

**An analysis of some aspects relating to rehabilitation in
terms of the Insolvency Act 24 of 1936**

by

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CHAPTER 1: INTRODUCTION

1.1 Background

The rehabilitation of an insolvent has the effect of putting an end to his sequestration¹ and to discharge all debts of the insolvent, which were due, or the cause of which has arisen before sequestration and which did not arise out of any fraud on the part of the insolvent.² Therefore, rehabilitation has the effect of relieving the insolvent of every disability resulting from his sequestration.³

In stark contrast to a world-wide trend,⁴ South Africa has a creditor friendly consumer insolvency system and can be categorised as very conservative. Internationally, a discharge of debt is deemed to be the most important aspect of natural person insolvency law,⁵ whereas in South Africa the focus remains on benefit to creditors.⁶

The fresh-start policy has its origins in the United States of America⁷ where natural person insolvents can, to their advantage, make use of the provisions of the Bankruptcy Reform Act⁸ to obtain a discharge.⁹ Contrary to South African insolvency law, the American fresh

¹ S 129(1)(a) of the Insolvency Act 24 of 1936 (hereinafter 'Insolvency Act' or 'Act').

² S 129(1)(b) of the Act.

³ S 129(1)(c) of the Act.

⁴ J Niemi, 'Consumer Insolvency in the European Legal Context' *Journal of Consumer Policy* (2012) 444 and 449.

⁵ J Ziegel, 'The challenges of comparative consumer insolvencies' *Penn State International Law Review* (2004–2005) 645, who divides systems into categories on the basis of their responsiveness to consumer insolvencies.

⁶ Ss 6, 10 and 12 of the Act.

⁷ Hereinafter 'USA'.

⁸ Of 1978.

⁹ M Roestoff 'n *Kritiese evaluasie van skuldverligtingsmaatreëls vir individue in die Suid-Afrikaanse insolvensiereg* (LLD thesis University of Pretoria 2002) 172 *et seq* and NJ Maghembe *A proposed discharge dispensation for consumer debtors in Tanzania* (LLD thesis University of Pretoria 2013) 37, for detailed discussions of the USA fresh-start policy.

start philosophy caught on internationally. Consequently, the international trend is to provide debt relief, as a primary goal,¹⁰ to all honest, but unfortunate debtors.¹¹

Van Apeldoorn¹² describes the fresh-start methodology as one where it

is not a favour, but an (almost) automatic right to be discharged from pre-bankruptcy debts in a fairly quick and formal bankruptcy proceeding. Forgiveness, amongst others, gives the wrongdoer (the debtor) the opportunity to regain self-esteem and become once again a productive member of society. In a capitalistic economy, we want debtors to reintegrate into the system for their sake and our own. For debtors, reintegration allows the taking of new risks. For society, taking risks is exactly what we want individuals and business to do. This enables the wheel of commerce to turn; individuals fend for themselves and do not become a drain on scarce societal resources.

Over-indebtedness and consequent insolvency of consumers in South Africa and the rest of the world are rapidly growing.¹³ Some of the reasons for this are the growth in the availability of consumer credit; the reduction in savings by individuals and families; financial mismanagement; and a lack of financial literacy.¹⁴ According to the World Bank,¹⁵ South Africans are the most indebted individuals in the world.¹⁶

There are only three statutory natural person debt relief measures available for consumers in South Africa, namely the administration procedure,¹⁷ the debt review procedure,¹⁸ and the sequestration procedure.¹⁹ The sequestration procedure is the only available procedure where debts of a consumer can be statutorily discharged.²⁰ Due to

¹⁰ N Huls 'A next step in debt enforcement: The merger of debt help and debt collection' *Journal of Consumer Policy* (2012) 499 *et seq*, DG Epstein and SH Nickles *Principles of Bankruptcy law* Thompson/West St. Paul MN 2007 7 and RG Evans *A critical analysis of problem areas in respect of assets of insolvent estates of individuals* (LLD thesis University of Pretoria 2008) 151 and 154.

¹¹ *Local Loan Co v Hunt* (1934) 292 US 244. Prior to the 2005 amendments to the bankruptcy system, the American system was described as ultra-liberal; Also see J Ziegel *Penn State International Law Review* (2004–2005) 645.

¹² JC van Apeldoorn 'The "fresh start" for individual debtors: social, moral and practical issues' *International Insolvency Review* (2008) 66.

¹³ J Ziegel *Penn State International Law Review* (2004–2005) 642–645 notes four general reasons for the rapid growth of over-indebtedness.

¹⁴ *Ibid*.

¹⁵ Hereinafter 'WB'.

¹⁶ WB Global findex database <http://bit.ly/1zpsu5J> (accessed 28 November 2016) and Moneyweb *South Africans are the world's biggest borrowers* <http://bit.ly/1RxsT5Q> (accessed 28 November 2016).

¹⁷ S 74 of the Magistrate Court Act 32 of 1944 (hereinafter 'The Magistrate Court Act').

¹⁸ S 86 of the National Credit Act 34 of 2005 (hereinafter 'The National Credit Act').

¹⁹ Insolvency Act in general.

²⁰ S 129 of the Insolvency Act.

its discharge feature, the sequestration and rehabilitation procedure is deemed to be the primary South African debt relief measure,²¹ in spite of the fact that debt relief is not the procedure's main aim, but merely a consequence thereof.²²

It is clear that South Africa did not keep up with modern developments in insolvency law. A reconsideration of the effectiveness of the system is necessary. In such a review the rehabilitation feature is of the utmost importance.

Although the South African insolvency legislation is currently in the process of reform²³ which led to the proposed 2015 Insolvency Bill,²⁴ it remains to be seen to which degree the new legislation will conform to international trends as regards debt relief.

1.2 Research objectives

The objectives of this study are to:

- a. investigate and critically analyse the efficiency and fairness of rehabilitation in the South African insolvency system. An emphasis will be placed on the discharge of debts;
- b. to find out if the South African insolvency system complies with international trends and guidelines;
- c. interpret the intention of the legislator with regards to sections 124 to 130 of the Insolvency Act;
- d. discuss the proposed amendments to the South African insolvency law, as contemplated in the 2015 Insolvency Bill, with regards to the rehabilitation of an insolvent consumer;

²¹ H Coetzee and M Roestoff 'Consumer debt relief in South Africa – Should the insolvency system provide for NINA debtors? Lessons from New Zealand' *International Insolvency Review* (2013) 193.

²² *Ex parte Ford* 2009 (3) SA 376 (WCC) 383 *et seq* and *Ex parte Shmukler-Tshiko* 2013 JOL 29999 (GSJ) in general.

²³ The South African Law Commission *Report on the review of the law of insolvency: Draft Insolvency Bill and explanatory memorandum* (2000) Project 63.

²⁴ Unofficial working draft of a proposed Insolvency and Business Recovery Bill 2015. Obtained from MB Cronje at the Department of Justice and Constitutional Development, Pretoria, South Africa.

- e. compare the current insolvency law system of South Africa with regard to rehabilitation, with that of the proposed amendments as contemplated in the 2015 Insolvency Bill, and with the systems of some foreign jurisdictions; and
- f. make substantive and procedural suggestions for law reform, in an attempt to eliminate possible inefficacies and uncertainty.

1.3 Delineation and limitations

The history and development of the South African insolvency law, and in particular rehabilitation and discharge, fall outside the ambit of this research.

This research will not deal with a corporate discharge in terms of business rescue proceedings or alternative dispute resolution and will be limited to the procedure of terminating natural person insolvency.

A discussion of the administration order procedure in terms of section 74 of the Magistrates' Courts Act, and the debt review procedure in terms of section 86 of the National Credit Act, will be limited to their relevance with regard to a discharge and the rehabilitation of a natural person debtor.

The constitutionality of the rehabilitation of an insolvent, as a debt relief measure, falls outside the ambit of this dissertation.

The focal point of this dissertation is on the rehabilitation of an insolvent in terms of the sequestration procedure and a discharge of his debt.

1.4 Structure of dissertation

This research is divided into six chapters, the first is an introduction.

In the second chapter international principles and guidelines, pertaining to rehabilitation are discussed.

The third chapter deals with the current rehabilitation system in South Africa. The circumstances, in chronological order, under which an insolvent may rehabilitate, are

addressed. The court's discretion is discussed and analysed with regard to the insolvent, property of the insolvent, costs, the setting aside of a sequestration order, postponements, unconditional grant, conditional grant, the suspension of an order and the refusal to grant a rehabilitation order. Practical obstacles and dilemmas facing insolvents, attorneys, trustees and the Master, with regard to the rehabilitation of insolvent consumers in South Africa, are also highlighted.

In the fourth chapter, a comparative study is undertaken. The rehabilitation systems of the USA and England and Wales are discussed and compared to that of South Africa.

In the fifth chapter, the proposed amendments to the South African insolvency law, in terms of the 2015 Insolvency Bill, are investigated and evaluated to determine whether these amendments will resolve the existing issues with regard to rehabilitation of an insolvent consumer in South Africa.

The sixth and last chapter embody my conclusions. Recommendations are also made.

1.5 Key references, terms and definitions

The masculine form is used throughout the dissertation, although it includes the feminine form.

For purposes of this dissertation the following terminology is used throughout the dissertation.

“**Master**” means the Master of the High Court of South Africa.

“**consumer**” means an

- (a) individual to whom goods or services are sold; and/or
- (b) an individual to whom money is paid, or credit is granted.

“**insolvent**” means a person that has been sequestrated by the High Court of South Africa.

“**debtor**” means any person that is indebted to any other person or corporate entity.

“**court**” means the High Court of South Africa.

“**applicant**” means the applicant in an application for an insolvent’s rehabilitation in the court.

“**application**” means an application to the court for the rehabilitation of an insolvent.

“**trustee**” means the trustee of an insolvent that has duly been appointed as such by the Master.

“**respondent**” means a person or entity that opposes an application for an insolvent’s rehabilitation.

“**natural person**” and “**consumer**” are used as synonyms.

CHAPTER 2: INTERNATIONAL PRINCIPLES AND GUIDELINES

2.1 Introduction

The World Bank *Report*,¹ which was published in 2012, describes discharge as one of the most salient characteristics of modern systems for the regulation of the insolvency of natural persons.²

It proceeds to describe rehabilitation as having three elements, namely a discharge of debt, non-discrimination, and the avoidance of excessive indebtedness.³

In this chapter international principles, guidelines and trends, with regard to the rehabilitation of an over-indebted natural person, are discussed by addressing the American policy, certain European principles, the French approach, INSOL International *Consumer debt Report*,⁴ and the World Bank *Report*. This is to set a foundation against which the South African system and proposed amendments are measured in subsequent chapters.

The American, European and French approaches discussed in this chapter are not intended as comprehensive studies, but merely to illustrate trends. More detailed comparative studies follow in chapter 4.

2.2 The American policy

The fresh-start policy originated from the United States of America.⁵ It has two characteristics. The first is a discharge from debts, which is the most important aspect for

¹ The World Bank Insolvency and Creditor/Debtor Regimes Task Force Working Group *Report on the treatment of the insolvency of natural persons* (2012) (hereinafter 'World Bank Report').

² *Idem* 138.

³ *Idem* 138–139.

⁴ INSOL International *Consumer debt report: report of findings and recommendations* (2nd edition) London (November 2011) (hereinafter 'INSOL International Consumer debt report II').

⁵ Hereinafter 'USA'. Also see M Roestoff *'n Kritiese evaluasie van skuldverligtingsmaatreëls vir individue in die Suid-Afrikaanse insolvensiereg* (LLD thesis University of Pretoria 2002) 172 *et seq* and NJ Maghembe *A proposed discharge dispensation for consumer debtors in Tanzania* (LLD thesis University of Pretoria 2013) 37, for detailed discussions of the USA fresh-start policy.

any debtor. The second is the debtor's ability to retain 'exempt' property.⁶ The fresh-start principle was born from the philosophy of forgiveness.⁷

The ideas behind the fresh-start philosophy are to encourage a debtor to co-operate with his creditors and to act as an incentive to engage in economic activity, knowing that he will be able to retain the fruits of his revived efforts.⁸

There are three theoretical justifications for a discharge with regard to the fresh-start principle.⁹ These rationales are traditional justifications for allowing people to escape their contractual obligations.¹⁰ They are 'rehabilitation', 'mercy' and 'collection'.

The Bankruptcy Reform Act of 1978 allows for a discharge by way of two procedures. These are liquidation under chapter 7,¹¹ and rehabilitation, which encompass repayment plans, under chapters 11¹² and 13.¹³ A debtor who files for chapter 7 bankruptcy in the USA does not have to be insolvent.¹⁴ He must surrender all non-exempt property to his trustee and receives an immediate and unconditional discharge in return.¹⁵ A discharge under chapter 13 is only granted when the debtor made full payment in terms of the payment plan.¹⁶

⁶ JT Ferriell and EJ Janger *Understanding bankruptcy* LexisNexis (2009) 4.

⁷ *Ibid.*

⁸ JJ Kilborn 'Mercy, rehabilitation, and *quid pro quo*: A radical reassessment of individual bankruptcy' *Ohio State Law Journal* (2003) 862.

⁹ *Ibid.*

¹⁰ *Pacta sunt servanda* principle.

¹¹ Ss 701–784 of the Bankruptcy Reform Act of 1978.

¹² *Idem* ss 1101–1174. Ch 11 provides for a reorganization process. It is more complicated and expensive than ch 13 procedure and are generally only used by business. See JT Ferriell and EJ Janger *Understanding bankruptcy* LexisNexis (2009) 191.

¹³ *Idem* ss 1301–1330. Ch 13 provides for a debtor with a regular source of income.

¹⁴ N Huls 'A next step in debt enforcement: The merger of debt help and debt collection' *Journal of Consumer Policy* (2012) 498–499.

¹⁵ JJ Kilborn *Ohio State Law Journal* (2003) 857.

¹⁶ Under certain circumstances, a debtor may receive a discharge before repayment in terms of the payment plan, which is known as a 'hardship discharge'. See s 1328 (b).

However, on 17 October 2005 most of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005¹⁷ came into effect. The BAPCPA has revised the very liberal fresh-start philosophy in the USA by denying the debtor immediate relief under chapter 7, in instances where it appears that he will be able to pay a portion of his debt from future income by means of the chapter 13 procedure. It also introduced compulsory counselling¹⁸ and a means test.¹⁹ The BAPCPA has been severely criticised by renowned academics as being a step backwards.²⁰ Kilborn²¹ argues that the introduction of the compulsory means test has led to excessive paper work and described it as a ‘fool’s errand’, because only 1% of chapter 7 filings have been found to be ‘abusive’.²² However, it seems that the BAPCPA led to a more nuanced and balanced approach by moving away from the straight discharge dispensation to an approach more aligned with that of an earned discharge.²³

For purposes of this dissertation the (almost) automatic right to a discharge²⁴ and the non-discriminatory access to the USA system are interesting features which will be compared to that of South Africa.

2.3 European principles

European insolvency law was revised in 1977 by the still influential Cork Report.²⁵ The *Cork Report* differentiates between the ‘honest though unfortunate debtor’,²⁶ and the dishonest or reckless insolvent. The Cork committee resolved that debtors should be

¹⁷ Hereinafter ‘BAPCPA’.

¹⁸ *Idem* s 109(h).

¹⁹ *Idem* s 707(b)(2).

²⁰ JJ Kilborn described it as a ‘spectacular failure’; JJ Kilborn ‘Still chasing chimeras but finally slaying some dragons in the quest for consumer bankruptcy reform’ *Loyola Consumer Law Review* (2012) 4–5. Also see J Carlitz ‘Developments in the United States consumer bankruptcy law: A South African perspective’ *Obiter* (2007) 407–408.

²¹ JJ Kilborn *Loyola Consumer Law Review* (2012) 4–5.

²² *Idem* 1–13.

²³ H Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* (LLD thesis University of Pretoria 2015) 46.

²⁴ JC van Apeldoorn ‘The “fresh start” for individual debtors: social, moral and practical issues’ *International Insolvency Review* (2008) 66.

²⁵ K Cork *Report of the review committee on insolvency law and practice* Her Majesty’s Stationary Office London (1982) (hereinafter ‘Cork Report’).

²⁶ *Idem* para 23 and 198.

encouraged to file their own applications and that the process from sequestration to eventual rehabilitation, should be as simple, swift and as cheap as possible.²⁷

In 2003 the European Union ordered a study on consumer overindebtedness and consumer law in the European Union.²⁸ Also in 2003 the European Commission's Enterprise Directorate published the EC Best project report on restructuring, bankruptcy and a fresh-start.²⁹ These reports were followed up by various other reports,³⁰ as the importance of rehabilitating over-indebted individuals and facilitating their re-entry into the economy became more pertinent.

After investigating the mentioned reports Coetzee³¹ summarises the European principles as follow:

...specialised courts are preferred and that insolvency procedure should be accessible, simple, quick and inexpensive. Costs and zero redemption capacity should not pose entry barriers. A relatively short period of a maximum period of four years seems to be the norm, with certain recommendations favouring a shorter period of three years. Payment obligations should also be reasonable and adjusted to the debtor's needs. Exemption for taxes, fines and damages are not recommended, although alimony exclusions are provided for. It further seems that informal settlements backed up by some form of cram down are preferred, but that court supervision or the possibility of approaching the courts is deemed to be important as it will facilitate settlements. The protection of certain assets and income is vital as a decent living standard for the debtor and his family should be ensured. Non-discrimination is another important element and linked thereto is the reduction of the stigmatising effect of bankruptcy. Professional, equipped and independent counselling and legal aid in both out-of-court and court procedures are deemed to be imperative.³²

Consequently it is clear that the European principles are debtor friendly and places a clear emphasis on rehabilitation. The debtor is assisted to get back on his feet.

²⁷ *Idem* par 539.

²⁸ U Reifner, J Kiesilainen, N Huls and H Springeneer *Consumer overindebtedness and consumer law in the European Union* (2003) (hereinafter 'Reifner Report').

²⁹ European Commission *Best project on restructuring, bankruptcy and a fresh start: Final report of the expert group* (2003) (hereinafter 'EC Best project Report').

³⁰ J Niemi-Kiesiläinen and A-S Hendrikson *Report on legal solutions to debt problems in credit societies* (2005).

³¹ H Coetzee (LLD thesis University of Pretoria 2015) 54.

³² *Ibid.*

The USA had a ‘straight discharge’ dispensation under the Bankruptcy Reform Act of 1978. However, this changed with the BAPCPA, which moved the USA to more of a ‘eared discharge’ dispensation, similar to the European principles and guidelines, where an immediate discharge is not favoured.³³

European principles which are relevant specifically with regard to rehabilitation are: the discharge of debt; the debtor’s re-entry into the economy, which is to the benefit of society and the debtor’s creditors; the preference for extra-judicial procedures; free and inclusive access to all debtors; and the exclusion of certain assets to assist the debtor with his ultimate rehabilitation.³⁴

2.4 The French approach

Kilborn is very impressed with the French system. He describes it as ‘a unique success story’, ‘spectacular performance shifts’ and ‘firing on all cylinders’.³⁵

The French system’s most impressive element is its administrative simplicity.³⁶ The treatment of ‘overindebtedness of individuals’ starts with the debtor’s petition to a regional ‘Commission on individual overindebtedness’,³⁷ which is administered by the *Banque de France*.³⁸ The commission then offers guidance in the development of a debt compromise plan, with minor concessions, also known as ‘ordinary measures’, such as an interest reduction or the extension of payment periods. If the creditors do not agree to these recommendations, then the applicant may approach the courts and the courts place a heavy reliance on the recommendation of the commission.³⁹ The commission could recommend the ‘extraordinary measure’ of a total deferral of debts for two years.⁴⁰ The commission would thereafter evaluate the debtor’s position again. The commission could

³³ M Roestoff ‘Rehabilitasie in die Suid-Afrikaanse verbruikersinsolvensiereg: internasionale tendense en riglyne’ *Litnet Akademies* (2016) 14–16 *et seq* and H Coetzee (LLD thesis University of Pretoria 2015) 54.

³⁴ M Roestoff *Litnet Akademies* (2016) 54.

³⁵ JJ Kilborn *Loyola Consumer Law Review* (2012) 24–25.

³⁶ *Ibid.*

³⁷ JJ Kilborn ‘*La responsabilisation de l’économie: What the United States can learn from the new French law on consumer overindebtedness*’ *Michigan Journal of International Law* (2005) 636–369.

³⁸ The *Banque de France* is the French central bank.

³⁹ JJ Kilborn *Michigan Journal of International Law* (2005) 639–348.

⁴⁰ This period was three years and was reduced to two years in 2004.

also recommend a court-imposed partial or total discharge.⁴¹ In 2004 the system was reformed to include a right of the commission to recommend the liquidation of non-exempted assets, followed by an immediate discharge, without the need for a repayment plan, in instances where debtors are financially ‘irremediably compromised’.⁴²

In 2010 two more adjustments became effective.⁴³ The first was to do away with the necessity of channelling cases to the courts where ‘ordinary measures’ are recommended. The commission now has the authority to enforce such recommendations. The only recourse for a creditor is to appeal ‘ordinary measures’. The second adjustment was that the commission can now recommend measures without the necessity of liquidation, in instances where the debtor does not own any assets of real value.⁴⁴

The French approach with regard to rehabilitation of an insolvent debtor is similar to the general principles followed in Europe.⁴⁵ The French place a high value on; a discharge of debt where necessary, a moratorium on the collection of debts, a re-entry into the economy which is to the benefit of society and the debtor’s creditors, extra-judicial procedure and free and inclusive access to all debtors.

The success of the French system and its uniqueness are founded in the involvement of the central bank. This lends credibility to the system from a creditor’s perspective. It is also largely administrative in nature (as oppose to judicial) which increase its effectiveness and efficiency.⁴⁶

2.5 INSOL international consumer debt reports

INSOL international is an international association of restructuring, insolvency and bankruptcy professionals. It *inter alia* research international and comparative insolvency

⁴¹ JJ Kilborn *Michigan Journal of International Law* (2005) 650–651.

⁴² JJ Kilborn *Loyola Consumer Law Review* (2012) 24–26 *et seq* and JJ Kilborn *Michigan Journal of International Law* (2005) 655–661.

⁴³ NJ Maghembe (LLD thesis University of Pretoria 2013) 285–291 for a concise description of the Swedish system, which is similar to this aspect of the French approach.

⁴⁴ JJ Kilborn *Loyola Consumer Law Review* (2012) 27–28.

⁴⁵ Par 2.3.

⁴⁶ JJ Kilborn *Michigan Journal of International Law* (2005) 638–639.

issues and assist in developing cross-border insolvency policies, international codes and best practice guidelines.⁴⁷

In May 2001, the first INSOL *Consumer debt report*⁴⁸ was published.⁴⁹ In November 2011 a second report⁵⁰ was published at a time when the world was trying to digest the economic downturn.⁵¹ The recommendations and principles remained the same in both of these reports,⁵² in spite of the fact that major economic changes occurred during this time.⁵³

Three of the four principles contained in these reports are relevant for the purposes of this dissertation. The fourth deals with preventative measures and will consequently not be discussed.

The first principle is that consumer debtors who cannot repay their debts are not always to blame, and that creditors who receive no or only minimum payments are not necessarily the victim of the situation.⁵⁴ Consequently, the first recommendation provides that⁵⁵

⁴⁷ <https://www.insol.org/page/19/about-us> (accessed 16 October 2016).

⁴⁸ INSOL International *Consumer debt report: Report of findings and recommendations* London (2011) (hereinafter 'INSOL *Consumer debt report I*').

⁴⁹ M Roestoff (LLD thesis University of Pretoria 2002) 475–481 *et seq* and M Roestoff and S Renke 'Solving the problem of overspending by individuals: International Guidelines' *Obiter* (2003) 4.

⁵⁰ INSOL International *Consumer debt report: Report of findings and recommendations* (2nd edition) London (2011) (hereinafter 'INSOL *Consumer debt report II*').

⁵¹ L Steyn 'Sink or swim? Debt review's ambivalent "lifeline" – a second sequel to "...a tale of two judgments" *Nedbank v Andrews* (240/2011) 2011 ZACPEHC 29 (10 May 2011); *First Rand Bank Ltd v Evans* 2011 4 SA 597 (KZD) and *First Rand Bank Ltd v Janse van Rensburg* 2012 2 All SA 186 (ECP)' *PELJ* (2012) 217.

⁵² Van Apeldoorn in the foreword to INSOL *Consumer debt report II*.

⁵³ H Coetzee (LLD thesis University of Pretoria 2015) 58.

⁵⁴ INSOL *Consumer debt report I* 14 and INSOL *Consumer debt report II* 15.

⁵⁵ INSOL *Consumer debt report I* 14 and INSOL *Consumer debt report II* 16.

[I]legislators should enact laws to provide for a fair and equitable,⁵⁶ efficient,⁵⁷ and cost-effective,⁵⁸ accessible,⁵⁹ and transparent⁶⁰ settlement and discharge of consumer and small business debts.⁶¹

The second principle is of especial importance to the purposes of this dissertation. It lobbies for some sort of a discharge of indebtedness. It highlights the shift from punishment to rehabilitation.⁶² Only one recommendation is made under the second principle and that is that

[I]legislators should offer consumer debtors a discharge of indebtedness as a tailpiece of a liquidation or rehabilitation procedure.⁶³

However, it also warns that debt relief procedures should not be seen as an easy way out, because this could impact on society's willingness to allow a fresh start for a debtor.⁶⁴

The third principle calls for extra-judicial rather than judicial proceedings, where there are equally effective options available.⁶⁵

In line with the European approach⁶⁶ and the post BAPCPA dispensation in the USA⁶⁷ a balanced approach is proposed, in that consumer credit risk should be fairly and equitably allocated.

⁵⁶ There should be a fair distribution of risk between the debtor and creditors in a predictable and equitable fashion.

⁵⁷ Complex and timewasting procedures should be avoided as consumer debtors usually do not have large estates. It is proposed that the administration of the process should be controlled by capable and efficient trustees or administrators.

⁵⁸ Costs should be shared by all stakeholders.

⁵⁹ Easy access to the system without several or intricate formalities creating obstacles to such access is preferred. In the event that the system makes provision for bankruptcy and rehabilitation procedures, it is proposed that the consumer should be free to choose between the two.

⁶⁰ Public confidence depends on transparency and therefore debtors and creditors should be able to monitor the process, have the opportunity to be heard, to receive notices and to be able to exercise their rights; *INSOL Consumer debt report I* 15–16 and *INSOL Consumer debt report II* 16–17.

⁶¹ The second report refers to 'debts of a problematic nature'. The debtor should have acted in good faith.

⁶² *INSOL Consumer debt report I* 22 and *INSOL Consumer debt report II* 15 and 20.

⁶³ Recommendation 5.

⁶⁴ *INSOL Consumer debt report I* 6 and *INSOL Consumer debt report II* 9.

⁶⁵ *INSOL Consumer debt report I* 6–7 and *INSOL Consumer debt report II* 10–11.

⁶⁶ Par 2.3.

⁶⁷ Par 2.2.

2.6 World Bank Report

In January 2011, the World Bank convened its Insolvency and Creditor/Debtor Regimes Task Force⁶⁸ to discuss revisions to a number of insolvency-related issues that was brought about by the global financial crisis. The Task Force had to consider the issue of natural person insolvency for the very first time.⁶⁹

A report was drafted and the final report⁷⁰ was published in December 2012. It was a reflective report, suggesting guidance and was not meant to be prescriptive.⁷¹

The report discusses six broad matters under the heading 'core legal attributes'. These are: general system design; the institutional framework; access to the system; creditor participation; procedural solutions and the payment of claims; and discharge.

Kilborn identified three salient themes in the World Bank Report, which he describes as 'high-level guidelines by which to evaluate existing and new personal insolvency systems'.⁷² These themes are of importance to this dissertation.

The first is a forced discharge of some or all debts of an over-indebted consumer. This is consistent with recommendations of other international organisations⁷³ and important for the purposes of this dissertation. Secondly, he identifies a widespread preference for informal negotiated workouts. However, the World Bank *Report* separates itself from former reports in that the practical difficulties inherent to this 'theoretically attractive goal' are emphasised. This is as such negotiations often fail.⁷⁴ The third theme is that some condition/s are set for relief. Something is expected in return for a discharge. Inherent in this theme is the call for cautious plan formulation to not unduly burden debtors.⁷⁵

⁶⁸ Hereinafter 'Task Force'.

⁶⁹ H Coetzee (LLD thesis University of Pretoria 2015) 66.

⁷⁰ The World Bank *Report*.

⁷¹ *Idem* 4–5 and 128.

⁷² JJ Kilborn 'Reflections of the World Bank's Report on the treatment of the insolvency of natural persons in the newest consumer bankruptcy laws: Colombia, Italy, Ireland' *Pace International Law Review* (2014) 4 *et seq* and M Roestoff *Litnet Akademies* (2016) 27–28.

⁷³ JJ Kilborn *Pace International Law Review* (2014) 4–5.

⁷⁴ *Idem* 5.

⁷⁵ *Idem* 5–6.

2.7 Conclusion

International principles and guidelines have, as a common intent, the facilitation of the re-entry of an over-indebted natural person into the economy. The honest but unfortunate debtor is not punished, but is rehabilitated. All of these discussed principles, guidelines and trends illustrate the use of a discharge of debt, although under different conditions, as a method of achieving this goal.⁷⁶ Initially the USA followed a ‘straight discharge’⁷⁷ dispensation, but later migrated to a position that is closer to an ‘earned discharge’ dispensation with the introduction of BAPCPA. Such introduction brought the USA approach in closer proximity to European systems.⁷⁸

It appears that it has become common cause that it is also in the best interest of creditors if debtors are rehabilitated and re-enter society and the economy constructively. It is not to the benefit of creditors, if a debtor is financially ruined and a burden on society.⁷⁹ A functioning natural person insolvency system thus benefit debtors, creditors and society. Consequently, all debtors, also those who cannot prove an advantage to creditors should be able to receive a discharge of their debts.

The following essential elements of an effective natural person insolvency system are identified, from this chapter. These elements are common denominators.

- a) Fair risk allocation between the debtor and creditors;⁸⁰
- b) All honest but unfortunate insolvents must be rehabilitated;⁸¹
- c) Rehabilitation consists of two elements, a discharge of debt and an exemption of certain property;⁸²
- d) Courts should not have a primary roll, although their involvement cannot be excluded;⁸³

⁷⁶ Para 2.2, 2.3, 2.4, 2.5 and 2.6.

⁷⁷ Par 2.2.

⁷⁸ Par 2.3.

⁷⁹ Para 2.2, 2.3, 2.4, 2.5 and 2.6.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

- e) The world is moving towards an ‘earned discharge’;⁸⁴ and
- f) Formal procedures are preferred to informal negotiated settlements.⁸⁵

⁸⁴ *ibid.*

⁸⁵ *ibid.*

CHAPTER 3: REHABILITATION IN TERMS OF THE INSOLVENCY ACT 24 OF 1936

3.1 Introduction

The South African natural person insolvency law system regulates rehabilitation, as a tailpiece of the sequestration procedure, in sections 124 to 129 of the Insolvency Act.¹ However, access to this system is extremely limited. The most important restriction is the condition that there must be a financial benefit, in other words an advantage to creditors, before a debtor can be sequestrated and therefore rehabilitated.²

In terms of the Insolvency Act an applicant must prove, on a balance of probabilities, that he owns enough realisable property sufficient to defray all costs of the sequestration and that the sequestration of the applicant's estate will be to the advantage of creditors.³

During 2000, at a time when interest rates were excessively high, our courts became overburdened with 'friendly sequestrations' and started cracking down on such applications,⁴ by for instance laying down stringent practise guidelines⁵ for such applications. Attorneys specialising in insolvency law were accused of running a 'fledgling cottage industry'.⁶ This forced desperate over-indebted debtors to revert to applications for the voluntary surrender of their estates.⁷ Our courts were and still are inundated with such applications.⁸ Again the courts cracked down on these applications by *inter alia* deciding that it is no longer to the advantage of creditors if concurrent creditors receive at least ten cents in the rand.⁹ The applicant now had to prove that the concurrent creditors

¹ Insolvency Act 24 of 1936 (hereinafter 'the Insolvency Act' or 'Act').

² *Idem* ss 6, 10 and 12. Also see M Roestoff 'Rehabilitasie in die Suid-Afrikaanse verbruikersinsolvensiereg: internasionale tendense en riglyne' *Litnet Akademies* (2016) 29 and 34.

³ *Idem* s 3(1). Also see *Ex parte Arntzen* [2012] JOL 29552 (KZP) 2.

⁴ See *Mthimkhulu v Rampersad* [2000] 3 All SA 512 (N) 514.

⁵ *Idem* 517.

⁶ *Ex parte Arntzen* [2012] JOL 29552 (KZP) 5 and 7.

⁷ S 3–6 of the Insolvency Act.

⁸ See *Ex parte Concato* [2016] 2 All SA 519 (WCC) 520.

⁹ See *Ex parte Ogunlaja* [2011] JOL 27029 (GNP) 3.

would receive at least 20 cents in the rand, for it to constitute an advantage to creditors.¹⁰ Strangely enough, this view is only followed in the High Court of South Africa in Gauteng.¹¹ Therefore, whether a creditor receives an advantage or not, depends on which side of a river he is situated at.

Once an insolvent gains access to the system he can be rehabilitated by bringing an application to the High Court.¹² If no such application is lodged he has to be willing to wait ten years after his sequestration, in which case he will be automatically rehabilitated.¹³

In this chapter, the conditions that a debtor must meet in order to be rehabilitated,¹⁴ after sequestration has already taken place, are discussed in chronological order. How the courts have applied their discretion to rehabilitate an insolvent in the past is also investigated by referring to reported case law. Furthermore, ancillary matters relating to rehabilitation and the court's discretion are considered.

The concerned legislative provisions are measured against international principles, trends and guidelines throughout discussions.¹⁵

3.2 The circumstances under which an insolvent may be rehabilitated

3.2.1 Section 124(1) and section 124 (5)

Where a composition¹⁶ was agreed to and where at least fifty cents in the rand was paid, in respect of all claims proven against the estate, or where security was given for such payment, the insolvent may immediately apply for rehabilitation.¹⁷

¹⁰ *Ibid.*

¹¹ See *Ex parte Concato* [2016] 2 All SA 519 (WCC) 527 for the rule in the Western Cape compared to See *Ex parte Ogunlaja* [2011] JOL 27029 (GNP) 3 for the rule in Gauteng.

¹² *Idem* s 124.

¹³ *Idem* s 127A.

¹⁴ *Idem* s 124.

¹⁵ Ch 2 par 2.7.

¹⁶ A composition is an agreement that has been reached between the insolvent and his creditors for the payment of their claims. See s 119 of the Act.

¹⁷ S 124 (1); See *Ex parte Woolf* [1958] 4 All SA 191 (N) 192–193, where the Master recommended that the court grant conditional rehabilitation, under circumstances where the composition failed due to no fault of the insolvent. The court declined to make the rehabilitation conditional and granted unconditional rehabilitation.

An insolvent may also apply for his rehabilitation immediately after he has paid all the proven claims against the estate and interest thereon and all the costs of sequestration, on condition that the Master has confirmed a plan of distribution providing for such payment.¹⁸

Subsections 124(1) and 124(5) compare well with international principles and guidelines.¹⁹ It attempts to motivate the insolvent to give his co-operation to his trustee and creditors by rewarding such an insolvent with an early rehabilitation. These sections therefore distinguish between the honest but unfortunate debtor and the dishonest debtor who will usually try and hide his assets from his trustee and creditors. Consequently, these provisions are in line with international principles and guidelines.²⁰

3.2.2 Section 124(3)

The insolvent may apply for rehabilitation after the expiration of a period of six months from the sequestration of his estate, on conditions that: no claim has been proved against his estate; he was not convicted of any offence mentioned in section 124(2)(c) of the Insolvency Act; and his estate has never been sequestrated previously.²¹ In these circumstances no recommendation by the Master is required.²² It is competent for a court to grant a rehabilitation order under this section in a situation where no trustee was appointed and where it was consequently impossible for creditors to prove claims.²³ If an insolvent is rehabilitated under this section, then his estate reinvest in him.²⁴

¹⁸ S 124 (5); See *Ex parte Driemeyer* [1967] 2 All SA 353 (N) 354–357, where the applicant’s application for his rehabilitation in terms of this section was dismissed. The Master did not confirm a plan of distribution providing for such payment. Consequently, the court found that it did not have jurisdiction to grant the order in such circumstances and that this was not condonable in terms of s 157(1) of the Act.

¹⁹ Ch 2 par 2.7.

²⁰ *Ibid.* The American ‘fresh start’ principle also encourages a debtor to give his co-operation. These sections of the Insolvency Act are similar to the ‘earned discharge’ principle adopted by the USA with BAPCPA and which principle is also followed in Europe.

²¹ In *Ex parte Fernandez* [1965] 3 All SA 264 (O) 266–267 the court found that a partner in a partnership can be rehabilitated in terms of this section if no claims have been proven against his estate, notwithstanding the fact that claims were proved against the estate of the partnership.

²² S 124(2) of the Act.

²³ See *Ex parte Hellman* 1963 (3) SA 27 (T) 30.

²⁴ S 129(2) of the Act.

It appears that the intention of the legislator with this section is to punish a creditor who does not prove his claim within six months after date of sequestration. The creditor's claim is discharged after the insolvent's rehabilitation.²⁵ It is important to keep in mind that a creditor can only prove his claim at a meeting of creditors²⁶ and it is completely out of the hands of the creditor when this meeting will take place.²⁷

Therefore, this provision is contrary to international principles and guidelines. Internationally a balanced approach is proposed, in that consumer credit risk should be fairly and equitably allocated.²⁸ Neither the honest debtor nor the honest creditor should be punished.

In *Ex parte Hellman*²⁹ an insolvent applied to court for his rehabilitation in terms of section 124(3) of the Insolvency Act. He complied with all of the statutory requirements contained in this section. The insolvent, in this case, was in the same situation than so many other insolvents, in that the Master failed to appoint a trustee in his estate and it was therefore impossible for any creditor to prove a claim. It was just as much impossible for the Master to confirm a first account in his estate. The Master filed a report objecting against his rehabilitation by *inter alia* making the following statements in his report:

I am of the opinion that the insolvent cannot be rehabilitated, but should make application in terms of sec 54(5) of the Insolvency Act for setting aside the sequestration order. I have no objection to this procedure being followed. The Insolvency Act of 1936 made special provision for insolvents who could not otherwise be rehabilitated, to be relieved of their disability by means of the provisions of sec 54(5), but unfortunately a loophole for mal-practice was created by sec 124(3) as I will indicate further on. Historically the first precedent was established in *Ex parte Davis*, 1903 T.S. 83, and was followed up to the promulgation of the 1936 Act. It may easily be said that this case and others I am quoting below are easily distinguishable, but what I am concerned with is the principle (*sic*).

The court found that the Master was incorrect in his assumption that s 124(3) only applies to situations where a trustee was appointed. The court also found that the Master was

²⁵ S 129(1)(b) of the Act.

²⁶ *Idem* s 44.

²⁷ *Idem* s 39.

²⁸ Ch 2 par 2.7.

²⁹ [1963] 3 All SA 31 (T) 36.

incorrect in assuming that s 54(5) should be used to set aside the sequestration order although the Applicant complied with the requirements as set out in s 124(3). The court did share certain concerns with the Master and made the following order:

1) No order is made on the application; 2) Leave is granted to the applicant to re-apply for rehabilitation, should he so desire, on the same papers and after he has filed a supplementary affidavit in which he must explain to the satisfaction of the Court hearing any such re-application, the following factors: ...

3.2.3 Section 124(2)(a)

An insolvent may apply for his rehabilitation after twelve months have elapsed from the confirmation³⁰ by the Master of the first account in his estate, on conditions that his estate has not previously been sequestrated and he has not been found guilty of any fraudulent act in relation to his existing or a previous insolvency. If the period of twelve months after confirmation of his account is within four years after sequestration, then the insolvent will have to obtain the Master's recommendation.³¹ If it is after four years, the insolvent will only need a report³² from the Master and not his recommendation.³³

3.2.4 Section 124(2)(b)

If an insolvent's estate was previously sequestrated, then the insolvent may apply for his rehabilitation three years after confirmation of his first account, on condition that he has not been found guilty of any fraudulent act in relation to his existing or a previous insolvency.³⁴ If it is after four years of date of sequestration, the insolvent will only need a report from the Master and not his recommendation.³⁵

³⁰ It is the duty the trustee to lodge a liquidation and distribution account with the Master. If the Master is satisfied with the account, then the Master will confirm this account in terms of s 112 of the Act. This account is then final.

³¹ The Master's recommendation must be based on all the information available to him. See *Chairperson, Walmer Estate Residents' Community Forum v City of Cape Town* 2009 (2) SA 175 (C) 178.

³² S 127(1) of the Act.

³³ *Idem* s 124(2).

³⁴ See *Ex parte Naidoo* [1965] 4 All SA 322 (N) 324, where the insolvent successfully applied for this rehabilitation under this section, notwithstanding the fact that his trustee laid a criminal case against him. However, he was not convicted at such stage.

³⁵ S 124(2) of the Act.

3.2.5 Section 124(2)(c)

If the insolvent was found guilty of a fraudulent act in relation to his existing or a previous insolvency, then he can only apply for his rehabilitation five years after the date of his conviction. A contravention of a section of the Insolvency Act, other than sections 132,³⁶ 133³⁷ and 134,³⁸ cannot *per se* be regarded as constituting a 'fraudulent act' in relation to the insolvent's insolvency, within the meaning of section 124(2)(c) of the Act.³⁹

This is in line with international trends, that only the honest debtor should receive the advantages of a discharge and rehabilitation.⁴⁰

3.2.6 Section 127A

An insolvent is deemed to be automatically rehabilitated upon the expiry of a period of ten years from the date of the sequestration of his estate.⁴¹ This is one of the most concerning aspects of rehabilitation in South Africa as it does not compare well to international principles and guidelines.⁴² This time period will be discussed in more detail in the chapters that follow and will be compared to that of other jurisdictions.

3.3 The court's discretion:

3.3.1 The insolvent's rehabilitation

The court may refuse to rehabilitate an insolvent, postpone the application for rehabilitation or grant the application, either absolutely or conditionally, irrespective of whether the application is opposed or not.⁴³ Consequently, the court's powers are discretionary and an insolvent does not have a right to be rehabilitated.⁴⁴ Therefore, the onus rests on the applicant to show that the court's discretion should be exercised in his favour.⁴⁵

³⁶ Concealing or destroying books or assets.

³⁷ Concealment of liability or pretext to existence of assets.

³⁸ Failure to keep proper records.

³⁹ See *Ex parte Koch* [1983] 3 All SA 249 (SE) 253.

⁴⁰ Ch 2 par 2.7.

⁴¹ S 127A of the Act.

⁴² Ch 2 par 2.7.

⁴³ S 127(2) of the Act.

⁴⁴ See *Ex parte Hittersay* [1974] 4 All SA 296 (SWA) 299.

⁴⁵ See *Ex parte Stegmann* 1936 OPD 38 43.

3.3.2 Property

All property acquired by the insolvent after his sequestration, but before his rehabilitation, becomes part of such insolvent estate, unless excluded by express statutory provisions.⁴⁶ Such excluded property will for instance be money received by the insolvent by way of pension,⁴⁷ or money received by the insolvent for work done or services rendered while being sequestrated and assets bought with such money.⁴⁸

Such property, which is excluded from the insolvent estate, remain vested in the insolvent after rehabilitation. Property included in the insolvent estate remain vested in the trustee after rehabilitation,⁴⁹ unless the insolvent is rehabilitated in terms of section 124(3) of the Insolvency Act, in which case the Insolvent is reinvested with his property.⁵⁰

Courts have come to assist insolvents in granting declaratory orders in instances such as where the insolvent have inherited during his insolvency and where a dispute exist between the insolvent and his trustee about who the owner of such property is.⁵¹ However, the court will not make a declaratory order, unless there are good reasons for doing so.⁵²

3.3.3 The setting aside of a sequestration order

An insolvent is, in certain circumstances, entitled to apply to have his sequestration order set aside where he is not entitled to apply for his rehabilitation. An example is where a trustee fails to lodge a liquidation and distribution account.⁵³ Where the Master fails to

⁴⁶ PH Meskin *Insolvency law and its operation in winding up* LexisNexis (1990) par 5.13.

⁴⁷ *Idem* par 5.14.2.

⁴⁸ *Idem* par 5.14.1.

⁴⁹ S 25(1) of the Act.

⁵⁰ *Idem* s 129(2).

⁵¹ In *Ex parte Kriel* [1949] 2 All SA 129 (O) 135 the court found that a declaratory order should only be granted if the notice of intention to apply for a declaratory order has fully described the property and the manner in which the insolvent acquired it. Such notice must be published in the Government Gazette and be served on the Master, the trustee and all creditors (proven and unproven).

⁵² In *Ex parte Noriskin* [1962] 1 All SA 400 (N) 401–402 the court refused to make a declaratory order that the insolvent is re-invested with his estate where he was rehabilitated under s 124 (3) of the Act. This is as the court was of the opinion that the legal position has already been clearly defined and that there are no disputes. See par 3.2.2.

⁵³ In *Ex parte Friedman* 1923 WLD 138 the insolvent applied for his rehabilitation after his trustee died. His trustee died before he could lodge a liquidation and distribution account with the Master and nobody could find the trustee's file. The court refused to rehabilitate the insolvent and instead set the sequestration order aside.

appoint a trustee at a meeting of creditors (that is convened to appoint a trustee), the Master or the insolvent with the Master's consent, may also apply to court to set the sequestration order aside.⁵⁴

In certain circumstances, it is possible to elect to have the sequestration order set aside,⁵⁵ or to apply for rehabilitation.⁵⁶ This would be the case where a trustee is not appointed. The sequestration order can then be set aside in terms of section 54(5) of the Act, or the insolvent can be rehabilitated in terms of section 124(3) of the Act, because the creditors would not have been able to proof their claims within 6 months after sequestration.⁵⁷

The setting aside of a sequestration order has the effect of restoring the *status quo ante*, which in turn will have the effect that the insolvent will again be liable for his debts.⁵⁸ In contrast, an order for his rehabilitation will discharge him in great measure⁵⁹ from debt due by him at the date of sequestration. It would therefore be to the advantage of the insolvent if he is rather rehabilitated.⁶⁰

3.3.4 Postponements

Although a postponement of the hearing of an application for rehabilitation is usually granted by the court at the insistence of the insolvent or his creditors, the court may postpone the hearing *suo motu*,⁶¹ particularly where it requires further information to be produced.⁶²

⁵⁴ S 54(5) of the Act.

⁵⁵ *Ibid.*

⁵⁶ S 124(3) of the Act.

⁵⁷ Par 3.2.2.

⁵⁸ S 54(5) of the Act.

⁵⁹ *Idem* s 129(1)(b).

⁶⁰ E Bertelsmann, RG Evans, A Harris, M Kelly-Louw, A Loubser, M Roestoff, A Smit, L Stander and L Steyn Nagel C (ed) *Mars: The law of insolvency in South Africa* (9th edition) Juta Cape Town (2008) 561.

⁶¹ S 127(2) of the Act.

⁶² See *Ex parte Le Roux* 1996 (2) SA 419 (C) 424.

3.3.5 Unconditional and conditional grant of a rehabilitation orders

The court has a discretion, when a rehabilitation order is considered, to attach such conditions thereto as it deems fit.⁶³ This is the case even where the application is made in consequence of the acceptance of a composition,⁶⁴ and even in favour of unproved creditors, whose claims have prescribed.⁶⁵ However, special and sound reasons must exist to justify the imposition of a condition,⁶⁶ such as blameworthy conduct, or that the insolvent is well able to pay the whole or part of the deficiency in the estate.⁶⁷

If an insolvent's insolvency was caused purely by misfortune and his conduct had not been reprehensible, the court will usually grant an order for his rehabilitation without attaching any condition thereto.⁶⁸ This is in accordance with international principles and guidelines which advocates for the unconditional rehabilitation of the honest but unfortunate debtor.⁶⁹

3.3.6 Suspension of rehabilitation orders

The court has the power to suspend the taking effect of a rehabilitation order.⁷⁰ This will for instance be prudent when the insolvent conducted his business in a reckless manner resulting in only a very small dividend to creditors.⁷¹ The court may also suspend the rehabilitation of an insolvent, and render his rehabilitation subject to him refunding contributions paid by creditors.⁷² If the insolvent fails to disclose in his application for rehabilitation that his employer is a private company running a purely family concern, the court may also suspend his rehabilitation.⁷³ The court may take any conduct of an

⁶³ S 127(2) and (3) of the Act. See *Ex parte Matthee* [1975] 1 All SA 579 (O) 586 where the court granted rehabilitation on condition that the insolvent make a payment to his trustee and to one of his creditors.

⁶⁴ See *Ex parte Sheen* 1914 TPD 586 and *Ex parte Tait* 1933 TPD 413.

⁶⁵ See *Ex parte Vermeulen* 1934 WLD 178 at 179.

⁶⁶ See *Ex parte Cutting* 1943 CPD 51 at 52.

⁶⁷ In *Ex parte Roos* [1955] 1 All SA 281 (O) 285 the court ordered that the insolvent be rehabilitated, but that his rehabilitation does not take effect until he pays to his trustee an amount which would increase the dividends to his concurrent creditors.

⁶⁸ See *Ex parte Meine* 1937 CPD 154 and *Ex parte Fowler* 1937 TPD 353.

⁶⁹ Ch 2 par 2.7.

⁷⁰ S 127(2) of the Act. See *Ex parte Butler* 1942 CPD 177.

⁷¹ See *Ex parte Messaris* 1937 CPD 278 at 278.

⁷² See *Ex parte Goshalia* 1957 (2) SA 182 (N) 182.

⁷³ In *Ex parte Palmer* [1961] 1 All SA 232 (W) 233–235 the applicant contended that he was working as a traveling salesman and barely earns enough to support his sickly wife and his children. However, one of his creditors

insolvent, which seems to be unsatisfactory, into account when considering the suspension of an insolvent's rehabilitation.⁷⁴

3.3.7 The refusal of a rehabilitation application

Examples of cases where the courts have refused to grant rehabilitation orders are where the insolvent conducted his business in an improper and negligent manner,⁷⁵ where he failed to take proper books of account⁷⁶ or where he ran up excessive debts shortly before sequestration.⁷⁷ The court may also take into account that an insolvent was difficult and refused to co-operate with his trustee when considering the refusal of an application for rehabilitation.⁷⁸ The rehabilitation of an insolvent may further be denied if he sidestepped the inhibitions of his insolvency by living in luxury, without making contributions to creditors.⁷⁹ In essence, an application for rehabilitation must fully disclose that the insolvent had learned the lessons of insolvency or had a genuine appreciation of the possible hardship his sequestration might have caused his creditors.⁸⁰

The court will ordinarily not refuse rehabilitation merely because there was a large excess of liabilities over assets, but it may be influenced to refuse rehabilitation if there are other unsatisfactory features as well, for example that the insolvent recklessly incurred the debts.⁸¹

3.4 Conclusion

A creditor cannot proceed to execute against a debtor's estate after sequestration has taken place.⁸² However, a discharge of the debtor's debt only takes place after the

opposed the application and brought to the attention of the court that he is in fact employed by a company of which his wife and brother are the only shareholders and that this company made a substantial profit. The court found that the applicant failed to disclose material facts and deliberately attempted to mislead the court. His rehabilitation was granted, but the working of the order was suspended for about 3 months.

⁷⁴ See *Ex parte Naidoo* 1946 NLR 43 at 44.

⁷⁵ See *Ex parte Bloomberg* 1914 EDL 1 at 2.

⁷⁶ See *Ex parte Hajee* 1939 NPD 197, where the insolvent was convicted of not keeping proper books of account in terms of s 138 of the Insolvency Act 32 of 1916.

⁷⁷ See *Ex parte Ezer* 1934 CPD 65.

⁷⁸ See *Greub v The Master* 1999 (1) SA 746 (C) 749.

⁷⁹ See *Ex parte Porritt* [1991] 3 All SA 156 (N) 165.

⁸⁰ See *Ex parte Le Roux* 1996 (2) SA 419 (C) 423–424.

⁸¹ See *Ex parte du Toit* 1964 (3) SA 159 (T) 161.

⁸² S 5 of the Act.

insolvent has been rehabilitated.⁸³ Rehabilitation usually follows a court application,⁸⁴ but can also occur automatically after a period of ten years.⁸⁵ The debts of a debtor are discharged as it stands at the date of sequestration, on the date of rehabilitation.⁸⁶

In South Africa, it is to a large extent out of the hands of the insolvent, when he will be able to rehabilitate.⁸⁷ For instance, in terms of section 124(2) of the Act, the first time that an insolvent can be rehabilitated is twelve months after the confirmation of his first liquidation and distribution account.⁸⁸ However, it is completely under the control of his trustee if and when he lodges the first liquidation and distribution account with the Master and in turn it is completely under the control of the Master when the account is confirmed. It depends on how fast the insolvent's trustee complies with his duties, such as to arrange the creditors meetings to enable the creditors to prove their claims,⁸⁹ and to sell the assets of the insolvent estate.⁹⁰ After the first liquidation and distribution account is lodged with the Master of the High Court, it is in the hands of the Master when and if he confirms the account.⁹¹ This does not compare well to the 'earned discharge' principle followed internationally.⁹²

Extraordinarily, it can also be to the insolvent's advantage when his trustee is lacklustre and fails to arrange the creditors' meetings within six months after date of sequestration, and the insolvent's creditors do not receive the opportunity to proof their claims. Not only will an insolvent be able to rehabilitate six months from the date of his sequestration, but his estate will reinvest in him.⁹³ It might be argued that it is unfair to a creditor, who does not receive the opportunity to proof his claim (because of no fault of his own), that the insolvent ends up with all his assets without any liabilities.⁹⁴ This subsection is therefore

⁸³ Ch 1 par 1.1.

⁸⁴ Par 3.2.

⁸⁵ Par 3.2.7.

⁸⁶ Ch 1 par 1.1.

⁸⁷ Par 3.2.

⁸⁸ Para 3.2.3 – 3.2.5.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² Ch 2 Par 2.7.

⁹³ Par 3.2.2.

⁹⁴ *Ibid.*

open to abuse by insolvents and it is exacerbated by the fact that such an application for rehabilitation is not served on the creditors and is often brought at a time when a trustee has not yet been appointed.⁹⁵

It is unclear what the intention of the legislator is, with section 124(3) of the Insolvency Act. If it is the intention of the legislator that the creditors should be punished if they do not prove claims against the estate within six months after sequestration (by losing their claims and their surety) then surely the legislator should have made it possible for them to do so unconditionally and should not have made their ability to proof their claims subject to the Master and the trustee's conduct. Although not the subject of this dissertation, it seems that section 129(2) could be unconstitutional, in that it seemingly permits arbitrary deprivation of property.⁹⁶

Another issue is that an insolvent whose trustee fails to lodge a liquidation and distribution account with the Master, might also feel aggrieved that he has to wait ten years to rehabilitate, because of no fault of his own.⁹⁷ Understandably, in such instances, an insolvent will be reluctant to bring an application to set aside his sequestration,⁹⁸ as he will then not receive a discharge of his debt.⁹⁹

At this time a reasonable conclusion might be reached that the South African insolvency law system discriminates against debtors by:

- a. excluding certain debtors from the sequestration procedure and therefore from receiving a discharge,¹⁰⁰ and
- b. allowing for a discharge of the debts of certain debtors six months after sequestration¹⁰¹ and others only ten years thereafter,¹⁰² without any justification;

⁹⁵ Par 3.2.2.

⁹⁶ S 25(1) Constitution of the Republic of South Africa, 1996.

⁹⁷ Par 3.2.6.

⁹⁸ Par 3.3.3.

⁹⁹ *Ibid.*

¹⁰⁰ Par 3.1.

¹⁰¹ Par 3.2.2.

¹⁰² Par 3.2.6.

while our courts are trying to treat a symptom of an illness that does not exist.¹⁰³

A reasonable inference can be made that sections 124–129 of the Insolvency Act are generally clumsy¹⁰⁴, creates unintended absurdities, is discriminatory¹⁰⁵ and possibly unconstitutional.¹⁰⁶ It also does not compare well to international trends and guidelines.¹⁰⁷

¹⁰³ Par 3.1.

¹⁰⁴ Par 3.2.

¹⁰⁵ Par 3.1.

¹⁰⁶ *Ibid.*

¹⁰⁷ Ch 2 par 2.7.

CHAPTER 4: REHABILITATION IN THE UNITED STATES OF AMERICA AND ENGLAND AND WALES

4.1 Introduction

In this chapter, aspects of the insolvency law system of South Africa,¹ in relation to the rehabilitation of an insolvent, is compared to that of the United States of America² and of England and Wales.³ Here, the foreign jurisdictions' relevant features are also evaluated against international guidelines extracted in chapter two.⁴

The aspects which will be compared will include the different procedures, access to a discharge of debt, whether the systems are creditor or debtor friendly and the overall intention with the legislation.

4.2 SA v USA

The rehabilitation of an insolvent is regulated in the USA by the Bankruptcy Reform Act of 1978. The USA have initially adopted an ultra-liberal policy known as the fresh-start policy,⁵ which has been criticised as being excessively generous and naïve.⁶

The Bankruptcy Reform Act⁷ offers two debt relief procedures. These are liquidation under chapter 7⁸ and rehabilitation under chapters 11⁹ and 13.¹⁰

¹ Hereinafter 'SA'.

² Hereinafter 'USA'.

³ Hereinafter 'The English system'.

⁴ Ch 2 par 2.7.

⁵ JJ Kilborn 'Mercy, rehabilitation, and *quid pro quo*: A radical reassessment of individual bankruptcy' *Ohio State Law Journal* (2003) 876.

⁶ J Ziegel 'The challenges of comparative consumer insolvencies' *Penn State International Law Review* (2004–2005) 646 and authorities cited there. See also the pro-liberal arguments noted in 647–648.

⁷ Bankruptcy Reform Act of 1978.

⁸ *Idem* ss 701–784.

⁹ *Idem* ss 1101–1174.

¹⁰ *Idem* ss 1301–1330.

Chapter 7 contains the most common form of bankruptcy, previously referred to as 'straight bankruptcy'. These petitions may be filed involuntarily¹¹ or voluntarily.¹² However, most of these petitions are filed voluntarily.¹³ It is interesting to note that the debtor does not have to be insolvent to access the system.¹⁴ The debtor who files for bankruptcy must surrender all non-exempt assets to his trustee and he receives an immediate and unconditional discharge in return.¹⁵ His trustee will then sell the property and distribute the proceeds to his creditors.¹⁶ Chapter 7 has two goals: the liquidation of the debtor's assets and the granting of a discharge. As regards the discharge, the debtor will always be entitled thereto regardless of the deficit in his estate, or the amount that his creditors will receive.¹⁷ However, the discharge only relates to unsecured debt. The debtor has a choice to either pay secured debts, sign reaffirmation agreements or surrender the property that serves as security.¹⁸ Reaffirmation agreements entails a promise by the debtor to pay a debt, despite its discharge. Acceptance of the offer of reaffirmation enables the debtor to keep the encumbered property and pay the debt over time. Reaffirmation of unsecured debt would seldom benefit the debtor.¹⁹

Chapter 13 provides for the rescheduling of debts of a debtor with a steady and regular income.²⁰ This chapter provides for a payment plan, in terms of which future income is utilised for the total or partial payment of claims. Maximum thresholds of debt liability and maximum duration of a repayment plan limits the accessibility of this procedure.²¹ A discharge in terms of chapter 13 is only granted when the debtor has made full payment

¹¹ *Idem* s 303(a).

¹² *Idem* s 301.

¹³ RG Evans *A critical analysis of problem areas in respect of assets of insolvent estates of individuals* (LLD thesis University of Pretoria 2008) 157.

¹⁴ N Huls 'A next step in debt enforcement: The merger of debt help and debt collection' *Journal of Consumer Policy* (2012) 498–499.

¹⁵ S 727 of the Bankruptcy Reform Act of 1978 *et seq* and JJ Kilborn *Ohio State Law Journal* (2003) 857.

¹⁶ *Idem* s 726.

¹⁷ This stands in absolute contrast to the South African system, where the debtor has to prove an advantage to his creditors, before he can access the system. See ch 3 par 3.1.

¹⁸ JT Ferriell and EJ Janger *Understanding bankruptcy* LexisNexis (2009) 603.

¹⁹ A Boraine and M Roestoff 'Developments in American consumer bankruptcy law: Lessons for South Africa' *Obiter* (2000) 49 and authority cited therein.

²⁰ S 109(e) of the Bankruptcy Reform Act of 1978.

²¹ *Idem* s 1322(d).

in terms of the payment plan.²² However, a debtor may request a chapter 13 'hardship discharge'. In such a case the court may only grant a discharge if the debtor's failure to complete the plan is due to circumstances for which the debtor should not be held accountable, the creditors have received at least the liquidation value of their unsecured claims and modification of the plan is not practicable.²³

Chapter 11 provides for a reorganisation process similar to that of chapter 13. However, the chapter 11 procedure are more expensive and complicated than that of chapter 13 and therefore generally only used by businesses.²⁴

On 17 October 2005 most of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act²⁵ came into effect. The BAPCPA has revised the very liberal fresh-start philosophy by: denying the debtor immediate relief under chapter 7, in instances where it appears that he will be able to pay a portion of his debt, from future income; introducing compulsory counselling;²⁶ and a means test.²⁷ The BAPCPA has been severely criticised by renowned academics, as being a step backwards.²⁸ Kilborn²⁹ argues that the introduction of the compulsory means test has led to excessive paper work and described it as a 'fool's errand'.³⁰

Despite the introduction of BAPCPA, the USA system can still be described as pro debtor,³¹ as it continues to provide alternative relief and a consequential discharge in the form of chapter 13 to those who do not qualify for a discharge in terms of chapter 7.³²

²² *Idem* s 1328.

²³ *Idem* s 1328(b).

²⁴ JT Ferriell and EJ Janger LexisNexis (2009) 191.

²⁵ 2005. Hereinafter 'BAPCPA'.

²⁶ S 109(h) of BAPCPA.

²⁷ *Idem* s 707(b)(2).

²⁸ See J Calitz 'Developments in the United States, consumer bankruptcy law: A South African perspective' *Obiter* (2007) 407–408.

²⁹ JJ Kilborn 'Still chasing chimeras but finally slaying some dragons in the quest for consumer bankruptcy reform' *Loyola Consumer Law Review* (2012) 4–5.

³⁰ *Ibid.*

³¹ M Roestoff 'n *Kritiese evaluasie van skuldverligtingsmaatreëls vir individue in die Suid-Afrikaanse insolvensiereg* (LLD thesis University of Pretoria 2002) 240–241. Roestoff discusses the proposed bill in 2002, which came into effect in 2005.

³² *Ibid.* This is contrary to the SA system that only provides for a discharge in sequestration proceedings. See ch 3 par 3.4.

Before the implementation of the BAPCPA the debtor could have self-selected which procedure he wanted to follow.

The rehabilitation of an insolvent in SA is regulated by sections 124–130 of the Insolvency Act.³³ The SA system stands in absolute contrast to the ‘fresh start’ principle of the USA. Where the system in the USA is regarded as pro-debtor,³⁴ the SA system can be described as archaic,³⁵ as it still prescribes to the notion of advantage for creditors.³⁶

The Insolvency Act, through the sequestration procedure, provides for the only form of a discharge in SA. It is because of this, the primary form of debt relief for natural persons in SA. However, the discharge is not the primary aim of the Act,³⁷ as an advantage for creditors remains the main intention. The SA system is a pro-creditor system, contrary to that of the USA, and other international trends and best practise.³⁸

In SA, rehabilitation is only available after a sequestration order has been granted, and therefore excludes natural persons who do not qualify for the sequestration procedure.³⁹ The most debilitating aspect of the SA rehabilitation procedure is the exclusivity created by the requirement that a debtor must proof an advantage to the creditors, before he can be sequestrated and consequently rehabilitated.⁴⁰ The SA system therefore excludes financially over committed individuals who needs a discharge the most. In SA, contrary to the USA, a natural person can be ‘too broke to go bankrupt’.⁴¹ This is as in the USA a debtor immediately receives an automatic discharge, if his petition is accepted in terms

³³ 24 of 1936. See ch 3, where rehabilitation in terms of the South African system was discussed in some detail.

³⁴ JJ Kilborn *Ohio State Law Journal* (2003) 876.

³⁵ H Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* (LLD thesis University of Pretoria 2015) 101.

³⁶ Ss 6(1), 10(c), and 12(1)(c) of the Insolvency Act 24 of 1936.

³⁷ *Ex parte Ford* [2009] JOL 23412 (WCC) 14. *Ex parte Shmukler-Tshiko* [2013] JOL 29999 (GSJ). See A Boraine and M Roestoff ‘Revisiting the state of consumer insolvency in South Africa after twenty years: The courts’ approach, international guidelines and an appeal for urgent law reform (1)’ *THRHR* (2014), for a discussion of the latter case.

³⁸ H Coetzee (LLD thesis University of Pretoria 2015) 91–100.

³⁹ Ch 3 par 3.1.

⁴⁰ Ss 6(1), 10(c), and 12(1)(c) of the South African Insolvency Act.

⁴¹ M Rochelle ‘Lowering the penalties for failure: Using the insolvency law as a tool for spurring economic growth; The American experience, and possible uses for South Africa’ *THRHR* (1996) 319.

of chapter 7.⁴² If a debtor does not qualify for chapter 7 relief, chapter 13 is available leading once again to a discharge of debt. In SA a debtor will only receive an automatic discharge ten years after his sequestration,⁴³ if he qualifies therefor. Also, no discharge is available in alternative debt relief measures, even where debtors are fortunate enough to gain access to such measures.⁴⁴

4.3 SA v The English system

The SA insolvency law system was greatly influenced by English law.⁴⁵ However, English law evolved in response to modern needs, whilst SA insolvency law stagnated.⁴⁶

English law provides for bankruptcy⁴⁷ and three formal statutory alternative debt relief procedures. These are individual voluntary arrangements,⁴⁸ the debt relief order,⁴⁹ and the county court administration order.⁵⁰

In contrast to the SA system,⁵¹ the English system does not discriminate on financial grounds and even offers a specific procedure for the so-called, No Income No Assets (NINA) debtors,⁵² by means of the debt relief order.⁵³ Unlike the position in SA all honest but unfortunate debtors have at least a formal recourse available.

Where the SA system is based in the philosophy of punishment, the English system has an element of benevolence to it,⁵⁴ such as compassion for the debtor. The SA sequestration procedure is founded in the concept of an advantage for creditors and is

⁴² Bankruptcy Reform Act of 1978.

⁴³ S 127A of the Insolvency Act.

⁴⁴ See ch 1 par 1.1.

⁴⁵ M Roestoff (LLD thesis University of Pretoria 2002) 8; RG Evans (LLD thesis University of Pretoria 2008); NJ Maghembe *A proposed discharge dispensation for consumer debtors in Tanzania* (LLD thesis University of Pretoria 2013) 114–115.

⁴⁶ H Coetzee (LLD thesis University of Pretoria 2015) 355.

⁴⁷ See pt 9 of the second group of parts of the Insolvency Act 1986.

⁴⁸ *Idem* pt 8.

⁴⁹ *Idem* pt 7A.

⁵⁰ Ss 112–117 of the County Court Administration Act 1984.

⁵¹ Ch 3 par 3.4.

⁵² H Coetzee and M Roestoff 'Consumer debt relief in South Africa – Should the insolvency system provide for NINA debtors?' Lessons from New Zealand *International Insolvency Review* (2013) 189.

⁵³ Pt 7A of the second group of parts of the Insolvency Act 1986.

⁵⁴ IF Fletcher *The law of insolvency* (4th edition) Sweet and Maxwell London (2009) read together with *The law of insolvency second cumulative supplement to the fourth edition* Sweet and Maxwell London (2014) 43.

creditor friendly,⁵⁵ where the English law adopted a position that the interest of the debtor and society are best served by legal procedures that aim to provide debt relief where there is no realistic prospect of repaying debt and to thereby offer hope for the future in the form of a rehabilitation and a fresh-start, following a discharge from bankruptcy.⁵⁶

In the English system, the Insolvency Act⁵⁷ regulates both individual and corporate insolvency. This is contrary to the SA system where various acts contains chapters and sections about insolvency or liquidation.⁵⁸ Section 279 of the Insolvency Act provides that an automatic discharge takes place once a period of one year has lapsed since the bankruptcy order was made. Section 279 to 282 describes the termination of bankruptcy upon a discharge or annulment. Annulment is competent where it appears to the court that the bankruptcy order should not have been made⁵⁹ or where, to the extent required by the rules,⁶⁰ the bankrupt's debts and expenses in relation to the procedure were paid or security has (to the satisfaction of the court) been provided therefor.⁶¹ The annulment of a bankruptcy order in the English system is similar to the setting aside of a sequestration order in the SA system.⁶²

Contrary to the English system, the SA system has an unbalanced focus on the advantage for creditors.⁶³ The English system on the other hand complies with international trends and principles, focussing on debtor rehabilitation.⁶⁴

The English system has been criticised for being complex and confusing, with debtors finding it difficult to choose between the different options.⁶⁵ As in the case with England

⁵⁵ H Coetzee (LLD thesis University of Pretoria 2015) 117–127.

⁵⁶ IF Fletcher Sweet and Maxwell London (2009) read together with Sweet and Maxwell London (2014) 43.

⁵⁷ 1986.

⁵⁸ See for instance ch 6 of the Companies Act 71 of 2008 that relates to business rescue and compromise with creditors and s 84(1A)(c) of the Banks Act 94 of 1990.

⁵⁹ S 282(1)(a).

⁶⁰ See r 6.211.

⁶¹ S 282(1)(b).

⁶² See ch 3 par 3.3.3 for discussions on the setting aside of a sequestration order in SA.

⁶³ H Coetzee (LLD thesis University of Pretoria 2015) 4, 117–127 and ch 3 hereof in general with regards to the SA system.

⁶⁴ IF Fletcher Sweet and Maxwell London (2009) read together with Sweet and Maxwell London (2014) 43.

⁶⁵ A Walters 'Individual voluntary arrangements: A "fresh start" for salaried consumer debtors in England and Wales?' *International Insolvency Review* (2009) 12 *et seq*, PB McKenzie D Skene and A Walters 'Consumer

and Wales, the SA debtors have a choice between different statutory procedures.⁶⁶ However, there are no objective third party who decides on the best procedure for the particular debtor, in both of these systems.

The English system has a liberal discharge system, as the debtor is generally automatically discharged after a period of one year in bankruptcy,⁶⁷ compared to that of South Africa, where a debtor only receives an automatic discharge after ten years.⁶⁸

4.4 Conclusion

The insolvency law systems of the USA⁶⁹ and the English system⁷⁰ share certain characteristics such as a substantive discharge of debt, easy and non-discriminatory access to these systems and that they are generally extrajudicial in nature. Most important of all, they share a philosophical view that it is to the benefit of creditors, if debtors are rehabilitated and allowed back into the economic society as soon as possible.

The SA insolvency law system compares well to these systems with regard to a substantive discharge of debt, which is provided for in the sequestration procedure.⁷¹ In this regard, the intention of the legislator can be inferred with the generality of the wording of sub-section 129(1)(c),⁷² namely

relieving the insolvent of every disability resulting from the sequestration.

It seems that the legislator has the intention to place the insolvent in a similar position, after rehabilitation, where he would have been if he was never sequestrated and was not over-indebted.

bankruptcy law reform in Great Britain' *American Bankruptcy Law Journal* (2006) 496–497 *et seq* and I Ramsay 'Between neo-liberalism and the social market: Approaches to debt adjustment and consumer insolvency in the EU' *Journal of Consumer Policy* (2012) 430.

⁶⁶ The administration procedure in terms of s 74 of the Magistrate Court Act 32 of 1944, the debt review procedure in terms of s 86 of the National Credit Act 34 of 2005, and the sequestration procedure in terms of the Insolvency Act 24 of 1936.

⁶⁷ S 279(1) of the Insolvency Act 1986.

⁶⁸ S 127A of the Insolvency Act 24 of 1936.

⁶⁹ Ch 4 par 4.2.

⁷⁰ Ch 4 par 4.3.

⁷¹ Ch 1 par 1.1.

⁷² *Ibid.*

Unfortunately, the SA insolvency law system falls horribly short in every other comparison with the USA- and the English systems. The SA insolvency law system is discriminatory,⁷³ because it excludes NINA⁷⁴ debtors from the sequestration procedure by the insistence that a debtor can only be sequestrated if a benefit to creditors can be proved.⁷⁵ The Insolvency Act does not allow for extrajudicial procedure⁷⁶ and is therefore expensive and it seems to be founded on a philosophical view of punishing the debtor for being unable to pay his debts, regardless of the reason for his over-indebtedness.⁷⁷ It also does not differentiate between an honest but unfortunate debtor and a habitual dishonest debtor.

An automatic discharge in the USA occurs immediately after the acceptance of the debtor's petition in terms of chapter 7.⁷⁸ The English insolvency law system generally allows for an automatic discharge at the end of a period of one year from the date of the order.⁷⁹ In SA an automatic discharge is only received ten years after the date of sequestration.⁸⁰ This punitive element of the South African insolvency law system remains unexplainable and unjustifiable and stands in glaring contrast to the USA system⁸¹ and to the English system⁸² and to international principles and guidelines.⁸³

The insolvency law systems of USA and the English system is summarised as being debtor friendly⁸⁴ while the SA insolvency law system is summarised as being creditor friendly⁸⁵. However, these descriptions are misleading. The mythological overview of most developed countries are that it is to the benefit of the creditors if a debtor is allowed back into the economic society, so that he can contribute to the economy and not remain a burden on society.⁸⁶ A more accurate description would be that the insolvency law

⁷³ Ch 3 par 3.4.

⁷⁴ *Ibid.*

⁷⁵ Ch 3 par 3.1.

⁷⁶ Ch 3 par 3.2.

⁷⁷ Ch 3 par 3.4.

⁷⁸ Ch 2 par 2.2 and par 4.2.

⁷⁹ Par 4.3.

⁸⁰ Ch 3 par 3.2.6.

⁸¹ Par 4.2.

⁸² Par 4.3.

⁸³ Ch 2 par 2.7.

⁸⁴ Para 4.2, 4.3 and 4.4.

⁸⁵ Ch 3 par 3.4.

⁸⁶ Ch 2 par 2.2 and par 4.2.

systems of the USA and the English systems are debtor and creditor friendly, while the SA system is designed to punish a debtor for becoming insolvent and being unable to pay his debts, regardless of who is at fault, to the detriment of the debtor, creditors and society as a whole.

It appears that the SA legislator is over emphasising the contractual principle of *pacta sunt servanda*⁸⁷ and attempting to protect the interest of the public from insolvents while under the incorrect assumption that all insolvents have become insolvent because of either his own stupidity, or because of dishonesty. The SA legislator apparently does not take the insolvent into account that became insolvent, for instance because he lost his employment, due to no fault of his own, and who are bombarded with credit providers recklessly advancing credit to him, while attempting to advance their own financial interests.

⁸⁷ This is a Latin expression meaning promises must be kept, or agreements and stipulations of the parties to a contract must be observed.

CHAPTER 5: REHABILITATION IN TERMS OF THE INSOLVENCY AND BUSINESS RECOVERY BILL 2015¹

5.1 Introduction

The South African Law Commission² published a report titled the *Report on the review of the law of insolvency* in 2000. It contained a draft bill³ as well as an explanatory memorandum.⁴ The latest version of these documents are unofficial working copies on file with the author.⁵

During the course of this dissertation certain shortcomings were identified in the South African insolvency law system. In this chapter it is investigated whether the 2015 Insolvency Bill will address and rectify these shortcomings.

For purposes of this chapter only the 2015 Insolvency Bill is discussed, because it contains the latest law reform proposals. Chapter 19 thereof regulates rehabilitation of natural persons. This chapter is divided into five divisions in accordance with the five proposed sections. These are; clause 101 which regulates when a debtor may apply to court for his rehabilitation; clause 102 contains directions as to when rehabilitation should be refused by a court; clause 103 states when an insolvent will be rehabilitated by an effluxion of time; clause 104 contains the effects of rehabilitation and clause 105 stipulates the penalties for unlawful inducement to accept a compromise or in connection with rehabilitation.

¹ Unofficial working draft of a proposed Insolvency and Business Recovery Bill 2015. Obtained from MB Cronje at the Department of Justice and Constitutional Development, Pretoria, South Africa.

² Hereinafter 'SALC'.

³ Hereinafter '2000 Insolvency Bill'.

⁴ Hereinafter '2000 Explanatory memorandum'.

⁵ Hereinafter the '2015 Insolvency Bill' and '2015 Explanatory memorandum'.

5.2 The circumstances under which an insolvent may rehabilitate

5.2.1 Clause 101(1)(a)

As soon as the Master of the High Court⁶ confirms a distribution account, which provides for the full payment of all proven claims with interest and all costs of liquidation, an insolvent may immediately be rehabilitated. This clause is similar to section 124(5) of the Insolvency Act.⁷ It can hardly be criticised. It promotes co-operation between the insolvent, his trustee and his creditors and rewards the honest insolvent with early rehabilitation.⁸

5.2.2 Clause 101(1)(b)

An insolvent may apply for his rehabilitation immediately after a composition⁹ has been reached and the Master issues a certificate to confirm such composition. This clause is similar to section 124(1) of the Insolvency Act.¹⁰ However, it is interesting to note that where the Insolvency Act requires that the composition must make provision for the payment of at least 50 cents in the rand of all proved claims, the 2015 Insolvency Bill does not have such a requirement.

5.2.3 Clause 101(1)(c)

An insolvent may apply for rehabilitation after the expiration of a period of four years after confirmation of the first liquidation account. This clause is similar to section 124(2)(a) of the Insolvency Act,¹¹ which makes provision for an insolvent to rehabilitate twelve months after confirmation of the first liquidation account.¹² The 2015 Insolvency

⁶ Hereinafter 'Master'.

⁷ 24 of 1936. Hereinafter 'the Insolvency Act' of 'Act'.

⁸ Ch 3 par 3.2.1 for a discussion on s 124(5) of the Insolvency Act. This also compares well to international trends and guidelines as discussed in ch 2 par 2.7.

⁹ A composition is an agreement that has been reached between the insolvent and his creditors for the payment of their claims. See s 119 of the Insolvency Act and s 119 of the 2015 Insolvency Bill.

¹⁰ See ch 3 par 3.2.1 for a discussion on s 124(1) of the Insolvency Act. Also see ch 2 par 2.4 with regard to the French system. The success of the French system is founded in the involvement of the central bank. For any system to be successful, the credit providers must be involved and this section promotes such involvement.

¹¹ See ch 3 par 3.2.4 for a discussion on s 124(2)(a) of the Insolvency Act.

¹² S 124(2) of the Insolvency Act.

Bill proposes that this time period be extended from twelve months to four years. When international trends and best practises¹³ are taken into account, then this section can only be described as an astonishingly big step backwards.

Section 124(2)(a) of the Insolvency Act is by far the most popular section in terms whereof most insolvents bring applications for their rehabilitation. It provides relief for an insolvent who was not previously sequestrated and did not commit any offences. It is unexplainable why the SALC felt that this period should be extended by three years.

It is doubtful whether the SALC considered the usual time period that transpires from the date of sequestration to the date of the confirmation of the first liquidation account. It is also doubtful whether the SALC considered the fact that it is largely out of the hands of the insolvent when his first liquidation account will be drafted and lodged with the Master. If, for instance, a trustee issues action to have a disposition declared an impeachable transaction,¹⁴ then the insolvent should accept the fact that he will only be able to rehabilitate after an effluxion of time. The same will apply if the Master neglects to appoint a liquidator.¹⁵

It will have a devastating effect on the South African insolvency law system if clause 101(1)(c) of the 2015 Insolvency Bill is incorporated into legislation. It will be very difficult for an attorney to convince an over-indebted debtor to surrender his estate when he will only be able to rehabilitate four years after an unidentifiable period, if he is lucky. If he is not so lucky then he will have to wait ten years.¹⁶

5.2.4 Clause 101(2)

This clause deals with insolvents who are convicted of an offence and is similar to section 124(2)(c) of the Insolvency Act.¹⁷ Such an insolvent will only be able to apply for rehabilitation five years after the date of conviction.

¹³ Ch 2 par 2.7.

¹⁴ Ss 26 and 29–34 of the Insolvency Act and ch 7 of the 2015 Insolvency Bill.

¹⁵ The Insolvency Act differentiate between a trustee and a liquidator, while the 2015 Insolvency Bill collectively refers to a liquidator. This is welcomed and create uniformity.

¹⁶ Cl 103 of the 2015 Insolvency Bill.

¹⁷ See ch 3 par 3.2.5 for a discussion of this section of the Insolvency Act.

This section creates a situation where it would be to the advantage of the insolvent to commit an offence. An insolvent will be able to rehabilitate five years after he has been convicted of an offence.¹⁸ If he is not convicted of such an offence, then he will have to wait for his first liquidation account to be confirmed (which is largely out of his control) and he will only be able to rehabilitate four years after that.¹⁹ If his liquidator is lacklustre and fails to lodge his first account with the Master, or if no liquidator is appointed, then he will only be able to rehabilitate ten years after liquidation.²⁰

5.2.5 Clause 101(3)

This clause makes it possible for an insolvent to reduce the period of four years after confirmation of the first liquidation account, as contemplated in clause 101(1)(c). The period can be reduced to twelve months, if the insolvent can get the recommendation of the Master. This will only be possible if the insolvent was not previously sequestrated. If he was previously sequestrated, then he can reduce this time period to three years, subject to him obtaining the Master's recommendation.

However, in practise it is very difficult to obtain such recommendation. In *Ex parte Greub: In re Greub v Master, High Court*,²¹ the Master refused to recommend the insolvent's rehabilitation. The court found that the Master must take all the insolvent's circumstances into account when recommending or refusing to recommend rehabilitation. The court found that a refusal to recommend rehabilitation is a ruling as contemplated in section 151 of the Insolvency Act and is subject to review by the High Court. However, the court refused to interfere with the Master's recommendation and dismissed the review application.

In determining in a particular case whether to grant his recommendation, the Master must decide, having regard to the facts surrounding the insolvency, whether the applicant is a fit and proper person to trade with the public on the same basis as any other honest man. In so deciding he will take into account a host of matters, many of which will not be

¹⁸ Cl 101(2) of the 2015 Insolvency Bill.

¹⁹ *Idem* cl 101(1)(c).

²⁰ *Idem* cl 103.

²¹ [1998] 4 All SA 591 (C) 591–597.

apparent to a court and he will arrive at his conclusion after considering not merely the information which the insolvent has put before him, but also his knowledge of the estate gleaned from his own records, what he has learned from the trustee, from the creditors and from other sources. He will also have regard to his own general experience in matters of this nature.²²

5.2.6 Clause 101(4)–(12)

These clauses regulate procedural obligations that the insolvent must comply with and are very similar to those of the Insolvency Act.

5.2.7 Clause 102

Sub-clause 1 of clause 102 sets out the necessity of the Master to report to the court on the merits of the application, which report must also be furnished to the applicant or his attorney. It also states that any party having an interest in the proceedings may oppose an application for rehabilitation.

Sub-clause 2 of clause 102 of the 2015 Insolvency Bill is even more draconian than clause 101. It states the following:

If the court is satisfied on the strength of a certificate by the Master or any other evidence that the debtor has intentionally impeded, obstructed or delayed the administration of the insolvent estate by- a) failing to submit a statement of affairs in accordance with the requirements of the Act; or b) failing to make available to the liquidator of the estate, in accordance with written directives by the liquidator or the Master, property belonging to the insolvent estate which was in his or her possession or custody or under his or her control or any book, document or record relating to his or her affairs which was in his or her possession or custody or under his or her control; or c) failing to notify the liquidator of the estate of the existence of any book, document, or record relating to his or her affairs which was not in his or her possession or custody or under his or her control, and as to where such book, document, or record could be found, or of any property belonging to his or her insolvent estate which was not mentioned in his or her statement of affairs, and as to where such property could be found; or d) failing to keep the liquidator of the estate informed of any change of his or her address during the period of three years after the liquidation of his or her estate; or e) failing to comply with section 16(3); or f) means of any other act or omission, *the court must refuse to*

²² *Ex parte Porritt* 1991 (3) SA 866 (N) 876.

*grant a rehabilitation order until the expiry of a period of 10 years after the date of liquidation of the debtor's estate.*²³

In my opinion, this section unreasonably impedes on the inherent discretion of the court.²⁴ It affords the Master and the liquidator an unprecedented ability to deny an insolvent rehabilitation, by judging the intentions of the insolvent and then simply filing a certificate which states that the insolvent was for instance obstructive. The court then does not have a discretion and must not only refuse rehabilitation, but also grant an order that the insolvent may not be rehabilitated within ten years after date of liquidation. The fact that the SALC thinks that it is justifiable to refuse the insolvent rehabilitation for a period of ten years, because the insolvent for instance did not notify his trustee that he moved,²⁵ is indicative of the SALC's stubborn persistence that the insolvent should be punished, regardless of the fact that his insolvency might have occurred due to no fault of his own. This stands in absolute contrast to international trends²⁶ and grants the insolvent's liquidator with an unreasonable amount of power over him, which will be open for abuse. It should be taken into account that in practice the insolvent and his trustee are often at odds with each other due to their different interests.

It seems that liquidators and credit providers had a big input in the drafting of this proposed legislation. A liquidator should not be able to tell the court when an insolvent can be rehabilitated and when not. If this legislation is enacted, then this sub-clause will form part of the arsenal of a liquidator, which he can then use to threaten an insolvent into submission.

An insolvent, married out of community of property, whose trustee claims that an asset that belongs to his wife, belongs to his insolvent estate (although not correct), will now have to consider if it is worth opposing the claim/allegation of his trustee, when the consequences of such opposition will be that he will not be able to rehabilitate for ten

²³ My emphasis.

²⁴ S 127 of the Insolvency Act confers a very wide discretion on the court, to either rehabilitate or not. It is submitted that this discretion should not be interfered with.

²⁵ Cl 102(2)(d) of the 2015 Insolvency Bill.

²⁶ Ch 2 par 2.7.

years.²⁷ His trustee will of course not hesitate to remind him of this. Financially it will always be better for the insolvent to convince his wife to give this asset to the insolvent estate, although the insolvent estate will not legally be entitled thereto.

If an insolvent commits a criminal offence and is found guilty in a criminal court, then he is allowed to rehabilitate five years after his conviction.²⁸ However, heavens forbid an insolvent dare to delay the administration of the insolvent estate by ‘means of any act or omission’,²⁹ then he will only be able to rehabilitate after ten years. In such instance, it seems that not even the court can protect him.³⁰ These clauses create the perception that over-indebted consumers are not properly represented at the SALC, if at all.

5.3 Clause 103 - Rehabilitation by effluxion of time

Clause 103 of the 2015 Insolvency Bill provides that an insolvent is automatically rehabilitated after a period of ten years from date of liquidation. This section is similar to section 127A of the Insolvency Act.³¹

When it is taken into account that for example an automatic discharge in the USA occurs immediately after the acceptance of the debtor’s petition in terms of chapter 7³² and in England and Wales an automatic discharge is generally awarded at the end of a period of one year from the date of the order,³³ it seems that the SALC is either completely unfamiliar with international principles and guidelines³⁴ or they hold a contrasting view.

The Law Commission justifies its view in the 2000 explanatory memorandum as follows:

The period of 10 years is somewhat arbitrary as would be any other period substituted for it. The only guideline is a vague feeling about what a proper period should be. Other countries have reduced their periods for “automatic” rehabilitation. Consequently, it makes sense to provide for different periods for different scenarios. However, simplicity is desirable in this regard and it is advisable for a simple rule that rehabilitation takes place after a fixed number of

²⁷ Cl 102(2)(b) of the 2015 Insolvency Bill.

²⁸ *Idem* cl 101(2).

²⁹ *Idem* cl 102(2)(f).

³⁰ The discretion of the court is removed by the word ‘must’ in this subsection.

³¹ See ch 3 par 3.2.6 for a discussion of rehabilitation by an effluxion of time with regard to the Insolvency Act.

³² Bankruptcy Reform Act of 1978. Also see ch 2 par 2.2 for a discussion of the system of the USA.

³³ S 279(1) of the Insolvency Act 1986. Also see ch 2 par 2.3 for a discussion of the system in England and Wales.

³⁴ Ch 2 par 2.7.

years unless there is a court order. In light of the limited comments in this regard and the fact that the 10-year period in the present legislation has become relatively known, no shortening of the period is proposed.³⁵

When you hold a view which stands in stark contrast to that of Europe,³⁶ the USA,³⁷ England and Wales,³⁸ the French,³⁹ INSOL international⁴⁰ and the World Bank,⁴¹ you should be able to substantiate your view with more than having ‘a vague feeling about what a proper period should be’ and ‘that the ten year period in the present legislation has become relatively known’.

This period is also contradictory to the international principle that promotes extra judicial procedure.⁴² Every insolvent who do not wish to wait ten year for rehabilitation must bring a court application.

5.4 Clause 104 - Effects of rehabilitation

Clause 104 reflects the effect of rehabilitation on the insolvent, the insolvent’s creditors and his property. It is very similar to section 129 of the Insolvency Act.⁴³

5.5 Clause 105 - Penalties for unlawful inducement to accept compromise or in connection with rehabilitation

Clause 105 of the 2015 Insolvency Bill is similar to section 130 of the Insolvency Act. However, an additional subsection⁴⁴ is added. It allows a liquidator to enforce such penalties, or if the liquidator fails to do so, a creditor of the estates, subject thereto that the liquidator is indemnified against costs. It is uncertain what is meant by ‘a liquidator is competent to enforce the penalty’. If it is the intention of SALC to give a liquidator the power to enforce a penalty without a court order, then this section will surely be

³⁵ Also see M Roestoff ‘Rehabilitasie in die Suid-Afrikaanse verbruikersinsolvensiereg: internasionale tendense en riglyne’ *Litnet Akademies* (2016) 11.

³⁶ Ch 2 par 2.3.

³⁷ Ch 2 par 2.2 and ch 4 par 4.2.

³⁸ Ch 4 par 4.3.

³⁹ Ch 2 par 2.4.

⁴⁰ Ch 2 par 2.5.

⁴¹ Ch 2 par 2.6.

⁴² Ch 2 par 2.7.

⁴³ Ch 1 par 1.1.

⁴⁴ Cl 105(2) of the 2015 Insolvency Bill.

unconstitutional,⁴⁵ because it will permit arbitrary deprivation of property. Sub-clause (b) levies substantial penalties against any person who for instance, promise a benefit to any person not to oppose a rehabilitation application. If a liquidator is entitled to collect such penalties without a court order and in his own discretion, then the person liable to pay such penalties will be arbitrarily deprived of property, being the amount of penalty he has to pay.

5.6 Conclusion

It is important to notice that the provisions of section 124(3)⁴⁶ of the Insolvency Act were completely omitted in the proposed 2015 Insolvency Bill. This section gives some reprieve to insolvents and enables insolvents to be rehabilitated much sooner than what the other subsections of section 124 of the Insolvency Act allow for. However, this section is susceptible to abuse⁴⁷ and the SALC can hardly be criticised for omitting these provisions in their proposals.⁴⁸

The proposed legislation in chapter 19 of the 2015 Insolvency Bill fails in several respects:

- a) The time when an insolvent can rehabilitate is increased from one year after the confirmation of the first liquidation and distribution account, to four years after such confirmation.⁴⁹ This when it is common international trend to decrease this time period.⁵⁰
- b) It does not provide for situations where the Master do not appoint a trustee or liquidator.⁵¹ In such an instance the insolvent will have to wait ten years to be rehabilitated by way of an effluxion of time;⁵²

⁴⁵ S 25(1) and (2) of the Constitution of the Republic of South Africa, 1996.

⁴⁶ Ch 3 par 3.2.3 and 3.4. In terms of this section an insolvent is able to rehabilitate six months after sequestration if no claims have been proved against his estate, subject thereto that he has not previously been sequestered and not found guilty of an offence.

⁴⁷ Ch 3 par 3.2.3.

⁴⁸ Ch 3 par 3.4.

⁴⁹ Par 5.2.3.

⁵⁰ Ch 4 par 4.4.

⁵¹ Par 5.2.3.

⁵² *Ibid.*

- c) It does not provide for insolvents whose liquidators are lacklustre and do not lodge a liquidation account;⁵³
- d) The provisions do not address the discriminatory nature of the Insolvency Act.⁵⁴ The SALC has maintained the requirement that a debtor must prove an advantage to creditors, before the procedure can be accessed and therefore can receive a discharge of debt.⁵⁵ The requirement that there must be an advantage to creditors before the system can be accessed are contained in the following sections of the 2015 Insolvency Bill: s 3(8)(a)(ii); s 10(1)(c)(i); s 11(1)(c); s 24(1A)(7); s 46(6); and s 184.
- e) It does not differentiate between an honest but unfortunate debtor and a debtor who became insolvent because of dishonesty;
- f) The 2015 Insolvency Bill maintains the philosophical overview that an insolvent should be punished;⁵⁶
- g) The SALC even goes as far, with their proposals, to suggest a reduction of the courts' discretion;⁵⁷
- h) It is contradictory to the international principle that promotes extra judicial procedure.⁵⁸ Every insolvent who do not wish to wait ten year for rehabilitation must bring a court application; and
- i) The most important shortcoming of the 2015 Insolvency Bill is probably the failure to accept international views, that it is to the benefit of creditors and society as a whole, if a debtor is given a fresh start as soon as possible.⁵⁹

⁵³ *Ibid.*

⁵⁴ Ch 4 par 4.4.

⁵⁵ Ch 1 par 1.1.

⁵⁶ Par 5.2.7.

⁵⁷ *Ibid.*

⁵⁸ Ch 2 par 2.7 and par 5.3.

⁵⁹ Ch 2 par 2.7 and ch 4 par 4.4.

What is concerning about the law reform proposals contained in chapter 19 of the 2015 Insolvency Bill is that it is substantially worse than our current legislation, which is outdated and arctic.⁶⁰ The 2015 Insolvency Bill proposes to extend the time period when an honest but unfortunate insolvent can apply to court for his rehabilitation,⁶¹ while maintaining the same time period for a dishonest insolvent, who has been convicted of an offence.⁶² The bill creates a situation where it would be to the advantage of an insolvent to commit an offence.⁶³ The SALC seems to be moving backwards and the justification for their proposals does not inspire confidence.⁶⁴

⁶⁰ Ch 3 par 3.4.

⁶¹ Par 5.2.3.

⁶² Par 5.2.4.

⁶³ *Ibid.*

⁶⁴ Par 5.3.

CHAPTER 6: CONCLUSION AND LAW REFORM PROPOSALS

6.1 Introduction

In chapter 3 of this dissertation, certain fundamental flaws are identified in the current South African¹ insolvency law system with regard to the rehabilitation of an over-indebted consumer or insolvent.²

In chapter 5, the new proposed legislation regarding rehabilitation is measured against the current SA insolvency law system³ and against international principles and guidelines.⁴ Unfortunately, the South African Law Commission⁵ is moving even further away from international principles and guidelines with the introduction of chapter 19 of the 2015 Insolvency Bill.⁶

The most significant international principles and guidelines,⁷ as well as the insolvency systems of the United States of America⁸ and that of England and Wales⁹ are used as a threshold to propose new legislative provisions as regards rehabilitation, in this chapter.

6.2 International principles and law reform proposals

It is submitted that rehabilitation in the South African insolvency law system should comply with the following principles:

- a) There should be **easy access** to the insolvency law system and the system should be none discriminatory. This will easily be achievable by removing all the

¹ Hereinafter 'SA'.

² Ch 3 par 3.4.

³ Ch 5 par 5.6.

⁴ Ch 2 par 2.7.

⁵ Hereinafter 'SALC'.

⁶ Unofficial working draft of a proposed Insolvency and Business Recovery Bill 2015. Obtained from MB Cronje at the Department of Justice and Constitutional Development, Pretoria, South Africa. Hereinafter '2015 Insolvency Bill'.

⁷ Ch 2 par 2.7.

⁸ Hereinafter 'USA'. See ch 2 par 2.2 and ch 4 par 4.2 for the insolvency system of the USA.

⁹ Hereinafter 'the English system'. See ch 4 par 4.3 for the English system.

references in the 2015 Insolvency Bill that requires an advantage for creditors as a prerequisite.¹⁰

- b) The insolvent should have an **automatic right to a discharge**. This principle was introduced by the USA¹¹ as the ‘fresh start’ principle and followed in Europe¹² and England and Wales.¹³ It is sacrosanct to any modern functional insolvency law system. However, this right like any other, should be limited by extending the period before an insolvent can rehabilitate, if the insolvent has committed a crime or has been sequestrated before and becomes a habitual over-indebted debtor. This limitation will avoid the abuse of the system.
- c) **The period for rehabilitation** to take place should not be more than four years under any circumstances. If a debtor cannot be rehabilitated after four years, then he will not be rehabilitated after any amount of time. This time should be calculated from the date of his sequestration and not the date of the confirmation of his liquidation account, because it is out of his control when this account will be drafted, lodged or confirmed.¹⁴ It was probably the intention of the legislator to make the time when the insolvent would be able to rehabilitate conditional on the confirmation of his liquidation account to motivate the insolvent to give his support to his trustee and the Master of the High Court¹⁵ in finalising the insolvent estate. However, such an intention would be founded on the incorrect assumption that trustees are just as eager to finalise small insolvent estates than the financially more lucrative estates. It is suggested that an insolvent be automatically rehabilitated after a period of two years after date of sequestration, without having to bring a court application. Should the insolvent have been sequestrated before, then this period is extended to three years and should the insolvent have committed a crime in terms of the insolvency act, then this period is extended to

¹⁰ Ch 3 par 3.1 and ch 5 par 5.6.

¹¹ Ch 2 par 2.2 and ch 4 par 4.2.

¹² Ch 2 par 2.3.

¹³ Ch 4 par 4.3.

¹⁴ Ch 3 par 3.4 and ch 5 par 5.2.3.

¹⁵ Hereinafter ‘the Master’.

four years. This would be subject to the right of a trustee, a creditor or the Master, to bring a court application to suspend the rehabilitation of the insolvent, should the party be able to prove that society needs protection against such a person. In this case the court should have a wide discretion to suspend the rehabilitation of the insolvent and to make such suspension conditional on for instance, the insolvent successfully completing some sort of educational course.

- d) The system will never work if debtors, creditors and society as a whole do not all buy into it.¹⁶ **Extra judicial procedure**, such as contemplated in the 2015 Insolvency Bill,¹⁷ will increase confidence in the system and it will reduce the attempt to abuse it. As a first step towards debt relief a presiding officer or administrator as referred to in the 2015 Insolvency Bill,¹⁸ should evaluate an over-indebted debtor's personal circumstances and refer such a person for either debt relief in terms of section 86 of the National Credit Act¹⁹, or insolvency procedure in terms of the Insolvency Act.

6.3 Concluding remarks

A high level of domestic consumption is required for both stability and growth. This is why consumers are encouraged by governments to consume. One of the ways to boost this consumption is to facilitate and expand credit facilities for consumers. Consumer debts become a problem when debtors are unable to find solutions for repayment without professional help and that is why society as a whole bears a collective responsibility.²⁰

The SA insolvency law reform proposals are doomed to fail, for as long as credit providers do not buy into the idea that it is to their advantage if an insolvent is rehabilitated as soon as possible and allowed back into the economy. It seems that this principle is the main difference between the rest of the developed world and the current SA insolvency law system and the proposed law reform by the SALC. A productive and rational negotiation

¹⁶ Ch 2 par 2.7. Also see ch 2 par 2.4 for a discussion on the French system and the importance to involve credit providers.

¹⁷ Ch 5 par 5.6.

¹⁸ *Ibid.*

¹⁹ 34 of 2005.

²⁰ INSOL International *Consumer debt report: Report of findings and recommendations* London (2011) 4.

regarding a new insolvency act can only begin once this philosophy is accepted by the major credit providers, the Receiver of Revenue, liquidators, attorneys and Judges.

At the end of the day a just balance must be maintained between creditors, the debtor and society for a modern economy to prosper.²¹

²¹ Ch 2 par 2.7.

BIBLIOGRAPHY

1. BOOKS

Bertelsmann E, Evans RG, Harris A, Kelly-Louw M, Loubser A, Roestoff M, Smith A, Stander L en Steyn L Nagel C (ed)

Mars: The law of insolvency in South Africa (9th edition) Juta Cape Town (2008)

Epstein DG and Nickles SH

Principles of Bankruptcy law Thompson/West St. Paul MN (2007)

Ferriell JT and Janger EJ

Understanding bankruptcy LexisNexis (2009)

Fletcher IF

The law of insolvency (4th edition) Sweet and Maxwell London (2009) read together with *The law of insolvency second cumulative supplement to the fourth edition* Sweet and Maxwell London (2014)

Meskin PH

Insolvency law and its operation in winding up (loose-leaf, updated regularly, 2016 update) LexisNexis Durban 1990

2. COMMISSION AND OTHER REPORTS

2.1 European Union

European Commission

Best project on restructuring, bankruptcy and a fresh start: Final report of the expert group (2003)

Niemi-Kiesiläinen J and Hendrikson A-S

Report on legal solutions to debt problems in credit societies (2005).

Reifner U, Kiesilainen J, Huls N and Springeneer H

Consumer overindebtedness and consumer law in the European Union (2003)

2.2 England and Wales

Cork K

Report of the review committee on insolvency law and practice Her Majesty's Stationary Office London (1982)

2.3 South Africa

The South African Law Commission

Report on the review of the law of insolvency: Draft Insolvency Bill and explanatory memorandum (2000) Project 63. Available from Mr. MB Cronje (mcronje@justice.gov.za) at Department of Justice and Constitutional Development, Pretoria, South Africa.

2.4 Other

INSOL International

Consumer debt report: Report of findings and recommendations London (May 2001)

INSOL International

Consumer debt report: Report of findings and recommendations (2nd edition) London (2011)

The World Bank Insolvency and Creditor/Debtor Regimes Task Force Working Group
Report on the treatment of the insolvency of natural persons (2012)

3. JOURNALS

Boraine A and Roestoff M

'Developments in American consumer bankruptcy law: Lessons for South Africa' *Obiter* (2000)

Carlitz J

'Developments in the United States consumer bankruptcy law: A South African perspective' *Obiter* (2007)

Coetzee H and Roestoff M

'Consumer debt relief in South Afrika – Should the insolvency system provide for NINA debtors? Lessons from New Zealand' *International Insolvency Review* (2013)

Huls N

'A next step in debt enforcement: The merger of debt help and debt collection' *Journal of Consumer Policy* (2012)

Kilborn JJ

'Mercy, rehabilitation, and *quid pro quo*: A radical reassessment of individual bankruptcy' *Ohio State Law Journal* (2003)

Kilborn JJ

'*La responsabilisation de l'économie*: What the United States can learn from the new French law on consumer overindebtedness' *Michigan Journal of International Law* (2005)

Kilborn JJ

'Still chasing chimeras but finally slaying some dragons in the quest for consumer bankruptcy reform' *Loyola Consumer Law Review* (2012)

Kilborn JJ

'Reflections of the World Bank's Report on the treatment of the insolvency of natural persons in the newest consumer bankruptcy laws: Colombia, Italy, Ireland' *Pace International Law Review* (2014)

McKenzie PB Skene D and Walters A

'Consumer bankruptcy law reform in Great Britain' *American Bankruptcy Law Journal* (2006)

Niemi J

'Consumer Insolvency in the European Legal Context' *Journal of Consumer Policy* (2012)

Ramsay I

'Between neo-liberalism and the social market: Approaches to debt adjustment and consumer insolvency in the EU' *Journal of Consumer Policy* (2012)

Rochelle M

'Lowering the penalties for failure: Using the insolvency law as a tool for spurring economic growth; The American experience, and possible uses for South Africa' *THRHR* (1996)

Roestoff M and Renke S

'Solving the problem of overspending by individuals: International Guidelines' *Obiter* (2003)

Roestoff M

'Rehabilitasie in die Suid-Afrikaanse verbruikersinsolvensiereg: internasionale tendense en riglyne' *Litnet Akademies* (2016)

Steyn L

'Sink or swim? Debt review's ambivalent "lifeline" – a second sequel to "...a tale of two judgments"

van Apeldoorn JC

'The "fresh start" for individual debtors: social, moral and practical issues' *International Insolvency Review* (2008)

Walters A

'Individual voluntary arrangements: A "fresh start" for salaried consumer debtors in England and Wales?' *International Insolvency Review* (2009)

Ziegel J

'The challenges of comparative consumer insolvencies' *Penn State International Law Review* (2004– 2005)

4. THESES AND DISSERTATIONS

Coetzee H

A comparative reappraisal of debt relief measures for natural person debtors in South Africa (LLD thesis University of Pretoria 2015)

Evans RG

A critical analysis of problem areas in respect of assets of insolvent estates of individuals (LLD thesis University of Pretoria 2008)

Maghembe NJ

A proposed discharge dispensation for consumer debtors in Tanzania (LLD thesis University of Pretoria 2013)

Roestoff M

'n Kritiese evaluasie van skuldverligtingsmaatreëls vir individue in die Suid-Afrikaanse insolvensiereg (LLD thesis University of Pretoria 2002)

5. STATUTES

5.1 England and Wales

County Court Administration Act 1984

Insolvency Act 1986

5.2 United States of Amerika

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

The Bankruptcy Reform Act of 1978

5.3 South Africa

Banks Act 94 of 1990

Companies Act 71 of 2008

Constitution of the Republic of South Africa, 1996

Insolvency Act 24 of 1936

Magistrate Court Act 32 of 1944

National Credit Act 34 of 2005

6. REGISTER OF CASES

Brown v Oosthuizen 1980 (2) SA 155 (O)

cf Chairperson, Walmer Estate Residents' Community Forum v City of Cape Town 2009 (2) SA 175 (C)

Ex parte Arntzen [2012] JOL 29552 (KZP)

Ex parte Bloomberg 1914 EDL 1

Ex parte Butler 1942 CPD 177

Ex parte Concato [2016] 2 All SA 519 (WCC)

Ex parte Cutting 1943 CPD

Ex parte Driemeyer [1967] 2 All SA 353 (N)

Ex parte du Toit 1964 (3) SA 159 (T)

Ex parte Ezer 1934 CPD 65

Ex parte Fernandez [1965] 3 All SA 264 (O)

Ex parte Ford [2009] JOL 23412 (WCC)

Ex parte Fowler 1937 TPD 353

Ex parte Friedman 1923 WLD 138

Ex parte Goshalia 1957 (2) SA 182 (N)

Ex parte Hajee 1939 NPD 197

Ex parte Hellman 1963 (3) SA 27 (T)

Ex parte Hittersay [1974] 4 All SA 296 (SWA)

Ex parte Kay 1942 WLD 11

Ex parte Koch [1983] 3 All SA 249 (SE)

Ex parte Kriel [1949] 2 All SA 129 (O)

Ex parte Le Roux 1996 (2) SA 419 (C)

Ex parte Matthee [1975] 1 All SA 579 (O)

Ex parte Meine 1937 CPD 154

Ex parte Messaris 1937 CPD 278

Ex parte Naidoo 1946 NLR 43

Ex parte Naidoo [1965] 4 All SA 322 (N)

Ex parte Noriskin [1962] 1 All SA 400 (N)

Ex parte Ogunlaja [2011] JOL 27029 (GNP)

Ex parte Palmer [1961] 1 All SA 232 (W)

Ex parte Porritt [1991] 3 All SA 156 (N)

Ex parte Roos [1955] 1 All SA 281 (O)

Ex parte Shmukler-Tshiko [2013] JOL 29999 (GSJ)

Ex parte Sheen 1914 TPD 586

Ex parte Stegmann 1936 OPD 38

Ex parte Tait 1933 TPD 413

Ex parte Vermeulen 1934 WLD 178

Ex parte Woolf [1958] 4 All SA 191 (N)

First Rand Bank Ltd v Evans 2011 (4) SA 597 (KZD)

First Rand Bank Ltd v Janse van Rensburg [2012] 2 All SA 186 (ECP)

Greub v The Master 1999 (1) SA 746 (C)

Local Loan Co v Hunt (1934) 292 US

Mthimkhulu v Rampersad [2000] 3 All SA 512 (N)

Nedbank v Andrews (240/2011) 2011 ZAACPEHC 29 (10 May 2011)

7. MISCELLANEOUS

WB Global findex database <http://bit.ly/1zpsu5J> (accessed 28 November 2016) and Moneyweb *South Africans are the world's biggest borrowers* <http://bit.ly/1RsxTS0> (accessed 28 November 2016).

<https://www.insol.org/page/19/about-us> (accessed 28 November 2016).