

Bankruptcy and alternative debt relief for consumers in Tanzania – a comparative investigation*

*Ngwaru Maghembe** and Melanie Roestoff****

Abstract

This article seeks to compare the Tanzanian consumer bankruptcy and debt relief procedures with those of South Africa. The purpose is to ascertain whether there are any lessons to be learnt by Tanzania from its fellow SADC country, and to indicate a way forward for future law reform in this regard. The research shows that the Tanzanian system, compared to the South African system, is in many respects more liberal towards debtors. So, for instance, the Tanzanian Bankruptcy Act does not require proof of advantage for creditors in order for a debtor to be adjudged bankrupt. However, the Tanzanian system does not provide for any significant alternative debt relief procedure. In 2001 the consumer debt committee of INSOL International recommended that legislators in countries undertaking law reform with regard to debt problems of individual debtors, should provide for alternative debt relief procedures which take into consideration the debtor's specific needs. We suggest that the Tanzanian legislator, when designing such a procedure, should learn from the mistakes of its South African counterpart. The alternative procedure should be inexpensive and simple and should involve extra-judicial rather than judicial proceedings. Finally, it should offer the consumer a discharge from indebtedness and enable him or her to make a fresh start.

INTRODUCTION

The United Republic of Tanzania (along with several other sub-Saharan African countries) is showing the same vital development signs that preceded the arrival of institutional financial investors in emerging markets (in

* This article is based on a paper presented at the INSOL International Academics' Group Meeting in Dublin in June 2010.

** LLD candidate and academic associate: Department of Mercantile Law, University of Pretoria.

*** Professor: Department of Mercantile Law, University of Pretoria.

Southeast Asia) in the 1980s.¹ Nellor² points out that successful emerging market countries like Tanzania, nearly always feature the private sector as the engine of growth, regardless of their form of economic organisation. Potential investors in these countries will always want to be confident that government policy will support private sector development and that their private property rights will be protected.³ Africa traditionally fares inadequately in this regard and in creating a positive business environment.⁴

In Tanzania an area of the private sector causing concern is the ability of the private consumer to acquire credit. A recent monthly economic review by the Bank of Tanzania shows that banks are registering growth levels in deposits, but are taking fewer risks in lending out the money.⁵ The review shows that even as the growth rates of monetary deposits edged upwards in the last three months of 2009, the rate of growth of credit to the private sector continued to slow down reaching 9,6 per cent in December 2009, compared to 12,2 per cent recorded in November 2009, and 44,6 per cent recorded for the year ending December 2008.⁶ These are worrying statistics considering that a key component of the national strategy for the reduction of poverty and economic expansion is the increase of access to financial services, including savings facilities, business and personal credit.⁷

The availability of credit to the consumer at reasonable interest and for a suitable duration depends on a number of factors that collectively affect the risk associated with lending.⁸ The following were identified as the major risk

¹ D Nellor 'The rise of Africa's frontier markets' (2008) 45 *Finance and Development* 34 see: www.imf.org/extended/pubs/ft/fandd/2008/09/nellor.pdf.

² Nellor n 1 above at 42.

³ A Braverman *et al* 'Rural credit markets and institutions in developing countries: lessons for policy analysis from practice and modern theory' (1986) 14 *World Development* 1254 see www.sciencedirect.com.

⁴ Nellor n 1 above at 42. In this discussion Nellor specifically excludes South Africa.

⁵ (January 2010) 12 *Bank of Tanzania Monthly Economic Review* – see www.bot-tz.org/Publications/PublicationsandStatistics.asp.

⁶ *Ibid.* The sustained slower growth rate of credit to the private sector is also driven by the continued cautious stance taken by banks in extending credit to the private sector, following the global financial crisis. It is important to note that this slowdown has also been accentuated by the fact that the annual growth of 44,6 per cent recorded in December 2008 was significantly higher than average, implying that the year to December 2009 was being measured against a relatively high base.

⁷ Speech by the President of the United Republic of Tanzania, His Excellency Jakaya Mrisho Kikwete, on Inaugurating the Fourth Phase Parliament of The United Republic of Tanzania, Parliament Buildings, Dodoma, (30 December 2005) 15 See: www.parliament.go.tz/bunge/index.php.

⁸ Braverman *et al* n 3 above at 1259.

factors for lenders in Tanzania by the Business Climate Legal and Institutional Reform (BizCLIR) project:⁹

- lack of a national identification system making it difficult to identify applicants;
- lack of credit information;
- ineffective enforcement mechanisms; and
- an outdated bankruptcy regime.

Policies and efforts to alleviate some of these risk factors are noteworthy and currently ongoing. With regard to the national identification system, the government of the United Republic of Tanzania through the National Identification Agency, has set aside funds for the cost of the procurement of goods and plants for the implementation of the National Identification System based on smart card technology.¹⁰ Regarding the lack of credit information, unlicensed credit bureaus will now be registered to enable the Bank of Tanzania to monitor and regulate the movement of credit more precisely. Further efforts in this regard include the creation of a public credit registry.¹¹ There are also reforms in the country's judiciary to facilitate efficient enforcement of debt mechanisms, including a fully operational commercial court division of the High Court of Tanzania, which has recently been established.¹² There is, however, no current initiative to strengthen the bankruptcy regime that relies on colonial legislation passed in 1930.

The need for legislative reform in the field of consumer credit law in South Africa arose, *inter alia*, because of the ineffectiveness of earlier consumer credit legislation¹³ in dealing with the demands of a complex consumer market.¹⁴ According to the Department of Trade and Industry, the over-supply of credit to those considered creditworthy, resulting in heavy debt burdens for a large number of consumers, was one of the main reasons for the need to reform the existing consumer credit legislation.¹⁵ Another

⁹ www.bizclir.com/cs/countries/africa/tanzania/gettingcredit.

¹⁰ The National Identification Agency Specific Procurement Notice MoHA/NIDA/PQ/2007–08/01. Recently the tender process had to be abandoned as a result of allegations of irregularities. See: <http://216.69.164.44/ipp/guardian/2009/01/29/130547.html>.

¹¹ www.ippmedia.com/frontend/index.php?l=14180.

¹² Note 9 above.

¹³ The Credit Agreements Act 75 of 1980 and the Usury Act 73 of 1968.

¹⁴ Department of Trade and Industry South Africa *Consumer credit law reform: policy framework for consumer credit* 2004 (hereafter *Policy framework*) 11 *et seq.*

¹⁵ *Id* at 13.

shortcoming was the inability of available debt relief measures at that stage¹⁶ to assist already over-indebted consumers to deal with their debt.¹⁷ As a result, for the first time in the history of South African consumer credit legislation, the legislator made specific provision for measures to combat reckless credit granting and over-indebtedness, as well as for measures aimed at resolving over-indebtedness through the enactment of the National Credit Act 34 of 2005 (NCA) in 2006.¹⁸

It is submitted that future law reform in Tanzania with regard to the debt problems of individual debtors should pay heed to the South African experience in this regard. An increase in credit extension to private consumers in Tanzania would clearly necessitate legislative reform with regard to the regulation of consumer credit. However, it would, in addition, call for the reform of Tanzanian bankruptcy regime, including its ability to resolve debt problems of consumers by providing for specific debt relief measures.

First of all, this article seeks to set out the procedures that may currently be instituted in Tanzania when an individual commits an act of bankruptcy, or is factually or commercially bankrupt. Secondly, it will investigate whether there are currently any alternative debt relief measures in Tanzania. Thirdly, the article seeks to compare the Tanzanian procedures to those of South Africa. The purpose of this comparison is to ascertain whether there are any lessons to be learnt by Tanzania from an economically more developed sub-Saharan (and fellow SADC¹⁹) country on how to modernise its bankruptcy system. The differences, similarities, strong points and weaknesses of both systems will be highlighted to indicate a way forward for future law reform regarding debt relief for individual consumers in Tanzania.

¹⁶ *Inter alia* personal bankruptcy in terms of the Insolvency Act 24 of 1936 and administration in terms of s 74 of the Magistrates' Courts Act 32 of 1944 – see the discussion below.

¹⁷ See *Policy framework* n 14 above at 13.

¹⁸ See ss 78–88 of the NCA. The Act was put into operation on 1 June 2006, 1 September 2006 and 1 June 2007 – see GN 22 in *Government Gazette* 28824 of 11 May 2006. The provisions of the Act dealing with over-indebtedness, reckless credit and rearrangement of debts came into operation on 1 June 2007.

¹⁹ The South African Development Community (SADC) is an alliance of majority ruled states in Southern Africa that has been in official existence since 1992. The objectives of the Community are provided for in Article 5 of the SADC Treaty and include the objectives to achieve development and economic growth, to alleviate poverty, to enhance the standard and quality of the life of the people of Southern Africa and to support the socially disadvantaged through regional integration – see also www.sadc.int.

BANKRUPTCY LEGISLATION AND PROCESSES IN TANZANIA

As is the position in South Africa, Tanzania does not have a unified bankruptcy legislation dealing with both natural and juristic persons.²⁰ Bankruptcy legislation in Tanzania, the Bankruptcy Act 9 of 1930,²¹ deals with natural persons, while the winding-up provisions of the Companies Act 12 of 2006 deal with the bankruptcy of corporations. In this regard section 118 of the Tanzanian Bankruptcy Act states that a receiving order shall not be made against any corporation, association, or company registered under the Companies Act of 2006. As in Kenya and Uganda, the Bankruptcy Act is virtually identical to the English Bankruptcy Act of 1914 (together with the English Bankruptcy (Amendments) Act of 1926) due to the region's colonisation by the English.²² Subsidiary bankruptcy rules²³ are also in effect in all three East African jurisdictions. In Kenya and Tanzania, the rules are similar to the English Bankruptcy Rules of 1952.²⁴

Acts of bankruptcy

Under section 3 of the Bankruptcy Act the following are deemed to be acts of bankruptcy by the debtor.

- If in Tanzania or elsewhere, the debtor makes any conveyance or assignment of his property to his trustee for the benefit of his creditors generally, or if he makes a fraudulent conveyance, gift, delivery or transfer of his property, or if he makes a conveyance or transfer of his property, or creates a charge thereon which would be void as a fraudulent preference, should he be adjudged bankrupt.²⁵
- If, with the intent to defeat or delay his creditors, he leaves Tanzania, or if he was outside Tanzania, remains, or departs from his house or dwelling, or begins to keep house.²⁶

²⁰ Unified insolvency legislation has however been in the pipeline since January 2000 – see University of Pretoria – Faculty of Law – Centre for Advanced Corporate and Insolvency Law *Final report containing proposals on a unified Insolvency Act* (2000).

²¹ Cap 25 (rev ed 2002).

²² I MacNeil *Bankruptcy law in East Africa* (1966) 14.

²³ See www.rita.go.tz.

²⁴ MacNeil n 22 above at 14.

²⁵ S 3(1)(a)–(c).

²⁶ S 3(1)d). Clearly, this act of bankruptcy was introduced via English bankruptcy law. Under early English bankruptcy legislation the practice of 'keeping house' was one of the acts of bankruptcy which allowed creditors to avail themselves of the bankruptcy process. In terms of this practice, the debtor, in order to avoid his creditors, retired to his house with his creditors' goods, enjoying immunity from legal process, which was deemed to cease at the debtor's doorstep – see HG Bauer *The Bankrupt's estate: a study of individual and collective rights of creditors under Roman and early English bankruptcy laws* (Master's thesis Southern Methodist University School of Law 1980) 66 *et seq.*

- If execution against him has been levied by seizure of his goods in any civil proceedings in any court and the goods have either been sold or held by the bailiff for 21 days.²⁷
- If he files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself.²⁸
- If a creditor has obtained a final judgment or final order against him for any amount and he does not, within 7 days after service of the notice on him in Tanzania,²⁹ either comply with the requirements of a bankruptcy notice under the Act,³⁰ or does not satisfy the court that he has a counter claim which equals or exceeds the amount of the judgment sum he was ordered to pay.³¹
- If a debtor gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts.³²

If a debtor commits any of these acts of bankruptcy, the High Court of Tanzania³³ may on being petitioned by either the creditor or the debtor, make a receiving order³⁴ for the protection of the estate.³⁵

The creditor's petition

Conditions on which a creditor may petition

In terms of section 6, a creditor³⁶ is entitled to present a bankruptcy petition against a debtor if the following requirements have been met:

- The debt owing by the debtor must be a liquidated claim of at least 1000 shillings payable immediately or at some certain future date; and
- The act of bankruptcy relied on must occur within 3 months before presentation of the petition; and
- The debtor must be domiciled in Tanzania, or within a year before the presentation of the petition have been ordinarily resident in Tanzania, or must have carried on business personally or by means of an agent or

²⁷ S 3(1)(e).

²⁸ S 3(1)(f).

²⁹ Or within the time limit allowed by the court order to effect service outside Tanzania – s 3(1)(g).

³⁰ See s 4.

³¹ Section 3(1)(g).

³² Section 3(1)(h).

³³ Section 97. In terms of s 97 the Chief Justice may however by order delegate all or any part of the jurisdiction of the High Court to any subordinate court, either generally or for the purpose of any particular case or class of cases.

³⁴ See s 5–13 and the discussion below.

³⁵ Section 5.

³⁶ Or two or more creditors who join in the petition.

manager, or must have been a member of a firm or partnership which has carried on business in Tanzania.

If the petitioning creditor is a secured creditor, he must state in his petition that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt, or he must give an estimate of the value of his security in which case he would be entitled to present a bankruptcy petition in respect of the balance due to him after deducting the value so estimated.³⁷

Proceedings and order on the creditor's petition

A creditor's petition must be verified by affidavit of the creditor or by a person on his behalf having knowledge of the facts, and must be served in the prescribed manner.³⁸ After the creditor's petition has been presented, a hearing is held before the receiving order can be issued.³⁹ At the hearing the petitioning creditor(s) must, in terms of section 7(2), prove the debt owing to the creditor(s), the proper service of the petition to the debtor, and the relevant act of bankruptcy. If it is necessary for the protection of the estate, the court may, at any time after the presentation of the bankruptcy petition and before granting the receiving order, appoint the official receiver⁴⁰ to be the interim receiver of the debtor's property and may direct him to take possession of the estate.⁴¹ The court may⁴² dismiss the creditor's petition if it is not satisfied with the proof of any of the requirements in terms of section 7(2). The court may also dismiss the petition if it is satisfied that the debtor is able to pay his debts, or if it is of the opinion that for another sufficient cause no order ought to be made.⁴³ If the debtor denies that he is indebted to the petitioning creditor, the court may stay the proceedings until the debtor's liability has been determined.⁴⁴ The court may, however, grant a receiving order on the petition of another creditor, and may meanwhile dismiss the petition in the stayed proceedings on such terms as it may think

³⁷ Section 6(2).

³⁸ Section 7(1).

³⁹ MacNeil n 22 above at 61. See s 7 and Bankruptcy Rules 129–141.

⁴⁰ The powers and function of the official receiver in Tanzania can be compared to that of the Master of the High Court in terms of the South African Insolvency Act. See ss 74–77 in respect of the appointment, status and duties of the official receiver.

⁴¹ See s 10 which also applies to debtors' petitions.

⁴² The court therefore has a discretion in this regard.

⁴³ S 7(3). It would therefore appear that the court would be entitled to dismiss a petition if it is of the opinion that it would not be to the 'advantage of creditors' to grant a receiving order – see ss 6, 10 and 12 of the South African Insolvency Act and the discussion below.

⁴⁴ Section 7(5).

just.⁴⁵ Under section 108 the court has a blanket authorisation to stay the proceedings under a bankruptcy petition at any time for sufficient reason.⁴⁶ In addition to its power to stay the bankruptcy proceedings, the court may also stay other pending proceedings against the debtor at any time after the petition has been filed.⁴⁷

The debtor's petition

In order to allow a debtor to start afresh even in the face of united opposition from his creditors, the legislator allows the debtor to petition himself into bankruptcy.⁴⁸ The debtor must fulfill the following requirements:⁴⁹

- the petition must allege that the debtor is unable to pay his debts;
- the debtor must file his statement of affairs with the official receiver;⁵⁰ and
- the petition must comply with the formal requirements in rules 106 to 110 of the Bankruptcy Rules.⁵¹

The filing of the petition by the debtor constitutes an act of bankruptcy and upon its proper filing the court shall⁵² issue a receiving order.⁵³ MacNeil notes that a debtor could intentionally commit another one of the acts of bankruptcy to prompt his or her creditors into a bankruptcy proceeding.⁵⁴ She could for example file in court a declaration that she is unable to pay her debts.⁵⁵

⁴⁵ Section 7(6).

⁴⁶ In *Re Woodward* 1945 2 KLR 9 the court allowed a petition but stayed the receiving order under the Courts (emergency powers) Ordinance. This Ordinance gave the court the power to stay bankruptcy proceedings if it was convinced that the inability of the debtor to pay was due to circumstances directly or indirectly attributable to any war in which His Majesty may be engaged. See also MacNeil n 22 above at 63.

⁴⁷ S 11. The power to stay pending procedures also applies to debtors' petitions. The Tanzanian Bankruptcy Act therefore affords the court a discretion to stay pending proceedings after a petition has been filed. *Cf* in this regard s 20(1)(b) and (c) of the South African Insolvency Act in terms of which all pending civil proceedings against the insolvent (except proceedings regarding a right or status insofar as the estate is not involved) as well as the execution of judgment are stayed after a sequestration order has been granted. In terms of s 5 of the South African Insolvency Act all sales in execution (not attachments) are stayed after publication by the applicant of his intention to voluntarily surrender his estate in terms of s 4(1).

⁴⁸ MacNeil n 22 above at 147.

⁴⁹ Section 8(1).

⁵⁰ Prepared in accordance with the provisions of s 16 of the Act – s 8(1).

⁵¹ MacNeil n 22 above at 147. These are rules on *inter alia* the paying of a deposit.

⁵² The court therefore has no discretion in this regard.

⁵³ Section 3(1)(f) and 8(1).

⁵⁴ MacNeil n 22 above at 147.

⁵⁵ *Cf* s 3(1)(f).

The receiving order

Once the court has made a receiving order, the official receiver shall be constituted as the receiver of the property of the debtor.⁵⁶ Upon making such an order, no creditor of the debtor, except as directed under the Act, shall have a remedy against the property or person of the debtor, nor shall they commence legal proceedings against the debtor without the leave of the court.⁵⁷ However, the receiving order will not interfere with the power of any secured creditor to realise, or otherwise deal with such security.⁵⁸ The receiving order must be published in the *Gazette* and advertised in the prescribed manner.⁵⁹

Soon after the granting of a receiving order, a general meeting of creditors⁶⁰ must be held to consider a proposal for a composition or scheme of arrangement,⁶¹ or whether the debtor should be adjudged bankrupt, and generally to decide on how to deal with the debtor's property.⁶² In terms of section 17 of the Act, the court must also appoint a day for the public examination of the debtor concerning his conduct, dealings and property. When the court is of the opinion that the affairs of the debtor have been sufficiently investigated, it will declare the examination to be concluded, but will only do so after the date appointed for the first meeting of creditors.⁶³

Adjudication of bankruptcy

After a receiving order has been granted, the court shall⁶⁴ adjudge the debtor bankrupt:⁶⁵

- if the creditors at the first meeting resolve that the debtor be adjudged bankrupt, or pass no resolution or if no meeting is held; or
- if a composition or scheme of arrangement is not approved within 14 days after conclusion of the public examination; or
- if the debtor with the concurrence of the official receiver, consents in writing to be adjudged bankrupt.

⁵⁶ Section 9(1).

⁵⁷ *Ibid.*

⁵⁸ Section 9(2).

⁵⁹ Section 13.

⁶⁰ Referred to in the Act as the first meeting of creditors – s 14(1).

⁶¹ See section 18 and the discussion below.

⁶² Section 14.

⁶³ Section 17(10).

⁶⁴ The court does not have any discretion in this regard.

⁶⁵ Section 20.

Adjudication of bankruptcy has the effect of the bankrupt's property vesting in a trustee⁶⁶ and it becoming divisible among his creditors.⁶⁷

Compositions and schemes of arrangement

The debtor may enter into a scheme of arrangement or composition before the filing of a bankruptcy petition. In such a case, where a deed of arrangement has been executed, a creditor can no longer present a bankruptcy petition against the debtor.⁶⁸

After a bankruptcy petition has been filed, a debtor may, within four days of filing his statement of affairs,⁶⁹ make a written and signed proposal for a composition or scheme of arrangement in satisfaction of his debts.⁷⁰ In such a case, the official receiver must hold a meeting of the creditors before the public examination has been concluded, and if the majority in number and three-quarters in value, of all the creditors who have proved claims accept the proposal, it shall be deemed to have been duly accepted and once approved by the court,⁷¹ will bind all creditors.⁷² If the court is of the opinion that the proposal is not reasonable or is not calculated to benefit the general body of creditors, or facts are proved which would require the court to refuse, suspend or attach conditions to the debtor's discharge,⁷³ it must refuse to approve the proposal.⁷⁴ However, in all other instances, the court has a general discretion to either approve or refuse to approve the proposal.⁷⁵

Section 23 provides that creditors may resolve to accept a proposal for a composition or scheme of arrangement after bankruptcy adjudication. In such a case the same proceedings and consequences will ensue as in the case of

⁶⁶ Appointed in terms of s 21.

⁶⁷ Section 20(1).

⁶⁸ Subsection 6(1) and s 25 of the Deeds of Arrangement Ordinance 10 of 1930 Cap 26 Revised Edition 2002.

⁶⁹ The statement of affairs must be submitted to the official receiver prior to, but not more than three days before presentation of the debtor's petition (s 16(2)(a)) and within fourteen days after the receiving order in the case of a creditor's petition (s 16(2)(b)).

⁷⁰ S 18(1).

⁷¹ The application for approval by the court shall not be heard until after the conclusion of the public examination by the debtor – s 18(6).

⁷² Section 18(2).

⁷³ Unless security is provided for the payment of at least five shillings in the pound on all unsecured provable debts. See s 29(2) and the discussion below in respect of the powers of the court to refuse, suspend or attach conditions to the debtor's discharge.

⁷⁴ Cf s 18(9) and (10).

⁷⁵ S 18(11). Before approving the proposal the court must also take into consideration the report of the official receiver as to the terms of the proposal and the conduct of the debtor and also any objections which may be made by a creditor – s 18(8).

a composition that has been accepted before adjudication.⁷⁶ If the court approves the composition or scheme it may, in terms of section 23(2), make an order annulling the bankruptcy and vesting the property of the bankrupt in him or her, or in such other person as it may appoint, and on such terms and conditions as it may deem fit.

Discharge of the bankrupt

The effect of an order of discharge is to release the bankrupt from all his or her debts provable in bankruptcy⁷⁷ except debts on a recognizance; debts resulting from an offence against any law relating to the general revenue of the state; debts incurred by means of fraud or fraudulent breach of trust; or debts arising from any liability under a judgment based on seduction or on a matrimonial cause.⁷⁸ A discharge also removes all legal disqualifications against the bankrupt arising from his or her bankruptcy.⁷⁹

The Tanzanian Bankruptcy Act, unlike the South African Insolvency Act,⁸⁰ does not allow a bankrupt an automatic discharge through passage of time. However, the bankrupt may apply to the court for an order of discharge any time after being adjudged bankrupt, although the application may not be heard until the public examination of the bankrupt has been concluded.⁸¹ When hearing the application, the court takes into consideration a report of the official receiver of Tanzania, or any reciprocating country as to the bankrupt's conduct and affairs (including a report as to the bankrupt's conduct during the proceedings under his bankruptcy).⁸² The court may⁸³ make the following orders.⁸⁴

- It may grant the order of discharge.
- It may refuse an absolute order of discharge.
- It may make an order suspending the operation of the order for a specified time.
- It may grant a discharge subject to any conditions with respect to any future earnings or property acquired subsequently.

⁷⁶ Section 23(1).

⁷⁷ *Cf* s 129 of the South African Insolvency Act discussed below.

⁷⁸ Section 32(1) and (2).

⁷⁹ *Cf* s 29(4) and compare s 129(c) of the South African Insolvency Act.

⁸⁰ *Cf* s 127A of the South African Insolvency Act and the discussion below.

⁸¹ Section 29(1).

⁸² Section 29(2).

⁸³ The court has a discretion in this regard.

⁸⁴ Section 29(2).

Where the bankrupt has committed an offence under the Act, or in connection with his bankruptcy, or where the occurrence of certain facts⁸⁵ have been proved, the court must⁸⁶ in terms of the first proviso to section 29(2), either refuse or suspend the discharge, or suspend it subject to the condition of payment of a dividend⁸⁷ to his creditors. Alternatively, the discharge may be granted on the condition that the bankrupt consent to judgment against him for any unpaid balance of the debts provable under bankruptcy.⁸⁸

The facts mentioned above⁸⁹ include the instance⁹⁰ where it has been proved⁹¹ that the bankrupt's assets are not of a value equal to ten shillings in the pound on the amount of his unsecured liabilities.⁹² However, if the bankrupt is able to convince the court that this fact has arisen from circumstances for which he cannot justly be held responsible,⁹³ the court will have the power to grant the discharge in terms of the main provision of section 29(2).

Administration of small estates

If the court, on petition by a debtor or creditor, is satisfied⁹⁴ that the estate of the debtor qualifies as a small estate,⁹⁵ or if the official receiver reports to the court that the estate qualifies as a small estate, it may make an order for the summary administration of the estate. In such a case the provisions of the Act will apply subject to the following modifications.⁹⁶

⁸⁵ See s 29(3).

⁸⁶ The court therefore has a discretion.

⁸⁷ Which the court may determine in its absolute discretion – s 29(d).

⁸⁸ In terms of the second proviso to section 29(2) the court has the discretion to modify the terms of the order in terms of the first proviso on application by the bankrupt at any time after the expiration of two years after granting of the order provided the bankrupt satisfies the court that there is no reasonable probability that he will be able to comply with the terms of the order.

⁸⁹ See the first proviso to s 29(2).

⁹⁰ Other instances are listed in subsection (b)–(m), *eg* where the bankrupt has omitted to keep books, has continued to trade after knowing him or herself to be insolvent, has given an undue preference to any of his creditors, or has previously been adjudged bankrupt or made a composition or arrangement with his creditors. Misconduct or conduct prejudicing creditors is a factor in most cases where a discharge can be refused.

⁹¹ To the satisfaction of the court – see s 29(5).

⁹² See s 29(3)(a) and compare the 'advantage for creditors' requirement in terms of ss 6, 10 and 12 of the South African Insolvency Act discussed below.

⁹³ See s 29(3)(a).

⁹⁴ By affidavit or otherwise.

⁹⁵ *Ie* where the property of the debtor is not likely to exceed 12 000 shillings – s 119.

⁹⁶ See s 119(a)–(c).

If the debtor is adjudged bankrupt, the official receiver will act as trustee with all the powers of a trustee in terms of the Act. Modifications may be made to the provisions of the Act as prescribed in terms of general rules⁹⁷ to save expense and simplify procedure. The modification of the provisions relating to the examination and discharge of the debtor is, however, not permitted.

Creditors may at any time, by special resolution resolve that someone else be appointed trustee whereupon the bankruptcy shall proceed as if an order for summary administration had not been made.⁹⁸

Alternatives to bankruptcy and reform initiatives

As has been pointed out above, there are currently no reform initiatives with respect to bankruptcy in Tanzania. On a reading of the Tanzanian Act, it becomes clear that the High Court of Tanzania is the gatekeeper to the only door in and out of bankruptcy. The only possible alternative remedy to the procedures discussed above, occurs as a by-product of the operation of the Civil Procedure Code 1966. Under Order 8A rule 3 of the Civil Procedure Code, all civil cases must first go through mediation where the court must act as mediator in an attempt to settle the dispute.

BANKRUPTCY AND ALTERNATIVE DEBT RELIEF MEASURES IN SOUTH AFRICA

Personal bankruptcy

Sequestration

In South Africa a debtor's estate may be sequestrated by way of voluntary surrender,⁹⁹ or his estate may be sequestrated on the basis of an application by a creditor, or two or more creditors, for the compulsory sequestration.¹⁰⁰ Both voluntary surrender and compulsory sequestration are instituted by way of notice of motion.¹⁰¹ This procedure is characterised by the fact that it is a relatively brief procedure in which the evidence is generally placed before the court in a written affidavit supported by additional documentary

⁹⁷ In terms of s 121 the Chief Justice may with the concurrence of the Minister for Legal Affairs, make general rules in complying with the objects of the Act.

⁹⁸ Section 119(c).

⁹⁹ Sections 3–7 of the Insolvency Act.

¹⁰⁰ Sections 9–12 of the Insolvency Act.

¹⁰¹ See rule 6 of the High Court Rules.

evidence.¹⁰² It is to be noted that these applications must be brought to the High Court which obviously has a bearing on the cost of the proceedings.¹⁰³

In Tanzania too, all bankruptcy petitions are also brought before the High Court but section 97 allows the Chief Justice to delegate all or any part of the High Court's jurisdiction to any subordinate court.¹⁰⁴ It should be noted that a creditor's petition is to be followed by a hearing which, it is submitted, could also increase the cost of proceedings.¹⁰⁵

In terms of the South African Insolvency Act, the court may accept the surrender of a debtor's estate, and may make an order sequestering that estate, if it is satisfied that the requirements prescribed in section 6 have been complied with, which, *inter alia*, requires that the applicant must prove that his estate is in fact insolvent, and that it will be to the advantage of his creditors if his estate is sequestered. With regard to compulsory sequestration, sections 10¹⁰⁶ and 12¹⁰⁷ require, *inter alia*, that the applicant must prove actual insolvency or must have committed an act of insolvency.¹⁰⁸ There is reason to believe that sequestration will be to the advantage of creditors.

The procedure of voluntary surrender is characterised by a number of technical formalities that have to be complied with.¹⁰⁹ Furthermore, the degree of proof required regarding the advantage for creditors-requirement is more stringent in the case of voluntary surrender than in the case of compulsory sequestration.¹¹⁰ Consequently, it often happens that a family member or a friend is asked to bring an application for his or her compulsory sequestration¹¹¹ to enable the debtor to be eventually

¹⁰² A Boraine in Nagel (ed) *Commercial law* (2006) 406.

¹⁰³ Cf A Boraine & M Roestoff 'Developments in American consumer bankruptcy law: lessons for South Africa' (Part 2) (2000) 21/2 *Obiter* 241 at 259.

¹⁰⁴ See s 97.

¹⁰⁵ See above.

¹⁰⁶ Providing for a provisional sequestration order.

¹⁰⁷ Providing for a final sequestration order.

¹⁰⁸ See s 8 which provides for 8 acts of insolvency. These acts are in many respects similar to the Tanzanian acts of bankruptcy discussed above.

¹⁰⁹ See s 4 of the Insolvency Act and compare the Tanzanian Bankruptcy Act (ss 8(1) and 16) which only requires a statement of affairs.

¹¹⁰ Unlike voluntary surrender which requires positive proof of advantage for creditors, compulsory sequestration requires only a 'reasonable prospect' that it will be to the advantage of creditors – compare the wording of ss 10(c) and 12(1)(c). See also *Amod v Khan* 1947 2 SA 432 (N).

¹¹¹ Usually based on an act of insolvency in terms of s 8(g) of the Act, ie where the debtor gives notice to any of his creditors that he is unable to pay any of his debts.

rehabilitated¹¹² and thereby obtain debt relief. However, these applications, termed ‘friendly sequestrations’, will not always provide a way out for debtors wishing to use the sequestration process to obtain debt relief. Where a friend or family relationship exists between the debtor and creditor, the case law is clear that a court has a duty to scrutinise the application with great care to determine advantage for creditors and to prevent prejudice to them.¹¹³

The ‘advantage for creditors’ requirement is not defined in the Insolvency Act. From case law it entails a ‘reasonable prospect of some pecuniary benefit to the general body of creditors’.¹¹⁴ Creditors must, therefore, receive at least a dividend. The size of the dividend depends on the facts and circumstances of each case, as well as the attitude of the creditors.¹¹⁵ However, there will be no advantage for creditors if no dividend or only a negligible dividend is available after the costs of sequestration have been paid.¹¹⁶

It is noteworthy that the Tanzanian Act does not require proof of advantage for creditors in order for a debtor to be adjudged bankrupt. However, the effect of section 29(3)(a) is that a bankrupt can eventually, in terms of section 29(2), be denied a discharge if it can be proved that he does not have sufficient assets as required in terms of section 29(3)(a) of the Act. A discharge can, however, still be obtained if the bankrupt is able to convince the court that the insufficiency of his or her assets has arisen from circumstances for which he cannot justly be held responsible.¹¹⁷

In terms of the South African Act, meetings of creditors,¹¹⁸ including meetings convened for the purpose of questioning the insolvent,¹¹⁹ are only

¹¹² See the discussion below.

¹¹³ *Boraine* n 102 above at 416 and see *Klemrock (Pty) Ltd v De Klerk* 1973 3 SA 925 (W); *Epstein v Epstein* 1987 4 SA 606 (C); *Craggs v Dedekind* 1996 1 SA 953 (C); *Ex parte Steenkamp and related cases* 1996 3 SA 822 (C); *Van Eck v Kirkwood* 1997 1 SA 289 (SE); *Beinash & Co v Nathan* 1998 3 SA 540 (W); *Lemley v Lemley* 2009 JDR 0445 (SE).

¹¹⁴ *Meskin and Co v Friedman* 1948 2 SA 555 (W) at 559; *Ex parte Kelly* 2008 4 SA 615 (T) at 617.

¹¹⁵ *Trust Wholesalers and Woolens (Pty) Ltd v Macan* 1954 2 SA 109 (N); *Fesi v Absa Bank Ltd* 2000 1 SA 499 (C).

¹¹⁶ *London Estates (Pty) Ltd v Nair* 1957 3 SA 591 (D); *Absa Bank v De Klerk* 1999 4 SA 835 (SE).

¹¹⁷ See s 29(3)(a).

¹¹⁸ *Cf* ss 39–42.

¹¹⁹ *Cf* s 65.

held after a sequestration order has been granted. Therefore, contrary to the position in Tanzanian law,¹²⁰ creditors do not have an opportunity to offer their opinion as to whether the debtor's estate should indeed be sequestrated or not, and steps can also not be taken to interrogate the insolvent regarding his affairs and the true position of his estate before sequestration.¹²¹

Rehabilitation

It is not a primary object of the South African Insolvency Act to grant debt relief to debtors.¹²² Sequestration followed by rehabilitation,¹²³ however, remains the ultimate formal statutory proceeding by which the debtor may force a discharge on his creditors and thereby obtain debt relief.¹²⁴

An insolvent whose estate has been sequestrated, may be rehabilitated automatically after ten years from date of sequestration,¹²⁵ or by means of a court order.¹²⁶ In the case of rehabilitation by order of court, the insolvent must base his application on one of the six grounds provided for in section 124. Usually four years must elapse before an insolvent will be rehabilitated.¹²⁷ The granting of a rehabilitation order is a matter which lies entirely in the discretion of the court and is not a right to which the insolvent is entitled.¹²⁸ Whether the application is opposed or not, the court may either grant or refuse the application, or may postpone the hearing of the application, or attach such conditions to the order for rehabilitation as it thinks fit.¹²⁹ The test for deciding whether a court should grant a rehabilitation order is to enquire whether the insolvent is a person worthy of

¹²⁰ See s 14 discussed above.

¹²¹ In 1988 the South African Law Reform Commission proposed that a first meeting of creditors should be held before the granting of a final sequestration order. After considering the provisional trustee's report regarding the debtor's affairs, creditors are given the opportunity to offer their opinion on what the best solution for the debtor's situation would be, where after the trustee must report to the court – see South African Law Commission 'Review of the law of insolvency: prerequisites for and alternatives to sequestration' *Working paper 29 Project 63* (1989) at 132.

¹²² *Cf Ex parte Pillay* 1955 2 SA 309 (N) at 311; *Ex parte Ford and two similar cases* 2009 3 SA 376 (WCC) at 383.

¹²³ Sections 124–129.

¹²⁴ Boraine & Roestoff n 103 above at 263.

¹²⁵ Section 127A.

¹²⁶ Section 124.

¹²⁷ See the proviso to s 124(2).

¹²⁸ *Ex parte Hittersay* 1974 4 SA (SWA) 326 at 328

¹²⁹ S 127(2).

rehabilitation, that is, whether he is a person who ought to be allowed to trade with the public on the same basis as any other honest man.¹³⁰

Rehabilitation in terms of the Act terminates sequestration and affords the debtor a discharge of all debts that existed before the date of sequestration, bar certain exceptions.¹³¹ However, as pointed out above, the debtor needs to overcome the obstacle created by the ‘advantage for creditors’ requirement. The court may only grant a sequestration order if advantage for creditors has been proved to its satisfaction.¹³² Therefore, as has aptly been explained by Rochelle,¹³³ a debtor in South Africa can be ‘too poor to go bankrupt’. To make things worse, the court in a recent decision in *Ex parte Ford and Two Similar Cases*,¹³⁴ refused to exercise its discretion in favour of the applicants for an order for the voluntary surrender of their respective estates as it found that debt review,¹³⁵ in terms of the NCA, was the more appropriate debt relief mechanism to be used, as the major portion of the applicants’ debt arose out of credit agreements in terms of the NCA. Thereby, it is submitted that the court essentially created a new stumbling block in the way of debtors wishing to use the sequestration process as a form of debt relief.

Composition

In terms of section 119 of the Insolvency Act, the insolvent may approach his creditors with an offer of composition at any time after the first meeting of creditors. The offer is made via the trustee. Where the offer is accepted by seventy-five per cent of the creditors in number and in value at a meeting called by the trustee for this purpose, it is deemed valid and binding upon all creditors.¹³⁶ Thus, unlike the position in Tanzania, the South African Act does not require that the accepted composition be approved by a court in order for it to be binding on all creditors.¹³⁷

¹³⁰ See E Bertelsmann *et al Mars the law of insolvency in South Africa* (2008) 575; *Ex parte Heydenreich* 1917 657 at 658; *Greub v The Master* 1999 1 SA 746 (C) at 752–3; *Ex parte Le Roux* 1996 2 SA 419 (C) at 423; *Ex parte Van Zyl* 1997 2 SA 438 (E) at 441.

¹³¹ See s 129.

¹³² Cf ss 6 and 12 of the Insolvency Act.

¹³³ MR 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’ (1996) 2 *TSAR* 315 at 319.

¹³⁴ See n 122 above.

¹³⁵ See the discussion below.

¹³⁶ S 119(7) of the Insolvency Act.

¹³⁷ Cf s 18(9) of the Tanzanian Act and the discussion above.

Where a composition has been agreed to and, at least fifty 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, with three weeks' notice, apply for rehabilitation immediately, and thus obtain a discharge of all pre-sequestration debts.¹³⁸ It should, however, be noted that the debt relief measure provided by section 119 is only available to a debtor after sequestration, and consequently only if 'advantage for creditors' has indeed been proved. The Tanzanian Act is more liberal towards the debtor in this respect, as it allows the debtor to make an offer of composition after a receiving order has been granted, and thereby enables the debtor to avoid bankruptcy.¹³⁹ It should, however, be noted that, in an attempt to provide an alternative debt relief measure, the South African Law Reform Commission proposed, in Schedule 4 of the 2000 Draft Insolvency Bill,¹⁴⁰ that a new section 74X be inserted in the Magistrates' Courts Act. The proposed section provides for a composition between a debtor and his creditors before sequestration which is binding on all creditors if accepted by the required majority. The composition is supervised by a magistrate and takes place after an investigation of the affairs of the debtor. The proposed legislation has, however, not yet been introduced.

Alternatives to bankruptcy

Administration and informal creditor workouts

In South Africa a debtor can apply for an administration order in terms of section 74 of the Magistrates' Courts Act, provided that his debts do not exceed fifty thousand rand.¹⁴¹ If the application is granted, the debtor must make payments to an administrator, who must draw up a list of creditors and must pay them from the amounts received from the debtor.

A debtor may also approach any or all of his creditors to obtain a release or a novation, which may take on different forms, for example, an agreement providing for the rescheduling of his debts by paying them off over a longer period. In essence these agreements are compositions and are based on contractual principles. Obviously creditors cannot be forced to agree to such proposals.¹⁴² Furthermore, it should be noted that where a debtor proposes a

¹³⁸ S 124(1) of the Insolvency Act.

¹³⁹ See s 18 of the Tanzanian Act and the discussion above.

¹⁴⁰ South African Law Commission 'Review of the law of insolvency' *Report Project 63* (2000).

¹⁴¹ See s 74(1)(b) and Governmental Notice R3441 in *Government Gazette* 14498 of 31 December 1992.

¹⁴² Boraine & Roestoff n 103 above at 259.

release or where he gives notice of his inability to pay his debts, he commits an act of insolvency, on which ground a creditor may then apply for the compulsory sequestration of his estate.¹⁴³

Although, unlike Tanzanian bankruptcy law, the South African insolvency law provides for alternatives to bankruptcy, it is submitted that South African law still does not offer adequate debt relief to all debtors who cannot meet their financial obligations.¹⁴⁴ The administration procedure is of limited scope as it is only available to debtors whose claims do not exceed fifty thousand rand. In practice it is also, in many instances, a failure as debtors do not keep to their payments.¹⁴⁵ This situation is aggravated by the fact that the procedure does not provide for a discharge of debts. An administration order only lapses after the costs of administration and the listed creditors have been paid in full.¹⁴⁶

Debt relief in terms of the National Credit Act 34 of 2005

The debt review process

One of the purposes of the NCA is to protect consumers by addressing and preventing over-indebtedness and by providing mechanisms for resolving over-indebtedness.¹⁴⁷ The NCA provides debt relief to over-indebted consumers in that it allows a consumer to apply to a debt counsellor to conduct a debt review and declare him over-indebted.¹⁴⁸ It should, however, be noted that the NCA only applies to consumers who are parties to a 'credit agreement' in terms of the Act.¹⁴⁹ Consequently, the debt review process will only provide debt relief in respect of debt which qualifies as 'credit agreements' in terms of the Act. Furthermore, if a credit provider under a credit agreement has already proceeded to take steps to enforce the agreement, an application for debt review may not be made in respect of such an agreement.¹⁵⁰

¹⁴³ See s 8(e) and (g) of the Insolvency Act.

¹⁴⁴ Also see the discussion in *Debt relief in terms of the National Credit Act 34 of 2005* below in respect of the debt relief measure provided for by the NCA.

¹⁴⁵ Boraine & Roestoff n 103 above at 263.

¹⁴⁶ S 74U of the Magistrates' Courts Act.

¹⁴⁷ Section 3(g).

¹⁴⁸ Section 86(1) of the NCA. in terms of s 86(10) the debt counsellor is given 60 days to complete the debt review process where after the credit provider can proceed with enforcement of the specific credit agreement.

¹⁴⁹ See s 4(1) of the NCA and S Renke, M Roestoff & FS Haupt 'The National Credit Act: New parameters for the granting of credit in South Africa' (2007) 28/2 *Obiter* 229 at 230–238 for a discussion of the field of application of the NCA.

¹⁵⁰ Section 86(2).

Where the consumer has applied for debt review and the debt counsellor concludes that the consumer is indeed over-indebted,¹⁵¹ the debt counsellor must recommend that the magistrate's court make an order that one or more of the consumer's credit agreements be declared to be reckless credit and/or that one or more of the consumer's obligations be re-arranged or restructured.¹⁵² Debt re-arrangement may be done by extending the period of the agreement and thereby reducing the amount of each payment due accordingly, or by postponing the dates on which payments are due under the agreement for a specified time (or by doing both).¹⁵³ Although the court has the power to enforce a recommendation by the debt counsellor on the credit providers, the NCA does not sanction a statutory discharge of the debt in general.¹⁵⁴ Consequently, the process will not provide debt relief to consumers who do not have sufficient income to repay their debt. In practice the process is only effective for consumers who can be described as 'mildly' over-indebted. A consumer, it is submitted, may therefore also be too 'poor' to go under debt review.

If a debt counsellor concludes that the consumer is not over-indebted the application must be rejected.¹⁵⁵ The consumer, with leave of the magistrate's court, may then apply directly to that court for the necessary relief.¹⁵⁶ However, if the counsellor concludes that although the consumer is not over-indebted, he is nevertheless experiencing¹⁵⁷ difficulty in meeting his obligations under credit agreements in a timely manner, the counsellor may recommend that the consumer and his credit providers voluntarily consider and agree on a plan of re-arrangement.¹⁵⁸ If all the parties accept the proposal, the counsellor must record it in the form of an order and file it as

¹⁵¹ See s 79(1) as to when a consumer will be considered to be over-indebted.

¹⁵² See s 86(7)(c) and 86(8)(b) and the interpretation of these provisions in *National Credit Regulator v Nedbank Ltd and others* 2009 6 SA 295 (GNP) at 303 *et seq.*

¹⁵³ Section 86(7)(c)(ii). Another possibility of re-arrangement is provided for namely by recalculating the consumer's obligations. However, this may only occur because of contraventions of certain parts of the Act, namely the parts dealing with unlawful agreements and provisions (see ch 5, part A), disclosure, form and effect of credit agreements (see ch 5, part B) and collection and repayment practices (see ch 6, part A).

¹⁵⁴ Cf A Boraine 'The reform of administration orders within a new consumer credit framework' in Kelly-Louw *et al* *The future of consumer credit regulation creative approaches to emerging problems* (2008) 212 n 26. Also see M Roestoff *et al* 'The debt counselling process – closing the loopholes in the National Credit Act 34 of 2005' (2009) 12/4 *PER* 247 at 292 *et seq* for proposed amendments to the NCA in this regard.

¹⁵⁵ Even if the debt counsellor has concluded that a particular credit agreement was reckless at the time it was entered into – s 86(7)(a).

¹⁵⁶ Section 86(9).

¹⁵⁷ Or is likely to experience.

¹⁵⁸ Section 86(7)(b).

a consent order in terms of section 138.¹⁵⁹ Otherwise the counsellor must refer the matter to the magistrate's court with a recommendation.¹⁶⁰

It may also be alleged in any court proceedings in which a credit agreement is being considered that the consumer under that agreement is over-indebted. The court may then refer the matter directly to a debt counsellor,¹⁶¹ or declare and relieve¹⁶² the over-indebtedness.¹⁶³ Consumers who are over-indebted may therefore apply for debt review themselves,¹⁶⁴ or alternatively wait for a credit provider to enforce a credit agreement in respect of which they are in default, and then raise the issue of over-indebtedness in court.¹⁶⁵

Acting on the debt counsellor's proposal¹⁶⁶ or the consumer's application,¹⁶⁷ the magistrate's court must conduct a hearing, having regard to the proposal and the information before it and the consumer's financial means, prospects and obligations.¹⁶⁸ The court may then reject the recommendation or application, as the case may be;¹⁶⁹ or make an order declaring any credit agreement to be reckless or an order re-arranging the consumer's obligations.¹⁷⁰

When a debt counsellor refers a matter to court, it has been held¹⁷¹ that such referral constitutes an application to court in terms of rule 55 of the magistrates courts rules.¹⁷² The application procedure in terms of rule 55 is cumbersome, costly and slow. This is one of the reasons why the debt review process is currently not regarded as an effective debt relief measure for consumers in South Africa.¹⁷³

¹⁵⁹ If consented to by the consumer and every credit provider concerned – s 86(8)(a).

¹⁶⁰ Section 86(8)(b).

¹⁶¹ Section 85(a).

¹⁶² In terms of s 87.

¹⁶³ S 85(b).

¹⁶⁴ In terms of s 86(1).

¹⁶⁵ JW Scholtz *et al Guide to the National Credit Act* (2008) 11–6.

¹⁶⁶ In terms of s 86(7)(b) and (c).

¹⁶⁷ In terms of s 86(9).

¹⁶⁸ Section 87(1).

¹⁶⁹ Section 87(1)(a).

¹⁷⁰ Or both orders – s 87(1)(b).

¹⁷¹ *National Credit Regulator v Nedbank and others* n 152 above at 310 *et seq*.

¹⁷² The Act is silent on the procedure to be followed when a debt review matter is referred to court – see Roestoff *et al* n 154 above at 273.

¹⁷³ See Roestoff *et al* n 154 above at 247 *et seq* and 280.

Effect of debt review and debt rearrangement

A consumer who has filed an application for debt review, or who has declared in court that he is over-indebted, may not incur any further charges under a credit facility or enter into any further credit agreement with any credit provider until the matter has been finalised.¹⁷⁴ If a consumer applies for or enters into a new credit agreement while a debt re-arrangement subsists, the consumer will forfeit the protection afforded by the provisions¹⁷⁵ in the Act dealing with over-indebtedness and reckless lending. Only when *all* the debt obligations under every credit agreement that was subject to debt rearrangement have been repaid, may the debt counsellor issue a so-called clearance certificate.¹⁷⁶ This would mean that a consumer, who for example has a home loan agreement with a repayment period of thirty years as one of his credit agreements under debt rearrangement, would only be relieved from the consequences of debt review after a period of at least thirty years. The Act does not provide for the consumer to be relieved from the disabilities resulting from debt review and debt re-arrangement at an earlier stage, that is, where the consumer has paid all his arrear instalments and can therefore no longer be regarded as over-indebted in terms of the Act.¹⁷⁷

CONCLUSION

It is interesting to note that compared to the South African system, the Tanzanian bankruptcy system, is in many respects more liberal towards debtors. The following positive and negative aspects of the Tanzanian system can be highlighted.

Although the discharge in Tanzanian law is subject to payment of a fixed dividend to creditors, the court still has the discretion to grant a discharge if the bankrupt can convince it that the insufficiency of his assets has arisen from circumstances for which he cannot justly be held responsible.¹⁷⁸

¹⁷⁴ *Ie*, when the debt counsellor has rejected the consumer's application and the consumer has not filed a direct application in time, or where the court has determined that the consumer is not over-indebted, or where all the consumer's obligations under credit agreements as re-arranged are fulfilled – s 88(1).

¹⁷⁵ Ch 4 part D – see ss 78–88.

¹⁷⁶ See s 71 and reg 27 of the Regulations made in terms of the National Credit Act, 2005 – Governmental Notice R489 in *Government Gazette* 28864 of 1 May 2006.

¹⁷⁷ *Cf* Roestoff *et al* n 154 above at 285 and 295 *et seq* for proposed amendments to the legislation in this regard.

¹⁷⁸ *Cf* s 29(3)(a) discussed above.

However, in contrast to the South African position, ‘advantage for creditors’ is not a requirement to be adjudged bankrupt.

A first meeting of creditors is held after the granting of the receiving order for the purpose of considering a proposal for a composition or scheme of arrangement, or to consider the question whether the debtor should eventually be adjudged bankrupt.¹⁷⁹ This allows creditors an opportunity to offer their opinion on what will be the best solution for the debtor’s financial affairs.

The public examination of the debtor is held before bankruptcy adjudication and before approval by the court of a proposal for a composition.¹⁸⁰ As a result, the true position of the estate can be ascertained at an early stage in the process.

The Tanzanian Act provides for a composition or scheme of arrangement after the public examination has been concluded, thereby allowing the debtor to avoid bankruptcy adjudication. However, unlike the position in South African law, it only becomes binding once it has been approved by the court.¹⁸¹

The Tanzanian Act does not allow a bankrupt an automatic discharge through passage of time.¹⁸² The Tanzanian Act provides for a summary administration procedure in the case of small estates and in such cases allows modifications to its provisions in order to save expenses and to simplify procedures.¹⁸³

Tanzanian bankruptcy law does not provide for any significant alternative debt relief measures for consumers.¹⁸⁴

¹⁷⁹ See *The receiving order* above.

¹⁸⁰ *Ibid.*

¹⁸¹ See the discussion in *Composition and schemes of arrangement* above.

¹⁸² See the discussion in *Discharge of the bankrupt* above.

¹⁸³ See the discussion in *Administration of small estates* above.

¹⁸⁴ See the discussion in *Alternatives to bankruptcy and reform initiatives* above.

As in South Africa, bankruptcy in Tanzania appears to be a costly procedure.¹⁸⁵ Therefore, provided that provision is made for an adequate alternative debt relief measure, bankruptcy should, in our view, only be implemented in circumstances where it would be cost-effective.¹⁸⁶

In 2001 the consumer debt committee of INSOL International recommended, *inter alia*, that legislators of countries undertaking law reform with regard to the debt problems of individual debtors, should provide for separate or alternative debt relief measures which take into consideration the debtor's specific needs.¹⁸⁷ Where, for example, the insolvency of the debtor is likely to be temporary, he should be allowed an opportunity to restructure his earnings and spending.¹⁸⁸ By enacting the NCA, the South African legislator has indeed provided for such an alternative debt relief measure. However, as has been pointed out above, this measure does not currently provide adequate or effective debt relief to consumers. It is submitted that one of the main reasons for this is the fact that it does not provide for the possibility that the court could enforce a discharge of a part of the consumer's debt obligations on the debtor's creditors. Moreover, as has been pointed out above, the debt review process is regarded to be ineffective as it is cumbersome, costly, and slow.

It would appear that the Tanzanian system is in need of an informal debt relief measure providing for debt restructuring as an alternative to bankruptcy. In this regard Tanzania should learn from the mistakes the South African legislator has made. The alternative debt relief measure should be inexpensive and simple and should involve extra-judicial rather than judicial proceedings. As has been pointed out by the INSOL Report, out-of-court proceedings take less of the courts' time, are less expensive, and can also be better designed for a more integrated approach to the debtor's problems, which are more often of a non-legal than of a legal nature.¹⁸⁹ Finally, it should offer the consumer a discharge from indebtedness as a method of

¹⁸⁵ In Tanzania it takes an average of three years to complete a bankruptcy proceeding that would cost an average of 22 per cent of the estate and has an average recovery rate of 21,3 cents on the United States dollar – World Bank 'Doing business in Tanzania' *Doing Business* (2009) 45. See also: www.doingbusiness.org.

¹⁸⁶ Cf M Roestoff 'n Kritiese evaluasie van skuldverligtingsmaatreëls vir individue in die Suid-Afrikaanse insolvensiereg (LLD thesis 2002) 497 *et seq*.

¹⁸⁷ INSOL International consumer debt report: *Report of findings and recommendations* (2001) 18 (hereinafter *INSOL Report*).

¹⁸⁸ *Ibid*.

¹⁸⁹ *Id* at 25 *et seq*.

concluding the procedure.¹⁹⁰ In this regard the following observation in the INSOL Report is significant:¹⁹¹

Providing a fresh start to a debtor who cannot reasonably repay all of his pre-existing debts is the recognition by society that over-indebtedness is, in many cases excusable. It is the key-element of any consumer debtor insolvency law or rehabilitation procedure, based on the principle that it is in society's interest that the debtor should be able to begin afresh, free from past financial obligations and not suffer indefinitely. It is the distinction between punishment of yesteryear and the economic reality of the twenty-first century.

¹⁹⁰ *Id* at 12.

¹⁹¹ *Id* at 22.