A legal analysis of the debt relief measures as alternatives to the sequestration of financially distressed debtors in South Africa*

Zuené Taljaard

LLB LLM (Pret)
Senior Lecturer in Insolvency Law, University of South Africa

Mziwabantu Dayimani

LLB (Stell) LLM LLM (Unisa)
Attorney, notary and conveyancer of the High Court

OPSOMMING

'n Regsanalise van skuldverligtingsmaatreëls as alternatief tot die sekwestrasie van skuldenaars in finansiële nood in Suid-Afrika

Daar is verskeie vorme van skuldverligtingsmaatreëls wat daarop gemik is om skuldenaars in Suid-Afrika in finansiële nood te help. Hierdie vorme van verligting sluit sekwestrasie, om deur 'n landdroshof onder 'n administrasiebevel geplaas te word, en 'n herstrukturering van skuld in. Die vereiste om te bewys dat sekwestrasie wel tot voordeel van skuldeisers is, beteken dat diegene wat nie die finansiële vermoë het om aan hierdie vereiste te voldoen nie, nie gesekwestreer kan word nie. Die tekortkoming van 'n administrasiebevel deur die landdroshof is dat dit slegs gebruik kan word as die skuld nie R50 000 oorskry nie. Dit beteken dat indien 'n skuldenaar skuld bo hierdie bedrag het, hulle nie hierdie vorm van skuldverligting kan gebruik nie. Die konsolidasie van skuld hou dan ook 'n aantal nadele in, insluitend die feit dat die koste van die skuld verhoog omdat die koste van die skuldberader asook verhoogde koste en fooie as gevolg van die herstrukturering by die bestaande skuld gevoeg word. Skuldherstrukturering kan dus 'n skuldstrik vir 'n skuldenaar stel. Waar 'n skuldeiser krediet verleen het, terwyl hy moes voorsien het dat die skuldenaar te veel skuld sou hê en nie sodanige skuld sou kon terug betaal nie, of as 'n skuldenaar 'n geskiedenis daarvan maak dat hy nie die skuld terugbetaal nie, kan die hof die krediet as roekelose krediet verklaar. Die hof het magte om roekelose krediet vir 'n tydperk wat hy mag bepaal op te skort. Die uitdaging hiermee is dat dit nie die skuld permanent opskort nie, wat beteken dat die skuldverpligting altyd vir die skuldenaar sal bly. Die wet verbied dan ook nie vir 'n skuldeiser om, sodra die skuldenaar om skuldhersiening aansoek doen, vir die sekwestrasie van die skuldenaar aansoek te doen nie. Daar is 'n behoefte aan wetgewende hervorming sodat skuldhersiening enige aansoek om sekwestrasie opskort, om 'n hof in staat te stel om skuld te kan verminder in die geval waar 'n skuldenaar te veel skuld het of in sodanige geval van roekelose krediet vergunning.

* This article is largely based on Mziwabantu Dayimani "Debt relief measures as alternatives to sequestration for financially distressed debtors" (LLM dissertation University of South Africa 2020) under supervision of Ms Zuene Taljaard.

1 INTRODUCTION

This article discusses various forms of debt relief for debtors who are natural persons, and it does not deal with debt relief for juristic persons such as companies or close corporations. The three forms of debt relief that will be examined are sequestration in terms of the insolvency law, administration orders in the law of debt collection, and debt consolidation in terms of statutorily defined credit agreements.

In relation to insolvency law, it is important to note that the controlling statute, the Insolvency Act,[1] does not define the term "insolvent", but that the insolvency of a person is manifested by his inability to pay his debts.[2] According to *Venter v Volkskas Ltd*,[3] the test for insolvency is whether the liabilities of the debtor (estimated fairly) exceed the debtor's assets (fairly valued). In terms of the Insolvency Act,[4] when a natural person becomes insolvent, his estate can be sequestrated. A sequestration order declaring a person's estate as being insolvent must be issued by a court in order for a person to be treated as an insolvent person for legal purposes.[5] The estate of an insolvent can be sequestrated in one of two ways being either by voluntary surrender or compulsory sequestration.[6] The insolvent debtor or his agent can apply to court for voluntary surrender of his estate.[7] In terms of section 9(1) of the Insolvency Act, any creditor of the insolvent debtor who has a liquidated claim of at least R100 can apply for compulsory sequestration of the debtor's estate.[8]

In both instances (voluntary surrender and compulsory sequestration), there is a requirement to prove that the sequestration would be to the advantage of the creditors of the insolvent debtor,[9] although the burden of proof in the case of voluntary surrender is more stringent.[10] Where a creditor applies for compulsory sequestration of a debtor, they bear the burden to prove that there is a reason to believe that the sequestration would be to the advantage of the creditors of the debtor.[11] This is a lesser burden of proof than in the case of voluntary surrender,[12] where the debtor applies for voluntary surrender of his estate and the burden is accordingly on them to prove that his sequestration would be to the advantage of the creditors (and not only prove that there is reasonable prospect as with compulsory sequestration).[13]

The voluntary surrender option has proven to be difficult to use as many debtors find it difficult to prove that sequestration would be to the advantage of creditors, as they normally do not have sufficient realisable assets to satisfy this

1 Insolvency Act 24 of 1936 (hereafter "Insolvency Act").
2 Sharrock, Van der Linde & Smith *Hockly's Insolvency Law* (2012) 3.
3 1973 3 SA 175 (T) 179.
4 Sharrock, Van der Linde & Smith (2012) 3.
5 *Ibid*.
6 S 3 of the Insolvency Act.
7 S 3 of the Insolvency Act. See also Sharrock, Van der Linde & Smith (2012) 3.
8 Sharrock, Van der Linde & Smith (2012) 3.
9 S 6(1) of the Insolvency Act. See also Loubser "Ensuring advantage to everyone in a modern South African Insurance Law" 1997 *SA Merc LJ* 326.
10 Loubser 1997 *SA Merc LJ* 326.
11 S 12(1)(*c*) of the Insolvency Act.
12 Sharrock, Van der Linde & Smith (2012) 17.
13 S 6(1) of the Insolvency Act.

requirement.[14] This stringent burden of proof has resulted in some debtors opting for friendly sequestration.[15] This is a compulsory sequestration that is initiated by a creditor who is sympathetic towards the debtor and thus applies for his sequestration to help him in his debt situation.[16] For both compulsory sequestration and friendly sequestration, the sequestration proceedings must be brought by a creditor of the debtor, and are not initiated by, or dependent on, the debtor himself.[17]

Besides sequestration in the law of insolvency, there are other legal avenues for debt relief for debtors who are financially harassed. These avenues include administration in terms of the Magistrates' Courts Act,[18] and debt consolidation in terms of the National Credit Act.[19] Accordingly, a debtor can resort to those measures, but they are limited in their scope and circumstances under which they can be resorted to. For example: (a) the administration process in terms of the Magistrates' Courts Act can be used only where the total debt does not exceed R50 000.[20] There is no similar process for debts above this threshold. (b) There is no regulatory body that manages administrators under the Magistrates' Court Act process, and the process is accordingly open to abuse.[21] (c) Debt consolidation in terms of the National Credit Act has been exploited by unscrupulous persons who lure debtors into resorting to the debt consolidation process without fully appreciating its ramifications.[22] (d) The debt consolidation and counselling process under the National Credit Act applies only to "credit agreements" as defined in the National Credit Act, and does not apply if a debt was not incurred in terms of a credit agreement.[23]

This article will focus on the different ways in which the estate of a debtor can be sequestrated, the challenges faced by financially distressed debtors regarding the current insolvency law regime, and other debt relief measures that are available to financially distressed debtors which can be used as alternatives to sequestration.

The main objective of the Insolvency Act is to ensure that in an insolvency situation there is pecuniary benefit for the general body of creditors[24] and not to provide relief to debtors who are under financial difficulties.[25] So although voluntary surrender and friendly sequestrations can provide debt relief for financially distressed debtors, they cannot be resorted to by debtors who do not

14 Smith "'Cast a cold eye': Some unfriendly views on friendly sequestrations" 1997 *JBL* 50.
15 *Ibid*.
16 Evans "Friendly sequestrations, the abuse of the process of court, and possible solutions for overburdened debtors" 2001 *SA Merc LJ* 485.
17 *Ibid*.
18 32 of 1944 (hereafter "Magistrates' Courts Act").
19 32 of 2005 (hereafter "National Credit Act").
20 S 74 of the Magistrates' Courts Act.
21 *Smith NO v Clerk, Pietermaritzburg Magistrates' Court* 2017 5 SA 289 (KZP) para 42.
22 Van Heerden & Boraine "The interaction between debt relief measures in the NCA 34 of 2005 and aspects of insolvency law" 2009 *PER/PELJ* 161.
23 National Credit Regulator "National Credit Act 34 of 2005: all you need to know as a consumer" vol 1 of 2007, https://www.ncr.org.za/documents/pages/ENGLISH.pdf (accessed on 16 June 2020). In terms of s 8 read with s 9 of the National Credit Act, a "credit agreement" is an agreement in terms of which payment owed by another person to another is deferred and interest or a fee is payable for such deferral.
24 *Lynn & Main Inc v Naidoo* 2006 1 SA 59 (N) para 3.
25 *Ex parte Shmukler-Tshiko* 2013 JOL 29999 (GSJ) para 4.

have realisable assets to provide pecuniary benefit for creditors.[26] Once an order for sequestration of the estate of a debtor is granted, a coming together of creditors (a *concursus creditorum*) is established and the interests of creditors as a group has preference over the interests of individual creditors.[27] Creditors may no longer enforce their claims individually but have to prove their claims against the insolvent estate.[28]

The other forms of relief like administration in terms of the Magistrates' Courts Act and debt consolidation in terms of the National Credit Act apply in limited cases. There is, therefore, a need to review the regulatory regime so that there is no distinction between debtors who have means to pay a dividend to creditors (who can prove advantage of creditors) and debtors who do not have the means to pay creditors and are thus unable to prove advantage of creditors.

The objective of the Insolvency Act does not have to be tampered with in order to cater for situations affecting financially distressed debtors, but there is a need to review other legislation, or introduce new legislation, on this issue. For example, the administration process under the Magistrates' Courts Act can be reviewed so that it applies to debts higher than the prescribed threshold and to curb abuse of the process by unscrupulous administrators. Another avenue that is available to the legislator to deal with these circumstances is to consider introducing a debt relief mechanism similar to debt consolidation in terms of the National Credit Act in cases where debt was incurred through means other than credit agreements as defined in the National Credit Act.[29]

The National Credit Act introduced the concept "development credit agreements"[30] in terms of which a development credit provider,[31] approved as such by the National Credit Regulator,[32] can provide credit to consumers in instances where such credit would otherwise be classified as reckless credit prohibited by the National Credit Act.[33] In considering the situations that are classified as development areas where the National Credit Act permits reckless credit, it will be argued that this concession increases the chances of such debtors defaulting on the repayment of their debts, and that there should accordingly be a regulatory regime that allows them debt relief that is more lenient than that

26 *Ibid*.
27 Sharrock, Van der Linde & Smith (2012) 4.
28 S 8(2) of the National Credit Act.
29 Certain categories of debt do not constitute credit agreements and thus do not have to adhere to the stringent requirements of the NCA, such as debts above R250 000 or mortgage bonds (ss 8(2) and 9(4) of the National Credit Act).
30 S 10 of the National Credit Act explains what constitutes a development credit agreement. This category includes an agreement between a credit co-operative provider and a member of that co-operative (where profit is not the dominant purpose of such credit), a credit agreement entered into for the development of a small business or for development of low cost housing, and credit that is made available to address the needs of historically disadvantaged people and low-income people and communities.
31 Any credit provider can apply to the National Credit Regulator for certification as a developmental credit provider, and such certification will enable that credit provider to offer developmental credit to consumers (s 41 of the National Credit Act).
32 S 12 of the National Credit Act provides for the establishment of the National Credit Regulator, which is a juristic person mandated to support the development of a fair credit market and also to monitor compliance with the NCA.
33 S 10 of the National Credit Act.

which applies to normal credit agreements. We shall consider whether the National Credit Act is the right piece of legislation to apply in these circumstances, or whether it should be dealt with in new legislation or another existing piece of legislation. The objectives of this article are to examine whether the current regulatory regime in South Africa sufficiently caters for debtors who are in financial difficulties, to consider whether there is a need for any legal reform, and, if there is, to recommend how such reforms could be achieved.

2 ALTERNATIVE DEBT RELIEF MEASURES

2. 1 Introduction

A debtor who is in financial difficulty can approach his creditors in order to request them to grant him repayment terms that would provide him with sufficient time to repay his debt.[34] Any debtor who follows such an approach exposes himself to the risk, however, that any of his creditors can interpret that approach as a declaration by the debtor that he is unable to pay his debts. In terms of the Insolvency Act, such a declaration would constitute an act of insolvency that constitutes a ground for a creditor to apply for the compulsory sequestration of the debtor's estate.[35] Parliament has enacted pieces of legislation that allow a financially stressed debtor to approach his creditors to facilitate the restructuring of the terms of his financing arrangements in order to alleviate his financial burden.[36]

As we mentioned, the option of sequestration in terms of the Insolvency Act is intended to safeguard the interests of the creditors of a debtor. We shall accordingly consider the interests of the debtor in discussing the statutory debt relief measures that can be accessed by financially distressed debtors as well as whether those options shield the debtor against the possibility of sequestration by his creditors. The options that will be discussed are placing a debtor under administration in terms of section 74 of the Magistrates' Courts Act, and debt review in terms of the National Credit Act.

2.2 Debt administration in terms of the Magistrates' Courts Act

Section 74(1) of the Magistrates' Courts Act provides that a debtor may apply for a court order at a Magistrates Court to place his estate under administration. A major limitation of such administration order is the fact that it can be used only where the total debts do not exceed R50 000.[37] The administration order entails the appointment of an administrator for the debtor's estate and would stipulate the amount that the debtor is obliged to pay for its debts.[38]

An administration order can be obtained only by a debtor who cannot pay a debt owed as a result of any judgment issued against them, or a debtor who

---

34 Boraine, Van Heerden & Roestoff "A comparison between formal debt administration and debt review – the pros and cons of these measures and suggestions for law reform (part 1)" 2012 *DJ* 80.

35 S 8 of the Insolvency Act.

36 For example, debt review in terms of s 86 of the National Credit Act and debt administration in terms of s 74 of the Magistrates' Courts Act.

37 S 74(1)(*b*) of the Magistrates' Courts Act. This amount is determined by the Minister of Justice. The current amount is set at R50 000, which has been the case since 2014 (GN 217 in *Government Gazette* 37477 of 27 March 2014).

38 S 74C of the Magistrates' Courts Act.

does not have enough funds to meet his financial obligations, even if no judgment was obtained against them.[39] A debtor is required, when making such an application, to provide the court with a sworn statement of his financial affairs.[40] The sworn statement must state each creditor and the amount owed to them, and must also be sent to each creditor by registered post at least three days before the court date.[41]

The court considers the application by the debtor. Any creditor can attend the court on the day the matter is considered and may object to the details of his debt in the sworn statement.[42] The court interrogates the statement and can allow any creditor to bring oral evidence to support his contentions. Once the court is satisfied that it has been provided with sufficient information about the debtor's liabilities, financial means, and standard of living, and the debtor has suggested an acceptable payment plan, the court can place the debtor's estate under administration in terms of section 74 of the Magistrates' Courts Act.[43] The court order must state the name of the appointed administrator and the amount the debtor is obliged to pay to the administrator, and the frequency of payments (either weekly or monthly). The administrator administers such money for the creditors.[44]

The court may order that any of the assets of the debtor should be realised and disposed of to repay the debts.[45] There are no qualification requirements to be an administrator, and so anyone can be an administrator.[46] The only requirement is that if the administrator is not a practising lawyer or officer of the court, he must provide security to the court to ensure that he will administer the money paid to him properly.[47] The administrator can charge fees for his services which may not exceed 12.5 per cent of the money paid to him in terms of the administration order.[48]

An administration order in terms of section 74 of the Magistrates' Courts Act protects the debtor against the creditors in that creditors are prohibited from continuing with their individual claims against the debtor during the subsistence of an administration order.[49] However this protection is limited, as any creditor who has a mortgage bond over immovable property of the debtor can enforce his claim against the immovable property. An administration order does not prevent creditors from bringing proceedings for the sequestration of a debtor.[50] Administration orders have been criticised for worsening the situation for debtors because they do not have a limited repayment period and the liabilities of debtors often escalate substantially during the administration period.[51]

---

39 S 74(1) of the Magistrates' Courts Act.
40 S 74A(1) of the Magistrates' Courts Act.
41 S 74A(5) of the Magistrates' Courts Act.
42 S 74B(1) of the Magistrates' Courts Act.
43 S 74B(1)(*e*) of the Magistrates' Courts Act.
44 S 74C of the Magistrates' Courts Act.
45 S 74C(*b*)(1) of the Magistrates' Courts Act.
46 S 74E(3) of the Magistrates' Courts Act.
47 S 74E(3) of Magistrates' Courts Act. See also *Oosthuizen v Landdros, Senekal* 2003 4 SA 450 (O).
48 S 74L(2) of the Magistrates' Courts Act.
49 S 74P(1) of the Magistrates' Courts Act.
50 *Ibid*.
51 Boraine "Some thoughts on the reform of administration orders and related issues" 2003 *De Jure* 4.

2.3 National Credit Act

2.3.1 *Scope and objects of the National Credit Act*

The National Credit Act was enacted to promote the economic welfare of the people of South Africa and to promote a fair and sustainable credit market. Some of the pillars of the National Credit Act are the promotion of access to credit, the avoidance of the provision of reckless credit by credit providers, and the promotion of responsible borrowing by consumers. The National Credit Act acknowledges that despite all measures that can be adopted to promote responsible borrowing and the avoidance of reckless credit, the circumstances of debtors can change such that over time they become unable to honour their debt repayment obligations. In order to deal with such unfortunate eventuality, the National Credit Act provides for a system of dealing with over-indebtedness based on the principle that a person who borrows from a responsible lender, or who voluntarily becomes indebted, should honour his financial commitments.

The scope of application of the National Credit Act is limited, as it applies only to debt that arose pursuant to a credit agreement as stipulated in the National Credit Act; it does not apply to any other debt. Although the National Credit Act provides for debt relief mechanisms for financially distressed debtors, only debtors whose credit agreements fall within its ambit can utilise such relief. For example, if debt was incurred from a lease of immovable property, the debtor in such instance is prohibited from relying on the relief measures in terms of the National Credit Act, as a lease agreement does not constitute a credit agreement.

In terms of section 1 of the National Credit Act, the term "consumer" connotes any person who owes another person money by virtue of money lent and advanced, goods delivered, or services rendered. In this article, we shall use the term "debtor" to refer to a debtor for the purposes of the Insolvency Act, and a consumer as defined in the National Credit Act.

2.3.2 *Debt review and debt re-arrangement in terms of the National Credit Act*

An over-indebted debtor can apply for debt review and debt restructuring in terms of the National Credit Act.[52] The National Credit Act provides that a debtor can apply to a debt counsellor to have themselves declared over-indebted.[53] A debtor is over-indebted if, based on the information available at the time of determination, he will not be able to pay his debts under all his credit agreements timeously.[54] In making this determination, a court will consider the financial means of the debtor and his financial commitments and propensity to pay debts based on his history of repayments.[55]

A debt counsellor is a natural person registered as a debt counsellor with the National Credit Regulator.[56] Once a debt counsellor receives an application from a person who applies to be declared over-indebted, he must notify all creditors of the debtor and all registered credit bureaus of such application, and must determine whether, in his assessment, the debtor appears to be over-indebted, and

52 *Nedbank v Andrews* (240/2011) [2011] ZAECPEHC 29 (10 May 2011) para 12.
53 S 86(1) of the National Credit Act.
54 S 79(1) of the National Credit Act.
55 S 79(1)(*a*) and (*b*) of the National Credit Act.
56 S 44(1) of the National Credit Act.

whether any of the debtor's credit agreements appears to be reckless credit by the credit provider under such agreement.[57] If the debt counsellor determines that the debtor is not over-indebted, the debt counsellor must reject the debtor's application to be declared as such.[58] In such an event, the debtor can apply to the magistrate's court for leave to approach directly the magistrate's court to submit a proposal for re-arrangement of his debts. Should the court grant such leave, the debtor must follow the same process that the debt counsellor would have followed in submitting a debt re-arrangement proposal to the magistrate's court.[59]

The National Credit Act provides for an amicable debt re-arrangement, in terms of which the debt counsellor can recommend that the debtor and the affected credit providers consider a voluntary debt re-arrangement.[60] This happens where a debt counsellor determines that the debtor is not over-indebted but is experiencing, or is likely to experience, difficulty in timely meeting his financial obligations.[61] In instances where the debt counsellor determines that the debtor is over-indebted, the debt counsellor must issue a proposal containing either one or both of recommendations that: (a) any credit agreement of the debtor constitutes reckless trading, or (b) the debts of the debtor be re-arranged.[62]

In terms of section 85 of the National Credit Act, the court can in any proceedings where a credit agreement is considered and it is alleged that the debtor is over-indebted, rule that the matter should be referred to a debt counsellor to assess whether the debtor is over-indebted and to make a recommendation to the court, or the court can of its own volition declare that the debtor is over-indebted and make an order as to how the debt should be re-arranged.[63]

In *Standard Bank of South Africa Ltd v Hales*,[64] a creditor sought to enforce a credit agreement that was secured by a mortgage bond. The debtor raised a defence that he was over-indebted.[65] The court looked at the discretion of the court to refer a matter to a debt counsellor in terms of section 85 of the National Credit Act, and held that, in exercising such discretion, the court must balance the rights and responsibilities of both the credit provider and the debtor.[66] The court stated that the National Credit Act should be considered in such a manner that there is no bias towards the interests of the debtor, but the rights of the creditor should also be considered.[67] Against this backdrop, the court held that although the debtor was over-indebted, the matter should not be referred to a debt counsellor under section 85, because, on the facts of the case, the debtor was so indebted that it was not possible for them to recover financially even if his debts were re-arranged.[68]

---

57 S 86 of the National Credit Act.
58 S 86(1) of the National Credit Act.
59 S 86(9) of the National Credit Act.
60 S 86(7)(*b*) of the National Credit Act.
61 *Ibid*.
62 S 86(7)(*c*) of the National Credit Act.
63 Boraine & Van Heerden "The interaction between the debt relief measures in the National Credit Act 34 of 2005 and aspects of insolvency law" 2009 *PER/PELJ* 26.
64 2009 3 SA 315 (D).
65 Para 6.
66 Para 13.
67 Para 22.
68 Para 23.

In terms of section 86(7)(*c*) of the National Credit Act, where it is recommended that the debts be re-arranged, the debt counsellor must state whether: (a) the repayment term should be extended, and repayments reduced accordingly; (b) the debtor should be given a specified period of payment holiday where no instalments will be paid; (c) there should be an extension of repayment term and postponement of repayments during certain seasonality where the debtor ordinarily does not earn income to repay the debts; or (d) the debt should be reduced by the amount of any charges included on it that are prohibited in terms of the law.[69]

Van Heerden and Boraine[70] highlight that the fact that the National Credit Act does not prescribe the maximum time period for which a credit agreement can be extended can pose challenges, as this might lead to unrealistically long extensions of time.[71] To ensure that debtors are not trapped in a cycle of debt in perpetuity, and also to ensure that creditors do not wait for the settlement of their debt over a prolonged period, the legislator should consider reviewing the National Credit Act so that there are parameters within which a court or a debt counsellor can decide to extend the repayment term under a credit agreement.

In the event that the debtor and each creditor accept the restructuring recommendation proposed by the debt counsellor, the debt counsellor must submit the proposal to the magistrate's court, stipulating that it is a consent order in terms of section 138 of the National Credit Act.[72] Where the debtor or any creditor does not accept the recommendation of the debt counsellor, the debt counsellor must refer the matter to the magistrate's court with his recommendation. The magistrate's court can grant an order either rejecting the proposal or approving it.[73]

A creditor who receives notification that a debtor has applied for debt review and re-arrangement may not enforce by litigation or judicial process any credit agreement or security against a debtor in terms of a credit agreement until the debt review or re-arrangement process is finalised.[74] As stated in paragraph 2 above, the National Credit Act does not apply to all credit agreements. This is problematic, because a creditor under an agreement that is regulated by the National Credit Act is prohibited from acting against a debtor in terms of the credit agreement where the debt review process has not been concluded whilst any other creditor of the debtor can enforce his debts against the debtor. This means that the creditors of the debtor have different rights. Van Heerden and Boraine believe that this differentiation amounts to an unjust deprivation of a creditor's rights.[75]

2.3.3 *Reckless credit*

The National Credit Act grants authority to the courts to declare as reckless credit any debt which was extended by a creditor to a debtor in circumstances

69 S 86(7)(*c*)(ii) of the National Credit Act.
70 Boraine & Van Heerden 2009 *PER/PELJ* 31.
71 *Ibid*.
72 S 86(8)(*a*) of the National Credit Act.
73 S 87 of the National Credit Act.
74 S 88(3) of the National Credit Act. See also Boraine & Van Heerden 2009 *PER/PELJ* 33.
75 Boraine & Van Heerden 2009 *PER/PELJ* 38.

where a creditor should have foreseen that a debtor would not be able to repay it.[76]

Section 80 of the National Credit Act stipulates three instances where a creditor would be regarded as having provided reckless credit. In the first instance, a creditor is providing reckless credit if he provides credit to a debtor without assessing the debtor's general understanding of the risks and responsibilities relating to the credit, and without assessing the repayment history and financial means of the debtor.[77] Secondly, a credit provider concludes a credit agreement whilst realising that the debtor did not appreciate the risks and obligations associated with the agreement.[78] Thirdly, a credit provider enters into a credit agreement whilst realising that doing so would cause the debtor to become over-indebted.[79]

The National Credit Act prohibits credit providers from providing reckless credit to debtors. It stipulates that whenever a court considers a credit agreement, it may declare credit provided under such credit agreement to be reckless.[80] If a court declares that the credit provided is reckless, similar to those circumstances described in the first and second types of reckless credit discussed above, the court can suspend some or all of the debtor's obligations under that agreement, or can suspend the application of that credit agreement for a period determined by it.[81] If a court declares that credit is reckless credit as described in the third type discussed above, the court must consider whether the debtor is over indebted at the time it considers the matter, and, if so, the court can suspend the application of that credit agreement for a period determined by it and restructure the terms of credit agreement.[82]

Where a court declares that credit amounts to reckless credit and sets aside the terms of the agreement, or suspends any of its terms, that will provide the debtor with some relief from debt advanced under that credit agreement.[83] The debtor would not be bound to the terms of the credit agreement and thus will have reprieve from any onerous terms contained in it. However, this relief might not be permanent, as the National Credit Act states that the terms of a credit agreement can be suspended or set aside; it does not state that the credit can never be repayable.[84] The National Credit Act also does not stipulate that the provisions of the credit agreement are illegal. Where a credit agreement is suspended, the debtor is still obliged to repay the debt upon the expiry of the suspension period, as the National Credit Act requires that a court must specify the suspension period of the debt.[85] Therefore, a debtor effectively gets only a break from its debt obligations but not a lasting relief from them.

---

76 *Ex parte Ford and Two Similar Cases* 2009 3 SA 376 (WCC).
77 S 80(1)(*a*) of the National Credit Act.
78 S 80(1)(*b*)(i) of the National Credit Act.
79 S 80(1)(*b*)(ii) of the National Credit Act.
80 S 83(1) of the National Credit Act.
81 S 83(2) of the National Credit Act.
82 S 83(3) of the National Credit Act.
83 Brits "The National Credit Act's remedies for reckless credit in the mortgage context" 2018 *PER/PELJ* 9.
84 *Idem* 11.
85 *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) para 14.

In *Ex parte Ford and Two Similar Cases*,[86] the court dealt with a sequestration application. It observed that the circumstances in that case presented a strong suspicion of reckless credit by a creditor and considered that one of the objects of the National Credit Act is to discourage the provision of reckless credit.[87] The court refused to grant an application for voluntary surrender of the estate of a debtor and rather instructed the debtor to use the recourse provided for under the National Credit Act.[88] The court held that public policy dictated that the courts should, when considering sequestration, give preference to the advantage of responsible creditors over the interests of reckless creditors.[89] Accordingly, where the reckless creditors stands to benefit the most from sequestration, the court should consider alternative options to sequestration like debt restructuring in terms of the National Credit Act, as that will ensure that all creditors are repaid their money and responsible creditors will be protected from reckless creditors.[90]

A court can, when it deals with a case of reckless credit, order that debt should be re-arranged and impose an administrative fine on a credit provider that provided reckless credit. The National Credit Act requires that all persons who are in the business of providing credit in terms of credit agreements must be registered as credit providers with the National Credit Regulator.[91] All credit agreements concluded by a credit provider who is not registered as required are void and unenforceable.[92] The National Consumer Tribunal[93] can suspend or cancel registration of a credit provider if it repeatedly provides reckless credit.[94]

The provisions of the National Credit Act dealing with reckless credit discourage credit providers from providing reckless credit and provide for punitive consequences for such credit providers in the form of a penalty and a possible deregistration as a credit provider. The provisions are not intended to provide for the discharge of liability or to exonerate borrowers who are financially distressed. The provisions do provide for reprieve in that debt can be suspended, extended, or re-arranged in another manner. The provisions dealing with reckless credit in the National Credit Act are intended to correct the negative effect of reckless credit on debtors and are not intended to enable debtors to evade the consequences of their actions.[95]

2.3.4 *Debt restructuring and application for compulsory sequestration*

In *Investec Bank Ltd v Mutemeri*,[96] a creditor applied for the compulsory sequestration of the estate of a married couple who were deemed to be married in community of property. The respondents opposed the application, because the sequestration was premised on a credit agreement in respect of which they had already applied for debt review in terms of the National Credit Act.[97] The

86 *Ex parte Ford and Two Similar Cases* 2009 3 SA 376 (WCC) para 3.
87 Para 4.
88 Para 21.
89 Para 5.
90 Para 20.
91 S 40 of the National Credit Act.
92 *Ibid*.
93 Established in terms of s 26 of the National Credit Act.
94 S 59 of the National Credit Act.
95 Brits 2018 *PER/PELJ* 12.
96 2010 1 SA 265 (GSJ).
97 Para 2.

respondents alleged that the sequestration provisions could not be brought at that stage, as the National Credit Act prohibited the enforcement of a credit agreement during a debt review.[98] When the matter was heard in court, the debt counsellor had already determined that the respondents were over-indebted and had applied to the magistrate's court for debt re-arrangement in terms of the National Credit Act.

The court had to consider whether the application for compulsory sequestration amounted to "an enforcement action" of the credit agreement in terms of the National Credit Act.[99] If it was, the creditor would be prohibited from bringing it during debt review proceedings, in terms of section 130, without first informing the debtor of his right to undergo debt review, in accordance with section 129.[100] The court stated that whether an application for sequestration constituted an enforcement action depended on the nature of relief sought by a creditor and not on the motive of the creditor.[101] It was held that the purpose of sequestration was to have a debtor declared insolvent and not the enforcement of a debt.[102] The court held that the aim of sequestration was to bring together the claims against the estate of a debtor to ensure that creditors are treated equally during the winding up of that estate.[103] The court accordingly held that the creditor did not have to comply with the provisions of the National Credit Act before he applied for sequestration in terms of the Insolvency Act.[104]

The respondents also relied on section 88(3) of the National Credit Act which prohibits a creditor who receives notice of an application for debt review from undertaking litigation or a judicial process to enforce any right or security under a credit agreement.[105] The court held that an application for sequestration did not constitute litigation or a judicial process to exercise or enforce rights between a creditor and a debtor.[106] The court stated that the creditor was merely relying on its claim in terms of the credit agreement to enable it to have standing to bring the sequestration proceedings; it was not enforcing its rights.[107]

In *Mutemeri*, the court held that an application for debt review in terms of the National Credit Act does not prevent a creditor from applying for the sequestration of a debtor.[108] The judge in *Mutemeri* explained that the National Credit Act prohibited a creditor from continuing with proceedings to enforce a debt, or from proceeding with litigation relating to the enforcement of the debt.[109] The judge added that sequestration merely resulted in the convergence of claims against the estate of the debtor to ensure that creditors are treated equally in the winding up of the estate.[110] The court accordingly held that this did not

98 Para 8.
99 Para 10.
100 *Ibid*.
101 Para 11.
102 Para 30.
103 Para 31.
104 Para 32.
105 Para 33.
106 *Ibid*.
107 Para 34.
108 Para 26.
109 Para 27.
110 *Ibid*.

amount to the enforcement of debt proceedings or litigation.[111] The court held that a creditor in sequestration proceedings might be relying on its debt for purposes of *locus standi*, but it was not enforcing its credit agreement with the debtor by applying for sequestration.[112]

Boraine and Van Heerden agree with the *Mutemeri* decision. They state that an application for compulsory sequestration can never result in a creditor becoming a judgment creditor or in obtaining a civil judgement against the debtor.[113] They also argue that insolvency has more advantages for creditors, as the estate of the debtor will be controlled by a trustee who has to look after the interests of the creditors, as opposed to debt restructuring where the debts remain with the debtor who can continue to conclude other contracts and incur more debt.[114] The debt counsellor in *Mutemeri* intervened in the court case to oppose sequestration. The court held that the debt counsellor did not have an interest in the matter as his role was limited to being a facilitator between the debtor and its creditors, and he did not have a substantial interest in an application for sequestration by virtue of his role as a debt counsellor.[115] We accordingly submit that the National Credit Act should be amended to deal with the interpretation issues that arose in *Mutemeri* and *Ford*.

Boraine and Van Heerden further argue that *Mutemeri* does not mean that a debtor or any other interested party may never succeed in convincing the court to order that debt review in terms of the National Credit Act should first be explored before sequestration, especially where the debtor or the interested party has concrete evidence to prove that debt review will indeed yield a better result for creditors than sequestration.[116] They argue that the courts have the ultimate discretion to decide whether or not to grant sequestration.[117] We submit that the sentiments expressed by Boraine and Van Heerden are correct. However, leaving this matter to the discretion of the court could have been avoided by including clear guidelines as to when the remedies in the National Credit Act would trump the recourse of a creditor in terms of the Insolvency Act.

In *Firstrand Bank v Evans*,[118] the debtor issued a written notice to his creditor advising the creditor that the debtor was under debt review. The creditor applied for the sequestration of the debtor, and argued that the debtor had committed the act of insolvency referred to in section 8(*g*) of the Insolvency Act by issuing such letter to the creditor. Section 8(*g*) provides that a debtor commits an act of insolvency if he gives written notice to any of his creditors that he is unable to pay any of his debts. The debtor opposed the application for sequestration by arguing that section 88(3) of the National Credit Act precluded a creditor from applying for sequestration after receipt of a notice that the debtor was under debt review.[119] The debtor also argued that the promulgation of the National Credit

111 Boraine & Van Heerden "To sequestrate or not to sequestrate in view of the National Credit Act 34 of 2005: A tale of two judgments" 2010 *PER/PELJ* 104.
112 *Mutemeri* para 28.
113 Boraine & Van Heerden 2010 *PER/PELJ* 110.
114 *Ibid*.
115 *Mutemeri* para 39.
116 Boraine & Van Heerden 2010 *PER/PELJ* 115.
117 *Ibid*.
118 *FirstRand Bank Ltd v Evans* 2011 4 SA 597 (KZD).
119 Para 12.

Act meant that the Insolvency Act had to be interpreted differently, so that creditors did not use the fact that a debtor applied for debt review as a basis for applying for the sequestration of such debtor.[120]

The court agreed with the judgment in *Mutemeri* that sequestration proceedings did not constitute an attempt by a creditor to enforce or exercise any right under a credit agreement, either by litigation or some other judicial process.[121] The judge stated that the National Credit Act did not stipulate that the Insolvency Act should be interpreted differently because of the enactment of the National Credit Act.[122] On this basis, the court held that the National Credit Act did not prohibit a creditor from applying for a debtor's sequestration if there was a valid legal basis to do so once he had applied for debt review.[123] The court accordingly granted the order for the sequestration of the debtor on the ground that the letter from the debtor informed the creditor that the debtor could not pay his debts, which was thus an act of insolvency in terms of section 8(*g*) of the Insolvency Act.[124]

The *Evans* judgment correctly interprets the National Credit Act but it also demonstrates the need for the National Credit Act to be aligned with the Insolvency Act.[125] In Evans, the debtor had managed to sell immovable property and used the proceeds to repay its debts, and thus had made substantial inroads into paying his debt. There was a debt repayment arrangement in place and the debtor was adhering to it, but because an act of insolvency had been committed, the court granted a sequestration order.[126]

Chokuda comments on *Evans* and clarifies that the point that was made by the court in that case is that not all notices to creditors of the fact that a debtor was under debt review will constitute an act of insolvency; it will depend on the wording of the letter.[127] Chokuda correctly points out that, to constitute an act of insolvency, the letter must clearly state that the debtor is unable to pay his debts, and not merely state that the debtor is under debt review.[128]

In *Naidoo v Absa Bank Limited*,[129] the debtor appealed to the Supreme Court of Appeal against a decision of the High Court to grant a sequestration order for his estate. The debtor based his appeal on section 129 of the National Credit Act. It requires a credit provider first to give a debtor notice to inform them of his right to debt review before a creditor embarks on proceedings to enforce a credit agreement. The court in *Naidoo* upheld the decision in *Mutemeri* that sequestration proceedings, even if they were based on a debt in terms of a credit agreement regulated by the National Credit Act, did not constitute proceedings to

120 Para 13.
121 Para 16.
122 Para 21.
123 Para 15.
124 Para 17.
125 Steyn "Sink or swim? Debt review's ambivalent 'lifeline' – a second sequel to '... a tale of two judgments'. *Nedbank v Andrews* (240/2011) 2011 ZAECPEHC 29 (10 May 2011); *Firstrand Bank Ltd v Evans* 2011 4 SA 597 (KZD) and *FirstRand Bank Ltd v Janse van Rensburg* 2012 2 All SA 186 (ECP)" 2012 *PER/PELJ* 209.
126 *Evans* para 22.
127 Chokuda "An application for debt review does not constitute an act of insolvency: *FirstRand Bank Ltd v Janse van Rensburg*" 2013 *SALJ* 5.
128 *Ibid*.
129 2010 4 SA 597 (SCA).

enforce a credit agreement. The court accordingly held that a creditor did not have to send a notice to the debtor in terms of the National Credit Act before it applied for the sequestration of a debtor, even where the debt arose in terms of an agreement regulated by the National Credit Act.[130]

Maghembe agrees that the *Naidoo* judgment correctly interpreted section 29 of the National Credit Act. However, Maghembe contrasts that judgment with the one in *Ford*.[131] In *Ford* the court held that, during sequestration proceedings, a court could refer a matter to a debt counsellor if the court believed that there was evidence of reckless trading by the creditor who had brought the sequestration proceedings. In *Naidoo* Cachalia J explained that the court in *Ford* was dealing with section 85 of the National Credit Act which was worded differently to section 129 of the National Credit Act.[132] Section 129 specifically provides that it applies to proceedings relating to the enforcement of a credit agreement. By contrast, section 85 grants the court a discretion to refer a matter to debt counselling in any proceedings in which a credit agreement is being considered.[133] The judge explained that in sequestration proceedings, although not dealing with the enforcement of a credit agreement (as required by section 129), the credit agreement was under consideration if the sequestration was based on a debt that arose from it, and accordingly section 85 of the National Credit Act would apply in sequestration proceedings.[134]

Maghembe argues that the court interpreted sections 85 and 129 correctly, but he notes that the manner in which section 129 is worded defeats the objects of the National Credit Act of alleviating over-indebtedness and of ensuring that debtors fulfil their obligations. If a debtor were allowed to opt for debt review instead of sequestration, that would give him the opportunity to avoid sequestration whilst he fulfils his repayment obligations to his creditors.[135]

In *Firstrand Bank Ltd v Janse Van Rensburg and a Related Matter*,[136] the two respondents were married out of community of property. They had both stood surety for debts of a close corporation to which the creditor had lent and advanced money. The respondents had applied for debt review and the creditor interpreted the notice of such debt review as a notice that stated to creditors that the respondents were unable to pay their debts. This was accordingly an act of insolvency in terms of section 8(*g*) of the Insolvency Act. The respondents sought the debt counsellor to declare that they were over-indebted.[137] The debt counsellor notified registered credit bureaus of the application.[138]

In *Van Rensburg*, the court was faced with the question as to whether an application for debt review in terms of the National Credit Act constituted an act

130 Para 4.
131 Maghembe "The Appellate Division has spoken – sequestration proceedings do not qualify as proceedings to enforce a credit agreement under the National Credit Act 34 of 2005: *Naidoo v ABSA Bank* 2010 4 SA 597 (SCA)" 2011 *PER/PELJ* 171.
132 *Naidoo* para 12.
133 Para 14.
134 Para 16.
135 Maghembe 2011 *PER/PELJ* 178.
136 2012 2 All SA 186 (ECP) para 8.
137 As required by s 86(7) of the National Credit Act.
138 In compliance with s 86(4) of the National Credit Act.

of insolvency in terms of section 8(*g*) of the Insolvency Act. Here, the creditor relied on the Evans judgment to argue that such application constituted an act of insolvency. The court distinguished *Evans* from the case before it – in the present case, the debtor had not issued, or caused to be issued, a written notice to its creditor.[139] The creditor merely relied on the fact that a credit bureau had noted in its records that the debtor was undergoing debt review. The court held that a notice required in terms of section 8(*g*) must be delivered by the debtor himself or someone authorised by him.[140] The court held that a credit bureau was not authorised by the debtor to communicate with his creditors on his behalf.[141] The court accordingly held that an application for debt review did not constitute an act of insolvency envisaged by section 8(*g*) of the Insolvency Act.[142]

Chokuda agrees with the reasoning in the *Van Rensburg* judgment and correctly argues that a notice by a debt counsellor to credit bureaux was merely a notification of the fact that the debtor was undergoing debt review.[143] Such notification is only a compliance notice, as it is required by section 86 of the National Credit Act read with regulation 24 of the regulations in terms of the National Credit Act.[144] Chokuda highlights that although applying for debt review does not constitute an act of insolvency for purposes of section 8(*g*) of the Insolvency Act, it could constitute an act of insolvency in terms of section 8(*e*) of the Insolvency Act.[145] (Section 8(*e*) states that a debtor is committing an act of insolvency if they make or offer to make an arrangement with his creditors that would release him wholly or partly from his debts.)

Where the debt counsellor concludes that a debtor is not over-indebted but is likely to find it difficult to pay his debts, the debt counsellor may recommend that the debtor and the creditors voluntarily re-arrange the debt. Chokuda warns that where a debtor takes up the recommendation by a debt counsellor and makes a recommendation to his creditors for the rearrangement of his debts, that could be interpreted as an act of insolvency in terms of section 8(*e*) of the Insolvency Act.[146]

There are several arguments that could be made on behalf of a debtor to defend such an application, including the fact that such arrangement would not necessarily release the debtor but is likely to provide a longer term within which to repay the debts.

2.3.5 *Where does this leave the debtor now*

The Insolvency Act was relevant when it was promulgated. However, the credit landscape in South Africa has evolved and it has become clear from the application of this statute that although it is premised on the advantage of creditors, it rarely results in creditors receiving significant dividends. It is clear that it results in significant financial distress for debtors but that should not be

139 *Van Rensburg* para 13.
140 Para 14.
141 Para 15.
142 *Evans* para 34.
143 Chokuda 2013 *SALJ* 11.
144 GN R489 in *Government Gazette* 28864 of 31 May 2006.
145 Chokuda 2013 *SALJ* 14.
146 *Idem* 16.

interpreted as being to the advantage of creditors. Debtors have to be kept accountable and should repay commitments they take on board.

Furthermore, the option of administration orders in terms of section 74 of the Magistrates' Courts Act is not adequate in its current format. Its limited scope and its susceptibility to abuse mean that it tends to result in more harm to, than good for, debtors.

The National Credit Act is an attempt to strike a balance between the advantage of creditors (debtors are still required to pay all their debts) and the relief it extends to debtors. Unfortunately, the Act falls short, in that it does not deal with the tension between it and the Insolvency Act, and it is also limited in its scope, as it does not apply to debt that did not arise from a credit agreement as defined in the National Credit Act.

3 CONCLUSION

The availability of credit (with the concomitant indebtedness) can assist in alleviating poverty and enabling persons to improve their economic situation over time. The World Bank Legal Review report indicates that approximately 50 per cent of South African credit consumers were financially distressed by December 2012, and that many of such consumers will be subject to debt collection procedures.[147] There is no uniform manner of dealing with the situation of both debtors and creditors when one is faced with the credit situation of financially distressed debtors.

The Insolvency Act was enacted decades ago and recent legislation (like the National Credit Act) has not been aligned with it to ensure uniformity when one deals with financially distressed debtors. The Insolvency Act is premised on the principle of protecting the requirement of advantage to creditors, which is a decisive factor when a court has to decide whether or not it will grant a sequestration order.

Debtors who have the financial means to meet the requirement of advantage to creditors stand a better chance of being sequestrated; debtors without such means cannot always be sequestrated in terms of the Insolvency Act.[148] Once a debtor is sequestrated, it can be rehabilitated upon the expiry of certain periods stipulated by the law, should the applicable requirements be met. Persons who are not able to be sequestrated are excluded from the possibility of being rehabilitated in this manner, and can be rehabilitated only after the expiry of the set term of ten years.

A debt administration order in terms of section 74 of the Magistrates' Courts Act can provide debt relief in that the liabilities of a debtor can be paid in a structured manner managed through an administrator. However, this relief has a number of limitations, because only debt of up to R50 000 can be subject to these orders, people who act as administrators are not regulated, there is no

147 Cissé *et al The World Bank Legal Review* vol 5 *Fostering Development through Opportunity, Inclusion, and Equity* (2014) 12, https://openknowledge.worldbank.org/-handle/10986/16240 (accessed on 16-06-2020) (hereafter "*World Bank Legal Review*").

148 Steyn "Human rights issues in South African insolvency law" 2004 *International Insolvency Review* 1, 3.

maximum period to repay this debt, and interest on it is not limited, which can cause debtors to never finish paying it.[149]

The National Credit Act is a step in the right direction towards providing debt reprieve for financially distressed debtors whilst ensuring that the creditors are paid what they are owed. This legislation, however, also has its limitations, including the fact that only debt arising from credit agreements as defined in the National Credit Act can be dealt with in terms of that legislation. This means that all other debt is excluded from the provisions of the National Credit Act. The National Credit Act is premised on the re-arrangement of debt and full repayment, rather than debt discharge. This, coupled with the fact that there are no parameters in the National Credit Act for the duration of a debt rearrangement and the conditions of such rearrangement, could lead to a debt spiral and the perpetual indebtedness of the debtor.

Research by the World Bank has revealed that there is a backlog of applications under the National Credit Act and section 74 of the Magistrates' Courts Act in South African magistrates' courts.[150] This means that accessing the relief envisaged in these statutes is cumbersome, costly, and slow.

The lack of alignment between these pieces of legislation means that a debtor can apply for debt review in terms of the National Credit Act and so expose themselves to a liquidation application by one or more of his creditors. The courts have correctly shied away from creating precedents that align the Insolvency Act and the National Credit Act. A debtor can be subject to debt review in terms of the National Credit Act whilst simultaneously being subject to administration in terms of section 74 of the Magistrates' Courts Act for its other debt. This is undesirable, as it exposes debtors to multiple court cases and costs. A streamlined debt relief regime will ensure that the liabilities of a debtor can be dealt with collectively, and will provide for conditions that look holistically at the situations of both the debtor and his creditors.

There is accordingly a need for a review of debt relief measures that are alternatives to the sequestration of financially distressed debtors. The South African Law Reform Commission previously proposed a pre-liquidation composition for debtors as a compulsory pre-sequestration step for individual debtors.[151] The proposed pre-liquidation composition would be supervised by a court, and an investigator would be appointed by the court to look into the affairs of a debtor and propose how a composition could be made in respect of his debts. The creditors of the debtor would vote on such proposal. If the majority of the creditors approve it, it would be enforceable on all creditors.[152]

It was proposed that this should be contained in a new Insolvency Act that would repeal the insolvency legislation applicable to juristic persons and individuals, and consolidate the Insolvency legislation in the country.[153] There is,

149 Boraine, Van Heerden & Roestoff "A comparison between formal debt administration and debt review – the pros and cons of these measures and suggestions for law reform (part 1)" 2012 *De Jure* 80.

150 *World Bank Legal Review* 15.

151 South African Law Commission *Report on the Review of the Law of Insolvency* Project 63 vol 1 (2000) 22.

152 *Idem* 32.

153 *Idem* 39.

however, no clarity as to when the government will consider this proposal, and whether it will be adopted into legislation. However, the proposal would assist in ensuring that there is relief for debtors who can extinguish their debts if they are provided with relief in the form of longer repayment periods and are provided with relief from being harassed by their creditors.[154]

There are alternatives to sequestration in South Africa. However, the various statutes are not aligned and do not provide for the discharge of a debtor to enable him to have a fresh start. They merely provide reprieve from being harassed by creditors whilst also not guarding against the worsening of a debtor's debt situation. It accordingly seems clear that debtors will still have to resort to the current measures in our debtor-friendly system, until serious interventions are made, along the lines we proposed earlier.

154 Mabe "Alternatives to bankruptcy in South Africa that provides for a discharge of debts: lessons from Kenya" 2019 *PER/PELJ* 8.