

DEBT RELIEF FOR CONSUMERS – THE INTERACTION BETWEEN INSOLVENCY AND CONSUMER PROTECTION LEGISLATION (PART 2)

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SUMMARY

In March 2002 the Department of Trade and Industry established a task team to review the legislation that has an impact on consumer credit. This resulted in a detailed report containing proposals for a new regulatory framework for consumer credit. Subsequently, in June 2005 the National Credit Bill was tabled in Parliament. Measures aimed directly at resolving over-indebtedness in the form of debt re-arrangement are introduced by the Credit Bill. The report also highlighted weaknesses in the current insolvency legislation especially with regard to available debt relief measures for consumers. It should, however, be noted that the 2000 Insolvency Bill *inter alia* provides for an alternative to insolvency proceedings in the form of a pre-liquidation composition.

This article examines the interaction between current and proposed insolvency and consumer protection legislation with regard to debt relief measures for consumers. The question arises whether the current and the proposed debt relief measures, when introduced, will not overlap unnecessarily. Furthermore, the question whether these measures will provide adequate relief to deal with current demands is also addressed. The South African Law Reform Commission when proposing the pre-liquidation composition in the Insolvency Bill, did not indicate what its relationship should be with the administration order procedure in terms of section 74 of the Magistrates Courts' Act. The question is therefore whether a need for administration orders will still exist if the proposed legislation relating to the pre-liquidation composition is introduced. Lastly, as South African law does not offer debt relief to debtors who have no income and no assets, proposals by the Department of Trade and Industry in the United Kingdom for a non-court based scheme of debt relief aimed at such debtors (the so-called "NINA" cases) are investigated in order to supply guidelines for South African law reform in this regard.

It is submitted that the proposals in the Credit Bill on debt re-arrangement could assist debtors to manage their debt in certain circumstances. It is furthermore suggested that a combination of the proposed pre-liquidation composition and a modified administration order procedure could offer the necessary debt relief in

situations where a debtor, apart from his debt in terms of a credit agreement, also has other outstanding debts. Finally, it is submitted that the “NINA” scheme could offer some guidance for the reform of South African law regarding debt relief to debtors who have no income and no assets.

1 SEQUESTRATION, ADMINISTRATION AND THE PROPOSED PRE-LIQUIDATION COMPOSITION

In current South African insolvency law a debtor’s estate may be sequestered by way of voluntary surrender,¹ or a creditor may apply for the compulsory sequestration² of the estate of a debtor. Although sequestration proceedings can be regarded as a debt relief measure, many debtors will not be able to make use of this procedure due to the relatively high cost involved. This is the case because sequestration applications must be brought before the High Court.³ In this regard the Report on Administration Orders⁴ notes that a discharge comes at a price in South Africa since not only the sequestration procedure but also the procedure to rehabilitate, which would ultimately effect the discharge of pre-sequestration debt,⁵ would usually require a High Court application. It is also essential to note that South African insolvency law lays down advantage for creditors⁶ as a prerequisite for sequestration applications and in so doing places a stumbling block in the way of debtors wishing to use the sequestration process as a debt relief measure. In essence the advantage for creditors requirement entails that the debtor must have sufficient assets that would, if realised, yield a dividend to concurrent creditors.⁷

In order to obtain debt relief a debtor may also apply to a magistrate’s court for an administration order.⁸ As pointed out in the Report on Administration Orders⁹ the basic philosophy behind the administration order procedure is to grant the debtor a statutory rescheduling of his or her debts, but without a discharge. It is however submitted that the administration order procedure does not provide adequate debt relief to debtors. The procedure

¹ S 3-7 of the Insolvency Act 24 of 1936. SA Law Commission Report Project 63 Draft Bill *Review of the Law of Insolvency* 2000 Vol 2 (hereinafter “the Insolvency Bill”) cl 3 which provides for the application by the insolvent debtor for the liquidation of his estate.

² S 9-12 of the Insolvency Act. Cf cl 4 of the Insolvency Bill which provides for the application by a creditor or creditors for the liquidation of a debtor’s estate.

³ See the definition of “court” in s 2 of the Insolvency Act and also cl 1 of the Insolvency Bill.

⁴ Centre for Advanced Corporate and Insolvency Law – University of Pretoria *Interim Research Report on the Review of Administration Orders in terms of Section 74 of the Magistrates’ Courts Act 32 of 1944* May 2002 (hereinafter “Report on Administration Orders”) 33.

⁵ S 129(1)(b) of the Insolvency Act and cf cl 99(1)(b) of the Insolvency Bill.

⁶ Cf ss 6, 10 and 12 of the Insolvency Act. It should be noted that the Law Reform Commission has recommended that the advantage for creditors requirement be retained – see cl 7(1)(b) and 8(1)(c) and the explanatory memorandum to the Insolvency Bill 15.

⁷ Cf Report on Administration Orders 58.

⁸ See s 74 and reg 48 of the Magistrates’ Courts Act 32 of 1944.

⁹ 34.

is only available to debtors with debts not exceeding R50 000¹⁰ and the order only lapses after the administration costs and all the listed creditors have been paid in full.¹¹ It therefore does not offer the debtor the opportunity of discharge from his debts as in the case of rehabilitation following sequestration. In this regard the Report on Administration Orders¹² states:

“Since the mainstream bankruptcy procedures are out of reach for many debtors ... many debtors are without a proper discharge measure in South African law. This is especially evident amongst the previously disadvantaged people who are now fast becoming part of the credit industry. Some may therefore view our system as being discriminatory, since, due to its stringent requirements for sequestration on the one hand, and due to the limited alternatives to sequestration available on the other hand, the formal discharge is only available to an exclusive few.”

Greig¹³ poses the question whether instalment payments payable to so-called micro-lenders or loan sharks could be the subject of administration orders and could therefore be reduced at the magistrate’s discretion in terms of section 74(1)(b).¹⁴ He refers to *Cape Town Municipality v Dunne*¹⁵ where it was held that the word “debts” in the proviso to section 74(1) only includes debts that are “due and payable”, and not debts which are only claimable in the future. Secondly, he also refers to *Carletonville Huishoudelike Voorsieners (Edms) Bpk v Van Vuuren*¹⁶ where it was held that instalments with regard to a hire-purchase agreement in terms of the Hire-Purchase Act¹⁷ could not be reduced as the court could not alter the contract between parties without express authority. The court found, however, that the magistrate would still be free to ensure that sufficient residue would remain each month to enable payment of the instalments in terms of the hire-purchase agreement.¹⁸ Greig submits that although the debtor is obliged in terms of section 74A(2)(e) to distinguish between debts of which the whole amount is owing and debts which are payable *in futuro*, there is no express provision which prevents the magistrate from including the instalment of the *in futuro* debt in the administration order and therefore reducing it. He points out however, that the viewpoint that the term “debt” only refers to debts that are claimable and payable, is strengthened by the provisions of section 74A(2)(1). This subsection provides that the applicant must include in his statement of affairs “the amount of the weekly or monthly or other

¹⁰ S 74(1)(B) of the Magistrates’ Courts Act and GN R3441 in GG of 1992-12-31.

¹¹ S 74U of the Magistrates’ Courts Act.

¹² 83.

¹³ “Administration Orders as Shark Nets” 2000 SALJ 622.

¹⁴ This subsection provides that a magistrate can make an administration order “providing for the administration of his estate and for the payment of his debts in instalments or otherwise”.

¹⁵ 1964 1 SA 741 (C) 746.

¹⁶ 1962 2 SA 296 (T).

¹⁷ 36 of 1942.

¹⁸ *Carletonville Huishoudelike Voorsieners (Edms) Bpk v Van Vuuren supra* 300-301.

instalments which the debtor offers to pay towards settlement of the debts referred to in paragraph (e)(i).¹⁹ Greig²⁰ concludes as follows:

“Although interpreting the section to allow the inclusion only of debts ‘due and payable’ may perhaps be technically more correct, the success of an administration order is put seriously at risk where the order cannot include reductions of *in futuro* instalments. Very often the reason for the debtor’s parlous financial position is not ‘debts the whole amount of which is owing’ but in fact a large and unmanageable number of deductions from the debtor’s wages or salary as a result of instalment payments on a series of imprudent loan applications.”

Greig²¹ suggests that micro loans-which are payable by way of *in futuro* instalments should be regulated by the legislator. According to him section 74 is the ideal remedy in instances where micro-loans are the reason for the debtor’s financial dilemma.²² In this regard he concludes:²³

“Disparate practice regarding administration orders indicates that s 74 as it stands is not fulfilling its intended role, and has not kept pace with technological changes and the burgeoning micro-lending industry. As part of the broader effort to regulate the industry, an overhaul of the s 74 procedure, which balances the rights of legitimate microlenders and their debtors, is long overdue ... [A]t this stage, there may be very little benefit for a debtor to be gained from going under administration, despite the fact that his or her position accords precisely with that which the legislature must have intended by enacting this particular procedure. Often, all that happens is that some ‘due and payable’ debts are restructured and an additional burden is placed on the debtor’s income, namely the fees of the administrator. Seen in the context of the controversy surrounding the micro-lending industry as a whole, the urgency of such reform is even more apparent.”

In an attempt to provide an alternative debt relief measure, the South African Law Reform Commission proposed the insertion of a new section 74X in the Magistrates’ Courts Act. The proposed new section makes provision for a composition between a debtor and his creditors before liquidation, which is binding on all creditors if accepted by the required majority. The composition is supervised by a magistrate and takes place after an investigation of the affairs of the debtor.

As pointed out above,²⁴ the Law Reform Commission did not indicate how the pre-liquidation composition should link with the administration procedure.

¹⁹ S 74A(2)(e)(i) refers to debts the whole amount of which is owing.

²⁰ 2000 SALJ 625.

²¹ 2000 SALJ 626.

²² The Report on Administration Orders 458 notes that there is no legal basis for the preference that the micro loan industry acquired through the interpretation of *in futuro* debts, consequently any reference to the words “*in futuro*” was deleted in the Proposed Act on Administration, Composition and Related Matters – see Report on Administration Orders 423ff.

²³ Greig 2000 SALJ 626.

²⁴ Par 1 in Part 1.

According to the Report on Administration Orders²⁵ an important issue not addressed by the Law Reform Commission is whether or not the pre-liquidation composition should become a prerequisite in all cases of insolvency. The question also arises whether there will still be a need for the administration order procedure in its current form if the pre-liquidation composition is introduced in our system.²⁶ In our view, the proposed composition procedure and a modified administration order procedure should be combined.²⁷ It should be noted that the provisions of the administration procedure and the proposed composition procedure overlap to a great extent.²⁸ Combination of these procedures will therefore result in a great number of the provisions of the current administration order procedure being superfluous. In our view implementation of the modified administration procedure should only be possible if the creditors do not accept a pre-liquidation composition.

In order for the administration order procedure coupled with the pre-liquidation composition to afford adequate debt relief to individuals the following are proposed regarding modification of the administration procedure:

- (a) The court should be empowered to enforce a repayment plan on creditors, which may also reduce the debtor's debt to an amount that he can afford to repay.²⁹ If it appears that the debtor does not have sufficient assets or surplus income and there is a probability of financial recovery, the court should be enabled to grant a moratorium in terms whereof enforcement action by creditors is barred for a specified time.³⁰ Creditors' interests should however be taken into account by provisions that prevent abuse of the process.³¹
- (b) Provision should be made for the lapsing of the order as soon as the costs and listed creditors are paid in terms of the repayment plan and

²⁵ 31.

²⁶ Cf Report on Administration Orders 32.

²⁷ See Roestoff LLD thesis 'n Kritiese Evaluasie van Skuldverligtingsmaatreëls vir Individue in die Suid-Afrikaanse Insolvensiereg (UP 2002) 435ff; and Roestoff and Renke "Solving the Problem of Overspending by Individuals: International Guidelines" 2003 *Obiter* 25. Combination of the procedures would contribute to the cost-effectiveness of the measure as the need for 2 court applications would be eliminated.

²⁸ Cf Roestoff LLD thesis 424ff.

²⁹ Cf the Dutch scheme of repayment (*schuldsaneringsregeling*) which does not require consent of creditors for the implementation of a repayment plan (*saneringsplan*) by the court. The plan can therefore be enforced on unwilling creditors – s 343 *Wet Schuldsanering Natuurlijke Personen* – see Roestoff LLD thesis 265ff; and Roestoff "Die Belang van *Schuldsanering* vir die Suid-Afrikaanse Insolvensiereg" 1996 *De Jure* 209 for a discussion of the Dutch *schuldsaneringsregeling*.

³⁰ Cf Roestoff LLD thesis 436. Also see the proposals in *A Choice of Paths – Better Options to Manage Over-indebtedness and Multiple Debt* (2004) Department of Constitutional Affairs: Consultation Paper (hereinafter "the 2004 Consultation Paper") 19ff for the introduction of provisions providing for a so-called enforcement restriction order.

³¹ *Eg* provisions limiting the repeated use of the procedure (cf s 288(2)(a) of the *Wet Schuldsanering*) and procedures enabling the court to rescind the order on application by an interested party, *eg* where the debtor did not comply with his obligations in terms of the order (cf s 74Q of the Magistrates' Courts Act).

the administrator has lodged a certificate to that effect with the clerk of the court.³² Payment in terms of the administration order should therefore result in an automatic discharge³³ of all debt forming part of the administration order.³⁴

- (c) A discharge should not be excluded where the debtor's failure to complete the plan is due to circumstances out of his control. In such a case the court should be empowered to grant a discharge on application of the debtor.³⁵
- (d) The legislator should provide for a maximum period for the duration of the plan. We propose a maximum period of five years, as a longer period could, in our view, negatively affect the success of the procedure as a debt relief measure.³⁶
- (e) Since there is no limitation on the scope of the debtor's financial obligations in terms of the pre-liquidation composition, it is submitted that the limitation that currently applies in the case of the administration procedure should also fall away. However, it should be ensured that the administration procedure will not be implemented in instances where there are sufficient assets to justify implementation of the sequestration procedure or where there are complex transactions that need to be investigated.³⁷ The court should therefore be empowered to refuse the granting of an administration order where sequestration seems to be a better option.³⁸ The legislator should also ensure that the period

³² Cf ch 13 of the American Bankruptcy Reform Act of 1978 (s 1328(a)) which enables the debtor to receive a discharge after all the payments in terms of the proposed plan have been completed – cf Boraine and Roestoff "Developments in American Consumer Bankruptcy Law: Lessons for South Africa (*Part One*)" 2000 *Obiter* 33 52ff; and Roestoff LLD thesis 204ff for a discussion of the chapter 13-scheme of repayment.

³³ Provision for an automatic discharge would in our view also contribute to the cost-effectiveness of the measure as the need for a further court application would be eliminated.

³⁴ This is also the position regarding the English administration order procedure – cf s 117(2) of the County Courts Act of 1984; and Roestoff LLD thesis 108ff. Provision should however also be made for the possibility that the court could, on application by an interested party, refuse a discharge or to grant a discharge subject to certain conditions, where the debtor made himself guilty of *mala fide* conduct in the course of the repayment plan – cf s 350(3) *Wet Schuldsanering*.

³⁵ Cf s 1328(b) of the American Bankruptcy Reform Act regarding the so-called "hardship discharge".

³⁶ Cf s 1322(d) of the American Bankruptcy Reform Act which enables the court to approve a plan of between 3-5 years.

³⁷ Cf *Levine v Viljoen* 1952 1 SA 456 459 where the court explained that the administration procedure is not the suitable procedure in instances where the debtor's estate is large and the debtor was involved in complex business transactions.

³⁸ The Report on Administration Orders 457 argues that if the amount of indebtedness is increased significantly or the limitation removed completely, complex legal issues regarding impeachable transactions and unexecuted transactions might arise, which will call for the sophisticated procedures provided for by the Insolvency Act. We are of the view that our proposals discussed in (e) above could provide a solution to the problems that might arise if the requirement relating to the limitation of the indebtedness of debtors is done away with completely.

whereafter a discharge is granted should not be shorter than in the case of discharge after sequestration.³⁹

- (f) The debtor should be precluded from obtaining further credit during the course of the repayment plan that would prevent him from completing the payments in terms of the plan.⁴⁰ It is therefore submitted that the current section 74H should be deleted. Creditors in respect of debt incurred after granting of the administration order should not be included in the plan.

In a previous article⁴¹ we suggested that the legislature should consider the implementation of informal measures as they are cost-effective. In this regard we proposed that an office in the magistrate's court should be established to provide debt mediation services, debt counselling and financial advice to debtors in general.⁴² We also suggested that the officials attached to this office should first attempt to reach an informal settlement before implementing the statutory composition procedure. The Credit Bill, as one of its purposes, aims to protect consumers by providing them with education about credit and consumer rights.⁴³ The only further provision in the Credit Bill regarding consumer education states that the National Credit Regulator,⁴⁴ in order to increase knowledge of the nature and dynamics of the consumer credit market and industry, and to promote public awareness of consumer credit matters, *inter alia* has to implement education and information measures.⁴⁵ The Credit Bill also provides for the registration of certain persons as debt counsellors.⁴⁶ Debt counsellors play an important role in the debt re-arrangement procedure discussed above.⁴⁷

The Report on Administration Orders notes that the administration procedure is the suitable debt relief measure in instances where the debtor does not have sufficient realisable assets to comply with the advantage for creditors requirement. However, in order to obtain an administration order the debtor should have sufficient income to make payments to the administrator for distribution amongst creditors.⁴⁸ It is submitted that the combined statutory composition and modified administration procedure that we propose, will only be accessible to debtors who have sufficient income to

³⁹ It should also be kept in mind that an administration order does not exclude sequestration of the estate of the debtor – see s 74R. A creditor who is therefore of the opinion that sequestration would serve his interests better can still bring an application for sequestration.

⁴⁰ Cf s 9(8) of the Proposed Act on Administration, Composition and Related Matters.

⁴¹ Roestoff and Renke 2003 *Obiter* 25.

⁴² Cf the Report on Administration Orders 86 and 454 suggesting that debtor education programmes and an informal system of debt counselling are necessary to enable consumers to deal with credit in a responsible way.

⁴³ And to *inter alia* thereby address and correct imbalances in negotiating power between consumers and credit providers – see s 3(e)(i).

⁴⁴ A body established by s 12 of the National Credit Bill (hereinafter “the Credit Bill”) which has different functions as a consumer credit institution – see ss 12-19.

⁴⁵ S 16(1)(a). As these measures still have to be implemented, it is not at this stage possible to deliver any constructive comment.

⁴⁶ See s 44.

⁴⁷ Par 2 2 in Part 1.

⁴⁸ 34.

enable them to repay their debt or a part thereof. As noted above⁴⁹ South African law currently does not provide any debt relief to debtors who have no assets or income. In the following section proposals for law reform in English insolvency law that aim to address this need, will be investigated.

2 DEVELOPMENTS IN ENGLISH INSOLVENCY LAW

2.1 Background

The English law of insolvency currently provides for various debt relief measures for individuals.⁵⁰ A debtor can approach the court with a bankruptcy petition or he can implement one of the formal⁵¹ or informal⁵² alternative procedures. Regarding the formal alternatives to bankruptcy, individual voluntary arrangements in terms of the Insolvency Act of 1986⁵³ and the administration order procedure in terms of the County Courts Act of 1984⁵⁴ can be distinguished.

A debtor can bring a bankruptcy petition⁵⁵ to court if he can prove that he cannot pay his debts.⁵⁶ A deposit of £310 is required before a petition will be allowed.⁵⁷ After granting of the order the estate vests in the official receiver⁵⁸ who administers the estate for the benefit of the creditors.⁵⁹ If a trustee is appointed, the estate, apart from certain exempt assets, will vest in the trustee, who must realise the estate and divide the proceeds amongst the creditors in accordance with certain prescribed rules.⁶⁰ A bankrupt's discharge becomes relevant when the administration and distribution process are completed. The effect of a discharge is that the bankrupt is released from all pre-bankruptcy debts and freed from all bankruptcy

⁴⁹ Par 1 in Part 1.

⁵⁰ Cf Fletcher *The Law of Insolvency* (2002) 38ff.

⁵¹ Cf Fletcher 43ff.

⁵² See in general Fletcher 73ff; Grier and Floyd *Personal Insolvency: A Practical Guide* (1998) 19.

⁵³ See Part VIII of the Insolvency Act – ss 252-263.

⁵⁴ Part VI of the County Courts Act; and Order 39 of the County Court Rules of 1981 SI 1981 No 1687.

⁵⁵ See in general Fletcher 124ff.

⁵⁶ S 272(1) of the Insolvency Act. A creditor can also implement bankruptcy provided that the minimum debt requirement of £750 is met – s 267(2).

⁵⁷ The deposit serves as security for the fees of the official receiver (see fn 58 below) – Grier and Floyd 10.

⁵⁸ An official receiver is appointed in every bankruptcy case. The official receiver is an official of the Insolvency Service of the Department of Trade and Industry as well as the court to which he is attached.

⁵⁹ S 287.

⁶⁰ See Fletcher 41, 261ff and 299ff; and Grier and Floyd 126ff. Creditors who have preferent rights are set out in Schedule 6 of the Insolvency Act. Introduction of the Enterprise Act of 2002 enabled the official receiver to come to a binding out of court agreement to obtain payments out of a bankrupt's income (an income payments agreement – see s 310A inserted by s 260 of the Enterprise Act), in addition to being able to obtain a court order in cases where the bankrupt and official receiver have been unable to agree – cf 2005-Consultation Paper 12.

disabilities and disqualifications,⁶¹ thereby affording debt relief to the bankrupt and thus a fresh start. On 1 April 2004 the Enterprise Act of 2002, which effected important changes to the Insolvency Act, came into force. The aim of the relevant provisions was to reduce the stigma attached to bankruptcy and to afford the bankrupt a fresh start once he is discharged.⁶² In terms of section 256 of the Enterprise Act a bankrupt is now automatically discharged from bankruptcy and all its restrictions after 12 months.⁶³

An individual voluntary arrangement⁶⁴ begins with a formal proposal by a debtor to his creditors to pay a part or all of the debtor's debts. This procedure affords debt relief by providing for a collective agreed arrangement with creditors, combined with a statutory moratorium against individual debt enforcement and a discharge after termination of the scheme. Creditors' interests are however not ignored. The debtor's proposal is subject to a thorough examination by a qualified insolvency practitioner who must also report to court whether in his opinion a meeting of creditors should be called to consider the proposal. Only if the court is satisfied that the calling of a meeting is justified and the prescribed majority votes in favour of the meeting, will the proposal bind the minority. The insolvency practitioner supervises the arrangement and pays the creditors in accordance with the accepted proposal. The purpose of the voluntary arrangement procedure seems to be the bringing about of an arrangement that would place creditors in a better position than the case would be if a bankruptcy order was granted.⁶⁵ Advantages of voluntary arrangements compared to going bankrupt are *inter alia* that the stigma and restrictions of bankruptcy are avoided.⁶⁶ Although the procedure requires no maximum or minimum level of debt and no maximum or minimum level of repayments it will only provide debt relief to debtors whose income enables them to make regular payments to creditors.⁶⁷

The administration order procedure⁶⁸ is a court-based debt management scheme for debtors with multiple debts totaling not more than £5 000, one of which must be a judgment debt. After an administration order has been granted interest can no longer be charged and the creditors listed in the order cannot take enforcement action without leave of the court. The court

⁶¹ Cf s 281(1) of the Insolvency Act; and Fletcher 332.

⁶² Cf 2004 Consultation Paper 39.

⁶³ Instead of 3 years – see the former s 279(1)(b) read with s 279(2)(b) of the Insolvency Act.

⁶⁴ See in general Berry *et al Personal Insolvency – Law and Practice* (1993) 35; Lawson *Individual Voluntary Arrangements* (1992) 1ff; Fletcher 43ff; and Grier and Floyd 61ff.

⁶⁵ Cf Grier and Floyd 63. They state in this regard: "An arrangement should not be regarded as a soft option but one that will demand a greater effort on the part of the debtor if he is to avoid the stigma of bankruptcy."

⁶⁶ Other advantages are the flexibility of the procedure – it gives the debtor more say in how his assets are dealt with and how payments are made to creditors. Furthermore the overall costs are likely to be less than those charged in bankruptcy and creditors are paid sooner – cf Roestoff LLD thesis 104 and authority referred to in fn 208; and *Guide to Bankruptcy* Department of Trade and Industry – The Insolvency Service 19 www.insolvency.gov.uk (hereinafter "*Guide to Bankruptcy*").

⁶⁷ Cf *Guide to Bankruptcy* 19.

⁶⁸ See in general Fletcher 67ff; and Grier and Floyd 19ff.

that has granted the order is responsible for the administration thereof and for this purpose an official of the court is appointed. In terms of section 117(1) payments by the debtor are firstly used for the cost of administration and thereafter for the payment of debts in terms of the order. An important aspect of this procedure is the fact that the order may provide for full or partial payment of the debtor's debts in instalments or otherwise.⁶⁹ However, the competence to allow partial payment is apparently not often employed by the court.⁷⁰ As soon as the provisions of the order are complied with, the order lapses and the debtor receives an automatic discharge of all the listed debts.⁷¹ No application for a discharge is therefore required.

The administration order procedure is designed to afford debt relief to individuals with limited or no assets, but with sufficient income to pay off a limited indebtedness over a period.⁷² However, according to the 2004 Consultation Paper⁷³ a large number of orders take many years to reach completion. Moreover, evidence gathered on the operation of the administration order procedure indicated that the procedure is largely ineffective in meeting the objective of providing debt relief because the majority of orders are unsuccessful.⁷⁴

In March 1998 a review of enforcement of civil court judgments was announced which included an in-depth re-evaluation of the administration order scheme.⁷⁵ Independent research commissioned by the Department of Constitutional Affairs during the review identified three types of debtors, namely, the so-called "could pay", "can't pay" and "won't pay". The "could pay" debtors are those with some income who are able to repay their debts over time but may need assistance to come to an arrangement with their creditors. The "can't pay" are those with every intention to pay their debts but are unable to do so, as they have no or limited surplus income. The "won't pay" are those debtors who have the means to repay their debts but choose not to or who have a genuine dispute relating to the existence of the

⁶⁹ S 112(1) and (6).

⁷⁰ *Berry et al* 611.

⁷¹ S 117(2).

⁷² See *Fletcher* 67; and *Grier and Floyd* 19.

⁷³ 15.

⁷⁴ A sample study conducted in 2002 of 500 closed orders revealed that only 15% of the orders were paid in full – see 2004 Consultation Paper 15. In 1988 the Civil Justice Review recommended that the administration order scheme should be "improved and used more widely". This led to the formulation of section 13 of the Courts and Legal Services Act 1990 which removed the requirement for an applicant to be a judgment debtor, the £5 000 limit of indebtedness and imposed a strict 3-year time limit on orders. Furthermore, provision was also made for the granting of a so-called enforcement restriction order instead of an administration order if the court is of the opinion that it would be a better way to deal with the case. S 13 has, however, never been implemented, due to various difficulties, including the definition of "debt". There were also concerns over the ability of courts to handle the likely increase in applications, the absence of provisions for investigation of misconduct by debtors and creditors and also the fact that only the income stream of the debtor and not his assets is considered – see 2004 Consultation Paper 37.

⁷⁵ 2004 Consultation Paper 37.

debt.⁷⁶ The 2004 Consultation Paper⁷⁷ points out that the existing administration order procedure does not distinguish between the different groups of debtors identified above. Research has furthermore indicated that the majority of debtors within the administration order scheme fall in the “can’t pay” group. Because of very low disposable income, repayment plans are inappropriate for this group. Often these debtors also cannot afford the £310 deposit to enter bankruptcy and thus obtain debt relief.⁷⁸ Implementation of bankruptcy would moreover be inappropriate in instances where the debtor has no income, no assets to deal with, and no apparent conduct issues that need to be investigated.⁷⁹ It is therefore clear that the existing debt relief measures in English insolvency law do not cater for the “can’t pay” group of debtors.⁸⁰

2.2 The proposed “NINA” debt relief scheme

In response to the need for a scheme of debt relief that would cater for debtors who fall in the so-called “can’t pay” group the Department of Trade and Industry proposed a new scheme aimed at debtors who have relatively low levels of liabilities, no assets over and above a nominal amount, and no surplus income with which to come to an arrangement with creditors. The salient features of the proposed scheme are briefly the following:⁸¹

- (a) The scheme would entail the making of an administrative debt relief order that would ultimately result in the debtor being discharged from his debt after a period of one year.
- (b) The scheme would be operated by official receivers and would generally not require any court intervention. This would make the scheme more efficient and cost-effective.
- (c) It is proposed that there should be a restriction on the number of times a person could apply for an order.⁸² An entry fee to cover the administration costs of the scheme would be required, but it would be significantly less than the deposit required for bankruptcy proceedings. It is furthermore proposed that the facility to apply for the debt relief order would only be available online.
- (d) In order to keep costs as low as possible, the involvement of the debt advice sector, which would act as an intermediary to assess whether a case is suitable before a debtor applies to the official receiver, is

⁷⁶ 2004 Consultation Paper 37ff. Assisting the debtors in the “can’t pay” and “could pay” group by providing them with suitable debt relief measures, could, according to the 2004-Consultation Paper 38, help creditors by maximizing potential repayments and also by allowing them to focus on the “won’t pay” group.

⁷⁷ 38.

⁷⁸ *Ibid.*

⁷⁹ 2005 Consultation Paper 49.

⁸⁰ Also known as “no income, no assets” or NINA” cases.

⁸¹ See 2005 Consultation Paper 5ff for a summary of the proposed scheme.

⁸² Possibly once every 6 years – 2005 Consultation Paper 22 and 32.

envisaged.⁸³ The 2005 Consultation Paper⁸⁴ notes that the “NINA” scheme does not provide an easy way out to debtors who have made no attempt to meet their obligations. It is therefore required that the debtor must show to the intermediary that he has made an attempt to come to an arrangement with his creditors, but without success.

- (e) The debtor would be required to instigate his own order and must complete forms that contain detailed information relating to his financial affairs. These would then be sent to the official receiver who would grant the debt relief order if the following criteria are met:
 - (i) The debtor should have total liabilities of less than £15 000, which would include secured and unsecured debt.⁸⁵
 - (ii) The debtor should have a maximum surplus income of £50 per month after meeting his reasonable domestic needs.⁸⁶
 - (iii) The debtor should have assets of no more than £300.⁸⁷
- (f) If the criteria are met, a debt relief order will be granted with a schedule of creditors attached. Creditors who are scheduled cannot take any enforcement action and the debts are discharged after 12 months.
- (g) Creditors’ interests are also taken into consideration as it is proposed that creditors should be able to object to the making of the order, particularly where the debtor has failed to disclose assets, income or liabilities. In such an instance the official receiver would further be able to revoke the order. Furthermore it is also proposed that it should be an offence for a debtor to willfully fail to disclose assets, income or liabilities. If the debtor experiences a change in circumstances during the period the order is in force, for example an increase in income, the debtor would be obliged to disclose this to the official receiver. In such an instance the debtor would be allowed a reasonable period of time to come to an arrangement with his creditors, whereafter the official receiver would annul the order whether an agreement has been reached or not. Both the debtor and creditors would have a right of appeal to the court if they were dissatisfied with the way the official receiver had dealt with the case. While the order is in force, the debtor would be subject to the same restrictions as in the case of bankruptcy.⁸⁸

⁸³ The 2005 Consultation Paper 24 notes that in cases where debtors have nothing to offer their creditors, debt advisers spend large amounts of time negotiating and attempting to persuade creditors that the debt should be written off. It is suggested that the proposed scheme would remove the need for much of this work.

⁸⁴ 25.

⁸⁵ As with bankruptcy, certain debts would be excluded, *eg* debts incurred as a result of fraud – see s 281 of the Insolvency Act.

⁸⁶ The 2005 Consultation Paper 6 notes that the question relating to what is reasonable will depend on the individual circumstances of the debtor. There would also be clearly defined guidelines as to what constitutes reasonable expenditure.

⁸⁷ As with bankruptcy certain property will be excluded – *cf* s 283(2) of the Insolvency Act.

⁸⁸ *Eg* with regard to obtaining credit – see s 257 of the Enterprise Act and schedule 4A (set out in schedule 20 to the Enterprise Act) which provides for a new system of bankruptcy restriction orders. A bankruptcy restriction order generally imposes restrictions as regards

3 CONCLUSION

In our view the proposals on debt re-arrangement in the Credit Bill are to be welcomed. These measures could in our view assist debtors to manage their debt in certain circumstances. The viewpoint that administration orders that reduce instalments of *in futuro* debts could not be granted, contributes in our view to the ineffectiveness of the current administration procedure as a debt relief measure. The uncertainty in this regard suggests that there is a definite need for a debt relief measure able to re-arrange repayment in terms of instalment repayment agreements. We submit that the proposals in the Credit Bill allowing for the re-arranging of obligations under one or more credit agreement, could fulfill the need which the administration order procedure apparently does not address. It should, however, be clear that these measures would not provide a solution in situations where a debtor, apart from his debts in terms of a credit agreement, also has other outstanding debts. It is submitted that our proposals relating to the combination of the proposed pre-liquidation composition and a modified administration order procedure could, in such instances, offer the necessary debt relief. As pointed out above, this combined procedure would only offer relief in cases where the debtor has sufficient surplus income to come to an arrangement with his creditors. Consequently, we submit that there is also a need in South African insolvency law to provide for a debt relief scheme for debtors who fall in the so-called “can’t pay” group. We suggest that the proposed “NINA” scheme could offer some guidance to South African law reform regarding debt relief for this category of debtors. One of the outstanding features of the proposed “NINA” scheme is the fact that the scheme would not require any court intervention, making the scheme more efficient and cost-effective. Providing the “can’t pay” group of debtors with a suitable debt relief measure would furthermore prevent negotiations with creditors that would eventually in any case come to nothing.⁸⁹

the conduct of the bankrupt (eg a prohibition on obtaining credit) that apply for between 2 and 15 years after discharge – 2005 Consultation Paper 33.

⁸⁹ Cf 2005 Consultation Paper 24.