (*CPA*), see section 3(1)(a)-(f).

505 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.

506 See section 3(1)(a)-(f) of the *CPA*.

507 Nanziri EL and Leibbrandt M "Measuring and Profiling Financial Literacy in South Africa" 2018 *South African Journal of Economic and Management Sciences* 1, 6.

these modalities, the practical feasibility of conducting financial literacy in South Africa remains unclear, and this calls for further scrutiny by the legislature.

### *f) the interplay between debt relief measures should be fair and properly coordinated*

Currently, there is no clear indication of the interplay between the existing debt relief measures in south Africa *viz.* sequestration proceedings, administration order, and debt review. Coetzee submits that many problems could be prevented by the legislature if there could be a regulation of the interplay between various debt relief measures through legislation.[508] The *Credit Amendment Act* categorically stipulates that an applicant for debt intervention should not be someone subject to an administration order or sequestration proceedings.[509] The *Credit Amendment Act* does not justify this provision. The researcher submits that this approach would be unfair on the part of debtors who would be paying off their debts under an administration order. This is because such debtors would not benefit from a debt discharge under sequestration proceedings, and they will also not access extinguishment under debt intervention as discussed in paragraph (c) of chapter six of this research. For the promotion of efficient and equal access to debt relief measures, the legislature will have to intervene by providing clear guidelines on the interplay between debt relief measures.

### *g) the scope of application for debt review and debt intervention should be extended*

One of the limitations of debt review and debt intervention is that these debt relief measures are only applicable to unsecured credit agreements as defined by the *NCA*.[510] Essentially, both debt review and debt intervention exclude other types of debt such as municipal fees, water and electricity, delictual claims, clothing accounts and school fees.[511] One of the purposes of the *Credit Amendment Act* is to promote and advance the social and economic welfare of South Africans by amending the *NCA* to provide for

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508 Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 244.
509 Section 1(b)(d) of the *Credit Amendment Act.*
510 Section 86A (2)(b) of the *Credit Amendment Act*.
511 Section 3 of the NCA; Asheela *The Advantage Requirement in Sequestration Applications: A Call for Relaxation* 42; Coetzee *A Comparative Reappraisal of Debt Relief Measures in South Africa* 212.

debt intervention.[512] However, given the limited scope of application of debt intervention and debt review, the researcher submits that it will be difficult to achieve this objective. Furthermore, the researcher maintains the view that this limitation will make it difficult to achieve the objective of addressing over-indebtedness of consumers. The World Bank favours open access[513] to debt relief without strenuous provisions of limiting the scope of application for debt relief measures, as is the case with debt review and debt intervention.[514] Therefore, the researcher submits that the scope of application for both debt review and debt intervention should be extended to achieve the objectives of these measures to relieve consumers of their over-indebtedness.

### *h) there must be time limits set for the duration of debt relief measures*

Unlike sequestration proceedings, debt review and administration order do not prescribe the maximum period for which these measures may run. It was mentioned in chapter four of this research that a lack of specified time limits for the duration of debt relief measures poses a disadvantage to consumers. This follows the fact that there is a possibility for debtors to be trapped in their debt indefinitely.[515] The World Bank proposes a period no longer than three years for repayment of debts because if the repayment plan is too long, the debtor may abandon it.[516] The legislature has made a positive step in the right direction in as far as debt intervention is concerned because the rearrangement of debts and extinguishment is envisaged to take place within five years.[517] Similar to the approach taken with debt intervention, the researcher submits that there should be a time limit for the duration of the maximum period for which debt relief measures should run for. This will encourage efficient and expeditious debt relief

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512 See para 1 of the Preamble to the *Credit Amendment Act*; see also the long title to the *Credit Amendment Act*.

513 World Bank *Report on the Treatment of the Insolvency of Natural Persons* 118, Open access is defined as the idea that an individual who meets an insolvency test such as the inability to pay debts as they fall due may gain access to an insolvency procedure permitting an ultimate discharge of debts.

514 World Bank *Report on the Treatment of the Insolvency of Natural Persons* 118-122; see also Coetzee H "An opportunity for No Income No Asset (NINA) Debtors to Get Out of Check? – An Evaluation of the Proposed Debt Intervention Measures" 2018 *THRHR* 593, 604.

515 Boraine and Roestoff 2014 *THRHR* 354 and 358.

516 World Bank *Report on the Treatment of the Insolvency of Natural Persons* 85-86; see Coetzee 2018 *THRHR* 593, 604; see also Boraine A "Some Thoughts on the Reform of Administration Orders and Related Issues" 2003 *De Jure* 217, 247.

517 Section 86A (6)(c) of the *Credit Amendment Act*; see also Leathern *Consideration of the Proposed Debt Intervention Procedure* 41.

for the consumers, including the poor and low-income earners, as they will become economically active through honouring their debts on time, in a case where there is no debt discharge or extinguishment.[518]

### *6.3 Conclusion*

For South Africa to have effective debt relief measures that are accessible to all consumers, particularly the low-income earners, some consideration needs to be done regarding the access requirements to ensure that all consumers have access to such measures. In practice, the poor and low-income earners find it difficult to access and utilise debt relief measures, hence the researcher made the above recommendations. Accordingly, the requirement of advantage to creditors under sequestration proceedings should be relaxed to enable low-income earners to utilise sequestration proceedings for debt relief since such debtors have no sufficient assets or income to prove the advantage to creditors. Consequently, low-income earners miss out on the opportunity for rehabilitation and discharge of pre-sequestration debt, which is available under sequestration proceedings. 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. Moreover, the lack of debt discharge under both debt review and administration order should be reconsidered to ensure that these debt relief measures offer debtors debt relief in a true sense and not just repayment plan or debt rearrangement. Additionally, the role of courts and creditors' involvement in the application for debt relief measures should be reconsidered because most consumers cannot afford litigation costs and creditors generally have an upper hand in most credit agreements. Furthermore, there should be clear regulation and promotion of financial literacy to address over-indebtedness and to eradicate financial illiteracy amongst consumers. Additionally, the interplay between sequestration proceedings, administration order, debt review and debt intervention should be properly regulated to clear any confusion on how these various debt relief measures apply and whether they are mutually exclusive or not. The scope of application for debt intervention and debt review should be expanded so that they do not only apply to credit agreements as

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[518] World Bank *Report on the Treatment of the Insolvency of Natural Persons* 118.

defined by the *NCA* so that more consumers can access debt relief for debts emanating outside the scope of the *NCA*. Lastly, administration order and debt review should have timeframes to avoid a debtor being subjected to these measures indefinitely.

All statutory debt relief measures in South Africa have limitations that are making it difficult for debtors, particularly the low-income earners, to access and utilise such measures. Until the above recommendations are considered and looked into by the legislature, the NCR and the NCT, the low-income earners will continue to suffer from the exclusion of accessing debt relief measures to recover from their over-indebtedness.

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**List of Abbreviations**

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|---|---|
| BASA | Banking Association of South Africa |
| CILSA | Comparative & International Law Journal of Southern Africa |
| FSCA | Financial Sector Conduct Authority |
| FSRA | *Financial Sector Regulation Act* 9 of 2017 |
| Int Insolv Rev | International Insolvency Review |
| JBL | Journal of Business Law |
| LILA | Low Income Low Asset |
| NCA | *National Credit Act* 34 of 2005 |
| NCR | National Credit Regulator |
| NCT | National Consumer Tribunal |
| NINA | No Income No Asset |
| 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 & Bankruptcy Professionals |

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|---|---|
| SCA | Supreme Court of Appeal |
| GN | Government Notice |
| GG | Government Gazette |