Chitimira, Howard; Magau, Phemelo

Article

An analytical precis of debt relief measures under the insolvency act 24 of 1936

Provided in Cooperation with:
Danubius University of Galati

EuroEconomica
Special Issue 2(39)/2020 ISSN: 1582-8859

An Analytical Precis of Debt Relief Measures under the Insolvency Act 24 of 1936[1]

Howard Chitimira[2], Phemelo Magau[3]

Abstract: Most poor and low-income earners are over-indebted since they rely too much on credit for their day-to-day consumer needs in South Africa. Owing to this, debt relief measures have become so important in the current South African credit driven society. Accordingly, there are four statutory debt relief measures that are available to over-indebted persons and insolvent debtors in South Africa, namely, the sequestration proceedings in terms of the Insolvency Act 24 of 1936 as amended (Insolvency Act), the administration order under the Magistrates Courts Act 32 of 1944 as amended (Magistrates Courts Act), the debt review that is contained in the National Credit Act 34 of 2005 as amended (NCA) and the recently introduced debt intervention in terms of the National Credit Amendment Act 7 of 2019 (Credit Amendment Act), which is yet to be successfully utilised. Despite these commendable efforts, most of the available debt relief measures are not yet easily accessible to the poor and low-income earners in South Africa. Given this background, the article discusses the sequestration proceedings as a debt relief measure in terms of the Insolvency Act. This is done to explore the strengths and weaknesses of such proceedings in relation to their accessibility and provision of debt relief measures to the poor and low-income earners in South Africa.

Keywords: debt relief; voluntary surrender; compulsory sequestration; friendly sequestration; advantage to creditors

JEL Classification: F34

1. Introductory Remarks

The term "debt relief" is not expressly defined in the Insolvency Act 24 of 1936 as amended ("Insolvency Act", see s 2). Nonetheless, debt relief could entail the reorganisation of a person's outstanding debt so as to provide some form of relief to that person in relation to the repayment of that debt. Debt relief may be affected in different ways such as relaxing the terms and conditions of the debt, partial or total remission of the debt, mitigation, partial or total reduction of the outstanding principal debt, reduction of loan interest rates and extending the repayment date of the principal debt (Edwards, 2003, pp. 38-65). Debt relief may be utilised by any indebted persons so as to, *inter alia*, make it easier

[1] This article was supported in part by the National Research Foundation of South Africa (NRF), Grant Number: 112115. In this regard, the authors wish to thank the NRF for its valuable support.
[2] Professor of Securities and Financial Markets Law, Faculty of Law, North West University, South Africa, Address: Private Bag X2046, Mmabatho, 2735, South Africa, Corresponding author: howard.chitimira@nwu.ac.za.
[3] Doctor of Laws (LLD) Candidate, Faculty of Law, North West University, South Africa, Address: Private Bag X2046, Mmabatho, 2735, South Africa, E-mail: ptmagau@gmail.com.
This article was influenced in part by Magau's Master of Laws (LLM) dissertation entitled: *A Statutory Analysis of Debt Relief Measures for Low-Income Earners in South Africa*, pp. 25-38. Consequently, he wishes to acknowledge the expert input of Prof H. Chitimira.

for them to repay their outstanding debts. Debt relief measures may slow, discourage or prevent over-indebtedness of all affected persons, especially, the poor and low-income earners (Arslanalp & Henry, 2006, pp. 207-220). However, despite the aforesaid advantage, the main disadvantage of debt relief measures is their ability to encourage reckless and irresponsible conduct of excessive borrowing on the part of all affected persons, especially the poor and low-income earners who could accumulate debts while wrongly expecting to get debt relief from their creditors (Corden, 1988, pp. 628-643). In this regard, it is important to note that most poor persons and low-income earners in South Africa are over-indebted since they rely too much on credit for their day-to-day consumer needs (Roestoff & Coetzee, 2012, pp. 53-76; Bond, 2013, pp. 569-592). Owing to this, debt relief measures have become so important in the current South African credit driven society (Coetzee & Roestoff, 2013, pp. 188-210). Accordingly, there are four statutory debt relief measures that are available to over-indebted persons and insolvent debtors in South Africa, namely, the sequestration proceedings in terms of the Insolvency Act (ss 3-12; Sharrock, Van der Linde & Smith, 2012, pp. 30-145), the administration order under the Magistrates Courts Act 32 of 1944 as amended (Magistrates Courts Act), the debt review that is contained in the National Credit Act 34 of 2005 as amended (NCA) and the recently introduced debt intervention in terms of the National Credit Amendment Act 7 of 2019 (Credit Amendment Act), which is yet to be successfully utilised. Despite these commendable efforts, most of the available debt relief measures are not yet easily accessible to the poor and low-income earners in South Africa (Roestoff & Coetzee, 2012, pp. 53-76). Given this background, the article discusses the sequestration proceedings as a debt relief measure in terms of the Insolvency Act (ss 3-12). This is done to explore the strengths and weaknesses of such proceedings in relation to their accessibility and provision of debt relief measures to the poor and low-income earners in South Africa (Bertelsmann, *et al*, 2019, pp. 50-400).

A debtor's estate may be sequestrated under voluntary, compulsory or friendly sequestration in terms of the Insolvency Act (ss 3-12). The sequestration process is commenced by the debtor under voluntary surrender or by the creditor under the compulsory and/or friendly sequestration (ss 3-12 of the Insolvency Act). In each instance, the applicant is obliged to apply to court for a sequestration order in respect of their estate. An application for a sequestration order may be instituted by the applicant in any High Court that has the relevant jurisdiction (s 149 (1) of the Insolvency Act; Rule 6 of the Uniform Rules of the High Court). A sequestration order is a court order that sequestrates the estate of the applicant and it includes a provisional order that has not been set aside by the court (s 2 of the Insolvency Act; Chitimira, 2019, pp. 342). The applicant's estate is only sequestrated when a provisional sequestration order is made final by the courts (ss 10 & 12 of the Insolvency Act). Thus, a sequestration order could also mean a formal declaration by the courts that a debtor is insolvent. A sequestration order may only be granted and utilised for debt relief if it is advantageous to creditors (ss 10 (c) & 12 (1) (c) of the Insolvency Act; Bertelsmann, *et al*, 2019, pp. 50-400; Mabe, 2019, pp. 2-28). Only creditors that successfully prove their liquidated claims may benefit from the affected individual and/or debtor's insolvent estate under the Insolvency Act (s 9 (1) and (2); Chitimira, 2019, pp. 342). However, the sequestration process might be very expensive for the applicant and/or affected debtors. Consequently, it is most likely that the poor and low-income earners may struggle to pay sequestration costs and/or to prove advantage to the creditors for them to get debt relief.

2. Debt Relief Measures under the Insolvency Act

2.1. Voluntary Surrender

A voluntary surrender maybe instituted by an insolvent debtor and/or his agent (*Ex parte Brown* 1951 4 SA 246 (N)), or a person entrusted with the administration of the deceased insolvent debtor's estate or a person in charge of the prodigal insolvent debtor's estate (*Ex parte Houston* 1958 1 SA 448 (N)). A voluntary surrender application may only be utilised as a debt relief measure if it is accepted by the courts that such application will benefit all the creditors that successfully prove their liquidated claims in respect thereof (s 3 (1) read with ss 4; 6 (1); 9 (1) & (2); 10 & 12 of the Insolvency Act). It is submitted that a liquidated claim includes a monetary claim for the goods sold and delivered by the seller to the purchaser (s 9 (2) of the Insolvency Act). Additionally, an application for voluntary surrender may also be instituted by all members of a partnership's estate (s 3 (2) of the Insolvency Act; *Ex parte Bester* 1937 CPD 45). Both spouses that are married in community of property may further apply for voluntary surrender in respect of their joint estate (Chitimira & Mabina, 2019, pp. 62-72). However, it must be noted that voluntary surrender has some key requirements that must be met by the applicant in terms of the Insolvency Act (s 6 (1); Kunst, *et al*, 2014, paras 2.4.1 & 3.2). For instance, the applicant debtor that want to rely on voluntary surrender as a debt relief measure is required to prove actual insolvency of their estate (s 6 (1) of the Insolvency Act; Kunst, *et al*, 2014, paras 2.4.1 & 3.2; Van der Merwe & du Plessis, 2004, pp. 353-357; *Ex parte Harmse* 2005 1 SA 323 (N) 325; *Venter v Volkskas Ltd* 1973 3 SA 175 (T) 179). Put differently, the applicant ought to prove on a balance of probabilities that the debtor's estate is factually insolvent before the affected debtor can rely on voluntary surrender as a debt relief measure under the Insolvency Act. This means that the insolvent debtor's estate must have liabilities that exceed the value of the available assets, which result in that debtor being unable to pay all the debts and/or subordinated debts of the relevant creditors as they fall due (Chitimira & Mabina, 2019, pp. 62-72; Luiz & Van der Linde, 1993, pp. 231). On the other hand, commercial insolvency is the failure of an individual, entity or company to pay the debts when they fall due. This often occurs irrespective of whether the affected person has some assets that exceeds their liabilities on paper. For this reason, it is sometimes quite an onerous task to prove the debtor's commercial insolvency for debt relief purposes. It appears that commercial insolvency does not suffice for the purposes of voluntary surrender under the Insolvency Act. Consequently, the affected debtor may not easily rely on commercial insolvency to apply for voluntary surrender as a debt relief measure under section 6 (1) of the Insolvency Act.

Moreover, the debtor must own or prove that they own sufficient realisable property to defray the costs of the sequestration process from the free residue of their insolvent estate (s 6 (1) read with ss 2 & 97 of the Insolvency Act; *Ex parte Van Heerden* 1923 CPD 279). Thus, debtors that only have a few assets which are easily consumed by the sequestration costs leaving no excess or free residue to pay the affected creditors' claims will not be able to rely on voluntary surrender as a debt relief measure under the Insolvency Act (*Mindel v Shaer* 1937 TPD 378, which held, *inter alia*, that any assets bought on instalments by the debtor forms part of the free residue to the extent that their actual value exceeds the outstanding debt owed to creditors by that debtor).

Over and above, for one to rely on voluntary surrender for debt relief purposes, they must prove that the voluntary surrender will bring some advantage to all the affected creditors (s 6 (1) read with ss 10 (c) &

12 (1) (c) of the Insolvency Act; Chitimira & Mabina, 2019, pp. 62-72; Van der Merwe & du Plessis, 2004, pp. 353-357). Nonetheless, the Insolvency Act does not specifically define the term "advantage to creditors". In this regard, the authors submit that "advantage to creditors" simply means that the debtor should prove that the voluntary surrender will bring some benefit to the entire general body of creditors (*Lynn & Main Inc v Naidoo* 2006 1 SA 59 (N) (*Naidoo* case), para 18); *Lotzof v Raubenheimer Lotzof v Raubenheimer* 1959 1 SA 90 (O) 94 (*Lotzof* case)). The insolvent debtor must prove on a balance of probabilities that there is reason to believe that the voluntary surrender will actually bring some advantage to all the affected creditors (s 6 (1) read with ss 3 (1); 10 (c) & 12 (1) (c) of the Insolvency Act; Temperman, 2014, pp. 21; Chitimira & Mabina, 2019, pp. 62-72; Boraine & Van Heerden, 2010, pp. 87). The debtor is further required to provide sworn valuation details of the available assets from the insolvent estate so as to prove that the voluntary surrender and/or final sequestration will bring some advantage to the general body of creditors (*concursus creditorum*) (Temperman, 2014, pp. 24-25; Visser, Pretorius, Sharrock & Van Jaarsveld, 2004, p. 553; *Ex parte Mattysen et Uxor* 2003 2 SA 308 (T)). The court will only grant an application for voluntary surrender if the advantage to creditors' requirement is satisfactorily proved by the affected debtor (*Ex parte Bergh* 1938 CPD 132; *Ex parte Smith* 1958 3 SA 568 (O) 371; Rampersad, 2013, pp. 7-19).

The debtor is also obliged to comply with certain formalities in order to successfully rely on voluntary surrender for debt relief purposes under the Insolvency Act (*Ex parte Pillay* 1955 2 SA 309 (N) para 311 (*Pillay* case); Visser, Pretorius, Sharrock & Van Jaarsveld, 2004, pp. 543). For instance, the debtor is obliged to issue a notice of surrender and lodge the statement of affairs at the Master's office as stipulated in section 4 of Insolvency Act (Sharrock, Van der Linde & Smith, 2012, pp. 20; Van Heerden & Boraine, 2009, pp. 22-59). The debtor is also required to publish a notice of surrender in a Government Gazette and a newspaper circulating near his or her place of residence and/or place of business (s 4 (1) of the Insolvency Act). Such publication ought to be done not more than 30 days but not less than 14 days before the date of the hearing and/or the date stipulated in the notice of surrender as the date upon which the application will be made to the court for the acceptance of the affected debtor's voluntary surrender (s 4 (1) of the Insolvency Act). Moreover, a notice of surrender must provide full names, address, occupation of the debtor, date of acceptance of the application, the court which accepted the application and a place where the debtor's statement of affairs will be inspected (Chitimira & Mabina, 2019, pp. 62-72; *R v Lewin* 1930 AD 344 par 349; *Ex parte Goldman* 1930 WLD 158). The statement of affairs must provide a balance sheet, a list of immovable and movable assets with their estimated value, a list of debtors and creditors and their postal and residential addresses and a list of movable assets pledged, hypothecated and/or subject to a lien (*Ex parte Nel* 1954 2 SA 638 (O); *Ex parte Silverstone* 1968 2 SA 196 (O) 198; *Ex parte Murphy* 1929 EDL 168 at 171; *Cumes & Co v Sacher* 1932 WLD 213). The debtor should submit the notice of surrender to all creditors and other interested parties within seven days of the publication date of that notice so as to effectively rely on voluntary surrender for debt relief purposes (s 4 (2) of the Insolvency Act; *Ex parte Harmse* 2005 1 SA 323 (N) 331; *Ex parte Wassenaar* 1968 2 SA 726 (T) 727).

2.2. Compulsory Sequestration

Debt relief may also be provided through compulsory sequestration proceedings that are instituted by any aggrieved creditor of the insolvent debtor in a competent court, especially, when the debtor commits some acts of insolvency (s 8 of the Insolvency Act; Sharrock, Van Der Linde & Smith, 2012, pp. 33). However, the applicant must comply with all the relevant requirements and related formalities before compulsory sequestration can be utilised for debt relief purposes under the Insolvency Act (ss 9; 10 (c) & 12 (1) (c)). Accordingly, affected creditors must prove that they have liquidated claims of not less than R100 each, against the debtor's insolvent estate before their compulsory sequestration application is granted for debt relief purposes (s 9 (1) of the Insolvency Act). Moreover, the affected creditor should prove that the debtor is factually insolvent or has committed an act of insolvency (s 9 (1) read with s 8 of the Insolvency Act). A debtor's acts of insolvency include making or attempting to make a disposition of any property that belong to the insolvent estate, which has the effect of prejudicing creditors or preferring one creditor over the other; removing or attempting to remove any such property in order to prejudice creditors or prefer one creditor over the other (s 8 of the Insolvency Act).

Furthermore, creditors must prove that there is a reason to believe that the compulsory sequestration will be to the advantage of the general body of creditors in order for them to successfully rely on such sequestration for debt relief purposes (s 9 (1) read with ss 8; 10 (c) & 12 (1) (c) of the Insolvency Act; see further Pepler, 2013, pp.15; 21–26; *Naidoo* case 59-68). In this regard, the creditors should positively submit to the court that the compulsory sequestration will be to the advantage of all creditors (*Meskin & Co v Friedman* 1948 2 SA 555 (W) paras 558-559 (*Friedman* case)). Accordingly, the creditors must prove that there is a reasonable prospect which is not too remote that the compulsory sequestration will bring some pecuniary benefit to all the affected creditors (*Friedman* case 558-559). Additionally, for the advantage to creditors' requirement to be satisfied, there must be a substantial majority of creditors that will receive some dividends from the compulsory sequestration proceedings that are instituted for debt relief purposes under the Insolvency Act (Sharrock, Van Der Linde & Smith, 2012, pp. 15; 39; 237–274; *London Estates (Pty) Ltd v Nair* 1957 3 SA 591 (D) 593 (*London Estate* case); *Braithwaite v Gilbert* 1984 4 SA 717 (W) 717 & *Lotzof* case paras 93-94). The affected creditors should merely prove on a balance of probabilities that there is a *prima facie* reason to believe that the compulsory sequestration will bring some advantage to all creditors (ss 10 (c) & 12 (1) (c) of the Insolvency Act; Temperman, 2014, pp. 23-26 *Fesi v ABSA Bank Ltd* 2000 1 SA 499 (C) paras 505–506 (*Fesi* case)).

The creditors should further comply with some formalities such as proof of sufficient security for costs for their liquidated claims to the Master (ss 6 (1) & 9 (1) of the Insolvency Act; also see *R v Hohls* 1959 2 SA 656 (N)). For instance, the affected creditors must get a certificate from the Master which proves that they have sufficient security for costs (s 9 (3) (b) of the Insolvency Act). This occurs when creditors provide sufficient proof of security for costs in respect of their compulsory sequestration application until a trustee is appointed (s 9 (3) (b) read with s 14 (1) of the Insolvency Act). Creditors must comply with the prescribed form and content that must be filed in a notice of motion and a supporting affidavit of a creditor with full details of debtors or any other affected person, for them to successfully rely on compulsory sequestration for debt relief purposes in South Africa (s 9 (3) of the Insolvency Act; *Thorne NO v Sinclair* 1930 EDL 409). The creditor must facilitate the search of the Master's records (*In re*

Hugo 1921 CPD 742), submit relevant information for the Master's report (s 9 (4) & (5) of the Insolvency Act) and furnish the debtor and interested parties with copies of the compulsory sequestration application. Creditors should also comply with the formalities for provisional sequestration, service of rule nisi, opposition to application, anticipation of return day and intervention by another creditor. In a nutshell, the affected persons may only rely on compulsory sequestration for debt relief purposes if they comply with all the relevant requirements and formalities (ss 9; 10 (c) & 12 (1) (c) of the Insolvency Act; see further Pepler, 2013, pp.15-20; Mabe & Evans, 2014, pp. 651-667).

2.3. Friendly Sequestration

Friendly sequestration can be utilised for debt relief purposes if a debtor commits an act of insolvency by requesting a friend, family member or an amicable creditor to apply for compulsory sequestration in respect thereof. In order to rely on friendly sequestration for debt relief purposes, the creditor must prove that there is a reasonable belief that the sequestration will bring some benefit to all creditors (s 9 (1) read with ss 8 (g); 10 (c) & 12 (1) (c) of the Insolvency Act; *Klemrock (Pty) Ltd v De Klerk* 1973 3 SA 925 (W) 927 (*Klemrock* case); *Epstein v Epstein* 1987 4 SA 606 (C) 610 (*Epstein* case); *Smith v Porrit* 2008 6 SA 303 (SCA) 308). The applicant in friendly sequestration must have a liquidated claim so as to successfully apply for compulsory sequestration for debt relief purposes (s 9 (1) read with s 8 (g) of the Insolvency Act; Sharrock, Van Der Linde & Smith, 2012, pp. 45-47; Asheela, 2012, pp. 33-37; Pepler, 2013, pp.19–20). In friendly sequestration, the creditors should merely prove to the courts that there is an objective reason to believe that the sequestration process will be advantageous to all creditors (Evans & Haskins, 1990, pp. 246-251). The advantage to creditors requirement will not be satisfied for debt relief purposes in friendly sequestration under the Insolvency Act if insufficient dividends are provided to a few creditors (*Ex parte Ogunlaja* [2011] JOL 2709 (GNP) "*Ogunlaja* case", para 9; *Vermeulen v Hubner* Case number 1165/1990 (T) (*Vermeulen* case). Furthermore, the mere fact that an amicable creditor co-operates with a debtor in respect of the owed debt does not automatically give rise to friendly sequestration under the Insolvency Act (*Sellwell Shop Interiors CC v Van der Merwe Case number* 27527/1990 (W); *Jhatam v Jhatam* 1958 4 SA 36 (N) 39-40; *Beinash & Co v Nathan* 1998 3 SA 540 (W) 541; *Yenson & Co v Garlick* 1926 WLD 53 para 57 & *Esterhuizen v Swanepoel and Sixteen Other Cases* 2004 4 SA 89 (W) para 91G-92D).

In order to combat possible malpractice and collusion in friendly sequestration (*Kuhn v Karp* 1948 4 SA 825 (T) para 827), the courts should verify the *locus standi* of the creditor and explore whether the creditor has provided sufficient security for costs. Moreover, the court should verify all the documentary evidence provided by the creditor and details of the debtor's available assets to curb collusion in friendly sequestration (*Nel v Lubbe* 1999 3 SA 109 (W) para 111; Boraine & Roestoff, 2000, pp. 241-270; *Epstein* case para 610). Despite these possible challenges, friendly sequestration is another legitimate way for debtors to release themselves from their debts (*Estate Logie v Priest* 1926 AD 312 paras 319-321; Evans, 2010, pp. 337-351). If utilised well, friendly sequestration could provide debt relief, debt discharge and rehabilitation of the affected debtors while empowering creditors to recover their owed debts (ss 3 to 12 of the Insolvency Act; Temperman, 2014, pp 17-29).

3. Advantages of the Sequestration Process as a Debt Relief Measure under the Insolvency Act

3.1. Rehabilitation and Debt Discharge

Although the concept of "rehabilitation" is not expressly defined under the Insolvency Act, it is nonetheless statutorily provided for under this Act (ss 124-130). Rehabilitation is probably the only statutory method by which a natural person debtor may be lawfully discharged from pre-sequestration debts and other related debts of their creditors in terms of the Insolvency Act (Roestoff & Renke, 2005, pp. 93-109). Put differently, the concept of rehabilitation of the insolvent debtors is primarily aimed at discharging them from all their *bona fide* non-fraudulent and lawfully obtained pre-sequestration debts in order to afford them another chance to transact and do business with other persons normally, without any insolvency-related restrictions (s 129 (1) (b) of the Insolvency Act; Boraine & Roestoff, 2002, pp.1-11). The rationale for rehabilitation is to formally end and remove the insolvency status from the affected debtors to enable them to have a fresh start in relation to their business, contracts and other transactions (s 129 (1) (b) of the Insolvency Act; Asheela, 2012, pp. 19; Roestoff, 2018, pp. 306-316; Roestoff & Renke, 2005, pp. 93-109). Rehabilitation empowers the debtors to re-establish and redeem their businesses without debt repayment threats and related pressure from their creditors (*Ex parte Moodley* 1955 1 SA 678 (T) 681; Roestoff, 2018, pp. 307).

There are two main types of rehabilitation under the Insolvency Act, namely, automatic rehabilitation after the lapse of ten years and rehabilitation by the courts within ten years. Automatic rehabilitation after ten years is available to any insolvent debtor that is not rehabilitated by the court within ten years from the date of the sequestration of their insolvent estate (s 127A (1) of the Insolvency Act). Accordingly, any insolvent debtor shall be deemed to be rehabilitated after the expiry of ten years from the date of the final sequestration of the insolvent estate unless a court, on application by any interested person after notice to the insolvent debtor, orders otherwise prior to the expiry of the said period (s 127A (1) of the Insolvency Act). This is called automatic rehabilitation which is effected after the effluxion of the aforesaid ten years period (s 127A (1) read with s 124 of the Insolvency Act; Sharrock, Van Der Linde & Smith, 2012, pp. 208; *Grevler v Landsdown en 'n Ander NNO* 1991 3 SA 175 (T) "*Grevler* case*"*). Notably, the court has discretion to reject the rehabilitation of the insolvent debtor even when rehabilitation provisions under the Insolvency Act have been complied with by that debtor (s 127 (2) of the Insolvency Act; *Ex parte Woolf* 1958 4 SA 190 (N) (*Woolf* case); *Ex parte Hittersay* 1974 4 SA 326 (SWA) (*Hittersay* case); *Ex parte Fourie* 2008 4 All SA 340 (D)). In this regard, the court when exercising its discretion should determine whether the insolvent person can be allowed to trade like any other honest person (Bertelsmann, *et al*, 2019, pp. 9-400). The ten years' period for automatic rehabilitation runs from the date of the provisional sequestration (*Grevler* case paras 175-178D). If the court orders that the insolvent debtor will not be automatically rehabilitated, the registrar of the court must send a copy of the order to every registrar of deeds (s 127A (2) of the Insolvency Act).Thereafter, each registrar of deeds must enter a caveat against the transfer of all immovable property or the cancellation or cession of any bond registered in the name of the insolvent debtor (s 127A (3) of the Insolvency Act). The caveat remains in force until the insolvent debtor is rehabilitated (s 127A (4) of the Insolvency Act). The insolvent debtor is automatically and completely discharged from all previous debts after the expiry of ten years from the date of the final sequestration of the insolvent estate.

The other type of rehabilitation is instituted by the insolvent debtor by way of a motion procedure in the relevant court within ten years and/or prior to the expiry of ten years from the date of the sequestration of the estate (s 124 of the Insolvency Act). For example, the insolvent debtor is statutorily empowered to apply for his or her rehabilitation immediately after receiving a composition acceptance certificate from the Master (s 124 (1) & (5) of the Insolvency Act). Additionally, the insolvent debtor who did not get a composition certificate from the Master but who previously notified the Master and the trustee in writing and by advertisement in the Government Gazette of his or her intention to apply to the court for rehabilitation, may apply to court for rehabilitation after the lapse of one year, three years or five years in accordance with the Insolvency Act (s 124 (2) (a) – (c) & (3); Roestoff, 2018, pp. 307). Nonetheless, it must be noted that no court may approve the insolvent debtor's application for rehabilitation before the lapse of four years from the date of sequestration of the insolvent estate unless the Master recommends otherwise (s 124 (2) of the Insolvency Act; Roestoff, 2018, pp. 307). Rehabilitation by the court prior to the expiry of the ten years' period is purely granted on the discretion of the court after certain conditions are met by the debtor (*Hittersay* case para 328; *Ex parte Snooke* 2014 5 SA 426 (FB) para 437; *Woolf* case para 190). The court is obliged to determine whether the insolvent debtor should be allowed to trade with the public as an honest person (*Ex parte Heydenreich* 1917 TPD 657 para 658). In this regard, the court will consider how the insolvent debtor conducted his or her business before and after the sequestration of the insolvent estate (s 124 (1) read with s 119 of the Insolvency Act). The insolvent debtor may apply for a rehabilitation order if his or her composition of not less than 50 cents in the rand was accepted by the Master (s 124 (1) read with s 119 of the Insolvency Act). The insolvent debtor may also apply for rehabilitation if he or she received a composition acceptance certificate from the Master to confirm that creditors accepted an offer of composition where payment was made or security was given for payment of not less than 50 cents in the rand in respect thereof (s 124 (1) read with s 119 of the Insolvency Act; Sharrock, Van Der Linde & Smith, 2012, pp. 209). The insolvent debtor may also apply for rehabilitation if no claims were proved by creditors after six months from the date of sequestration or if the insolvent debtor has not been convicted of insolvency-related fraudulent activities and/or if the insolvent debtor has not been sequestrated under any law prior to the sequestration (s 124 (3) read with ss 132-134 of the Insolvency Act).

The insolvent debtor may also apply for rehabilitation if the prescribed period of 12 months after confirmation of the first account has lapsed. The initial confirmation is usually done by the Master (s 124 (2) (a) to (c) of the Insolvency Act; *Ex parte Porrit* 1991 (3) SA 866 (N)). Moreover, the insolvent debtor may apply to court for rehabilitation if all the proved claims of the affected creditors are fully settled (s 124 (5) of the Insolvency Act). However, the full payment and settlement must be interpreted carefully to prevent the debtor from evading to pay all the debts (*Ex parte Van Zyl* 1991 (2) SA 313 (C) (*Van Zyl* case); ss 124 (3) & 124 (5) of the Insolvency Act; Sharrock, Van Der Linde & Smith, 2012, pp. 208-209; *Van Zyl* case para 313).

In a nutshell, the insolvent debtor must comply with the requirements as indicated above as well as the preliminary steps for rehabilitation application such as publishing a notice of intention to apply for rehabilitation in the Government Gazette and furnishing another copy of the notice to the trustee in accordance with section 124 (1) of the Insolvency Act. As earlier stated, the insolvent debtor must provide security for costs of at least R500 for the payment of costs of any opposition to the application for rehabilitation (s 125 of the Insolvency Act).

When the application for rehabilitation is granted it automatically gives rise to various effects on the part of the applicant insolvent debtor. For instance, rehabilitation ends the sequestration process and legally relieves the insolvent debtor of all debts, except for fraud-related debts. Rehabilitation further relieves the insolvent debtor of all previous insolvency-related restrictions (s 129 (1) of the Insolvency Act; see *North American Bank Ltd (in Liquidation) v Granit* 1998 (3) SA 557 (W) paras 565-567). Nonetheless, rehabilitation does not affect the rights, duties and powers under a composition or the liability of a surety for the insolvent debtor, or the liability of any person to pay a penalty or suffer a punishment (s 129 (3) of the Insolvency Act). Moreover, rehabilitation does not re-invest the insolvent with his or her former estate except where a composition provides that the estate will re-invest in the insolvent debtor (s 120 (2) of the Insolvency Act), or where the rehabilitation was based on the fact that no claims were proved by affected creditors within six months of sequestration (s 129 (2) of the Insolvency Act). All property which has not been distributed to creditors and which was vested in the trustee before rehabilitation remains vested in the trustee after rehabilitation for the purposes of realisation and distribution to the relevant persons (s 25 (1) of the Insolvency Act). Furthermore, if the insolvent debtor registers immovable property after the caveats expired, such registration shall be deemed valid (s 25 (3) of the Insolvency Act).

Sequestration proceedings could provide debt relief to the affected debtors. In this regard, debt discharge refers to the lawful release of a debtor from previous obligations to service debts after the completion of insolvency proceedings (Coetzee, 2015, pp. 36-169). Thus, debt discharge may be effected after the cancellation of debts due to the insolvency of the debtor. However, for this to happen, the debtor must comply with all the relevant requirements of insolvency proceedings as discussed above. As soon as the debt is lawfully discharged by the court through insolvency proceedings and rehabilitation, the insolvent debtor will no longer be liable for the debt and the creditor is prohibited from making any effort to recover his or her owed debts (Fletcher, 2017, pp. 40-148). Notwithstanding these possible advantages of rehabilitation, the main rationale for insolvency proceedings under the Insolvency Act is to provide some advantage to creditors rather than to provide debt relief and/or debt discharge to debtors (*Ex parte Arntzen* 2013 1 SA 49 (KZP) para 13); *Pillay* case para 311; *Fesi* case paras 505–506; *Ex parte Ford* 2009 3 SA 376 (WCC); Roestoff, 2018, pp. 307). Over and above, rehabilitation and other insolvency-related debt relief measures have remained inaccessible to the poor and low-income earners who are sometimes not able to comply with all the requirements for insolvency proceedings in South Africa. Rehabilitation is also not available to partnerships estates that are sequestrated under the Insolvency Act (s 128).

3.2. Composition and Debt Discharge

Composition is another debt relief measure that is provided under the Insolvency Act. Composition is instituted by the insolvent debtor that is provisionally sequestrated and/or in financial problems in order to enter into a compromise with his or her creditors to avert compulsory sequestration (s 119 of Insolvency Act; *Mahomed v Lockhat Brothers & Co Ltd* 1944 AD 230 para 241; Boraine & Roestoff, 2002, pp. 7-8). There are two types of composition namely, common law compromise and statutory compromise. Common law compromise is based on contractual principles and it requires the approval of all the creditors before it can be successfully utilised as a debt relief measure by the insolvent debtor.

This is usually a better alternative for creditors since it could give them higher dividends early, while saving sequestration costs. Insolvent debtors usually offer to pay higher dividends and higher monetary amounts to make the common law compromise attractive to their creditors. If the offer of common law compromise is successfully approved by all creditors, the insolvent debtor will be released and discharged from the debts without his or her estate being sequestrated. Thereafter, the insolvent debtor will also be able to continue with his or her trade and/or business if its beneficial to the creditors (Boraine & Roestoff, 2002, pp. 7-8). Prior to and/or after a provisional sequestration order, the insolvent debtor may enter into a written agreement with creditors and/or the provisional trustee to pay certain dividends on creditors' claims on condition that he or she may be released from the debts and the provisional sequestration order be suspended. This agreement will only be valid if approved by all concurrent creditors (*Prinsloo en 'n Ander v Van Zyl NO* 1967 1 SA 581 (T) para 583, where it was held that creditors who do not agree with the common law compromise agreement are free to apply for the sequestration of the insolvent debtor's estate). The aggrieved creditor's application for the compulsory sequestration of debtor's estate may nullify any pre-existing common law compromise agreement. In most instances, all the creditors are obliged to sign the common law compromise agreement and no liability ensues to any creditor until all creditors have signed that agreement (*Kopman & another v Benjamin* 1951 1 SA 882 (W), which held that any creditor may withdraw his or her signature before the common law compromise agreement is finalised). If the insolvent debtor's offer of common law compromise is accepted by the courts and a provisional sequestration order is discharged, the rights and duties of the various parties, including the surety must be decided in terms of that agreement or the relevant deed and/or provisions of common law. Where the common law compromise involves the sale of assets, the consent from the Master and provisional trustee must be obtained by the insolvent debtor before the sale of such assets (*Harrington v Fester & others* 1980 4 SA 424 (C).

On the other hand, statutory compromise (also known as statutory composition) is instituted in terms of section 119 of the Insolvency Act. In statutory compromise, the decision of the majority of the creditors binds all the creditors. Thus, unlike the position under the common law compromise, statutory compromise does not depend on the participation and approval of all the relevant creditors. In this regard, it is crucial to note that a creditor that files a claim in terms of section 44 of the Insolvency Act must be permitted to prove it before the statutory composition offer is considered (*Mia v The Master & Others* 1940 TPD 86 paras 93-94). However, unlike common law compromise, the sequestration order is not discharged or suspended under the statutory compromise. Accordingly, the insolvent remains un-rehabilitated but he or she may apply for early rehabilitation under certain circumstances (ss 119-123 of the Insolvency Act). Notably, the statutory compromise may be effected by the insolvent debtor any time after the first creditors meeting (s 119 (1) of the Insolvency Act). Moreover, if the trustee decides to accept the offer for statutory composition, he or she must immediately deliver a copy of the offer with the relevant report to all affected creditors (s 119 (2) of the Insolvency Act). Likewise, if the trustee decides that the offer is not acceptable to all creditors, he or she must immediately inform the insolvent in respect thereof (s 119 (3) of the Insolvency Act). Thereafter, the aggrieved insolvent debtor is entitled to appeal to the Master against the decision of the trustee (s 119 (4) of the Insolvency Act). The trustee may convene a general creditors meeting not earlier than 14 days but not later than 28 days from the day of the initial notice to creditors for them to consider the statutory composition offer (s 119 (5) & (6) read with ss 40-42 of the Insolvency Act). The statutory composition offer may only be considered if it is

accepted by the relevant creditors and granted by both the trustee and the Master (s 119 (5) to (7) of the Insolvency Act). Notably, the statutory composition agreement may contain any terms that the insolvent debtor sees fit to incorporate. However, if the statutory composition offer provides for security, the nature of security must be specified fully in the statutory composition agreement. Moreover, where the security is a surety bond or guarantee, all sureties must be named in the statutory composition agreement. The statutory composition offer must not have a condition that entitles one creditor to benefit over the other creditors (s 119 (7) of the Insolvency Act). Furthermore, the statutory composition offer must not have a condition that makes the offer subject to the rehabilitation of the insolvent debtor (s 119 (7) of the Insolvency Act). The statutory composition offer must be accepted by the majority of creditors for it to be binding (s 119 (7) of the Insolvency Act). The insolvent debtor is entitled to a composition certificate from the Master once the statutory composition offer is granted (s 119 (7) of the Insolvency Act).

The statutory composition will give rise to various consequences on the part of the insolvent debtor and the relevant creditors. For instance, all concurrent creditors are bound by the statutory composition agreement, including those whose claims are not secured or preferent and others who did not prove their claims (s 120 (1) of the Insolvency Act; *Ilic v Parginos* 1985 1 SA 795 (A) paras 803-804). The property of the insolvent debtors will be re-invested and restored to them and removed from the administration of the trustee (s 120 (2) of the Insolvency Act). This suggests that the statutory composition might have the effect of restoring all or some property to insolvent debtors without necessarily discharging their debts. The statutory composition also restores property of the insolvent debtor's spouse (s 122 of the Insolvency Act). The trustee is obliged to frame a liquidation account, administer composition, report to creditors and devise a plan for the distribution of the assets to the creditors as soon as the statutory composition offer is accepted (s 123 (2) of the Insolvency Act). As earlier stated, acceptance of the statutory composition offer empowers the insolvent debtor with a right to apply for prompt rehabilitation (s 124 (1) read with ss 119 & 123 of the Insolvency Act). However, the insolvent debtors may only be discharged from all pre-sequestration debts if their application for prompt rehabilitation is granted on the basis of a prior statutory composition agreement which they concluded with the relevant creditors (Boraine & Roestoff, 2002, pp. 7-8). Moreover, where there was an illegal inducement on creditors and other relevant persons to accept a composition, the offenders will be liable for a criminal offence (s 141 of the Insolvency Act). A trustee may recover the penalty for illegal inducement of any person to vote for statutory composition and/or not to oppose the insolvent debtor's application for rehabilitation (s 131 read with s 130 of the Insolvency Act). If the trustee fails to recover such penalties, any affected creditor may proceed to recover the penalties and related costs on behalf of the trustee (s 131 read with s 130 of the Insolvency Act).

4. Disadvantages of the Sequestration Process as a Debt Relief Measure under the Insolvency Act

4.1. The Challenges of Proving the Advantage to Creditors Requirement

The advantage to creditors requirement is very difficult to prove in sequestration proceedings for most insolvent debtors, especially the poor and low-income earners in South Africa. This follows the fact that the advantage to creditors requirement is rigidly imposed on the applicant in voluntary, friendly and compulsory sequestration under the Insolvency Act (ss 10 (c) & 12 (1) (c); also see Chitimira, 2019, pp. 342-352; Sharrock, Van Der Linde & Smith, 2012, pp. 19). It is submitted that the advantage to creditors requirement is more difficult to prove in voluntary surrender than in compulsory sequestration (Boraine & Roestoff, 2000, pp. 261-270; *Botha v Botha* 1990 4 SA 580 (W) para 581). For instance, since most debtors will be struggling to pay their debts, it is very difficult for them to provide a detailed account of their financial position and successfully prove that their voluntary surrender application will be advantageous to all the affected creditors. The courts are stricter on the debtors' compliance with the advantage to creditors requirement in voluntary surrender in order to combat the abuse of sequestration proceedings by some unscrupulous debtors. In relation to this, the courts will obviously reject the debtor's application voluntary surrender if it provides little or no benefit to all the affected creditors (*Stainer v Estate Bukes* 1933 OPD 86 para 90). Consequently, low-income earners and poor debtors that do not have sufficient assets and/or any excess income will definitely find it difficult to prove the advantage to creditors requirement for debt relief purposes under the voluntary surrender sequestration proceedings (*Friedman* case paras 558-559).

Similarly, in compulsory sequestration, the court will only grant a provisional or final sequestration order if it brings some advantage to the general body of creditors (ss 10 (c) & 12 (1) (c) of the Insolvency Act; Temperman, 2014, pp. 26; Loubser, 1997, pp. 325-333; Boraine & Roestoff, 2000, pp. 261-270). It is very difficult for the applicant creditor to prove that the compulsory sequestration proceedings will yield or is likely to yield some dividends to all relevant creditors (*Trust Wholesalers and Woollens (Pty) Ltd v Mackan* 1954 (2) SA 109 (N) para 111). Consequently, both creditors and debtors are not able to rely on compulsory or friendly sequestration for debt relief purposes if there is little or no dividends available to all the creditors after the sequestration costs are paid (*London Estate* case para 591; *Ex parte Steenkamp and Related Cases* 1996 3 SA 822 (W)). The mere fact that there is a large amount of money left after the payment of sequestration costs does not automatically mean that the compulsory or friendly sequestration will yield some pecuniary benefit to all creditors and enable the applicant to get adequate debt relief (*Naidoo* case paras 18-59; Sharrock, Van Der Linde & Smith, 2012, pp. 19-43). Moreover, reliance on sequestration proceedings for debt relief purposes is extremely difficult in compulsory and friendly sequestration since the onus of proving the advantage to creditors is solely and rigidly imposed on the sequestrating creditors (*Wilkins v Pieterse* 1937 CPD 165 para 170; *Ressel v Levin* 1964 (1) SA 128 (C); *Dunlop Tyres (Pty) Ltd v Brewitt* 1999 (2) SA 580 (W) para 583). The plight for the low-income earners and poor debtors is exacerbated by the fact that debt relief is not the primary object of the Insolvency Act since it is mainly aimed at providing some advantage to all creditors (Asheela, 2012, pp. 33-37). Furthermore, the plight for the low-income earners and poor debtors is worsened by the failure of the Insolvency Act to expressly provide for different classes of debtors so as to treat them differently according to their peculiar circumstances (Evans, 2001, pp. 485-

508). Notwithstanding the fact that the distinction of debtors could be viewed by other persons as discriminatory, the authors submit that the Insolvency Act should be amended to expressly distinguish between the poor, low-income earners and rich debtors so as to determine those that can easily prove and satisfy the advantage to creditors requirement in insolvency proceedings for debt relief purposes (Evans, 2010, pp. 465-483; Asheela, 2012, pp. 37; Coetzee, 2015, pp. 246). This approach could ameliorate the possible unlawful and unconstitutional effects of the rigid application of the advantage to creditors requirement on the part of the applicant, especially the natural person debtors that are low-income earners and poor in all South African insolvency proceedings (Coetzee, 2016, pp. 55).

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

Apart from voluntary surrender, friendly sequestration and compulsory sequestration proceedings, the Insolvency Act is silent on other alternative measures that could be utilised for debt relief purposes in South Africa (Mabe, 2019, pp. 2-28). This status *quo* has made it very difficult for debtors, particularly the poor and low-income earners, to access debt relief through the available sequestration proceedings under the Insolvency Act (ss 3-12). For example, the Insolvency Act does not provide for out of court debt relief proceedings (Coetzee, 2015, pp. 51-246). Moreover, the applicant is currently obliged to lodge an application for sequestration in the High Court and this requires one to have legal representation (ss 3-12 of the Insolvency Act; Sharrock, Van Der Linde & Smith, 2012, pp. 7). The applicant also needs to apply to the High Court for composition and rehabilitation in terms of the Insolvency Act (ss 119-130 read with ss 149 (1); 150-151). This clearly shows that all sequestration proceedings are rigidly court-driven and the applicant has to comply with onerous statutory requirements before he or she can successfully rely on such proceedings to get debt relief. As a result, the poor and low-income earners that cannot satisfy the advantage to creditors requirement and other onerous statutory requirements under the Insolvency Act are not able to rely on sequestration proceedings for debt relief purposes in South Africa (ss 6 (1); 10 (c) & 12 (1) (c) of the Insolvency Act). In this regard, South Africa should consider following the World Bank Report guidelines which provide that the insolvency laws must not have rigid court-driven debt relief measures that give rise to numerous delays for the affected debtors to get debt relief and debt discharge, which deprives them to get a new start and access to relevant socio-economic resources (World Bank Report, 2013, paras 162-163; Mabe, 2019, pp. 2-28).

4.3. Absence of Alternative Debt Relief Measures

Contrary to the position in Kenya where alternative debt relief measures are enumerated in the Insolvency Act 18 of 2015 ("Kenyan Insolvency Act", ss 14; 18; 254; 258; 304-361), the South African Insolvency Act does not stipulate any such measures. The alternative debt discharge and debt relief measures that are provided in Kenya include debtors' schemes of arrangement with creditors, individual voluntary arrangements (IVA), expedited procedures, summary instalment orders (SIO) and the no asset procedures (ss 14; 18; 254; 258; 304-361 of the Kenyan Insolvency Act). Unlike South Africa, Kenya seems to have moved quickly to align its insolvency laws with the World Bank Report which, *inter alia*, stipulates that the principal role of any insolvency laws should be to enable the debtors to get a new start

after their debts are discharged (World Bank Report, 2013, paras 359-360). The World Bank Report guidelines for debt relief measures stipulates that insolvency laws must provide a quick, open and automatic access to debt relief for natural person debtors (World Bank Report, 2013, para 418; Mabe, 2019, pp. 2-28). This automatic open access empowers natural person insolvent debtors to access debt relief measures that enable them to be discharged from their debts (World Bank Report, 2013, paras 418-421). As discussed herein, there is a definite need for the statutory provision of alternative debt relief measures in insolvency laws to enable the low-income earners and poor debtors to promptly obtain debt relief and debt discharge outside sequestration proceedings. This follows the fact that debt relief and debt discharge for natural person debtors takes effect only after all sequestration proceedings are finalised, which is a very long period of time. In this regard, alternative debt relief measures could also help natural person debtors to deal with certain debts that are usually difficult to discharge such as alimony and child support, student loans and criminal restitution fines.

5. Concluding Remarks

As discussed herein, voluntary surrender, friendly sequestration and compulsory sequestration are the only statutory debt relief measures that are available under the Insolvency Act in South Africa. The advantages of these sequestration proceedings such as composition and rehabilitation were discussed. Likewise, the disadvantages of insolvency-related debt relief measures under the Insolvency Act such as the challenges of proving the advantage to creditors' requirement, absence of out of court debt relief measures and the absence of alternative debt relief measures were further discussed. It was also noted that the rigid reliance on sequestration proceedings under the Insolvency Act has negatively affected the timeous access to debt relief and debt discharge for some natural person debtors that are low-income earners and poor in South Africa (Coetzee, 2015, pp. 51-246; Boraine, & Roestoff, 2014, pp. 351-374). Moreover, it was noted that the sequestration proceedings under the Insolvency Act are rigidly court-driven and they may only be utilised for debt relief purposes by natural person debtors after a long period of court proceedings that are very expensive and difficult to access for low income earners and poor debtors. Given this background, it is submitted that the requirements for sequestration proceedings under the Insolvency Act should be carefully streamlined to enable low-income earners and poor debtors to obtain debt relief and debt discharge without too much difficulties. In this regard, the advantage to creditors requirement under the Insolvency Act should be carefully relaxed to cater for the peculiar circumstances of low-income earners and poor debtors in South Africa (Asheela, 2012, pp. 33-37; *Body Corporate of Empire Gardens v Sithole* 2017 4 SA 161 (SCA). Furthermore, the Insolvency Act should be amended to expressly provide for different classes of debtors, especially low-income earners and poor debtors, so as to treat them fairly and in accordance with their peculiar circumstances. The distinction between the poor, low-income earners and rich debtors could enable all relevant persons to determine debtors that can easily satisfy the advantage to creditors requirement for debt relief purposes under the Insolvency Act. As earlier stated, this approach could combat possible unlawful and unconstitutional effects of the rigid application of the advantage to creditors requirement on the part of low-income earners and poor debtors under the Insolvency Act (Coetzee, 2016, pp. 55). South Africa should also consider amending the Insolvency Act in line with the World Bank Report guidelines and shun rigid court-driven debt relief measures that cause delays for the affected debtors to get debt relief

and debt discharge (World Bank Report, 2013, paras 162-163; Mabe, 2019, pp. 2-28). The Insolvency Act should be amended to expressly provide for alternative debt relief measures that are utilised by low-income earners and poor debtors to obtain debt relief and debt discharge outside sequestration proceedings.

References

Arslanalp, S. & Henry, P.B. (2006). Policy Watch: Debt Relief. *Journal of Economic Perspectives*, 20 (1), pp. 207-220.

Asheela, N.V. (2012). *The Advantage Requirement in Sequestration Applications: A Call for Relaxation*. LLM dissertation: University of Pretoria.

Bertelsmann, E.; Evans R.G.; Harris, A.; Kelly-Louw, M.; Loubser, A.; Roestoff, M.; Smith, A.; Stander, L. & Steyn, L. (2019). *Mars: The Law of Insolvency in South Africa.* 10th ed, Cape Town: Juta & Co Ltd.

Bond, P. (2013). Debt, Uneven Development and Capitalist Crisis in South Africa: From Moody's Macroeconomic Monitoring to Marikana Microfinance Mashonisas. *Third World Quarterly*, 34 (4), pp. 569-592.

Boraine, A. & Roestoff, M. (2002). Fresh Start Procedures for Consumer Debtors in South African Bankruptcy Law. *International Insolvency Review*, 11 (1), pp. 1-11.

Boraine, A. & Roestoff, M. (2000). Developments in American Consumer Bankruptcy Law: Lessons for South Africa (Part 2). *Obiter*, pp. 241-270.

Boraine, A. & Roestoff, M. (2014). Revisiting the State of Consumer Insolvency in South Africa after Twenty Years: The Courts' Approach, International Guidelines and an Appeal for Urgent Law Reform. *Journal for Contemporary Roman-Dutch Law*, 77 (3), pp. 351-374.

Chitimira, H. & Mabina, T.T. (2019). The Meaning of Advantage to Creditors under Voluntary, Compulsory and Friendly Sequestration in South Africa. *Acta Universitatis Danubius. Juridica*, 15 (2), pp. 62-83.

Chitimira, H. (2019). Advantage to Creditors in Compulsory Sequestration Proceedings: Body Corporate of Empire Gardens v Sithole 2017 4 SA 161 (SCA). *Journal for Contemporary Roman-Dutch Law*, 82 (2), pp. 342-352.

Coetzee, H. & Roestoff, M. (2013). Consumer Debt Relief in South Africa: Should the Insolvency System Provide for NINA Debtors? Lessons from New Zealand. *International Insolvency Review*, 22 (3), pp. 188-210.

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

Coetzee, H. (2016). Is the Unequal Treatment of Debtors in Natural Person Insolvency Law Justifiable? A South African Exposition. *International Insolvency Review*, 25 (1), pp. 36-55.

Corden, W.M. (1988). Debt Relief and Adjustment Incentives. *Staff Papers*, 35 (4), pp. 628-643.

Evans, R.G. (2001). Friendly Sequestrations, the Abuse of the Process of Court, and Possible Solutions for Overburdened Debtors. *SA Merc LJ*, pp. 485-508.

Evans, R.G. (2010). Law Reform in Respect of Assets in Insolvent Estates in South Africa. *SA Mercantile Law Journal*, 22 (4), pp. 465-483.

Edwards, S. (2003). Debt Relief and Fiscal Sustainability. *Review of World Economics*, 139 (1), pp. 38-65.

Evans, R. & Haskins, M. (1990). Friendly Sequestrations and the Advantage of Creditors. *South African Mercantile Law Journal*, 2 (2), pp. 246-251.

Evans, R. G. (2010). A Brief Explanation of Consumer Bankruptcy and Aspects of the Bankruptcy Estate in the United States of America. *Comparative and International Law Journal of Southern Africa*, 43 (3), pp. 337-351.

Fletcher, I. F. (2017). *The Law of Insolvency.* London: Sweet and Maxwell.

Loubser, A. (1997). Ensuring Advantage to Everyone in a Modern South African Insolvency Law. *SA Merc LJ*, pp. 325-333.

Mabe, Z. (2019). Alternatives to Bankruptcy in South Africa that Provides for a Discharge of Debts: Lessons from Kenya. *PER*, 22 (1), pp.1-34.

Mabe, Z. & Evans, R.G. (2014). Abuse of Sequestration of Proceedings in South Africa Revisted. *SA Merc LJ*, pp. 651-667.

Kunst, J.A., Boraine, A. & Burdette, D. (2014). *Meskin Insolvency Law and Its Operation in Winding-Up* Service Issue 42, Durban: Lexis Nexis.

Pepler, J. J. (2013). *Advantage for Creditors in South African Insolvency Law – A Comparative Investigation*. LLM dissertation: University of Pretoria.

Rampersad, K. (2013). *The Interface between the Insolvency Act 24 of 1936 and the National Credit Act 34 of 2005*. Masters in Business Law: University of KwaZulu-Natal.

Roestoff, M. & Renke, S. (2005). A Fresh Start for Individual Debtors: The Role of South African Insolvency and Consumer Protection Legislation. *International Insolvency Review*, 14 (2), pp. 93-109.

Roestoff, M. (2018). Rehabilitation of an Insolvent and Advantage to Creditors under the Insolvency Act 24 of 1936: *Ex parte Purdon* 2014 JDR 0115 (GNP). *Journal of Contemporary Roman-Dutch Law*, 81, pp. 306-316.

Roestoff, M. & Coetzee, H. (2012). Consumer Debt Relief in South Africa: Lessons from America and England; and Suggestions for the Way Forward. *SA Mercantile Law Journal*, 24 (1), pp. 53-76.

Sharrock, R.; Van Der Linde, K. & Smith, A. (2012). *Hockly's Insolvency Law*. Cape Town: Juta & Co. Ltd.

Temperman, E. (2014). *The Judiciary's Discretion in Sequestration Applications*. LLM dissertation: University of Pretoria.

Van der Merwe, C.G. & du Plessis, J.E. (2004). *Introduction to the Law of South Africa*. The Haque: Kluwer Law International.

Boraine, A. & Van Heerden, C. (2010). To Sequestrate or not to Sequestrate in View of the National Credit Act 34 of 2005: A Tale of Two Judgments. *PELJ*, 13 (3), pp. 84-124.

Van Heerden, C. & Boraine, A. (2009). The Interaction between the Debt Relief Measures in the National Credit Act 24 of 2005 and Aspects of Insolvency Law. *PELJ*, 12 (3), pp. 22-63.

Visser, C.; Pretorius, J.T.; Sharrock, R. & Van Jaarsveld, M. (2004). *Gibson: South African Mercantile and Company Law*. Cape Town: Juta and Company Ltd.

World Bank, (2013). *Working Group on the Treatment of the Insolvency of Natural Persons Report on the Treatment of the Insolvency of Natural Persons*. World Bank, Washington DC.

Case Law

Beinash & Co v Nathan 1998 3 SA 540 (W).

Body Corporate of Empire Gardens v Sithole 2017 4 SA 161 (SCA).

Botha v Botha 1990 4 SA 580 (W).

Braithwaite v Gilbert 1984 4 SA 717 (W).

Cumes & Co v Sacher 1932 WLD 213.

Dunlop Tyres (Pty) Ltd v Brewitt 1999 (2) SA 580 (W).

Ex parte Arntzen 2013 1 SA 49 (KZP).

Epstein v Epstein 1987 4 SA 606 (C).

Grevler v Landsdown en 'n Ander NNO 1991 3 SA 175 (T).

Esterhuizen v Swanepoel and Sixteen Other Cases 2004 4 SA 89 (W).

Ex parte Bergh 1938 CPD 132.

Ex parte Brown 1951 4 SA 246 (N).

Ex parte Ford 2009 3 SA 376 (WCC).

Ex parte Fourie 2008 4 All SA 340 (D).

Ex parte Goldman 1930 WLD 158.

Ex parte Harmse 2005 1 SA 323 (N).

Ex parte Heydenreich 1917 TPD 657.

Ex parte Hittersay 1974 4 SA 326 (SWA).

Ex parte Houston 1958 1 SA 448 (N).

Ex parte Mattysen et Uxor 2003 2 SA 308 (T).

Ex parte Moodley 1955 1 SA 678 (T).

Ex parte Murphy 1929 EDL 168.

Ex parte Nel 1954 2 SA 638 (O).

Ex parte Ogunlaja [2011] JOL 2709 (GNP).

Ex parte Pillay 1955 2 SA 309 (N).

Ex parte Porrit 1991 3 SA 866 (N).

Ex parte Smith 1958 3 SA 568 (O).

Ex parte Steenkamp and Related Cases 1996 3 SA 822 (W).

Ex parte Van Heerden 1923 CPD 279.

Ex parte Van Zyl 1991 2 SA 313 (C).

Ex parte Wassenaar 1968 2 SA 726 (T).

Ex parte Woolf 1958 4 SA 190 (N).

Ex parte Silverstone 1968 2 SA 196 (O).

Ex parte Snooke 2014 5 SA 426 (FB).

Fesi v ABSA Bank Ltd 2000 1 SA 499 (C).

Harrington v Fester & others 1980 4 SA 424 (C).

In re Hugo 1921 CPD 742.

Ilic v Parginos 1985 1 SA 795 (A).

Klemrock (Pty) Ltd v De Klerk 1973 3 SA 925 (W).

Kopman & another v Benjamin 1951 1 SA 882 (W).

Kuhn v Karp 1948 4 SA 825 (T).

Jhatam v Jhatam 1958 4 SA 36 (N).

London Estates (Pty) Ltd v Nair 1957 3 SA 591 (D).

Lotzof v Raubenheimer Lotzof v Raubenheimer 1959 1 SA 90 (O).

Lynn & Main Inc v Naidoo 2006 1 SA 59 (N).

Nel v Lubbe 1999 3 SA 109 (W).

Mahomed v Lockhat Brothers & Co Ltd 1944 AD 230.

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

Mia v The Master & Others 1940 TPD 86.

North American Bank Ltd (in Liquidation) v Granit 1998 (3) SA 557 (W).

Prinsloo en 'n Ander v Van Zyl NO 1967 1 SA 581 (T).

R v Hohls 1959 2 SA 656 (N).

R v Lewin 1930 AD 344.

Ressel v Levin 1964 (1) SA 128 (C).

Sellwell Shop Interiors CC v Van der Merwe Case number 27527/1990 (W).

Smith v Porrit 2008 6 SA 303 (SCA).

Stainer v Estate Bukes 1933 OPD 86.

Thorne NO v Sinclair 1930 EDL 409.

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

Venter v Volkskas Ltd 1973 3 SA 175 (T) 179.

Vermeulen v Hubner Case number 1165/1990 (T).

Wilkins v Pieterse 1937 CPD 165.

Yenson & Co v Garlick 1926 WLD 53.

Legislation

Insolvency Act 24 of 1936.

Magistrates Courts Act 32 of 1944.

National Credit Act 34 of 2005.

National Credit Amendment Act 7 of 2019.