SOUTH AFRICA'S NATIONAL CREDIT AMENDMENT ACT 7 OF 2019: PROGRESSION OR REGRESSION FOR NATURAL PERSON DEBT RELIEF

JASON KLAASEN

KLSJAS001

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Supervisor: Dr. Andrew Hutchison

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CHAPTER ONE

INTRODUCTION

Research Motivation and Background

Motivation

South Africa has had a fragmented approach to natural person insolvency by having numerous legislative mechanisms. Statutory relief in the form of sequestration under the insolvency Act,[1] administration orders under the Magistrates Courts Act,[2] and debt relief under the National Credit Act,[3] have failed to aid in the plight of the no income no asset ('NINA') debtor.[4] Barriers to access and financial obligations in attaining any form of debt relief under these measures have been inherently problematic as will be shown in this contribution. The NINA debtors, as well as the low income low asset ('LILA') debtors, have had no reasonable prospect of legislative intervention for debt relief. As a result, I submit that due to a dysfunctional development of South African natural person insolvency law, it has sequentially played a contributory role in perpetuating the over indebtedness of many South Africans. To this effect, debtor rehabilitation is an impossibility in the absence of a straight forward mechanism providing for a discharge of debt. This is especially true in the South African context where many consumers are indigent and cannot afford even the most modest forms of sustenance for sustainability.

To disregard the plight of the NINA debtor is to not only subject these individuals to a never-ending cycle of debt distress but to further negatively impact an individual's well-being for various reasons. For instance, debt issues have been associated with lowered self-esteem, pessimistic outlooks on life and reduced mental health attributed to depression and

[1] Act 24 of 1936.

[2] Act 32 of 1944.

[3] Act 34 of 2005.

[4] This is a group with no income and no realisable assets available for distribution to creditors. See: Roestoff & Coetzee 'Debt Relief for South African NINA debtors and what can be learned from the European approach' (2017) *CILSA* 252.

severe anxiety.[5] Debt has further been linked to a decline in physical health. In this regard, burdened with high repayments, many debtors sacrifice numerous ways to keep healthy such as foregoing medical care and healthy foods.[6] Furthermore, the correlation between debt and suicide cannot be ignored.[7] Financial despair has been found to lead to more suicide attempts than any other psychological condition, barring that of depression.[8] For the abovementioned reasons, it is appropriate to analyse and critique South Africa's current debt relief landscape in order to assist the NINA debtor by suggesting a way forward.

Background

It was once permitted in South Africa, under the MCA, s 65, to imprison a debtor for non-repayment of their civil debts. This illustrated both the serious importance that the South African legislature placed on debt repayments as well as the far-reaching implications where defaults occurred. This was until 1995, where Kriegler J for the majority in the case of *Coetzee v Government of South Africa*,[9] held that the provisions of s 65 are so clearly inconsistent with the right to freedom provided under s 11(1) and so indefensible under s 33(1) of the Constitution that there was no reason to retain such provisions. It became clear just how creditor oriented South African legislation in the form of the Insolvency Act and MCA were, prior to the introduction of the Constitution.[10]

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[5] Bridges and Disney, 'Debt and Depression' *Journal of Health Economics*, 29(3), (2010), 388-403; Fitch et al., Debt and mental health: the role of psychiatrists' *Advanced in Psychiatric Treatment*, 13, (2007), 194-202.

[6] Drentea and Lavrakus, 'Over the limit: the association among health, race and debt' Social Science and Medicine, 50, (2000), 517-529.

[7] One particular heartbreaking example is that of Happiness Mbedezi. In 2012 this young 22-year-old committed suicide in Diepsloot after owing R3, 320. Her suicide note stated in clear terms that she felt there was no way of escaping her debt. See: De Waal 'Debt traps, the silent killers of SA's vulnerable' 7 August 2012, *Daily Maverick*, available at: <https://www.dailymaverick.co.za/article/2012-08-07-debt-traps-the-silent-killers-of-the-sas-vulnerable/>.

[8] Wang et al., 'Recent stressful life events and suicide attempt' *Psychiatric Annals*, 42(3), (2012), 101-108.

[9] *Coetzee v Government of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* 1995 (4) SA 631 (CC).

[10] Ibid at para 18. It should be noted that this case was decided under the Interim Constitution and not the Final Constitution.

Post-apartheid South Africa was left with a failing economy and a black majority living and working in atrocious conditions which founded a strong need for radical change.[11] Part of this change was the incorporation of a market driven microcredit model.[12] Notwithstanding South Africa's community-based self-sustainable financing,[13] the large commercial banks were soon on board and providing credit to the poor.[14] This model, however, soon became a double-edged sword. Providing credit to low-income consumers was originally thought to be the answer to South Africa's inequality and unemployment problem.[15] It became apparent, however, that lending with high interest rates to the financially illiterate was a risk with a trenchant realisation of debt defaults.[16]

By December 2012, there were 19.97 million credit active consumers in South Africa, of which the number of those with "impaired records" (three months or more in arrears) was couched at 9.34 million consumers.[17] A further 15 per cent of consumers were described as "debt stressed" (one or two months in arrears).[18] This was the same year that saw a tragic development unfold – the Marikana Massacre. Pay-day lenders, loan sharks ("mashonisas"),[19] and reputable microcredit institutions (MCIs) had started to target some of South Africa's most vulnerable – migrant mine workers in the city of Rustenburg. Working a job that is the low paid, physically demanding, and incredibly dangerous saw these individuals heavily exploited.[20] The result - individuals who were financially illiterate were subject to unscrupulous micro lending thereby inevitably landing them into unrepayable

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[11] Milford Bateman 'South Africa's post-apartheid microcredit-driven calamity' *Law, Democracy and Development* Vol 18 (2014) at 118.

[12] Ibid.

[13] See for example: Parker Shipton 'Credit Between Cultures: Farmers, Financiers, and Misunderstanding in Africa' *New Haven: Yale University Press* (2011).

[14] Bateman op cit note 11 at 118.

[15] Ibid at 92 and 118.

[16] Mark Ellyne and Benjamin M. Jourdan 'Did the National Credit Act of 2005 Facilitate a Credt Boom and Bust in South Africa?' (2015) available at: www.essa.org.za/fullpaper/essa_2798.pdf.

[17] National Credit Regulator, *Credit Bureaux Monitor First Quarter* (December 2012) – available at: <www.ncr.org.za>, accessed 16 February 2020..

[18] Ibid. See also: Bateman op cit note 11 at 119.

[19] In Zulu, directly translated means: "one who buries you under". These are any credit providers that are not regulated by the NCR as required by the NCA

[20] Bateman op sit note 11 at 132.

levels of micro debt. This ended in a wildcat strike[21] and a calamitous massacre of 34 mineworkers.[22] This is arguably the largest incident of violence since apartheid which was, in large part, attributed to the growing issue of over-indebtedness.[23] By 2013, it was estimated that 40 per cent of South Africans income went toward offsetting their debts.[24] By August 2014, African Bank, the largest lender of unsecured credit went under curatorship by the South African Reserve Bank after experiencing a pitfall of defaults.[25] As a result, bottom-up development, inequality, and poverty have remained with little prospect of recovery and no indication of the poor escaping their debt.[26]

The attitude toward natural person insolvency has long been geared toward protecting the interests of the creditor. This is especially evident in South Africa under the Insolvency Act,[27] where our courts have reaffirmed the advantage of creditors principle.[28] As such, this has been problematic for the NINA debtor. New Zealand, however, was the first jurisdiction to specifically cater for the NINA debtor using the No Asset Procedure ('NAP') contained in their Insolvency Act.[29] Should an honest debtor meet the access requirements

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[21] A wildcat strike occurs where union members undertake to go on strike without the support and approval of the union which in this case was the National Union of Mineworkers (NUM).

[22] For more information see: Alexander, 'Marikana, turning point in South African history, *Review of South African Political Economy*, 2013, 40(138), 605-619; 'Marikana Massacre' *South African History Online*, 16 August 2013, available at: < https://www.sahistory.org.za/article/marikana-massacre-16-august-2012>.

[23] Davis R, "Marikana: The debt-hole that fueled the fire", *Daily Maverick*, 12 October 2012, available at: <https://www.dailymaverick.co.za/article/2012-10-12-marikana-the-debt-hole-that-fuelled-the-fire/>.

[24] Malcolm Rees and Dane Volker 'Garnishees 'exploit all South Africans' - Webber Wentzel' *MoneyWeb*, 15 August 2013, available at: <https://www.moneyweb.co.za/archive/garnishees-exploit-all-south-africans-webber-went/>, accessed 14 February 2020.

[25] Stephanie Giamporcaro 'Lest we forget – lessons from African Bank' *Fin24*, 27 September 2017, available at: <https://www.fin24.com/Opinion/lest-we-forget-lessons-from-african-bank-20170927>, accessed on 14 February 2020.

[26] Bateman op cit note 11 at 118.

[27] See sections 6, 10 and 12.

[28] See *BP Southern Africa (Pty) Ltd v Furstenburg* [1966] (1) SA 717 (O) 720 where Erasmus J stated, "the whole tenure of the Act, inasmuch as it directly relates to sequestration proceedings is aimed at obtaining a pecuniary benefit for creditors". More recently in *Stratford v Invesec bank Limited and Others* [2015] (3) SA 1 (CC) at para 42-43, the Constitutional Court made reference to *Meskin and Co v Friedman* 1948 (2) SA 555 (W) which stated at 559, "The facts put before the court must satisfy it that there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to creditors". As such the Constitutional Court found that the term "advantage" is broad and should not be rigidified.

[29] New Zealand Insolvency Act 2006.

and be admitted to this procedure, they shall receive a discharge of their qualifying debts. Similarly, Kenya's newly enacted Kenyan Insolvency Act 18 of 2015 has introduced a number of alternatives to bankruptcy including the NAP. In addition, the United Kingdom ('UK') have had a measure, the debt relief order ('DRO'), inserted into the Insolvency Act 1986 providing debt relief to the NINA debtor. Similarly, the DRO allows a person who is unable to settle his or her debts and who owes little, as well as no income and no assets, may submit an application and on consideration of the access requirements, may have a moratorium put in place, generally, for a year and thereafter the debt is extinguished.[30]

In South Africa, the National Credit Amendment Bill, 2017 dubbed the 'Debt Relief Bill' ('Bill') as it were, is now entrenched in the National Credit Amendment Act ('NCAA'),[31] after being assented to by President Cyril Ramaphosa on 13 August 2019. The NCAA, though not yet in force, amends the National Credit Act,[32] ('NCA') setting out a number of amendments aimed at curbing reckless credit lending and ensuring debt relief to the NINA debtor. Indeed, the legislature must be commended for addressing and directing efforts to the plight of the NINA debtor. While these efforts provide a step in the right direction, much speculation has surrounded a number of aspects pertaining to the debt intervention, namely: the rushed nature of the Bill with Parliament failing to apply its mind to a socio economic impact assessment study conducted by Genesis Analytics on behalf of the Department of trade and industry,[33] the potential ramifications it will have on both creditors and consumers alike, the issue of applicants earning under a R7, 500 capped salary being too low of a figure as well as the R50, 000 capped amount of debt being too low of a figure, the quality of discharge offered and whether unsecured credit under the NCA is the best way to deal with this issue. In light of the NCAA and surrounding speculation, this study undertakes to examine the areas in which the NCAA will likely fail in its goal to achieve debt relief for these consumers.

Significance of Study

[30] Section 251H, I, and M of the UK Insolvency Act 1986.

[31] Act 7 of 2019.

[32] Act 34 of 2005 as amended by Act 19 of 2014.

[33] Lynely Donnelly 'Debt Act not a relief for everyone' *Mail & Guardian* 23 August 2019, available at: <*https://mg.co.za/article/2019-08-23-00-debt-act-not-a-relief-for-everyone*>, accessed on 1 September 2019.

The significance of this study serves to promote and investigate further avenues of debt relief in a manner that creates a more singular, unified form of debt relief. The importance of this is paramount to the long-term goal of sustainability to both the NINA debtor and the South African economy as a whole. While reasonable consumer debt encourages economic growth, excessive consumer debt forces consumers to spend less and forces lenders to be more tringent with their lending and therefore directly negatively impacts the economy.[34] Today we are faced with a multifaceted, slightly fractured system of debt relief in South Africa.[35] The NCAA now brings in a fourth alternative and whether this alternative will succeed in its objectives remains to be observed. Therefore, anticipating the problematic areas of the NCAA in relation to debt intervention before it comes into effect may assist in directing efforts to rectify these areas allowing for a more effective and less discriminatory process.

Research Question

The primary aim of this study is to assess whether the debt relief provided within the NCAA will be sufficient for the NINA debtor. Since restrictions are capped for debt relief under the NCAA such as salary amount and debt amount, this contribution will have particular reference to the NINA debtor as they have no regular income to afford alternative legislative avenues. In determining whether this debt relief will be a success, this study will undertake a secondary objective in assessing personal insolvency best practices across the world, with particular reference to New Zealand, Kenya, and the UK. In the event where the study presents adverse findings toward the current debt relief under the NCAA, recommendations will be proposed to ensure the longevity of an individual's credit record, provide more efficient means of debt relief, greater access to such debt relief, and ultimately create a more uniform avenue of dealing with debt relief.

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[34] Household debt plays an important factor in our economy as it allows consumers to spend money, whether it is day to day spending or large investments. This spending ultimately allows businesses to flourish because as a business's earning potential increases, so will their manufacturing output, employment opportunities and raw materials for example. As a result, the economy in turn flourishes. However, where excessive debt occurs and consumers cannot afford to spend, this will negatively impact the economy. See Valckx 'Rising Household Debt: What it Means for Growth and Stability' *IMFBlog*, 3 October 2017, available at: https://blogs.imf.org/2017/10/03/rising-household-debt-what-it-means-for-growth-and-stability/#:~:text=Debt%20greases%20the%20wheels%20of,some%20of%20their%20future%20earnings.&text=Since%202008%2C%20household%20debt%20as,a%20sample%20of%2080%20countries.

[35] We have different Acts and different procedures dealing with debt relief in South Africa with each having its own set of barriers to access.

The primary question of this study asks to what extent the NCAA fails in its objectives pertaining to debt relief. To answer this question, the NCAA is examined in detail in conjunction with answering a number of sub-questions:

a) To what extent do current statutory measures avail themselves to NINA debtors?
b) To what extent does the debt relief under the NCAA conform to international best practices?
c) To what extent does the debt relief under the NCAA conform to the objects of the NCA?
d) To what extent does the debt relief amend the current South African insolvency framework?

Methodology

The methodology employed for this study entails desk-based research. Books, current legislation, case law, journal articles, and reports from both South Africa and alternate countries such as New Zealand, Kenya, and the UK will be used to conduct a comparative study from which a rational and practical approach to insolvency law in South Africa is recommended.

A critical analysis of the three legislative measures to debt relief prior to the NCAA will be conducted briefly. The aim of which is to show the need for a more inclusive system for natural person insolvency in South Africa. In this regard, the main areas of concern are the access criteria and the relief offered between those measures in contrast to the relief contained in the NCAA.

Thereafter, international best practices will be considered in an effort to seek further effective yet viable means of debt relief. The World Bank Report,[36] has expressed that it may not be desirable to transplant overly complex procedures from richer to poorer countries as the courts in those countries may not have the administrative capacity.[37] From a jurisprudential standpoint, the debate on "legal transplants" is relevant in order to ascertain

[36] World Bank *Report on the treatment of the insolvency of natural persons* (2013) (hereinafter 'World Bank Report')

[37] Ibid at para 180.

whether such "legal transplants" may occur within comparative jurisdictions.[38] Alan Watson argues for the "legal transplants" thesis, which, in brief, essentially takes a formalistic view of the law whereby rules can be moved from one jurisdiction to another. As a result, these rules are effectively considered in isolation from society. Opposed to this argument, Legrand argues that before simply transplanting a legal device, the context where the legal device is to be transplanted must be taken into account. Thus, a law cannot be transferred without cognisance of the foreign law intertwined with the social and political background as this may entail a risk of rejection. In a similar vein, Khan-Freund goes even further by observing that comparative analysis of law for practical purposes 'becomes an abuse only if it is informed by a legalistic spirit which ignored the context of the law'.[39] In agreement with Legrand and Khan-Freund, I submit that before considering the transplant of a foreign device, the social and political context where the lawmaker wishes to transplant that law is pertinent for the reasons abovementioned.

In this regard, a comparative analysis of the New Zealand (NZ) and Kenya insolvency regimes will be conducted. The NZ Insolvency regime was reformed by the NZ *Insolvency Act* 2006 while the Kenyan insolvency regime was reformed through the Kenyan *Insolvency Act* 18 of 2015. Both jurisdictions offer similar alternatives to bankruptcy under the umbrella of one Act. Of importance to this comparative analysis, however, is the inclusion of the No Asset Procedure ('NAP') as employed by these jurisdictions. In the South African context, the *Insolvency Act* has failed to provide adequate measures to the NINA debtor. Similarly, the old Kenyan *Bankruptcy Act* also failed to provide alternative measures to bankruptcy. The same was noted for NZ as the legislature's intention was to secure an alternative for those individuals whose circumstances were not adequately dealt with under the existing regime prior to the *Insolvency Act* 2006. Moreover, NZ and Kenya's insolvency regime's do not discriminate on financial grounds thereby further rendering the two insolvency regime's as an appealing option for the South African context. Furthermore, cognisance of the English law of insolvency is particularly important since English law has influenced much of South African law while also having an insolvency regime that

[38] See further: O. Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37 *MLR* 1; A. Watson, *Legal Transplants: An Approach to Comparative Law* (2ed University of Georgia Press 1993); P. Legrand, "The Impossibility of 'Legal Transplants'" (1997) 4 *Maastricht J Eur & Comp L* 111.

[39] Khan-Freund ibid at 27.

accommodates the NINA debtor by way of the DRO.[40] In evaluating these procedures, caution is taken to not disregard the South African context requiring a *sui generis* measure attributed to the current socio-economic climate.

Chapter Outline

Chapter one introduces reasons and motivations behind why the study of the South African natural person insolvency is pertinent for the NINA debtor. Following the motivations and background, the research objectives and significance of the study aim to promote and investigate further avenues of debt relief. The research question is posed thereafter with the methodology providing the course upon which this question will be investigated and answered. Chapter two evaluates whether the debt relief system, prior to the NCAA, provides adequate relief to the NINA debtor. This will include a brief outline of the sequestration procedure found within the Insolvency Act, the administration procedure found within section 74 of the Magistrates Court Act and debt review found within section 86 of the NCA. The intention of this discussion will be to set out the structural inadequacies of the current legislative measures for NINA debtors, particularly with regard to access and discharge thereof. Chapter three evaluates certain international insolvency trends in particular countries that exhibit proficient methods of dealing with natural person insolvency. Countries dealt with are New Zealand, Kenya and the UK. Each country has a particular system dealing with natural person insolvency and these systems will be evaluated against the background of South African insolvency law in order to establish a level of compatibility between the two. Chapter four analyses the current debt relief mechanism found under the NCAA by carefully evaluating the provisions of the NCAA. This evaluation will include a detailed discussion of the purpose of the debt relief, its compatibility with the objects of the NCA, as well as the procedural issues that arise from this process. In addition, the Report issued by Genesis Analytics on the likely impact of the debt intervention will be considered. The chapter then closes with the most likely impact the debt intervention may have on both creditors and the consumers it intends to protect. Chapter five concludes the study by providing a summary and evaluation of the research into the current debt relief offered. Using the South African approach to debt relief under the NCAA in comparison to international trends provides the

[40] The DRO will be discussed in chapter 3.

research basis upon which this study offers final recommendations on a way forward for South African natural person insolvency.

CHAPTER TWO

THE DEBT RELIEF LANDSCAPE PRIOR TO THE NCAA: A CRITICAL ANALYSIS

Introduction

South Africa currently has three statutory natural person insolvency mechanisms that a debtor may utilize. When the NCAA debt relief mechanism comes into force there will be four statutory procedures available. The inclusion of this fourth procedure is evidence of the prevailing failure the South African Insolvency regime has had for NINA debtors, however, this will not be discussed in this chapter. I will also exclude the proposed pre-liquidation composition which was regarded, for a number of reasons, to be of no real assistance to the NINA debtor.[41] What I will discuss is Sequestration under the Insolvency Act, Administration Orders under the Magistrates Court's Act, and Debt Review under the NCA, which have all largely failed in providing debt relief to the NINA debtor for various reasons which shall follow. Thereafter, voluntary compositions both at common law and statute law will be discussed. The aim of this chapter is not to delve into great detail regarding each procedure but rather to cast a light onto their inadequacies in assisting the NINA debtor. This section, therefore, will provide a short critical analysis of the above three procedures, as well as the statutory and common law composition. The aim of which is to illuminate their shortcomings and provide clear reasons why an Insolvency law reform is needed.

Sequestration

The principal debt relief measure in South Africa is sequestration which offers a full discharge of the insolvent's debt under s 129 of the Insolvency Act. The aim is to provide a debtor with the liquidation of their estate and ultimately grant a discharge of all pre-sequestration debt.[42] Emphasis must be placed on the fact this is currently the only

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[41] For a discussion on the proposed pre-liquidation composition see Coetzee 'Does the proposed pre-liquidation composition proffer a solution to the No Income No Asset (NINA) debtor's quandary, and, if not,

what would?' 80 (2017) *THRHR*.

[42] S 129(1)(b) of the Insolvency Act.

mechanism that offers a full discharge of debt incurred prior to sequestration. A debtor's estate may be sequestrated in two ways: voluntary surrender on application by the debtor or by compulsory sequestration brought on by a creditor. Important to note is that both these applications must be brought to the High Court which in itself imposes a cost on proceeding with the application.

If a debtor chooses to go via the voluntary surrender route, the test for a successful application is found in s 6(1) of the Insolvency Act which decrees that the provisions of section four must be complied with,[43] the debtor is in fact insolvent, there are sufficient realisable assets to cover the costs of sequestration, and that the residue paid from the estate *will be to the advantage of creditors*.[44] On a reading of s 6(1), it would appear that the 'advantage to creditors' rule is applied more rigidly, as seen by the courts, opposed to compulsory sequestration.[45] With a compulsory sequestration, in order for the creditor to attract a provisional sequestration order the creditor must establish a liquidated claim against the debtor,[46] that the debtor has committed an act of insolvency or is insolvent,[47] and that there is *reason to believe* that there will be an advantage to creditors if the estate is sequestrated.[48] When comparing the two applications it has been noted that the 'advantage to

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[43] S 4 provides preliminary formalities that are to be complied with.

[44] Emphasis added on the wording of s 6(1) showing that there must be an advantage for creditors. In *Trust Wholesalers and Woollens (Pty) Ltd v Mackan* 1954 (2) SA 109 (N) at 111 the court held that sequestration must "yield at the very least, a not-negligible dividend" for concurrent creditors. This dictum was applied in *Stock Owners Co-operative Co Ltd v Rautenbach* 1960 (2) SA 123 (E). Similarly, in *Julie Whyte Dresses (Pty) Ltd v Whitehead* 1979 (3) SA 218 (D) the court referred to the above dictum albeit *obiter*. In *Stratford and Others v Investec Bank Ltd* 2015 (3) SA 1 (CC) at para 44, the court held that the term "advantage" is broad and should not be rigidified thereby not laying down a hard and fast rule to this effect.

[45] In *Ex parte Bergh* 1938 CPD 132, it was held that a court retains discretion to reject an application of voluntary surrender where there will be minimal benefit to creditors; In *Ex parte Pillay* 1955 2 SA 309 (N) at 311, it was held that the aim of voluntary surrender is for the benefit of creditors; The court in *Ex parte Bouwer* 2009 6 SA 382 (GNP) at paras 2-5 considered applications for voluntary surrender. The court held that there are procedural requirements set out in s 4 of the Insolvency Act while the substantive requirements are set out in s 6(1) of the Insolvency Act. The common thread between all the applications was that the reasons for insolvency were vague and inadequate. The court refers to *Ex parte Hayes* 1970 4 SA 94 (N) at 96A-C insofar as the court is not a rubber stamp and that in order to exercise its discretion judiciously the applicant must be candid by disclosing all material facts. In this case the applicants failed to disclose their salaries and as such a failure to being candid resulted in a dismissal of the applications.

[46] S 10(a) of the Insolvency Act.

[47] S 10(b) of the Insolvency Act.

[48] S 10(c) of the Insolvency Act. Emphasis added to show the difference in wording between voluntary surrender and compulsory sequestration.

creditors' principle is applied more rigidly in cases of voluntary surrender.[49] It is precisely for this reason why a "friendly sequestration" would occur. Friendly sequestrations are a form of compulsory sequestration whereby family or friends bring an application for the debtor's sequestration and therefore ultimately yielding a lower threshold for the 'advantage to creditors' principle.[50] Bozalek J in *Ex Parte Concato,*[51] made reference to the previous case of *Ex Parte: Arntzen (NedBank Limited as intervening creditor)*[52] where Gorven J, in a carefully well-reasoned judgment, held that voluntary surrender applications require an even higher level of disclosure than friendly sequestrations.

It is clear from the above forms of sequestration that the 'advantage to creditors' principle is important for purposes of the Insolvency Act and undoubtedly provides a barrier to access for many debtors. If the court is not satisfied that a sequestration will be to the advantage of creditors, the debtor will not receive a statutory discharge and therefore reliance cannot be placed on this form of debt relief.[53] Such an advantage has been interpreted to mean that a "substantial portion" of creditors, in reference to the value of their claims, will derive an advantage from the sequestration.[54] Furthermore, in cases where the requirements of voluntary surrender or compulsory sequestration are met, the court nevertheless retains the discretion to decline the sequestration.[55] The result being that in some cases a debtor may be so overburdened that their estate will fail to yield an advantage to the creditors, as seen in *Van Rooyen v Van Rooyen*.[56] *In casu,* two former employees of a Close Corporation were bound as sureties for the Close Corporation in favour of the intervening creditor in terms of a

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[49] Boraine & Roestoff 'Revisiting the State of Consumer Insolvency in South Africa after Twenty Years: The Courts Approach, International Guidelines and an Appeal for Urgent Law Reform' (2014) *77 THRHR* 351 at 357.

[50] See in general with regard to friendly sequestrations: Evans 'Unfriendly Consequences of Friendly Sequestration' 2003 15 *SA Mercantile LJ* 437; Evans & Haskins 'Friendly Sequestrations and the Advantage of Creditors' 1990 2 SA Mercantile LJ 246.

[51] 2016 (3) 549 (WCC) at paras 7-13.

[52] 2013 (1) SA 49 (KZP) at para 12.

[53] Boraine & Roestoff 'The Treatment of insolvency of natural persons in South African law: An appeal for a balanced and integrated approach' in Hassane Cisse *Fostering development through opportunity, inclusion and equality, The World Bank Legal Review,* volume 5 (2014) THRHR 354 at 95.

[54] *Trust Wholesalers and Woollens (Pty) Ltd v Macken* 1957 (2) SA 109 (N); Fesi v ABSA Bank Ltd 2000 (1) SA 499 (CC).

[55] *Julie Whyte Dresses (Pty) Ltd v Whitehead* 1970 3 SA 218 (D) 219.

[56] *Van Rooyen v Van Rooyen (Automutual Investments (EC) (Pty) Ltd., Intervening Creditor* (2000) 2 All SA (SE) 485.

lease agreement. What followed was a sequestration of the first surety but this failed to provide a non-negligible dividend for the creditor resulting in the second surety becoming liable for the outstanding debt. What transpired was a friendly sequestration in which an application for sequestration was made by the mother of the second surety. The application, however, failed on the 'advantage to creditors' principle and therefore could not be sequestrated. This case exposes the flawed nature of the South African Insolvency regime because the second option upon failure of sequestration would be an administration order. However, due to the amount of debt exceeding the R50 000 limit, an administration order was not applicable.[57] Moreover, should debt review under the NCA have been available at the time the case was decided, the debt would have had to have been limited to a credit agreement in which case this was a credit guarantee, thereby qualifying as a credit agreement under s 8(5) of the NCA. Ultimately, should debt review have been available, this would have nevertheless, rendered no discharge for the debtor. As a result, the above case neatly addressed the shortcomings of the South African insolvency procedures.

Administration

An administration order in terms of s 74 of the Magistrates' Courts Act is available for those debtors going through a time of hardship and could not see through a sequestration because they either do not qualify or it would deplete their estate.[58] Consequently, this order is aimed toward the more modest estate and will only provide consolation where the outstanding debt does not exceed an amount determined by the Minister by notice in the *Gazette* which is currently set at R50 000.[59] Should a debtor be granted an administration order, the debtor will then pay the administrator whom then pays the creditors, making the essence of this order a debt repayment plan. Once the administrator and all creditors are paid the administration order will lapse.[60] What this means is that there is no fixed date whereupon a discharge will be granted thereby leaving the possibility that a debtor may be overindebted for an indefinite period of time.[61] Due to the nature of the administration order with its essential aim of

[57] An amount of R94, 260.34 was due to the intervening creditor.

[58] *Ex Parte Van den Berg* 1950 1 SA 816 (W).

[59] S 74(1)(b) of the MCA and Government Notice R1411 in Government Gazette 19435 of 30 October 1998.

[60] S 74U of the MCA.

[61] Boraine & Roestoff 'Revisiting the State of Consumer Insolvency' op cit note 49 at 360.

restructuring debt, it places an exigent demand on the debtor to have a regular income or disposable assets in order to fund the debts and costs of the administration order.

In light of the above, an administration order firstly, fails to furnish a debtor with a discharge of their debt but rather it merely restructures the debt. This is because the administration order only lapses once the cost of administration and listed creditors have been paid in full.[62] Secondly, it limits a debtor's claim to the R50 000 ceiling thereby excluding any honest but unfortunate debtors that have a debt over R50 000 but which do not qualify for sequestration.[63] Lastly, in order to qualify for this procedure there would need to be some form of income or assets to make regular payments and this, by virtue, excludes NINA debtors from its reach. I submit that in light of the above, the administration order should allow for debts up to at least R100 000 to provide for a wider range of debtors to enter into this process.

Debt Review

The debt review procedure is found under s 86 of the NCA and operates as a viable debt relief mechanism to those mildly over indebted. By virtue of debt review finding its operation within the NCA, sections 1 and 8 of the NCA find application where the former defines a 'credit agreement' while the latter sets out the types of agreements that fall within the scope of the NCA.[64] The essence of a credit agreement involves a transaction whereby goods or services were supplied, the payment was deferred or billed periodically, and a charge, fee or interest is payable to the credit provider.[65] To enter into debt review a consumer must first

[62] Coetzee and Roestoff 'Consumer debt relief in South Africa – Should the insolvency system provide for NINA debtors? Lessons from New Zealand' (2013) *Int Solvency Review* at 200.

[63] Roestoff proposes that there be no monetary limit in this regard and that creditor's interests will nevertheless be protected as the sequestration order is not excluded from an administration order and therefore creditors may apply for a sequestration order where it would yield a better result. See Roestoff 'Eenvormige insolvensiewetgewing in Suid-Afrika: Moet die administrasiebevel ingesluit word? (2000) *De Jure* 133.

[64] S 1 of the NCA, under the definition of "credit agreement" it is stated that this means an agreement that meets all the criteria set out under section 8. S 8, thereafter, lists a number of criteria where an agreement will be a credit agreement for purposes of the NCA.

[65] S 8(3)(a) and (b) of the NCA. Notwithstanding the exclusions set out under s 8(2) thereof.

apply to a debt counsellor,[66] to be declared over-indebted as per the test set out under s 79.[67] It has been held, however, that it is not cost effective for debt counsellors to consider applications of consumers earning less than R7, 500 per month.[68] Alternatively, a court hearing a matter concerning a credit agreement may refer the matter directly to a debt counsellor.[69] The debt counsellor must then make an assessment as to whether the consumer appears to be over-indebted,[70] or if the consumer seeks a declaration of reckless credit, assess whether any of the consumer's credit agreements appear to be reckless.[71] On conclusion of the assessment, if it appears the consumer is not over-indebted the application may be rejected.[72] Where the consumer is not over-indebted but unlikely to satisfy their credit agreements in a timely manner then the debt counsellor may recommend the consumer and credit provider's voluntarily agree on a plan of debt re-arrangement.[73] If, however, the debt counsellor concludes that the consumer is in fact over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make an order declaring there to be reckless credit and/or that the consumers' obligations be re-arranged.[74]

Important to note is that where a creditor has already taken steps to enforce the agreement, debt review will not be applicable.[75] In *Investec Bank Ltd v Mutemeri & Another*,[76] Trengrove AJ held that sequestration proceedings are not barred under s 88(3) of the NCA.[77] This position was reaffirmed by the SCA in *Naidoo v ABSA Bank Ltd*,[78] whereby

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[66] The office of the debt counsellor was created by the NCA and whom is a designated person that conducts the debt review procedure.

[67] S 86(1) of the NCA.

[68] *Memorandum on the Objects of the National Credit Amendment Bill*, 2018.

[69] S 85(a) of the NCA.

[70] S 86(6)(a) of the NCA.

[71] S 86(6)(b) of the NCA.

[72] S 86(7)(a) of the NCA.

[73] S 86(7)(b) of the NCA.

[74] S 86(7)(c) of the NCA. See further: s 86(7)(c)(i) and (ii) of the NCA. In terms of the re-arrangement methods that may apply to a specific case, see: s 86(7)(c)(ii)(aa)-(dd) of the NCA.

[75] S 86(2) of the NCA.

[76] 2010 (1) SA 265 (GSJ).

[77] S 88(3) prohibits a credit provider from enforcing a right or security under a credit agreement once the credit provider has received a notice of court proceedings under s 83, s 85, or s 86(4)(b)(i).

[78] 2010 (4) SA 597 (SCA) at 600-601.

it was held that sequestration proceedings do not amount to enforcement proceedings contemplated by the NCA. As a result, where a debtor has applied for debt review and a debt re-arrangement order comes into existence, this will not be a bar to the granting of a sequestration order.[79] Furthermore, in *Nedbank Ltd v The National Credit Regulator*,[80] the SCA held that once a s 129(1)(a) notice has been sent to the applicant in respect to a specific credit agreement, then the provisions of s 86(2) would bar the applicant from including that specific credit agreement from the debt review procedure. I therefore submit that debt review under the NCA should be amended to allow a debtor, who is undergoing debt review, be permitted to evade a sequestration application.

Debt review, like an administration order, fails to provide a discharge of debt,[81] with no time limit set for the payment plan.[82] Unlike an administration order, there is no monetary limit for debt review for natural persons.[83] This may seem *prima facie* advantageous, however, the agreement must be covered by the NCA and thereby excludes a multitude of other forms of debt such as delictual claims, shopping accounts, maintenance and municipal accounts as well as certain types of surety debts.[84] Debt review and administration orders do share a commonality in that both require the consumer to have a regular income inasmuch as they both provide for debt re-arrangements or rescheduling but not a discharge of the debt.[85] This was neatly summed up in *Collet v Firstrand Bank Ltd,*[86] where it held that 'the purpose of debt review is not to relieve the consumer of his obligations but to achieve either a voluntary re-arrangement or a debt re-arrangement by the Magistrate's Court'.[87] This is problematic because once again, the NINA debtor is essentially excluded by virtue of their

[79] *Firstrand Bank Ltd v Kona & Another* 20003/2014 [2015] ZASCA 11 (13 March 2015) at para 14; *Firstrand Bank Ltd v Evans* 2011 (4) SA 597 (KZD) at paras 29-37.

[80] 2011 (3) SA 581 (SCA) at para 14.

[81] S 87 of the NCA read with National Credit Regulation 27.

[82] Ss 86(10) and s 88 read with National Credit Regulation 27.

[83] Monetary limits are placed on juristic persons, see s 4(1)(a).

[84] S 1 and s 8 of the NCA. See also, Coetzee & Roestoff 'Consumer debt relief in South Africa' op cit note 51 at 198.

[85] Leathern, 'A consideration of the proposed debt intervention procedure from a debt-relief perspective' (2018) (Doctoral Dissertation, University of Pretoria) at 21.

[86] 2011 (4) SA 508 (SCA).

[87] Ibid at para 10.

unemployment. It is clear these statutory measures do not find application for every natural person insolvency case and as a result lower the overall success of the insolvency system.[88]

Voluntary Composition

A further avenue would be a composition which may be attempted in terms of s 119 of the Insolvency Act or alternatively, a composition at common law. A statutory composition in terms of s 119 allows an insolvent to submit a letter of composition to the trustee of his/her estate at any time after the first meeting of creditors of that insolvent estate.[89] The statutory composition will require acceptance of creditors whose votes amount to not less than three-fourths in value and three-fourths in number,[90] of the votes of all creditors who proved claims against the estate.[91] As such, the advantage of a statutory composition is that a majority decision is binding.[92] The downside, however, is that there is no discharge of the sequestration order or of the debt upon acceptance by the majority.[93]

At common law, a debtor who is facing provisional sequestration may enter into voluntary negotiations regarding a debt restructuring in order to avoid insolvency.[94] An agreement may be entered into by the debtor and all creditors,[95] whereby the parties agree that the creditors will be paid in full or in part, subject to certain circumstances and conditions, as full and final payment.[96] The common law composition will only bind those creditors who agree to it,[97] however, for reasons of practicality, all creditors would need to agree to using this instrument.[98] Beneficial to this approach is the fact that the debtor's status

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[88] Coetzee, 'A comparative reappraisal of debt relief measures for natural person debtors in South Africa' (LLD thesis University of Pretoria 2015) at 411.

[89] S 119(1) of the Insolvency Act.

[90] Calculated in accordance with the provisions of s 52.

[91] S 119(7) of the Insolvency Act.

[92] Bertelsmann *et al Mars* paras 24.1-24.2.

[93] Sharrock, Van der Linde and Smith *Hockly's Insolvency Law* at 204.

[94] *Mahomad v Lockhat Brothers & Co Ltd* 1944 AD 230, 241.

[95] All creditors must agree. See, *Prinsloo and Another v Van Zyl NO* 1967 (1) SA 581 (T), at 583.

[96] Coetzee op cit note 70 at 290.

[97] *De Wit v Boathavens CC* 1989 (1) SA 606 (C) 611.

[98] Coetzee op cit note 77 at 290.

remains unchanged and they are allowed to go about their ordinary course of business as before the agreement.[99] Once the composition is approved the debtor will be released from their debts and any provisional sequestration order will be discharged.[100] For NINA debtors, a composition at both common and statutory law would be an unrealistic prospect for a restructuring of the debt due to the low level of disposable income.[101] Furthermore, it is highly likely that many creditors would not agree to a composition and in a situation where there are multiple creditors the prospects drop even further.

Conclusion

From the above analysis, it is abundantly clear that the current insolvency framework provides little support to the NINA debtor. Sequestration is too expensive a procedure, specifically because of the advantage for creditors requirement. The administration order is not only limited in scope with a R50 000 cap but it provides no discharge to the debtor as the administration order only lapses once the creditors are paid in full. Finally, debt review is an alternative procedure, however, it only is limited to those agreements that qualify as 'credit agreements' in terms of the NCA. Not only is debt review subject to this qualification but debt review is also excluded where a creditor has taken steps to enforce the agreement. Moreover, debt review, like an administration order, fails to provide a discharge of debt. Simply put, sequestration is the only procedure giving a debtor a discharge, but this is often too expensive, leaving debtors with two alternative options that merely assist in debt re-arrangement. Lastly, a composition seems an unlikely endeavour as many creditors would not easily submit to such an agreement.

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[99] Smith, 'Compositions in Insolvency' *THRHR* 31 (1968) at 30.

[100] Bertelsman *et al Mars* para 24.1.

[101] Coetzee & Roestoff 'Consumer debt relief in South Africa' op cit note 53 at 189.

CHAPTER THREE

DEBT INTERVENTION: INTERNATIONAL TRENDS

Introduction

It is clear from the above observations that the South African natural person insolvency system has inherent structural issues insofar as access to discharge of debt is concerned. This is especially true for the NINA debtor where sequestration is not an option.[102] Due to the inadequate support provided by the insolvency system it is pertinent to look at international trends that may be applied in South Africa. In this regard, the World Bank Report ('Report'),[103] will be discussed highlighting selected aspects that are important to a natural person insolvency system. Thereafter, the NAP will be discussed as New Zealand, a developed economy and Kenya, a developing economy, have both made use of this mechanism showing its versatility not only as a debt discharge mechanism but also showing that it has transplantable properties. Lastly, the UK DRO, will be analysed in order to ascertain whether it would be applicable in the South African context. I will conclude my discussion by evaluating whether these procedures may be applicable and beneficial for the South African NINA debtor.

World Bank Report

In the wake of the global financial crisis of 2008, consumer insolvency was recognised as a systemic risk with a need for domestic laws and institutions to enable jurisdictions to deal with over-indebtedness effectively. Therefore, a need presented itself for an international body to issue a Report undertaking natural person insolvency best practices from an international perspective. In 2011, the World Bank convened its Insolvency and Creditor/Debtor Regimes Task Force ('Task Force'), to discuss revisions of the unified standard for the comparative examination of business insolvency and creditor/debtor regimes

[102] This is largely due to the advantage for creditors requirement as discussed in Chapter two.

[103] World Bank *Report on the treatment of Insolvency of natural persons* (2013).

('ICR Standard').[104] Part of this discussion, however, was to consider the topic of insolvency of natural persons for the first time.[105] A number of important issues were raised in the Report that are beneficial for the utilization in the South African context such as access requirements, minimal creditor involvement, discharge and a fresh start.

It is important to note that all countries utilise different laws and systems and therefore insolvency laws cannot be undertaken with a 'one size fits all' approach.[106] From an access point of view, the Report finds that standards for access to the formal insolvency regime and restructuring plans should be clear, transparent and ensure against the abuse by creditors and/or debtors.[107] For debtor access, it is said that complicated access requirements may keep debtors in a state of informal insolvency due to their apprehensiveness of the formal system.[108] These complicated access requirements are usually in place to screen the individual to ensure they are not abusing the insolvency system and to uphold the principle of *pacta sunt servanda*.[109] Less complicated access requirements will, however, have the benefit of reducing this reluctance. With lower access requirements, this does not mean that an individual's conduct will not be reviewed or sanctioned by, for example, having limits imposed on the discharge granted.[110] The Report further points out that there is little evidence to suggest 'moral hazard' in systems with relatively open access and as a result advocates for a more open approach with applying intermediate sanctions to individuals after entry as opposed to barring them at the outset.[111]

A further issue addressed in the Report is that of creditor involvement. The Report finds that creditors play little to no role, and add no value in the procedure of insolvency of natural persons. When creditors do act, however, they usually act in their own best interests which is of little help to the debtor.[112] However, the Report makes mention that creditors should be permitted to challenge the discharge of a debtor retroactively where assets or

[104] World Bank *Report* at paras 1-2.

[105] Ibid at para 3.

[106] Ibid at para 19.

[107] Ibid at para 186.

[108] Ibid at para 197.

[109] The principle that agreements must be kept; Ibid at para 193.

[110] Ibid at para 199.

[111] Ibid at para 193.

[112] Ibid at para 207.

unexpected income are discovered post-discharge.[113] By making this provision for creditors, a level of protection for creditors is maintained and in line with a balanced approach for which this paper advocates.

The last core issue addressed in the Report is that of discharge. The Report notes that one of the principal purposes of having an insolvency system is to re-establish economic capability of the individual.[114] In doing so, the rehabilitation of a debtor includes three elements. First, the debtor must be freed from excessive debt. In this regard, the Report speaks to a "fresh start" meaning that the debtor may be freed from their debt without the implementation of a payment plan.[115] This notion, however, is met with opposition by many countries inasmuch as they prefer certain conditions to be met over a certain period of time and prefer at least a partial payment of debt as a condition of discharge.[116] This would be better termed as an "earned fresh start" but the Report does, however, note that this would not be applicable to those honest but unfortunate debtors who cannot afford to even pay a fraction of the debt, much like the South African NINA debtors. The second element to rehabilitation is non-discrimination during and after receiving relief.[117] The Report finds that the benefits of discharge may become delusory if the discharge is not respected after the insolvency procedure has concluded and makes special mention of the issue in light of the fact that discrimination issues are rarely discussed in the context of insolvency.[118] Thirdly, the last element to rehabilitation flows logically from the term 'rehabilitated' in that the debtor should be able to avoid becoming excessively overindebted again by being more responsible with their use of credit.[119]

New Zealand: No Asset Procedure

[113] Ibid at para 216.

[114] Ibid at para 354.

[115] Ibid at para 355.

[116] Ibid at para 356.

[117] Ibid.

[118] Ibid at para 360. Debtors must not be discriminated against because they filed for insolvency or have received relief. Many repayment plans take many years and therefore discrimination during and after that period should be taken into account.

[119] Ibid at para 361.

New Zealand ('NZ') was one of the first countries to expressly provide for the NINA debtors, an area where South African insolvency law has been absent. From a developing country perspective, the NZ insolvency laws are particularly appealing due to its simplicity. In 2006, the NZ insolvency laws were reformed by way of the new NZ Insolvency Act ('NZ Act').[120] The NZ Act provides for bankruptcy as well as alternatives in the form of proposals,[121] summary instalment orders,[122] and the NAP.[123] For purposes of this paper, the NAP will be the only focus of the NZ Act as this would be a fitting option in the context of South African NINA debtors.

Access Requirements

The NAP has a number of requirements before a debtor may be admitted, but notably, it offers relief to a debtor 'who has no realisable assets'.[124] It is clear that the NZ legislature, in creating this procedure, have considered that the debtors who would not qualify for bankruptcy had no other means of debt discharge and have now catered for these debtors. Due to the short time period of 12 months for the NAP in contrast to the three year time period for bankruptcy, this has made the NAP entry requirements more restrictive in order to curb prospective abuse.[125] A debtor who meets the criteria set out in s 363 of the NZ Act may apply to the Official Assignee for entry into the NAP by completing and filing an application and statement of financial affairs in the prescribed form.[126] The official Assignee is part of the NZ Insolvency and Trust Service (ITS) and is appointed under the State Sector Act 1988 to administer the Insolvency Act without court intervention.[127] The criteria in order to be admitted into the NAP are as follows:

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[120] Insolvency Act 2006 No 55 (NZ).

[121] Part 5, Subpart 2, ss 325 – 339.

[122] Part 5, Subpart 3, ss 340-360.

[123] Part 5, Subpart 4, SS 361-377B.

[124] S 363(1)(a) of the NZ Act.

[125] Brown & Telfer *Personal and Corporate Insolvency Legislation: Guide and Commentary to the 2006 Amendments* (2013) 2nd ed LexisNexis NZ Limited at 38.

[126] S 362(1) and s 362(2).

[127] The Official Assignee also administers the insolvency provisions of the Companies Act 1993 and the Criminal Proceeds (Recovery) Act 2009. The ITS, also known as the Official Assignee's Office, is a business unit of the Ministry of Business, Innovation and Employment.

(a) The debtor has no realisable assets;[128] and
(b) The debtor has not previously been admitted to the no asset procedure;[129] and
(c) The debtor has not previously been adjudicated as bankrupt;[130] and
(d) The debtor has total debts (apart from any excluded debt) that are not less than $1,000 and not more than $50, 000;[131] and
(e) Under a prescribed means test, the debtor does not have any means of repaying any amount towards those debts;[132] and
(f) The outcome for any creditor would not be any better if the debtor were adjudicated bankrupt.[133]

The above access requirements are further contingent upon the debtor's conduct and as a result the Assignee may reject a debtor's application if it is found on reasonable grounds that:

(a) The debtor has concealed assets with the intention of defrauding his or her creditors;[134] or
(b) The debtor has engaged in conduct that would constitute an offence under the Act if the debtor were adjudicated bankrupt;[135] or
(c) The debtor has incurred a debt or debts knowing that the debtor does not have the means to repay them;[136] or
(d) A creditor intends to apply for the debtor's adjudication as a bankrupt and it is likely that the outcome for the creditor if the debtor is adjudicated as bankrupt will be materially better than if the debtor is admitted under the no asset procedure.[137]

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[128] S 363(1)(a).

[129] S 363(1)(b).

[130] S 363(1)(c).

[131] S 363(1)(d). NZ $50, 000 equates to roughly R550, 245. Conversion done through OANDA money converter on 27 July 2020, available at: https://www1.oanda.com/currency/converter/

[132] S 363(1)(e).

[133] S 363(1)(f).

[134] S 364(a).

[135] S 364(b).

[136] S 364(c). Coetzee op cit note 77 at 338 footnote 290 and Brown & Telfer op cit note 114 at 41 find this provision to be controversial as there may be instances where an honest debtor was forced to take out a loan which he or she believed they would be able to pay back. As a result, this disqualification may be difficult to enforce.

[137] S 364(d).

Thereafter, the debtor is formally admitted to the NAP when the Assignee sends a written notice to the debtor.[138] Coetzee points out that this corresponds with the international guideline that "creditors should only participate in instances where estates represent significant value".[139] In addition to the above, the Assignee must notify creditors that the debtor has entered the NAP,[140] as well as maintain a public register of persons admitted to the procedure and persons discharged from the procedure.[141]

Circumstances of Obtaining Access

Once an application is made, the debtor may not obtain any credit, alone or jointly, of more than $100[142] without first informing the creditor that they have applied for entry to the NAP.[143] Contravention of this provision could result in a conviction of imprisonment for no longer than 1 year or a fine of no more than $5,000,[144] or both.[145] Once the debtor is admitted to the procedure, the Assignee will send a written notice to the debtor in the prescribed form as well as inform the creditors of the debtors admission to the NAP and advertise in the prescribed manner that the debtor has been admitted to the NAP.[146]

Creditors, however, are affected inasmuch as there is a moratorium on the enforcement of debt.[147] Once the debtor is admitted to the procedure, creditors may not

[138] S 367(1).

[139] Coetzee op cit note 77 footnote 294.

[140] S 367(2).

[141] S 368(1).

[142] The equates to roughly R1,092. Conversion done through OANDA money converter on 20 July 2020, available at: https://www1.oanda.com/currency/converter/

[143] S 366.

[144] The equates to roughly R54, 577. Conversion done through OANDA money converter on 20 July 2020, available at: https://www1.oanda.com/currency/converter/

[145] S 371(3). It should be noted that the debtor will, however, have a defence if the debtor can prove that debtor himself or herself informed the creditor that the debtor was admitted to the NAP or that the creditor was informed that the debtor was admitted to the NAP as per s 371(2).

[146] S 367(1) and s 367(2).

[147] Coetzee & Roestoff 'Consumer debt relief in South Africa' op cit note 53 at 205. Coetzee, op cit note 77 at 339 footnote 297 submits that international guidelines favour this position whereby a moratorium is created once admitted into the procedure.

recover or enforce a debt that was owed at the time of being admitted into the NAP or a debt that would be provable under bankruptcy.[148] There are, however, three qualifications to which the NAP does not apply and this includes maintenance orders,[149] payments for child support,[150] and student loans.[151] Upon entry into the NAP the debtor has a number of duties, namely; compliance with reasonable requests from the Assignee,[152] notifying the Assignee where there is a change of circumstances and the debtor would be able to repay any amounts towards the debt under s 369(1),[153] and not obtaining credit of more than $1,000 without first informing the credit provider that he or she is subject to the NAP.[154]

Termination & Discharge

Termination of the NAP may occur in a number or ways. The Assignee may terminate the debtor's participation in the NAP per s 373,[155] the debtor may be discharged as per s 377, the debtor may apply for their own adjudication or alternatively a creditor applies for the debtor's adjudication.[156] In maintaining a debtor-creditor balance, a creditor is permitted to apply to the Assignee for termination on one of two grounds being: (1) the debtor did not meet the entry criteria, or (2) that there are reasonable grounds for the Assignee to conclude that the debtor was disqualified under s 364.[157] Termination becomes effective once the Assignee has sent the debtor a written notice in the prescribed form to the debtor's last known address, whether the debtor has received the notice or not.[158] Thereafter, the Assignee must send a

[148] S 369(1).

[149] S 369(2)(a) per the Family Proceedings Act 1980.

[150] S 369(2)(b) per the Child Support Act 1991.

[151] S 369(2)(c).

[152] S 370(1).

[153] S 370(2).

[154] S 370(3).

[155] S 373(1) permits the Assignee to terminate the NAP where the debtor was wrongly admitted into the procedure, for example, concealing assets or misleading the Assignee or where the Assignee is satisfied that the debtors financial circumstances have changed, enabling the debtor to repay an amount towards the debt.

[156] S 372(a)-(d).

[157] S 376(1) and s 376(2). The disqualification criteria, per s 364, are set out above under 'access requirements'.

[158] S 373(2).

written notice of termination to the creditors of the debtor that are known to the Assignee as soon as practicably possible.[159]

Discharge for a debtor who has successfully participated in the NAP will occur 12 months from the date the debtor was admitted to the NAP.[160] The Assignee, however, may set a deferred discharge date if satisfied that the 12-month period should be extended.[161] In this case, the Assignee must send a written deferral notice to the debtors last known address before the end of the 12 month period.[162] Discharge, whether deferred or not, will then result in a cancellation of those debts that became unenforceable upon entry into the NAP.[163] This will not be the case, however, for any debt where the debt or liability was incurred as a result of fraud or fraudulent breach of trust or for which the debtor has obtained forbearance through fraud.[164]

Kenya: No Asset Procedure

Despite NZ being a first world country, Kenya as a third world country adopted similar measures to NZ in revamping their insolvency regime through their recently enacted Insolvency Act 18 of 2015 ('Kenyan Act'). Prior to this enactment, the insolvency of natural persons was dealt with under the old Bankruptcy Act[165] which provided no alternatives to bankruptcy aside from schemes of arrangement and compositions.[166] Not only has Kenya opted to enact a new piece of legislation that will aid in the plight of the NINA debtor but it would seem that in doing so, the objective of the Act is still to maintain a balanced approach between debtors and creditors.[167] Among these alternatives to bankruptcy include: individual

[159] S 373(3).

[160] S 377(1).

[161] S 377(2)(a). An extension would be used to properly determine whether the debtor's participation in the NAP should be terminated.

[162] S 377(2)(b). The deferral notice must contain the date upon which automatic discharge will occur and must be no later that 25 working days after the 12-month period expires.

[163] S 377A(1).

[164] S 377A(2).

[165] Bankruptcy Act (Chapter 53 of the Laws of Kenya).

[166] Ibid at ss 18(1)-(20).

[167] See preamble of the Act where it is stated *inter alia* "to provide alternative procedures to bankruptcy that will enable the affairs of insolvent natural persons to be managed for the benefit for their creditors".

voluntary arrangements, expedited procedures, summary instalment orders, and the NAP. As above, the focus here will be on the NAP as this pertains to the circumstances of the NINA debtor. It should be noted, however, that legislative changes in Kenya introducing the NAP are still fairly recent and as a result there is a lack of evidence surrounding the procedure's success. It is, however, a transplant from NZ where it has not only functioned effectively but has the elements of a well designed framework that does not inherently discriminate against any particular consumer.

Access Requirements

The access requirements for the NAP are almost an exact copy of the requirements set out in the NZ Act. The Official Receiver ('OR') must be satisfied that:

(a) the debtor has no realisable assets;[168]
(b) the debtor has not previously been admitted to the no-asset procedure;[169]
(c) the debtor has not previously been adjudged bankrupt;[170]
(d) the debtor has total debts that are not less than one hundred thousand shillings and not more than four million shillings;[171] and
(e) the debtor does not have the means to repay any amount towards those debts.[172]

The above is almost identical to its NZ counterpart. There are only two differences, firstly; the difference in currency which would be adjusted in accordance with the specific country using the NAP. Secondly, the NZ Act has an extra requirement for a debtor's access which is that the outcome for any creditor should not be any better if the debtor were adjudicated bankrupt. This would make the NZ access requirements slightly more restrictive but nevertheless does not deter from the bulk of the provision.

[168] S 345(1)(a).

[169] S 345(1)(b).

[170] S 345(1)(c).

[171] S 354(1)(d). One hundred thousand Kenyan shillings equates to roughly NZ $ 1,407 and four million Kenyan shillings equates to roughly NZ $56,715. The NZ Act allows for an amount of not less than NZ $1, 000 and not more than NZ $50, 000. As such the amounts are fairly similar in respect to their respective currencies. In terms of South African Rands, four million shillings equates to R517, 969. Conversion done through OANDA money converter on 5 August 2020, available at: https://www1.oanda.com/currency/converter/

[172] S 345(1)(e).

In terms of any form of disqualification from the NAP, these conditions are exactly the same to its NZ counterpart. The OR may disqualify the debtor if it is satisfied on reasonable grounds that:

(a) the debtor concealed assets with the intention of defrauding creditors;[173]
(b) engaged in conduct that would constitute an offence under the Act;[174]
(c) incurred a debt or debts knowing that he or she would not have the means to repay the debt;[175] and
(d) a creditor intends to apply for the debtor to be adjudged bankrupt, and if the debtor were to be adjudged bankrupt, the outcome for the creditor would be materially better for the creditor as opposed to the NAP.[176]

Mabe argues convincingly that the last disqualification above would seem contradictory to the purpose of the NAP.[177] First, Mabe argues the NAP is to provide an alternative to bankruptcy and second, if a debtor has no realisable assets then it is unlikely that bankruptcy would result in a materially better outcome for creditors.[178] I submit that the inclusion of this provision is merely to preserve the balance between debtors and creditors even though this procedure is aimed at assisting the debtor. Striking a balanced approach becomes difficult in this scenario and as a result, this provision is not likely to assist any creditors, however, without this provision it could possibly be an arbitrary deprivation of property since there is no right for the creditor to make representations.

Circumstances of Obtaining Access

Once the application is made, the debtor is prohibited from obtaining credit of more than ten thousand shillings[179] without first informing the credit provider that he or she is subject to the NAP. Punishment for such an offence will be a fine of not more than five hundred thousand

[173] S 346(a).

[174] S 346(b).

[175] S 346(c).

[176] S 346(d).

[177] Mabe 'Alternatives to Bankruptcy in South Africa That Provides for a Discharge of Debts: Lessons from Kenya' *PER / PELJ* (2019) 22 at 17.

[178] Ibid.

[179] This equates to roughly R1, 537. Conversion done through OANDA money converter on 20 July 2020, available at: https://www1.oanda.com/currency/converter/

shillings[180] or imprisonment of not more than six months, or both. When comparing this provision to its NZ counterpart it is very apparent that the Kenyan Act imposes a heavier fine in terms of Kenyan shillings converted to Rand, however, Kenya imposes only half the amount of prison time to that of NZ. It is submitted, however, that due to Kenya's prison conditions of serious overcrowding, the legislature would have preferred a higher fine than further subject debtor's to long periods of prison time in already overcrowded facilities.[181]

Once the debtor has been admitted to the procedure no creditor may recover or enforce a debt that is owed at the time of entering the NAP and that would be provable in the debtor's bankruptcy.[182] In line with the NZ Act, certain debts will remain enforceable such as those for maintenance orders,[183] child support orders,[184] and loans to secure education of a dependent child or step-child.[185]

Termination & Discharge

Termination of the NAP may occur in the same ways mentioned above in the NZ Act. This includes termination by the OR under s 355,[186] the debtor obtains a discharge under s 359,[187] the debtor applies for the debtor's bankruptcy,[188] or alternatively a creditor applies for the

[180] This equates to roughly R76, 833. Conversion done through OANDA money converter on 20 July 2020, available at: https://www1.oanda.com/currency/converter/

[181] 'Overcrowding crisis in Kenyan prisons' *the Informer*, 30 June 2019, available at: http://theinformer.co.ke/21169/overcrowding-crisis-in-kenyan-prisons/; Salaudeen 'Kenya has freed nearly 5000 inmates via newly adopted Skype court sessions' *CNN*, 2 April 2020, available at: https://edition.cnn.com/2020/04/02/africa/kenya-courts-on-skype/index.html; for a general overview of the prison system in Kenya see Nyaura & Ngugi. 'A Critical Overview of the Kenyan Prisons System: Understanding the Challenges of Correctional Practice.' *International journal of innovation and scientific research* 12 (2014), 6-12.

[182] S 351(1).

[183] Under the Matrimonial Causes Act (Cap 152 of the Laws of Kenya).

[184] Under the Children Act (No. 8 of 2001).

[185] S 351(2).

[186] S 354(a). S 355 sets out the instances in which the OR may terminate the NAP and these are directly aligned to the NZ Act which includes wrongful admission to the NAP or a change in financial circumstances of the debtor.

[187] S 354(b).

[188] S 354(c).

debtor's bankruptcy.[189] Where termination occurs on grounds that the debtor concealed assets or mislead the OR, the OR can apply to the court for a preservation order and the court may make an order that it deems appropriate.[190] Where early termination occurs, the debtor's debts will become enforceable and he or she will become liable for any interest or penalties that may have accrued.[191]

Discharge is similar as under the NZ Act in that the debtor will be automatically discharged after 12 months from the date upon entering into the NAP.[192] The automatic discharge will not apply, however, if the OR is satisfied that the 12-month period should be extended.[193] In this instance the OR must send a written deferral notice to the debtor's last known address before the end of that period.[194] In the deferral notice, the OR must specify an alternative date for automatic discharge which may not be more than 35 days after the end of the 12-month period.[195] This is in contrast to the 25 days stipulated in the NZ Act, therefore, giving an extra 10 days under the Kenyan Act. Thereafter, the effect of discharge will be a cancellation of those unenforceable debts upon entry into the NAP and the debtor will not be liable for any part of the debts.[196]

United Kingdom: Debt Relief Order

Like the NZ and Kenyan Insolvency systems, the UK also provides alternatives to bankruptcy, namely: individual voluntary arrangements,[197] county court administration orders,[198] and the debt relief order ('DRO').[199] The DRO was inserted into the UK Insolvency

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[189] S 354(d). This application by the creditor would need to be an enforceable debt as under s 351(2).

[190] S 356.

[191] S 357(b).

[192] S 359(1).

[193] S 359(2)(a).

[194] S 359(2)(b).

[195] S 359(3).

[196] S 360(1). As under the NZ Act, the same disqualifications apply where the debt or liability occurred as a result of fraud or fraudulent breach of trust or where the debt or liability incurred has obtained forbearance through fraud. See s 360(2).

[197] See part 8 of the second group of parts in the UK Act.

[198] See s 112 to 117 of the County Courts Administration Act 1894.

Act ('UK Act')[200] by way of s 108 of the Tribunals, Courts and Enforcement Act,[201] and came into effect on 6 April 2009.[202] While it is noted that the UK insolvency law is not all consolidated within one Act making things fairly complicated as with South African insolvency law, I will solely focus on the DRO as anything outside of the DRO is beyond the scope of this paper. The DRO was modelled around the NZ NAP and as such, the legislature considered the most vulnerable debtors.[203] There are a few reasons why the DRO will be discussed. Firstly, South African insolvency law has been largely influenced by English law and therefore it would not be wasteful identifying whether this procedure may be applicable in the South African context.[204] Secondly, the procedure specifically caters for the NINA debtor which, in the South African context, is currently desired. Thirdly, a debtor may only apply for a DRO once every six years which takes into account creditors interests and this is in line with a balanced approach for which this paper seeks.[205] This is further reiterated by the fact that provision is made for a creditor to object to the DRO or a specific debt within the DRO.[206] Fourthly, the DRO is administrative in nature resulting in no use of court processes and this would alleviate the burden of South Africa's heavily inundated courts.[207] As a result, the DRO will be canvassed for compatibility in the South African context.

Access Requirements

For a debtor who is unable to repay their debts, they may apply to the Official Receiver ('OR') through an 'approved intermediary' who will then submit an application on the

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[199] See part 7A of the second group of parts in the UK Act.

[200] Act 1986.

[201] Act 2007.

[202] Conway 'Debt Relief Orders' House of Commons Library Briefing Paper 4982, 11 November 2019, available at: http://intranet.parliament.uk/commons-library

[203] Ramsay 'The new poor person's bankruptcy: comparative perspectives' (2020) 29 *International Insolvency Review*, at s7.

[204] Coetzee op cit note 78 at 355.

[205] See Schedule 4ZA(5) of the UK Act.

[206] S 251K(1).

[207] The is subject to an exception under s 251G whereby a creditor may proceed with an intervention with the permission of the court on such terms it may impose.

debtor's behalf.[208] It must be noted, however, that the OR requires a fee of £90 in cash at the time of making the application and this will not be refunded whether a DRO is granted or not.[209] The DRO will be in respect to 'qualifying debt' which includes a liquidated sum payable either immediately or at some certain future time and is not an 'excluded debt'.[210] In order to be eligible for the DRO the following criteria must be met:[211]

(a) the debtor must owe less than £20, 000.[212]
(b) The debtor must have less than £50 to spend each month following tax deductions, national insurance and normal household expenses.
(c) The debtor must have lived and worked in England or Wales in the last three years.
(d) The debtor's assets must not be worth more than £1,000 in total.

Once an application has been submitted, the debtor has a number of duties inclusive of what the OR may reasonably require for the purpose of carrying out its functions in relation to the application.[213] The OR must then consider the application and is only permitted to refuse an application based on the provisions contained within s 251.[214] The OR may refuse an application where the debtor has not met all the requirements under s 251B,[215] the debtor has not answered queries put to him or her to the satisfaction of the OR,[216] or the debtor has made a false representation or omission in making the application.[217] Moreover, a refusal can occur where the OR is not satisfied that the debtor is unable to pay his debts, that at least one of the specified debts was a qualifying debt at the time of application, or that the

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[208] S 251U outlines information on approved intermediaries.

[209] Gov.UK 'Getting a Debt Relief Order' Updated 12 June 2019, available at: https://www.gov.uk/government/publications/getting-a-debt-relief-order/getting-a-debt-relief-order; this equates to roughly R1, 883. This kind of fee would hardly be feasible for the South African NINA debtor's unless a charity were to pay the fee which is the case in some circumstances in the UK.

[210] S 251A(2) is subject to ss (3) which provides that a debt is not a qualifying debt insofar as it is secured.

[211] See Schedule 4ZA of the UK Act; Gov.UK 'Getting a Debt Relief Order' Updated 12 June 2019, available at: https://www.gov.uk/government/publications/getting-a-debt-relief-order/getting-a-debt-relief-order

[212] This equates to roughly R418, 550. Conversion done through OANDA money converter on 20 July 2020, available at: https://www1.oanda.com/currency/converter/

[213] S 251J(2). These duties are relatively the same to those required under the NAP.

[214] S 251C(3).

[215] S 251C(4)(a).

[216] S 251C(4)(b).

[217] S 251C(4)(c).

conditions in Part 1 of Schedule 4ZA are met.[218] Should the OR not refuse the application then a DRO must be made in the prescribed form and the order must include a list of debts which the OR is satisfied are qualifying debts of the debtor.[219] Thereafter, the OR must provide the debtor with a copy of the order and make an entry into the register of the order containing the prescribed information.[220] At this point, the DRO becomes effective upon entry into the register.[221]

Circumstances of Obtaining Access

Upon entry to the DRO register, a moratorium commences over those qualifying debts and as a result any creditor will have no remedy in respect of the debt and may not commence a creditors petition or legal proceedings.[222] Similar to the NAP, the moratorium will run for the period of one year after the date the order came into effect.[223] The moratorium period may be extended by the OR for reasons provided in s 251H(2), however, the OR may not extend the moratorium period for carrying out or completing an investigation under s 251K without the permission of the court.[224] S 251K concerns objections and investigations with regard to the DRO which takes into consideration creditors interests by allowing a creditor to object to the making of the order, the inclusion of the debt in the list of qualifying debt, and the details of the debt specified in the order.[225] Qualifications to such objection though, include that the objection be made during the moratorium period, it must be made to the OR in the prescribed

[218] Schedule 4ZA is titled 'Conditions which must be met' and is inclusive of the debtor's connection with England and Wales, insolvency history, overall indebtedness, overall monthly surplus income and limits on the value of the debtor's property.

[219] S 251E.

[220] S 251E(4).

[221] S 251E(7).

[222] S 251G(1) and s 251G(2). A creditor may intervene, however, with the permission of the court. So, there may be exceptional cases where court involvement exists.

[223] S 251H(1).

[224] S 251H(3). Again, there may be court involvement in this regard.

[225] This is because the OR is under an obligation, per s 251K(3), to consider every obligation made under this section. See specifically, s 251K(1)(a)-(c).

manner, Any extension of the moratorium period must be made before the one year period ends and may not be longer than three months.[226]

While the DRO is effective, the debtor may not enter into any credit agreements exceeding £500[227] without telling the creditor that he or she is subject to the DRO.[228] A debtor may also not act as a director of a company or manage a business with a different name without informing the name under which the DRO was made.[229]

Termination & Discharge

Discharge for all the qualifying debt under the DRO will occur at the end of the moratorium.[230] However, this will not occur where the moratorium is terminated early or where the debtor incurred the debt fraudulently or through a fraudulent breach of trust.[231] Furthermore, the discharge granted does not release any other person from any liability for which the debtor is released by the discharge or any liability as surety for the debtor.[232] Lastly, where the court revokes the DRO under s 251M after the end of the moratorium period, the qualifying debts under the DRO will be treated as though the discharge under s 251I(1) never applied to them.

Conclusion

It is evident from the above that the NAP, as a procedure, is simplistic and timeous in nature. While the NAP was discussed in two separate jurisdictions, the bulk of the procedure remained the same with almost all the provisions within the Kenyan Act being a carbon copy of its NZ counterpart. There are a number of characteristics to this procedure that make it

[226] S 251H(4).

[227] This equates to roughly R10, 464. Conversion done through OANDA money converter on 22 July 2020, available at: https://www1.oanda.com/currency/converter/

[228] Gov.UK 'Getting a Debt Relief Order' op cit note 195. Point 5 under 'Restrictions'.

[229] Ibid.

[230] S 251I(1).

[231] S 251I(2) and s 251I(3).

[232] S 251I(4).

attractive in the South African context. First and foremost, the procedure is directly aimed at the NINA debtor who has been discriminated against in South African insolvency law.[233] With regard to discrimination, this is extinguished as no financial discrimination exists within this procedure as the debtor need not have any assets or financial means to satisfy creditors in order to access the procedure. Second, the NAP is primarily administrative in nature and thereby excludes courts in the process which is highly attractive in a South African context as all statutory measures have some form of court involvement.[234] Relieving this burden from the inundated courts would be a step in the right direction for South African insolvency law and align itself with international guidelines. Thirdly, the total amount of debt is not capped at a low rate since NZ allows for debts of not more than NZ $50, 000 which equates to roughly R545, 773 while the Kenyan NAP allows for debts of not more than four million shillings which equates to roughly R614, 664.[235] As a result, this allows for a much broader value of debts to be included in this procedure. The South African legislature could use their discretion in deciding the capped amount for those debtors that are currently excluded from the statutory measures.

From a discussion of the DRO, it is evident that the procedure was transplanted from the NZ NAP despite some structural changes in the procedure. The DRO is fairly compliant with international guidelines in a number of ways. First, the DRO is not reliant on courts but rather more administrative in nature which is, again, an attractive feature for South Africa. Second, another aspect to the DRO, similar to the NAP, is the capped debt amount of £20, 000 which equates to roughly R418, 548. That amount, although lower than the amounts under the NZ and Kenyan NAP, nevertheless allows for a wide discharge. Third, as a matter of process the creditors do not participate in the process despite exceptional circumstances where a creditor may object to the DRO. I submit that in order to achieve a balanced approach to debtor and creditor interests, a creditor should retain their option to intervene should the circumstances be so adversely against him or her and the DRO provides for this. Lastly, The DRO addresses the moral hazard concern by having strict qualification criteria and imposing serious consequences for a debtor who alters their finances in order to qualify for the DRO.

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[233] Discrimination based on financial means as discussed in Chapter 2 under the current legislative mechanisms.

[234] See Chapter 2 above.

[235] Conversion done through OANDA money converter on 23 July 2020, available at: https://www1.oanda.com/currency/converter/

CHAPTER FOUR

DEBT INTERVENTION: A NEW SOUTH AFRICAN PERSPECTIVE

Introduction

So far this paper has attempted to first illuminate the inadequacies of the current debt relief landscape in South Africa and, second, use particular examples of international trends in order to ascertain two things. Firstly, whether those examples may be transplanted into the South African context and yet remain a beneficial procedure for NINA debtors in South Africa. Secondly, use these examples as a yardstick in order to determine whether the newly enacted debt intervention under the NCAA will, as much as may be determined, be beneficial to the plight of the NINA debtor in South Africa. This section will now discuss the debt intervention as provided by s 86A of the NCAA as well as its alignment with the objects and purpose of the NCA. As with the abovementioned procedures, the debt intervention procedure will be assessed by looking at the access requirements, the circumstances that will occur once a debtor obtains access to the procedure, how termination and discharge will occur, as well as the issues of rehabilitation and clearance certificates. In addition, however, this section will also discuss some of the key findings from the Genesis Analytics Final Report ('Final Report') in order to give a better understanding of the likely impact of the NCAA through thorough research.

Debt Intervention

In an effort to address the dire circumstances of the NINA debtors, the Portfolio Committee on Trade and Industry published the Draft National Credit Amendment Bill, 2017 alongside the *Memorandum on the Objects of the National Credit Amendment Bill*, 2017 ('*Memorandum*'). The Bill was passed by the National Assembly on 12 September 2018 and thereafter sent to the National Council of Provinces where it was also passed on 6 March 2019. Once both houses had passed the Bill it was sent to President Cyril Ramaphosa for assent on 13 August 2019.[236] The Bill, now the NCAA, is entrenched in South African law, however, it is not yet in force until such time as the Minister indicates otherwise.

[236] Parliamentary Monitoring Group, available at: https://pmg.org.za/bill/832/

The preamble to the NCAA provides the central reasons for why it has come to fruition. It first identifies the purpose of the NCA, being:

> "To promote a fair transparent, competitive, sustainable, responsible, efficient, effective, and accessible credit market industry, and to protect consumers"[237]

Thereafter, the preamble identifies:

> "There categories of consumers for whom existing natural person insolvency measures are inaccessible, either because of the focus that these measures place on benefit to credit providers, or the cost involved with such natural person insolvency measures"

And:

> "without suitable alternative natural person insolvency measures… it is not only an insurmountable challenge for them to manage or improve their financial position, but it also amounts to unjustified and unfair discrimination on socio-economic grounds"[238]

Aligned with the preamble, the NCAA introduces a newly crafted debt intervention procedure. The debt intervention aims to eliminate the benefit for creditors bar to sequestration and the cost issues associated with natural person insolvency measures in order to assist those categories of persons identified in the preamble. Due to the addition of this procedure the NCA has also accommodated the fact that this procedure will require more resources and as such, extended the responsibilities of the NCR and NCT.

Access Requirements

It is important to remember that the NCAA amends the NCA and therefore the s 1 definition of a 'credit agreement' is relevant for purposes of debt intervention.[239] S 86A of the NCAA sets out the procedure that a prospective debt intervention candidate must follow in order to be considered for the procedure. Before this consideration, it must be noted that the definition of 'debt intervention applicant' sets forth a number of requirements itself. These requirements

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[237] See s 3 of the NCA.

[238] Preamble to the NCAA, 2019. On the point of unjustifiable discrimination on the basis of the excluded debtor's socio-economic status, see Coetzee 'Is the Unequal Treatment of Debtors in Natural Person Insolvency Law Justifiable? A South African Exposition' 2016 *International Insolvency Review* 57. Coetzee argues that the natural person insolvency regime in South Africa is in contradiction with the Constitution and the Equality Act.

[239] S 1 provides: a "credit agreement" means an agreement that meets all the criteria set out in section 8. In this regard, see s 8(1)(a)-(d) read with the qualifications in ss (2).

include that the applicant must be a natural person,[240] they must be a consumer under an unsecured credit agreement,[241] they receive no income or in the event they do receive an income, it must not exceed R7, 500 per month for the preceding six months,[242] they must be over-indebted,[243] and they must not be subject to a sequestration or administration order.[244]

Notwithstanding the definition requirements, the applicant must apply in the prescribed manner and form to the NCR in order to be declared over-indebted if the applicants debt in unsecured credit agreements amounts to less than R50, 000.[245] This point, theoretically, aligns itself with international trends such as the NZ and Kenyan NAP in that it joins the movement away from inundated courts towards a more administrative procedure. There are, however, certain credit agreements that do not qualify for debt intervention. Firstly, a developmental credit agreement as contemplated in s 10 of the NCA,[246] and secondly, any credit agreement where the credit provider of that credit agreement has taken the steps contemplated in s 130 of the NCA to enforce that agreement.[247] Upon receiving an application, the NCR must comply with s 86(4) and (6) of the NCA.[248] In addition, the debt applicant and each credit provider listed in the application must comply with s 86(5) of the NCA which is to adhere to any reasonable requests made by the debt counsellor and to participate in good faith in the review and in any negotiations regarding a re-arrangement.[249]

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[240] S 1(b) of NCAA.

[241] S 1(b)(a). This includes unsecured short term credit transactions and unsecured credit facilities.

[242] S 1(b)(b).

[243] S 1(b)(c). The applicant must be over-indebted, whether due to a change in personal circumstances or other circumstances. See s 79 of the NCA for the criteria for over-indebtedness in this regard.

[244] S 1(b)(d).

[245] S 86A(1). Note, however, this amount may be altered once every 12 months by the Minister in terms of s 171(2A)(b). This change would be after a consideration of the way in which inflation is impacting the original amount.

[246] S 86A(2)(a) of NCAA.

[247] S 86A(2)(b) of NCAA. This section is subject to s 85(c) which provides that a court may enquire as to whether the consumer wishes to participate in debt intervention, and if so, the court may refer the matter to the NCR for consideration or alternatively, where there is sufficient information, make an order in terms of s 87(1A) or s 87A.

[248] S 86A(3). Sections 86(4) of the NCA describes what the debt counsellor should do upon receiving an application and s 86(6) of the NCA provides that the debt counsellor, if having accepted the application, must determine if the consumer is over-indebted or if there was reckless credit.

[249] S 86(5)(a) and (b) of the NCA.

Circumstances of Obtaining Access

Once the applicant has applied to the NCR in the prescribed manner and form, the NCR may declare the applicant over-indebted should the applicant have a total unsecured debt of less than R50 000.[250] When considering an application, the NCR must provide the applicant counselling on financial literacy and access to training to improve the applicant's financial literacy.[251] Financial literacy has been defined as "the knowledge, ability and opportunity to make sound money management choices."[252] After consideration, a number of outcomes may follow. Firstly, should the applicant not qualify for the debt intervention, a simple rejection would occur.[253] Secondly, where the applicant does not qualify for debt intervention but will nevertheless experience difficulty in satisfying their debt obligations the NCR must recommend the applicant and credit providers to voluntarily enter into and agree on a plan of debt re-arrangement.[254] Thirdly, where a credit agreement constitutes reckless lending, an unlawful credit agreement, or a credit agreement resulting from prohibited conduct, the NCR will refer that agreement to the Tribunal for the appropriate declaration.[255] Fourthly, should the applicant qualify for debt intervention and the applicant's obligations could be satisfied within five years or a longer period as prescribed, then the NCR must refer the matter with a recommendation to the Tribunal for an order contemplated in s 87(1A).[256] In addition to

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[250] S 86A(1). For further functions of the NCR, see s 15A(1) and (2) which have been inserted.

[251] S 86A(5)(a) and (b). This task placed on the NCR most certainly widens the scope of its obligations. At this point, there is no clarity on how this will be implemented or to what standard this will be taught. With a large portion of South African's being financially illiterate this will indeed be a massive task requiring many more resources. Especially considering how diverse the country is and the many languages that will need to be communicated efficiently and effectively. What we do know is that s 171 of the NCA is now amended by the assertion of s 171(1)(bA) whereby it is up to the minister, in consultation with the NCR, to make regulations regarding the participation of a financial literacy programme.

[252] S 1(c).

[253] S 86A(6)(a). Even where the applicant does not qualify, they still receive the benefit of counselling on financial literacy and access to training in this regard notwithstanding the question mark around how comprehensive this will be.

[254] S 86A(6)(b).

[255] S 86A(6)(c).

[256] S 86A(6)(d). The new s 87(1A) states that "the Tribunal or a member of the Tribunal acting alone in accordance with this Act, must conduct a hearing and, having regard to the recommendation and other information before it and the consumer's financial means, prospects and obligations may – (a) reject the recommendation or application as the case may be; or (b) …". See further s 87(1A)(a) and (b). The reference to "other information" in this provision, however, seems vague since it is unclear what would constitute relevant or irrelevant information?

rejecting an application, it may make an order finding an agreement to be reckless, as well as making an order to re-arrange the debtor's debt in a number of ways.[257] These were originally in reference to the orders a Magistrate's court could make regarding debt review. There is now an addition, however, in the form of s 87(1A)(b)(ii)(dd) which allows the Tribunal to make an order re-arranging the debt intervention applicant's obligations by "determining the maximum interest, fees or other charges contemplated in section 101(1)(e), under a credit agreement, which maximum may be zero, for such a period as the Tribunal deems fair and reasonable but not exceeding the period contemplated in section 86A(6)(d)."[258] This departs from the debt review process inasmuch as a Magistrate's court could only make an order of re-arrangement by extending periods of an agreement, postponing payments, and recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6 of the NCA.[259] Therefore, the Tribunal is now entrusted to make such orders including the above s 87(1A)(b)(ii)(dd).

Lastly, where the applicant qualifies for debt intervention but the income and assets are insufficient to settle the obligations within the given time period as per the fourth point above, then the NCR must refer the matter with a recommendation in the prescribed manner and form for an order contemplated in s 87A.[260] Once there has been a referral as contemplated by s 86A(6)(e) above, the Tribunal may, after having considered the information from this referral, make an order that the debt intervention applicant does not qualify for debt intervention and reject the application.[261] Alternatively, the Tribunal could make an order to suspend all of the qualifying credit agreements, in part or in full, for 12 months, to which this period may be extended for a further 12 months, in which case the factors in ss (3) must be taken into account.[262] In addition to suspending these agreements,

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[257] The original ways in which this could be done were listed under s 86(7)(c)(ii)(aa)-(dd) of the NCA.

[258] S 87(1A)(b)(ii)(dd).

[259] See in general s 86(7)(c)(ii).

[260] S 86A(6)(e). If the NCR refers an application for debt intervention in terms of this section, then s 86A(9)(a) must be complied with in that the NCR must inform each credit provider listed in the application for debt intervention of such referral and invite the credit providers to make representations to the Tribunal by a specified date.

[261] S 87A(2)(a).

[262] S 87A(2)(b)(i). These periods do align with the World Bank Report insofar as a period exceeding three years would be considered to be reckless. See, World Bank Report op cit note 36 at para 35.

the Tribunal will require the applicant to attend a financial literacy programme.[263] Following from the above, the ss (3) factors to be taken into account when considering an alteration or extension of a suspension of payments includes, firstly, whether the applicant is a disabled person, a minor heading a household, a woman heading a household, or an elderly person.[264] On this point, it is commendable to have inserted this provision to act as a marker for the Tribunal to take into consideration more vulnerable groups. I submit, however, that this provision lends itself to a closed list and may limit the Tribunal's scope when making considerations. Furthermore, the provision is clouded in uncertainty. Leathern points out that it is unclear what effect it would have on the debt intervention whether the household is headed by a man, woman, or disabled person when debt intervention is required.[265] In addition, the term "elderly" has no definition and therefore appears to confer a wide discretion on the Tribunal in this regard. Secondly, whether the applicant had ever applied for debt review or sequestration, or administration;[266] or thirdly, whether the applicant has ever had any debt extinguished by an order of the court.[267] Again, there are little guidelines on the above two points and perhaps a time period should be given for when the applicant can apply for debt intervention from the last date the applicant applied for debt review (or sequestration, or administration, or had debt extinguished). After an order has been granted in terms of s 87A(2)(b) outlined above, the NCR must review the financial circumstances of the debt intervention applicant eight months after the order was granted.[268] If the NCR concludes that the applicant has sufficient income or assets to allow the obligations to be re-arranged within the contemplated period in s 86A(6)(d), then it must refer the matter with a recommendation to the Tribunal for an order contemplated in s 87(1A).[269] Conversely, should there be insufficient income or assets to be re-arranged within the s 86A(6)(d) period, then it must refer the matter to the Tribunal for an extension of the period of suspension.[270]

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[263] S 87A(2)(b)(ii). Again, the financial literacy is welcomed but the concerns raised in note 251 remain.

[264] S 87A(3)(a)(i).

[265] Leathern op cit note 85 at 44.

[266] S 87A(3)(a)(ii).

[267] S 87A(3)(a)(iii).

[268] S 87A(5)(a).

[269] S 87A(5)(b)(i).

[270] S 87A(5)(b)(ii).

Termination & discharge

With a discharge of debt being one of the main aims of debt intervention, it is important to consider whether discharge will likely occur after the NCR has considered an application. This is because many debtors may be under the illusion that their debt will be wiped clean and given a "fresh start" without considering the process and factors, as outlined above, that must be followed before this could happen.

When considering discharge, the Tribunal may, once it has considered:

> "(a) the referral contemplated in subsection 5(c)(ii);[271]
>
> (b) whether the debt intervention applicant still does not have sufficient income or assets to allow the obligations to be re-arranged during the period contemplated section 86A(6)(d);[272] and
>
> (c) the factors contemplated in subsection (3), and subject to subsections (7) and (8), declare the total amounts contemplated in section 101(1) under the qualifying credit agreements as extinguished."[273]

In this regard, the definition of "extinguish" has been inserted by the NCAA and refers to the cessation of all rights and obligations inherent to or resulting from, a credit agreement;[274] and the cessation of any rights or obligations that may arise in law due to the original cessation.[275] While s 87A(8)(a), referred to in the above quoted section, places prohibition limitation of six months minimum on the debtor from applying for credit, s 87A(9) qualifies this limitation by stating that the limitation may not exceed 12 months.[276] Coetzee points out the significance of this aspect of the intervention as the principal objective

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[271] S 87A(6)(a).

[272] S 87A(6)(b).

[273] S 87A(6)(c). Subsection (7) states that the extinguishment may be a percentage of the total amount under each agreement and that it must apply equally to all qualifying credit agreements. This is only logical as the partial extinguishment of debt, if not applied equally across all the agreements, would benefit some creditors more than others. Subsection (8) then further requires that the debt intervention applicant's right to apply for credit is limited for a minimum period of six months and may limit this for a period that is longer should it be deemed fair and reasonable considering the factors in subsection (3) and (9).

[274] S 1(c)(a).

[275] S 1(c)(b).

[276] This section further provides a number of factors to consider when deciding on the discretionary period such as the total amount of unsecured debt, the number of credit agreements that were submitted for debt intervention, the period of each qualifying credit agreement, and the applicant's credit record.

of natural person insolvency systems is economic rehabilitation.[277] The NCR must then notify the debt applicant of any order contemplated within s 87A and serve a copy thereof on all the credit providers listed in the application and every registered credit bureau.[278] If, however, information is placed before the Tribunal showing that the debt intervention applicant was dishonest in his or her application or fails to comply with the conditions of the debt intervention order, the Tribunal may then rescind or change the order.[279] On this point, it would seem that the Tribunal has discretion to decide what "information" will qualify in order to satisfy itself or its threshold should there be one.

A debt intervention applicant who has filed for debt intervention as contemplated in s 86A may not enter into a further credit agreement, other than a consolidation agreement.[280] This would, however, be permitted if (1) the NCR rejects the application for debt intervention and the prescribed time period within s 86A(7) has expired without the applicant having applied,[281] (2) the Tribunal finds that the applicant is not over-indebted or has rejected the proposal by the NCR,[282] (3) the Tribunal made an order or the debt intervention applicant and credit providers came to an agreement of re-arranging the applicant's obligations and these obligations under the credit agreements have been fulfilled,[283] and/or (4) the period contemplated in s 87A(8) has expired.[284]

It should also be noted that a creditor who receives notice of a s 86A application may not exercise or enforce a credit agreement until such time that either the NCR or Tribunal has rejected the applicant's application,[285] an event contemplated in ss (1)(a), (b) or

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[277] Coetzee 'An Opportunity for No Income No Asset (NINA) debtors to get out of check? An evaluation of the proposed debt intervention procedure' 81 (2018) *THRHR* at 604. See also World Bank report para 354.

[278] S 87A(10)(a) and (b).

[279] S 87A(11).

[280] S 88A(1).

[281] S 88A(1)(a). This refers to the situation where the NCR has rejected the application and the applicant then fails to approach the Magistrate's court for an order contemplated in s 87 within the prescribed time.

[282] S 88A(1)(b).

[283] S 88A(1)(c). This excludes the obligations under a consolidation agreement. If the applicant fulfils the obligations under another consolidation agreement, then s 88A(2) provides that the effect of ss (1) will continue until this is achieved.

[284] S 88A(1)(d). This section refers to the period after an order has been granted and the Tribunal thereafter limits the applicant's right to apply for credit for a minimum of six months.

[285] S 88A(3)(a).

(c) has occurred,[286] or alternatively, the applicant has defaulted on a re-arrangement plan between the applicant and credit providers.[287] This is important as it offers the applicant protection and aligns with international standards insofar as a moratorium is created over debt enforcement. While this section is intended to protect the applicant, perhaps further protection from creditors would be possible if the moratorium is created from the moment the application is submitted.[288]

Furthermore, if a credit provider enters into a credit agreement, that is not a consolidation agreement, with a debt intervention applicant who is expecting an order related to debt intervention then the new credit agreement may be declared to be reckless credit despite whether or not the circumstances in s 80 apply.[289] On the other hand, whether the applicant enters into or applies for a credit agreement prohibited by s 88A then the provisions related to debt intervention will not apply to that new credit agreement.[290]

Application for Rehabilitation

Where a debt intervention applicant has been granted an order in terms of s 87A(6), the applicant may apply to the NCR in the prescribed manner and form for a rehabilitation order to be granted by the Tribunal.[291] S 87A(6) was quoted under the previous heading laying out the instances of contemplation for the Tribunal before it declares certain amounts under qualifying credit agreements to be extinguished. In the application for rehabilitation the applicant must submit proof that he or she has paid the full amounts contemplated in s 101(1) regarding costs of credit, as it fell due according to the order that was granted for debt intervention.[292] This must be done by showing that payments were made in full to each credit

[286] S 88A(3)(b).

[287] S 88A(3)(c).

[288] INSOL International, Consumer Debt Report (2011) at 17. See also, Roestoff & Coetzee 'Rectifying an unconstitutional dispensation? A consideration of proposed reforms relating to no income no asset debtors in South Africa' (2020) *IIR* at s106.

[289] S 88A(4).

[290] S 88A(5).

[291] S 88B(1).

[292] S 88B(2).

provider,[293] or that a settlement agreement has been entered into with the relevant credit provider to which the outstanding amounts are resolved to the satisfaction of the credit provider.[294] In addition, the application must include further information as may be prescribed by the Minister to show that the applicant has improved his or her financial circumstances to the extent that the applicant can participate in the credit market and successfully have completed the programme in s 87A(2)(b)(ii).[295]

Once receiving the application, the NCR must then notify all credit providers that are affected by the order in s 87A(6) including every registered credit bureau.[296] The NCR must also consider the application for rehabilitation to make sure all requirements in ss (2) and (3) are met and if so, refer the matter to the Tribunal for consideration.[297] If, however, the NCR rejects the application for rehabilitation, the applicant may apply directly to the Tribunal for an order contemplated in ss (7) discussed below.[298] Before considering the application for rehabilitation, the Tribunal must notify all credit providers of the date on which rehabilitation will be considered.[299] Once this is completed, the Tribunal can then consider the application along with any supporting information and submissions made by credit providers to come to a decision as to whether the applicant is rehabilitated or not.[300] Should the Tribunal grant an order of rehabilitation, any limitation of rights contemplated in s 60, regarding the application for credit, will end on the date of the new order.[301] Thereafter, the NCR must inform the applicant of any order made and serve a copy thereof upon all the credit providers listed in the application including every registered credit bureau.[302] Thereafter, the credit bureaux must remove a listing regarding the debt intervention applicant within seven days after receiving proof of the rehabilitation order.[303]

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[293] S 88B(2)(a).

[294] S 88B(2)(b).

[295] S 88B(3)(a) and (b).

[296] S 88B(4)(a)(i) and (ii).

[297] S 88B(4)(b).

[298] S 88B(5).

[299] S 88B(6).

[300] S 88B(7).

[301] S 88B(8).

[302] S 88B(9).

[303] S 71A(3C).

The order of rehabilitation is a neat approach for a consumer, who has paid their outstanding debt, to have access to credit once again. The rehabilitation order is essentially what a consumer should be aiming for once having entered into the debt intervention framework. Once achieving rehabilitation, the next hurdle for the consumer is to obtain a clearance certificate in order to have certain information expunged from its records.[304]

Clearance Certificate

In addition to the above, s 71(1A) has been inserted by the NCAA providing that a debt intervention applicant who has successfully re-arranged their obligations with credit providers, can apply to the NCR within seven days for a clearance certificate.[305] This is on condition that the applicant has satisfied all their obligations under every credit agreement that was subject to the debt re-arrangement order.[306] The applicant would have to further demonstrate their financial ability to satisfy future obligations in terms of the re-arrangement order or show that there are no arrears on the re-arranged agreements,[307] as well as demonstrate that all obligations under all credit agreements in the re-arrangement order, other than those future obligations, have been settled in full.[308] In turn, the NCR must submit a copy of the clearance certificate to all registered credit bureaux.[309] In the event where the NCR fails to issue the clearance certificate or submit a copy thereof, the applicant may apply to the Tribunal to review that decision or failure to issue and if the Tribunal is satisfied that the applicant is entitled to a clearance certificate then it may direct the NCR to issue the certificate and submit a copy thereof to all credit bureaux.[310]

With the insertion of s 71A(3A), where an order or decision has been made to either reject the application, make an order of suspension in terms of s 87A(2)(b)(i),[311] an order

[304] See s 71(5) of the NCA.

[305] S 71(1A).

[306] S 71(1A)(a).

[307] S 71(1A)(i)-(ii)

[308] S 71(1A)(b)(iii).

[309] Ibid.

[310] S 71(3A)(a)-(b).

[311] S 71A(3A)(a).

limiting the rights of the consumer under s 60,[312] or an order for rehabilitation contemplated in s 88B(7), the NCR must submit proof of the above orders or decisions and their end dates to the credit bureaux within two business days.[313] If a credit provider disputes an order or decision provided above then the credit provider or debt intervention applicant may apply to the Tribunal to settle the dispute.[314] Should the Tribunal find the dispute frivolous, it may nevertheless make an order to correct the information giving rise to the dispute. Thereafter, as with a rehabilitation order, the credit bureaux must remove a listing related to the debt intervention applicant within seven days from receipt of proof of the decision or order made above.[315]

There is great importance placed on the clearance certificate because it firstly, removes the fact that a consumer was subject to a debt re-arrangement order,[316] secondly, removes any information in relation to any default made by the consumer,[317] and thirdly, removes any record that a specific credit agreement was subject to a debt re-arrangement order or agreement.[318] As a result, the consumer then has a clean slate with regard to unsecured debt, or as it is internationally referred, a "fresh start". This is aligned with the World Bank Report as discussed above under Chapter three.[319]

Genesis Analytics Report

On 30 April 2019 the final report of an independent impact assessment of the NCAA 2018,[320] was published ('Final Report').[321] This was commissioned by the Department of Trade and

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[312] S 71A(3A)(b).

[313] S 71A(3A)(c).

[314] S 71A(3D).

[315] S 71A(3B). Where there is a suspension, the listing must be removed on the end date of the suspension unless the NCR provides proof to extend the suspension or alternatively, provides proof of a limitation contemplated in s 87A(8).

[316] S 71(5)(a) of the NCA.

[317] S 71(5)(b) of the NCA.

[318] S 71(5)(c) of the NCA.

[319] See note 114 above. The "fresh start" versus "earned fresh start" were discussed and it was noted that the "earned fresh start" may not be applicable to those honest but unfortunate debtors that are so deeply indebted.

[320] Note that this is not the NCAA 2019 (referred herein as 'NCAA') which this paper has been working off, however, a large majority has remained the same.

Industry and worked off evidence collected from January to March 2019. The report is highly detailed with volumes of information, however, the aim of this section is to extract the important bits that I feel will positively and negatively affect the performance of the NCAA. As such, I will discuss the main findings of the report under two separate headings. Firstly, I will discuss the likely impact that the Final Report envisages for the NCAA 2018 and secondly, the recommendations of the report thereafter.

The Likely Impact

Genesis looked at a target group of almost 360 000 consumers representing an outstanding R2.8 billion.[322] This number of consumers added up to 3 per cent of consumers earning under R7, 500 per month. With many issues having been discussed such as short term versus long term prospects, costs for the various parties involved, and case studies on India and the UK, the report in summary returns a net negative for the NCAA 2018.

In achieving a balanced approach that this paper aims for, one aspect of the Final Report attempts to weigh up the short term benefits versus the long term negative impact on financial exclusion.[323] In the short term, the rationale is understandable as an appropriate debt relief mechanism for NINA debtors is highly necessitated by the inequality that the current landscape of natural person insolvency in South Africa provides. There is no doubt that over-indebtedness impacts the quality of life for low income earners and it's a persistent area of concern for national policy makers. In this regard, the debt intervention is a highly anticipated and welcomed mechanism for many consumers.[324] There will be a successful extinguishment of debt for roughly 85 815 individuals and intervention for a further 177 759 individuals.[325] This will no doubt restore dignity to those successful individuals and establish a level of equality within the debt relief mechanisms as those NINA debtors will now have a statutory mechanism to rely upon. The long term negative impact, however, will see creditors implement more stringent affordability requirements as an inevitable response to the

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[321] Genesis Analytics 'An independent impact assessment of the National Credit Act Amendment Bill, 2018' Final report, 20 April 2019.

[322] Ibid at 8.

[323] Ibid at 66.

[324] Ibid.

[325] Ibid.

increased risk profile.[326] The withdrawal of this credit from the formal credit market is estimated to be R12.8 billion.[327] As a result of this withdrawal, it is only logical that consumers will approach the informal credit market and it is estimated that R7.7 billion (60%) of the credit withdrawn from the formal market will be supplied by the informal market.[328] Indeed, this ease of substitutability between formal and informal credit will undermine the notion of financial inclusion which is, in essence, a major purpose of the NCA.[329] In determining the net impact of the debt intervention mechanism, the Final Report quantified the number of individuals that will successfully achieve debt extinguishment and benefit from intervention while, on the other hand, looked at the larger R11.7 million people who will suffer from the response of credit providers in reaction to the debt intervention.[330]

On the issue of financial inclusion, this has been a key policy of the National Treasury and South African Reserve Bank aligned with broader national development goals to reverse previous patterns of exclusion.[331] This led to the introduction of the Financial Sector Charter whereby formal financial service providers have pledged their commitment to financial inclusion. According to the Final Report, South Africa has made strides in redressing this exclusion over the past two decades by indicating that in the year 2011, 54% of individuals over the age of 15 had an account, in the year 2014 this number raised to 70%, however, declined by one per cent in 2017 to 69%.[332] It became apparent that financial inclusion has stalled and may be attributed to charging high fees, lack of trust from low-income earners, and low levels of financial literacy which has become a recurring theme throughout.[333] Despite the slowed progress in financial inclusion, the Final Report estimates that the NCAA 2018 will have a negative impact on financial inclusion policy. In the short term, the debt intervention will indeed facilitate relief for consumers effectively closed out of formal markets due to over-indebtedness and thereby facilitate financial inclusion by

[326] Ibid.

[327] Ibid.

[328] Ibid.

[329] See s 3(a) of the NCA. The term 'financial inclusion' refers to the inclusion of excluded groups into the formal financial sector.

[330] Genesis Analytics op cit note 314 at 66.

[331] Ibid.

[332] Ibid.

[333] Ibid.

allowing them to re-enter the formal market post rehabilitation. However, in the long term the markets will likely introduce two new 'rules' which will be firstly, to place debt intervention consumers on a higher risk register, and secondly, tighten credit provision to all consumers earning less than R7, 500.[334] I submit that should this scenario become a reality, this goes against the principle goal of financial inclusion and will negatively hurt the very people that the NCAA aims to protect. The Final Report estimates that the net effect will be a reduction in the pool of capital made available to the 11.2 million consumers that earn less than R7, 500 by 17.9%.[335] Furthermore, it is estimated that 60% of that 17.9% drop will be picked up by the informal sector which will no doubt perpetuate those consumers indebtedness with usurious interest rates and provide them with no legal or regulatory recourse.

The debt intervention was forecast to cost the state a fair amount to establish the additional functions of the NCR, for example, its staffing, systems, and office space. The NCR's budget in 2018/2019 was R 134 million,[336] however, according to the Final Report, Genesis estimates that the costs in the first year would increase to R510 million, this being an additional R375.9 million (280% increase on the present budget) under the baseline scenario.[337] Under the high-uptake scenario, Genesis estimates the increase to be an astronomical R1.55 billion (1057% increase on the present budget).[338] Furthermore, in addition to the NCR, the NCT estimates that it will receive roughly 10 000 applications in year one and therefore its budget will increase by R20.6 million for the first year. According to the Final Report, however, Genesis estimates over 23 000 applications under the baseline scenario increasing the costs to R31.8 million in the first year and R100.3 million under the high-uptake scenario.[339] This shows a significant amount of costs and most certainly far higher than what the NCR and NCT has predicted. In terms of the overall costs to the national fiscus, Genesis predicts an amount of R407.6 million (the NCR's R375.9 million and the

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[334] Ibid.

[335] Ibid. This percentage would be a decline from R71.4 billion to R53.5 billion.

[336] See the National Credit Regulator Annual Report (2018/2019) available at: http://www.thedtic.gov.za/wp-content/uploads/NCR_AR_2019-2.pdf, accessed 15 December 2020.

[337] Ibid at 79. This is the likely scenario whereby there will be roughly 510, 803 applicants with an outstanding book value of R4.1 billion. The other is the high-uptake scenario, considered less likely but still possible, whereby there are 2, 089, 290 applicants with an outstanding book value of R16.1 billion.

[338] Ibid.

[339] Ibid at 80.

NCT's R31.7 million) in year one and an amount of almost R2.1 billion over five years.[340] This extra cost to the fiscus must be balanced against the present budget deficit and tax shortfall to validate these extra expenses.

Recommendations

The Final Report recommends that parliament should introduce the debt intervention but within the bounds of the current debt review system accompanied by subsidy mechanisms for low-income consumers.[341] To provide this, it will mitigate the long term negative impact on consumers as it is better for financial inclusion and better respects constitutional principles insofar as everyone is equal under the law.[342] Indeed, it is a matter of constitutionality and equity that insolvency laws are made universally accessible because without this access we condemn the low income consumer, specifically NINA debtors, to a perpetual cycle of indebtedness. As such, the final Report advocates for this process to be utilised within the framework of debt review.

The Final Report also finds this approach more cost effective by using a system already in place, requires no new capacity in the state, and places the responsibility of subsidising sub-economic debt review on credit providers.[343] In this respect, Genesis finds that there are a number of options when it comes to subsidies, such as; a state funded subsidy,[344] consumer-funded by levy,[345] credit provider-funded by levy,[346] and credit provider-funded on a case-by-case basis when in debt review.[347] The Final Report finds the

[340] Ibid at 81.

[341] Ibid at 12.

[342] Ibid.

[343] Ibid.

[344] Having the state subsidise debt counsellors in order for them to take on low-income consumers.

[345] A small industry-wide levy could be raised by every credit transaction to be paid by the consumer, collected by the credit provider, and sent to a central subsidy fund.

[346] A small industry-wide levy could be raised on every credit transaction to be paid and collected by the credit provider on every credit agreement to a central subsidy fund.

[347] This would involve an amendment to the NCA to make it an offence for a debt counsellor to turn away a consumer of the basis of affordability. Here, the debt counselor would advise credit providers that there has been a sub-economic application for debt review. The creditors would then be offered an opportunity to proceed by subsidizing the fees of the debt counsellor in proportion to their share of the debt, or alternatively, by agreeing to waive their portion of the debt.

latter approach more appealing for four reasons. Firstly, there is no extra cost to the state.[348] Secondly, the outcome will be fully funded for all low-income interventions, and where they are waived, the prospects of repayment will be improved.[349] Thirdly, it would have the effect of making credit providers take responsibility for solutions of over-indebtedness since they would be asked to share the cost of unwinding over indebtedness, or alternatively, waiving the debt all together.[350] On this point, however, I submit that this would run the risk of further reducing access to credit as credit providers may not want unneccessary exposure to high risk debtors. Lastly, this would formalise the process that has often occurred privately whereby creditors write off debt in certain instances informally.[351]

In addition, to introduce debt extinguishment into our insolvency law that is applicable to all consumers would facilitate financial inclusion. As the Final Report mentions, it is not debt extinguishment *per se* that that drives financial exclusion but rather by virtue of the fact that there is a two tier system – one for the rich and one for the poor.[352]

It is noted, however, that to place debt extinguishment under the debt review process would bare similar resemblance to that of sequestration insofar as material consequences are concerned. Such consequences should include mandatory financial literacy training, exclusion from the formal credit market during the process and for two years after rehabilitation.[353] Furthermore, creditors would be allowed to pursue secured assets under debt review as under insolvency law, except for that of primary residence.[354] This would, however, be in line with the mandate that all persons are treated equal under the law.

Conclusion

From the above discussion it is clear that there are a number of drawbacks in light of the NCAA. To start with the positives, however, the NCAA truly does aim to curb the relentless

[348] Genesis Analytics op cit note 321 at 12.

[349] Ibid.

[350] Ibid.

[351] Ibid.

[352] Ibid.

[353] Ibid.

[354] Ibid.

debt cycle that many NINA and LILA debtors find themselves in. This is admirable and most definitely needed for those whom find themselves drowning in debt with no way of escape. For the procedure to be publicly funded is a benefit to those debtors who have no income or little spare income to afford such a procedure. The framework of the debt intervention is complex, detailed and drafted to the needs of South African NINA and LILA debtors. Furthermore, the procedure is administrative and widens the scope of the NCR and NCT which is in line with international trends. Not only is this internationally acceptable but very much needed in South Africa where our courts are inundated with matters. While this may be positive, greater responsibility will require greater resources and whether the NCR and NCT have correctly accounted for this is questionable. Another aspect of the procedure that achieves a balanced approach in that it allows for creditors to make written representations to the Tribunal coupled with the fact that secured credit will be excluded from the procedure.[355]

To take a look at the debt intervention framework the first identification that needs to be made is that it branches from the NCA. As such, the purpose and objects of the NCA, as well as qualifying credit agreements under the NCA will only be admitted to the procedure. This undoubtedly limits the scope of the procedure and will exclude many honest but unfortunate debtors. As Roestoff & Coetzee quite accurately point out in regard to resorting to the NCA's field of application, it "thwarts a holistic solution to financial problems".[356] Not only is the NCAA's restriction to the NCA problematic but I find the use of the debt intervention to be in conflict with the objects and purpose of the NCA, despite it being the very statute it originates from. It is clear that the debt intervention will not promote financial inclusion by crafting another system solely for NINA debtors. Instead, it creates another pathway for NINA and LILA debtors which, in the short term, will be beneficial. For the long term, however, financial inclusion will require a procedure open to all honest but unfortunate debtors such as the NAP or DRO.

Further limitations include the R50, 000 ceiling of unsecured credit debt will further exclude debtors that may be earning more or even less than R7,500 per month as the amount of debt can quite easily escalate past R50, 000. This amount is aligned with the Administration order which has been criticised for not keeping track with reality.[357] Another

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[355] While this is positive for creditors, a debt intervention procedure that is aimed at helping the debtor escape their debt should not only reside to one form of credit - being unsecured credit in this case.

[356] Roestoff & Coetzee op cit note 283 at s107.

[357] Coetzee 'A comparative reappraisal' op cit note 87 at 178 and Roestoff op cit note 68 at 133.

limitation is the cap on income which will, again, perpetuate financial exclusion. Indeed, debt counsellors are less likely to take on consumers that earn less than R7, 500 which is why this figure is used but it nevertheless discriminates against those who may be in just as much debt but earning slightly over this threshold. Not only does this differentiate consumers on the basis of their income but it will increase the risks of financial exclusion as evidenced by the Final Report.

CHAPTER FIVE

CONCLUSION

Summary and Recommendations

The key objective of this dissertation has been to ascertain whether the debt intervention found in the NCAA will be successful in aiding the plight of the NINA debtor. To reach this conclusion, it is important to understand the current natural person debt relief landscape in South Africa. In this regard the sequestration procedure, administration procedure, debt review and voluntary composition were analysed. It became clear that despite the individual issues within each procedure, such as access to the procedure and discharge, the overall framework in South Africa is fragmented by the use of different Acts and different procedures which, essentially, class consumers into categories from rich to poor.[358]

In order to judge the adequacy of South Africa's current natural person insolvency regime, a number of international trends were taken into account to extract valuable principles that would be needed to secure a framework that will operate successfully in South Africa as it does in other counties. The World Bank Report named a number of core aspects that are integral to a successful system such as a clear and transparent process, limitations on creditor involvement, and the importance of discharge. With this in mind, the NZ and Kenya NAP's were particularly forthcoming. The NZ NAP was used as an example because not only was NZ the first country to specifically cater for NINA debtors but because the procedure is simple in its approach. Therefore, it aligns itself with one of the key markers from the World Bank Report, that is, simplicity. In addition, once admitted to the NAP creditors may not enforce or recover a debt. Again, this is in line with international guidelines that a moratorium should be created once the debtor is admitted to the procedure.[359] The Kenyan NAP exhibits the very same qualities to that of the NZ NAP and evidences that the NAP is a transplantable procedure. Not only is Kenya a third world country making use of the NAP, but it overhauled its entire insolvency legislation which is massive step for the

[358] You need the financial means to enter the sequestration process by showing an advantage to creditors and therefore not realistically available to those NINA or LILA debtors. On the other hand, we now have debt intervention for poor consumers. There is no singular procedure with a wide enough scope to provide availability to all debtors.

[359] See note 147.

Kenyan insolvency regime. Similarly, the UK DRO is also based on the NZ NAP and provides for a wide discharge. Not only is the DRO also administrative in nature but it addresses the moral hazard concerns by strict qualification criteria and serious consequences in breach thereof. It also strives for a balanced approach in that creditors are able to intervene in exceptional circumstances with the permission of the court.[360] What the above procedures have highlighted, and all have in common, is the importance of the move away from the courts which has indeed been noted, as the debt intervention will be largely placing reliance on the NCR and NCT.

In recommending a path forward, my recommendations are two pronged. The first path, and less likely, would be to overhaul the entire South African natural person insolvency regime. This should be done by creating one unified piece of legislation that can accommodate all insolvency matters under a new Insolvency Act, as seen in NZ. This would require a massive effort since we currently have sequestration under the Insolvency Act, administration orders under the MCA, debt review under the NCA, and now we presented with debt intervention under the NCAA. To amalgamate them all would indeed prove to be a mammoth task but one that is not impossible as we have seen something similar with the Kenyan insolvency regime. There is no doubt that this would provide a more simple and efficient system of natural person insolvency.[361] For example, with no single piece of legislation to encompass these measures, we are subjected to differing policy objectives. This is one of the major concerns for the debt intervention mechanism being subject to the NCA, for example, because this limits the procedure to the confines of credit agreements only. As a result, debt not forming part of a credit agreement will inevitably be excluded from the procedure. This would not benefit the debtor in obtaining a "fresh start" or even an "earned fresh start" in relation to the excluded debt.

The second path, and one more likely, is to revise the NCAA in its current form. While I do agree with the Final Report prepared by Genesis that the debt intervention would be better placed within the debt review mechanism, I simply cannot see the legislature turning back now. I am of the opinion that since we are now faced with the NCAA, and with much effort having gone into this piece of legislation to specifically consider the South African context, we should best utilize this legislation by way of a number of changes if a

[360] See note 222.

[361] See further, the recommendations by Coetzee 'A comparative reappraisal' op cit note 87 at para 8.2.2.

complete overhaul is not possible. I recommend that a number of changes should occur before it comes into force. Only once in force can the Minister use s 171(2A)(a) to amend the monthly income amount of a debt intervention applicant every 12 months.[362] What is worrisome is that the Minister must consider "inflation" when setting the amount.[363] Indeed, inflation is rising but whether adhering strictly to inflation is questionable when the amount is currently set at a minimal R7, 500. Therefore, this amount should be amended to a higher figure before the NCAA comes into force.[364] Alternatively, should the amount remain the same, I submit that the wording of s 171(2A)(a) should be amended to exclude the point on inflation. Ideally, however, this figure providing a cap on income should be scrapped entirely and rather use the requirement that the debtor "have no realisable assets" as an entry marker on this point. This would be aligned with the NZ and Kenyan NAP entry requirement that a debtor have no realisable assets in order to access the NAP. The UK's DRO is slightly different in that stipulates that an applicant's assets must not exceed £1000. I submit that while the debt intervention is not necessarily aligned to the NAP, it would still be more beneficial to use the 'no asset' requirement opposed to the salary cap. In this way, the procedure would still focus on the low-income consumer without discriminating against those earning slightly above the threshold.

The same is true for the amount of the qualifying total unsecured debt contemplated in s 86A(1) which is currently set at R50, 000.[365] If we compare the NZ and Kenyan NAP, the total amount of qualifying debt in NZ equates to R550, 000 while in Kenya it amounts to roughly R518, 000. The DRO sits slightly less at roughly R418, 548. These amounts far

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[362] S 171(2A)(a) provides: "the Minister may once every 12 months, by notice in the Gazette and after having considered the following factors, adjust the amount contemplated in the definition of "debt intervention applicant" in section 1 in respect of the maximum gross income of a debt intervention applicant

(i) The gross income required by a consumer to be an economically viable client for a debt counsellor as at the time of the proposed adjustment;

(ii) The cost associated with an administration or sequestration order as at the time of the proposed adjustment; and

(iii) Inflation."

[363] Ibid.

[364] If the amount is amended to a higher amount before the NCAA comes into force, then a 12-month re-evaluation as per s 171(2A(a) considering inflation will be acceptable. It is the starting amount of R7, 500 that is too low.

[365] S 171(2A)(b) provides as above, that once every 12 months the Minister may adjust the amount of qualifying total unsecured debt.

exceed the total unsecured debt allowed in order to access the debt intervention procedure. Once the Minister makes changes to these amounts under the debt intervention it would lessen the restrictions placed on access to the procedure. With greater access by simply increasing the abovementioned amounts, we can allow many more honest but unfortunate debtors obtain debt intervention while lessening the impact of financial exclusion. In order to align the debt intervention with international trends such as the NAP and DRO the total unsecured debt cap could be raised to an amount of roughly R400 000 since this only includes unsecured debt.

A further, and equally important factor of the debt intervention is financial education. In specifically considering the South African context, financial education is sorely lacking amongst South Africa's poor communities where the debt traps begin for many consumers. By improving financial literacy, this would improve the long-term position of South African consumers. Currently, counselling on financial literacy and access to training is to be provided during the consideration of an application,[366] while participation in a financial literacy program will be required by the Tribunal when suspending qualifying agreements.[367] Despite this welcomed aspect of the debt intervention, it would be encouraging to see the proposal by the NCR and NCT of how they intend to roll out this financial education in the most effective manner possible before the debt intervention comes into force.

In noting the simplicity of the NZ and Kenyan NAP, this cannot be said for the debt intervention process. The debt intervention is complex with many hurdles to overcome before a discharge may occur. The repeated assessment of the debtors financial standing contributes to the complexity of the procedure not only by prolonging it but by making it cumbrous in nature.[368] This complexity is not seen in the NAP procedure and this could possibly be attributed to the strict qualification criteria of an applicant. For example, the debt intervention does not provide, as an entry requirement, that the applicant may not have been previously subject to a debt intervention order. It does, however, provide that an applicant may not have previously been subject to a sequestration or administration order. The NAP procedure in NZ and Kenya specifically stipulates that an applicant may not have been subject to the NAP

[366] See note 251.

[367] s 87A(2)(b)(ii).

[368] See also the remarks of leathern op cit note 85 at 63.

prior to the current application. In order to make the debt intervention more efficient and less burdensome on the NCR, perhaps a revision of s 87A(5)(a)-(d) would be in order by eliminating to recurring assessments needed on an applicant. Particularly, the further re-assessment at the eight month interval after an extension or suspension was granted by the Tribunal.[369] This recommendation is merely for efficiency purposes to alleviate some of the resources needed by the NCR. Should the NCR be efficient in this regard, then this would not be needed.

Final Remarks

To conclude, it is heartening to see the debt intervention procedure aiming to achieve a more balanced approach after considering how South Africa's history of achieving an advantage for creditors has prevailed. There have been essentially two sets of issues highlighted in this paper. Firstly, what I would call the deep issues leading to long term ineffectiveness and these are in reference to the foundations and structure of the debt intervention. This includes the ill-fate of the debt intervention being placed under the NCA. Secondly, what I would call the shallow issues that need rectifying in order to be a viable and effective short term solution while mitigating financial exclusion as best possible under the framework. These include the increases in monthly salary amount and total unsecured debt amounts in order to allow for wider access to the procedure. While the deep issues will remain acting as an anchor to the debt intervention and prevent it from fully flourishing as a well-rounded debt procedure, the shallow issues may be amended to allow for greater and much needed debt relief. The fact of the matter is that if our current insolvency regime remains the same, even with the addition of the NCAA, South Africa will still be lacking a well-rounded, succinct procedure that provides a true 'fresh start' to all unfortunate debtors that have no way of escaping their debt.

[369] S 87A(5)(c).

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