BACKGROUND TO CERTAIN ASPECTS RELATING TO CONSUMER INSOLVENCY IN SOUTH AFRICAN LAW

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1 Introduction

1.1 Consumer insolvency in South Africa is dealt with in the Insolvency Act 24 of 1936 [hereafter the Insolvency Act] that provides for liquidation of assets, but there are also other legislation that provides debt restructuring procedures, i.e. the administration order in terms of the Magistrates’ Courts Act 32 of 1944 [hereafter the Magistrates’ Courts Act] and debt review in terms of the National Credit Act 34 of 2005 [hereafter the NCA or the National Credit Act]. Apart from legislation a creditors’ work out that may lead to a voluntary debt restructuring is also possible.

1.2 It is nevertheless fair to say that there is no principled view and approach regarding consumer insolvency in South African law. Even if one looks at the reform initiatives as referred to in paragraph 9 below, it seems that there is no sense of integrating the various procedures in order to establish a proper framework for the various options available.

1.3 It is also important to have some understanding of the socio-economic conditions in South Africa in order to have a better understanding of the availability and operation of debt relief measures in this society. The following indicators will provide some insights in this regard:

1.3.1 South Africa can largely be classified as a developing economy but it contains elements of a highly developed economy on the one hand, and an extremely underdeveloped economy on the other hand. The differences between these two extremes are stark and there is no real gradual cross-over between these two landscapes.

1.3.2 In terms of the latest national census, South Africa has 50 million inhabitants
of which around 25% are formally classified as unemployed and around 23% lives below the poverty line.

1.3.3 White South Africans are generally perceived to be rich and Black South African as poor but this is not a true reflection of the “new” society since the advent of the current democratic order in 1994. (It must however be noted that the former apartheid laws did exclude the majority of South Africans from many opportunities in the economy including the credit markets.)

1.3.4 At present many White South Africans also find themselves in the category of formally unemployed and there was a significant increase in the number of Black South African who can now be classified as middle class.

1.3.5 When it comes to credit granting, there was a major increase in the especially the micro loan market during the 1990’s when South Africa embraced a democratic constitution - but his also gave rise to a significant problem of over-indebtedness amongst black South Africans.

1.3.6 Still according to Finance Minister, Pravin Gordhan, of the estimated 50 million South Africans, nearly 16 million (almost a third) receive social grants. The number of South Africans liable for personal income tax stands in stark contrast to this figure. Even though the South African Revenue Services (SARS) reports a growth in the individual tax register from 1.7 million in 1994 to 6 million in 2010, the number is still very low. SARS reports a further growth to more than 12 million in 2011 following a policy change to register all individuals in formal employment. This figure however does not reflect the number of individuals actually liable for or paying personal income tax, as all salary earners, irrespective of whether they are liable for individual income tax, must now be registered.

1.3.7 As far as over-indebtedness of South African consumers is concerned, since June 2007 there has been an on-going deterioration of the number of consumers in ‘good standing’. At the end of March 2012, credit bureaux had records of 19.49 million credit active consumers, of which 9.05 million had impaired credit records.
Thus, at present only 53.6% of credit-active consumers are in ‘good standing’. Many of these over-stretched consumers will be subject to either an individual or collective debt collecting procedure.

1.3.8 Stats: sequestrations

The pattern concerning the number of sequestrations, i.e. the collective liquidation of assets-procedure, the following may be noted:

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<td>4020</td>
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<td>3366</td>
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<tr>
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2 Liquidation of assets and discharge

2.1 In brief insolvency for consumer debtors is firstly regulated by the Insolvency Act. The Insolvency Act provides for a sequestration order that can be granted by a High Court. The sequestration order can be obtained on application to the High Court by a creditor for compulsory sequestration of the debtor’s estate [sections 8 – 12 of the Insolvency Act], or, on application for voluntary surrender of his or her estate by a debtor in terms of sections 3 to 7 of the Insolvency Act. After the granting of a sequestration order, the debtor is formally referred to as an “insolvent”.

2.2 The granting of the sequestration order is based on a number of statutory requirements as referred to in the previous paragraph but it is fair to say that the advantage of creditors serves the purpose of a filter, in other word the decisive factor on whose estate will be sequestrated and whose not. This requirement can be met in a number of ways but one of the most important questions in order to determine compliance with it is if the creditors will receive a pecuniary benefit. In practice this
relates to the question if the unsecured concurrent creditors will receive at least a dividend based on the *pari passu* principle. The size of the dividend is not prescribed in the Insolvency Act but in practice some judges require an indication in the case of voluntary surrender that there should be a dividend of at least 20 cents to the rand. The Court will however also consider other factors within the realm of the advantage principle, like the fact that the trustee will be able to unearth other assets and also alternative repayment measures like the administration order or debt review in terms of the National Credit Act. The Court hearing the matter still has a discretion to grant the sequestration order or not. In particular, the requirement of advantage of creditors plays a significant role in the exercise of its discretion by the Court. The Court will also not grant an order if it deems the application to be an abuse of the sequestration process.

2.3 After sequestration the insolvent debtor may obtain a rehabilitation as is discussed below in paragraph 7 and in principle rehabilitation will afford the insolvent a discharge of pre-sequestration debt. It must be stressed that this is the only formal statutory procedure that provides a discharge for overburdened debtors.

2.4 Sequestration as a debt relief measure is thus almost reserved for debtors whose estates will probably yield a pecuniary benefit for the creditors – in other words there must be some assets in the estate. There is no procedures to deal with assetless estates and also no statutory guidelines relating to the different options of debt relief available to consumer debtors.

3 Other debt relief measures

3.1 As explained below in paragraphs 4 and 5, South African law provides two statutory debt restructuring models, namely the administration order and debt review in terms of the National Credit Act. Both have their limitations as explained at the relevant discussions below but both are still available to consumer debtors. Neither of these procedures provide a discharge and the debtor must repay all the debt with the added cost and interest over a longer time period. The only real benefit the debtor receives from a debt relief point of view is that the period for repayment is extended with the result that the amount of the instalments being lowered. So if you can’t obtain a sequestration order and your creditors aren’t prepared to grant you a
voluntary discharge of your debts, you remain shackled with debt –sometimes indefinitely.

4 Administration orders in terms of section 74 of the Magistrates’ Courts Act 32 of 1944

4.1 With regard to formal debt restructuring procedures for consumer debtors, South African law provides for an administration procedure in terms of the Magistrates’ Courts Act 32 of 1944 [hereafter the Magistrates’ Courts Act].

4.2 This procedure entails that consumer debtors who are unable to pay the amount of any judgment against him or her, or to meet his or her financial obligations and has not sufficient assets capable of attachment to satisfy such judgment or obligations, may apply to a Magistrate’s Court for an administration order that would, if successful, in effect compel the creditors to accept a rearrangement/ restructuring of the due and payable debt. [Section 74(1) of the Magistrates’ Courts Act.]

4.3 Although this procedure does provide debt relief for consumer debtors, its application is limited in that it only applies where the debts amount to not more than ZAR50 000, and it also offers no discharge, i.e. debtors may thus remain under debt almost indefinitely. Debts that will become due and payable only in the future, i.e. after the granting of a particular administration order as mentioned in paragraph 4.5 below, are not included in the order.

4.4 In terms of an administration order a Court will assist the debtor by appointing an administrator to take control of the debtor’s financial affairs and to manage the payment of debts due to creditors. [Section 74E of the Magistrates’ Courts Act.] In terms of the order the debtor has an obligation to make monthly or weekly payments to the administrator. The administrator, after deducting necessary expenses and a specified remuneration determined by a prescribed tariff, must in turn make a regular distribution out of such payments to all the proven creditors. [Sections 74I-J of the Magistrates’ Courts Act.] The procedure thus has an element of a collective judicial procedure and is thus sometimes described as a modified form of insolvency proceedings.

4.5 A restructuring sanctioned by court order thus basically entails a repayment
plan that will provide for an extension of the repayment period. It is implicit in the procedure that the debtor must have a regular income since he or she must make weekly or monthly payments to the administrator to be distributed amongst the proven creditors as explained above. The amount that the debtor must pay over to the administrator is based on an approximation of the difference between the debtor’s future income and the sum of a reasonable amount required for the maintenance of the debtor and his or her dependants; periodical payments to be made in terms of credit agreements in terms of the National Credit Act 34 of 2005; payments to be made in terms of an existing maintenance order; periodical payments to be made in terms of a mortgage bond; and certain other future debts. [Section 74C(2 of the Magistrates’ Courts Act.]

4.6 Secured debt, insofar as it qualifies as in futuro debt, is thus excluded from an administration order and an order for the rescheduling of such debt is therefore not possible. However, the Court will usually and may in its discretion, when calculating the amount to be paid to the administrator in terms of the order, make provision for the periodical payment which a debtor is obliged to make under a credit agreement in terms of the NCA as well as for the periodical payments under a mortgage bond. [Section 74C(2)]

4.7 Although this is first and foremost a debt restructuring plan in the form of a repayment plan, sections 74C(1)(b) and 74K of the Magistrates’ Courts Act, allow in principle that property may be realized by the administrator if a court authorizes such sale. (This provision is seldom used in practice.) If the property to be sold is subject to a credit agreement in terms of the National Credit Act 34 of 2005, the written consent of the credit provider must first be obtained.

4.8 This procedure has become subject to severe criticism due to, amongst other reasons, the following:

4.8.1 Various abuses manifest in the system;
4.8.2 Practical difficulties, especially the lack of capacity of some courts to deal with all the applications, are experienced;
4.8.3 There is no proper regulation of administrators;
4.8.4 No maximum time-period for repayment or any discharge is provided for;
4.8.5 Due to the factors mentioned in paragraph 4.7.4 and the added administration costs and interest the amount of debt escalates to such an extent that many debtors never get out of their debt situation;

4.8.6 Since the procedure is limited to those instances where the debt is not more than ZAR 50 000, many debtors are excluded from this procedure;

4.8.7 It is also not always clear to what extent this procedure and debt restructuring in terms of the NCA as discussed below in paragraphs 5 et seq should or could co-exist.

5 Debt re-arrangement (restructuring) in terms of the National Credit Act 34 of 2005

5.1 The National Credit Act 34 of 2005 (hereafter the NCA or the National Credit Act) regulates various aspects relating to credit agreements to which the NCA applies [see section 4 of the NCA]. It must thus be noted that not all types of debt are regulated by this Act. The purpose of the NCA amongst other aspects in terms of section 3(g) is to address and prevent over-indebtedness of consumer debtors, and to provide mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations. The cornerstone of debt relief in terms of the NCA is thus full satisfaction and not to provide a discharge of any kind. In order to assist over-indebted consumers, the NCA has specifically created the office of debt counsellors, being the designated persons to offer and conduct the services of debt counseling and debt review that may lead to debt restructuring of credit agreements regulated by the NCA. [Sections 86 - 88 of the NCA.]

5.2 During the initial debt review process the debt counsellor is obliged to review the debtor’s credit agreements in order to determine whether the debtor is over-indebted and whether reckless credit was extended. [Section 86(6) of the NCA.]

5.2.1 A consumer is over-indebted if the preponderance of available information at the time of the determination indicates that the consumer is or will be unable to satisfy in a timely manner all the obligations under all the
credit agreements to which the consumer is a party. This is determined with regard to his or her financial means, prospects and obligations and probable propensity to satisfy all the obligations in terms of all his or her credit agreements in a timely manner. [Section 86(6) read with section 79 of the NCA.]

5.2.2 The NCA prescribes certain penalties for the credit provider in case of reckless credit granting in terms of sections 83 to 84 of the NCA.

5.3 An assessment by a debt counsellor regarding the over-indebtedness of the consumer will determine the way forward. In this regard section 86(7) of the NCA provides that if, as a result of an assessment conducted in terms of section 86(6), the debt counsellor reasonably concludes that—

5.3.1 the consumer is not over-indebted, the debt counsellor must reject the application, even if the debt counsellor has concluded that a particular credit agreement was reckless at the time it was entered into. In such an instance the debtor may, with leave of the Magistrate’s Court, apply directly to such Court for an order as contemplated in section 86(7)(c) of the NCA; or where the debt counsellor reasonably concludes that

5.3.2 the consumer is not over-indebted, but is nevertheless experiencing, or likely to experience, difficulty satisfying all the consumer’s obligations under credit agreements in a timely manner, the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement. If such a plan is accepted by (all) the credit provider(s), the debt counsellor may obtain a consent order from a Magistrate’s Court in terms of section 86(8)(a) to effect the restructuring as provided for by the NCA in section 86(7)(c)(ii) of the NCA; or where the debt counsellor reasonably concludes that

5.3.3 the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate’s Court makes either or both of the following orders as provided for in the subsections of section 86(7)(c) of
the NCA below, namely-

“Section 86(7)(c): i) that one or more of the consumer’s credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and

Section 86(7)(c): (ii) that one or more of the consumer’s obligations be re-arranged by—

(aa) extending the period of the agreement and reducing the amount of each payment due accordingly;

(bb) postponing during a specified period the dates on which payments are due under the agreement;

(cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or

(dd) recalculating the consumer’s obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6 of the NCA.”

5.4 Debt review or debt re-arrangement (restructuring) may also be initiated by any Court hearing any matter where a credit agreement is being considered and it is alleged that the debtor is over-indebted. [Section 85 of the NCA.]

5.5 Where a debt re-arrangement (restructuring) is ordered, the effect is usually that the amount of the instalment is reduced and the payment term extended. In practice the debt counsellor does not receive and distribute payments on behalf of the debtor, since this function is assigned to independent Payment Distribution Agents.

5.6 Although the Court has limited restructuring powers, it is in actual fact
empowered to force or “cram down” a re-scheduling of debt upon creditors. It should be noted that the Court is also empowered to order such rescheduling with regard to secured debt, which would inter alia include obligations with regard to home mortgages. Compared to the position with regard to other foreign systems, such as Chapter 13 repayment plans in terms of the American Bankruptcy Code, this is quite revolutionary.

5.7 No direct provision is made in the NCA for the debt counsellor to realize the debtor’s assets or to make such a recommendation to the Court. (In practice and in view of the determination of over-indebtedness in terms of section 79 as referred to in paragraph 2(i)(i) above, assets available for realization may, however, be taken into consideration for the purposes of debt restructuring.)

5.8 Debt review followed by restructuring in terms of the NCA is at present in high demand amongst South Africa consumer debtors due to economical woes and since the majority of their debt amounts to credit agreements as regulated by the NCA. However, the process is not without difficulties, such as:

5.8.1 Like the administration order procedure, debt restructuring in terms of the NCA also does not offer a discharge, i.e. the NCA does envisage full repayment of the debt and there is also no time limit prescribed regarding the rescheduling of the debt repayment period;

5.8.2 A particular credit agreement in terms of which debt enforcement has already commenced will be excluded from the debt review application [section 86(2) of the NCA]. In this regard the Supreme Court of Appeal has recently held that the provisions of section 86(2) would bar the consumer from including that specific agreement in the debt review procedure as soon as a section 129(1)(a) notice has been delivered in respect of that specific agreement. A section 129(1)(a) notice is a letter which a credit provider must send to a defaulting consumer before such credit provider may commence legal proceedings to enforce the agreement.]

5.8.3 The facts referred to in 2(n)(i) also cause debtors to remain in debt
almost indefinitely and cause an escalation in the amount of the debt, due to
the cost and interest factor;

5.8.4 As in the case of administration orders, there seems to be a lack of
capacity in some Magistrates’ Courts to deal with the many applications and it
causes delays in the matters being heard within a reasonable time at such
Courts;

5.8.5 The NCA also does not specifically prescribe the procedure to be
followed or the information to be disclosed when bringing a debt review
application to court. It is also not clear what exactly the hearing of the matter
entails. As a whole the procedure may be regarded as cumbersome, costly and
slow.

5.8.6 The NCA provides that a credit provider may give notice to terminate
the debt review process 60 business days after the date on which the consumer
applied for the debt review. In this regard the Supreme Court of Appeal held
that a referral of a debt review matter to Court does not bar the credit provider
from terminating the debt review. A credit provider may therefore terminate
the process in respect of a specific agreement as soon as 60 business days have
lapsed, irrespective of whether the matter is pending in Court. Such
termination is not necessarily a dead end for the consumer as the NCA
provides that the Court may order that the debt review resume in respect of a
credit agreement that is being enforced by litigation. However, the courts are
reluctant to order a resumption and it seems that an order will only be granted
if the Court is convinced that the consumer will eventually succeed in his or
her application for debt review.

5.8.6 Although nearly the majority of consumer debt amounts to credit
agreements in terms of the NCA, this debt restructuring procedure is only
applicable to credit agreement debt and not to other types of debt that a
consumer may have. This aspect restricts the applicability of the procedure in
order to deal with all types of debt simultaneously. (In practice, debt
counsellors thus sometimes use the voluntary distribution procedure described
in paragraph 6 below in conjunction with the statutory procedure described above in order to deal with non-credit agreement debt as well.)

5.8.7 It is also possible to restructure some debt in terms of the NCA and others in terms of an administration procedure as discussed above in paragraphs 4 et seq but these procedures are not well-aligned. It is fair to say that although administration orders are still in use, many cases of overindebtedness will now probably be dealt with in terms of the new provisions in the NCA as described above rather than in terms of the administration procedure. (It is nevertheless submitted that a single statutory repayment procedure is to be preferred.)

6 Voluntary restructuring

6.1 Consumer debtors may, with the cooperation of creditors, use an informal creditor work-out that may amount to a voluntary debt restructuring or voluntary composition. This mode is based on the contractual principle of consent, but some creditors will not be prepared to cooperate in such a voluntary system. Where the creditors accept a reschedulement of payment, it is also referred to as a voluntary distribution. (As indicated above in paragraph 5.7.5, this procedure is sometimes used by debt counsellors in conjunction with debt restructuring in terms of the NCA in order to deal with all the types of debt of a particular debtor.)

7 Rehabilitation and discharge of debt

7.1 The only statutory discharge offered to consumer debtors in South African law regarding a discharge of pre-sequestration debt is provided by section 129 of the Insolvency Act, that follows rehabilitation after the estate of a consumer debtor has been sequestrated. The requirements for rehabilitation are set out below.

7.2 An insolvent will automatically be rehabilitated after ten years from the date of sequestration. Any interested party is entitled to apply to Court within that ten year-period to prevent automatic rehabilitation. [Section 127A of the Insolvency Act.]
7.3 **Alternatively,** an insolvent, may also be rehabilitated by means of a Court order (see below). The Insolvency Act provides various conditions and different time limits before the debtor may apply for his rehabilitation, but he or she usually has to wait four years since the commencement date of sequestration as explained in paragraph 3.1.4 (d) below.

7.4 An insolvent may apply for his or her rehabilitation to the same Court that has granted the sequestration order [see section 124 of the Insolvency Act]. The application must be supported by an affidavit wherein the insolvent declares that he or she has made a complete surrender of his or her estate and has not granted or promised any person any benefit or entered into any secret agreement with the intent to induce the trustee or any creditor not to oppose the application. The affidavit must also contain full particulars relating to the dividend paid out to the creditors and the current income and expenditure, and assets of the insolvent. [Section 126 of the Insolvency Act.] Anyone with an interest in the estate may object to his rehabilitation. The insolvent must furnish security with the Registrar of the High Court to the value of at least ZAR500 for any costs incurred due to the opposition of the application for rehabilitation. [Section 125 of the Insolvency Act.] The insolvent (applicant) must usually also give notice to the Master of the High Court and/or his/her trustee, as well as in the *Government Gazette,* depending on the specific statutory ground he or she relies upon, prior to bringing the application. [Section 124 of the Insolvency Act.] The statutory grounds for rehabilitation by court order in terms of this section are as follows:

(a) The insolvent may apply for rehabilitation after 12 months have elapsed since the date of confirmation of the first trustee’s account. The insolvent must publish a notice of the intended application in the *Government Gazette* at least six weeks prior to the application. [Section 124(2)(a) of the Insolvency Act.]

(b) Where the insolvent had been previously sequestrated, he or she may only apply for rehabilitation three years after date of confirmation of the trustee’s first account. Also, six weeks prior notice has to be given to the Master and creditors by publishing a notice to that effect in the *Government Gazette.* [Section 124(2)(b) of the Insolvency Act.]
(c) Where the insolvent has been convicted of any fraudulent act in relation to his or her existing or previous insolvency, or of any other offence under sections 132, 133 and 134 of the Insolvency Act, he may only apply for rehabilitation after five years have elapsed from the date of his conviction. Six weeks prior notice must also be given as in paragraph (a) and (b) above. [Section 124(c) of the Insolvency Act.]

(d) In none of the abovementioned cases (paragraph 7.4 (a) to (c)) will the court order rehabilitation within four years after sequestration without the Master’s recommendation. [Proviso to section 124(2) of the Insolvency Act.]

(e) Where no claims were proved by any creditor, the insolvent has not been convicted of an offence mentioned in paragraph 3.1.4 (c) above, and where it is the first time that his or her estate is sequestrated, the insolvent may apply for rehabilitation six months after the application for his or her sequestration. Six weeks prior notice as mentioned in paragraph (a) must also be given. [Section 124(3) of the Insolvency Act.]

(f) Where a composition was agreed to as indicated in section 119(7) of the Insolvency Act and where the Master of the High Court certifies that at least 50 cents in the rand was paid in respect of all claims proved against the estate, or where security was given for such payment, the insolvent may apply for rehabilitation. The insolvent must give three weeks’ notice of the application in the Government Gazette and a copy of such notice must also be handed to the trustee. [Section 124(1) of the Insolvency Act.]

(g) Where all claims are paid in full together with interest, the insolvent may, at any given time after confirmation of the distribution account, apply for rehabilitation. Three weeks’ prior notice must be given to the Master and the trustee. [Section 124(5) of the Insolvency Act.]

7.5 The Court hearing the application may refuse, postpone or grant the requested order for rehabilitation. Before granting the order the Court must be convinced that all the statutory requirements as referred to above have been met and that the rehabilitation of the debtor is indeed desirable.
7.6 It is thus accepted in South African law that an insolvent does not have a right to rehabilitation but that it remains a discretionary matter in the hands of the Courts. Such discretion must however be exercised judicially and not arbitrarily. It is normally expected that both the trustee and the Master will provide a report as to the desirability of rehabilitation in a particular instance. Apart from the facts stated in the application of the insolvent the Court will also consider these last-mentioned reports and objections to rehabilitation raised by creditors – if any. When exercising its discretion the Court will consider the desirability of rehabilitation in the sense of whether the insolvent is such a person as ought to be rehabilitated. In this regard the question is if the insolvent is a person that ought to be allowed to trade with the public on the same basis as any other honest person.

7.7 The Court hearing the matter may also impose conditions for rehabilitation. [Section 129 of the Insolvency Act.]

7.8 Subject to any conditions imposed by the Court, rehabilitation ends sequestration, discharges all the insolvent’s pre-sequestration debts except those arising out of any fraud on his or her part, and also relieves the insolvent of every disability resulting from sequestration. [Section 129 of the Insolvency Act.] It must be noted that claims for maintenance (alimony) is an ongoing obligation and even a rehabilitated insolvent will remain obliged to pay maintenance out of future income. The Court hearing the matter may also impose conditions for rehabilitation and such conditions may include an order that certain debts will not be discharged on rehabilitation [section 129 of the Insolvency Act read with section 127(3) and (4) of the Insolvency Act].

8 “INSOLVENCY PRACTITIONERS” IN CONSUMER INSOLVENCY MATTERS

8.1 It must first be understood that currently South African insolvency law in the broadest sense does not provide for a regulated insolvency profession but that there are people coming from the attorneys’, accountants’ or auditors’ professions who act
as such. There are also other persons without formal qualifications who take appointments as such. In general it is also only the trustee appointed in terms of the Insolvency Act that is viewed as an insolvency practitioner because it is not generally appreciated that consumers making use of debt relief measures like administration orders or debt review also find themselves in a kind of insolvency situation.

8.2 Although insolvency practitioners in general are not compelled to belong to a professional body in terms of South African law, there are certain statutory bars against the appointment of certain persons to act as trustees in terms of the Insolvency Act (i.e. a system of negative licensing). The Master of the High Court has a discretion to appoint a person to act as a *trustee* in case of sequestration regulated by the Insolvency Act, but will in practice only appoint people with some expertise in the field and who are not barred from such appointments.

8.3 *Debt counsellors* in terms of the NCA must comply with certain statutory requirements, undergo training and register as such in terms of the NCA before they may act as such.

8.4 There are no formal requirements or disqualifications set for *administrators* appointed by Court in terms of section 74 of the Magistrates’ Courts Act.

8.5 All these categories of “insolvency practitioners” mentioned above, i.e. *trustees*, *debt counsellors* and *administrators* are in principle subject to systems of prescribed fees which fees are borne by the debtor or his/ her insolvent estate in the case of sequestration. At present there is in general not direct state funding available to meet these fees.

8.5.1 In the case of a sequestrated estate in terms of the Insolvency Act, it must be noted that where there is a shortfall to meet the costs of administering such an estate, that certain creditors may become liable towards the estate to settle same by means of a system of contributions.

8.5.2 In the case of debt review in terms of the NCA, debtors who earn less then ZAR2500 per month may apply for assistance from the National Credit
9 Law reform

9.1 Insolvency Act

9.1.1 The South African Law Reform Commission has been working on new insolvency legislation since 1987 and they have published a report plus a Draft Insolvency Bill in 2000. One of the aims of law reform project is to have one piece of insolvency legislation that will deal with insolvency of both individuals and other entities like companies.

9.1.2 With regard to sequestration, this procedure is termed liquidation but little has changed in the Bill on a principle level, in other words if the Bill is anything to go by, we are not looking at the introduction of a revolutionary new insolvency system. Within the ambit of other debt relief measures (debt restructuring), the Bill proposes an alternative debt relief measure to sequestration in the form of a pre-sequestration composition. This proposal is also in essence a debt restructuring device but the important factor is that a prescribed majority of creditors can bind the minority by means of majority vote.

9.1.3 Although the concept of a new unified insolvency legislation was accepted by Cabinet in March 2003, this initiative has stalled for some time but probably due to the new interventions following the new Companies Act of 2008 further work has been effected and a working document containing a draft bill titled the Draft Insolvency and Business Recovery Bill dated 30 June 2010 has been completed by the Department of Justice. It is unclear when this new piece of legislation will be taken forward by government.

9.2 Administration order

9.2.1 With regard to the administration order, unexpectedly, and probably due to the prolific growth in the micro-lending industry, these orders became extremely popular after 1994 to such an extent that it has been referred to as “an industry”. Many believe that this industry is under-regulated, and that it gave rise to serious abuse due to a number of factors. It was widely believed that unscrupulous administrators were
holding unexpected consumer-debtors at ransom – and that these debtors would never escape their financial problems. Although this had not been probed, there were indications that many individuals who had to rely on the so-called micro lenders, ended up under the administration regime which in its current form aggravated their debt situation rather than affording real relief. In spite of the fact that a Micro Finance Regulatory Council was established in 1999 in order to accredit lenders and monitor their behaviour, problems in this area persisted. These and other complaints prompted the Department of Justice to implement a reform project which was subsequently suspended in view of the introduction of the National Credit Act 34 of 2005.

9.2.2 Nevertheless, around 2001 and prior to the introduction of the National Credit Act, on request of the Department of Justice the Center for Advanced Corporate and Insolvency Law, based at the University of Pretoria, conducted a research project with the view of advising this Department on the reform of the administration order. As a result of this preliminary investigation that culminated in the Interim Report, the Department of Justice requested the South African Law Commission to appoint a project committee in order to make formal proposals regarding the reform of administration orders. The Project Committee was appointed during 2003 and the project registered as Project 127, Review of Administration Orders. The previously mentioned Interim Report formed the basic discussion document for the Project Committee but final proposals has not been published yet.

9.2.3 It is also important to note that Department of Justice and the South African Law Reform Commission were in the process of considering the reform of the administration order due to the criticism lodged against it, when Department of Trade and Industries introduced the National Credit Act 34 of 2005 containing debt review as a further alternative debt relief measure. In short it is a pity that these two initiatives were not synchronised on the one hand to have established a proper single debt restructuring model to deal with all sorts of consumer debt, and, at the same time to have addressed problems that existed with the administration procedure. Nevertheless, a golden opportunity was missed to have dealt with the real issues in a comprehensive way.
9.2.4 It is clear from paragraphs 4.8 and 5.8 that neither the administration order, nor debt review are satisfactory in all respects. In view of the advantage for creditors principle many consumer debtors are also without a proper remedy since they will not qualify for sequestration. As was highlighted in paragraph 9.2.3, a suitable single alternative debt restructuring measure is to be favored over the incoherent and fragmented approach currently in place. It is submitted that a principled approach should be adopted to deal with the liquidation of assets, debt restructuring and also assetless estates in a coherent way. Even though introducing a no-asset measure will have an impact on and cost to the economy, it is submitted that it is more expensive to keep these consumers in their fatal states, thereby totally excluding them from the formal sector and economy.

9.3 Debt review

It can also be noted that the introduction of the National Credit Act of 2005 had an effect on consumer bankruptcy by means of voluntary surrender and compulsory sequestration in terms of the Insolvency Act of 1936, since the debt review procedure introduced by the National Credit Act is used by many consumers in an attempt to obtain a debt relief in the form of a repayment plan. This procedure is however not well-aligned and practical problems occur as stated above. The responsible Department i.e. Department of Trade and Industries via the National Credit Regulator is however reviewing this Act as well.
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