Natural Person Debt Relief Reforms in Nigeria—A Comparison with South Africa

Tobi Osunlaja, Hermie Coetzee† and Melanie Roestoff‡*

Abstract

The purpose of this article is to compare the proposed natural person debt relief procedures in Nigeria with South Africa's existing and proposed measures. It is the first time that the proposed Nigerian system is analysed. The comparison is made in order to determine whether Nigeria can learn from South Africa's experience regarding natural person insolvency law. South Africa is chosen as a comparative jurisdiction because it has a wealth of documented experience relating to insolvency law. Furthermore, Nigeria and South Africa boast the two largest economies on the African continent and consequently share economic and developmental challenges. These challenges are intrinsically linked to natural person insolvency law, since they determine the context in which an insolvency law system must be developed and within which it must function. As a subtext, the research considers whether Nigeria complies with some of the more pertinent international principles and guidelines regarding natural person debt relief. To achieve this objective, the Nigerian system is measured against the yardstick of the World Bank Report on the Treatment of the Insolvency of Natural Persons. Two key foundations of effective and efficient natural person insolvency systems highlighted by the World Bank's report relate to (a) access to insolvency systems and (b) the eventual discharge of debts that such systems should result in. The research concludes that the Nigerian natural person insolvency law reforms do not meet the required international standards in these respects and that the jurisdiction may learn from South Africa's successes and failures within the field, particularly from the circumstances leading up to and its recent proposals for reform.

* LLB (Olabisi Onabanjo University); LLM (University of Pretoria). LLD candidate, Department of Mercantile Law, University of Pretoria.

† BCom Law (University of Pretoria); LLB (University of Pretoria); LLM (University of Pretoria); LLD (University of Pretoria). Associate Professor, Department of Mercantile Law, University of Pretoria.

‡ Melanie Roestoff, BLC (University of Pretoria); LLB (University of Pretoria); LLM (University of Pretoria); LLD (University of Pretoria). Professor and Acting HoD, Department of Mercantile Law, University of Pretoria.

INTRODUCTION

Nigeria—popularly referred to as the giant of Africa—has one of the largest economies on the continent.[1] This can be attributed to its large population, which is estimated to exceed 180 million.[2] Although one might expect that a country with such a large population and vibrant economy would be home to an equally dynamic natural person insolvency system, this is not the case. Despite the fact that bankruptcy laws have been in existence in Nigeria for over thirty-nine years, no successful bankruptcy case has ever been recorded.[3] Fortunately, the ineffective piece of legislation regulating natural person insolvency law in Nigeria at present, namely, the Bankruptcy Act of 1979 (BA),[4] is about to be repealed and replaced.

The ineffectiveness of the Nigerian natural person debt relief system can be ascribed to a plethora of problems. The most significant of these are that the BA does not provide for adequate debt relief measures[5] and that insolvency proceedings are costly.[6] Also, societal beliefs of the Nigerian people result in the stigmatisation of debtors,[7] which are fuelled by their ignorance of insolvency laws.[8] Other problem areas include the lack of unified insolvency legislation,[9] the challenge of overburdened courts—which results in the delay of judicial proceedings[10]—and the lack of regulation of bankruptcy practitioners.[11]

These problems culminated in calls for reform.[12] As a result, reform initiatives were recently undertaken by the Nigerian National Assembly, which led to the Committee on Banking and other Financial Institutions

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1 International Monetary Fund, 'Regional Economic Outlook' (April 2018) 1 <https://bit.ly/2QDOKZn> accessed 27 August 2018.

2 The World Bank, 'Data Bank' <http://bit.ly/2BRnfZv> accessed 27 August 2018. Nigeria has a larger population than South Africa, which has a population of just over 50 million; The World Bank, 'Data Bank' <https://bit.ly/2KxTwFc> accessed 29 October 2018.

3 See Olisa Agbakoba and Olanrewaju Fagbohunlu, 'Bankruptcy and Winding-Up Proceedings: Potential Mechanisms for Speedier Debt Recoveries' (1992) 4 <https://bit.ly/2OxebKG> accessed 27 August 2018.

4 Bankruptcy Act 15 of 1979 (CAP B2 Laws of Federation of Nigeria (LFN) 2004) (BA). The BA was amended by the Bankruptcy (Amendment) Decree (No 109 of 1992).

5 See International Association of Restructuring, Insolvency and Bankruptcy Professionals, 'Report: Africa Round Table on Insolvency Reform' (2010) 2. See also Joseph Nwobike, 'Whether Bankruptcy and Winding-up Proceedings are Veritable Tools for Debt Recovery in Nigeria' (2013) 33 <https://bit.ly/2w49VL9> accessed 27 August 2018; and Agbakoba and Fagbohunlu (n 3) 7.

6 Agbakoba and Fagbohunlu (n 3) 7.

7 ibid 2.

8 Business Hallmark News, 'Why Bankruptcy Law is Difficult to Enforce in Nigeria' (2015) 1 <https://bit.ly/2KQJvli> accessed 12 August 2018.

9 The Companies and Allied Matters Act 1990 regulates corporate insolvency in Nigeria.

10 See Agbakoba and Fagbohunlu (n 3) 4 and Olisa Agbakoba 'Debt Recoveries and the Judicial System' (1992) 8 <https://bit.ly/2MnwPHq> accessed 12 August 2018.

11 See Business Hallmark News (n 8) 1.

12 International Association of Restructuring, Insolvency and Bankruptcy Professionals (n 5) 2.

drafting the Bankruptcy and Insolvency Act of 2015 (BIA).[13] The proposed BIA was passed by the National Assembly and is currently in its final stage, namely being signed into law by the President.[14]

The proposed BIA is a unified piece of legislation, which will regulate both natural person and corporate insolvency proceedings, since it will apply to natural persons, partnerships and corporate entities alike.[15] The primary aim of the proposed BIA regarding natural person insolvency is explained in its long title as

> to make provision for corporate and individual insolvency; and to proffer solutions for the rehabilitation of the insolvent debtor; and to create the office of the supervisor of insolvency and for other matters connected therewith.[16]

The intended purpose of the proposed legislation, as regards natural person debtors, can also be inferred from a report by the Committee on Banking and other Financial Institutions, which forms part of the National Assembly Senate Debate on the proposed legislation.[17] It states that the BIA is intended to provide for an 'equitable distribution of available assets among creditors in such a manner that an honest debtor is discharged from future liabilities.'[18]

This article aims, for the very first time, to set out and consider the debt relief procedures pertaining to insolvent natural persons under the proposed BIA. This is done in comparison with the South African debt relief measures.[19] It also considers proposed South African reforms in this sphere. The comparison with South Africa is motivated by its extensive experience—both positive and negative—regarding natural person insolvency law. Because South Africa also hosts a major developing economy in Africa, it shares economic and developmental challenges with Nigeria. The latter two attributes are concomitant of natural person insolvency law, since they determine the contexts in which such systems must be developed and in which they must function. The similarities and differences between the two systems as well as their strong points and weaknesses regarding debt relief are highlighted to identify the possible shortfalls of the proposed BIA and indicate the way forward for future reform initiatives in Nigeria.

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13 See the Bankruptcy and Insolvency Act (CAP B2 Laws of the Federation of Nigeria (LFN) 2011) (BIA) <https://bit.ly/2KTl4nd> accessed 12 August 2018.

14 See the Policy and Legal Advocacy Official Website <https://bit.ly/2MkfGOX> accessed 12 August 2018, as regards the status of the proposed BIA.

15 See the long title of the proposed BIA.

16 ibid. See also the National Assembly, 'Senate Debate' 10 (26 May 2016) <https://nass.gov.ng/document/download/9515> accessed 12 August 2018.

17 See the National Assembly (n 16) 11.

18 ibid.

19 The BA is not considered in detail because this research is forward-looking.

A secondary discussion centres on the question whether the proposed Nigerian natural person insolvency reforms comply with the principles stemming from the World Bank Report on the Treatment of the Insolvency of Natural Persons.[20] To this end, the focus is on the report's principles relating to access to the natural person insolvency system and the discharge of debts, as these are the most prominent characteristics of effective natural person insolvency systems.[21]

The choice of the World Bank Report is informed by the fact that it is the most recent international report pertaining to natural person insolvency law. Also, it advanced from earlier international reports in specifically acknowledging the plight of the No Income No Assets (NINA) group of debtors.[22] The World Bank Report recognises that this group is often excluded from insolvency systems because they do not have assets that may be liquidated or income to qualify for payment plans.[23] This attribute makes the World Bank Report especially relevant in the Nigerian context, since the majority of Nigerians live below the national poverty line[24]—a clear indication that the Nigerian population in all likelihood consists of a high number of NINA debtors. Although not the main focus of this research, the NINA group of debtors is of special importance in the African context and therefore their plight is highlighted.[25]

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20 The World Bank Insolvency and Creditor/Debtor Regimes Task Force Working Group, 'Report on the Treatment of the Insolvency of Natural Persons' (2011) (World Bank Report).

21 These two principles were identified by Jason Kilborn; see Jason Kilborn, 'Reflections of the World Bank's Report on the Treatment of the Insolvency of Natural Persons in the Newest Consumer Bankruptcy Laws: Colombia, Italy, Ireland' (2015) Pace Intl LR 311–314, where he summarises the World Bank Report into three themes, which are: formal legal mechanisms, negotiated workouts and rehabilitation plans. Considering these three themes, formal legal mechanisms and negotiated workouts can be categorised under the principle of access, which seeks to ensure that all debtors have access to debt relief measures through various debt relief mechanisms. The third theme, which seeks to ensure that every honest debtor has a chance to start afresh is linked to the discharge principle. The principle of access simply means that all honest but unfortunate debtors should have access to debt relief procedures and that it should not be determined by the financial capability of a debtor. This can be guaranteed by ensuring that every insolvency system makes provision for sufficient procedures whereby all honest but unfortunate debtors, irrespective of their financial circumstances, can find a debt relief procedure that suits their financial situation; see World Bank Report (n 20) 46–51. Discharge is another principal goal of an insolvency system for natural persons and should be extended to all 'honest but unfortunate' debtors primarily to ensure their 'fresh start'. Thus, discharge seeks to ensure that debtors are set free from indebtedness and are consequently reinstated in their pre-insolvency state; see World Bank Report (n 20) 12.

22 World Bank Report (n 20) 56 and 136.

23 ibid.

24 See the World Bank, 'Poverty and Equity Brief, Sub-Saharan Africa' (2018) 1 <http://bit.ly/2P9u0Yb> accessed 12 August 2018.

25 World Bank Report (n 20) 56–57 and 99.

NATURAL PERSON DEBT RELIEF IN NIGERIA

General

The proposed BIA uses the term 'bankruptcy' to refer to natural person insolvency proceedings in Nigeria.[26] The proposed proceedings are designed to play a dual role in ensuring that over-indebted natural persons are able to access relief, while protecting creditors' interests.[27] Consequently, the anticipated legislation adopts a balanced approach to natural person insolvency by providing not only for debtors' remedies, but also for a measure to be initiated by creditors. Furthermore, in an attempt to ensure that a balanced approach as regards debtors *inter se* is achieved, the proposed BIA provides for different measures depending on a debtor's circumstances. The proposed formal measures are:

- receiving orders, which are creditors' bankruptcy proceedings;[28]
- assignments, which may be instituted by debtors;[29] and
- proposals, which include compositions and schemes of arrangement.[30]

Receiving Orders

In terms of the proposed procedure, one or more creditors may petition a court for a receiving order against a debtor.[31] The petition must show that[32] the debtor owes the petitioning creditor an amount of no less than one million naira and that the debtor has committed an act of bankruptcy within a six-month period before filing the petition.[33]

In situations where the petitioning creditor qualifies as a 'secured creditor', the law provides for two scenarios. First, such a creditor may indicate in the petition that—should a receiving order be granted against the debtor—he is willing to give up his security for the collective benefit

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26 See s 3 of the proposed BIA.

27 See the National Assembly (n 16) 11.

28 See s 5 of the proposed BIA.

29 See s 15 of the proposed BIA.

30 See s 26 of the proposed BIA.

31 See s 5(1) of the proposed BIA.

32 Section 5(1)*(a)* and *(b)* of the proposed BIA.

33 Following the style of the BIA, the masculine form ('he') is used in this article. The acts of bankruptcy are where a debtor (a) gives notice to any of his creditors that he is about to suspend payments of his debts and files a declaration of his inability to pay debts in the court; (b) assigns, removes, disposes of or is about to assign, remove, or dispose of his properties with the intent to defraud, defeat or delay his creditors' execution initiatives; (c) makes an assignment of his property—in Nigeria or elsewhere—to a trustee for the general benefit of his creditors whether it is an assignment authorised by the proposed BIA or not; (d) makes a fraudulent conveyance, gift, delivery or transfer of his property or any part of the property; (e) makes a fraudulent transfer or conveyance of his property or any part thereof—in Nigeria or elsewhere—or created a charge thereon, which is void under the BIA as a fraudulent preference; (f) intends to defeat or delay the claims of his creditors in wise intent and departs from Nigeria, or is already absent from Nigeria and decides to remain out of the country, or departs from his dwelling place; (g) does not allow the execution of

of creditors.[34] Second, the secured creditor may provide an estimate of the value of his security in the petition[35] in which case he would be admitted as a petitioning creditor for the remainder of his claim. In the latter instance he would be admitted as an unsecured creditor for the unsecured part of his claim.[36]

The petition for a receiving order should be verified by an affidavit by the petitioner or a person duly authorised by the petitioner to do so.[37] In situations where two or more petitions for receiving orders are filed against the same debtor or against joint debtors, the court may merge the proceedings or any of them on such terms as it deems fit.[38]

At the hearing of the petition, the court will require the petitioner to present proof of the facts alleged in the petition—the most important being the amount owed and proof of bankruptcy, by means of the possible acts of bankruptcy[39]—and that the petition was served on all interested parties, namely, the debtor, creditors and legal representatives in the case of deceased debtors.[40] Thereafter, the court may make a receiving order.[41] Upon granting the order, the debtor is adjudged bankrupt and the court will appoint a licensed trustee[42] to oversee the liquidation and distribution of

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a process issued against his property to be satisfied for twenty-one days after issue, or does not have property to satisfy the execution of a process issued and such process has been returned by the marshal and endorsed as unexecuted due to a lack of property; (h) exhibits his statement of assets and liabilities at a creditors' meeting, which shows he is insolvent or simply presents a written admission of inability to pay debts; or (i) defaults on any proposal made under the BIA and ceases to meet his obligations generally as they fall due. See s 4(1) of the proposed BIA. See s 8 of the South African Insolvency Act 32 of 1936 (IA), which provides for similar acts of bankruptcy.

34 Section 5(2) of the proposed BIA.

35 ibid.

36 Section 5(3) of the proposed BIA.

37 Section 5(4) of the proposed BIA. The witness to the attestation of the petition should be an attorney at law if the petition is attested to within Nigeria or a judge, magistrate, notary public, consul or consular officer if attested to outside Nigeria; see s 5(5)*(a)* and *(b)* of the proposed BIA.

38 See s 5(10) of the proposed BIA.

39 See s 5(1)*(a)* and *(b)* of the proposed BIA.

40 See s 5(10) and (11), s 6(2) and s 13 of the proposed BIA.

41 See s 5(10) of the proposed BIA.

42 A trustee is defined as a person who is licensed or appointed under the proposed BIA; see s 3 of the proposed BIA. According to the proposed legislation, the functions of a trustee are numerous and as follows: To receive properties on behalf of the debtor; dispose or sell properties of the insolvent estate that are perishable or likely to depreciate; initiate court proceedings on behalf of the insolvent estate; insure all insurable properties in the insolvent estate; deposit all monies received by the estate in a trust account; keep book and record of the administration of the estate; report in writing to creditors, inspectors and supervisors of the insolvent estate when necessary; conduct the eventual sale of assets of the insolvent estate for the benefit of the creditors; and take other necessary actions in favour of the insolvent estate; see ss 200–221 of the proposed BIA.

the bankrupt individual's estate.[43] At such time, the rights of the bankrupt individual to dispose of or deal with his property cease and vest in the trustee.[44] The costs incurred by the petitioner will be taxed and paid out of the bankrupt estate, unless the court provides otherwise.[45] The court could for instance make such an order where the earnings from the estate would be insufficient to pay the costs incurred by the trustee.[46]

Assignments

It is proposed that an insolvent person[47] (or a legal representative in the case of a deceased person) 'may, with the leave of the Court, make an assignment of all his property for the general benefit of his creditors.'[48] The reference to 'general benefit of … creditors' may imply that a debtor who does not own assets or receive income (that can be liquidated and distributed) will not be able to access the assignment procedure and consequently the discharge of debt in which it ultimately results. It is interesting to note that a similar requirement is not prescribed in the context of receiving orders. Therefore, it

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43 See s 5(13) of the proposed BIA. See also ss 8(1), 9(1), 12 and 93 of the proposed BIA. With regard to the administration of the insolvent estate of a bankrupt individual, the trustee would inquire as to the names and addresses of the creditors of a bankrupt individual to send a notice of bankruptcy and of the first meeting of creditors (within five days after the date of the trustee's appointment) to every known creditor and the supervisor; see s 93(1) of the proposed BIA. The first meeting of creditors must be held within the twenty-one-day period following the day of the trustee's appointment and must take place at the office of the supervisor. The purpose of the first meeting of creditors is to consider the affairs of the bankrupt individual; affirm the appointment of the trustee (or substitute the trustee if need be); appoint one or more (but not exceeding five) inspectors who would oversee the administration of the estate as stated in s 107 of the proposed BIA; and provide any further directions to the trustee as the creditors may see fit; see s 93(6)*(a)–(d)* of the proposed BIA. In the notice, the trustee should also set out information concerning the financial state of the bankrupt individual and 'the obligations of the bankrupt to make payments required under section 53 to the estate of the bankrupt'; see s 93(4)*(a)* of the proposed BIA. The notice must be published in a local daily newspaper not later than five days before the first meeting of creditors; see s 93(5) of the proposed BIA. In the course of the administration of the estate and the distribution of properties, the trustee must honour instructions by creditor resolution and those of inspectors. However, in situations where there is a conflict between the directions resulting from creditor resolutions and those provided by inspectors, creditor directions take preference; see s 110(1) of the proposed BIA.

44 See s 60(1) of the proposed BIA.

45 Section 7(1) of the proposed BIA.

46 Section 7(2) of the proposed BIA.

47 An 'insolvent person' means a person who is not bankrupt and who resides, carries on business or has property in Nigeria, whose liabilities to creditors provable as claims under this Act amount to not less than one million naira, and: (a) who is for any reason unable to meet his obligations as they generally become due; (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due; or (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing. See s 3 of the proposed BIA.

48 See s 25(1) of the proposed BIA.

seems that although the assignment procedure could be explored by natural person debtors as a medium to obtain relief from indebtedness, NINA debtors could be excluded from its ambit. Another provision that excludes some debtors stems from the definition of 'insolvent person', which refers to those with debts of at least one million naira.

Once a court grants leave to initiate the assignment procedure,[49] the insolvent may proceed to make an assignment to the supervisor.[50] The assignment of an estate should be accompanied by a sworn affidavit indicating all the assets owned by the debtor, the names and addresses of all creditors, creditors' claims and the nature of each claim.[51] If the supervisor accepts the application for assignment, the insolvent is declared bankrupt.[52] The supervisor will then appoint a licensed trustee to liquidate and distribute the insolvent estate, which process is akin to the one followed under the receiving order procedure.[53]

When a bankrupt individual files for the administration of his estate and his realisable assets amount to less than USD10 000 (after the claims of the secured creditors have been paid) a summary administration procedure will be applied.[54] This procedure is not independent from the assignment procedure and rather serves as a condensed or simplified process resorting under the latter procedure.[55] Although it appears that the summary administration procedure is aimed at NINA debtors, the question regarding the reference to benefit of creditors remains.

Proposals (Compositions and Schemes of Arrangement)

The proposed BIA provides for the proposal procedure, which is intended as an alternative to bankruptcy (thus an alternative to receiving orders and assignments). It is anticipated that this will take the form of a debt rearrangement procedure,[56] where a debtor has the option of making a proposal to his creditors to extend the time in which he must satisfy his debts or to agree to a scheme of rearrangement of his financial affairs.[57]

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49 ibid. It is unclear from the proposed BIA what factors (if any) the court would consider in this respect.

50 Section 25(3) of the proposed BIA. Section 3 of the proposed BIA explains that a '[s]upervisor means the office of the Supervisor of Insolvency, which is created in accordance with s 175' of the proposed BIA. Section 175(1) provides as follows: For the purposes of this Act, there shall be a Supervisor of Insolvency who shall be responsible to the Minister for the general administration of this Act and whose office shall be a public office.

51 See s 25(2)*(a)–(d)* of the proposed BIA.

52 See s 3 of the proposed BIA.

53 Section 25(4) read together with ss 200–221, which set out the functions of a trustee.

54 See s 25(6) of the proposed BIA. See s 145 of the proposed BIA for provisions pertaining to summary administration.

55 See s 25(6) of the proposed BIA.

56 See s 26 of the proposed BIA.

57 See ss 3 and 26 of the proposed BIA.

The proposal procedure may be initiated by an insolvent person, a receiver (regarding an insolvent estate),[58] a liquidator of an insolvent estate,[59] a bankrupt individual or the trustee of a bankrupt estate.[60] It constitutes an independent measure because it may be explored from the outset, without having to proceed through bankruptcy measures—as is the case with the summary administration procedure.

A debtor may make a proposal to his creditors as a general group or according to their classes.[61] A notice of intention to commence such proceedings, filed in the prescribed format at the supervisor's office, will set the process in motion.[62]

Once a notice of intention to file a proposal is successfully lodged at the supervisor's office, the insolvent individual is required to lodge a copy of the actual proposal with a licensed trustee.[63] If the person in respect of whom the proposal is made is already bankrupt, the statement of his affairs should be submitted to the trustee of his insolvent estate.[64] Such a proposal 'shall be approved by the inspectors before any further action is taken on the proposal.'[65] However, when the person in respect of whom the proposal is made is not bankrupt, a financial statement showing his financial position

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58 See s 3 of the proposed BIA: 'Receiver' means a person who has been appointed to take, or has taken, possession or control, pursuant to: (a) a security agreement; or (b) an order of a Court made under any law that provides for or authorizes the appointment of a receiver or receiver-manager, of all or substantially all of (i) the inventory; (ii) the accounts receivable; or (iii) the other property, of a debtor that was acquired for, or is used in relation to, a business carried on by the debtor.

59 The BIA does not define a liquidator.

60 See s 26(1)*(a)–(e)* of the proposed BIA.

61 See s 26(2) of the proposed BIA. A proposal may be made to secured creditors in respect of any class of secured claims.

62 See s 30(1) of the proposed BIA.

63 Section 26(9) of the proposed BIA.

64 See ss 26(9)*(a)* and 149*(e)* of the proposed BIA.

65 Section 26(10) of the proposed BIA. Section 3 of the proposed BIA provides that an '"inspector" means an inspector appointed under section 107'. Section 107 of the proposed BIA states that an inspector is usually appointed to oversee the administration of the estate of the 'bankrupt trustee'. (The latter appears to be a mistake because the function of the inspector ought to be to oversee the administration of the estate of the *bankrupt* and not that of the bankrupt trustee; see ss 91, 110(1) and 111 of the proposed BIA). Inspectors' oversight functions include verifying the estate's bank balance from time to time, examining the trustee's accounts and inquiring to determine the adequacy of the security filed by the trustee. They should also, subject to s (4), approve the trustee's final statement of receipts, disbursements, dividend sheet and dispositions of realised properties. See s 111(3) of the proposed BIA. Furthermore, the inspectors (before approving the final statement of receipts and disbursements of the trustee), should satisfy themselves that all the property has been accounted for and that the administration of the estate has been completed as reasonably as possible. Also, inspectors must determine whether disbursements and expenses were made appropriately and have been duly authorised. They must further determine whether the fees and remunerations paid are just and reasonable in the circumstances. See s 111(4) of the proposed BIA.

on the date on which the proposal was lodged with the trustee is required.[66] The financial statement should be verified by an affidavit[67] and signed by the insolvent and the trustee.[68] The trustee will then, in the prescribed form, report on the reasonableness of the financial statement.[69]

A meeting of creditors should be held within twenty-one days after the proposal was filed.[70] The creditors may accept or reject the proposal.[71] A proposal is deemed accepted[72] when a majority in number and two-thirds in value of all classes of creditors (excluding secured creditors),[73] present at the meeting or by proxy, vote for the acceptance thereof.[74] Once accepted, the trustee must apply within five days to court for approval.[75]

The court 'shall' refuse the proposal in certain instances, namely (a) where it is of the opinion that the terms of the proposal are unreasonable or would not benefit the general body of creditors;[76] (b) where the proposal does not provide for trustees' fees and costs; and (c) where it is proven that the debtor has committed certain blame-worthy acts,[77] for example, where he fails to keep his financial books up to date, continues to trade despite his insolvent state, or is found to have contributed to his insolvent state by making bad decisions or living recklessly.

When the insolvent is subject to the bankruptcy procedure, a proposal approved by the court automatically annuls such proceedings.[78] The effect of this is that all the rights, titles and interests of the trustee in the property of the debtor under bankruptcy are re-vested in the debtor or in any person approved by the court—unless the terms of the proposal provide otherwise.[79]

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66 Section 26(9)*(b)* of the proposed BIA.
67 See s 26(9)*(b)* of the proposed BIA.
68 Section 30(2) of the proposed BIA.
69 Section 26(14) of the proposed BIA.
70 Section 32(1) of the proposed BIA.
71 See s 35(1) of the proposed BIA.
72 Such creditors include both secured and unsecured creditors. As regards the former, it applies to secured claims in terms of which the proposal was made.
73 An exception to the exclusion of secured creditors is where the proposal is made in classes of secured claims and where the secured creditors voted for the acceptance of the proposal, by a majority in number and two-thirds in value of the secured creditors present personally or by proxy; see s 44(4)*(a)* and *(b)* of the proposed BIA.
74 See ss 35(2)*(d)* and 44(4) of the proposed BIA.
75 Section 40*(a)* of the proposed BIA.
76 See s 41(2) of the proposed BIA.
77 See ss 165 and 169 of the proposed BIA for instances pursuant to which a debtor's conduct should be subjected to censure.
78 See s 43(1) of the proposed BIA.
79 ibid.

When creditors do not consent to a proposal or if it is annulled by a court,[80] the debtor is deemed to have made an assignment.[81] Such an assignment would have the same effect as one filed in terms of section 25 of the proposed BIA.[82]

Discharge in Terms of the BIA

The proposed BIA provides for the discharge of a debtor who has been adjudged bankrupt.[83] Consequently, the end result of both the receiving order procedure and the assignment procedure is a discharge of the bankrupt's debt.[84] A discharge follows automatically by a lapse of time (for first-time bankrupt individuals) or upon a court order.[85]

An automatic discharge under the proposed BIA is afforded to a first-time bankrupt individuals[86] at the end of the nine-month period which follows immediately after a bankruptcy order, stemming from either the receiving order procedure or the assignment procedure, is made. However, it will not follow automatically if it is opposed by a supervisor, trustee or creditor within that period.[87] The trustee is responsible to deliver a notice of the imminent automatic discharge of a debtor to the supervisor, the bankrupt individual and creditor(s) (who have proven claims) not less than fifteen days before the date on which the automatic discharge would become effective.[88] If an interested party wants to oppose the automatic discharge, he must deliver a notice of the intended opposition to other interested parties.[89] The notice may be delivered at any time before expiry of the nine-month period[90] and must set out the grounds for opposition.[91]

The possible grounds for opposition include instances where the bankrupt individual (a) did not comply with procedural requirements of the law; (b) engaged in questionable conduct during bankruptcy; (c) was convicted of crime or fraud; or (d) defaulted on payment obligations imposed by the trustee regarding a determination to surrender excess income (where relevant).[92]

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80 The court may annul a proposal where the debtor defaults in its performance of any provision of the proposal; it appears to the court that the proposal cannot continue without injustice or undue delay; or the court's approval was obtained by fraud; see s 46(1) of the proposed BIA.

81 See s 38*(a)* of the proposed BIA.

82 Section 26(8)*(a)* and *(b)* and s 46(3) and (4) of the proposed BIA. See also s 30(8)*(b)* of the proposed BIA.

83 See s 160 of the proposed BIA.

84 See s 160(2) and (3) of the proposed BIA.

85 See ss 160 and 161 of the proposed BIA.

86 See s 160(3) of the proposed BIA.

87 Section 160(1)*(g)* of the proposed BIA.

88 Section 160(10)*(b)* of the proposed BIA.

89 See s 160(1)*(c)–(e)* of the proposed BIA.

90 ibid.

91 Section 160(1)*(c)–(e)* and (3) of the proposed BIA.

92 See ss 53, 163(2)*(a)* and *(b)*, 164 and 165 of the proposed BIA.

After the notice of intention to oppose is filed, the matter must be referred to court and the trustee must apply for a date on which the opposition hearing will take place.[93] The trustee must also submit a report with a recommendation to court. The trustee may recommend that the discharge be rejected, awarded without conditions or on condition that the debtor makes certain payments to the estate.[94]

At the hearing, the court must, among other issues raised, determine whether a debtor has fulfilled his financial obligations if such obligations had been imposed by the trustee.[95] The court will consider the amount that the trustee imposed on the debtor, the amount already paid towards the bankrupt estate and the financial resources available to the debtor.[96] The court retains discretion to discharge the debtor's debt after considering the relevant circumstances.[97]

If the automatic discharge was not opposed or if an opposition failed, the trustee must issue a certificate to the bankrupt individual,[98] confirming that he is discharged and released from all debts.[99] It must also indicate that the automatic discharge bears the status of an immediate and absolute order.[100]

Besides the court's involvement when a discharge is opposed, the proposed BIA also provides for a discharge by order of court if the debtor is a repeat bankrupt or if he is a first-time bankrupt who intends to apply for a discharge before the expiration of the nine-month period following bankruptcy.[101] In the latter instance, the provisions relating to an automatic discharge immediately cease to apply.[102]

An interesting feature of the proposed BIA's discharge provisions is that a repeat bankrupt is deemed to have applied for a discharge by order of court the moment when the receiving order is made or once he applies for an assignment order in relation to his estate.[103] In other words, as far as a repeat bankrupt is concerned, a receiving order or an assignment automatically constitutes an application for a discharge by order of court.[104] An exception to this automatic consequence is when a bankrupt individual serves on the

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93 ibid. See also s 160(1)*(f)* of the proposed BIA.
94 See s 163(1) and (3) of the proposed BIA.
95 See s 53(2)*(c)* and s 163(2)*(a)* and *(b)* of the proposed BIA.
96 ibid.
97 See s 164 of the proposed BIA.
98 Section 167(1) of the proposed BIA.
99 See s 160(1)*(g)*(i) and (ii) of the proposed BIA. See also s 170(2) of the proposed BIA.
100 Section 160(4) of the proposed BIA.
101 Section 160(2) of the proposed BIA.
102 ibid.
103 See s 161(1) of the proposed BIA.
104 ibid.

court and the trustee a written notice in which he waives his right in this regard.[105]

The trustee of the estate shall apply to the court, not earlier than three months before and not later than one year after bankruptcy, for a court date on which the hearing of the application for a discharge via court order will take place. This should be done after giving five days' notice to the bankrupt individual.[106]

After the trustee has secured a court date for the hearing of the discharge application, he must send a notice of the application to the supervisor, the bankrupt individual and all creditors at least fourteen days before the hearing takes place.[107] The trustee must also prepare a report in the prescribed form, setting out the state of the bankrupt individual's affairs, the causes of his bankruptcy and the manner in which the bankrupt individual has performed the duties imposed by the proposed BIA and obeyed the orders of the court.[108] The report should also comment on the bankrupt individual's conduct before and after his bankruptcy.[109] This could assist the court in determining whether or not the bankrupt individual has been well-behaved.[110] The trustee's report must be accompanied by a resolution of the inspectors, indicating whether they approve or disapprove of the report.[111]

The trustee's report must ultimately recommend whether the bankrupt individual should be discharged—considering his conduct and financial ability to make payments.[112] The trustee must specifically consider the following matters in drafting the report:[113]

- whether the bankrupt individual has complied with the procedural requirements and, if relevant, made the payments imposed in terms of the proposed section 53;[114]

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105 ibid. It is uncertain why a bankrupt individual would want to waive his right to a discharge. Although this may occur in situations where reaffirmation agreements are reached, it could not be the case in Nigeria as the BIA does not provide for such agreements. Reaffirmation agreements are reached when a debtor reaffirms personal responsibility for liabilities that ordinarily ought to have been or will be released upon his discharge. Nevertheless, such agreements undermine the fresh start principle as they reactivate pre-bankruptcy debts and therefore negate the essence of a fresh start, which is to ensure speedy rehabilitation. See Stephanie Ben-Ishai, 'Reaffirmation of Debt in Consumer Bankruptcy in Canada' (2015) Canada Business LJ 238 at 240, regarding reaffirmation agreements and how they affect the fresh start.

106 See s 161(2) of the proposed BIA.

107 See s 161(6) of the proposed BIA.

108 See s 162 of the proposed BIA.

109 See s 162(1)*(d)* of the proposed BIA.

110 See s 162(1)*(e)* of the proposed BIA.

111 See s 162(1) of the proposed BIA.

112 See s 163(1) of the proposed BIA read together with s 53 of the proposed BIA.

113 Section 163(2)*(a)–(c)* of the proposed BIA.

114 See s 53 for payments that the trustee may prescribe. These payments are often imposed on bankrupt individuals who have income that exceeds necessary expenses to maintain a reasonable standard of living.

- the total amount that the bankrupt individual has paid to the estate (financial commitment), bearing in mind his indebtedness and available financial resources; and
- whether the bankrupt individual decided to opt for bankruptcy as a means to obtain relief from indebtedness while he could have made a viable proposal.

The court can grant or refuse an absolute order of discharge, suspend the operation of the discharge order for a specified period, or grant an order of discharge subject to certain terms or conditions.[115] When the court grants a discharge, it will issue a certificate of discharge to the bankrupt individual, which has the same effect as an automatic discharge.[116] As is the case with the automatic discharge, a discharge by court order releases the bankrupt individual from all claims provable in bankruptcy.[117]

Not all debts are discharged and although some of the excluded debts (for instance those stemming from fraud, bail applications and spousal or child support) were expected, others, such as[118] student loans and debts resulting from revolving credit,[119] were not. Sureties are also unaffected by the discharge and consequently remain liable in accordance with the accessory contract.[120] The latter also applies to the proposal procedure. In this respect, section 44(5) of the proposed BIA—the only reference to a discharge in the context of proposal procedures—provides that

> the acceptance of a proposal by a creditor does not release any person who would not be released under this Act by the discharge of a debtor.

Evaluation

In light of the soon-to-be enacted BIA, there are three avenues through which indebted Nigerian natural persons will be able to secure relief, namely receiving orders, assignments and proposals. These procedures—and thus the broader Nigerian natural person insolvency system—should be evaluated as a whole against key international guiding principles relating to natural person insolvency law. In this respect, access to debt relief for all insolvent debtors and the consequent possibility of a discharge are of paramount importance.

Regarding the accessibility to the proposed debt relief measures, the bankruptcy measure, secured by means of receiving order and assignment

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115 See s 164(2) of the proposed BIA.
116 Section 167(1) of the proposed BIA.
117 Section 170(2) of the proposed BIA.
118 See s 170(1) of the proposed BIA.
119 ibid.
120 See s 171 of the proposed BIA in relation to bankruptcy and s 44(5) and as regards the proposal procedure.

procedures, in essence constitutes a liquidation procedure through which the assets of the insolvent estate will be liquidated and the proceeds distributed among creditors of the estate. Therefore, these procedures are not *suitable* for estates without assets. In fact, the assignment procedure, although not set as an absolute requirement,[121] explicitly provides that an insolvent natural person may make an assignment of his property for the general benefit of his creditors. Thus, it can be inferred that the BIA envisages that the assignment procedure should not be applied to benefit debtors but rather the general body of creditors. On the other hand, the proposal procedure is aimed at a payment plan, which naturally requires a debtor to have some form of income to make a viable proposal to benefit creditors. Although advantage for creditors is not set as a requirement, it seems that it might be indirectly required. Consequently, it is unclear whether insolvent persons who are without assets and without a substantial flow of income would be able to access the system at all.

Also, the definition of an insolvent person in the proposed BIA excludes insolvent persons whose liabilities to creditors provable as claims under the proposed BIA amount to less than one million naira. This requirement further excludes debtors from both the bankruptcy and the proposal procedures.

By evaluating the entire proposed Nigerian natural person debt relief system against the international principle favouring access to the insolvency system for all honest but unfortunate debtors, it is possible that a large number of debtors, including NINA debtors, will not be able to access any of the proposed statutory debt relief procedures. Some will be excluded, albeit indirectly, due to their financial (in)ability (whether it pertains to assets or income), while others will be barred because of the level of their outstanding debt. A subtler discrimination is the exclusion of those who cannot afford the procedures, which are court-based and require the appointment of inspectors in the bankruptcy process specifically. While it appears that the summary administration procedure is aimed at NINA debtors, it forms part of the assignment procedure, although in a simplified form, and therefore the questions surrounding costs and the reference to the benefit of creditors remain. It is submitted that the summary administration procedure's provisions are too thin and intertwined with the bankruptcy procedure to constitute a practical solution to NINA debtors.

Appraising the Nigerian debt relief system against international principles favouring a discharge of debt of honest but unfortunate debtors as a tailpiece of debt relief measures, shows that those who will not be able to gain access to the system will also be excluded from accessing its discharge provisions. It could even be that NINA debtors will form the largest part of the most vulnerable of the marginalised group. Therefore, in essence, the Nigerian

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[121] See the South African position where advantage for creditors is a specific requirement.

debt relief system does not align with the international guiding principle that advocates a discharge for all honest but unfortunate debtors.

NATURAL PERSON DEBT RELIEF MEASURES IN SOUTH AFRICA

General

A number of natural person debt relief measures are available to an insolvent debtor in South Africa. The sequestration procedure in terms of the Insolvency Act 24 of 1936 is considered to be the primary debt relief procedure because of its discharge feature.[122] This procedure can be compared to the proposed bankruptcy procedure in Nigeria because it is an asset liquidation procedure in nature. Also, as is the case in Nigeria, the sequestration procedure may be accessed via two routes, namely the compulsory application route[123] or the voluntary surrender route.[124]

The South African insolvency system provides for two alternative debt relief measures, namely the administration order procedure in terms of the Magistrates' Courts Act[125] and the debt review procedure in terms of the National Credit Act (NCA).[126] These procedures take the form of repayment plans and could (in some respects) be compared to Nigeria's suggested proposal procedure.

South Africa is also in the process of reforming its insolvency laws. It appears from the proposals, which envisage the repeal of the Insolvency Act and the promulgation of a Unified Insolvency Act,[127] that the sequestration procedure will in essence remain largely intact, although a proposed pre-liquidation composition will be included in the proposed legislation.[128] Another planned reform relates to the NCA where the inclusion of the debt intervention procedure is proposed.[129]

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122 Hermie Coetzee and Melanie Roestoff, 'Consumer Debt Relief in South-Africa – Should the Insolvency System Provide for NINA Debtors? Lessons from New Zealand' (2013) International Insolvency Review 188 at 193.

123 See s 9 of the IA. The South African compulsory sequestration procedure is similar to the proposed Nigerian receiving order procedure because both are creditors' liquidation applications.

124 See s 3 of the IA. The voluntary surrender procedure is similar to the proposed assignment procedure in Nigeria because both are debtors' liquidation applications.

125 See s 74 of the Magistrates' Courts Act 32 of 1944 (MCA).

126 See s 86 of the National Credit Act 34 of 2005 (NCA).

127 See South African Law Reform Commission, 'Report on the Review of the Law of Insolvency: Draft Insolvency Bill and Explanatory Memorandum (Project 63)' (2000) and the 2000 Insolvency Bill. The latest version of the Insolvency Bill is that of 2015, which is accompanied by the 2014 Explanatory Memorandum.

128 See cl 118 of the 2015 Insolvency Bill.

129 See the National Credit Amendment Bill of 2018 (NCAB). The NCAB was adopted by the National Assembly and the National Council of Provinces. It was referred to the President who will sign it into law.

Sequestration

Voluntary surrender

The voluntary surrender procedure creates an avenue whereby an insolvent individual may apply to the court for approval to surrender his estate in exchange for relief from indebtedness.[130] However, the discharge of debt is not the (main) aim of the sequestration procedure—it is merely a consequence thereof.[131]

A debtor may apply for the voluntary surrender of his estate either in person or through an agent. The latter could be a *curator bonis* where the debtor is unable to manage his affairs[132] or anyone entrusted with the administration of the insolvent estate of a deceased person.[133]

A debtor must comply with certain requirements before applying for the voluntary surrender of his estate.[134] These are divided into procedural[135] and substantive requirements.[136] The primary purpose of the procedural requirements is to inform creditors of the voluntary surrender application and thereby provide them with an opportunity to object to the surrender.[137] It also provides creditors with important information about the debtor's estate.[138] After the applicant has fulfilled the procedural requirements in accordance with section 4 of the IA, the court will also consider whether the substantive requirements were fulfilled.

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130 André Boraine and Melanie Roestoff, 'Fresh Start Procedures for Consumer Debtors in South African Bankruptcy' (2002) International Insolvency Review 1 at 3.

131 See *Ex parte Ford* [2009] 3 SA 376 (WCC) 383.

132 See s 3(1) and (2) of the IA.

133 See s 3(1) of the IA.

134 Sections 4 and 6 of the IA.

135 The procedural requirements are set out in s 4 of the IA. These entail that a notice of surrender be published (not more than thirty days and not less than fourteen days before the date that the application is made to the court) in the *Government Gazette* and a newspaper circulating in the district in which the debtor resides; that a copy of the notice be delivered to creditors, the South African Revenue Service and registered trade unions representing any of the debtor's employees within seven days after publication of the notice; and that a statement of the applicant's affairs be lodged in duplicate form and be made available for inspection by the creditors at the office of the Master or at the office of the magistrate (where there is no master's office) for a period of fourteen days after the date mentioned in the notice of surrender; s 4(1)–(3) of the IA.

136 The substantive requirements are that the court must be *satisfied* that s 4 was complied with; the estate is insolvent; there is sufficient free residue in the estate to cover sequestration costs; and most importantly, sequestration of the estate would constitute advantage for the creditors of the estate. See s 6 of the IA. As regards the advantage requirement, see *Ex parte Smith* [1958] (3) SA 568 (O) 570–571 where the court affirmed that an application for voluntary surrender must contain a specific allegation, which is supported by facts—unless figures speak for themselves—that sequestration will be to the advantage of the creditors of the estate. Consequently, a mere allegation to show a desire to surrender the estate for the benefit of the creditors of the estate will not suffice.

137 Sections 3–5 of the IA. See also *Ex parte Henning* [1981] 3 SA 843 (O) 852.

138 Boraine and Roestoff (n 130) 3.

The advantage for creditors requirement is the most important substantive requirement and the courts are usually very strict in ensuring that there will be an advantage for creditors before awarding a sequestration order in the case of voluntary surrender applications.[139] Therefore, the applicant debtor in his application should make a full and frank disclosure of his financial details relating to his income, assets, liabilities and expenditures.[140] The advantage for creditors requirement is not defined in the IA, but the courts require that some form of pecuniary benefit should result to creditors.[141] The proposed Nigerian BIA hints at a similar objective, namely that a debtor's estate should be assigned to benefit creditors.[142] However, unlike its South African counterpart, the proposed BIA does not set the phrase in mandatory terms.

Compulsory sequestration

The second way in which the sequestration procedure can be accessed in South Africa is via the compulsory sequestration application route.[143] The compulsory sequestration procedure is a distinct debt collection procedure, which allows a creditor or creditors to apply for the sequestration of an insolvent's estate.[144] The primary aim of this procedure is to ensure the impartial distribution of the proceeds of the debtor's estate amongst creditors.[145] Therefore, the compulsory sequestration procedure is not primarily a tool for debt relief but rather a creditor's channel to recover debts.[146] Nevertheless, it may result in the eventual discharge of debts,[147] thereby relieving the debtor of all pre-sequestration debts.

As is the case in voluntary surrender proceedings, the applicant creditor or creditors must fulfil procedural[148] and substantive requirements before

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139 It was held in *Ex parte Bouwer* [2009] 6 SA 386 (GNP) 393 that the advantage for creditors requirement constitutes a 'key consideration' in determining whether a sequestration order should be granted.

140 See *Ex parte Bouwer* (n 139) 390–393.

141 See *Meskin & Co v Friedman* [1948] 2 SA 559 (W) 559.

142 Section 25(1) of the proposed BIA.

143 Section 9 of the IA.

144 See *Walker v Syfret* [1911] AD 141 166.

145 See Robert Sharrock, Alastair Smith and Kathleen van der Linde, *Hockly Insolvency Law* (Juta 2012) 4.

146 *Walker v Syfret* (n 144) 166. The compulsory sequestration procedure is similar to receiving orders under the BIA because it also constitutes an asset liquidation procedure, which can be explored by creditors.

147 Section 129 of the IA.

148 The procedural requirements are that the applicant creditor ensures that sufficient security is given to the Master of the High Court to cover all costs of sequestration until a trustee is appointed for the insolvent estate. The applicant creditor must also furnish a copy of the petition to the employees of the debtor, the trade unions representing the employees, the South African Revenue Service and the debtor; s 9(3)–(5) of the IA.

a compulsory sequestration order will be awarded.[149] However, these are less strict than the requirements applicable to voluntary sequestration applications. For instance, an applicant creditor is required to prove a reasonable likelihood that some pecuniary benefit will accrue to the creditors of the insolvent estate. Therefore, the applicant merely has to prove that there is a reason to believe that sequestration will be to the advantage of creditors, unlike in voluntary sequestration applications where the applicant debtor must prove that there would, in fact, be an advantage for creditors.[150] The less stringent requirements regarding compulsory sequestration applications led to the birth of what was coined 'friendly sequestrations'.[151] This happens where a friend or family member applies for the sequestration of the debtor's estate.[152] A friendly sequestration is thus a compulsory sequestration application where the applicant has a friendly relationship with the debtor and where the motive for bringing the application is to ensure debt relief. Consequently, friendly sequestration applications came into existence as a result of debtors' pursuit for debt relief,[153] due to their inability to satisfy the stringent formalities and stricter burden of proof required in voluntary surrender applications.[154]

Some regard friendly sequestration applications as an abuse of the court process because of instances where debtors colluded with friendly creditors to the detriment of the true creditors of the insolvent estate.[155] Also, in instances where the total costs incurred in sequestration is excessively high (in that they unduly reduce the amount available for distribution to creditors) the friendly sequestration application was found to be abusive.[156]

In order to discourage the use of friendly sequestration applications (and thus the abuse of the compulsory sequestration procedure) and to ensure that there is an advantage for creditors,[157] the courts have laid down certain

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149 The substantive requirements are as follows: The applicant creditor must prove that he has a liquidated claim of not less than R100 against the debtor or that the aggregate claim of creditors against the debtor is not less than R200; the debtor is insolvent or has committed an act of insolvency; and there is reason to believe that sequestration of the debtor's estate would be to the advantage of creditors; ss 8, 9(1) and 10*(c)* of the IA.

150 See *Stratford v Investec Bank Limited* [2015] 3 SA 1 (CC) 22. See also *Amod v Khan* [1947] 2 SA 432 (N) 438 where the court comments that it is easier for a debtor to prove advantage to creditors as he knows all about his own affairs and can easily prove that advantage of creditors will ensue while on the other hand, the creditor generally has little knowledge of the exact position of the debtor's affairs.

151 For a discussion of friendly sequestrations in general, see Zingapi Mabe and Roger Evans, 'Abuse of Sequestration Proceedings in South Africa Revisited' (2014) SA Merc LJ 651 at 658.

152 ibid.

153 ibid 656.

154 ibid.

155 ibid 489.

156 See *Ex parte Shmukler-Tshiko* [2013] JOL 29999 (GSJ) 10 and *Ex parte Arntzen (Nedbank Ltd intervening)* [2013] 1 SA 49.

157 Section 12(1)*(c)* of the IA.

guidelines to be applied in friendly circumstances.[158] The guidelines were set to ensure that the applicant makes full and frank disclosure of the necessary facts and information.[159] In these instances, proof of indebtedness and sufficient assets in the insolvent estate (movable and immovable assets, which establish an advantage for creditors) is required. A valuation report, which specifies the value of assets and proof of authenticity of the valuation arrived at, is also specifically required.[160] This valuation must be done by a qualified valuator.[161]

Rehabilitation

Rehabilitation brings an end to the sequestration process, reinstates a debtor's status prior to sequestration[162] and—most importantly for purposes of this study—grants the debtor a discharge of all debts incurred prior to sequestration.[163]

Rehabilitation occurs automatically after ten years from the date of sequestration of the debtor's estate[164] or by means of a court order, which can be applied for before the lapse of the ten-year period after sequestration.[165] This is similar to the discharge provisions under the proposed BIA, which also provide for an automatic discharge or a discharge on application to

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

159 ibid.

160 ibid 517.

161 ibid.

162 Section 129(1) of the IA. Unlike the proposed system in Nigeria, which does not impact on a debtor's status, a number of restrictions apply to an unrehabilitated insolvent in South Africa. These are for instance that a debtor is unable to conclude a valid contract without the consent of the trustee (s 23(2) of the IA) and carry on business or take up employment in the business of a trader who is a general dealer or a manufacturer in any capacity (s 23(2) of the IA). Furthermore, an unrehabilitated insolvent cannot serve as a member of the national assembly, provincial legislature, municipal council or national council of provinces or as a director of a company, except with the leave of the court; ss 47(1)*(c)*, 62, 106(1)*(c)* and 158(1)*(c)* of the Constitution of the Republic of South Africa, 1996 and s 218(1)*(d)*(i) of the Companies Act 61 of 1973. Also, an unrehabilitated insolvent cannot be appointed as a business rescue practitioner (s 69(8)*(b)* read together with s 69(11) and s 138(1)*(d)* of the Companies Act 71 of 2008), participate in the management of a close corporation of which he is a member (s 47(1)*(b)*(i) of the Close Corporations Act 69 of 1984 or act as a member of the board of the Land and Agricultural Development Bank of South Africa (ss 1 and 10 of the Land and Agricultural Development Act 15 of 2002). See also Melanie Roestoff, 'Insolvency Restrictions, Disabilities and Disqualifications in South African Consumer Insolvency Law: A Legal Comparative Perspective' 2018 J of Contemporary Roman-Dutch L 1–11, for a comprehensive analysis of restrictions that rest on an unrehabilitated insolvent in South Africa and the consequent hardship on honest, competent and responsible debtors who are being denied employment opportunities, which may help to improve their financial situations.

163 Section 129(1)*(a–c)* of the IA.

164 Section 127A of the IA.

165 Section 124 of the IA.

court. The major difference between the provisions lies in the waiting period, with Nigeria's proposed period being set at nine months.

A debtor applying for rehabilitation by means of a court order must base his application on any of the six grounds listed in section 124 of the IA.[166] Such applications are subject to the court's discretion,[167] which is exercised once it is satisfied that the conditions of the law, as set out in section 127, have been met. In essence, the court will grant the rehabilitation of the debtor if it is persuaded that he may be allowed to conduct business once again[168] and has learnt the lessons of his insolvency, thereby appreciating the hardship he has caused to creditors.[169] An automatic discharge would follow where a debtor does not apply for his rehabilitation, but waits for the ten-year period to lapse.

Composition

There are two types of compositions available to a debtor in South Africa, namely compositions in terms of section 119 of the IA and the common-law composition.

The common-law composition simply requires the debtor to enter into some form of agreement with creditors regarding his financial obligations. In this respect, the debtor and his creditors will typically reach an agreement on dividends to be paid.[170] A common-law composition is centred on the principles of the law of contract and only binds the creditors who have agreed to it.[171] The consequence of entering into a common-law composition is that the initial contracts between the debtor and his creditors are terminated and

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166 The grounds are as follows: a) After twelve months from the confirmation of the first trustee account by the Master, unless the matter falls within the provisions of paragraph 'b' or 'c' below; b) after three years from the confirmation of the first trustee's account by the Master in situations where the insolvent debtor has previously been sequestrated, unless the matter resorts under the provisions of 'c' below; c) after five years from conviction of any fraudulent act relating to the insolvency under consideration or a previous insolvency or of any offence under ss 132, 133 or 134 of the IA or any corresponding provision under the 1916 Insolvency Act. Furthermore, the proviso to s 124(2) stipulates that an insolvent may only, within a period of four years, apply for a rehabilitation order under the above circumstances ('a' to 'c') where it has been recommended by the Master; d) six months after the date of sequestration where no creditor has proved a claim against an insolvent estate and the insolvent debtor has not been previously sequestrated or committed any offence in connection to sequestration; e) immediately after the Master has confirmed the distribution account where all claims have been paid in full with interest as well as the costs of sequestration; or f) immediately after the insolvent debtor and the creditors of the insolvent estate have agreed to a composition, which results in the Master issuing a certificate of composition indicating that payment of 50 cents in the rand of all claims against the insolvent estate is paid; ss 124, 119(7), 132, 133, 134 of the IA.

167 *Ex parte Hittersay* [1974] 4 SA 326 (SWA) 328.

168 *Greub v The Master* [1999] 1 SA 746 (C) 749.

169 ibid.

170 See Sharrock and others (n 145) 188.

171 See *De Wit v Boathavens CC* [1989] 1 SA 606 (C) 611.

replaced with new ones. The termination of the former contract may afford relief to a debtor[172] in instances where debts are written off in whole or in part.[173] Theoretically, a common-law composition is available to a wide range of debtors, irrespective of their financial status. However, successful common-law compositions involving debtors with little or nothing to offer (such as NINA debtors) are rare due to such debtors' lack of negotiating power.[174]

A debtor may also enter into a statutory composition in terms of the IA[175] by making an offer of composition to the creditors of the insolvent estate through his trustee. This offer may be made at any time after the first meeting of creditors.[176] An offer of composition is deemed to be accepted when at least seventy-five per cent in value and in number of all creditors (who have proven claims against the estate) consent to the acceptance of the proposal.[177] The offer of composition may be in the form of a proposed agreement stating that claims will be paid in part or in full as full and final settlement.[178] Because the statutory composition procedure may only be accessed after a provisional sequestration order has been granted, it does not assist those who do not have access to the sequestration procedure—such as NINA debtors. Although the statutory composition procedure is similar to the Nigerian proposal procedure, the latter constitutes an independent procedure.

Alternatives to Sequestration

Background

There are two alternative debt relief measures in South Africa, namely the administration order procedure in terms of section 74 of the MCA and the debt review procedure in terms of section 86 of the NCA.[179]

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172 ibid.

173 ibid.

174 Hermie Coetzee, 'A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa' (LLD thesis, University of Pretoria 2015) 302 and 303.

175 See s 119(1) of IA.

176 ibid.

177 Section 119(7) of the IA.

178 ibid.

179 As is the case with the Nigerian proposal procedure, these procedures are independent from the sequestration procedure.

Administration order procedure

Section 74 of the MCA provides for the administration order procedure as a debt relief measure for debtors whose debts do not exceed R50 000[180] and who have a regular source of income.[181] The procedure is simple and inexpensive and ultimately results in a court-ordered repayment plan.

Only 'due and payable' debts may be included in the procedure and therefore it does not cover debts that are only due to be paid in the future.[182] To commence the administration order procedure, the debtor must file an application at a magistrates' court. The application should be accompanied by a full statement of the debtor's affairs.[183] Every debt listed in the statement of affairs is accepted as being proved, unless the court makes amendments thereto.[184]

A magistrate presides over the process and the parties before the court are the debtor, the creditors and their legal representatives. The debtor may be interrogated by his creditors, their legal representatives or the court on issues relating to his assets and liabilities, his current and future income or that of his spouse, his current standard of living and other matters that the court may deem necessary.[185]

If the court is satisfied with the debtor's application, it will grant an administration order in the prescribed form.[186] The administration order would basically entail a repayment plan or arrangement in terms of which the debtor must make weekly or monthly payments to an administrator appointed to oversee the execution of the order.[187] When determining the periodic amount, the living expenses of the debtor and his dependants as well as existing maintenance orders must be taken into account.[188] Once the

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180 The administration order is available to persons whose debts do not exceed the amount determined by the Minister of Justice. The amount is published by notice in the official gazette from time to time. See s 74(1)*(b)* of the MCA. The current amount is set at R50 000; s 74(1)*(b)* of the MCA read together with Government Notice (GN) 217 in GG 37477 (27 March 2014).

181 See Mark Greig, 'Administration Orders as Shark Nets' (2000) SALJ 622 at 626. The administration order procedure does not serve as a bar to the sequestration of a debtor's estate; see s 74R of the MCA. In fact, the application for an administration order or related conduct could constitute an act of insolvency, which may be used to apply for the debtor's compulsory sequestration. This is because the debtor will give notice of his inability to pay his debts or will propose a release; see s 8*(e)* and *(g)* of the IA. See further *Madari v Cassim* [1950] 2 SA 35 (N) 38; *Fortuin v Various Creditors* [2004] 2 SA 570 (C) 573; and *Ex parte August* [2004] 3 SA 268 (W) 271.

182 See *Cape Town Municipality v Dunne* [1964] 1 SA 741 (C) 744 747 where the difference between debts that are 'due and payable' and *in futuro* debts are explained.

183 Section 74(1) and 74A(1) and (2) of the MCA.

184 See s 74B(1)*(a)* and *(b)* of the MCA.

185 See s 74B(1)*(e)* of the MCA.

186 Section 741 of the MCA.

187 Section 74E read together with s 74I of the MCA.

188 ibid.

order is made, the administrator should collect payments from the debtor and distribute them in accordance with the order.[189]

The administrator must lodge a certificate with the clerk of the court once all costs of administration and all creditors are paid in full, at which time the administration order terminates.[190] It is clear that the administration order procedure does not provide for the discharge of debts and only terminates once all creditors and costs of administration have been satisfied in full.[191]

Debt review procedure

The debt review procedure is the second alternative debt relief measure. As is the case with the administration order procedure, it results in the restructuring of debt.[192]

Although the NCA seeks to address and provide measures for resolving over-indebtedness, it is 'based on the principle of satisfaction by the consumer of all responsible financial obligations.'[193] Therefore, it is not surprising that the procedure does not result in a discharge of debt.

The NCA regulates specific types of civil obligations collectively termed credit agreements.[194] Consequently, only such obligations can form part of the debt review process. Generally speaking, the NCA applies to credit agreements made between parties that are unrelated and which have legal consequences in South Africa.[195] An agreement constitutes a credit agreement in terms of the NCA if it qualifies as a credit facility,[196] credit transaction,[197] or guarantee for credit facilities or credit transactions.[198] If an agreement does not resort under any of these definitions, it could still constitute an NCA-regulated credit agreement if it is characterised by a

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189 See s 74J(1) of the MCA.

190 Section 74U of the MCA.

191 ibid.

192 See s 3*(i)* of the NCA.

193 See s 3*(g)* of the NCA.

194 See s 1 of the NCA.

195 Section 4 of the NCA.

196 A credit facility is constituted where a credit provider supplies goods, services or money to a consumer from time to time and the credit provider either defers the consumer's obligation to pay any part of the goods, services or money or bills the consumer periodically. A charge, fee or interest is then added to the amount deferred or periodically billed to the consumer; see s 8(3)*(a)*(i) of the NCA.

197 An agreement qualifies as a credit transaction if it is a pawn transaction, discount transaction, incidental credit agreement, instalment agreement, mortgage agreement, secured loan or a lease of movable property; see s 8(4) of the NCA. See also s 1 for the definitions of these agreements.

198 An agreement is regarded as a credit guarantee if a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which the NCA applies; see s 8(5) of the NCA. This is commonly referred to as a suretyship; see Jannie Otto and Renee-Louise Otto, *National Credit Act Explained* (4 edn, Lexis Nexis 2015) 127.

payment deferral and the levying of a charge, fee or interest.[199] However, if a transaction does resort under the definition of a credit agreement, the NCA's application could specifically be excluded. For instance, some agreements are not deemed to be credit agreements. These are insurance policies (or credit extended for maintaining the premiums on insurance policies),[200] leases of immovable property,[201] transactions between stokvels and their members,[202] debt resulting from dishonoured cheques or similar instruments[203] and debt arising from continuous services.[204] Also, the NCA's application is limited in instances where a credit agreement constitutes an incidental credit agreement,[205] emergency loan,[206] student loan,[207] pawn transaction,[208] public interest credit agreement[209] or temporary increase in the credit limit under a credit facility.[210] Furthermore, the NCA provides that some agreements to which the NCA generally applies are excluded from the debt review procedure. In this respect, a credit agreement in terms of which the credit provider has proceeded to take the steps contemplated in section 130[211] to enforce that agreement will be excluded from the debt review procedure.[212] Also, juristic persons acting in the capacity of a consumer do not enjoy the protection afforded by chapter 4 part D of the NCA, which relates to over-indebtedness and reckless credit and therefore also the debt review process.[213]

A debtor may commence a debt review procedure by applying to a debt counsellor to be placed under debt review.[214] The debt counsellor must inform all the creditors and credit bureaus of the application within five business days after receiving it.[215] The debt counsellor should thereafter determine whether or not the debtor is over-indebted.[216] If the debtor is found not to be over-indebted, the debt counsellor must provide the debtor with a rejection

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199 See s 8(4)*(f)* of the NCA.
200 Section 8(2)*(a)* of the NCA.
201 Section 8(2)*(b)* of the NCA.
202 Section 8(2)*(c)* of the NCA.
203 Section 4(5) of the NCA.
204 Section 4(6)*(b)* of the NCA.
205 Section 78(2)*(e)* of the NCA.
206 Section 78(2)*(b)* of the NCA.
207 Section 78(2)*(a)* of the NCA.
208 Section 78(2)*(d)* of the NCA.
209 Section 78(2)*(c)* of the NCA.
210 Section 78(2)*(f)* of the NCA.
211 This section regulates procedures in court.
212 Section 86(2) of the NCA.
213 Section 78(1) of the NCA.
214 Section 86(1) of the NCA. After the debt counsellor receives the application for debt review, the counsellor may request that the debtor pay an application fee; s 86(3)*(a)* of the NCA. Also, the debt counsellor must provide the debtor with proof of receipt of the application; s 86(4)*(a)* of the NCA.
215 See s 86(4)*(b)* of the NCA.
216 Section 86(6)*(a)* of the NCA.

letter.[217] In such instances, the debtor may, with leave of the court, apply directly to the court for relief.[218]

If the debt counsellor concludes that a debtor is not over-indebted but is experiencing difficulties in paying his debts timeously, the counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt rearrangement.[219] If the credit providers and debtor reach an agreement, it must be documented by the debt counsellor in the form of a court order.[220] The court or the National Consumer Tribunal[221] will then confer the order in accordance with section 138. If the parties fail to reach an agreement, the debt counsellor must refer the matter to a magistrates' court with recommendations.[222]

Of importance for this study are the instances where a debt counsellor finds a debtor to be over-indebted. Here, although not prescribed by the NCA, the debt counsellor will in practice first attempt to reach a negotiated agreement.[223] If successful, the agreement is set out in the form of an order, which is filed as a consent order at the court or the NCT. If the attempts at a negotiated plan fail, the debt counsellor will follow the process set out in the NCA by issuing a proposal recommending that the magistrates' court make certain orders.[224] The possible orders include that one or more of the consumer's credit agreements be declared reckless[225] and/or that one or more of the consumer's commitments to his credit providers be rearranged. The NCA specifically prescribes the way in which such commitments may be rearranged, namely by extending the period of the agreement and reducing the amount of each payment due accordingly; postponing the dates

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217 See reg 25 of the National Credit Regulations 2006.

218 Section 86(9) of the NCA.

219 See s 86(7)(b) of the NCA.

220 See s 86(8)(a) of the NCA.

221 Hereafter referred to as the NCT.

222 See s 86(8)(b) of the NCA.

223 See Corlia van Heerden, 'Over-indebtedness and Reckless Credit' in Johan Scholtz (ed) *Guide to the National Credit Act* (LexisNexis 2008) para 11.3.3.2.

224 Section 86(7)(c) of the NCA.

225 Section 86(7)(c)(i) of the NCA. A debtor may also raise a defence of reckless credit in terms of s 80(1) of the NCA where he must prove the necessary facts to substantiate his claims. Reckless credit will ensue where a credit provider failed to carry out a proper financial assessment of the debtor; carried out a proper assessment, but extended credit to the debtor despite the assessment having revealed that such credit will render the debtor over-indebted; or where the information to the credit provider's disposal showed that the consumer did not grasp his risks, costs or obligations in terms of the proposed agreement; s 80(1)(a), 80(1)(b)(i) and 80(1)(b)(ii) of the NCA. A court or the NCT may declare any credit agreement that resorts under s 80(1) reckless; s 83(1) of the NCA. A credit agreement that is declared reckless in terms of s 80(l)(a) or 80(l)(b)(i) of the NCA may be set aside in whole or part; s 83(2)(a) of the NCA. The force and effect of such an agreement may also be suspended in accordance with s 83(3)(b)(i) of the NCA; s 83(2)(b) of the NCA. A credit agreement that is declared reckless in terms of s 80(l)(b)(ii) may be suspended and the consumer's obligations under any other credit agreements may be restructured; see s 83(3)(b) of the NCA.

on which payments are due under the agreement; extending the period of the agreement and postponing the dates on which payments are due under the agreement; or recalculating the consumer's financial obligations where contraventions of Part A or B of chapter 5, or Part A of chapter 6 are detected.[226]

The magistrate may either accept or reject the proposal.[227] He may also make his own order within the prescribed parameters. When an order for debt review is granted, a payment distribution agent will be appointed to ensure that credit providers are paid in accordance with the order.[228]

A debt counsellor must issue a debtor, whose debts have been rearranged in terms of part D of chapter 4,[229] with a clearance certificate within seven days after the debtor has[230]

> *(a)* satisfied all the obligations under every credit agreement that was subject to that debt re-arrangement order or agreement, in accordance with that order or agreement; or
> *(b)* demonstrated as prescribed—
> (i) financial ability to satisfy the future obligations in terms of the re-arrangement order or agreement; or
> (ii) that there are no arrears on the re-arranged agreements contemplated in subparagraph (i); and
> (iii) that all obligations under every credit agreement included in the re-arrangement order or agreement, other than those contemplated in subparagraph (i), have been settled in full.

Subparagbraph (i) refers to a mortgage agreement which secures a credit agreement for the purchase or improvement of immovable property, or any other long-term agreement as may be prescribed.

A debt counsellor must, within seven days after the clearance certificate is issued, file a certified copy of the certificate with the national register established in terms of section 69 of the NCA and all registered credit bureaus.[231] The credit bureaus must then expunge any form of negative listings made against the debtor.[232] A clearance certificate brings an end to the debt review process but does not result in a discharge of debts.

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226 Section 86(7)*(c)*(ii)*(aa)–(dd)* of the NCA.
227 Section 87(1)*(a–b)* of the NCA.
228 See reg 10A(9) of the National Credit Regulations 2006 as regards the duties and obligations of payment distribution agents.
229 See s 71(1) of the NCA.
230 See s 71(1A) of the NCA.
231 See s 71(4)*(a)* of the NCA. Although the NCA makes reference to the national register, it has not been established as yet.
232 See s 71(6) and 71A(2) of the NCA.

Evaluation and Reform Initiatives

South Africa offers various statutory debt relief procedures. However, the primary procedure, namely sequestration, is only available to debtors who have substantial assets that are sufficient to prove an advantage for creditors upon liquidation. The alternative debt relief procedures, namely the administration order and debt review, result in debt rearrangements and may therefore only be accessed by debtors who have some form of income that can be used to draw up a repayment plan. There is also the statutory composition procedure, which may be accessed by debtors already subject to the sequestration procedure and who were thus able to prove an advantage for creditors. On the other hand, any South African debtor may theoretically make use of the common-law composition procedure for it does not directly or indirectly prescribe any access requirements. However, the chances of negotiations succeeding are slim when debtors have no or insufficient income. Also, it is difficult to obtain consent from all credit providers.[233]

The South African debt relief system therefore appears to be lacking when evaluated against the international guiding principle favouring access to debt relief measures for all honest but unfortunate debtors. In fact, it is argued[234] that such differentiation amounts to unjustifiable, unfair discrimination on the basis of excluded debtors' socio-economic status.[235] This, in turn, renders the broader South African natural person insolvency system unconstitutional to the extent that it conflicts with the right to equality in terms of section 9 of the Constitution.[236]

As regards the international guiding principle favouring a discharge of debt for all honest but unfortunate debtors, the sequestration procedure, statutory composition procedure and (theoretically) common-law composition provide for a discharge. However, only those who are able to access—or use in the case of the common-law composition—these procedures will obtain a fresh start for which the debt review procedure and the administration order procedure do not provide.

The South African government is aware of these inadequacies and law reform is imminent. Unfortunately, this impending reform does not originate from a holistic review of the natural person insolvency law sphere and will merely add yet another debt relief procedure, namely debt intervention, to the landscape.[237] However, the proposed debt intervention procedure is

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233 See Coetzee (n 174) 302–303.

234 See in general Hermie Coetzee, 'Is the Unequal Treatment of Debtors in Natural Person Insolvency Law Justifiable?: A South African Exposition' (2016) International Insolvency Review 26, and the Memorandum on the Objects of the NCAB (hereafter the '2018 Memorandum') referring to Coetzee's arguments in this regard.

235 ibid.

236 ibid.

237 See the Preamble to the NCAB, the definition of 'debt intervention' in cl 1 of the NCAB and the '2018 Memorandum' (n 234) para 1.

not the first or only attempt by the government to address the plight of the excluded group of debtors. In fact, the inclusion of a pre-liquidation composition procedure in the Unified Insolvency Act is also currently under consideration.[238] The pre-liquidation composition is intended as a debt relief procedure for those who are unable to pay their debts but do not qualify for the liquidation procedure.[239] The 2014 Explanatory Memorandum explicitly styles the procedure as 'an opportunity for a fresh start, which entails a discharge of debts' for those who are currently excluded.[240] Regrettably, as Coetzee argues, the proposed procedure probably will not reach its aim.[241] Although the Master will be able to order a discharge of destitute debtors' debts,[242] the measure prescribes a compulsory preceding negotiation phase and hearing to be conducted by an administrator.[243] Only once negotiations fail and where the debtor cannot pay significantly more than what he offered during negotiations, may he apply to the Master for a discharge of his debts, which excludes secured and preferential debts.[244] Coetzee contends that it is a fool's errand to compel debtors who do not have any negotiating power to participate in an expensive (since no provision for financial assistance regarding costs are made) compulsory negotiation phase and hearing. Not only are the odds of a negotiated outcome very slight, but the intended class of debtors will not be able to pay the related costs.[245]

This brings us to the proposed debt intervention measure. The aim of this measure is to provide a remedy to those who are excluded from the sequestration, debt review and administration order procedures.[246] Clause 13 of the NCAB intends to insert a new section 86A, detailing the debt intervention application, in the NCA. In terms of the new section 86A, a debt intervention applicant may apply to the National Credit Regulator (NCR)[247] to be declared over-indebted provided that his total unsecured

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238 See cl 118 of the 2015 Insolvency Bill, which is accompanied by the '2014 Explanatory Memorandum'. For a detailed account and evaluation of the latest version of the procedure within the context of NINA debtors see Hermie Coetzee, 'Does the Proposed Pre-liquidation Composition Proffer a Solution to the No Income No Asset (NINA) Debtor's Quandary and if Not, What Would?' (2017) J of Contemporary Roman-Dutch L 18.

239 See '2014 Explanatory Memorandum' (n 238) 201 and 208. The 2015 Insolvency Bill uses the term 'liquidation' when referring to both the liquidation of juristic persons and the sequestration of natural persons.

240 See '2014 Explanatory Memorandum' (n 238) 208.

241 Coetzee (n 238) 26.

242 Clause 118(22) of the 2015 Insolvency Bill.

243 Clause 118(6) and 118(10) of the 2015 Insolvency Bill.

244 Clause 118(22)*(b)* of the 2015 Insolvency Bill.

245 Coetzee (n 238) 25.

246 See the Preamble to the NCAB and the definition of debt intervention applicant in cl 1 of the NCAB. See also the '2018 Memorandum' (n 237) para 1. Clause 2 of the NCAB proposes to amend s 3 of the NCA to provide for debt intervention as 'one of the tools to promote and advance the social and economic welfare of South Africans'; '2018 Memorandum' (n 234) para 3.2.

247 Hereafter 'NCR'.

credit does not exceed R50 000.[248] Only a natural person, or natural persons with a combined estate, who earns a gross income of at most R7 500 per month, is over-indebted and not subject to a sequestration or administration order, qualifies for debt intervention.[249] Secured credit and credit that does not resort from a credit agreement regulated by the NCA are excluded.[250]

The proposed section 86A(6)*(d)* read together with section 87A(5)*(b)*(i) empowers the NCR to determine whether a restructuring of the debtor's debt within a five-year period (or a longer period, which may be prescribed) is attainable and, if so, to make a recommendation for a restructuring order in accordance with the proposed section 87(1A) to the NCT. However, if the applicant's income and assets are not sufficient to produce a workable restructuring within the five-year period (or longer as may be prescribed), the NCR may recommend that the NCT suspend the debt in whole or in part for a twelve-month period.[251] The NCR must review the applicant's position upon the expiration of an eight-month period after the suspension order.[252] If the debtor then has sufficient income or assets to rearrange as contemplated in the proposed section 86A(6)*(d)*, the NCR must refer the matter with such a recommendation to the NCT.[253] If the debtor still does not qualify for a rearrangement, the NCR must refer the matter to the NCT to consider a further extension of twelve months.[254] The NCR must again review the matter eight months after the second suspension period.[255] If the debtor is still, after a period of twenty-four months, not in a position to restructure his debts within the set parameters, the NCR must make a recommendation to the NCT to extinguish the debtor's debts or a part thereof.[256] The NCT must also make an order limiting the debtor's right to apply for credit for a minimum of six and a maximum of twelve months.[257] The provision regarding extinguishing of debt will only be effective for four years.[258] The Minister must review the effect of section 87A within three years after subsection 86A(6)*(e)* comes into effect and present his findings to the National Assembly.[259]

The proposed section 88B determines that a debt intervention applicant in whose favour an extinguishing of debt was ordered may apply to the NCR

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248 Proposed s 86A(1) of the NCA.

249 See the definition of debt intervention applicant in cl 1 of the NCAB, which will be inserted into s 1 of the NCA.

250 ibid.

251 Proposed s 86A(6)*(e)* read together with s 87A(2)*(b)*(i) of the NCA.

252 Proposed s 87A(5)*(a)* of the NCA.

253 Proposed s 87A(5)*(a)* and *(b)*(i) of the NCA.

254 Proposed s 87A(5)*(b)*(ii) read together with s 87A(2)*(b)*(i) of the NCA.

255 Proposed s 87A(5)*(a)* of the NCA.

256 Proposed s 87A(5)*(c)*(ii) of the NCA. See cl 1 of the NCAB for a definition of 'extinguish'.

257 Proposed s 87A(8) and (9) of the NCA.

258 Proposed s 87A(12)*(a)* of the NCA and '2018 Memorandum' (n 234) para 3.13.

259 See proposed s 86A(12)*(b)* of the NCA and '2018 Memorandum' (n 234) para 3.13.

for a rehabilitation order through the NCT.[260] The debtor must prove that the costs of credit, in terms of section 101(1), are fully paid to his creditors or that he reached a settlement agreement with credit providers 'to the effect that those amounts have been resolved to the satisfaction of the credit provider.'[261] The debtor must substantiate his application with information to be prescribed by the Minister.[262] This must include proof that his financial circumstances improved to such an extent that he may once again participate in the credit market and that he attended a financial literacy programme.[263] A rehabilitation order lifts any limitation on the debtor's right to apply for credit in terms of section 60 of the NCA.[264]

Roestoff acknowledges that the proposed measure, in accordance with other jurisdictions, will assist specifically NINA debtors to obtain a fresh start.[265] However, she argues that it will not assist all consumers who are presently excluded from all forms of statutory debt relief. Those with unsecured debts exceeding R50 000 will for instance still be excluded. The same applies to debtors earning more than R7 500 per month but not enough to put forth a viable proposal for a restructuring in terms of either the administration order or debt review procedures. She refers to the anomaly that NINA debtors will be able to make a fresh start, but not those who are too 'poor' to qualify for sequestration but too 'rich' to qualify for debt intervention.

CONCLUSION

The primary objective of the proposed bankruptcy law in Nigeria is to ensure a balanced system that caters for both debtor and creditor interests. On the other hand, the South African system is undisputedly pro creditor because it primarily seeks to protect the interest of creditors through its advantage for creditors requirement. A number of similarities exist between the proposed procedures under the BIA and its South African counterparts. The receiving orders procedure available to creditors in Nigeria is similar to the compulsory sequestration procedure in South Africa. These two procedures are both creditor-initiated liquidation procedures. Furthermore, the Nigerian assignments procedure and the South African voluntary surrender procedure clearly correspond, as both are debtors' bankruptcy procedures and are aimed at attaining debt relief. The South African bankruptcy procedures may only be accessed by debtors who have assets to be liquidated. Although not certain as yet, it seems that this will also be the case in Nigeria, as

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260 Proposed s 88B(1) of the NCA.
261 Proposed s 88B(2) of the NCA.
262 Proposed s 88B(3) of the NCA.
263 Proposed s 88B(3) of the NCA.
264 Proposed s 88B(8) of the NCA.
265 Melanie Roestoff, 'Nog 'n Vriendskaplike-sekwestrasie-aansoek Sneuwel: *Botha v Botha* [2017] JOL 38011 (VB)' (2018) Litnet 1274–1276.

both the assignment and receiving order procedures make reference to the benefit for creditors, albeit not as a direct requirement.

The proposal procedure in Nigeria is comparable in essence to the statutory composition procedure in South Africa because both are formal statutory procedures whereby debtors and creditors are encouraged to reach a negotiated outcome, which would be binding on dissenting minority creditors. The major difference between the two procedures is the fact that the proposed Nigerian proposal procedure constitutes an independent alternative debt relief measure to bankruptcy while statutory composition in South Africa can only be accessed during the course of insolvency proceedings. However, if implemented, the proposed pre-liquidation and debt intervention procedures may provide such independent alternative procedures in South Africa.

The proposed BIA provides for an automatic discharge and also a discharge by court order, which is similar to rehabilitation under the IA. However, the Nigerian proposed BIA is more liberal in its discharge, most notably because a Nigerian debtor will be able to obtain an automatic discharge nine months after his bankruptcy became effective. In South Africa, an automatic discharge only follows ten years after sequestration.

Another difference between the two jurisdictions is that the proposed system in Nigeria does not place any restrictions on a bankrupt individual as is the case in South Africa, where a debtor is restricted before rehabilitation. Such restrictions are presently placed on bankrupt individuals under the Nigerian BA. This development in the Nigerian insolvency law would enhance the economic rehabilitation of a bankrupt individual.

After evaluating the proposed BIA and the South African debt relief landscape against the imperative access and discharge principles highlighted by the World Bank Report, it is apparent that the special needs of NINA debtors are not catered for even though this group's interests are of utmost importance in the socio-economic contexts of developing countries. However, in this respect Nigeria can learn from South Africa's successes and failures. The proposed South African debt intervention measure could serve as a good example for Nigeria to devise a NINA procedure. Although debt intervention is not effective yet, and one would have to wait and see how it will be implemented in practice, it serves to rectify a constitutional and practical problem and is consequently well thought through. However, we suggest that such a procedure should also be included in the proposed BIA and not in another separate piece of legislation. The reason for this is that the South African experience has shown that haphazard reform of various pieces of legislation is not desirable. It is plain: Nigeria needs a holistic reform of natural person debt relief measures contained in one piece of legislation regulating such measures instead of different government departments initiating different reforms as and when problems arise.

Although Nigerian reforms are positive as a whole and signify major progress in for instance ensuring an automatic discharge after nine months, they are lacking in that not all honest but unfortunate debtors will have the opportunity to access such a discharge. The reason for this is because the proposed system is heavily reliant on the courts, which is expensive and consequently not affordable for all debtors. Also, although the intention is not altogether clear, both bankruptcy procedures still refer to benefit for creditors, which could be a major hindrance as far as debt relief is concerned —as is clear from the South African experience. Because South Africa has learnt the hard way, it is not necessary for Nigeria to do so. Nigeria must instead take cognisance of South Africa's successes and failures and thereby ensure that it provides adequate, inexpensive debt relief procedures for all. Fulfilling this need is in the interests of society, because the economy will benefit when debtors are given the chance to start afresh.