South African Law Reform Commission

DISCUSSION PAPER

REVIEW OF ADMINISTRATION ORDERS

PROJECT 127

OCTOBER 2020

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Introduction

This discussion paper has been prepared to elicit responses from various stakeholders and interested members of the public, and to serve as a basis for the South African Law Reform Commission's (SALRC) deliberations during its consultative process with regard to the discussion paper. Following an evaluation of the responses and final deliberations on the matter, the SALRC will issue a report on this subject, which will be submitted to the Minister of Justice and Correctional Services for tabling in Parliament.

The views, conclusions and recommendations contained in this paper are not the final views of the Commission. The paper is published in full to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular area of the law with sufficient background information to enable them to place focussed submissions before the SALRC.

The SALRC will assume that respondents agree to the SALRC quoting from or referring to comments and attributing comments to respondents, unless representations are marked "Confidential". Respondents should be aware that the SALRC may in any event be required, under the Promotion of Access to Information Act 2 of 2000, to release information contained in representations.

Respondents are requested to submit written comments and representations to the SALRC by 31 December 2020 at the address appearing on page xiii below. Comments may be sent by email, fax or post. However, comments by email are preferred.

This document is available on the Internet at *http://salawreform.justice.gov.za*

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DEBT REARRANGEMENT: MERGING THE ADMINISTRATION ORDER AND DEBT REVIEW PROCESSES TO BE REGULATED BY A SINGLE ACT

South African Law Reform Commission

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Summary

The main recommendations in this discussion are summarised as follows:

1. This discussion paper evaluates whether the legislative provisions with regard to administration orders should be repealed in view of the current credit regulatory environment and consumers' access to debt review. The Commission concluded that the repeal of the legislative provisions governing administration orders would adversely affect certain categories of debtors who do not qualify to apply for debt review.[1] Hence, administration orders cannot be repealed without providing these debtors with an alternative remedy. The discussion paper therefore provides different options for dealing with the abuses and problems in the administration order regime. These options are reflected in the proposed Debt Rearrangement Bill, the Magistrates' Courts Amendment Bill (option 1) and the Magistrates' Courts Amendment Bill (option 2).

2. The main complaint against administrators is that they charge remuneration and expenses in excess of the prescribed tariff. This practice causes debtors to stay under administration for long periods. The problem is compounded by the fact that there is no dedicated regulatory body for administrators. The proposed Debt Rearrangement Bill addresses, among other things, the regulation of administrators by merging the administration order and debt review processes, as far as possible. As a result, the Commission recommends that the provisions governing administration orders in the Magistrates' Courts Act 32 of 1944 (MCA) and the provisions governing debt review in the National Credit Act 34 of 2005 (NCA) should be repealed.[2] The proposed Bill thus provides for an improved debt review process, using best practices from both the administration orders and debt review processes (a hybrid system).[3] Taking into account the similarities between the functions of administrators and debt counsellors, the Bill provides that the National Credit Regulator must, subject to certain exclusions, also deal with debt which falls

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1 Chapter 4 of the discussion paper.

2 Both these Acts deal with debt rearrangement. The NCA applies to debt that emanates from credit agreements (debt review) whilst the MCA applies to other debts such as judgment debts and credit agreements where legal proceedings have been taken to enforce such agreements (administration orders). As a result, consumers often find themselves in a situation where they have to apply for both debt review and an administration order because certain debts are excluded from either of these debt rearrangement measures. This defeats the purpose of providing relieve to over-indebted consumers as an already financially strained person would have to pay the cost for two separate applications.

3 This will ensure that a holistic assessment of a person's financial position is conducted and will make debt rearrangement simple and cost effective. It further aligns with international trends and guidelines that prefer a holistic approach towards dealing with all of a debtor's debts. See also chapter 8 of this discussion paper.

within the ambit of administration orders e.g judgment debt and debt where enforcement proceedings have commenced. As the functions of the National Credit Regulator are not limited to debt review, the Commission recommend that the provisions relating to the National Credit Regulator remain in the NCA. However, the Schedule to the Debt Rearrangement Bill aligns this Bill with the NCA to make the National Credit Regulator responsible for regulating the application of the proposed Debt Rearrangement Bill. Furthermore, a person who is subject to an administration order on the date of commencement of the proposed legislation may apply to court to convert his or her administration order to a debt rearrangement order (debt review order).[4] Also, an administrator may be registered as a debt counsellor on condition he or she satisfies the prescribed education, experience or competency requirements within one year from the date of registration as a debt counsellor.[5] Consequently, administrators who become debt counsellors will come under the regulation of the National Credit Regulator. This will address the problem of over-charging by administrators because, in terms of the debt review process, payments are received and made by registered and regulated payment distribution agents and not debt counsellors.

3. The Commission are of the view that having multiple procedures[6] to deal with over-indebtedness is counterproductive and therefore consider the proposed Debt Rearrangement Bill as the only option to deal with debt rearrangement comprehensively.[7] The Commission, however, realise that it could take years before this Bill is enacted into law in view of the processes it must go through, especially in the Department of Trade and Industry. Hence the Commission recommend the following two-stage approach. First, the proposed amendments to the Magistrates' Courts Act are recommended as an immediate solution to the problems in the administration order regime. Second, the proposed Debt Rearrangement Bill is recommended as a long term solution to the problems that plague the administration order and debt review processes. The following paragraphs summarise the issues set out in the draft Magistrates' Courts Amendment Bill (option 1) and the draft Magistrates' Courts Amendment Bill (option 2):

4. As it does not seem cost-effective to establish a new regulatory body for a relatively small number of full-time administrators in South Africa, the Magistrates' Courts Amendment Bills deal with the regulation of administrators by stipulating that the Director-General of the

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4 Clause 34(2) of the Debt Rearrangement Bill.
5 Clause 34(1) of the Debt Rearrangement Bill.
6 That is, administration orders, debt review and sequestration.
7 See Chapter 8 for a discussion of the merging of the administration order and debt review processes to be regulated by a single Act (the proposed Debt Rearrangement Bill).

Department of Justice and Constitutional Development (DOJCD) establish in the Department a dedicated Help Desk to receive, assess and refer complaints against administrators. Any person may submit to the Help Desk a complaint against an administrator with regard to an alleged contravention of the proposed amendment Acts. The Help Desk must, after an assessment of the complaint, refer the complaint for investigation to the professional body[8] of which the administrator is a member, if the Help Desk concludes on reasonable grounds that there is substance in the complaint. The Help Desk may also refer the complainant to any other appropriate forum for relief. A professional body that receives a complaint against an administrator who is a member of that body must investigate the complaint in terms of the applicable legislation and its rules or processes. However, the professional body must be guided by the proposed amendment legislation and the proposed code of conduct for administrators referred to in clause 74X.[9]

5. Although case law has, to a certain extent, clarified the interpretation of the provisions of the MCA dealing with the remuneration and expenses of administrators, the Commission are of the view that these provisions should be amended for the sake of legal certainty. In this regard, the proposed Magistrates' Courts Amendment Bill (option 2) makes it clear that the expenses and remuneration (which may not exceed 12,5%) an administrator may deduct from the payments received are those items listed in the Tariff of Part III of Table B of Annexure 2 to the rules. However, the proposed Magistrates' Courts Amendment Bill (option 1) removes the function of collecting and distributing payments from the administrator. In terms of this Bill, payments must be received into and distributed from the Justice Administered Fund through the MojaPay Application.[10] This Bill gives the administrator a flat percentage of 12.5% for expenses and remuneration. This is because it would be difficult to customise the MojaPay Application to make different payments to the total of 12.5%. The discussion paper thus poses the question whether the 12.5% should be reduced in view of the fact that an administrator would also claim for legal cost and an amount for the

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8 See the proposed section 74E(1D)(f), which provides that a person may not act as an administrator if he or she is not a member of a professional body (MCA Bills option 1 and 2).

9 Paragraphs 6.38–6.42 of the discussion paper and the proposed clause 74NA (MCA Bills option 1 and 2).

10 The Commission have liaised with the Corporate Services: Information and Systems Management branch (ISM) in the DOJCD about the functionality of the MojaPay Application to perform several of the functions currently performed by administrators, in particular, to receive payments from debtors and to distribute such funds to the debtors' creditors. According to ISM, payments made by debtors in terms of an administration order can be deposited through MojaPay into the Justice Administered Fund, from where the payment will be distributed to the creditors. Further, see paragraphs 5.368 – 5.381. See also the proposed amendments to sections 74G(9), 74I(1), 74J, 74K(3), 74L and the proposed amendment to section 3 of the Justice Administered Fund Act, 2 of 2017 (MCA Bill: option 1). See also the inclusion of clauses 74HA, 74JA, 74LA and 74N(4) (MCA Bill, option 1).

determination of reckless credit. Payments in terms of the latter Bill must also be done in accordance with the mentioned Tariff.[11]

6. The amendment Bills make it clear that the administrator's expenses and remuneration exclude legal cost[12] relating to a debtor's administration. However, the Bills clarify that some of these legal costs may not be incurred without the written consent of the debtor. The proposed Bills entitle an administrator to an amount for the determination of reckless credit. Such amount is to be determined in accordance with a prescribed tariff. To avoid abuse of this amount as was the case with debt review, the Commission recommend that an administrator be entitled to this amount only if the court has made a declaration of reckless credit.[13] The proposed Bills provide that no other fees or costs except the fees referred to in the proposed clause 74L may be charged to a debtor's administration. In this regard, the Magistrates' Courts Amendment Bill (option 2) makes the administrator liable for fees and costs illegally added to the debtor's administration.[14]

7. The Commission recommend that the threshold of R50 000 for administration order applications be increased to R300 000.[15] The Commission recommend that the Minister, from time to time by notice in the *Gazette*, increase this amount.[16] Although the NCA places no monetary limit on an application for debt review, the Commission are of the opinion that removing the limit for administration orders completely might be problematic because a major increase in the amount would require the introduction of more sophisticated procedures for interrogations, similar to those for insolvencies. Increasing the limit to an amount of R300 000, however, would widen the scope of administration orders as a debt relief measure to include those who qualify neither for sequestration nor for debt review.

8. The Commission recommend that, unless good cause is shown by a debtor why an administration order should be granted, an administration order should not be granted if the

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11 See in this regard paragraph 5.400 of the discussion paper.

12 Legal cost relating to a section 74O application for an administration order, an application for an emoluments attachment order or garnishee order, a section 74J(9) application for the rescission of an administration order, a section 74Q(1) application for the suspension, amendment or rescission of an administration order, a section 74Q(2) application for the amendment of an administration order, steps taken to trace a debtor who has disappeared as provided for in section 74J(9), and proceedings to recover the amount referred to in section 74J(14) from the creditor. See in this regard clause 74L(2) of the MCA Bill (option 1) and clause 74L(4) of the MCA Bill (option 2).

13 Paragraphs 5.397 – 5.398 of the discussion paper. See also clause 74L(3) of the MCA Bill (option1) and clause 74L(5) of the MCA Bill (option 2).

14 See the inclusion of subclauses (2) and (3) in section 74N of the MCA.

15 This amount has not been adjusted since 1993.

16 Paragraphs 5.50–5.55.

court finds that the debtor obtained credit or an extension of credit with fraudulent intent within six months before the date of application, that an unsuccessful application was made for the granting of an administration order or an administration order was rescinded (because of the debtor's non-compliance therewith) within 12 months before the date of application, that the debtor has received a discharge in terms of the Insolvency Act within four years before the date of application, that a debt rearrangement order in terms of section 87*(b)* or a consent order in terms of section 138 of the NCA was made in respect of a debt referred to in the debtor's statement of affairs and the debtor has defaulted on such debt rearrangement or consent order, that the debtor has knowingly or recklessly furnished false or misleading information in the statement of affairs or during the hearing of the application, or that the debtor does not understand the administration order process and its consequences.[17]

9. The MCA imposes no obligation on an administrator to determine whether credit advanced to a debtor constitutes reckless credit. The Commission are of the view that whether or not credit was reckless ought to be determined when the initial application for an administration order is made. The Commission therefore recommend that the administrator should determine whether any of the debtor's credit agreements appear to be reckless. If the administrator concludes on reasonable grounds that one or more of the debtor's credit agreements appear to be reckless, he or she should recommend that the court declare such credit agreements to be reckless credit.[18] Furthermore, the MCA should clearly state that the court may, during the hearing of an application for an administration order, consider whether a credit agreement is reckless. Consequently, an administration order may include a declaration of reckless credit by the court that considered the application for an administration order.[19]

10. People often are placed under administration without fully appreciating the consequences and sign forms without being aware of the contents. Hence the Commission recommend that the statement of affairs include a certificate by the administrator or the person who prepared the statement of affairs stating that the statement of affairs is a true reflection of the debtor's instructions; that he or she has no reason to doubt the accuracy of any of the statements made by the debtor; and that he or she has advised the debtor of the consequences of administration and is satisfied that the debtor understands them.[20] The

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17 Paragraphs 5.70 - 5.73 of the discussion paper.

18 Paragraphs 5.254 of the discussion paper.

19 Inclusion of paragraph (h) in section 74B(1); inclusion of paragraph (c) in section 74C(1). See in this regard the MCA Bills (options 1 and 2).

20 Paragraphs 5.124–5.125.

Commission further recommend that, at the hearing of an application for an administration order, the court interrogate the debtor on whether the person who is to be appointed as the administrator or the person who has prepared the statement of affairs has explained to the debtor the benefits, consequences, cost and administration order process and whether the debtor understands them.[21]

11. The Commission are mindful of the fact that not all debtors who apply for an administration order enjoy the protection of section 65J of the MCA. This section provides that the amount of the instalment payable or the total amount of instalments payable where there is more than one emoluments attachment order payable by the judgment debtor may not exceed 25 per cent of the judgment debtor's basic salary. Only a debtor referred to in section 74D of the MCA will come under the protection of section 65J as it is problematic to issue an emoluments attachment order in instances where debtors are self-employed or financially assisted by family members. The Commission therefore recommend that section 74B(1) of the MCA be amended to require the court that hears the application for an administration order to ensure that the debtor will have sufficient means for his or her maintenance and that of his or her dependants after payment of the administration order instalment. In order to do this, the court will have to call for and consider all relevant information, including, but not limited to, any existing emoluments attachment order.[22]

12. The current provisions of the MCA relating to administration orders exclude *in futuro* debts from administration orders. *In futuro* debts fall outside the administration order process, but some administrators argue that *in futuro* debts should be paid as part of the administration order process. *In futuro* debts, which are mainly credit agreements, are dealt with in terms of the NCA. The NCA provides for a process in terms of which a consumer who is unable to satisfy in a timely manner all his or her obligations under credit agreements may be declared over-indebted, after which his or her obligations can be rearranged. The inclusion of *in futuro* debt under administration orders will deny *in futuro* creditors the rights they have under the NCA. Section 86(10) of the NCA provides that if a consumer is in default under a credit agreement that is being reviewed for debt review, the credit provider in respect of that credit agreement may, at least 60 business days after the date on which the consumer applied for the debt review, give notice to terminate the review. Furthermore, the credit provider may proceed to enforce that agreement in terms of Part C of Chapter 6 of the

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21 See paragraphs 5.126 and 5.231 of the discussion paper.

22 See paragraphs 5.168, 5.169 and 5.175 of the discussion paper.

NCA.[23] Hence, the credit provider may, without having to go to court, terminate the debt review (within the specified period) if the consumer is in default. In the case of an administration order, the credit provider will have to go to court to rescind the administration order or to apply for an EAO to ensure payment in terms of the administration order. Furthermore, debtors with *in futuro* debt stand to benefit from the measures contained in the Debt Review Task Team Agreements.

13. Some debtors are unable to access the services of their administrators because of the long distances they have to travel to reach the offices of their administrators. The Commission are of the view that by establishing branch offices in close proximity to debtors, administrators would make their services more accessible to the majority of, if not all, the debtors under administration with them. Hence the Commission recommend that the head or branch office of an administrator should be within a radius of 50 kilometres of the place where the debtor resides, is employed or carries on business. The court should, however, still have a discretion to appoint a person as an administrator if it is satisfied that the financial burden to the debtor caused by travelling to the head office or a branch office of such person would not be greater than it would have been if an administrator was appointed whose office is within a radius of 50 kilometres of the place where the debtor resides, is employed or carries on business, or may so appoint an administrator if the office of the nearest administrator was situated more than 50 kilometres from the place where the debtor resides, is employed or carries on business. It is also important that any service, information or document in respect of an administration order provided by or in possession of the head office of an administrator be available through any of its branch offices.[24]

14. The Commission find the custom of an administrator taking over the administration files of another administrator without having been appointed by the court unacceptable because the court has an important oversight role to ensure that fit and proper persons are appointed as administrators. However, the Commission do not want to lose sight of the fact that if an administrator has to bring a new application for each administration file, it would have further cost implications for the debtors. It should be kept in mind that the purpose of the application is not to decide whether the debtor should be placed under administration, but to decide whether the new person is suitable to be appointed as an administrator. The Commission therefore recommend that only one application be brought for the take-over of all the previous administrator's administration files. It is also important that the new

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23 Section 86(11) of the NCA.

24 Paragraph 5.213 of the discussion paper.

administrator, within one month of his or her appointment, notify each debtor and creditor of his or her appointment. A copy of the notice should be lodged with the clerk of the court where the administration order was granted.[25]

15. In order to ensure that the court appoints a person who is suitable to act as an administrator and that no person other than the administrator appointed administers the estate of the debtor, the Commission recommend that a person may not act as an administrator if he or she has not been appointed by the court to act as such for the estate of the debtor concerned; has been struck off the roll of attorneys or if proceedings have been instituted to strike his or her name off the roll of attorneys or to suspend him or her from practice as an attorney; has been found guilty of unprofessional, dishonourable or unworthy conduct relating to the management of his or her trust account kept in terms of section 86 of the Legal Practice Act 28 of 2014 or in terms of any other law relating to his or her profession; is an unrehabilitated insolvent; is not a member of a professional body; or does not comply with the prescribed education, experience or competency requirements (subject to the transitional provisions).[26] A court may withdraw the appointment of an administrator who contravenes these provisions and refer the matter for investigation to the professional body of which the person is a member.[27]

16. The Commission recommend that a person who knowingly acts as an administrator for the estate of and for the payment of the debts of a debtor in instalments or otherwise without being appointed as an administrator should not be entitled to expenses and remuneration for his or her services.[28]

17. It came to the Commission's attention that administrators perform "swop-outs", for instance, they buy a R20 000 debt from the creditor for R5 000 and the creditor then writes off the debt. In other words, the administrator buys the debt and then charges the debtor interest. In order to curb this form of abuse, the Commission recommend that the proposed legislation stipulate that an administrator may not buy the debt of a debtor from the person to whom that debt is owed.[29] A court may withdraw the appointment of an administrator who contravenes this provision and refer the matter for investigation to the professional body of which the administrator is a member.

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25 Paragraphs 5.176, 5.216–5.222 of the discussion paper.

26 Paragraph 5.214 of the discussion paper.

27 See proposed amendments to section 74N (Magistrates' Courts Amendment Bill, options 1 and 2)

28 Paragraph 5.220 of the discussion paper.

29 Paragraphs 5.210 and 5.215 of the discussion paper.

18. Although there is no dedicated regulatory body for administrators, most debtors are unaware that they can report abuse to the professional bodies of which their administrators are members. Hence the Commission recommend that all administrators provide debtors under their administration with a prescribed letter informing them of their rights and obligations, the administrator's rights and obligations, the contact details of the professional body of which the administrator is a member, the procedure for referring a complaint against the administrator to the professional body, and the remedies provided for in the proposed legislation should the administrator fail to carry out his or her duties.[30]

19. The Commission were alerted to the fact that administrators add more creditors to the administration immediately after the administration order is granted. They apparently do so to get past the threshold of R50 000. The Commission recommends that a creditor who becomes a creditor of the debtor after the granting of an administration order should apply to court to be included in the list of creditors referred to in section 74G(1). This should also apply to those who were creditors of the debtor on the date the administration order was granted or on the date the application for the administration order and the statement of affairs were lodged with the clerk of the court, but who were not included in the list of creditors.[31] Requiring a creditor to apply to court to be included in the list of creditors will give the court an opportunity to scrutinise the credit agreement concerned for the purpose of declaring it reckless.

20. The Commission recommend that an administrator be required to request each creditor of the debtor to consider reducing the interest rate on the debt owed to him or her. If a creditor decides to reduce the interest rate, it will shorten the period the debtor remains under administration. The reduced interest rate, if any, in respect of each amount should be reflected in the statement of affairs. Furthermore, section 74B should be amended to provide that the court may rearrange the debtor's debt based on the agreed reduced interest rate.[32]

21. The Commission's attention was drawn to the fact that distribution accounts filed with the court do not state the nature of the charges levied by administrators. The Commission are of the view that all costs relating to a debtor's administration should be delineated in the distribution account. The Commission consequently recommend that the Rules Board amend Form 52 to reflect the interest charged by each creditor and the legal costs (per item) relating

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30 Paragraphs 5.229 - 5.230 of the discussion paper.

31 Amendments to section 74H of the MCA (Bill: option 1&2). Paragraph 5.255 - 5.257 of the paper.

32 Paragraph 5.117 of the discussion paper.

to a debtor's administration. Furthermore, each creditor and the amount paid to them should be listed under paragraph B(2), which deals with claims that enjoy preference in terms of section 74J(3). Each expense under paragraph B(3), which deals with urgent or extraordinary medical, dental or hospital expenses, should be listed. Also, the section 74O cost of an application for an administration order should be listed in Form 52. The proposed amendments will help debtors to understand the costs that were charged by their administrators and creditors and to query charges that should not have been deducted.[33]

22. As the distribution account is the only tool at the debtor's disposal to ascertain whether the correct deductions and payments have been made by the administrator, it is important that the distribution account correctly accounts for all expenses and costs in a debtor's administration. The Commission therefore recommend that a distribution account that, as a result of the administrator's negligence, reflects the incorrect amounts for deductions for expenses and remuneration, cost and payment to creditors serve as a ground for the removal of the administrator because the drawing up of the distribution account is a statutory duty that must be complied with.[34]

23. Because creditors add interest to outstanding amounts owed by debtors, the Commission recommend that an administrator who without good reason fails timeously to distribute the payments received to the creditors is liable to repay to the debtor's estate any additional costs and interest that have accrued as a result of such failure.[35]

24. The Commission believe that debtors cannot expect to be allowed to hold on to luxury items while creditors must accept payment over an extended period. Although administration (and debt review) is about restructuring the debtor's obligations, provision should be made for the realisation of luxury items. The Commission are therefore of the view that the administrator must obtain the written permission of the debtor before he or she realises an asset of the estate under administration. If the debtor refuses without good reason to give the administrator permission to realise an asset, the administrator should approach the court for authorisation to realise the asset. When considering whether an asset should be realised, the court has to consider whether the asset is essential for the debtor or his or her dependants' daily living and whether the asset is needed for the debtor's occupation, trade or business.

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33 Paragraphs 5.289 and 5.330 of the discussion paper.

34 Paragraph 5.331 of the discussion paper.

35 Paragraph 5.332 of the discussion paper.

However, an asset which is the subject of a credit agreement may not be realised except with the written permission of the credit provider.[36]

25. The Commission recommend that an administrator who adds to the debtor's debt fees for services that are unrelated to the administration of a debtor, and who adds to the debtor's debt an amount paid to any person for recommending that the debtor be placed under administration be liable to pay the debtor's estate the amounts paid to the person concerned or for the services concerned.[37]

26. The Commission were alerted to the fact that the section 74U certificate, which must be lodged with the clerk of the court as soon as the cost of the administration and the listed creditors have been paid in full, has no enforcement value in practice as creditors are not prevented from suing the debtor for any outstanding debt after the administration order has lapsed. In order to address this problem, the Commission recommend that the administrator be required to notify the creditors that he or she intends to lodge the certificate with the clerk of the court and to request the creditors to furnish him or her with the outstanding balance of the debt owed to them. If the outstanding balance is not received by the administrator within 20 business days from the date of the request to the creditors, the administrator must lodge the certificate with the clerk of the court and send copies to the creditors, following which the administration order will lapse and then the creditor may no longer claim any outstanding balance from the debtor.[38]

27. In conclusion the Commission recommend that a code of conduct be drafted for administrators.[39]

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36 Paragraph 5.342 of the discussion paper.

37 See proposed amendments to section 74N (Magistrates' Courts Amendment Bill, options 1 and 2).

38 Paragraph 5.450 of the discussion paper.

39 Clause 74X of the MCA Bills (option 1 and 2).

CHAPTER 1: INTRODUCTION

A Purpose of the investigation into the review of administration orders (project 127)

1.1 The purpose of the investigation is to review the legislative framework that currently regulates administration orders, to identify shortcomings or deficiencies, to consider the need for law reform and to identify legislative responses to deal with abuses and problems in the administration order regime.

B Background

1.2 Project 127: The review of administration orders was included in the Commission's programme during the latter part of 2002. The Commission's Working Committee resolved in 2005 that this project should be scrapped, provided certain changes were effected to the National Credit Bill. However, the National Credit Act 34 of 2005 (hereafter the NCA) was adopted without the proposed amendments.

1.3 After the Department of Trade and Industry submitted a proposal for urgent amendments to the NCA and the Magistrates' Courts Act 32 of 1944 (MCA) the Commission reconsidered the matter. At its meeting of 23 June 2007 the Commission's Working Committee decided the following:

- The proposal for the repeal of the legislative provisions with regard to administration orders and a sunset clause for administration orders were endorsed.
- An SALRC report on the matter should be promoted.

1.4 During 2008 the Commission published a questionnaire which included the following questions:

- Should administration orders be abolished if certain changes to the NCA were made?
- Should administration orders lapse after a specified number of years?

1.5 More than 50 completed questionnaires were received, some accompanied by detailed comments. The researcher at the time, Mr Cronje, compiled a document containing a discussion of the comments; this document was considered by the Commission on 14

January 2009. At this meeting the Commission approved Mr Cronje's proposals for the way forward. The proposals included the following:

- The period of notice stipulated in section 74A(5) is too short and should be increased;
- debts not yet due (*in futuro*) should not be paid until such debts become due and payable;
- administrators should be required to register and should be regulated;
- the amount of R50 000 should regularly and automatically be adjusted;
- the question of whether appointments should be limited to persons who practise in the area of a particular court should be considered;
- the selling of administration files should be regulated;
- measures aimed at ensuring that proper charges are levied should be improved;
- provision should be made for access to information and proper reporting; and
- old administration orders should lapse after the expiry of a specified period.

1.6 In order to give effect to the above-mentioned proposals, a document entitled “Administration orders: Proposed amendments to section 74 to 74W of the Magistrates’ Courts Act 32 of 1944” (hereafter “the workshop paper”) was compiled. This document served as a basis for discussions at a workshop held at the University of Pretoria on 31 May 2011. The workshop was attended by 62 persons representing administrators, debt counsellors, creditors, magistrates, debtors under administration and NGOs representing them. The purpose of the workshop was to give interested parties an opportunity to discuss the Commission’s preliminary recommendations on the reform the law on administration orders. The written submissions received on the above document reflect the discussions at the workshop.

1.7 A group of stakeholders who stated that they represented the interests of debtors under administration met with the then researcher, Mr Cronje, a few days prior to the workshop. They opposed the proposed amendments to the MCA and insisted that administration orders be abolished. Subsequent to this meeting the agenda for the workshop was amended at short notice to commence the workshop with a discussion on the abolition of administration orders. Strongly divided opinions were expressed during this discussion. It was clear that substantial agreement on whether or not administration orders should be abolished would not be achieved at the workshop.

1.8 Stakeholders in favour of the abolition of administration orders indicated that they would not attend the second session of the workshop dealing with the proposed amendments to the MCA. They were reminded that the Commission had to entertain all viewpoints and that the views on possible amendments held by those representing the interests of debtors were important as well. The Commission invited them to submit to it comments in writing on the workshop paper, but they did not respond to this invitation.

1.9 In July 2015, a paper entitled "Proposal paper on whether administration orders should be repealed, taking into account consumers' access to debt review" was compiled. Comments on the paper were received from the Departments of Trade and Industry, and Justice and Constitutional Development (Free State), the National Treasury and the judiciary. This was followed by a round-table discussion held on 30 March 2016. The following decisions were taken at the round-table discussion:

(a) A hybrid system, using best practices from both the administration order and debt review processes, should be investigated for purposes of law reform.
(b) With due regard to the current credit regulatory environment, the need to use administrators to administer the estates of debtors should be investigated to determine whether this practice should continue.
(c) A Commission paper recommending the appointment of an advisory committee, comprising key individuals and representatives from the departments concerned, should be submitted to the Commission for consideration.

1.10 On 1 November 2016, the Minister of Justice and Constitutional Development approved the appointment of two advisory committee members for the investigation into the review of administration orders (project 127) to assist with the investigation and to advise the Commission where necessary. On 16 January 2019, the Minister approved the appointment of two additional advisory committee members.

1.11 Finally, the Commission would like to point out that the drafting of this discussion paper has been impeded by limited research capacity. The first researcher assigned to project 127 was actively involved in another Commission project and other tasks until his retirement in 2012. The researcher who took over the project was, at that stage, finalising the project 25 investigation that had been assigned to her. She was involved in, among other things, the parliamentary and subsequent processes concerning the Trafficking in Persons Bill.

C Stakeholder participation

1.12 The Commission gave due consideration to input received from stakeholders. This discussion paper makes several proposals for the reform of the law in order to address the problems relating to administration orders. The Commission believe that the discussion paper, taking into account the interests of administrators and creditors, sets out several proposals for the protection of debtors under administration.

1.13 The Commission's consultation process is objective and transparent and takes into account the viewpoints of all stakeholders. The Commission therefore urge all stakeholders to participate in their discussions on the matter and to submit, in paper or electronic form, comments in writing on the proposals contained in this discussion paper. This discussion paper has been distributed, as far as possible, to all stakeholders.

D Methodology

1.14 For this discussion paper a qualitative methodology was followed, along with elements of desktop research and evaluation of submissions received. Research to date includes an examination of concerns raised by stakeholders over the last few years, consultations with stakeholders, and an analysis of the current legislative framework.

1.15 This discussion paper follows on the workshop held at the University of Pretoria. Comments received at and subsequent to the workshop have been taken into account in the drafting of the discussion paper. Options for law reform and the Commission's preliminary recommendations are set out throughout the discussion paper. The views, conclusions and recommendations in the discussion paper should not be regarded as the Commission's final views. The discussion paper will be followed by a report that sets out the Commission's final recommendations and legislative proposals. The report will be submitted to the Minister of Justice and Constitutional Development, who may then implement the Commission's recommendations by introducing the proposed draft legislation in Parliament.

1.16 The Commission follow a consultative process that involves communities, interested parties, persons with specialised knowledge on the matter under investigation and government departments whose policy or legislation is affected by the investigation. Copies of the discussion paper will be distributed to organisations and persons with expert knowledge whose views the Commission particularly wish to canvass. Furthermore,

comments on the preliminary proposals contained in this discussion paper will be obtained through questionnaires, individual discussions and workshops.

E Outline of discussion paper

1.17 The discussion paper comprises eight chapters. The following chapter (chapter 2) explains what an administration order is. Chapter 3 gives an exposition of how the United States of America, New Zealand, Australia, Ireland, England and Wales have dealt with the issue of over-indebtedness. Chapter 4 answers the question whether administration orders should be abolished. Chapter 5 proposes amendments to sections 74 to 74W of the Magistrates' Courts Act. Chapter 6 deals with the regulation of administrators and Chapter 7 deals with amendments to the rules and forms in respect of administration orders applying to the magistrates' courts. Chapter 8 discusses the merging of the administration order and debt review processes.

F Draft Bills

The Commission are of the view that having multiple procedures[40] to deal with over-indebtedness is counterproductive and therefore consider the proposed Debt Re-Arrangement Bill as the only option to deal with debt re-arrangement comprehensively.[41] The Commission, however, realise that it could take years before this Bill is enacted into law in view of the processes it must go through, especially in the Department of Trade and Industry. Hence the Commission recommend the following two-stage process. First, the proposed amendments to the Magistrates' Courts Act are recommended as an immediate solution to the problems in the administration order regime. Second, the proposed Debt Re-arrangement Bill is recommended as a long term solution to the problems that plague the administration and debt review processes.

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40 That is, administration orders, debt review and sequestration.

41 See Chapter 8 for a discussion of the merging of the administration order and debt review processes to be regulated by a single Act (the proposed Debt Rearrangement Bill).

CHAPTER 2: WHAT IS AN ADMINISTRATION ORDER?

2.1 Money, in particular consumer credit, plays a vital role in contemporary society. It betters the lives of consumers in that they are able to buy things that improve their daily living. Although many South Africans are able to strike a balance between their income and expenses, the majority, sadly, consume more than what they can afford. As a result, they often end up in debt.

2.2 As at the end of June 2020, credit bureaus in South Africa held records for 26,96 million credit-active consumers. Of these consumers, 10.00 million have impaired records and 20,66 million have impaired accounts.[42] These numbers could have been higher, had the Department of Trade and Industry regulations on the removal of adverse consumer credit information and information relating to paid-up judgments not come into effect on 1 April 2014.

2.3 Kelly-Louw points out that many consumers can only afford to buy things, especially expensive property or goods such as houses, flats, motor vehicles and furniture, by means of credit. Credit also allows consumers to pay the cost of building their own house or making improvements to their existing one. Consumers use credit to pay for their consumables and necessities (clothing, food, fuel and utilities) as well as for their own or their children's education. Many types of credit purchases are made on a regular, sometimes daily, basis. Therefore, many consumers have credit cards, vehicle and asset finance, home loans, personal loans, study loans, or clothing store accounts.[43] If these are not used in a responsible manner, it is likely to become a debt trap for consumers. Worsening their financial circumstances, according to Boraine, is the fact that whereas some South Africans can obtain credit from mainstream financial institutions, the majority have to go to either informal moneylenders (loan sharks) or micro-lenders who grant relatively small loans but at high interest rates.[44] Administration orders, as a debt relief measure, come in at the tail end because they address the consequences of, most often, irresponsible use of credit.

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42 National Credit Regulator ***Credit Bureau Monitor*** June 2020 available at *http://www.ncr.org.za* .

43 Kelly-Louw M "The Statutory in duplum rule as an indirect debt relief mechanism" (2011) 23:3 ***SA Mercantile Law Journal*** 352-375 at 352.

44 Boraine A "Some thoughts on the reform of administration orders and related issues" (2003) 2 ***De Jure*** 217-251 at 221.

2.4 Administration orders are regulated in terms of sections 74 to 74W of the MCA. Jones and Buckle[45] identified the following three classes of person in respect of whom administration orders can be applied:

- a judgment debtor of money who is unable to pay the amount of the judgment;[46]
- a debtor against whom no judgment has been taken, but who is unable to meet his financial obligations and does not have sufficient assets capable of attachment to satisfy such liabilities;[47] and
- a judgment debtor of money who has been called before the court for an inquiry into his financial position and who is ordered by the court to apply for an order placing his estate under administration.[48]

2.5 Only people whose debts do not exceed R50 000 can apply for an administration order.[49] Debts that are payable in future instalments due in terms of an enforceable and existing contract, e.g. a mortgage agreement, are excluded from administration orders.[50] When a debtor has successfully applied for an administration order, an administrator is appointed to take control and manage the payments of debts due to creditors until all the listed creditors and administration costs have been paid in full.[51] The debtor must make weekly, monthly or other payments, as determined by the court, to the administrator.[52] The creditors have no choice but to consent to a rescheduling of the debtor's debts and to accept reduced payments. The administrator must distribute such payments *pro rata* among the creditors at least once every three months.[53] An administration order ends only when the cost of the administration and the listed creditors have been paid in full. Once this has happened, the administrator is obliged to lodge a certificate to that effect with the clerk of the court and send copies thereof to the debtor's creditors.[54]

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45 Jones & Buckle ***The Civil Practice of the Magistrates' Courts in South Africa*** Vol 1: The Act 10 ed (service 10, 2018) 489.

46 See section 74(1)(a) of the MCA..

47 See section 74(1)(a) of the MCA.

48 See section 65I of the MCA.

49 The Minister, by GN R.3441 of 31 December 1992, determined the amount at R50 000 with effect from 1 January 1993.

50 Mabe Z "Alternatives to bankruptcy in South Africa that provide for a discharge of debts: Lessons from Kenya" ***PER / PELJ*** 2019 (22) at 8.

51 Mabe Z "Alternatives to bankruptcy in South Africa that provide for a discharge of debts: Lessons from Kenya" ***PER / PELJ*** 2019 (22) at 7.

52 Section 74I(1) of the MCA.

53 Section 74J(1) of the MCA.

54 Mabe at 8.

2.6 Administration may, in certain circumstances, be forced upon the debtor. This is usually done for the debtor's own protection. A court enquiring into the financial affairs of a debtor against whom a judgment for payment of a sum of money has been granted may, of its own motion, place the debtor's estate under administration if the judgment debtor has other debts as well and if his or her total debts do not exceed the amount of R50 000.[55]

2.7 Although the main purpose of section 74 is to protect debtors, who are usually poor and either illiterate or uninformed about the law, against legal action and execution proceedings by creditors, it is also designed to protect creditors.[56] When debtors default on their debts, creditors face the risk of getting very little or no payment. Hence, the conflicting interests of the creditors must be managed by the administrator in a manner that seeks to achieve a fair distribution of the available funds.[57]

2.8 A debtor who qualifies neither for an administration order[58] nor for debt review in terms of the NCA has no other remedy but to consider voluntary surrender of his or her estate or, alternatively, to face a possible application for sequestration brought by a creditor.[59] However, because of the prerequisite that there must be benefit (an advantage) to creditors, a debtor may be too poor to apply for sequestration.[60]

2.9 Unlike sequestration, where a financial benefit for creditors must be proved,[61] section 74 does not have as a prerequisite that there must be a financial advantage for the creditors.[62] The cost of an application for an administration order is also much lower than that of an application for a sequestration order. The sequestration procedure is expensive

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55 Section 65I(2)-(3) of the MCA; see also Jones & Buckle Vol 1: The Act 10 ed (service 5, 2014) 490.

56 Jones & Buckle ***The Civil Practice of the Magistrates' Courts in South Africa*** Vol 1: The Act 10 ed (service 10, 2016) 490.

57 ***Bafana Finance Mabopane v Makwakwa and Another*** 2006 (4) SA 581 (SCA) at 587B, E and G; see also Jones & Buckle Vol 1: The Act 10 ed (service 5, 2014) 490.

58 Section 74(1)*(b)* of the MCA provides as a prerequisite for the granting of an administration order that the total amount of all the debtor's debts due may not exceed the amount determined by the Minister, which is currently R50 000.

59 Section 74R of the MCA provides that the granting of an administration order is no bar to the sequestration of the debtor's estate.

60 Roestoff and Coetzee (2012) 24 *S**A Mercantile Law Journal*** 53 at 58.

61 Mabe Z "Alternatives to bankruptcy in South Africa that provide for a discharge of debts: Lessons from Kenya" ***PER / PELJ*** 2019 (22) at 4; Roestoff M and Coetzee H "Debt relief for South African NINA debtors and what can be learned from the European approach" ***The Comparative and International Law Journal of Southern Africa*** 2017 (50:2) 251 – 274 at 254; Roestoff and Coetzee "Consumer Debt Relief in South Africa; Lessons from America and England; and Suggestions for the Way Forward" (2012) 24 ***SA Mercantile Law Journal*** 53 at 55.

62 ***Fortuin and Others v Various Creditors*** 2004 (2) SA 570 (C) at 575D and G.

and must be made through an application to the High Court.[63] The aim of an administration order is to assist a debtor to repay his or her debts without the need to surrender his or her assets.[64]

2.10 The provisions contained in sections 74 to 74W of the MCA create a procedure that is regarded as a "modified form of insolvency".[65] In *Madari v Cassim* Caney AJ explained:

> This is designed, it seems to me, as a means of obtaining a *concursus creditorum* easily, quickly and inexpensively, and is particularly appropriate for dealing with the affairs of debtors who have little assets and income and genuinely wish to cope with financial misfortune which has overtaken them. Creditors have certain advantages under such an order, including the appointment of an independent administrator and the opportunity of examining the debtor. They are not debarred from sequestrating the debtor if the occasion to do so arises.[66]

2.11 Administration orders have therefore correctly been described as a debt relief measure because a debtor is able to reschedule payment of his or her debt under the supervision of an administrator[67] while creditors are prohibited from taking action to collect money owing, except with regard to any mortgage bond or a debt rejected in accordance with section 74B or by leave of the court[68]

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63 Roestoff and Coetzee (2012) 24 ***SA Mercantile Law Journal*** 53 at 55.

64 See also ***African Bank Ltd v Jacobs and Another*** 2006 (3) SA 364 (C) at 365I; see also Jones & Buckle Vol 1: The Act 10 ed (service 10, 2016) 490.

65 Jones & Buckle ***The Civil Practice of the Magistrates' Courts in South Africa*** Vol 1: The Act 10 ed (service 10, 2016) 489.

66 1950 (2) SA 35 (D) at 38; see also ***Marsha Coetzee v Charles Edward Erasmus NO and Various Creditors*** unreported case no. A682/10 (Judgment delivered in the Western Cape High Court on 5 October 2011) at para 13; ***Bafana Finance Mabopane v Makwakwa and Another*** 2006 (4) SA 581 (SCA) at 586C; ***African Bank Ltd v Weiner and Others*** 2004 (6) SA 570 (C) at 575; ***Ex Parte August*** 2004 (3) SA 268 (W) at 271E*;* ***Fortuin and Others v Various Creditors*** 2004 (2) SA 570 (C) at 573D; ***Weiner NO v Broekhuysen*** 2003 (4) SA 301 (SCA) at 305; ***Volkskas Bank ('n Divisie van ABSA Bank Bpk) v Pietersen*** 1993 (1) SA 312 (C). However, in ***Rodrew (Pty) Ltd v Rossouw*** 1975 (3) SA 137 (O) the court found that the respondent in applying for an administration order did not commit an act of insolvency as his intention was to pay all his creditors in full and that his assets exceeded his liabilities. The court stated that an application for an administration order should, when it is alleged that it constitutes an act of insolvency in terms of sec. 8*(g)* of the Insolvency Act 24 of 1936, be construed according to its tenour as a whole and not according to the meaning in isolation of certain words used therein. This view was also expressed in ***Shaban and Co (Pty) Ltd* v *Plank*** 1966 (1) SA 59 (O), in which the court held that the respondent's notice to creditors that he is unable to liquidate his liabilities was no more than a proposal to creditors to wait and that the words did not amount to an unequivocal inability to pay; see also Jones & Buckle Vol 1: The Act 10 ed (service 5, 2014) 491.

67 Jones & Buckle Vol 1: The Act 10 ed (service 5, 2014) 490; Boraine 2003 *De Jure* 217.

68 Section 74P of the MCA.

2.12 Administration orders are particularly suited to dealing with small estates as the cost of sequestration proceedings could easily exceed the value of the debtor's assets.[69] The administration order procedure is simple and inexpensive and is aimed at assisting debtors to reschedule their financial obligations.[70]

2.13 Creditors often contribute to the dire financial situation of debtors when they indiscriminately provide credit or lend money to debtors, without conducting a proper affordability assessment. On the other hand, debtors often are the authors of their own misfortune because they incur debt without calculating whether they, considering their household income, would be able to repay such debt. However, section 74 of the Act does not provide as a prerequisite that granting an administration order is subject to a debtor not being the cause of his or her own financial embarrassment.[71]

2.14 The micro-lender industry also plays a part in persons' being placed in a position where they have to apply for an administration order. Micro-lenders grant relatively small, short-term loans to generally low-income earners. The loan is usually intended to tide over the borrower until the next payday. Such loans are extended to borrowers at high interest rates, justified because of the high risk of borrowers defaulting.[72]

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69 Jones & Buckle Vol 1: The Act 10 ed (service 10, 2016) 490; ***Bafana Finance Mabopane v Makwakwa and Another*** 2006 (4) SA 581 (SCA) at 586C.

70 Roestoff and Coetzee (2012) 24 ***SA Mercantile Law Journal*** 53 at 63-64.

71 ***Ex Parte August*** 2004 (3) SA 268 (W) at 271I.

72 ***Bafana Finance Mabopane v Makwakwa and Another*** 2006 (4) SA 581 (SCA) at 583C.

CHAPTER 3: COMPARATIVE LAW ON DEBT RELIEF AND DEBT REARRANGEMENT MEASURES

A Introduction

3.1 It is important to establish how other countries deal with the issue of over-indebtedness in order to benefit from their experience. In this chapter, an exposition is given of how the United States of America, Australia, New Zealand, Ireland, England and Wales deal with the issue. In South Africa, the problem of over-indebtedness is addressed through different procedures set out in three separate statutes,[73] but the aforementioned countries deal with debt relief measures in a single statute, which means they are able to utilise available resources more effectively.

B Foreign jurisdictions

1 United States of America

3.2 The American bankruptcy system is regulated by the Bankruptcy Reform Act, 1978. The Act is referred to as the "Bankruptcy Code" and is embodied in Title 11 of the United States Code.[74] The Bankruptcy Code provides debtors with two forms of debt relief. These are Chapter 7 liquidations (involuntary cases), previously known as "straight bankruptcy,"[75] and Chapter 13 adjustment of debts (voluntary cases), which provides for the payment of debts of a debtor with regular income.[76] Both voluntary and involuntary cases are commenced by filing a petition with the bankruptcy court.[77] An involuntary case may be commenced only under Chapter 7 and only against a person who is not a business or commercial corporation.[78]

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73 The Insolvency Act 24 of 1936, the National Credit Act 34 of 2005 and the Magistrates' Courts Act 32 of 1944.

74 Roger G Evans "A brief explanation of consumer bankruptcy and aspects of the bankruptcy estate in the United States of America" **XLIII CILSA** (2010) 338.

75 Roger G Evans **XLIII CILSA** (2010) 341.

76 Section 109(e) of the Bankruptcy Code.

77 *United States Bankruptcy Code* Michigan Legal Publishing Ltd 2018 edition.

78 Section 303(a) of the Bankruptcy Code.

3.3 The United States Trustee[79] may raise, and may appear and be heard on, any issue in any case or proceedings under the Bankruptcy Code.[80] Calitz states that the primary role of the United States Trustee is to serve as the watchdog over the bankruptcy process.[81] The United States Trustee is responsible for the appointment of trustees in voluntary cases as well as involuntary cases.

3.4 Chapter 7 trustees are often referred to as "panel trustees" because they are appointed by the United States Trustee to a panel in each judicial district. Once trustees have been appointed to the panel, cases are generally assigned through a blind rotation process. The Chapter 7 trustee investigates the financial affairs of the debtor, collects assets of the debtor that are not exempt under the Bankruptcy Code, liquidates the assets, and distributes the proceeds among the debtor's secured creditors first. If any assets remain, they are distributed pro rata among the unsecured creditors.

3.5 Chapter 13 trustees are called "standing trustees" because they have a standing appointment from the United States Trustee to administer Chapter 13 cases in a particular geographical area. Standing trustees evaluate the financial affairs of the debtor, make recommendations to the court regarding confirmation of the debtor's repayment plan, and administer the court-approved plan by collecting payments from the debtor and disbursing the funds to creditors.[82] Chapter 13 adjustment of debts is often used by consumers who want to keep their assets while paying back part of their debt over a period of three to five years.[83] In Chapter 13 cases the US Trustee is also responsible for monitoring the debtors' reorganisation plans.[84]

3.6 Whereas Chapter 7 debtors are afforded an immediate discharge of debts, Chapter 13 debtors only become eligible for discharge after they have paid off their debts as set out in their plans of reorganisation.[85] A discharge in terms of Chapter 7 or Chapter 13 protects

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79 The United States Trustees fall under the Executive Office for US Trustees and are part of the United States Trustee Program that is the component of the US Department of Justice responsible for overseeing the administration of bankruptcy cases and private trustee. See in this regard the US Trustee Program at https://www.justice.gov/ust.

80 Section 307 of the Bankruptcy Code.

81 Calitz JC "A reformatory approach to state regulation of insolvency law in South Africa" Thesis (2009) 77 University of Pretoria.

82 US Trustee Program https://www.justice.gov/ust.

83 Roger G Evans **XLIII CILSA** (2010) 341-342.

84 Calitz JC "A reformatory approach to state regulation of insolvency law in South Africa" Thesis (2009) 81 University of Pretoria.

85 Calitz JC "A reformatory approach to state regulation of insolvency law in South Africa" Thesis (2009) 81 University of Pretoria.

the debtor against any attempt to collect, recover or offset any debt which was discharged as a personal liability of the debtor.[86]

2 Australia

3.7 The government department responsible for the administration and regulation of the personal insolvency system in Australia is known as the Australian Financial Security Authority (AFSA).[87] The personal insolvency system comprises bankruptcy, debt agreements and personal insolvency agreements. Debt agreement administrators (hereafter "administrators") and trustees are central to the functioning of the personal insolvency system. The Inspector-General, who is the accounting authority and permanent departmental head of the AFSA, is responsible for registering individuals as administrators and trustees. A person registered as a trustee may be appointed a trustee for a personal insolvency agreement or a trustee for the estate of a bankrupt. However, a person registered as a trustee may also act as an administrator without having to be registered as an administrator.

3.8 As regards the functions of the Inspector-General, he or she may require the production of any book kept by an Official Receiver, a trustee or an administrator and may at any time investigate the books of a trustee or an administrator.[88] Furthermore, the Inspector-General may make inquiries and investigations with respect to[89]—

(a) the administration or the conduct of a trustee (including a controlling trustee) in relation to bankruptcy, a personal insolvency agreement or a debt agreement;

(b) the conduct of an administrator in respect of a debt agreement; and

(b) the conduct and affairs of a bankrupt, a debtor under a debt agreement or a debtor under a personal insolvency agreement.

Debt agreements

3.9 Debt agreements apply to insolvent debtors who have limited liabilities, a low income and minimal assets. Hence strict thresholds have been set on who may apply for a debt

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86 Roestoff and Coetzee (2012) 24 ***SA Mercantile Law Journal*** 53 at 73.

87 Crouch Amirbeaggi: Business Advisors and Insolvency Services "Bankruptcy" http://www.bankruptcy.net.au/bankruptcy.html.

88 Section 12(2) of the Bankruptcy Act, 1966.

89 Section 12(1) of the Bankruptcy Act, 1966.

agreement.[90] In the 10 years prior to making a proposal for a debt agreement, the debtor may not have been declared bankrupt, subject to a debt agreement or have given authority for his or her affairs to be dealt with under a personal insolvency agreement.[91] Furthermore, the debtor's unsecured debts and assets may not be more than the prescribed amount[92] and the debtor's after-tax income for the year following the date of the proposal may not exceed the prescribed amount.[93]

3.10 An insolvent debtor may submit to the Official Receiver[94] a written proposal[95] for a debt agreement, which must be accompanied by a statement of the debtor's affairs.[96] The proposal must authorise an administrator (being a registered trustee, Official Trustee or another person) to oversee the implementation of the agreement.[97] The Official Receiver must ask each affected creditor to indicate whether the proposal should be accepted.[98] If the majority (in value) of the creditors accept the proposal for a debt agreement, all the unsecured creditors of the debtor are bound by the agreement. However, the debtor's secured creditors have the option to realise their security by selling the assets concerned.[99] A creditor of the debtor cannot bring a bankruptcy application against the debtor or enforce his or her debt, and the sheriff is prevented from taking action to execute or sell the debtor's assets.[100] A debt agreement ends when all the obligations under the agreement have been

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90 McCabes "Part IX and Part X agreements: non-bankruptcy alternatives for individuals" June 30 2015 https://lexology.com/library/detail.aspx?g=b95afaf4-cfd7-421f-b8b6-f2a3fd9d1.

91 Section 185C(4)(a) of the Bankruptcy Act, 1966. According to Rapsey and Griffiths the debtor's unsecured debt and assets may not be more than $106 561,00. See in this regard Rapsey and Griffiths "Personal Insolvency: An overview of bankruptcy" 2018 http://rapseygriffiths.com.au/personal-insolvency-an-overview-of-bankruptcy/.

92 Section 185C(4)(b) and (c) of the Bankruptcy Act, 1966.

93 Section 185C(4)(d) of the Bankruptcy Act, 1966. According to Rapsey and Griffiths the debtor's after-tax income may not be more than $79 920,75.

94 The Bankruptcy Act, 1966, divides Australia into seven geographical bankruptcy districts. Each district is headed by an Official Receiver. The Official Receivers are government officials subject to the control of the Inspector-General. Staff of the AFSA are employed to assist the Official Receivers to exercise their powers and functions. See in this regard Crouch Amirbeaggi: Business Advisors and Insolvency Services "Bankruptcy" http://www.bankruptcy.net.au/bankruptcy.html.

95 A debt agreement proposal must identify the debtor's property that is to be dealt with under the agreement; specify how the property is to be dealt with; and provide that if the total amount paid by the debtor under the agreement is insufficient to meet all provable debts in full, those provable debts are to be paid proportionately. See in this regard section 185C(2) of the Bankruptcy Act, 1966.

96 Section 185C(1) and 185D(1) of the Bankruptcy Act, 1966.

97 Section 185C(2)(c) read with Division 3A of the Bankruptcy Act, 1966.

98 Section 185EA of the Bankruptcy Act, 1966.

99 Rapsey and Griffiths "Personal Insolvency: An overview of bankruptcy" 2018http://rapseygriffiths.com.au/personal-insolvency-an-overview-of-bankruptcy/.

100 Section 185K(1) and (3) of the Bankruptcy Act, 1966.

discharged.[101]

Personal insolvency agreements

3.11 An insolvent debtor may sign an authority authorising a registered trustee, a solicitor or the Official Trustee[102] (hereafter "the controlling trustee")[103] to call a meeting of the debtor's creditors and to take control of the debtor's property.[104] Unlike debt agreements, personal insolvency agreements have no threshold (limit on debt, income and assets). The debtor must provide the controlling trustee with a statement of his or her affairs and a proposal setting out how his or her affairs should be dealt with.[105] This proposal must include a draft personal insolvency agreement.[106] Personal insolvency agreements are tailored[107] to suit the debtor's unique financial circumstances and the debtor is able to negotiate a settlement arrangement that may involve the payment of less than 100 cents in the dollar.[108]

3.12 The controlling trustee must conduct an investigation into the affairs of the debtor,[109] following which he or she must prepare a report stating whether he or she believes the creditor's interest would be better served by accepting the debtor's proposal or by the

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101 Section 185N(1) of the Bankruptcy Act, 1966.

102 In the absence of a registered trustee the Official Receiver or Inspector-General may act as the Official Trustee.

103 When an authority becomes effective, the person authorised by it becomes the controlling trustee.

104 Section 188(1) of the Bankruptcy Act, 1966.

105 Section 188(2C) and (2D) of the Bankruptcy Act, 1966.

106 A personal insolvency agreement must, among other things, identify the debtor's property that would be available to pay the creditors' claims and specify how the property is to be dealt with; identify the debtor's income that would be available to pay the creditors' claims and indicate how the income is to be dealt with and the order in which it is to be distributed among creditors; specify the extent (if any) to which the debtor is to be released from his or her provable debts and the conditions (if any) for the agreement to come into operation, specify the circumstances in which, or the events on which, the agreement terminates; specify the order in which proceeds of realising the property are to be distributed among creditors; and specify whether or not the antecedent transactions provisions of this Act apply to the debtor; see in this regard section 188A(2) of the Bankruptcy Act, 1966.

107 Crouch Amirbeaggi states that the new terms for the repayment of existing debt may include the following:

- Full release from current debts.
- An undertaking to repay a new, mutually agreed, smaller debt to creditors.
- A moratorium on payments, e.g. creditors agree to a six-month period without repayments.
- Repayment of new mutually agreed smaller debt by periodic payments to a trustee e.g. an insolvent debtor makes monthly repayments into a fund held by a trustee, who pays creditors when the new agreed reduced debt is paid.
- Creditors offered assets not available in bankruptcy.
- A combination of the above.

108 O'Brien Palmer Insolvency and Business Advisory "Part X Personal Insolvency Agreement" available at *http://obp.com.au/part-x-debt-personal-insolvency-agreement/.*

109 Section 229(1)-(3) of the Bankruptcy Act, 1966. See also O'Brien Palmer Insolvency and Business Advisory "Part X Personal Insolvency Agreement" available at *http://obp.com.au/part-x-debt-personal-insolvency-agreement/.*

bankruptcy of the debtor. A copy of the report must be given to the Official Receiver and to each of the creditors.[110] At the meeting convened to consider the debtor's proposal, the majority (in value) of the creditors may accept the proposal and require the debtor to implement the personal insolvency agreement or require the debtor to file a bankruptcy application.[111]

3.13 All the creditors are bound by the terms of the personal insolvency agreement and cannot institute legal proceedings outside the agreement to recover their debt or to bring a bankruptcy application against the debtor. However, the personal insolvency agreement does not affect the rights of secured creditors to realise their security.[112] The debtor is released from the personal insolvency agreement if the trustee of the agreement is satisfied that all the obligations under the agreement have been discharged.[113]

Bankruptcy

3.14 Bankruptcy may be initiated by a debtor[114] or by a creditor. A debtor who is a party to a debt agreement or a personal insolvency agreement may not make a bankruptcy application, except with leave of the court.[115]

3.15 On application by a creditor who has obtained a final judgment or court order against a debtor, an Official Receiver may issue a bankruptcy notice requiring the debtor to pay the debt within a specified time period. Non-compliance with the bankruptcy notice constitutes an act of bankruptcy and entitles the creditor to make a bankruptcy application for a sequestration order.[116]

3.16 Where the court declares an insolvent debtor bankrupt by making a sequestration

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110 Section 189A(1) and (2) of the Bankruptcy Act, 1966.

111 Section 204 of the Bankruptcy Act, 1966.

112 O'Brien Palmer Insolvency and Business Advisory "Part X Personal Insolvency Agreement" available at *http://obp.com.au/part-x-debt-personal-insolvency-agreement/*.

113 Section 232 of the Bankruptcy Act, 1966.

114 Section 55 of the Bankruptcy Act, 1966.

115 Section 55(5A) and (6) of the Bankruptcy Act, 1966.

116 Section 41 of the Bankruptcy Act, 1966. See also Crouch Amirbeaggi: Business Advisors and Insolvency Services "Bankruptcy" http://www.bankruptcy.net.au/bankruptcy.html.

order, the property of the bankrupt vests in the Official Receiver[117] or the registered trustee who has consented to act as trustee of the debtor's estate.[118] After an insolvent debtor has become a bankrupt, a creditor may not enforce any remedy against the person or the property of the bankrupt or commence any legal proceeding in respect of a provable debt. However, the right of a secured creditor to realise his or her security is not affected.[119]

3 New Zealand

3.17 In terms of the Insolvency Act, 2006, the New Zealand Insolvency and Trustee Service, through the Office of the Official Assignee, administers all bankruptcies and the alternatives to bankruptcy. These alternatives are summary instalment orders and no-asset procedures.[120] The Act further provides for a proposal to creditors for the payment or satisfaction of an insolvent's[121] debt.[122] The above-mentioned procedures are discussed below.

Bankruptcy

3.18 A debtor is adjudicated bankrupt either if a creditor of the debtor applies for an order of adjudication and the court makes the order, or if the debtor files an application for adjudication with the Assignee if that debtor has combined debts of $1 000 or more.[123] A debtor is automatically adjudicated bankrupt when his or her application to have himself or herself adjudicated bankrupt is filed with the Assignee. That adjudication has the same consequences as if the debtor had been adjudicated bankrupt by the court.[124]

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117 The Official Trustee administers the bankrupt's estate with the assistance of the staff at the AFSA. See in this regard Crouch Amirbeaggi: Business Advisors and Insolvency Services "Bankruptcy" at http://www.bankruptcy.net.au/bankruptcy.html.

118 Section 58 of the Bankruptcy Act, 1966.

119 Section 58(3)(a) and (5A) of the Bankruptcy Act, 1966.

120 New Zealand Insolvency and Trustee Service "About Insolvency and Trustee Service" 2018 at https://www.insolvency.govt.nz/support/about/about-insolvency-and-trustee-service/. See also section 8 and subpart 3 and 4 of Part 5 of the Insolvency Act, 2006.

121 The Insolvency Act, 2006, defines "insolvent" as a person who is not a bankrupt, but who is unable to pay his or her debts as they become due.

122 See section 8 and subpart 2 of Part 5 of the Insolvency Act, 2006.

123 Sections 10(2) and 45 of the Insolvency Act, 2006.

124 Section 47 of the Insolvency Act, 2006. To file an application for adjudication, a debtor must lodge it with the Assignee in accordance with the prescribed procedure. The debtor's application is filed with the Assignee when it is endorsed by the Assignee as having been received. See in this regard section 49 of the Insolvency Act, 2006.

3.19 A creditor may, after his or her application for adjudication has been filed but before the court makes an order of adjudication, apply to the court for an order appointing an Assignee as receiver and manager of all or part of the debtor's property.[125] If this option is not exercised by the creditor, the Official Assignee, once notified by the Registrar of the court's adjudication, must nominate an Assignee to be the Assignee of the debtor's property.[126]

3.20 In brief, the process after adjudication involves the following:[127]

- The Assignee must advertise the adjudication of the bankrupt.
- The bankrupt must file with the Assignee a statement of his or her affairs if he or she has not already done so.
- The Assignee must call the first meeting of the bankrupt's creditors.
- All proceedings to recover any debt provable in the bankruptcy are halted.
- The court may, on application by the Assignee, order the bankrupt to pay an amount or periodic amounts during the bankruptcy as a contribution towards payment of the bankrupt's debts.
- The Assignee may examine any person in relation to, and may require that person to produce or surrender, any document that relates to the bankrupt's property, conduct or dealings.
- The Assignee must sell the bankrupt's property for the benefit of the creditors.

3.21 A bankrupt may at any time apply to the court for an order of discharge from bankruptcy.[128] However, a bankrupt is automatically discharged from bankruptcy three years after he or she has filed his or her statement of affairs, except if the Assignee or a creditor has objected to an automatic discharge.[129] The automatic discharge of the bankrupt has the same effect as if the court made an order for the bankrupt's discharge.[130]

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125 Section 50 of the Insolvency Act, 2006.

126 Sections 58 and 59 of the Insolvency Act, 2006.

127 Sections 65–76, 147 and 165 of the Insolvency Act, 2006.

128 Section 294 of the Insolvency Act, 2006.

129 Section 290 of the Insolvency Act, 2006.

130 Section 291 of the Insolvency Act, 2006.

Summary instalment order

3.22 A debtor who has unsecured debts of not more than $50 000 and who is unable immediately to pay those debts may make an application to the Assignee to pay his or her debts in instalments or in full or to the extent that the Assignee considers practicable in the circumstances of the case.[131] The application must state that the debtor proposes to pay the creditors in full or must indicate the amount in the dollar that the debtor proposes to pay. The application must also mention the name and address of the debtor's proposed supervisor and annex the written consent of that person to be the supervisor. If the debtor thinks that a supervisor is not necessary, he or she must provide reasons.[132]

3.23 Before making a summary instalment order, the Assignee must allow the debtor or a creditor to make representations, if the debtor or creditor wants to do so.[133] In addition to a summary instalment order, the Assignee may make orders[134]—

(a) concerning the debtor's future earnings or income;

(b) concerning the disposal of goods that the debtor owns or possesses; or

(c) giving the appointed supervisor the power to direct the debtor's employer to pay all or part of the debtor's earnings to the supervisor and to supervise payment of the reasonable living expenses of the debtor and his or her dependants.

3.24 The supervisor must send a notice of the summary instalment order to the debtor's creditors[135] and must distribute the money paid by the debtor under the summary instalment order among the creditors.[136]

3.25 If the Assignee decides to dispense with the appointment of a supervisor, the Assignee must supervise the debtor's compliance with the summary instalment order and any other orders made by the Assignee in respect of the debtor.[137]

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131 Sections 340 and 343(1) of the Insolvency Act, 2006.

132 Section 342(2) of the Insolvency Act, 2006.

133 Section 343(2) of the Insolvency Act, 2006.

134 Section 344 of the Insolvency Act, 2006.

135 Section 353 of the Insolvency Act, 2006.

136 Section 358 of the Insolvency Act, 2006.

137 Section 345(2), read with section 346(1), of the Insolvency Act, 2006.

3.26 Lastly, creditors may not institute proceedings against the debtor for debt owed to them without permission of the Assignee or unless the debtor is in default under the summary instalment order.[138]

No-asset procedure

3.27 A debtor who has no realisable assets, has total debts of not less than $1 000 and not more than $47 000, and does not have the means (according to the prescribed means test) of repaying any amount towards those debts may apply to the Assignee for entry to the no-asset procedure. However, the debtor may not previously have been admitted to the no-asset procedure or adjudicated bankrupt.[139]

3.28 A debtor is disqualified from entry to the no-asset procedure if he or she has concealed assets with the intention of defrauding his or her creditors; has engaged in conduct that would, if he or she were adjudicated bankrupt, constitute an offence under the Insolvency Act, 2006; or has incurred a debt or debts knowing that he or she does not have the means to repay them. Furthermore, the Assignee may not admit a debtor to the no-asset procedure if a creditor intends applying for the debtor's adjudication as a bankrupt and it is likely that the outcome for the creditor, if the debtor is adjudicated bankrupt, will be materially better than if the debtor is admitted to the no-asset procedure.[140]

3.29 The Assignee may terminate a debtor's participation in the no-asset procedure if the Assignee is satisfied that the debtor's financial circumstances have changed, enabling the latter to repay an amount towards his or her debts.[141] If the Assignee terminates a debtor's participation in the no-asset procedure because the debtor has concealed assets or misled the Assignee, the court may, on application by the Assignee, make an order for the preservation of the debtor's assets pending an application for the debtor's adjudication.[142]

3.30 Once the debtor is admitted to the no-asset procedure, the Assignee must notify the creditors to that effect.[143] Creditors may not enforce their debts after the debtor has been

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138 Section 352 of the Insolvency Act, 2006.

139 Sections 362(1) and 363(1) of the Insolvency Act, 2006.

140 Section 364 of the Insolvency Act, 2006.

141 Section 373(1) of the Insolvency Act, 2006.

142 Section 374(1) of the Insolvency Act, 2006.

143 Section 367 of the Insolvency Act, 2006.

admitted to the no-asset procedure.[144]

3.31 The debtor is automatically discharged from the no-asset procedure 12 months after the date on which he or she was admitted to it, unless the Assignee is satisfied that the 12-month period should be extended in order properly to consider whether the debtor's participation in the no-asset procedure should be terminated.[145] On discharge, the debtor's debts that became unenforceable on his of her admission to the no-asset procedure are cancelled, and he or she is not liable to pay any part of the debts, including any penalties and interest that may have accrued.[146] However, this does not apply to debts incurred through fraud.[147]

Proposal to creditors for payment of debt

3.32 An insolvent may make a proposal to creditors for the payment or satisfaction of his or her debts. The proposal may include an offer to assign all or any of the insolvent's property to a trustee for the benefit of the creditors; to pay the insolvent's debts by instalments; to compromise the insolvent's debts at less than 100 cents in the dollar; and to pay the insolvent's debts at some time in the future; and may include any other conditions for the benefit of the creditors.[148]

3.33 The proposal must be accompanied by a statement of affairs and must have endorsed on it the name of the person who is willing to act as a trustee for the creditors.[149] The trustee named in the proposal becomes the provisional trustee when the proposal is filed.[150] The provisional trustee must call a meeting of the insolvent's creditors.[151] The creditors may accept the proposal with or without amendments or modification.

3.34 After the proposal has been accepted by the creditors, the provisional trustee must apply to the court for approval of the proposal. The court must, before approving a proposal,

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144 Section 369 of the Insolvency Act, 2006.

145 Section 377(1) and (2) of the Insolvency Act, 2006.

146 Section 377A(1) of the Insolvency Act, 2006.

147 Section 377A(2) of the Insolvency Act, 2006.

148 Section 326 of the Insolvency Act, 2006.

149 Section 327 of the Insolvency Act, 2006. The trustee is employed by the New Zealand Insolvency and Trustee Service. See in this regard Citizens Advice Bureau "Insolvency and Bankruptcy" 2009.

150 Sections 328(1) and 329 of the Insolvency Act, 2006.

151 Section 330 of the Insolvency Act, 2006.

hear any objection by a creditor. The court may refuse to approve the proposal if it is of the view that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors.[152] A proposal that is approved by the court is binding on all the creditors who are affected by the terms of the proposal.[153] The trustee must give effect to the terms of the proposal. This includes taking control of and distributing and selling the property mentioned in the proposal.[154] After the court has approved the proposal and while the proposal remains in force, a creditor may not, without permission of the court, file or proceed with an application for the insolvent's adjudication or institute legal proceedings in respect of the debt.[155]

4 Republic of Ireland

3.35 In Ireland, the court may adjudicate a debtor bankrupt if the debtor presents a petition for adjudication against him- or herself or, under certain circumstances, if a creditor presents a petition for adjudication. A debtor's petition for adjudication must be accompanied by a statement of affairs and an affidavit that he or she has made reasonable efforts to reach an appropriate arrangement with his or her creditors by making a proposal for a debt settlement arrangement or a personal insolvency arrangement.

3.36 When a debtor is adjudicated bankrupt, all property belonging to that person vests in the Official Assignee for the benefit of the creditors of the bankrupt.[156] The Official Assignee manages the Bankruptcy Division of the Insolvency Service of Ireland.[157] Regarding bankruptcy, the functions of the Official Assignee are to ascertain the debts and liabilities of the debtor, and to collect, realise and distribute the assets of the debtor.[158]

3.37 Besides bankruptcy, debtors also have three alternative insolvency arrangements at their disposal. These are a debt relief notice, a debt settlement arrangement and a personal insolvency arrangement. These measures are provided for in the Personal Insolvency Act,

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152 Section 333(1)–(3) of the Insolvency Act, 2006.

153 Section 334 of the Insolvency Act, 2006.

154 Section 337 of the Insolvency Act, 2006.

155 Section 335 of the Insolvency Act, 2006.

156 Section 44(1) of the Bankruptcy Act, 1988.

157 What is bankruptcy http://www.citizensinformation.ie/en/money_and_tax/personal_finance/debt/personal.

158 Section 61(2) of the Bankruptcy Act, 1988.

2012.[159] This Act aims to ameliorate the difficulties experienced by debtors in discharging their indebtedness and to enable insolvent debtors to resolve their indebtedness without having to be declared bankrupt. The three insolvency arrangements are set out below.

Debt relief notice

3.38 A debt relief notice aims to give relief from debt to persons with little or no disposable income or assets.[160] An application for a debt relief notice must be made to the Insolvency Service through an approved intermediary.[161] If the Insolvency Service is satisfied that the debtor complies with all the requirements for a debt relief notice, it must issue a certificate to that effect. The certificate, together with a copy of the application and the supporting documentation, must be submitted to the appropriate court.[162]

3.39 On receiving a notification from the registrar of the court that the court has issued a debt relief notice, the Insolvency Service must so inform the approved intermediary, the debtor and every creditor.[163] A debt relief notice remains in effect for a period of three years ("supervision period") from the date on which its issue is recorded on the Register of Debt Relief Notices.[164] If the debtor's circumstances change during the supervision period, he or she must inform the Insolvency Service accordingly, as this may create an obligation to repay some of the debts included in the debt relief notice.[165]

3.40 During the supervision period, a creditor may not initiate any legal proceedings in relation to a specified qualifying debt, take any step to recover goods in the possession or custody of the debtor, or contact the specified debtor regarding payment of a specified

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159 Amendments to the Personal Insolvency Act, 2012, are updated up to 5 May 2016.

160 Insolvency Service of Ireland "Guide to a debt relief notice" March 2016 4 https://www.isi.gov.ie/en/ISI/DRN_March_2016.pdf/Files/DRN_March_2016.pdf.

161 Approved Intermediaries are people who have been approved by the Insolvency Service of Ireland to act on the debtor's behalf as intermediaries in the debt relief process. See in this regard Insolvency Service of Ireland "Guide to a debt relief notice" March 2016 16.

162 Section 31(1) of the Personal Insolvency Act, 2012.

163 Section 33(1) of the Personal Insolvency Act, 2012.

164 Section 34(1) of the Personal Insolvency Act, 2012.

165 Section 36 of the Personal Insolvency Act, 2012. See also Insolvency Service of Ireland "Guide to a debt relief notice" March 2016 11 https://www.isi.gov.ie/en/ISI/DRN_March_2016.pdf/Files/DRN_March_2016.pdf.

qualifying debt.[166] Furthermore, a creditor may not, during the supervision period, apply for or proceed with a bankruptcy petition against the debtor.[167]

3.41 The debts of a debtor who has complied with the terms of his or her debt relief notice are written off at the end of the three-year supervision period.[168] The Insolvency Service will then issue a debt relief certificate confirming the debtor's discharge from his or her debts.[169]

3.42 A debt relief notice will be cancelled if the debtor failed to comply with the terms of the debt relief notice or if it comes to light that the debtor failed to disclose all the relevant information or was untruthful in the disclosure of the information, or if an adjudication in bankruptcy has been made in relation to the specified debtor that has not been annulled or discharged. The result would be that the debtor reverts to owing the full amount that was owed prior to obtaining a debt relief notice, including any interest accrued.[170]

Debt settlement arrangements

3.43 A debtor with unsecured debts may make a proposal for a debt settlement arrangement with his or her creditors. The proposal must be made on behalf of the debtor by a personal insolvency practitioner.[171] A debtor is not eligible for a debt settlement arrangement if he or she is an undischarged bankrupt, is subject to a debt relief notice or is a party to a personal insolvency arrangement.[172]

3.44 The personal insolvency practitioner must notify the Insolvency Service of the debtor's intention to propose a debt settlement arrangement and apply on behalf of the debtor for a protective certificate.[173] If the Insolvency Service, following its consideration of

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166 Section 35(1) of the Personal Insolvency Act, 2012.

167 Section 35(2) of the Personal Insolvency Act, 2012.

168 Insolvency Service of Ireland "Guide to a debt relief notice" March 2016 8 https://www.isi.gov.ie/en/ISI/DRN_March_2016.pdf/Files/DRN_March_2016.pdf.

169 Section 46(2) of the Personal Insolvency Act, 2012.

169 Insolvency Service of Ireland "Guide to a debt relief notice" March 2016 12 https://www.isi.gov.ie/en/ISI/DRN_March_2016.pdf/Files/DRN_March_2016.pdf.

170 Section 44 of the Personal Insolvency Act, 2012. See also Insolvency Service of Ireland "Guide to a debt relief notice" March 2016 11-12 https://www.isi.gov.ie/en/ISI/DRN_March_2016.pdf/Files/DRN_March_2016.pdf.

171 Section 55 of the Personal Insolvency Act, 2012.

172 Section 57(1) of the Personal Insolvency Act, 2012.

173 Section 59(1) of the Personal Insolvency Act, 2012.

the application for a protective certificate, is satisfied that the application is in order, it must issue the certificate and furnish that certificate, together with a copy of the application and the supporting documentation, to the appropriate court. The Insolvency Service must also notify the personal insolvency practitioner of the issuing of the certificate.[174]

3.45 If the court is satisfied that the eligibility criteria and the other relevant requirements have been satisfied, it must issue a protective certificate.[175] A protective certificate remains in force for a period of 70 days from the date of its issue.[176] The registrar of the court must notify the Insolvency Service and the personal insolvency practitioner of the issuing of the protective certificate, following which the personal insolvency practitioner must notify each of the creditors of the court's decision to issue the certificate and that the debtor intends to make a proposal for a debt settlement arrangement.[177]

3.46 When a protective certificate has been issued, the personal insolvency practitioner must make a proposal for a debt settlement arrangement to the creditors of the debtor.[178] The terms of a proposal for a debt settlement arrangement may include a lump sum payment to creditors, a payment arrangement with creditors, an agreement by the debtor to transfer some or all of the debtor's property to a person (who may be the personal insolvency practitioner) to hold the property in trust for the benefit of the creditors, a transfer of specified assets of the debtor to creditors generally or to a specified creditor, or a sale of specified assets of the debtor by the personal insolvency practitioner and the payment of the proceeds of such sale to creditors.[179]

3.47 When a debt settlement arrangement has been approved, the personal insolvency practitioner must notify the Insolvency Service and each creditor concerned of that approval[180] and must send a notice to each creditor indicating that he or she may raise an objection to the coming into effect of the arrangement.[181] Furthermore, the Insolvency

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174 Section 61(1) of the Personal Insolvency Act, 2012.

175 Section 61(2) of the Personal Insolvency Act, 2012.

176 Section 61(5) of the Personal Insolvency Act, 2012.

177 Section 61(10) and (12) of the Personal Insolvency Act, 2012.

178 Section 64(1) of the Personal Insolvency Act, 2012.

179 Section 66(2) of the Personal Insolvency Act, 2012.

180 Section 75(1) of the Personal Insolvency Act, 2012.

181 Section 75(2) of the Personal Insolvency Act, 2012.

Service must notify the court concerned and furnish that court with a copy of the notification that the debt settlement arrangement has been approved.[182]

3.48 If no objection has been lodged by a creditor, the court must consider whether to approve the coming into effect of the debt settlement arrangement.[183] The registrar of the court must notify the Insolvency Service and the personal insolvency practitioner of the court's decision. On receipt of a notification that the court has approved the coming into effect of the debt settlement arrangement, the Insolvency Service must register the arrangement in the Register of Debt Settlement Arrangements. The debt settlement arrangement comes into effect upon being registered in the Register of Debt Settlement Arrangements.[184]

3.49 Payments to be made to creditors under the terms of the debt settlement arrangement must be made by the debtor through the personal insolvency practitioner concerned. The personal insolvency practitioner must monitor implementation of the arrangement.[185] A debt settlement arrangement remains in effect until it is completed or terminated.[186] The maximum duration of a debt settlement arrangement is five years, but it may provide that this period be extended for a further period of one year in such circumstances as are specified in the arrangement.[187]

3.50 A creditor may not, while a protective certificate or a debt settlement arrangement remains in force, initiate any legal proceedings against the debtor, take any step to secure or recover payment from the debtor, enforce a judgment against the debtor, take any step to recover goods in the possession of the debtor, or present or proceed with a bankruptcy petition against the debtor.[188]

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182 Section 76(1) of the Personal Insolvency Act, 2012.

183 Section 78(1) of the Personal Insolvency Act, 2012.

184 Section 78(6)–(8) of the Personal Insolvency Act, 2012.

185 Section 80 of the Personal Insolvency Act, 2012.

186 Section 79(1) of the Personal Insolvency Act, 2012.

187 Section 65(2)(a) of the Personal Insolvency Act, 2012.

188 Sections 62 and 79(3)-(5) of the Personal Insolvency Act, 2012.

3.51 If the debtor has performed all of his or her obligations under the debt settlement arrangement, the debtor is discharged from the remainder of the debts specified in the arrangement.[189]

Personal insolvency arrangements

3.52 A debtor may make a proposal for a personal insolvency arrangement with his or her creditors. The proposal must be made on behalf of the debtor by a personal insolvency practitioner.[190] A debtor is not eligible for a personal insolvency arrangement if he or she is an undischarged bankrupt, is subject to a debt relief notice or is a party to a debt settlement arrangement.[191] Unlike a debt settlement arrangement, a personal insolvency arrangement is not restricted to unsecured debts. At least one of the creditors of the debtor must be a secured creditor holding security over an interest in property of the debtor.[192]

3.53 If a personal insolvency practitioner has been instructed to make a proposal for a personal insolvency arrangement, he or she must, on behalf of the debtor, apply for a protective certificate.[193] The procedure for applying for and obtaining a protective certificate is the same as that of a debt settlement arrangement.

3.54 When a protective certificate has been issued, the personal insolvency practitioner must make a proposal for a personal insolvency arrangement to the creditors of the debtor.[194] The terms of a proposal for a personal insolvency arrangement may include the same terms as a debt settlement arrangement, with the addition that they may include an arrangement for the treatment of the security and the satisfaction or restructuring of the secured debt.[195]

3.55 The steps to be taken by the personal insolvency practitioner and the Insolvency Service following the creditor's approval of the personal insolvency arrangement are similar

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189 Sections 89(1) and (2) of the Personal Insolvency Act, 2012.

190 Section 55 of the Personal Insolvency Act, 2012.

191 Section 91(1)(h) of the Personal Insolvency Act, 2012.

192 Section 91(1)(c) of the Personal Insolvency Act, 2012.

193 Section 91(1)(a) of the Personal Insolvency Act, 2012.

194 Section 98(1)(c) of the Personal Insolvency Act, 2012.

195 Section 100(2)(f) of the Personal Insolvency Act, 2012.

to those of a debt settlement arrangement,[196] with the exception that the Insolvency Service must register the personal insolvency arrangement in the Register of Personal Insolvency Arrangements. The personal insolvency arrangement comes into operation upon being registered in the Register of Personal Insolvency Arrangements.[197]

3.56 Payments to the creditors in terms of the personal insolvency arrangement must be made by the debtor through the personal insolvency practitioner concerned. The personal insolvency practitioner must monitor implementation of the arrangement.[198] A personal insolvency arrangement remains in effect until it is completed or terminated.[199] The maximum duration of a personal insolvency arrangement is six years, but it may provide that this period be extended for a further period of one year in such circumstances as are specified in the arrangement.[200]

3.57 A debtor has the same protection against creditors as in the case of a debt settlement arrangement while the protective certificate or personal insolvency arrangement remains in force.[201] When the debtor has performed all of his or her obligations under the personal insolvency arrangement, the debtor is not discharged from the secured debts covered by the arrangement, except to the extent provided for in the arrangement.[202]

5 England and Wales

Debt relief orders

3.58 In England and Wales, the Insolvency Act, 1986, provides that a person who is unable to pay his or her debts may apply[203] to the official receiver[204] for a debt relief order

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196 Sections 112(1) and (2), 113(1), 115(1) and (6) of the Personal Insolvency Act, 2012.

197 Section 115(7) and (8) of the Personal Insolvency Act, 2012.

198 Section 117 of the Personal Insolvency Act, 2012.

199 Section 116(1) of the Personal Insolvency Act, 2012.

200 Section 99(2)(b) of the Personal Insolvency Act, 2012.

201 Sections 96(1) and 116(3) of the Personal Insolvency Act, 2012.

202 Section 99(2)(c) of the Personal Insolvency Act, 2012.

203 Section 251B(1) of the Insolvency Act, 1986. Section 251B(2), read with rule 9.3, sets out the information that must be included in an application for a debt relief order.

204 An official receiver is a civil servant and also a court officer attached to the Insolvency Service.

through an approved intermediary.[205] The debtor must meet certain criteria to qualify for a debt relief order. The total amount of the debtor's debt, the debtor's monthly surplus income and the total value of the debtor's property may not exceed the prescribed amounts.[206] The official receiver must make a debt relief order in relation to the debts specified in the application if he or she is satisfied that they are qualifying debts on the application date.[207]

3.59 A moratorium period of one year applies in respect of debt relief orders.[208] During the moratorium period, creditors have no remedy in respect of debt included in the order and may not bring a bankruptcy application against the debtor or commence any action or other legal proceedings against the debtor for the debt, except with permission of the court.[209] However, secured creditors are not prevented from enforcing their security.[210]

3.60 A creditor must within 30 days of the date on which a notice of the making of the order was received submit his or her objection against the debt relief order to the official receiver.[211] The Insolvency Act sets out several grounds on which the official receiver may revoke a debt relief order.[212]

3.61 At the end of the moratorium period, the debtor is discharged from all the qualifying debts specified in the order (including all interest, penalties and other sums which may have become payable in relation to those debts since the application date).[213]

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205 Section 251A(1) of the Insolvency Act, 1986. Section 251U(1) defines "approved intermediary" to mean "an individual … approved by a competent authority to act as an intermediary between a person wishing to make an application for a debt relief order and the official receiver".

206 See Part 1 of Schedule 4ZA of the Insolvency Act, 1986.

207 Section 251C(3)(b) of the Insolvency Act ,1986.

208 Section 251H(1) of the Insolvency Act, 1986.

209 Section 251G(1) and (2) of the Insolvency Act, 1986.

210 Section 251G(5) of the Insolvency Act, 1986.

211 Section 251K(1) and (2) of the Insolvency Act, 1986.

212 Section 251L stipulates the following grounds:

"The official receiver may revoke the order on the ground that—

(a) any information supplied by the debtor in, or in support of, the application, or after the determination date, was incomplete, incorrect or otherwise misleading; that the debtor has failed to comply with a duty imposed by the Act; that a bankruptcy order has been made in relation to the debtor; or that the debtor has made a proposal for an individual voluntary arrangement;

(b) he or she should not have been satisfied that the debts specified in the order were qualifying debts;

(c) either or both of the conditions relating to the debtor's monthly surplus income and property are not met at any time after the order was made."

213 Section 251I(1) of the Insolvency Act, 1986.

3.62 The Act provides harsh penalties for a person who makes an application for a debt relief order or a person in respect of whom a debt relief order is made and who makes any false representation or omission in support of his or her application; who conceals or falsifies any documents; who fraudulently disposes of property; who fraudulently deals with property obtained on credit; or who obtains credit without giving the person from whom the credit is obtained the relevant information about his or her status.[214]

Individual voluntary arrangements

3.63 A person owing money, whether or not he or she is bankrupt,[215] may make a proposal to his or her creditors to pay off all or part of his or her debt. Such a proposal is called an individual voluntary arrangement (hereafter "voluntary arrangement") and must be made through a nominee on behalf of a debtor. The nominee must be a person who is qualified to act as an insolvency practitioner, or authorised to act as nominee, in relation to the voluntary arrangement.[216] In the case of a debtor who is an undischarged bankrupt, the official receiver may be specified in the proposal as the nominee.[217]

3.64 A voluntary arrangement may be preceded by an application for an interim court order.[218] A debtor who is an undischarged bankrupt must, before making an application for an interim order, give notice to the official receiver, and, if there is one, the trustee[219] of his or her estate.[220] An interim order has the effect that, during the period for which it is in force, no bankruptcy petition relating to the debtor may be presented or proceeded with and no other proceedings, and no execution or other legal process, may be commenced or continued and

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214 Section 251O–251S of the Insolvency Act, 1986.

215 The term bankruptcy is used for the formal procedure for individuals (not companies) who are declared by the court to be insolvent. See in this regard PricewaterhouseCoopers "Insolvency in brief: A guide to insolvency terminology and procedure". Available at https://www.pwc.co.uk/assets/pdf/insolvency-in-brief.pdf.

216 Section 253(2) of the Insolvency Act 1986. The title nominee is given to an insolvency practitioner acting in an voluntary arrangement, prior to the creditors approving (or rejecting) the voluntary arrangement.

217 Section 263A and 263 B of the Insolvency Act, 1986.

218 This application may be made by the debtor and, in the case of a debtor who is an undischarged bankrupt, by the debtor or the trustee of his estate or the official receiver.

219 The general function of the trustee is to realise and distribute the bankrupt's estate.

220 Section 253(4) of the Insolvency Act, 1986.

no distress may be levied against the debtor's property or its subsequent sale, except with leave of the court.[221]

3.65 When an interim order has been made, the nominee must, before the order ceases to have effect, submit a report to the court stating whether, in his or her opinion, the voluntary arrangement which the debtor is proposing has a reasonable prospect of being approved and implemented and whether a meeting of the debtor's creditors should be summoned to consider the debtors' proposal. If the nominee is of the view that such a meeting should be summoned, the date on and the time and place at which the meeting should be held must also be indicated in the report.

3.66 An interim order ceases to have effect at the end of 14 days beginning with the day after the making of the order[222] but can be extended if the nominee has failed to submit the required report or needs to be replaced by another nominee; to give the nominee more time to prepare the report; or to enable the proposed voluntary arrangement to be considered by the debtor's creditors, if the court is satisfied that a meeting of the debtor's creditors should be summoned.[223]

3.67 A report of the creditors' consideration of a proposal must be prepared by the convener or, if the proposal is considered at a meeting, by the chair. The report must state whether the proposal was approved or rejected and, if approved, with what modifications, if any. The nominee must give notice of the result of the consideration to everyone who was invited to consider the proposal, to any other creditor, and, if the debtor is an undischarged bankrupt, the official receiver and the trustee of the debtor's estate.[224]

3.68 If the creditors' meeting has approved the voluntary arrangement in respect of a debtor who is an undischarged bankrupt, the court must, on application made by the bankrupt or the official receiver, annul the bankruptcy order if the bankrupt has not made an application within the prescribed period.[225] An interim order which was in force in relation to

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221 Section 252(2) of the Insolvency Act, 1986. See also section 254 of the Act.

222 Section 255(6) of the Insolvency Act, 1986.

223 Section 256(3)–(5) of the Insolvency Act, 1986.

224 Rule 8.24 of the Insolvency (England and Wales) Rules, 2016.

225 Section 261 (1)-(2) of the Insolvency Act, 1986.

the debtor ceases to have effect on the day the report with respect to the creditors' meeting is made to the court.[226]

3.69 With regard to the implementation of a voluntary arrangement, the nominee concerned becomes the supervisor of the voluntary arrangement and must oversee its implementation. As soon as reasonably practicable after the voluntary arrangement is approved, the debtor or, if the debtor is an undischarged bankrupt, the official receiver or the trustee of the debtor's estate, must do all that is required to put the supervisor in possession of the assets included in the voluntary arrangement.[227]

Bankruptcy (also known as personal insolvency or sequestration)

3.70 The Act provides for a bankruptcy procedure in terms of which an individual may be declared bankrupt by a court. An application for a bankruptcy order may be made by the debtor, by one or more of the debtor's creditors, or by the supervisor of a debtor under a voluntary arrangement.[228]

3.71 The court appoints a person who is qualified to act as an insolvency practitioner to inquire into the debtor's affairs and submit a report to the court stating whether the debtor is willing to make a proposal for a voluntary arrangement and to act in relation to any voluntary arrangement. If the debtor is willing make such a proposal, the report must also state whether a meeting of the debtor's creditors should be summoned to consider the proposal. When considering the report of the insolvency practitioner, the court may, without any application, make an interim order if it deems it appropriate to do so for the purposes of facilitating the consideration and implementation of the debtor's proposal, or make a bankruptcy order if it deems it inappropriate to make an interim order.[229]

3.72 If the court is of the view that it would be in the debtor's interests to apply for a debt relief order instead of proceeding with the application for a bankruptcy order, the court may refer the debtor to an approved intermediary for the purposes of making an application for a debt relief order. When such a referral is made, the court must stay the proceedings on the

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226 Section 260(4) of the Insolvency Act, 1986. See also section 259(1)(b) of the Act.

227 Rule 8.25 of the Insolvency (England and Wales) Rules 2016.

228 Section 264(1) of the Insolvency Act, 1986.

229 Section 274(3) of the Insolvency Act, 1986.

bankruptcy application, but if, following the referral, a debt relief order is made, the court must dismiss the bankruptcy application.[230]

3.73 The court is not allowed to make a bankruptcy order on application by the supervisor of a debtor who is bound by a voluntary arrangement unless the court is satisfied that the debtor has failed to comply with his obligations under the voluntary arrangement, or that the debtor has failed to do all such things as may, for the purposes of the voluntary arrangement, have been reasonably required of him or her by the supervisor of the arrangement.[231]

3.74 When a bankruptcy order has been made, the official receiver must, as soon as practicable in a period of 12 weeks beginning with the day on which the order was made, decide whether to summon a general meeting of the bankrupt's creditors for the purpose of appointing a trustee of the bankrupt's estate.[232] The trustee of a bankrupt's estate must at the time of his or her appointment be qualified to act as an insolvency practitioner.[233] If the official receiver decides not to summon such a meeting, he or she must, before the end of the said period of 12 weeks, give notice of his or her decision to the court and to every creditor of the bankrupt. The official receiver becomes the trustee of the bankrupt's estate from the date notice is given to the court.[234]

3.75 When a bankruptcy order is made in a case in which an insolvency practitioner's report has been submitted to the court, the court may appoint that insolvency practitioner as trustee of the debtor's estate. When a bankruptcy order is made at a time when there is a supervisor of an approved voluntary arrangement in relation to the bankrupt, the court may appoint that supervisor as trustee of the debtor's estate.[235]

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230 Section 274A(2) and (3) of the Insolvency Act, 1986.

231 Section 276 of the Insolvency Act, 1986.

232 Section 293(1) of the Insolvency Act, 1986.

233 Section 292(2) of the Insolvency Act, 1986.

234 Section 293(2) and (3) of the Insolvency Act, 1986.

235 Section 297(4)–(8) of the Insolvency Act, 1986.

CHAPTER 4: REPEAL OF LEGISLATIVE PROVISIONS GOVERNING ADMINISTRATION ORDERS

A Background

4.1 As mentioned in paragraph 1.4 above, during 2008 the Commission published a questionnaire which included the question whether administration orders should be abolished if certain changes were made to the NCA. Responses to the questionnaire indicated that it would be to the detriment of debtors and others to abolish administration orders. Some comments received on the paper prepared for the stakeholders' workshop, which was held on 31 May 2011, again raised the issue of abolishing administration orders. Other comments advocated the retention of administration orders in addition to the debt review procedure in terms of the NCA.

B Comments received

4.2 Prof Kelly-Louw argues that it is difficult to find convincing reasons to retain administration orders in the current South African consumer debt framework. In her view, there should only be one single debt relief measure available to consumers (i.e., natural persons), irrespective of the type of debt or the amount of debt involved. She contends that debt relief and debt restructuring as provided for in the NCA, although far from perfect, do represent a significant improvement on administration orders. She recommends that the application of the measures in the NCA be broadened so that they may also be available to consumers who currently only qualify for applying for administration orders. She admits that debt review has by no means resolved all the problems currently experienced with administration orders, but says that it certainly is a more attractive alternative debt relief measure. She expresses the view that there can be no justification for maintaining the *status quo* of two similar debt relief measures that run concurrently. At present, debt review is available only to certain elite consumers – those who can afford to take up credit – and the poorest of the poor who may also be in dire need of this type of debt relief are excluded and only have administration as an option. She adds that abolishing administration orders will have the added bonus of avoiding the current problematic situation of a consumer's being subject to administration for certain debts and a debt review for others.

4.3 Prof Kelly-Louw further substantiates her argument in favour of the abolishment of administration orders as follows:

> The NCA covers most types of debt and an average consumer will be able to apply for debt review. Even if a consumer has no debts because of ordinary credit agreements, they will most likely still have debts because of incidental credit agreements (e.g., arrears on an electricity bill or telephone account) governed by the NCA and therefore will still have the option of applying for a debt review. Only a very small number of consumers will exclusively have debts falling outside the NCA and where their sole option would be to apply for an administration order. It is also not desirable to have a situation where the same debtor is subject to a debt review and an administration order. A debt review cannot be properly conducted if it only takes into consideration the debts falling within the scope of the NCA. A debt counsellor will inevitably have to take all the debts of a consumer into consideration when he or she determines how much a consumer can repay on his or her credit agreements. Thus, it logically makes sense to only have one person accessing the whole debt situation of a particular consumer. Accordingly, the Magistrates' Courts Act 32 of 1944 ("The Magistrates' Courts Act") should be amended so that a magistrate's court may also refer a matter to a debt counsellor or restructure the debts of a consumer where it relates to a matter involving any type of consumer debt, irrespective of whether or not it falls within the ambit of the NCA.
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> A further reason for arguing that the debt relief provided for in the NCA should be made available to every person is that it provides a fairly cheaper debt relief option compared to the various costs involved in applying for an administration order. A consumer may initiate his own debt review by approaching a debt counsellor directly or requesting a court to order a debt review. A consumer qualifying for an administration order unfortunately does not have the same options available and he or she has to approach a court for obtaining such an order and that necessarily implies that more costs will be involved.

4.4 In conclusion, Prof Kelly-Louw requests that instead of effecting changes to the current administration legislation, the Department of Justice abolish it entirely and rather amend the MCA so that the current debt review and restructuring processes could also apply to other debts, particularly those currently falling in the sole domain of administration orders. Therefore she is of the view that, provided the current problems with debt review can be resolved, it would be more beneficial if all consumers were able to apply for a restructuring order in terms of the debt review process.

4.5 Similarly, Bentley Attorneys argue for a single debt relief process but, interestingly, suggest that, in view of the fact that the debt relief provisions of the NCA have been poorly drafted and are vague and terse, all forms of debt moratorium, with regard to both credit agreements and other debts, should be incorporated under the well-established section 74 of the MCA.

4.6 The Banking Association of South Africa explain that the debt review procedure contained in the NCA is a procedure aimed at the rehabilitation of an over-indebted consumer and that the concept of "over-indebtedness" has been clearly defined in the NCA, which provides that "[a] consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party"[236]. This is the category of consumer that qualifies for the debt review procedure in terms of the NCA. It is a very different type of consumer compared to a debtor that is eligible for debt administration in terms of the MCA. The Banking Association of South Africa further explain that the debtor contemplated in the MCA is a debtor that "is unable forthwith to pay the amount of any judgment obtained against him in court, or to meet his financial obligations, and has not sufficient assets capable of attachment to satisfy such judgment or obligations".[237]

4.7 The Banking Association of South Africa comment that in the first instance the consumer is in financial distress but has the capability to meet, over a reasonable period of time, if assisted, all his or her obligations in terms of the credit agreements entered into. In the second case the consumer, at a certain point in time, does not have the ability to meet a judgment which is an immediate obligation, nor does he or she have any assets to meet his or her financial obligations. This consumer is worse off than the consumer in the first scenario and requires the assistance of the court to appoint someone to take control of his or her estate, stay any proceedings against him or her by his or her creditors and manage his or her estate in a manner that will treat his or her creditors equitably. This is the form of *concursus creditorum* that the legislature had in mind.

4.8 Booysen & Co. Inc. Attorneys remark that it is important to differentiate and have a clear understanding of the difference between administration orders under the MCA and debt rearrangement orders under the NCA. They tabulate the difference between the two procedures as follows:

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236 Section 79 of the NCA.

237 Section 74(1)*(a)* of the MCA.

Administration Orders	**Debt Review (debt rearrangement orders)**
Administration orders are made in respect of debts (such as judgment debts) the whole of which is due, owing and payable, and do not include *in futuro* debt. Once a creditor has enforced his rights under an *in futuro* claim, such as a credit agreement, the whole claim becomes due and payable and becomes part of the administration order debt.	Debt under a debt rearrangement order only relates to credit agreements (by definition *in futuro* claims) or incidental credit agreements. It specifically excludes any claims which are not credit agreements or credit agreements where enforcement proceedings have commenced.
A debtor with debt (i.e. now due and payable, excluding *in futuro* claims) exceeding R50 000 does not qualify for an administration order.	There is no limit on the value of the claims under a debt rearrangement order.
A debtor only qualifies for an administration order if he or she does not have sufficient assets capable of attachment to cover his or her debt.	Debt rearrangement has as its aim to preserve assets and keep credit agreements in place if the order would result in the eventual satisfaction of the debt.
An administration order is enforceable by an emoluments attachment order and all the other processes in terms of sections 74 and 65 of the MCA	A debt rearrangement order is voluntary and lapses immediately when the consumer defaults, allowing for normal legal recovery (section 88(3) of the NCA).
An administration order ensures that a debtor has enough income to maintain him- or herself and those dependent on him or her. The balance after deducting living expenses from income becomes the amount available to all creditors (subject to certain other deductions).	Should a consumer's "free" income not be sufficient to ensure payments that will result in eventual satisfaction of a claim, a debt rearrangement order will not be granted.

Administration Orders	Debt Review (debt rearrangement orders)
An administration order prevents costly multiple legal actions for recovery of small debts.	Varies contractual terms to relieve over-indebtedness but does not enforce payment.

4.9 Unlike Prof Kelly-Louw, who argued in favour of one debt relief procedure, Booysen & Co. Inc. Attorneys contend that the above-mentioned differences make it impossible and unwise to merge the two processes into one.

4.10 Krüger and Van Eeden Attorneys submit that administration orders are protecting debtors much more efficiently than debt review orders.

4.11 The Banking Association of South Africa state that the debt administration procedure is necessary in our law and has to co-exist in harmony with the provisions of the NCA. They further suggest that the SALRC consider the alignment of the provisions of section 74 of the MCA with those provisions of the NCA that deal with debt review.

4.12 Christo van der Merwe comments that section 74 contains comprehensive, properly drafted and well-considered provisions. He thinks, however, that the section needs to be amended to bring it in line with modern thinking. He is adamant that section 74 should not be abolished and in order to indicate its importance, he outlines the failure of the NCA to provide for the needs of a section 74 debtor. This failure he justifies as follows:

- The NCA offers relief only to those debtors who have not yet received a section 129 demand and in respect of credit agreements only.
- The NCA does not provide for deductions by way of an emoluments attachment order, without which an unsophisticated debtor simply cannot make weekly, fortnightly or monthly payments towards an administrator and/or a payment distribution agency (PDA).
- The absence of an emoluments attachment order system is to the prejudice of the creditors, as the debtors in the section 74 field generally lack the willingness and/or ability to make direct payments, whether by way of cash payment, bank stop order or debit order.
- The NCA lacks the protection afforded a debtor in terms of section 74P.
- The NCA lacks a simple dispute procedure similar to that contained in section 74B.

- The NCA lacks the benefit of the forfeiture of the whole claim in the event of a collection after the date of the order, as provided for in section 74J(14).
- The NCA process is simply too expensive for the middle- and lower-income debtor.
- The NCA excludes delictual claims and all claims not falling within the definition of a credit agreement.
- The lengthy procedure of the remedies afforded by the NCA is to the detriment of the lower- and middle-income class of debtors, who mostly require urgent assistance because of the fact that they typically lack the ability to take control of their financial embarrassment prior to their debts' spiralling out of control.
- The PDA system for the NCA debt review process does not suit unsophisticated debtors, as they seldom have access to e-mail for purposes of reporting, etc.
- The centralised PDAs are out of reach of debtors.
- The separation between the debt counsellor and the PDA creates confusion in the minds of unsophisticated debtors.
- The separation between debt counsellors and PDAs further creates opportunities for unscrupulous debt counsellors to conceal costs, to list unlawful claims, to make excuses for non-reporting, etc.

C Evaluation and recommendations

4.13 South African law provides for three different forms of debt relief. They are debt review, administration orders and insolvency. The procedures for these forms of debt relief are contained in the NCA[238], the MCA[239], and the Insolvency Act,[240] respectively. The first-mentioned two Acts are relevant for purposes of considering the question whether administration orders should be repealed.

4.14 Consideration should be given to whether debt review may be used as a remedy for the debtor contemplated in section 74 of the MCA. Section 79 of the NCA provides that —

> [a] consumer is over-indebted if … the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, …

238 34 of 2005.

239 32 of 1944.

240 24 of 1936.

4.15 The Commission agree with the Banking Association of South Africa that such a consumer is in financial distress, but that he or she would, over a reasonable period of time and if assisted, be able to meet all his or her obligations in terms of the credit agreements entered into. This type of consumer differs from a debtor who is eligible for an administration order in terms of the MCA.

4.16 The debtor contemplated in the MCA —

> is unable forthwith to pay the amount of any judgment obtained against him in court, or to meet his financial obligations, and has not sufficient assets capable of attachment to satisfy such judgment or obligations; …[241]

4.17 As pointed out by the Banking Association of South Africa, the debtor referred to above is, at some point in time, unable to comply with the judgment or to meet his or her financial obligations. These are immediate liabilities that are due, owed and payable. Such a debtor also lacks sufficient assets that can be sold to satisfy the judgment or his or her obligations.[242]

4.18 It is therefore clear that debt review is limited to credit agreements only, whereas administration orders have a broader ambit. Debt review is available to consumers with *in futuro* debts. These are debts that become due and payable in the future and are usually paid monthly on a specified date.

4.19 Section 4 of the NCA provides for certain exclusions from the application of the Act. In addition to these exclusions, the following categories of persons do not qualify to apply for debt review:

4.20 A consumer may not apply for debt review if the credit provider has applied for a court order to enforce a credit agreement.[243] If the credit provider has complied with all the provisions of section 130 of the NCA, the court will make an order to enforce the credit agreement.[244] In that case, the consumer (judgment debtor) will have a judgment debt of

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241 Section 74(1)*(a)* of the MCA.

242 Most often the debtor's assets are in such a ruined state that the proceeds of selling the assets would not be sufficient to cover the cost of the sheriff.

243 Section 86(2) of the NCA.

244 Section 130 of the NCA provides that the credit provider may approach the court for an order to enforce a credit agreement only if, at the time, the consumer is in default and has been in default under that agreement for at least 20 business days.

which the full amount is due, owed and payable.[245] The consumer is, however, not without a remedy and may apply for an administration order.

4.21 A judgment debtor referred to in section 65I of the MCA may not apply for debt review. Section 65I of the MCA provides as follows:[246]

> (1) If, before or during the hearing of the proceedings in terms of a notice under section 65A(1) a judgment debtor has lodged or lodges with the court an application for an administration order for hearing on a date not later than the earliest date on which such application may be heard and it appears that he has complied with the provisions of section 74, the court shall postpone the hearing of the proceedings until the application for an administration order has been disposed of.
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> (2) If a judgment debtor has not lodged or does not lodge with the court an application for an administration order before or during the hearing of such proceedings and it appears at the hearing that the judgment debtor has other debts as well, the court shall consider whether all the judgment debtor's debts should be treated collectively and if it is of opinion that they should be so treated, it may, with a view to granting an administration order, postpone further hearing of the proceedings to a date determined by the court and order the judgment debtor to submit to the court a full statement of his affairs in the form prescribed in the rules, and containing the particulars for which the said rules make provision and to cause a copy thereof to be delivered by registered post to each of his creditors at least 3 days before the date appointed for the further hearing.
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> (3) If upon receipt of the statement referred to in subsection (2) it appears that the judgment debtor's total debts do not exceed the amount determined by the Minister from time to time by notice in the *Gazette*, the court may grant an administration order under section 74 in respect of the judgment debtor's estate.
>
> (4) If the court grants an administration order in respect of the judgment debtor's estate, it shall stay the proceedings in terms of the notice under section 65A(1), but may grant the judgment creditor costs already incurred in connection with such proceedings, and such costs may be added to the judgment debt.

4.22 Furthermore, the court may order the judgment debtor to apply for an administration order, as inferred from the provisions of section 65I above.

4.23 It is clear from section 79 of the NCA that delictual claims do not qualify as obligations. The result is that a person who becomes over-indebted as a result of a delictual

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245 Alternatively, the judgment debtor may, in terms of section 65 of the MCA, pay the judgment debt in specified instalments, provided that the judgment creditor has given permission for this.

246 Section 65A referred to in section 65I provides in subsection (1)(a) that "[i}f a court has given judgment for the payment of a sum of money or has ordered the payment in specified instalments or otherwise of such an amount, and such judgment or order has remained unsatisfied for a period of 10 days from the date on which it was given or on which such an amount became payable or from the expiry of the period of suspension ordered in terms of section 48*(e)*, as the case may be, the judgment creditor may issue … a notice calling upon the judgment debtor … to appear before the court in chambers on a date specified in such notice in order to enable the court to inquire into the financial position of the judgment debtor and to make such order as the court may deem just and equitable."

claim is not eligible to apply for debt review and therefore will not enjoy the protection provided for in the NCA. Such a person risks the possibility of losing his or her assets if the court gives judgment against him or her for the payment of an amount of money and he or she fails to make payment in the manner ordered by the court. Such a person is, however, eligible to apply for an administration order before the matter is taken to court or once judgment is given against him or her.

4.24 It is apparent from the discussion above that the repeal of administration orders would adversely affect certain debtors. Hence, administration orders cannot be repealed without providing these debtors with an alternative remedy. With the current *status quo*, consumers could find themselves in an untenable position if they have to apply for both debt review and an administration order because certain debts are excluded from either of these debt relief measures. This dilemma would defeat the purpose of debt relief, because an already financially strained person would have to pay the cost of two separate applications. Furthermore, judgment debt cannot be included under debt review, although it may be included in the debtor's application for a sequestration order or administration order. A debtor with both judgment debts and credit agreements will therefore be dealt with in terms of two different procedures.

4.25 This discussion paper explores several options, including a single debt rearrangement measure, regardless of the type of debt, and the alignment of administration orders in terms of the MCA with debt review in terms of the NCA. The aim of these options should be to achieve a holistic assessment of the person's financial position, and to make access to debt relief simple and cost-effective.

CHAPTER 5: PROPOSED AMENDMENTS TO SECTIONS 74 TO 74W OF THE MAGISTRATES' COURTS ACT 32 OF 1944

A Introduction

5.1 This chapter proposes several definitions to aid interpretation of the proposed legislative provisions. It evaluates the submissions made to the Commission on various sections of the MCA. The provisions of the MCA relating to administration orders with which the Commission agrees and in respect of which the Commission has received no comments are not reflected in this chapter.

B Definitions

1 Proposed amendments

5.2 For the sake of legal certainty and clarity, the workshop paper recommended the inclusion of various definitions. These definitions are the following:

74AA. Definitions

(1) In sections 74 to 74W, unless the contrary intention appears:

"administration order" means an order issued in terms of section 74;
"administrator" means a natural person appointed as an administrator by the court in terms of section 74E;

"capital amount" means any amount owing with interest to the date of application, but does not include interest due after the date of application;[247]

"date of application" means the date set down for the hearing of the application;

"debt" means any amount owing by the debtor, irrespective of the fact that such amount may be immediately due and payable, or payable in future, or in future instalments;

"debtor" means a natural person who is a debtor in the usual sense of the word and, in the event of such a person being married in community of property, includes both the debtor and his or her spouse;[248]

"financial lease" means a contract whereby a lessor leases specified movable property to a lessee at a specified rent over a specified period, subject to a term of the contract that—

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247 Claims must be proved for the capital amount as defined here. See also the proposed amendments to sections 74(1)(b), 74A(2)(e), 74CA(1) and 74J(1A)(c).

248 It is clear that the absence or separation of one spouse may cause practical problems if the other spouse wishes to apply for an administration order. However, marriage in community of property has serious consequences for spouses as well as creditors and cannot be ignored merely because it causes inconvenience.

(a) at the expiry of the contract the lessee may acquire ownership of the leased property by paying an agreed or determinable sum of money to the lessor; or

(b) the rent paid in terms of the contract shall at the expiry of the contract be applied in reduction of an agreed or determinable price at which the lessee may purchase the leased property from the lessor; or

(c) the proceeds of the realisation of the leased property at the expiry of the lease shall accrue wholly or partly to the lessee; (par 6.1.36.1)[249].

"notice" means, subject to subsections (2) and (3), notice or delivery by registered mail, fax, electronic mail or personal delivery to an address or number indicated by the intended recipient as an address or number;[250]

regular income" means weekly or monthly or other periodical income, and includes annual performance bonuses or other annual bonuses;

"reservation of ownership contract" means a contract in terms of which corporeal or incorporeal movable property is sold to a purchaser, the purchase price is payable wholly or partly in the future, the property is delivered to or placed at the disposal of the purchaser and the ownership in the property does not pass to the purchaser upon delivery of the property, but remains vested in the seller until the purchase price is fully paid or until the occurrence of some other specified event;

"secured debt" means—

(a) a debt in respect of which a creditor can assert ownership of property delivered under a reservation of ownership contract or a financial lease in so far as payment can be obtained as a result of such assertion of ownership;

(b) a debt that is secured by property of the debtor under administration over which a creditor has a secured right by means of any special bond, landlord's hypothec or pledge, including a cession of rights to secure a debt, a right of retention or a preferent right over property in terms of any other Act;

"security asset" means property which ensures payment of or is held as security for payment of a secured debt;

"spouse" means a person's—

(a) partner in a marriage;

(b) partner in a customary union or customary marriage according to customary law;

(c) civil union partner as defined in section 1 of the Civil Union Act, 2006 (Act No. 17 of 2006); or

(d) partner in a relationship in which the parties live together in a manner resembling a partnership contemplated in paragraphs (a), (b) or (c), even if one or both are in such a partnership with another partner;[251]

"unsecured debt" means a debt which is not a secured debt. (Par 6.1.36.5.)

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249 The workshop document pointed out that as part of the review of insolvency law it is proposed that a "financial lease" be regarded as a security asset. It therefore proposes the same position for administration orders and says that a comparison should be made with the definition of "lease" in section 1 of the NCA.

250 Proof of the address and fax number is required to ensure that notice is actually given and not only alleged.

251 The definition includes "common law" or **de facto** partners and persons married according to any religion, as long as two persons live together in a manner resembling a marriage, customary union, or civil union.

2 Comments received

Definition of "administrator"

5.3 Booysen & Co. Inc. Attorneys disagree with the recommendation that the appointment of an administrator be limited to natural persons and are of the opinion that both natural and juristic persons should be eligible for appointment as administrators. They maintain that in the case of an attorney administrator, the partners in or directors of the firm are personally and jointly liable for the debts and actions of the firm as a juristic entity. Likewise, in the case of a non-attorney administrator, the proprietor of or partners in the business are liable. If the business is a juristic person, it must in any event, to the satisfaction of the court, give security, which can include personal sureties from directors or members. Booysen & Co. Inc. Attorneys further explain that in a firm of attorneys, the appointment is usually taken up by one attorney. Should he or she die, retire or leave the firm or become unable to act, individual applications under section 74E must be launched with regard to each order to appoint another attorney in the firm as the administrator, which will result in unnecessary costs for debtors.

Definition of "capital amount"

5.4 Booysen & Co. Inc. Attorneys indicate that the debtor must list all the claims in his or her statement of affairs (which will include interest to that date). Furthermore, the creditor may raise objections in terms of section 74B(1)*(b)*, and once established the claims (i.e. capital amount plus interest to date of granting of the order) are listed in the 74G(1) list of creditors. This has the following effect:

- All the listed creditors are entitled to a pro rata share of monies paid in terms of the administration order. Such pro rata payments are calculated according to the amounts set out in the section 74G(1) list of creditors.
- The listed amounts include interest from the date on which the debtor/consumer went into default (if the underlying debt was a credit agreement) to the date of the granting of the administration order.
- A creditor who wishes to claim further interest must prove his or her claim in terms of section 74H. He or she would, in the case of a credit agreement where the consumer is in default, be limited by the provisions of section 103 of the NCA, namely the statutory *in duplum* rule, which relates to interest and costs from the date of default and not the date of the granting of the administration order.

5.5 HVDM Attorneys disagree with the proposed definition, as it means that all interest, collection costs and the like, up to the date of the application would have to be capitalised, changing the nature of the claim. As a result, the capital amount would then be the amount "owing" or "due and payable" on the date of the application.

5.6 Krüger and Van Eeden Attorneys caution that the definition of "capital amount" could be misunderstood by some creditors, who might add interest until such time as the interest is equal to the capital amount as defined and not until it is equal to the original capital amount signed for in the original credit agreement.

Definition of "date of application"

5.7 The respondents generally agreed with the proposed definition.

Definition of "debt"

5.8 Booysen & Co. Inc. Attorneys oppose the inclusion of *in futuro* debts in the definition of "debt" or the notion that such debts should be included in an administration order in the manner proposed. They submit that *in futuro* debt are credit agreements and that there are enough debt rearrangement provisions in the NCA to deal with it. They suggest that the definition of "debt" should follow the definition set out in the current section 74A(2)(e)(i) of the MCA, namely "debts the whole amount of which is owing, including judgment debts payable in instalments".

Definition of "notice"

5.9 The Banking Association of South Africa say that because the proposed definition accommodates service by fax, e-mail and other electronic devices, it alleviates the difficulties previously experienced by creditors, who had to send notices and communications by mail only.

5.10 Booysen & Co. Inc. Attorneys support the proposal of giving notice by fax or e-mail, but reason that the practice under debt rearrangement orders has resulted in an excessive burden of proof: the proof required by our courts makes this type of service virtually impossible or impractical. Furthermore, it cannot be a requirement that an e-mail or fax address be nominated in respect of each individual application. A general confirmation by a

creditor that he, she or it will accept service in terms of section 74 of the MCA at a specific e-mail address or fax address must be sufficient. Booysen & Co. Inc. Attorneys propose the inclusion of the words “at which it will accept delivery of all notices and applications in terms of section 74” at the end of the definition, after the word “number”.

Definition of “regular income”

5.11 Matthee Attorneys are of the opinion that commission received and income of contract workers should be included because work are often contracted out to avoid certain provisions of labour legislation. They argue that the exclusion of such workers would mean that they cannot use these measures to their benefit. They are, however, of the view that annual bonuses should not be included because people who usually qualify for an administration order fall in the very-low-income group. They generally use their annual bonuses to buy necessities such as school clothing.

5.12 Norman Shargey opposes the inclusion of annual bonuses or other annual amounts because, according to him, debtors do not know if they will receive annual bonuses. He submits that because these forms of income are not taken into account in debt review proceedings it should not be taken into account in respect of administration orders.

Definition of “spouse”

5.13 HVDM Attorneys and Matthee Attorneys comment that paragraph *(d)* of the definition is broader than what is provided for in our family law and could create problems in practice. HVDM Attorneys use the following scenario to explain the kind of problem that might be experienced: “Two young people will live in one house, the order will be granted, and two months later they will break up and the case will have to be revised as both incomes would have been taken in consideration.”

5.14 The Magistrates Court Committee of the Cape Law Society submit that the extension of “spouse” to common-law marriages and/or *de facto* partners will limit the option of an administration order as a possible debt relief measure if the statutory limit of R50 000 remains in effect. The Committee state that the average debtor (applying as a single applicant) could easily run up unsecured debts in excess of R50 000, especially when the debtor has various microloans. Furthermore, the proposed extension of “spouse” would only be used in those applications where the joint debts are merely nominal and would force spouses in similar partnerships to opt to apply independently to court for an administration

order as single applicants. Hence the Committee are of the opinion that the extension of "spouse" to common-law marriages and/or *de facto* partners would benefit debtors as intended only if the current statutory limit of R50 000 is increased.

3 Evaluation and recommendations

Definition of "administrator"

5.15 See the discussion in paragraphs 5.216 to 5.222.

Definition of "capital amount"

5.16 In the light of the comments received, the Commission recommend that this definition be deleted.

Definition of "date of application"

5.17 As no objection against the inclusion of the proposed definition was received the Commission recommend that the definition be included in the proposed legislation.[252]

Definition of "debt"

5.18 For the reasons set out in paragraphs 5.307 to 5.315, the Commission are of the view that the proposed definition of "debt" be deleted. See in this regard the definition of "debt" in the proposed Debt Rearrangement Bill.

Definition of "notice"

5.19 Regarding notice to creditors, the Commission are of the view that it would not be cost effective to obtain the physical address, e-mail address and fax number in respect of each individual application as this would place an additional burden on administrators, which might lead to further costs for debtors. The Commission thus recommend that the administrator may inform a creditor that any notice, application for or copy of an administration order or other related matter that must be brought to the attention of the

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[252] Clause 73A(1) (Bills: options 1 & 2).

creditor in respect of a debt under administration with the administrator would be delivered to an address or number or electronic address given by the creditor as his, her or its address, number or electronic address, unless the creditor gives a different address, number or electronic address for the purpose of delivery.[253]

5.20 Administrators should realise, however, that when proof of delivery is required by either the creditor or the court they should readily be able to provide such proof. Doing so in the case of delivery by fax or e-mail should not be a problem. In case of a fax, a transmission report that the fax was transmitted successfully, and in the case of an e-mail, a notification that the e-mail was delivered successfully, should be sufficient proof.[254]

Definition of "regular income"

5.21 Regarding the suggestion by Matthee Attorneys that any commission received and the income of contract workers be included in the definition of "regular income", the Commission are of the view that these are understood in the expression "periodical income". Periodical income should be understood as income received from time to time, whether or not at regular intervals.

5.22 As regards Matthee Attorneys suggestion that annual bonuses should not be used for the payment of the debtor's debts, the Commission is of the view that a portion of such bonuses be allocated to the payment of a debtor's debts in order to shorten the period of the debtor's administration. Administrators are encouraged to find out from debtors what essential goods they need to buy with such bonuses.

Definition of "spouse"

5.23 With reference to the comments made by HVDM Attorneys, it should be kept in mind that it would be difficult to determine the correct monthly instalments the debtor would be able to pay if the income of the debtor's live-in partner is not taken into account. The debtor would be unable to afford a higher instalment if his or her partner's income is not taken into account. It would therefore only be fair towards the debtor's creditors to calculate the correct monthly instalment. By paying a higher instalment, the debtor would be able to settle his or her debts sooner. However, if for some reason the income of the debtor's partner is no

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253 Clause 73A(4) (Bills: options 1 & 2).

254 Clause 73A(2) (Bills: options 1 & 2).

longer available, the debtor would be able to apply for an amendment of the administration order in terms of section 74Q of the MCA.

5.24 The Magistrates Court Committee of the Cape Law Society's concern that the proposed paragraph *(d)* of the definition might disqualify a debtor from applying for an administration order because of the statutory limit of R50 000 has been addressed by the Commission's recommendation in paragraphs 5.50 to 5.55 that the limit be increased to R300 000.[255] Therefore, the Commission reaffirm their proposed definition of "spouse".

C When notice by fax or e-mail is regarded as notice and when notice to creditor may be given to attorney of creditor

1 Proposed amendments

5.25 The workshop paper recommended the inclusion of the following subsections after the subsection on definitions in the MCA.

> (2) A notice by fax is regarded as notice if, according to a transmission report, the fax has been transmitted successfully and notice by e-mail is regarded as notice if no report is received that the e-mail could not be delivered.
>
> (3) Notice to a creditor may be given to the attorney of the creditor if the debtor declares that it is clear that the attorney is acting for the creditor.

2 Comments received

5.26 Booysen & Co. Inc. Attorneys caution that the proposed subsection (3) will result in unnecessary litigation. Booysen & Co. point out that it is trite law that every party affected by an application order should receive notice of such application. In addition, notice must be sent to the creditor as the affected party.

5.27 Matthee Attorneys are of the view that subsection (3) could be problematic because magistrate's courts insist that a written declaration by the creditor should be lodged, which would delay and complicate matters. In their opinion creditors might abuse this section to delay finalisation of the administration or to make it difficult. They submit therefore that it

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255 Amendment to section 74(1)(b) (Bills: options 1 & 2).

should be sufficient to have communication or legal documentation in some form or another from attorneys that confirms that they act on behalf of a creditor.

3 Evaluation and recommendations

5.28 Having regard to the concerns raised, the Commission realise that the proposed subsection (3) could cause problems, because while it might be clear from the debtor's perspective that the attorney is acting for the creditor, it might not be the case for any of the other parties. The Commission therefore recommends that subsection (3) be deleted.

D Jurisdiction

1 Proposed amendment

5.29 In the light of submissions that "forum shopping" occurs in practice, the workshop paper recommended the insertion of the following section before section 74 of the MCA.

Jurisdiction
A debtor may apply for an administration order to the court in the district within which the debtor normally resides, is employed or carries on business.

2 Comments received

5.30 The Banking Association of South Africa are in favour of the proposed amendment. According to them this amendment will –

- enable a debtor to have access to his or her affairs with the administrator;
- provide the debtor with the convenience of easily reporting any change in his or her financial situation to the administrator;
- place the administrator in a favourable position in relation to the debtor's employment status, which will effectively benefit such debtor's creditors;
- allow more interaction and engagement between a debtor and an administrator, which will result in the debtor's being well informed of the administration procedure, the duration of the process and the consequences of failure by the debtor to meet the obligations in terms of the court order;
- provide magistrates within a particular jurisdiction with a mechanism to assess the competencies of the administrator because magistrates have a fair amount of

knowledge about the standing of administrators practising in their area of jurisdiction.

5.31 Booysen & Co. Inc. Attorneys point out that the following courts have jurisdiction in respect of an application for an administration order:

- The court in whose district the debtor resides, is employed or carries on business;[256]
- any court in which a judgment had been obtained against the debtor;[257]
- any magistrate's court in which section 65 proceedings are underway against the debtor.[258]

5.32 Therefore, forum shopping cannot be an issue in administration order applications. Booysen & Co. Inc. Attorneys have no objection to the proposed amendment.

5.33 HVDM Attorneys support the proposed amendment. They are of the view that an application for an administration order should be brought in the district where the debtor or applicant resides, is employed or carries on business. Of particular concern to them is establishing jurisdiction in a court where judgment was taken against the debtor.[259] They caution that this gives some "unscrupulous administrators" a wide selection of districts to choose from and that they may, in some instances, "invent" their own district as the chosen one.

3 Evaluation and recommendations

5.34 The Commission are of the view that jurisdiction should depend on a meaningful connection between the debtor and the court and not on the preference of the applicant or the applicant's attorney. The Commission therefore agree with HVDM Attorneys that jurisdiction should not be established in a court where judgment was taken against the debtor as this could encourage forum shopping. The Commission reaffirm their

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256 Section 28(1)(a) of the MCA.

257 Section 74(1) of the MCA.

258 Section 65 of the MCA. Booysen & Co. Inc. Attorneys further explain that section 65I of the MCA creates a procedure for a debtor to bring an application for an administration order not later than the earliest date on which such application may be heard if he or she is faced with a section 65 inquiry. The section 65 inquiry will be adjourned if it appears that he or she has complied with the provisions of section 74. In addition, under section 65I(2), the court may order a debtor to submit to the court a full statement of affairs in the form prescribed in the rules if a section 65 inquiry shows that the judgment debtor has other debts as well and the court is of the opinion that they should be dealt with collectively. They further note that an administration order under this subsection is not a voluntary application by the debtor; the debtor is in fact ordered by the court to apply for an administration order.

259 See section 74(1) of the MCA.

recommendation that a debtor may apply for an administration order to the court in the district within which he or she normally resides, is employed or carries on business. Furthermore, a court should continue to have jurisdiction to make an administration order under section 65I proceedings.[260]

E Section 74: Monetary cap and granting an administration order subject to sufficient income

1 Proposed amendments

5.35 An administration order may be granted when the total amount of all a debtor's debts due does not exceed the amount of R50 000.[261] This amount has not been adjusted since 1993[262] and is out of touch with the cost of living, which has increased tremendously over the past decade. Many consumers are already over-indebted, but their estates are such that they do not qualify for sequestration, nor, unfortunately, for bringing a successful application for debt review in terms of section 86 of the NCA. The workshop paper recommended that section 74(1) of the MCA be amended as follows:

(1) Where—

(a) a debtor is unable forthwith to pay the amount of any judgment obtained against him in court, or to meet his financial obligations, and has not sufficient assets capable of attachment to satisfy such judgment or obligations;

(b) a debtor states that the total capital amount of all **[his debts]** the debtor's unsecured debt due does not exceed the amount determined by the Minister from time to time by notice in the *Gazette*;[263] and

(c) the regular income of the debtor, after deduction of costs and periodical payments authorised by the court, is sufficient to justify the making of an administration order, taking into account the alternatives to administration,[264]

260 Amendment to section 74(1) (Bills: options 1 & 2).

261 See section 74(1)(b) of the MCA.

262 The Minister determined the amount at R50 000 by GN R.3441 of 31 December 1992 with effect from 1 January 1993. GN R.3441 was repealed by GN R.1411 of 30 October 1998, which left the amount unchanged. GN R.1411 was repealed by GN 217 of 27 March 2014, which also left the amount unchanged. See *Government Gazette* No. 3441 read with *Government Gazette* No. 1411 of 30 October 1998. See in this regard Jones & Buckle Vol 1: The Act 10 ed (service 14, 2017) 492.

263 The workshop document proposes that administration orders remain a remedy for debtors with limited unsecured debts. It was argued that if secured assets were excluded, many more debtors would qualify as large debts are often secured. Also, it may not be necessary to adjust the amount if the limit applied to the capital amount of unsecured debts.

264 The workshop document states that the need for debt relief does not justify administration orders which favour neither the debtor nor creditors. It was further argued that it is not advisable to provide that a percentage of regular income should be available for payment of ordinary debts and that the magistrate

a **[such]** court with jurisdiction **[or the court of the district in which the debtor resides or carries on business or is employed]** may, subject to subsection (2), upon application by the debtor or under section 65I, **[subject to such conditions as the court may deem fit with regard to security, preservation or disposal of assets, realization of movables subject to hypothec (except movables referred to in section 34 of the Land Bank Act, 1944 (Act 13 of 1944)), or otherwise,]** make an administration order in accordance with section 74C **[(in this Act called an administration order) providing for the administration of his estate and for the payment of his debts in instalments or otherwise.]**

2 Comments received

Limit of R50 000

5.36 Several respondents[265] argued that the current jurisdictional limit of R50 000 is too low and recommend that this amount be increased.

5.37 HVDM Attorneys draw the Commission's attention to the judgments in the Supreme Court of Appeal where it was decided that legal action would be deemed to have commenced with the section 129 notice provided for in the NCA. Having regard to these judgments, HVDM Attorneys believe that far more credit agreements will fall under administration orders as the only remedy for an over-indebted consumer. They point out that the inclusion of *in futuro* debts would necessitate an increase in the current limit of R50 000. Krüger and Van Eeden Attorneys agree with this point.

5.38 Matthee Attorneys support an increase of the current amount in such a manner that each creditor to whom a debt is owed that falls within the jurisdiction of the magistrate's court may be listed in the administration order, irrespective of whether the total amount of the debtor's debts is higher than the monetary jurisdiction of the magistrate's court. Matthee Attorneys' reason for this view is that a creditor is in any event free to apply for sequestration of the debtor's estate if the creditor is of the opinion that administration is not a workable solution.

5.39 Although the members of the Magistrates' Courts Committee of the Cape Law Society agree that the amount of R50 000 should be increased, they differed about how much the increased amount should be. Some members argued that the limit should be

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should retain a discretion, but should take into account the regular income of the debtor and alternatives to administration orders.

265 Booysen & Co. Inc., HVDM Attorneys, Krüger and Van Eeden Attorneys, Matthee Attorneys, Magistrates' Court Committee of the Cape Law Society, and the Banking Association of South Africa.

R100 000, while others were of the view that the limit should be adjusted in accordance with the jurisdictional limit of the civil regional courts. Those in favour of the latter amount gave the following example to support their view: "[W]here a debtor is involved in an accident and causes damages in the sum of R250 000-00. A financially strained debtor will not qualify for administration and will neither qualify for debt review as delictual claims are categories of debt specifically excluded from the debt review process. This debtor risks the possibility of losing his assets without being afforded an opportunity of a court considering an application for administration."

5.40 Christo van der Merwe mentions that the NCA sets no monetary limit for debt review applications; he therefore questions why a monetary limit is set for administration order applications. He points out that there is no remedy for a debtor who has no assets[266] and who has received a section 129 notice on his or her credit agreements[267] if his or her total debt exceeds the limit set by section 74. He argues that there would be no prejudice if all debts, except secured debts, were included, *in futuro* debts excluded and the monetary cap removed. This, in his view, would raise the administrator's fee as the instalments would increase, but the fee would not become excessive as the rules cap the administrator's 10% commission portion (which is included in the total fee of 12,5%). He suggests that if the monetary limit is retained, it should be brought in line with the magistrates' courts general monitory jurisdiction.

Capital amount

5.41 With reference to the proposed definition of "capital amount", the Magistrates' Court Committee of the Cape Law Society submit that creditors do not disclose the capital amount outstanding prior to the order being granted. In addition, interest adjustments are usually made after the court order has been granted. Therefore, the calculation of interest due as at the date of the application would exclude many debtors whose debts (after addition of interest) might easily exceed R50 000.

Unsecured debt

5.42 Booysen & Co. Inc. Attorneys comment that the proposed amendments to section 74(1)(b) are based on the premise that the debt taken into account to determine the

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266 This debtor cannot apply for sequestration.

267 This debtor cannot apply for debt review.

maximum amount allowed includes debt in respect of secured assets and debts under reservation of ownership agreements and mortgage bonds. According to them, this is not the case.

5.43 The Banking Association of South Africa say that the proposed amendment implies that if secured assets were excluded, more debtors would qualify as large debts are often secured. The Association disagree that this would allow more debtors into the administration order process. They mention that secured loans up to R180 000 are currently available in the credit market and that secured debts such as mortgage agreements are in any case excluded from the calculation to determine the monetary limitation. It is therefore incorrect to assume that the monetary limitation would restrict the number of debtors that would qualify for administration.

Regular income

5.44 The respondents challenge the proposed section 74(1)(c) and give the following reasons for their view that it be deleted:

- The proposed amendment will result in endless litigation to try to determine what is meant by "is sufficient to justify the making of an administration order taking into account the alternatives to administration".[268]
- The proposed amendment seems to be in conflict with (both the current and the proposed) section 74C.[269]
- The proposed amendment implies that the applicant would have to address the court on all other debt review remedies available in law – such as debt review, voluntary distribution, section 65J(7) and sequestration – in order to convince the court that administration is the best or only remedy for him or her. This would not only lengthen the format of the application, but also be far more costly because legal opinions, debt counsellor opinions, etc., requiring substantial investigation, would have to be obtained.[270]
- In South African law, there is more than enough case law setting out the prerequisites for the granting of an administration order.[271]

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268 Booysen & Co. Inc. Attorneys.

269 Booysen & Co. Inc. Attorneys.

270 HVDM Attorneys.

271 HVDM Attorneys.

5.45 Booysen & Co. Inc. Attorneys add the following comment in respect of the proposed section 74(1)(c). The purpose and result of an administration order include, amongst other things, the following:

- An administration order prevents execution against assets if the debtor does not have sufficient assets capable of attachment to satisfy all his or her judgments or obligations.
- It creates a situation where all creditors (irrespective of whether they have judgments or not) will all share pro rata in the amount paid to and by the administrator.
- It allows creditors to receive at least a pro rata payment in respect of their claims without having to incur legal costs.
- It streamlines the court process with regard to debt collection. It anticipates legal action in the court by either granting an administration order or ordering a judgment debtor to place his or her estate under administration. (Multiple court actions are consolidated in one application.)
- It ensures, under the provisions of section 74C, that the debtor has sufficient income to maintain him- or herself and those dependent on him or her.
- Execution in respect of more than one judgment is consolidated in one emoluments attachment order and does not result in multiple emoluments attachment orders served on the debtor's employer.
- It limits legal costs for both the debtor and his or her creditors. As relatively small claims are involved, it is conceivable that legal costs could eventually amount to more than the original claims. An administration order prevents this.
- The purpose of an administration order is not debt relief. It is a quick, easy and inexpensive way of execution against debtors with small estates and low-income debtors.

5.46 Furthermore, a creditor is clearly entitled to an order for a monthly payment of whatever the debtor can afford to pay under a section 65A inquiry. Therefore, the fact that the creditor may only be successful with an order for R100, in respect of a R100 000 claim is irrelevant. Likewise, creditors under an administration order are entitled to, and have a right to claim, whatever the debtor can pay. There is no alternative and sequestration is also not an option.

5.47 Booysen & Co. Inc. Attorneys point out that should an administration order not be granted, the creditors would –

- proceed to sell whatever little the debtor has, resulting in creditors' being preferred and hardship for the debtor and those dependent on him or her;
- proceed with individual section 65 inquiries resulting in –
  - multiple emoluments attachment orders;
  - duplication of costs;
  - further overloading of the court system.

5.48 Matthee Attorneys find the proposed section 74(1)(c) problematic and say that there is ample case law which indicate that an administration order could be granted irrespective of whether a substantial amount was offered for payment of debt. They argue that if any creditor thinks that a debt is not being properly paid off, the creditor is free to apply for sequestration of the debtor's estate. Matthee Attorneys highlight the following benefits of an administration order, notwithstanding the fact that the debtor has insufficient funds to pay his or her debts:

- It reduces the burden on magistrates' courts because individual amounts are not claimed in terms of section 65 of the MCA, but the order consolidates all the debts in one administration order.
- It prevents creditors from incurring unnecessary legal costs if a person is unable to pay his or her debts.
- An agreement can be concluded with a creditor to pay off debts sooner. The administrator may pay a creditor in full if the debt owed to such creditor is less than or equal to the monthly amount paid to the administrator. If a creditor accepts a reduced amount or is prepared to write off 50% of the debt, the creditor can be listed as a preferred creditor. (This brings big savings for the debtor and is also to the advantage of other creditors.)

5.49 The Magistrates Court Committee of the Cape Law Society word their disagreement with the proposed section 74(1)(c) as follows:

> This section does not specify what other 'alternatives' should be considered by the debtor and further proposes that the debtor must 'show' that he has considered such 'alternatives' before applying for an administration order. In other words, this section dictates that an administration application should be the 'last option' for the debtor after he/she has considered 'alternatives'. If the latter is the reasoning behind this proposed change, then surely it leaves the debtor 'exposed' to legal action that could be taken by his creditors whilst he attempts to consider his 'alternatives'. This could have detrimental consequences for a debtor. To what extent should a debtor show that he/she has taken the 'alternatives' into account? Many debtors consider applying for an administration order after they have attempted to make alternate

> arrangements with creditors, who simply either do not get back to the debtor or proceed with such legal action, ignoring the debtor's attempts to make payment arrangements. The proposed changes to this section leaves a debtor powerless to an extent that he/she cannot apply to court, at any stage, in good faith for an administration order as the relief available is conditional upon the debtor showing that he has considered 'alternatives'.

3 Evaluation and recommendations

Limit of R50 000

5.50 It is possible that the total amount of a debtor's debt may, as a result of the addition of further creditors, exceed the limit of R50 000 while an administration order is still in force.[272] In such a case, the court has a discretion to rescind the order, but the order is not invalid merely because the limit is so exceeded.[273] However, the court does not have a discretion to grant an administration order if the debtor's liabilities as disclosed in his or her statement of affairs exceed the prescribed amount.[274]

5.51 There is general agreement that the current limit of R50 000 is too low. Regarding the proposal that this limit be removed, in *Levine v Viljoen*[275] Roper J expressed the view that because of the limited facilities for investigation, administration orders are unsuitable for use in the case of more elaborate estates where the transactions of the debtor may have been complex.[276] He further stated as follows:[277]

> An examination of the provisions of sec. 74 of the Magistrates' Courts Act shows that the machinery therein provided for the administration of the estate of a debtor is of a rudimentary and limited character. On the day appointed for the hearing of an application for an administration order the debtor is obliged to appear in person and may be examined as to his financial position. There is however no provision for a systematic examination into his business transactions and his assets and liabilities such as is carried out in the case of insolvency by the trustee of the sequestrated estate. The examination on the day of hearing is by the presiding magistrate or by any creditor or representative of a creditor, who in the majority of cases would be unlikely to have any detailed knowledge of the affairs of the debtor as a whole or

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272 Section 74H of the MCA provides for the inclusion of creditors in the list of creditors after the granting of an administration order.

273 Section 74(2) of the MCA.

274 Jones & Buckle Vol 1: The Act 10 ed (service 10, 2016) 493.

275 1952 (1) SA 456 (W) at 460.

276 See also Jones & Buckle Vol 1: The Act 10 ed (service 10, 2016) 490.

277 459B-G.

> sufficient information to form the basis of an effective inquisition into his actual financial position. There is no impounding of the applicant's books or other business records, and no provision for his recall for further examination after an administration order has been made. The court and the creditors are therefore largely in the hands of the debtor himself. Effective safeguards against concealment of assets or preferential treatment of creditors are practically non-existent. It is true that when making an order for administration the court appoints an administrator … who would have neither the time nor the staff nor the training necessary for a full inquiry into the debtor's business affairs, and whose duties are moreover in fact limited to the receipt of the periodical payments ordered by the court and their distribution among the creditors.

5.52 Boraine states that a major increase in the amount would require the introduction of more sophisticated procedures regarding interrogations, the treatment of voidable dispositions and unexecuted contracts.[278]

5.53 Hence, removing the limit for administration orders completely might be problematic. The Commission are more in favour of increasing this amount to an amount of R300 000. This amount is higher than the monetary jurisdiction of the Magistrates Court. The new monetary jurisdiction limit for the district courts has increased from R100 000 to R200 000 from 1 June 2014.[279] The Commission is, however, of the view that an application for an administration order should always be heard in the Magistrates' Court (district court) although it might exceed the monetary jurisdiction of that court. The Commission thus recommends that section 74 of the MCA should be amended to state that an application for an administration order must be heard in the Magistrates' Court.

5.54 The Commission considered the question that increasing the current limit to an amount of R300 000 might be too high having regard to the limited nature of the investigative mechanism provided for in the MCA. On the other hand, debt restructuring in accordance with the NCA, unlike the administration order process, does not explicitly provide for financial interrogation of the consumer,[280] despite the fact that the NCA places no monetary limit on an application for debt review.

5.55 Moreover, increasing the limit to an amount of R300 000 would widen the scope of administration orders as a debt relief measure to include those who qualify for neither

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278 Boraine A "Some thoughts on the reform of administration orders and related issues" (2003) 2 *De Jure* 217-251 at 233 and 248.

279 *Government Gazette* Volume 585, Number 37477, 27 March 2014.

280 Boraine A "A comparison between formal debt administration and debt review – the pros and cons of these measures and suggestions for law reform (Part 2)" (2012) 45:2 *De Jure* 254-271 at 263.

sequestration nor debt review. The Commission therefore recommends that the threshold of R50 000 be increased to R300 000. This amount should be increased by the Minister from time to time by notice in the *Government Gazette*.[281]

Capital amount

5.56 With reference to the comments made on the definition of "capital amount" in paragraph 5.41 above, the Commission recommend the deletion of the word "capital" before the word "amount" and the deletion of the definition of "capital amount".

Unsecured debt

5.57 With reference to the comments made on the definition of "unsecured debt" in paragraphs 5.42 and 5.43 above, the Commission recommend the deletion of the word "unsecured" before the word "debt' and the deletion of the definition of "unsecured debt". However, the Commission recommends that the court should be empowered to exclude one or more secured debts from the debtor's administration, provided that the assets concerned are not essential for the debtor or his or her dependant's daily living or needed for the debtor's occupation, trade or business.[282]

Regular income

5.58 The Commission reconsidered the proposed paragraph (c) in the light of the comments made and recommend that it be deleted. The Commission is, however, of the view that the court must consider whether the debtor will have sufficient means for his or her maintenance and that of his or her dependants after payment of the instalment in terms of the administration order.[283]

Section 74: When administration order may not be granted

1 Proposed amendments

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281 Amendment of subsection (1)(b) and insertion of subsection (1A) in section 74 (Bills: options 1 & 2).

282 Clause 74C(1)(f).

283 Clause 74B(1)(k) (Bills: option 1&2).

5.59 The Commission believe that a fair balance must be struck between the debtor's interests and the interests of creditors. A debtor who applies for an administration order has certain responsibilities, which include making a complete and accurate disclosure of his or her financial affairs and other required information. Furthermore, a debtor should not be allowed to apply repeatedly for administration. As a general rule, it should be provided that 12 months must pass before a fresh application can be made. Innocent rescissions of administration orders do occur. For instance, the order may be rescinded because the debtor could not make any payments after he or she has lost his or her job. Similarly, an administration order may be refused for technical reasons without any bad faith on the part of the debtor. The debtor should, however, be allowed to show cause why the application should be granted despite a previous application or order. Hence, the workshop paper recommended that the following provisions be inserted after section 74(1)

(1A) No administration order shall be granted if it appears that—

(a) the debtor has knowingly or recklessly furnished false or misleading information in the statement of affairs referred to in section 74A(1)*(a)*(i) or during the hearing;

(b) the debtor obtained credit or the extension of credit recklessly or with fraudulent intent within six months before the date of application;

(c) either an unsuccessful application was made for the granting of an administration order or an administration order was set aside within 12 months before the date of application; and

(d) the debtor has received a discharge in terms of the Insolvency Act, 1936 (Act No. 24 of 1936), within four years before the date of application.

5.60 The workshop paper further proposed that subsection (2) be amended as follows:

(2) An administration order shall not be invalid merely because at some time or other the capital **[total]** amount of the debtor's unsecured debt is found to exceed the amount determined by the Minister from time to time by notice in the *Gazette*, but in such a case the court may, if it deems fit, rescind the order.

2 Comments received

Granting of administration order

5.61 Booysen & Co. Inc. Attorneys are of the opinion that the words "if it appears" in the proposed subsection (1A) are open to interpretation, which might well result in unnecessary litigation. They propose that these words be replaced by the words "should the court find".

Credit or the extension of credit obtained recklessly or with fraudulent intent within six months before date of application

5.62 According to HVDM Attorneys the intention of the reckless-credit provisions in section 80 of the NCA is to protect debtors against reckless credit-granting by credit providers. They query why credit obtained recklessly should be a disqualification for applying for an administration order. They say that if the intention is that the magistrate hearing the application for an administration order should have the discretion to decide if an agreement was in fact reckless with the view to applying the consequences set out in the NCA to the granting of that credit agreement, then the MCA should add such a provision in section 74C.

5.63 The Magistrates Court Committee of the Cape Law Society comment that the proposed amendment does not take cognisance of the personal circumstances of the debtor that resulted in the application for an administration order. The Committee note that the amendment excludes a debtor who finds him- or herself in a position where his or her spouse becomes unemployed within six months after the credit was obtained. The debtor may have had good intentions of paying such debt in full but failed to do so because of the untimely loss of employment. The Committee observe that the wording of the proposed amendment does not leave any discretion for a court to consider an application for an administration order even though the debt was incurred within six months before date of application. The Committee therefore suggest that Form 45 should include a section where the debtor may direct the court to certain facts that necessitated the application for an administration order. The Committee are of the view that a creditor, even when a debtor's debt had been incurred recently, might support the granting of the administration order as the creditor would realize that the prospects of recovering the capital are better with a debtor under administration than with a debtor who simply cannot afford to pay anything.

5.64 Christo van der Merwe says that the words "the extension of credit recklessly" penalise the debtor instead of the creditor. He recommends that paragraph (b) be redrafted as follows: "… the debtor obtained credit with fraudulent intent within six months before the date of the application".

Unsuccessful application or administration order set aside within 12 months before date of application

5.65 The Banking Association of South Africa agree with the proposed amendment. They state that the current practice is that once a debtor becomes unemployed, creditors insist

that the administrator apply to court to have the administration order rescinded. According to the Banking Association of South Africa, this resolves the problem of the debtor, once re-employed, again applying for an administration order, thereby hindering a creditor's ability to recover its, his or her debt. This would also prevent a debtor from abusing the administration process.

Discharge in terms of the Insolvency Act within four years before date of application

5.66 Booysen & Co. Inc. Attorneys state that the proposed amendment would never find application in practise and that it is inconceivable that such a situation would ever arise. HVDM Attorneys support the proposed amendment in principle, but caution that a debtor could be without protection if he or she gets into financial trouble because of *bona fide* unforeseen circumstances, such as a medical condition. They suggest that the following be added at the end of paragraph (d): "unless good cause is shown by the debtor".

No administration order after debt review

5.67 The Banking Association of South Africa submit that neither the provisions of the NCA nor the provisions of the MCA prevent a consumer from first applying for debt review in terms of the NCA and later, when the debt review process does not suit him or her, apply for an administration order. They recommend therefore that in order to prevent consumers from forum shopping and using the debt review process as a mechanism to avoid meeting their credit obligations a consumer whose application for debt review has been accepted by a debt counsellor should not be entitled to apply for an administration order. Furthermore, an administration order should not be granted in cases where the debtor has successfully applied for debt review in terms of the NCA but subsequent to entering the debt review process has defaulted on his or her obligations in terms of the rearrangement agreement or consent order, or if the credit provider has invoked the right to terminate the debt review process in terms of section 86(10) of the NCA. The Banking Association of South Africa believe that this would prevent forum shopping by debtors that merely use the debt review and debt administration processes to avoid meeting their obligations and as a method to frustrate the rights of creditors.

When administration order is not invalid

5.68 With reference to their comment in paragraph 5.42, Booysen & Co. Inc. Attorneys suggest the deletion of the word “unsecured”.

3 Evaluation and recommendations

Granting of administration order

5.69 The Commission do not support Booysen & Co. Inc. Attorneys suggestion that the words “if it appears” be replaced with the words “if the court finds” as there is no need for the court to make any final finding at this stage. The matter may be sent for further investigation where the circumstances in paragraphs (a) to (d) appear.[284]

Credit or the extension of credit obtained recklessly or with fraudulent intent within six months before date of application

5.70 With reference to the comments of HVDM Attorneys and Christo van der Merwe, the Commission appreciate that as much as it is the obligation of a debtor not to obtain credit knowing well that he or she cannot afford the monthly instalments, it is ultimately the responsibility of credit providers to do a proper assessment of the debtor’s financial position so as to ensure that credit is not granted recklessly. Hence the Commission recommend that the words “recklessly or” be deleted from the proposed paragraph (b).[285] However, the Commission is cognisant of the fact that some debtors intentionally withhold information required for doing an affordability assessment from creditors. Debtors’ failure to provide creditors with the requisite information often have a negative impact on the ability of credit providers to do a proper affordability assessment. The Commission therefore recommends that an administration order should not be granted if it appears that the debtor failed to fully and truthfully furnish the credit provider with the required information and the debtor’s failure to do so materially affected the ability of the credit provider to make a proper assessment.[286] The Commission recommend that the words “unless good cause is shown by the debtor why the order should be granted” be added after paragraph (d) of the subsection. This will address the concern raised by the Magistrates Court Committee of the Cape Law Society.

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284 Insertion of subsection (3) in section 74 (Bills: options 1 & 2).

285 Insertion of paragraph *(a)* in subsection (3) of section 74 (Bills: options 1 & 2).

286 Insertion of paragraph *(f)* in subsection (3) of section 74 (Bills: options 1 & 2).

The Commission further recommends that Form 44 (application for an administration order) should be amended to include a section where the debtor may give reasons why the administration order should be granted, despite the provision of the proposed clause 74(3).[287]

Unsuccessful application or administration order set aside within 12 months before date of application

5.71 As there has been no objection to the proposed amendment, the Commission reaffirm its recommendation.[288]

Discharge in terms of the Insolvency Act within four years before date of application

5.72 The Commission confirm their recommendation. The Commission also support the suggestion by HVDM Attorneys that the words “unless good cause is shown by the debtor” be added after paragraph (d) of subsection.[289]

No administration order after debt review

5.73 The Commission agree that consumers should not be allowed to avoid meeting their obligations by applying for an administration order if their debt review has been terminated because they have without reasonable grounds defaulted on their payments. The Commission therefore recommend that an administration order not be granted in respect of a credit agreement if the debtor was in default under the credit agreement and the agreement was subject to debt rearrangement in terms of section 87(1)*(b)* of the NCA or a consent order in terms of section 138 of the NCA, unless good cause is shown why the order should be granted.[290]

5.74 However, the Commission do not support the suggestion that a consumer be barred from applying for an administration order if the credit provider has invoked the right to terminate the debt review process in terms of section 86(10) of the NCA. Even though the consumer may be in default under the credit agreement, he or she has to be given an

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287 See Form 44 under Chapter 7.

288 Insertion of paragraph *(b)* in subsection (3) of section 74 (Bills: options 1 & 2).

289 Clause 74(1A)(c).

290 Insertion of paragraph (d) in subsection (3) of section 74 (Bills: options 1 & 2).

opportunity to show that he or she would be able to comply with a debt rearrangement order. Moreover, if the consumer's application for debt review is rejected, he or she should be able to apply for an administration order, provided that the requirements for such an order are met.

When administration order is not invalid

5.75 In view of the Commission's recommendation that the words "capital" and "unsecured" be deleted in section 74(1)(b), it is recommended that these words be deleted from the proposed subsection (2) as well.

F Section 74A: Notice and documents to be submitted with application for administration order

1 Proposed amendments

5.76 The workshop paper recommended that section 74A(1) of the MCA be amended as follows:

(1)**[With an application referred to in section 74 (1) the debtor shall submit a full statement of his affairs in the form prescribed in the rules]** The debtor shall, at least 10 court days before the date of application—

(a) lodge a notice of application for an administration order in the form prescribed in the rules with the clerk of the court and attach—

(i) a statement of his affairs in the form prescribed in the rules;
(ii) a draft order in the form prescribed in the rules;
(iii) an affidavit by the person nominated as administrator that he or she is not disqualified in terms of .... [See page …Reference to be made to the applicable section dealing with the registration and regulation of administrators];
(iv) an affidavit and proof that the debtor has given notice to creditors in terms of paragraph *(b)*;

(b) by means of a notice in the form prescribed in the rules, give notice to creditors and disputed creditors of his intention to apply for an administration order.

2 Comments received

Notice of application for administration order

5.77 The Banking Association of South Africa are in favour of extending the time period to 10 court days as it would give creditors sufficient time to attend court, oppose applications and provide the court with evidence that could have a material effect on the court's decision.

5.78 Booysen & Co. Inc. Attorneys caution that the issue should not be confused by changing the general principle that a reference to a day in an Act refers to a calendar day, and in the rules to a court day. They argue that, having regard to notice by electronic service, 10 court days notice are too long for an application that is semi-urgent by nature. They mention that if notice is given by registered post, the rules allow a further four days. They propose that "10 court days" be changed to "10 days".

5.79 HVDM Attorneys submit that the notification period to the creditors should be extended to 10 days, taking into account the proposal that service be done through e-mail, and fax transmissions.

Documentation which should be attached to notice of application for administration order

5.80 Booysen & Co. Inc. Attorneys agree with the requirements proposed in subparagraphs (i) and (ii) but, with reference to subparagraphs (iii) and (iv), warn against over-regulating a process that should be simple, quick and inexpensive. They say that the appointment of an administrator is a statutory function performed by the court and explain that the magistrate exercises his or her discretion as to whom to appoint and must be satisfied that the person is qualified to be appointed an administrator. With regard to subparagraph (iv), Booysen & Co. Inc. Attorneys submit that the requirement to attach an affidavit is unnecessary because the courts have over the past 70 years accepted either original registered post slips as proof of posting or an acknowledgement in writing by the creditor that the application had been served by hand. Furthermore, the attorney that brings the application has to make a submission that proper service has been effected and then has to furnish proof to the magistrate. The magistrate either accepts or rejects the proof.

5.81 HVDM Attorneys state that the court may require such proof as it deems necessary or at a credit provider's request or if there is a dispute. They say that this has proved to be cost effective. They mention that it is very difficult and costly to obtain copies of all credit agreements and statements. According to them, credit providers bluntly refuse to provide such copies or take their time to produce them.

5.82 Krüger and Van Eeden Attorneys note that the proposed affidavits required in subparagraphs (iii) and (iv) would increase the application costs of an administration order. They propose that, instead of the required affidavit envisaged in subparagraph (iii), the

certificate of acceptance as an administrator should be changed to state that the administrator is not disqualified to act as an administrator. Regarding subparagraph (iv), they believe that proof of notice is sufficient and that the magistrate is not supposed to grant the relief sought without such proof. Hence the required affidavit is redundant.

5.83 Norman Shargey argues that the required affidavits proposed in subparagraphs (iii) and (iv) would increase the burden placed on administrators and are unnecessary since the various courts and magistrates know who the administrators are.

5.84 With reference to subparagraph (iv), Christo van der Merwe proposes that the affidavit and proof that notice was given to the creditors should be made available on the date of hearing the application.

Notice to disputed creditors

5.85 The Banking Association of South Africa welcome the inclusion of the words "disputed creditors" in paragraph (b) because creditors have the experience of not being notified of disputed matters and as a consequence suffer financial loss. This amendment will provide a creditor with the opportunity to prove a claim even if the debtor disputes the claim.

5.86 Booysen & Co. Inc. Attorneys and HVDM Attorneys suggest that "disputed creditors" should be defined. They are of the view that it would be difficult to determine who these creditors are and whether their claims should be included in determining whether the total debts do not exceed the maximum amount allowed for the granting of an administration order.

5.87 Matthee Attorneys disagree that a disputed creditor should receive notice. They reason that if a debtor is of the opinion that no money is due to a person, there is no reason why the debtor's finances and personal details should be open for inspection by that person. They caution that this could lead to abuse of the process by creditors and state that the Act makes sufficient provision for cases where creditors' claims are rejected.

3 Evaluation and recommendations

5.88 Regarding the period of notice for an administration order application, there is general agreement that the period of three days' notice is too short. Consideration should be

given to whether the period of notice for an administration order application should be brought in line with the period of notice provided for in other applicable laws. A debt counsellor who receives an application for debt review must notify all the credit providers concerned of the application.[291] The manner and form of this notification have been prescribed in the regulations. As regards notice to parties affected by the referral (application) to the magistrate's court, there is no provision in the NCA. The referral (application) is governed by the rules and must be served on affected parties in terms of the rules. Regulation 2 contained in Government Notice No. R.362 of 10 May 2012: Debt Counselling Regulations, 2012 read with rule 55 of the Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa (the rules), provides that notice in respect of the application for debt review must be given not less than 10 days before the date of the hearing. As correctly pointed out by Booysen & Co. Inc. Attorneys, reference to a day in a rule refers to a court day.[292] Therefore, a notice period of 10 court days is required for debt review applications.

5.89 Unlike the NCA, which does not provide for a notice period, section 74A(5) of the MCA stipulates the number of days' notice that must be given to creditors, namely three days' notice. In view of the fact that only court days may be included in the computation of days,[293] the Commission recommends that the period of notice be changed to 10 court days.[294]

5.90 In paragraph 5.214 below, the Commission recommend that certain categories of persons be disqualified from acting as an administrator, namely persons who have not been appointed by the court to act as an administrator for the estate of the debtor; who have been struck off the roll of attorneys or against whom proceedings have been instituted to strike their name off the roll of attorneys or to suspend them from practice; who have been found guilty of unprofessional, dishonourable or unworthy conduct relating to the management of their trust accounts; who are of unsound mind and have been so declared or certified by a competent authority; who are unrehabilitated insolvents; who are not members of a professional body; who do not comply with the prescribed education, experience or competency requirements; or who have been convicted of an offence of which dishonesty is

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291 Section 86(4) of the NCA.

292 See also rule 2(2) of the rules.

293 See the definition of "court day" in section 1 of the MCA and rule 2(2) of the rules.

294 Amendment to section 74A(5) (Bills: options 1 & 2).

an element. Furthermore, a court may, upon a finding that a person referred to above has acted as an administrator, withdraw his or her appointment as administrator.

5.91 Also, the clerk or registrar of the court must notify the professional body with which that person is registered of the finding referred to in paragraph 5.90. The professional body should consider revoking or cancelling the registration the person requires in order to conduct his or her business. In the light of these recommendations, the Commission agree with the deletion of the proposed subparagraph (iii).

5.92 Regarding the comments of HVDM Attorneys in paragraph 5.81, the Commission would like to point out that section 65 of the NCA places a duty on a credit provider to provide a consumer with any document (including a copy of a credit agreement) that is required to be delivered to a consumer in terms of the Act. Such a document may be delivered in person or by fax, e-mail or printable web-page. A credit provider may not charge a fee for the original copy of such a document. With reference to the comments received on subparagraph (iv), it should be noted that the proposed amendment Bills provide for delivery of documents by fax or e-mail. It is important to understand that a transmission report showing that a fax has been transmitted successfully or a notification that an e-mail has been successfully delivered is insufficient to satisfy proper proof of service of an application. This is because the service of a court document is part of the fundamental cornerstone of our legal system, especially taking into account the *audi alteram partem principle*. The Commission is therefore of the view that a service affidavit should be submitted with the proof that the debtor has delivered to the creditors a copy of the application and statement of affairs.[295] This is in line with the practice in debt review matters where a service affidavit is filed at court prior to the hearing of the matter.

5.93 With regard to subsection (1)(b), the Commission see no reason why disputed creditors should not receive notice of the application for administration if they are known to the debtor and the debtor has provided their details to the administrator. A creditor should not be excluded from the proceedings merely because the debtor disputes the creditor's claim. The Commission are of the view that "disputed creditor" means a creditor the amount of whose claim is disputed or in respect of whose claim there is a dispute about whether or not it has been settled. Such creditors will, however, have to attend the hearing and provide proof of their debt. A disputed creditor who does not fall under the definition of "disputed creditor" may fall back on the provisions of sections 74B(1)(a)-(b), 74F(3), 74Q(1).

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[295] Amendment of section 74A(5) (Bill: option 1 & 2).

Section 74A: Statement of affairs

1 Proposed amendments

5.94 The workshop paper recommended that section 74A(2) of the MCA be amended as follows:

(2) In the statement of affairs **[form]** referred to in subsection (1) provision shall be made for the following particulars, among other things **[*inter alia*]**, namely—

(a) the name and business address of the **[debtor's]** employer of the debtor or the debtor's spouse or, if the debtor or spouse is not employed, the reason why he or she is unemployed;

(aA) personal particulars of the debtor and the spouse of the debtor;

(b) a detailed list of the debtor's assets and their estimated **[current market]** values **[and full particulars of interests in property and claims in his favour, including moneys in a savings or other account with a bank or elsewhere]** listed separately, namely—

(i) assets subject to secured debt which the debtor wishes to retain as necessary goods;

(ii) assets excluded from the administration; and

(iii) assets not subject to secured debt which the debtor wishes to retain;

(c) the debtor's trade or occupation and his gross regular **[weekly or monthly]** income and that of the debtor's spouse **[his wife]** living with him, and particulars of all deductions from such income by debit **[stop]** order or otherwise, supported as far as possible by written statements **[by the employers of the debtor and his wife]**;

(d) a detailed list of the debtor's necessary **[essential]** weekly or monthly expenses and those of the persons dependent on the debtor **[him]**, including travelling **[his own transport]** expenses of the debtor, the debtor's spouse and the debtor's dependants **[and those of his wife to and from work, and those of his children to and from school]**;

(e) a complete list of all the debtor's creditors and their addresses, and the capital amount owing to each creditor, in which a clear distinction shall be made between—

(i) debts due to secured creditors **[the whole amount of which is owing, including judgment debts payable in instalments in terms of a court order, an emoluments attachment order or a garnishee order; and]**;

(ii) debts due to unsecured creditors **[obligations which are payable in futuro in periodical payments or otherwise or which will become payable under a maintenance order, agreement, stop order or otherwise, and in which the nature of such periodical payments is specified in each case or when the obligations will be payable and how they are then to be paid, the balance owing in each case and when, in each case, the obligation will terminate;]**;

(iii) debts due to disputed creditors, if any; and

(iv) conditional debts and debts payable on a date after the date of application;

(f) **[the security and the estimated value of the security that a creditor has or]** the name and address of any other person who, in addition to the debtor, is liable for any debt;

(g) **[full particulars, supported as far as possible by a statement and a copy of the credit agreement, as defined in section 1 of the National Credit Act, 2005 (Act 34 of 2005), of goods purchased under that credit agreement, the purchase price, the instalments payable, the balance owing and the date on which the purchase price will be paid in full, and the reasons adduced by the debtor why provision should be made for the payment of the remaining instalments]**

whether the estate of the debtor was sequestrated in terms of the Insolvency Act, 1924 (Act No. 24 of 1936), within ten years before the date of application;

(h) **[full particulars of any mortgage bond on immovable property owned by the debtor, the instalments payable, the balance owing, the date on which the mortgage debt will be paid in full and the reasons adduced by the debtor why provision should be made for the payment of the instalments payable in terms of such mortgage bond]** whether any administration order was made at any time in respect of the debtor's estate and, if so, whether such order lapsed or was set aside and, if so, when and for what reasons;

(i) **[full particulars of any asset purchased under a written agreement other than a credit agreement referred to in paragraph (g), the instalments payable, the balance owing, and the date on which the purchase price will be paid in full, and the reasons adduced by the debtor why provision should be made for the payment of the instalments that become payable under such agreement;]**

(j) **[whether any administration order was made at any time in respect of the debtor's estate and, if so, whether such order lapsed or was set aside and, if so, when and for what reasons]** a declaration by the debtor that he or she is aware of important aspects of the issue of an administration order;

(k) the names **[number]** and ages of the persons dependent on the debtor and his or her spouse **[wife]** and their relationship to **[kinship** with] them;

(l) if an administration order is made, the amount of the weekly or monthly or other instalments which the debtor offers to pay towards settlement of the debts referred to in paragraph (e)**[(i)]**;

(m) a certificate by an admitted and practising attorney who acted for the debtor, stating that— -

(i) the statement of affairs referred to in subsection (1) is a true reflection of the debtor's instructions;

(ii) the attorney has no reason to doubt the accuracy of any of the statements by the debtor; and

(iii) the attorney has advised the debtor of the consequences of administration and is satisfied that the debtor understands them.

2 Comments received

Application for debt review

5.95 Concerning the particulars to be included in the statement of affairs, the Banking Association of South Africa submitted that the debtor should be obligated to disclose whether he or she has applied in the last 12 months for debt review in terms of the NCA, whether such application was accepted and the reason for the termination of the debt review. Alternatively, the debtor should state that he or she has not applied for debt review in the previous 12 months.

Personal particulars of debtor and spouse of debtor

5.96 With reference to the proposed section 74A(2)(aA), Matthee Attorneys are of the view that, if the parties are married out of community of property, there would be no reason to disclose the personal details of the debtor's spouse because the spouse would not be

liable for the debt owed to the debtor's creditors. They submit that the joint expenses of the household should be taken into account and the contribution of the spouse to the expenses should be just and reasonable.

Detailed list of debtors assets and estimated value

5.97 With reference to section 74A(2)(b), Booysen & Co. Inc. Attorneys state that the purpose of the current subsection is, firstly, to determine whether the debtor has sufficient assets capable of attachment to satisfy all his debts. Should he or she have sufficient assets capable of attachment, he or she does not qualify for an administration order under section 74(1)(a). Secondly, it will enable the court to decide whether an order in terms of section 74K ought to be made.

Gross regular income

5.98 The Banking Association of South Africa state that, in addition to merely stating the debtor's income in the statement of affairs, the debtor should be obliged to provide proof of such income in the form of a current salary advice or other proof of income. This would provide his or her creditors and the court with documentary proof that the debtor does indeed not have sufficient income to meet his or her obligations. The Banking Association of South Africa propose that the section be amended to provide that proof of income in respect of the debtor and his or her spouse, if married in community of property, must be included with the statement of affairs. This would enable both the court and the creditors to make informed decisions regarding the consumer's financial predicament.

5.99 According to Matthee Attorneys, if the debtor is married out of community of property, his or her spouse who is not a party to the application for administration should not be obliged to furnish the court or any other party with proof of income or deductions from his or her salary.

5.100 Norman Shargey mentions that, in most cases, it is impossible to obtain a written statement from an employer about an employee's earnings. He is thus of the view that a salary advice as in the past should suffice.

In futuro debts

5.101 See the Commission's discussion regarding the inclusion of *in futuro* debt in administration orders in paragraphs 5.307 to 5.315 below.

Debts due to disputed creditors

5.102 Matthee Attorneys are of the opinion that a disputed debt should not be listed because such a creditor has no right to access the personal information of the debtor.

Full particulars of goods purchased under credit agreement, of mortgage bond on immovable property and of written agreement

5.103 Booysen & Co. Inc. Attorneys advise that the current section 74A(2)(g) be retained and suggest that it be qualified with the order that the debtor could seek under section 85 of the NCA, should it be found that the debtor may retain the asset.

5.104 Norman Shargey, however, states that there is no logical reason why the current section 74A(2)(g) requires a copy of the credit agreement to be lodged and submits that this creates unnecessary work and costs.

5.105 With regard to a possible order under the NCA in respect of a reduction of instalments, Booysen & Co. Inc. Attorneys propose that the current section 74A(2)(h) be retained. They contend that the court does not have jurisdiction, under neither the NCA nor the MCA, to interfere with the contractual rights and obligations created under the agreements referred to in section 74A(2)(i) and therefore submit that the proposal to delete this provision is not correct.

Certificate by attorney concerning application for administration order

5.106 The respondents in general disagree with the proposed paragraphs (m)(i) and (ii).[296]

5.107 Booysen & Co. Inc. Attorneys submit that the statement of affairs is not always prepared by an admitted practising attorney. They explain that if the administration

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296 Booysen & Co. Inc. Attorneys, Krüger and Van Eeden Attorneys, Matthee Attorneys, Norman Shargey and the Magistrates Committee of the Cape Law Society.

application is prepared by a non-attorney administrator, the debtor will for the first time consult with an attorney or articled clerk at court and then solely for the purpose of moving the application at court. Furthermore, attorney administrators, as a rule, have consultants and articled clerks who prepare the statements of affairs. Hence, it is impossible for an admitted and practising attorney to verify the information that is contained in the statement of affairs.

5.108 Booysen & Co. Inc. Attorneys suggest that the proposed certificate should be filed by the attorney or articled clerk appearing on behalf of the applicant (debtor) at the hearing of the matter.[297] In their view, the certificate should state that the debtor has been advised of the consequences of administration and that the administrator is satisfied that the debtor understands them. Alternatively, section 74B should require that the magistrate verify the information at the hearing, as a large number of magistrates do so in any event.

5.109 Krüger and Van Eeden Attorneys are of the opinion that the proposal would result in additional costs for debtors, especially if the administrator is not an attorney administrator. They state that no attorney would sign such a certificate for free. They explain that all their files contain an originally signed "Rules and Regulations" in which the administration process and aspects of the capital, interest and costs are clearly set out. These "Rules and Regulations" are explained to debtors in their own language.[298] They propose that a document similar to their “Rules and Regulations” be filed in the court file to serve as proof that the process was explained to the debtor.

5.110 Similarly, Matthee Attorneys suggest that a document explaining the consequences of an administration order should be drafted by the DOJCD and handed to the debtor by the magistrate at the hearing of the application. Alternatively, to remove any uncertainty in this regard, such a document should be signed and attached to the application for an administration order and should form part of the application. This view was echoed by Norman Shargey.

5.111 The Magistrates Court Committee of the Cape Law Society submit that the proposal places a burden on the attorney to do more than simply attend court and move for an order. This will increase the attorney’s fees and be an additional charge for the debtor to pay over and above the section 74O costs. The Committee add that the onus would be on the

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297 Section 74B of the MCA.

298 A copy is attached as Annexure "D".

attorney appearing at court to satisfy him- or herself that the information is indeed correct and that the debtor understands same.

5.112 The Committee says that the provision purports to ensure not only that the information or content of the Form 45 application is true and correct, but that the debtor understands the process. However, those in the administration order business use of consultants to recruit new clients and to complete the Form 45 application forms. The consultants often are eager to have debtors placed under administration in order to earn commissions on the introduction of new clients. They very often are guilty of failing to explain properly the process of administration to vulnerable debtors who would opt for any means of alleviating their financial position.

5.113 The Committee states that the attorney who eventually represents the debtor at court is only the representative for purposes of the court proceedings. The attorney is not aware of the debtor's statement of affairs and will not be involved in the administration of the debtor's estate at all. According to the Committee, this does not mean that the attorney should not be familiar with the contents of the administration application at the hearing of the matter. In fact, any attorney appearing on behalf of an applicant should prepare properly for the hearing of the matter before court.

5.114 The Committee recommend that the administrator should be responsible for confirming that the information as submitted in the application is true and correct, and that the consequences of the administration have been explained to the debtor and that he or she is satisfied that the debtor understands them. The Committee further suggest that the administrator should be present at court and be called to the witness box to confirm under oath that the process of the administration application and the consequences of administration have been explained to the debtor.

5.115 Christo van der Merwe reasons that this requirement might result in additional charges for debtors because their administrators would be expected to have additional consultations with them. He proposes that, if the provision is retained, the certificate should be made available on the date of hearing the application.

3 Evaluation and recommendations

Application for debt review

5.116 With reference to the Commission's view expressed in paragraphs 5.71 to 5.73 above, the Commission recommend that subsection (2) be amended to include the following:[299]

- whether the debtor has received a discharge in terms of the Insolvency Act within four years before the date of application for an administration order;
- whether an unsuccessful application was made for the granting of an administration order or whether an administration order was rescinded within 12 months before the date of application for an administration order; and
- whether an order for debt rearrangement in terms of section 87(1)(b)(ii) of the NCA or a consent order in terms of section 138 of the NCA was made in respect of a debt referred to in the statement of affairs and, if so, the reason for the termination of the debt review.

5.117 In various cases the court has held that the magistrate's court, being a creature of statute, may not change the contractual interest rate as doing so would effectively alter the terms of the original agreement. For example, the court in *First Rand Bank Ltd v Adams and Another*[300] indicated that a debt review proposal can extend the time period for payment or the proposal can create a window in terms of which payments are not made, in order to give the consumer an opportunity to generate liquidity which will allow payments to resume. The court thus held that there is no legislative basis to reduce the interest rate pursuant to a debt review proposal.[301] However, in *LP v Nicolette Vosloo and Others*[302] the court stated that "where parties have entered into responsible negotiations within the debt review process and reach agreements amending the contractual interest rates, in a manner that is not only satisfactory, but also to the benefit of all concerned parties, Magistrates do have the authority to confirm these agreements. In such circumstances, Magistrates are not acting ultra vires, but within the scope of their jurisdiction by giving effect to the agreements

299 Insertion of paragraphs (m), (n) and (o) in section 74A(2) (Bills: options 1 & 2).

300 2012 (4) SA 14 (WCC).

301 See also *SA Taxi Securitization (Pty) Ltd v Lennard* (unreported decision of the Eastern Cape High Court, Grahamstown, delivered on 21 October 2010), and *Nedbank limited v Jones and Others* 2017 (2) SA 473.

302 Unreported decision of the Western Cape High Court, Cape Town, delivered on 23 October 2017.

reached in the debt review process which falls within the ambit, spirit and purpose of the NCA."[303] Hence the court held that the magistrate's court has jurisdiction to make orders rearranging a consumer's debt based upon an amended interest rate agreed upon by the parties.[304] The Commission therefore recommend that section 74J be amended to require that an administrator request each creditor of the debtor to consider reducing the interest rate on the debt owed to him or her.[305] If a creditor decides to reduce the interest rate, it will shorten the period the debtor remains under administration. The reduced interest rate, if any, in respect of each amount should be reflected in the statement of affairs.[306] In addition, section 74B should be amended to provide that the court may rearrange the debtor's debt based on the agreed reduced interest rate.[307]

Personal particulars of debtor and spouse of debtor

5.118 The concern raised by Matthee Attorneys in respect of the personal particulars and the income of a spouse married out of community of property is addressed by the Commission's proposal that the provisions of subsection (2) should not apply to a spouse married out of community of property, except in so far as it relates, for the purpose of determining the debtor's necessary expenses and those of the persons dependent on him or her, to the income of such spouse who lives with the debtor.[308]

Detailed list of debtor's assets and estimated value

5.119 The Commission agree with the comment of Booysen & Co. Inc. Attorneys.

Gross regular income

5.120 The Commission agrees with the proposal of the Banking Association of South Africa that the debtor should provide proof of his or her income referred to in the statement of affairs.[309] However, proof of income of the debtor's spouse should be required only if the

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303 Paragraph 9 of the judgment.

304 Paragraph 14 of the judgment.

305 Proposed 74JA(1)(Bill: option 1) and Insertion of subsection (1B) in section 74J (Bill: option 2) .

306 Amendment to section 74A(2)*(e)* (Bills: option 1 & 2).

307 Insertion of paragraph *(j)* in section 74B(1) (Bills: option 1 & 2).

308 Insertion of subsection (2A) in section 74A (Bills: option 1 & 2).

309 Amendment to section 74A(2)(c) (Bills: options 1 & 2).

debtor is married in community of property. Proof of income can include a salary advice, a written statement from his or her employer(s) or any other manner acceptable to the court.

In futuro debts

5.121 See the Commission's recommendations regarding the inclusion of *in futuro* debt in administration orders in paragraphs 5.307 to 5.315 below.

Debts due to disputed creditors

5.122 As regards Matthee Attorneys' proposal that a disputed debt not be listed, the Commission have recommended in paragraph 5.93 above that certain categories of disputed creditors should receive notice of the application for an administration order. Consequently, their debts should be listed.

Full particulars of goods purchased under credit agreement, of mortgage bond on immovable property and of written agreement

5.123 With reference to the comments made, the Commission recommend that the provisions of section 74A(2)(g)-(i) be retained.

Certificate by attorney concerning application for administration order

5.124 The Commission take cognisance of the fact that the statement of affairs is not always prepared by the attorney who acted for the debtor. It is, however, vital that the administrator should, whether or not he or she is an attorney, ultimately take responsibility for the content of the statement of affairs. Hence the Commission recommend that the proposed paragraph (m) be amended to provide that the statement of affairs should include a certificate by the administrator or the person who prepared the statement of affairs stating that the statement of affairs is a true reflection of the debtor's instructions; that he or she has no reason to doubt the accuracy of any of the statements by the debtor; and that he or she has advised the debtor of the consequences of administration and is satisfied that the debtor understands them.[310] This is important because not all debtors have the same level of literacy, Moreover, some debtors might be illiterate.

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310 Insertion of paragraph (g) in section 74A(2) (Bills: options 1 & 2).

5.125 The Commission cannot comprehend how the administrator or the person who has prepared the statement of affairs can advise the debtor to apply for administration without explaining to the debtor the administration process and the consequences of administration. People are placed under administration without a full appreciation of the consequences and sign forms without being aware of the contents. The certificate by the administrator or the person who has prepared the statement of affairs could go some way towards limiting this.

5.126 A further safeguard is contained in section 74B(1)(g), which provides that the court must interrogate the debtor on whether the person to be appointed as the administrator or the person who has prepared the statement of affairs has explained to the debtor the administration order process and whether the debtor understands the process.

5.127 In response to the submission by Matthee Attorneys that a document explaining the consequences of an administration order should be drafted by the DOJCD, the Commission recommend that an administrator provide the debtor with a prescribed letter setting out the debtor's rights and obligations, the administrator's rights and obligations, the contact details of the professional body of which the administrator is a member, and the remedies provided for in the MCA should the administrator fail to carry out his or her duties.[311]

5.128 The concern that consultants who are eager to earn commission often fail to explain the process to the debtors is to a certain extent addressed by the proposed clause 74(3)*(g)*, which provides that an administration order shall not be granted if the court finds that the debtor does not understand the administration order process and its consequences.

Section 74A: Confirmation of statement of affairs and assistance to debtor

1 Proposed amendments

5.129 The workshop paper recommended that section 74A(3) be amended as indicated below. Subsections (4) and (5) are also reflected below as comments have been received on them.

(3) The statement referred to in subsection (1) shall be confirmed by an affidavit in which the debtor declares that to the best of his knowledge the names of all his creditors and the amounts

311 Clause 74E(5).

owed by him to each of **[them]** the creditors severally are set forth in the statement and that the declarations made therein are true.

(4) The clerk of the court shall, if requested thereto by an illiterate debtor and upon payment of the fee prescribed in the rules, assist the debtor in completing the statement referred to in subsection (1).

(5) The debtor shall lodge an application for an administration order and the statement referred to in subsection (1) with the clerk of the court and shall deliver to each of his creditors, at least 3 days before the date appointed for the hearing, personally or by registered post a copy of such application and statement on which shall appear the case number under which the original application was filed.

2 Comments received

5.130 HVDM Attorneys recommend that subsection (4) be repealed because the clerk of the court neither has the ability or the knowledge to compile such documentation, nor does he or she have the resources to file the distribution statements.

5.131 Krüger and Van Eeden Attorneys suggest that subsection (5) be amended to make provision for service by telefax or e-mail.

5.132 Matthee Attorneys propose that the three-day notice referred to in subsection (5) be increased to 10 days.

3 Evaluation and recommendation

5.133 The Commission support the submissions made by Krüger and Van Eeden Attorneys and by Matthee Attorneys.[312] The Commission disagree with HVDM Attorneys' suggestion that subsection (4) be repealed because the clerk of the court is generally required to explain the rules of procedure to litigants.[313]

G Section 74B: Hearing of application for administration order

1 Proposed amendments

312 Amendments to section 74A(5).

313 See in this regard Rule 3(8) of the Magistrates Rules of Court.

5.134 The workshop paper proposed that section 74B of the MCA be amended as follows:

(1) At the hearing of an application for an administration order—

(a) any creditor, whether he has received notice in terms of section 74A(5) or not, may attend the hearing and provide proof of his debt and object to any debt listed by the debtor in the statement of his affairs referred to in section 74A(1);

(b) every debt listed by the debtor in the said statement shall be deemed to be proved, subject to any amendment made thereto by the court, unless any creditor raises objections thereto or the court rejects it or requires substantiation thereof by evidence;

(c) any creditor to whose debt an objection is raised by the debtor or any other creditor or who is required by the court to substantiate his debt with evidence shall provide proof of debt;

(d) the court may defer proof of debt and postpone consideration of the application for an administration order or proceed to deal with such application and, if an administration order is granted, the debt shall subsequently when proved be added to the debts listed;

(e) the debtor may be interrogated by the court and by any creditor whose debt has been acknowledged or proved, or by leave of the court, by any creditor the proof of whose debt has been deferred, or by the legal representative of such creditor with regard to -

(i) his assets and liabilities;

(ii) his present and future income and that of his spouse **[wife]** living with him;

(iii) his standard of living, and the possibility of economising; and

(iv) any other matter that the court may deem relevant.

(2) If at the hearing it appears to the court that any debt other than a debt on the ground of or arising from any judgment debt is a matter of contention between the debtor and the creditor or between the creditor and any other creditor of the debtor, the court may, upon inquiry into the objection, allow or reject the debt or a part thereof.

(3) Any person whose debt has been rejected in accordance with subsection (2) may, notwithstanding the provisions of section 74**[P]**, institute proceedings or proceed with an action already instituted in respect of such debt.

(4) If any person referred to in subsection (3) has obtained judgment in respect of any debt referred to in that subsection, the amount of the judgment shall be added to the list of proved debts referred to in subsection (1).

[(5) No administration order shall be granted at the request of any debtor if it is proved that any administration order was rescinded within the preceding period of 6 months because of the debtor's non-compliance therewith, unless the debtor proves to the satisfaction of the court that his non-compliance with the order was not wilful.]

2 Comments received

5.135 With reference to their comment in respect of section 74A(2)(m), Booysen & Co. Inc. Attorneys recommend that, at the hearing, the debtor should confirm under oath–

- that he or she has read the application for an administration order and the statement of affairs or that they were read to him or her;
- that the above-mentioned were drafted in terms of the instructions he or she gave and are true and correct;
- that he or she has been advised of the consequences of administration and understands them; and
- that he or she has been advised of the address of the nominated administrator and how and where to contact him or her.

5.136 Booysen & Co. Inc. Attorneys further suggest that, if the debtor has disclosed credit agreements in his statement of affairs, the court should deal with such credit agreements in terms of section 85 of the NCA.

5.137 With reference to the proposed amendment in subsection (1)*(e)*(ii), Matthee Attorneys caution that this also affects a person married out of community of property or living in a live-in relationship with another person who has nothing to do with the former's debt.

3 Evaluation and recommendations

5.138 The Commission disagree with Booysen & Co. Inc. Attorneys that the debtor should confirm under oath the points listed in paragraph 5.135 above. Debtors are often placed under administration without a full appreciation of the consequences and sign forms without being aware of the contents. The Commission therefore recommend that the debtor be interrogated by the court on whether the person to be appointed as the administrator or the person who has prepared the statement of affairs has explained to the debtor the administration order process and the consequences of administration and whether the debtor understands them.[314] The Commission are of the view that an administration order

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314 Insertion of paragraph *(g)* in section 74B(1) (Bills: options 1 & 2).

should be granted only if the court is satisfied that the debtor understands the administration order process.[315]

5.139 Concerning the submission made by Matthee Attorneys, the Commission recommend that subsection (1)*(e)*(ii) should not apply to a spouse married out of community of property or a spouse referred to in paragraph *(d)* of the definition of "spouse", except in so far as the income of such spouse who lives with the debtor is relevant for the purpose of determining the debtor's necessary expenses and those of the persons dependent on him or her, including travelling expenses of the debtor and the debtor's spouse and dependants.

H Section 74C: Contents of administration order

1 Proposed amendments

5.140 The workshop paper proposed that section 74C of the MCA be amended as follows:

(1) An administration order shall be in the form prescribed by the rules and—

(a) shall lay down the amount of the weekly or monthly or other payments to be made by the debtor to the administrator in terms thereof, which shall, as nearly as possible, approximate the difference between the debtor's future income, which shall include the future income, if any, of a spouse married in community of property and the sum of—

(i) the amount determined by the court as the reasonable amount required by the debtor for his or her necessary expenses and those of the persons dependent on him or her;

(ii) the future and arrear instalments in respect of secured debts for the retention of assets that the court regards as necessary for the requirements of the debtor and his or her dependents, if the court regards the payments and the payment of arrear instalments as reasonable in view of the debtor's income; and

(iii) the periodical payments to be made by the debtor in terms of an existing maintenance order;

(aA) shall make provision for the payment of future payments and arrear payments in respect of the secured debts contemplated in paragraph *(a)*(ii); and

(b) may specify—

(i) the assets, if any, of the estate under administration which are not subject to a secured claim and which the debtor must retain to meet his or her requirements and those of his or her dependants: Provided that the retention is reasonable in view of the debtor's income **[may be realized by the administrator for the purpose of**

[315] Insertion of subsection (3)(g) in section 74 (Bills: options 1 & 2).

distributing the proceeds among the creditors: Provided that no such asset that is the subject of any credit agreement regulated by the National Credit Act, 2005 (Act 34 of 2005), shall be realized without the written permission of the seller];

(ii) that deductions from the regular income of the debtor that are justified by the reasonable needs of the debtor be continued, but that other deductions, except statutory deductions or payments to be made in terms of an existing maintenance order, be discontinued; and

[(iii) the debtor's obligations which the court took account of in determining the amount of the weekly or monthly or other instalments to be paid by the debtor to the administrator;

(iv) the assets, if any, which shall not be disposed of by the debtor except by leave of the administrator or the court;]

(iii) **[v]** such other provisions or conditions as the court may deem necessary or expedient.

(2) The debtor may not dispose of any assets contemplated in subsection (1)*(a)*(ii) and may not dispose of assets contemplated in subsection (1)*(b)*(i) except by leave of the administrator or the court or subject to such other provisions that the court may order. **[The amount of the weekly or monthly or other payments to be made by the debtor to the administrator in terms of the administration order shall, as nearly as possible, approximate the difference between the debtor's future income and the sum of-**

(a) **the amount determined by the court as the reasonable amount required by the debtor for his necessary expenses and those of the persons dependent on him;**

(b) **the periodical payments which the debtor is obliged to make under a credit agreement as defined in section 1 of the National Credit Act, 2005 (Act 34 of 2005): Provided that the court may in its discretion refuse to take into account the periodical payments which the debtor undertook to pay under such a transaction for the purchase of goods which are not exempt from execution in terms of section 67 or which, in the opinion of the court, cannot be regarded as the debtor's household requirements, unless the court is of opinion that in all the circumstances it is desirable to safeguard the goods concerned;**

[Para. (b) amended by s. 48 (c) of Act 120 of 1993 and by s. 172 (2) of Act 34 of 2005.]

(c) **the periodical payments to be made by the debtor in terms of an existing maintenance order;**

(d) **the periodical payments to be made by the debtor under a mortgage bond or any other written agreement for the purchase of any asset in terms of which the liabilities thereunder are payable in instalments, if in all the circumstances the court is of opinion that the instalments payable are reasonable in view of the judgment debtor's income and the sums of money due by him to other creditors or that it is desirable to safeguard the mortgaged property or the asset to which the written agreement relates; and**

(e) **the payments to be made by the debtor by virtue of any other obligation referred to in section 74A (2) (e) (ii).**

(3) The court may take into account the income of the debtor's wife, who is living with him, in determining the amount referred to in subsection (2) (a) and, where the debtor is married in community of property, in determining the debtor's income.]

2 Comments received

5.141 The respondents[316] disagree with the inclusion of arrear instalments in subsection 1(a)(ii). Booysen & Co. Inc. Attorneys state that debtors in general do not have the funds to pay arrear instalments. They add that creditors have the option to cancel and enforce credit agreements when debtors default, and should therefore not be regarded as preferred creditors.

5.142 HVDM Attorneys say that the proposal makes excessive provision for creditors with secured debts, in respect of not only monthly payments but also the payment of arrears. This, in their view, would not only make such a creditor a preferred creditor, but could also result in no residue being available for payment to the other concurrent creditors.

5.143 Matthee Attorneys argue that the inclusion of subsection (1)(a) would amount to the protection of certain secured debts, while some of such secured debts are part of the reason for the debtor's debt problem. They propose the inclusion of a provision that would enable the court to identify a debt as reckless. They submit that even though it may be a secured debt, the creditor should be required to participate in the administration or the goods of the secured debt are to be returned without a claim against the debtor.

5.144 With reference to section 74C(1)(aA), Matthee Attorneys reiterate that this section provides protection for secured debts that should not be protected because persons are often over-indebted as a result of the granting of these debts. They point out that some of the goods sold are in such a poor condition that they have no value and that their removal would in fact cost more than the proceeds that can be obtained at auction. Therefore, the goods should not be paid as a preferred claim, but rather form part of the administration without any right to claim back the goods.

5.145 With reference to section 74C(b)(ii), Krüger and Van Eeden Attorneys submit that an administrator does not have the power to recommend that policies be cancelled; only qualified brokers may give such advice.

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316 Booysen & Co. Inc. Attorneys, HVDM Attorneys and Matthee Attorneys.

5.146 Matthee Attorneys are of the view that all debts should become claimable and payable when a person goes under administration. This would ensure that creditors make sure that persons can afford debt before loans are granted to them.

3 Evaluation and recommendations

5.147 It should be noted that the current section 74C(2)(b) provides for periodical payments which the debtor is obliged to make under a credit agreement. It could be argued that periodical payments include both future and arrear instalments.

5.148 The concern that the proposed provision gives preferential treatment to creditors with a secured debt is exaggerated. The proposed subsection (1)(a)(ii) applies only to assets that the court regards as necessary for the requirements of the debtor and his or her dependants. There is therefore no obligation to make provision for assets that are not essential for the debtor's daily living and that would normally be considered as luxury or nice-to-have items. Moreover, the Commission is of the view that the court should be empowered to exclude one or more secured debts from the debtor's administration as secured debts often include luxury items.[317] However, an asset so excluded should not be essential for the debtor or his or her dependants' daily living or needed for the debtor's occupation, trade or business. The exclusion of certain secured debts from a debtor's administration will not only reduce the amount of debt under administration, but will also shorten the period of the debtor's administration. Creditors of debts so excluded have the option of taking possession of the assets concerned and sell them to cover costs. Furthermore, a creditor can lodge a claim, in terms of section 74H of the MCA, with the administrator for any shortfall after realisation of the security asset. However, the outstanding amount will be dealt with as an unsecured debt.

5.149 The Commission are of the view that if a creditor with a secured debt has not contributed to the financial dilemma of the debtor in that the credit was not granted recklessly, provision should be made for the future and arrear instalments of that creditor, unless the court excludes the debt. The Commission are, however, cognisant of the fact that many persons are caught in a debt spiral because of the reckless granting of credit. Therefore, in paragraphs 5.254 to 5.255 below it is recommended that an administrator should determine whether any of a debtor's credit agreements appear to be reckless. If the administrator is of the view that one or more of the debtor's credit agreements are reckless, he or she must recommend that the court declare such credit agreements to be reckless

317 Inclusion of para *(f)* in section 74C(1) (Bill: option 1) and para *(e)* in section 74C(1) (Bills: option 2).

credit.[318] The court should make the determination in terms of Part D of Chapter 4 of the NCA. An administration order should therefore include a declaration of reckless credit.[319] Enabling the court to consider reckless credit during the hearing of an administration order application would go a long way towards ensuring that creditors of secured debt who granted credit recklessly receive only partial or no payment. Apart from setting aside all or part of the debtor's rights and obligations under such credit agreements, the court may also suspend the force and effect of such credit agreements and may restructure the debtor's obligations.[320]

5.150 Whether or not provision is made for the future and arrear instalments in respect of secured debts, creditors are entitled to apply for an attachment order, provided that they have followed the process set out in sections 129 and 130 of the NCA. So, in order to ensure that debtors retain the assets the court regards as necessary for the requirements of the debtor and his or her dependants, provision must be made for both future and arrear instalments.

5.151 It should be kept in mind that once a creditor has enforced his or her rights under an *in futuro* claim such as a credit agreement, the whole claim becomes due and payable and becomes part of the administration order debt.

I Section 74CA: Secured debts

1 Proposed amendments

5.152 The workshop paper further recommended the inclusion of the following section after section 74C of the MCA:

74CA Secured debts

(1) A creditor who holds a security asset for a claim retains the remedies as a secured creditor for the capital amount of the claim due on the date of application, but during the administration–

(a) if notice to the debtor is required, the secured creditor shall give notice to the administrator as well;

(b) the creditor may realise a security asset without a court order after 21 days' notice to

318 Insertion of clause 74AA (Bills: options 1 & 2).

319 Insertion of paragraph (c) in section 74C(1) (Bills: options 1 & 2).

320 Section 83 of the NCA.

the administrator;

(c) the creditor shall give account to the administrator in respect of the realisation of a security asset and the application of the proceeds.

(2) If there is a shortfall after realisation of a security asset, the creditor may lodge a claim for the shortfall with the administrator.

2 Comments received

5.153 Booysen & Co. Inc. Attorneys state that the proposed amendments would take away the rights that a consumer (debtor) has under the NCA, namely debt rearrangement and section 129 and section 130 rights and protection. They submit that the necessary mechanism has been created under the NCA to deal with this type of claim (secured debts); such claims should be excluded from the administration order and should the debtor be over-indebted, he or she should be dealt with in terms of sections 85 and/or 86 and 87 of the NCA.

5.154 HVDM Attorneys recommend that secured creditors should file all documentation and information regarding the realisation of an asset in the court file. According to them, this information could be valuable to the court and to credit providers in the event of a reopening of proceedings in terms of section 74Q with a view to making further financial enquiries, etc.

5.155 With reference to section 130(2) of the NCA and the fact that a mortgage has not been included as a credit agreement in that section, HVDM Attorneys submit that it is yet to be determined whether a mortgagee would have the right to claim any shortfall after the property had been sold in auction. They say that, depending on the interpretation of section 130(2), lodging a claim as proposed in section 74CA(2) might not be permissible.

5.156 With reference to section 74CA(1)(b), Krüger and Van Eeden Attorneys warn against giving creditors the right to realise security assets without a court order. They propose that the creditors should follow the procedures clearly set out in sections 127 and 130 of NCA and should obtain a court order before realising debtors' assets.

5.157 Matthee Attorneys reiterate that it is often due to the granting of credit debtors cannot afford to repay that they are placed under administration. Therefore, a duty rests on the courts and the legislature to protect such debtors against exploitation.

3 Evaluation and recommendations

5.158 The following protective measures contained in the NCA aim to ensure that legal proceedings, including the attachment of assets, are not instituted against consumers without their being given the opportunity to remedy any default. Section 129(1)(b) of the NCA provides that if the consumer is in default under a credit agreement, the credit provider may not commence any legal proceedings to enforce the agreement before first providing notice to the consumer with regard to the default. Section 130(1) provides that a credit provider may approach the court for an order to enforce a credit agreement only if the consumer is in default and has been in default under that agreement for at least 20 business days. Furthermore, the court may determine the matter only if the court has satisfied itself as to the requirements of section 130(3).[321]

5.159 However, the proposed clause 74CA(1)*(b)* does not contain similar safeguards as pointed out above. The Commission therefore recommends the deletion of the proposed clause.

5.160 The Commission endorse the proposed subclause (2). The Commission believe that it is to the benefit of both creditors and debtors. A creditor doesn't need to institute court

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321 Section 130(3) provides as follows:

"(3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that—

(*a*) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with;

(*b*) there is no matter arising under that credit agreement, and pending before the Tribunal, that could result in an order affecting the issues to be determined by the court; and

(*c*) that the credit provider has not approached the court—

(i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or

(ii) despite the consumer having—

(*aa*) surrendered property to the credit provider, and before that property has been sold;

(*bb*) agreed to a proposal made in terms of section 129 (1) (*a*) and acted in good faith in fulfilment of that agreement;

(*cc*) complied with an agreed plan as contemplated in section 129 (1) (*a*); or

(*dd*) brought the payments under the credit agreement up to date, as contemplated in section 129(1)(*a*)."

proceedings to enforce the remaining obligations of a debtor under a credit agreement, while the debtor is enabled to pay the shortfall in affordable instalments.

J Section 74D: Authorizing of issue of emoluments attachment order or garnishee order

1 Proposed amendments

5.161 The workshop paper proposed that section 74D of the MCA be amended as follows:

> (1) Where the administration order provides for the payment of instalments out of future emoluments or income, the court shall authorize the issue of an emoluments attachment order in terms of section 65J in order to attach emoluments at present or in future owing or accruing to the debtor by or from his employer, or shall authorize the issue of a garnishee order under section 72 in order to attach any debt at present or in future owing or accruing to the debtor by or from any other person (excluding the State), in so far as either of the said sections is applicable, and the court may suspend such an authorization on such conditions as the court may deem just and reasonable.
> (2) The emoluments attachment order may be authorized and issued without prior notice to the employer.
> (3) No other emoluments attachments orders may be issued while the debtor is under administration without review by the court that issued the administration order.

2 Comments received

5.162 Booysen & Co. Inc. Attorneys confirm that the proposed amendments are in line with a correct interpretation of the provisions of sections 65J, 74D and 74I of the MCA, but they alert the Commission to the problem in certain courts where the clerk of the court that granted the administration order and authorised the issue of an emoluments attachment order (EAO), refused to issue (sign) an EAO if the address of the employer was not within the area of jurisdiction of that court as provided in 65J(1)(a) of the MCA. They point out that the clerk does not take into account that the EAO is not issued in terms of section 65J(1)(a) but in terms of the sections 74I(3) and 74D. They recommend therefore that sections 74D and 74I should provide that, notwithstanding the provisions of sections 65J(1)(a), the court granting the administration order may authorise an EAO and the clerk of the court must issue such order.

5.163 With reference to the proposed subsection (3), HVDM Attorneys ask how the clerk of the court would know not to issue another EAO. They suggest that the employer should not deduct any further EAO with regard to the same employee, but must notify the administrator of any EAO served, and must inform the sheriff of the administration order. They are of the

view that the five per cent the employer deducts before payment of the administration EAO is too high, taking into consideration that the debtor is over-indebted. They consequently suggest that a cost analysis be done in order to determine a fair but affordable amount to be paid to the employer for the deduction.

5.164 Melting the Darkness indicate that section 89(2)(ii) of the NCA provides that a credit agreement is unlawful if, at the time the agreement was made, the consumer was subject to an administration order and the administrator concerned did not consent to the agreement. They mention that administrators sometimes indeed consent to such agreements, so increasing the debtors' monthly liability.

5.165 Matthee Attorneys say that they do not understand why the state should be excluded in section 74D(1). They reason that money payable by the state to a third party is due in exactly the same way as a salary.

5.166 With reference to the proposed section 74D(2), Matthee Attorneys are of the opinion that notice should be given to the employer so that he, she or it can inform the court if he, she or it has reason not to enforce the EAO.

5.167 Regarding the proposed section 74D(3), Matthee Attorneys are opposed to allowing any further EAOs in respect of other persons (creditors) at all. They argue that an administration order presupposes that a person and his or her dependants need to live on the remainder of their income.

3 Evaluation and recommendations

5.168 The Department of Justice and Constitutional Development (DOJCD) reviewed several provisions, including section 65J, of the MCA. This review has led to the amendment of section 65J, which now provides that the amount of the instalment payable or the total amount of instalments payable, when there is more than one emoluments attachment order (EAO) payable by the judgment debtor, may not exceed 25 per cent of the judgment debtor's basic salary. The court may make an order regarding the division of the available amount to be committed to each of the EAOs. Further, the court must be satisfied that each EAO is just and equitable and that the sum of all the EAOs is appropriate.[322] A further safeguard built

322 Section 65J(1A).

into this section is that the clerk of the court must, before issuing an EAO, ensure that the court has authorised it.[323]

5.169 The amendment of section 65J was preceded by several complaints of unauthorised deductions from debtors' salaries because EAOs were issued without judicial oversight. The constitutionality of section 65J prior to its amendment was tested before the Western Cape High Court.[324] The applicants in the case argued that in section 65J(2)(a) the words "the judgment debtor has consented thereto in writing or" and section 65J(2)(b)(i) and (ii) of the Act were inconsistent with the Constitution and invalid to the extent that they failed to provide for judicial oversight over the authorisation and issuing of an EAO. On 13 September 2016, the Constitutional Court in *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* [2016] ZACC 32 confirmed the Western Cape High Court judgment that section 65J(2) of the Magistrates' Courts Act was inconsistent with section 34 of the Constitution and invalid to the extent that it failed to provide for judicial oversight when EAOs are issued. The Constitutional Court ruled that no EAO may be issued unless the court has authorised its issuing after satisfying itself that it is just and equitable to do so and that the amount is appropriate. This means that the clerk of the court may no longer issue an EAO without an order of court authorising the issuing of that emoluments attachment order.

5.170 In the light of the amendments made to section 65J the Commission are of the view that their proposed subsection (3) is no longer needed. The Commission further recommend that section 74D be aligned with the provisions of section 65J by giving the court a discretion to authorise an EAO.

5.171 Regarding Booysen & Co. Inc. Attorneys' concern that in certain courts the clerk of the court refuses to issue (sign) the EAO if the address of the employer is not within the area of jurisdiction of that court, section 65J(1)(a) has been amended to provide that an EAO may be issued from the court of the district in which the judgment debtor resides, carries on business or is employed. The amendment therefore addresses the concern expressed.

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323 Section 65J(3)(b).

324 *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (Case 16703/14).

5.172 The question posed by HVDM Attorneys about how the clerk of the court would know not to issue further EAOs has been addressed by section 65J(3)(b), which provides that the clerk of the court must ensure that the court has authorised an EAO before issuing that order.

5.173 HVDM Attorneys correctly pointed out that the employer may withhold a commission of five per cent for paying over the amount of the EAO to the administrator. This means that the administrator receives only 95% of the amount payable. Section 65J(10) of the MCA provides that any garnishee may, in respect of the services rendered by him or her in terms of an emoluments attachment order, recover from the judgment creditor a commission of up to five per cent of all amounts deducted by him or her from the judgment debtor's emoluments by deducting such commission from the amount payable to the judgment creditor. An administrator is considered a judgment creditor for purposes of section 65J.[325] The Commission are of the view that the creditors of the debtor should carry a percentage of the five per cent commission payable to the garnishee. The creditors would otherwise have had to contract the services of a debt collector but in the case of an EAO they do not have to do so because the administrator is collecting the payment.

How should the MCA be amended to ensure that the five per cent commission is recovered from the judgment creditors?
Should the Rules Board make rules regarding the percentage the administrator may deduct from the amount payable to the creditors? This percentage should preferably be determined according to a sliding scale, depending on the total number of the debtor's creditors.

5.174 With reference to the submission by Matthee Attorneys in paragraph 5.166 and to the new section 65J(2A), which provides that a judgment creditor must serve on the judgment debtor and on his or her employer notice of the intention to have an EAO issued against the judgment debtor, the Commission recommend the deletion of its proposed clause (2).

5.175 The Commission is mindful of the fact that not all debtors who apply for an administration order enjoy the protection of section 65J of the MCA. It is problematic to issue an EAO in instances where debtors are self-employed or financially assisted by family members. Furthermore, an administrator is not obliged to bring an application for an EAO at the same time that an administration order is granted. Only a debtor referred to in section 74D will come under the protection of section 65J. The Commission therefore recommend

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325 See in this regard section 74I(2).

that section 74B(1) be amended to require the court that hears the application for an administration order to ensure that the debtor will have sufficient means for his or her maintenance and that of his or her dependants after payment of the administration order instalment.[326] In order to do this, the court will have to call for and consider all relevant information, including, but not limited to, any existing EAO. This means that the court may refuse to grant an administration order if it finds that too little funds will be left for the debtor's maintenance and that of his or her dependants. It would, after all, be senseless to grant an administration order if the debtor is most likely going to be unable to comply with his or her obligations in terms of the administration order.

K Section 74E: Appointment of administrator

1 Proposed amendments

5.176 It was brought to the Commission's attention that some administrators, without having been appointed by the court, take over administration files from other administrators. The debtors concerned are also not consulted. The Magistrates' Courts Act is clear, however, that an administrator can only be appointed by the court. It is therefore unacceptable for an administrator to act as administrator for the estate of and for the payments of the debts of a debtor without being appointed by the court to do so. The workshop paper therefore recommended that section 74E of the MCA be amended as follows:

(1) When an administration order has been granted under section 74(1), the court shall appoint a person <u>who practises within its area of jurisdiction</u> as administrator, which appointment shall become effective only—

(a) after a copy of the administration order has been handed or sent to him by registered post;

(b) in the event of his being required as administrator to give security, after he has given such security;

<u>*(c)* after he has provided the clerk of the court with a certified copy of his certificate proving his membership of the Council for … / regulatory body referred to in section …; and</u>

<u>*(d)* in the event of his being an attorney, after he has provided the clerk of the court with a letter signed by the secretary of the law society of which he is a member, to the effect that he is a practising attorney and that—</u>

<u>(i) no proceedings to strike his name off the roll of attorneys or to suspend him from practice as an attorney have been instituted by that law society; and</u>

<u>(ii) he has not been found guilty of unprofessional, dishonourable or unworthy conduct relating to the management of the trust account that he keeps in</u>

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326 Insertion of paragraph (k) in section 74 B(1) (Bills: option 1 & 2).

terms of section 33 of the Attorneys, Notaries and Conveyancers Admission Act, 1934 (Act 23 of 1934), or any other conduct which in the opinion of the secretary will render him unfit to be appointed as an administrator.

(2) An administrator may on good cause shown be relieved of his appointment by the court, and the court may appoint any other person in his place.

(3) An administrator who is not an officer of the court or a practitioner shall, before a copy of the administration order is handed or sent to him by registered post, give security to the satisfaction of the court and thereafter as required by the court for the due and prompt payment by him to the parties entitled thereto of all moneys which come into his possession by virtue of his appointment as an administrator.

(4) An administrator shall not be obliged to give security in respect of his appointments as an administrator of the estate of any particular debtor if he has given or gives security to the satisfaction of the court for the due and prompt payment by him to the parties entitled thereto of all moneys which may come into his possession by virtue of his appointment as administrator of the estate of any debtor, irrespective of whether such appointment was made before or after the date on which the said security was given.

(5) An administrator shall, within 30 days after complying with the provisions of subsection (1), provide the debtor over whose estate he has been appointed as an administrator with a letter as prescribed informing the debtor of his rights and obligations, the administrator's rights and obligations and the remedies provided for in this Act if the administrator fails to carry out his duties in terms of this Act.

(6) An administrator who contravenes the provisions of subsection (5) is guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

(7) A person who acts as an administrator for the estate of and for the payments of the debts of a debtor in instalments or otherwise without being appointed as an administrator as contemplated in subsection (1) is guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

(8) A person who on the date of commencement of this Act acts as an administrator for the estate and the payment of the debts of a debtor in instalments or otherwise without being appointed as an administrator as contemplated in subsection (1) must within six months after the date of commencement of this Act apply to be appointed as the administrator.

2 Comments received

Accessibility of the office of the administrator

5.177 Christo van der Merwe is in favour of limiting an administrator to a specific area of jurisdiction, provided that debtors who are employed, conduct business or reside within 50 kilometre of the administrator's courthouse should be allowed to apply to that specific court. To substantiate the proposed 50-kilometre radius, he mentions that there is neither a CCMA nor a central divorce court in each town to assist the poor and that there are currently court jurisdictions with no practising attorneys. He states that it would be impossible to have administrators practising in each court jurisdiction. He therefore recommends that section 74E(1) be amended by substituting the words "its area of jurisdiction" for the words "who

practises within 50 kilometres of the Court". He cautions, however, that an administrator could have several offices and could claim that he or she practises at each of these offices; hence he proposes that the restriction be linked to the administrator's residence.

5.178 Christo van der Merwe says that limiting the appointment of administrators to a specific area would automatically improve the judicial oversight over administrators, which would make it unnecessary to create a regulatory body for administrators.

5.179 Several respondents[327] vehemently oppose the proposal in subsection (1) that the court should appoint only a person who practises within its area of jurisdiction. In substantiation of their views, they submit the following:

- Debtors in areas with no administrators will never be able to apply for an administration order.[328]
- Infrastructure costs and bank charges make it virtually impossible for an administrator to administer a small number of administration orders profitably.[329]
- An administration practice is profitable only if it administers more than a fixed number of administrations.[330]
- Some magisterial districts are so small that it would not be worth opening an office in them[331]
- The provision is unreasonable and prejudicial to an administrator whose offices are ideally situated or in close proximity to various courts' areas of jurisdiction.[332]
- Administrators who run honourable practices and have referral work because of good service will automatically be excluded from an appointment if he or she is limited to the area of jurisdiction of the district where he or she practises.[333]

5.180 In justification of their disagreement with the proposal, Booysen & Co. Inc. Attorneys mention that in KwaZulu-Natal, which has a total of 52 magisterial districts, there are –

(a) 20 areas of jurisdiction where no attorneys practise;

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327 Booysen & Co. Inc. Attorneys, Norman Shargey, Matthee Attorneys and the Magistrates Court Committee of the Cape Law Society.

328 Booysen & Co. Inc. Attorneys and Matthee Attorneys.

329 Booysen & Co. Inc. Attorneys.

330 Matthee Attorneys.

331 Matthee Attorneys.

332 Magistrates Court Committee of the Cape Law Society.

333 Magistrates Court Committee of the Cape Law Society.

(b) seven areas of jurisdiction where only one firm of attorneys practise in each area of jurisdiction; and

(c) nine areas of jurisdiction where only two attorneys practise in each area of jurisdiction.

5.181 They say that they are administering administration orders granted in more than 170 magisterial districts and that they manage these by way of branch offices, call centres, toll-free telephone numbers, and electronic communication. They submit that provided the debtor is aware of where the administrator is situated and how he or she can be contacted or communicated with; if the debtor accepts this, he or she should have the right to nominate whom he or she wishes as his or her administrator.

5.182 Matthee Attorneys indicate that they have several administrations in areas far from their office that are dealt with quite easily by means of the internet and correspondent attorneys.

5.183 The Magistrates Committee of the Cape Law Society suggest that the court should exercise its discretion at the hearing of the matter and should consider whether the appointment of an administrator whose offices are not in the area of jurisdiction of the court is reasonable or not. Creditors should likewise have the right to object to the appointment of an administrator, including an administrator whose office is not in close proximity of the debtor's place of residence or employment.

5.184 In contrast to the above, the respondents[334] below welcome the proposal.

5.185 HVDM Attorneys explain that the administration order process is a rehabilitation process and the debtor needs to have access to the administrator and the information on his or her file, and to receive personal guidance from the administrator. They add that there may be exceptional reasons why an administrator who is not practising in a specific court district may be appointed, so they recommend that the section be amended to provide that, on good cause shown and furnishing of ample proof that the debtor would receive the same guidance without additional cost, the court may in its discretion appoint an administrator who does not practise in the court's area of jurisdiction.

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334 HVDM Attorneys.

5.186 According to Krüger and Van Eeden Attorneys their clients appreciate the fact that they can make an appointment to discuss their file. They emphasise that it is important for a debtor to know his or her administrator and to be able to do regular enquiries into his or her administration. They mention that they stay in touch quite easily with all their clients in the whole of the Vaal Triangle – Vereeniging (Meyerton), Vanderbijlpark and Sasolburg – and even arrange consultations for their Meyerton clients in Meyerton at another attorney's office. They highlight, however, that it would become difficult if they had administrations outside a radius of 50 kilometres.[335]

5.187 Melting the Darkness question whether the amendment is necessary. They point out that if the administration order does not arise from a judgment or emanates from section 65I, the court of jurisdiction is the court where the debtor resides, carries on business or is employed.[336] They say that this provision is abused by administrators who choose "soft" courts and falsify the addresses of the debtors. They suggest that provision be made for penalties to stop this practice.

Giving of security by administrator

5.188 With reference to subsection (1)(b), HVDM Attorneys argue that the provisions regarding the form of security to be furnished are still very vague. They are of the view that even practising attorneys should furnish ample security. In their experience, it is practically impossible for all the debtors to lodge individual claims with the Fidelity Fund against an attorney administrator in the event of embezzlement of trust funds. They claim that lodging a claim with the Fidelity Fund is a long process and that the debtors and creditors would be out of pocket if the administrator did not have the means to refund the account for the total deficit. They recommend that all funds, even in the case of a practising attorney, be deposited in a separate trust account. Furthermore, interest earned on the account could be used to cover bank charges and to make a contribution to the Fidelity Fund to secure the total amount in the account.

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335 Christo van der Merwe proposes that a court should have jurisdiction to appoint an administrator in respect of the estates of debtors who reside or carries on business within a 50 km radius of such court. He mentions that the High Courts have jurisdiction over more than one town and the Magistrates' Courts Rules (as recently amended) are aligning the proceedings in the lower courts with those of the High Courts.

336 See section 74(1) of the MCA.

Suitability for appointment as administrator

5.189 The respondents disagree with the proposed paragraphs (c) and (d) of subsection (1).[337]

5.190 Booysen & Co. Inc. Attorneys submit that it is up to administrators, debtors and creditors to regulate the industry and they are doing so by lodging complaints against and reporting and removing incompetent and unqualified administrators. They say that the administration order industry has over the past 10 years to a very large extent "cleansed" itself and that magistrates by and large appoint administrators known to them. They are of the view that the proposed amendments would delay the appointment of administrators, and add that it should be specified how often the proposed letter would have to be submitted, whether it would be in respect of a specific period and whether a separate letter would have to be filed for each application.

5.191 With reference to the proposed paragraph (d), Matthee Attorneys state that a certificate from the attorneys' fidelity guarantee fund should be sufficient for an attorney to qualify to be appointed as an administrator. They submit that if an attorney administrator has a fidelity guarantee certificate, debtors and/or creditors can institute a claim against the fidelity guarantee fund, even if the attorney administrator is insolvent or deceased. This is not the case with non-attorney administrators, however.

5.192 The Magistrates Court Committee of the Cape Law Society says that a practising attorney should be in receipt of a valid Fidelity Fund certificate and membership card issued by his or her law society and states that these should be accepted as confirmation that the attorney is a practising attorney.

5.193 Christo van der Merwe questions why paragraph (d) sets additional requirements for attorneys while paragraph (c) only requires proof of membership of the proposed council or regulatory body for non-attorney administrators. He points out that while it might take months or years to strike an unscrupulous administrator from the roll, magistrates would be in a better position to prevent the appointment of such administrators as they are familiar with the administrators in their areas of jurisdiction.

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337 Norman Shargey and Booysen & Co. Inc. Attorneys.

5.194 Matthee Attorneys mention that they have brought several applications to relieve administrators of their duties. As the point was made that the magistrates' courts can deal with matters only if they are authorised by statute, Matthee Attorneys propose the inclusion of the following in subsection (2): "on application an administrator may on good cause shown be relieved of his appointment".

5.195 Matthee Attorneys suggest that subsection (4) be amended to provide that all persons, except attorneys, furnish security.

Information to be provided to debtor by administrator

5.196 Booysen & Co. Inc. Attorneys are in favour of the proposed amendments in subsections (5) to (8).

5.197 HVDM Attorneys suggest that attorneys appearing on behalf of debtors should provide their clients with the information referred to in subsection (5).

5.198 Krüger and Van Eeden Attorneys comment that subsection (5) would be unnecessary if the "Rules and Regulations" proposed by them[338] are adjusted to contain the information concerned. Furthermore, the "Rules and Regulations" could be signed and filed in the court file. This, according to them, would mean that no proof of service would have to be given at a later stage.

5.199 Norman Shargey proposes that a document setting out the information referred to in subsection (5) be annexed to the application.

5.200 Matthee Attorneys approve of the proposed subsection (5), but would prefer the Department to draft a document that should form part of the rules and be signed before the magistrate by the person who applies for administration. The court could then ascertain from the person whether the document had been discussed with him or her before the application was made. According to Matthee Attorneys hat it often happens that administrators convince persons making an application for administration to sign documents that they neither have read nor understand.

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338 See paragraph 5.109 above.

5.201 The Magistrates Court Committee of the Cape Law Society submit that the magistrate hearing the application should bring the information concerned to the attention of the debtor. Alternatively, "the draft court order or a separate court form should be drafted and signed at the hearing of the matter which ensures that the debtor has been informed of the above". The Committee say that the proposed amendment should stipulate how the letter should be delivered to the debtor, whether by registered mail, e-mail or ordinary mail etc.

5.202 Some respondents[339] feel that the proposed subsections (6) and (7) are too drastic in that the punishment would be too severe for the offence. Krüger and Van Eeden Attorneys say that there should be a balance between the offence and the punishment, while the Magistrates Court Committee of the Cape Law Society believe that the criminal sanction proposed in subsection (6) is inappropriate. Norman Shargey argues that the sanction should merely be that an administrator could be removed from his appointment.

Administration of estate of debtor by person or entity not appointed as administrator by the court

5.203 With reference to subsections (7) and (8), Norman Shargey points out that courts do not want to be burdened with hundreds of substitution matters on any given day and that most courts insist that only approximately 10 such matters a day be set down. He therefore suggests that an administrator only be required to advise all interested parties that he or she has taken over as administrator; to provide them with his or her contact details; and to inform them that, as soon as reasonably possible, an application to be substituted as administrator will be made. In addition, a copy of this notice must be filed at the court where the order for administration was granted. Norman Shargey adds that it should be kept in mind that there is a substantial amount of work involved in bringing an application for substitution. Hence, in his view, it is impractical and unrealistic to provide that no person may act as an administrator before he or she has been so appointed by a court.

5.204 Regarding subsection (7), Matthee Attorneys submit that a prison sentence should rather be considered if a person had been appointed as an administrator, but did not distribute the funds as provided in the Act. They mention that there are High Court judgments in which it was held that in such a case the trust account of the administrator

339 HVDM Attorneys, Krüger and Van Eeden Attorneys, Norman Shargey, and Matthee Attorneys.

should be attached until another administrator has been appointed. Furthermore, it should be kept in mind that where a large number of administrations are taken over and substituted by the court, one or two could be left out. It would therefore be unfair to impose a prison sentence on an administrator for such an oversight.

5.205 By contrast, Melting the Darkness support the proposed subsection (7) and believe that it would solve the problem of administrators taking over administration files from other administrators without having been appointed by the court.

5.206 The Magistrates Court Committee of the Cape Law Society endorse the inclusion of subsections (7) and (8). The Committee are of the opinion that these provisions would prevent abuse in instances where files are simply sold and/or transferred to another administrator without the necessary notice being given to all parties and the necessary court application being made in terms of section 74E. The Committee pointed out that there is another category of abuse involving certain administrators who allow their names to be used simply to get the appointment as the administrator, while the actual administration of the debtor's file is with another entity. The Committee recommend that the amendments include a provision to put a stop to such abuse.

5.207 Christo van der Merwe suggests that the period referred to in subsection (8) be extended to one year. He finds it senseless to expect an administrator who for instance has taken over files five years previously, to obtain formal orders within six months after commencement of the Act.

5.208 In order to streamline and expedite the process of subsection (8), he proposes that the Act should make it possible for an administrator to bring one application to appoint him or her formally as an administrator in all the matters. He proposes the following subsections:

> "Section 74E(9): A person whom has without a formal Order of substitution, taken over and/or taken control of a file and/or matter wherein another person was appointed by a Magistrate's Court and done so to act as Administrator, shall within a period of 1 (one) year of commencement of this Act make a request to a Magistrate at the Court at which the previous Administrator was so appointed, for a formal substitution.
>
> Section 74E(10): The person mentioned in Section 74E(9) may make one request to a Magistrate in respect of all the matters in that specific Court wherein that person took control, on proviso that such person shall attach a list of case numbers concerned and in addition thereto an affidavit deposed to by that persons wherein he/she affirms that that all the respective debtors has

at some point in time prior to the request, been informed of the fact that he/she has taken control.

Section 74E(11): A copy of the Magistrate's Order of substitution so granted in respect of all the respective matters may thereafter be filed at the Clerk of the Court under each of the case numbers of the matters so affected."

5.209 With reference to subsection (7), Matthee Attorneys enquire how voluntary distributions should be dealt with. They mention that they often assist people who do not qualify for debt administration by doing voluntary distributions for them. This is usually done when the debts of a person exceed the limitation of R50 000.

5.210 Baker and McKenzie Attorneys explain that administrators sometimes perform "swop-outs", that is to say they buy, say, a R20 000 debt from the creditor for R5 000 and the creditor then writes off the debt. In other words, the administrator buys the debt and then charges the debtor interest.

3 Evaluation and recommendations

Accessibility of the office of the administrator

5.211 Although the Commission understand the comments made in respect of subsection (1), they cannot lose sight of the fact that some debtors are unable to access the services of their administrators because of the long distances they have to travel to reach the offices of their administrators. A careful balance needs to be struck between the interest of administrators and that of debtors. Ideally, a debtor should be able to reach his or her administrator's office without effort by public transport.

5.212 Booysen & Co. Inc. Attorneys say debtors are able to reach their offices through toll-free telephone numbers and electronic communication. This implies that a debtor should have a phone or computer or should at least have access to one.

5.213 The Commission are of the view that by establishing branch offices in close proximity to debtors, administrators would make their services more accessible to the majority of, if not all, their debtors. Hence, the Commission recommend that the head office or a branch office of an administrator should be within a radius of 50 kilometres of the place where the debtor

resides, is employed or carries on business.[340] The court should, however, still have a discretion to appoint a person as an administrator if it is satisfied that the financial burden to the debtor caused by travelling to the head office or branch office of such person would not be greater than it would have been if an administrator was appointed whose office is within a radius of 50 kilometres of the place where the debtor resides, is employed or carries on business, or may so appoint an administrator if the office of the nearest administrator is situated more than 50 kilometres from the place where the debtor resides, is employed or carries on business.[341] The Commission applaud those administrators who have extended the area of their practice by establishing branch offices. It is important, however, that any service, information or document in respect of an administration order provided by or in possession of the head office of an administrator should be available at any of its branch offices.[342]

Suitability for appointment as administrator

5.214 The Commission have reconsidered their recommendations set out in paragraphs (c) and (d) of section 74E(1) in paragraph 5.176 above. Although the aim of these recommendations was to ensure that the court appoint a person who is suitable to act as an administrator, they also place an additional burden on those administrators who execute their functions with integrity. The Commission are of the view, therefore, that a person may not act as an administrator if he or she has not been appointed by the court to act as an administrator for the estate of the debtor concerned;[343] has been struck off the roll of attorneys or if proceedings to strike his or her name off the roll of attorneys or to suspend him or her from practice as an attorney have been instituted; has been found guilty of unprofessional, dishonourable or unworthy conduct relating to the management of his or her trust account that he or she keeps in terms of section 86 of the Legal Practice Act, 2014 (Act 28 of 2014), or in terms of any other law relating to his or her profession; is of unsound mind and has been so declared by a competent authority; is an unrehabilitated insolvent; is not a member of a professional body;[344] or does not comply with the prescribed education,

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340 Insertion of subsection (1A) in section 74E (Bills: options 1 & 2).

341 Insertion of subsection (1B) in section 74E (Bills: options 1 & 2).

342 Insertion of subsection (1C) in section 74E (Bills: options 1 & 2).

343 See paragraph 5.214 and clause 74EA, which deals with persons who currently act as administrators without having been appointed by the court. See also the proposed clause 31*(a)* (Bills: option 1) and 28*(a)* (Bills: option 2).

344 See the proposed amendments to section 74N which provide for certain consequences if the court finds that a person has contravened the provisions of subsection (1D). One of the consequences is that the professional body of whom the person is a member must be notified of the contravention and may

experience or competency requirements (subject to the transitional provisions) or has been convicted of an offence of which dishonesty is an element.[345]

5.215 In response to Baker and McKenzie's submission that some administrators buy the debt of debtors under administration with them from the debtors' creditors, the Commission recommend that this practice be prohibited because it constitutes a conflict of interest.[346] An administrator is supposed to look after the interests of the debtor and would not be able to do so if he or she becomes the debtor's creditor.

Administration of estate of debtor by person or entity not appointed as administrator by the court

5.216 The Commission find the practice of an administrator taking over the administration files of another administrator without having been appointed by the court unacceptable because the court plays an important oversight role in ensuring that fit and proper persons are appointed as administrators. The Commission's view is in line with the standpoint of Ledwaba J in *Stander v Erasmus.*[347] In that case, the administrator and a person with whom she had formed a close corporation to be used as a juristic person for the management of the debtors' estates under administration entered into an agreement of sale with another person, in terms of which they ceded their rights, title and interest in the administration applications to the other person at a price of R500 000.[348] The agreement further stated that the sellers and the purchaser agree, by way of an affidavit, that the purchaser would substitute the current administrator as the administrator.[349] In response to this, Ledwaba J stated the following:[350]

> I know that there is a practice of establishing juristic persons through which files under administration are administered. The legitimacy of such practice, in my view, raises serious concerns because the said juristic persons have not been appointed by the court.

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revoke or cancel the registration or admission that that person requires in order to conduct his or her business. However, if such a person is not a member of a professional body, he or she will not suffer the consequences intended by this provision. This will be problematic in the absence of a dedicated regulatory body for administrators.

345 Insertion of subsection (1D) in section 74E (Bills: options 1 & 2).

346 Insertion of subsection (1E) in section 74E (Bills: options 1 & 2).

347 2011 (2) SA 320 (GNP).

348 Page 321D.

349 Page 321H.

350 Page 324D-F. See also ***African Bank Ltd v Jacobs and Another*** 2006 (3) SA 364 (C) at 367D – E, where the court referred to the fact that the administrator was conducting the administration through a corporate entity as a "supposed irregularity".

> In terms of the provisions of s 74 of the Act, the appointment of an administrator is done by the court. If such a person is to be relieved of his/her appointment it is the court that must sanction same, and the new appointment or substitution should be done by the court.
>
> I have serious doubts about the legitimacy of the practice of appointed administrators in using close corporations and companies to do administration, without the approval of the court.
>
> The interests of debtors and creditors are of paramount importance, hence in s 74J(1) of the Act the debtors and creditors have the right to inspect the list of all payments and other funds received by the administrator. Now, if the payments are going to be received by a person not appointed by the court, the rights and interests of debtors and creditors are going to be compromised.

5.217 Ledwaba J said that the administrator, in allowing the trust account to be conducted and controlled by another person, acted contrary to her duties and responsibilities as an administrator.[351] He further observed that the administrator and the purchaser dealt with the files of the debtors under administration as if they were their personal assets, without the approval of the court.[352]

5.218 However, the Commission do not want to lose sight of the fact that if the new administrator has to bring a new application for each administration file, it would have further cost implications for the debtors. It should be kept in mind that the purpose of the application is not to decide whether the debtor should be placed under administration, but to decide whether the new person is suitable to be appointed as an administrator. The Commission therefore recommend that only one application should be brought for the take-over of all the files.[353] It is also important that the new administrator must, within one month of his or her appointment, notify each debtor and creditor concerned of his or her appoint. A copy of the notice should also be lodged with the clerk of the court where the administration order was granted.[354] The provisions of section 74E and its proposed amendments apply, with the necessary changes, to the appointment of the substitute administrator.[355] The Commission doubt, however, whether the debtors should carry the cost of such an application, keeping in mind that the take-over was done based on a decision made by the current administrator. The current administrator and the administrator to be appointed should therefore decide

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351 Page 325C.

352 Page 324H.

353 Clause 74EA(1) (Bills: options 1 & 2), clause 31(a) (Bills: option 1) and clause 28(a) (Bills: option 2).

354 Clause 74EA(2) (Bills: options 1 & 2).

355 Clause 74EA(5) (Bills: options 1 & 2).

between them who should carry the cost of the application.[356] The Commission further recommend that a different application form should be prescribed for the substitution of an administrator.

5.219 Furthermore, a person who, on the date of commencement of the proposed legislation, acts as an administrator without having been appointed as an administrator should, within six months of the commencement of the proposed legislation, make an application to court to be appointed as the administrator. Regarding the Commission's alternative option that payment be made into the Administration Account, the Commission recommend that an administrator, within 30 days from the date of commencement of the proposed legislation, pay all moneys received by him or her from or on behalf of debtors into the Administration Account for distribution to the creditors of the debtors and notify each debtor that payment must be made into the Administration Account.[357]

5.220 With reference to the concern raised by the Magistrates Court Committee of the Cape Law Society that certain individuals apply to court to be appointed as administrators knowing that the actual administration of the debtors' files would be done by another entity, the Commission recommend that a person may not be appointed as an administrator if he or she is not the person who will administer the estate of the debtor after the application for an administration order is granted.[358] Furthermore, a person who knowingly acts as an administrator without having been appointed as an administrator should not be entitled to expenses and remuneration as contemplated in section 74L.[359]

5.221 The Commission believe that the concerns raised in respect of subsection (7) have been addressed by the proposed sections 74EA in that those who are acting as administrators without having been appointed by the court to do so would be able to make a single application to be appointed.

5.222 Having regard to the comment made by Matthee Attorneys that an administrator might inadvertently leave out one or two administration files when applying to be substituted

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356 Clause 74EA(3) (Bills: options 1 & 2).

357 See the transitional provision in the Magistrates' Courts Amendment Bill (option 1).

358 Clause 74E(1D)*(a)* (Bills: option 1 & 2).

359 Clause 74EA(4) (Bills: option 2).

as an administrator, the Commission recommend that the word "knowingly" be inserted before the word "acts".[360]

In view of the fact that some administrators use juristic persons to administer their administration order files, should the Act provide for the appointment of a juristic person as an administrator?[361]

Giving of security by administrator

5.223 Boraine states that the administrator's giving security to the satisfaction of the court is meant to serve as a guarantee for moneys received and paid into the trust account of the administrator, but the practices surrounding the giving of such security are sometimes doubted.[362] He also refers to the practice by non-attorneys of evading the requirements of the Act pertaining to security by forming arrangements with attorneys to pose as the appointed administrators and front for administration companies.[363]

5.224 The reason why attorneys are not required to provide security is that they have fidelity fund cover. Debtors can lodge claims against the Legal Practitioners' Fidelity Fund if they have suffered pecuniary loss as a result of theft or mismanagement of funds. This remedy becomes futile in instances where the attorney who is appointed as the administrator does not conduct the administration of the debtor's estate after the administration order has been granted.

5.225 In paragraphs 5.214 above, the Commission recommend that a person may not act as an administrator if he or she has not been appointed by the court to act as the administrator for the estate of the debtor concerned. If a person acts as an administrator without having been appointed by the court to do so, it would have serious consequences, which are outlined in the amended section 74N of the proposed Magistrates' Courts

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360 Clause 74EA(4) (Bills: option 2).

361 A comparison could be drawn with the Debt Collectors Act 114 of 1998, which provides for a company or close corporation to carry on business as a debt collector. In terms of section 8 of the Act, in addition to the company or close corporation itself, every director of the company and member of the close corporation and every officer of such company and close corporation, not being himself or herself a director or member but who is concerned with debt collecting, must be registered as a debt collector.

362 Boraine A "A comparison between formal debt administration and debt review – the pros and cons of these measures and suggestions for law reform (Part 1)" (2012) 45:1 *De Jure* 80-103 at 88.

363 Boraine A "A comparison between formal debt administration and debt review – the pros and cons of these measures and suggestions for law reform (Part 2)" (2012) 45:2 *De Jure* 254-271 at 259; Boraine A "Some thoughts on the reform of administration orders and related issues" (2003) 2 *De Jure* 217-251 at 231.

Amendment Bills (options 1 and 2). The Commission believe that these recommendations would be a deterrent to contravening the provisions of the proposed legislation.

5.226 The provision of security by the administrator for due and prompt payment to the debtor's creditors is relevant only in respect of the Commission's proposed Magistrates' Courts Amendment Bill (option 2). The Commission recommend that section 74E(3) be amended to provide that a non-attorney administrator must, before being appointed as an administrator, give the required security.[364] As regards the proposed Magistrates' Courts Amendment Bill (option 1), the Commission recommends that section 74E(3) and (4) should be repealed. This is because administrators, in terms of this Bill, will not be responsible for the receiving of and distribution of funds in terms of an administration order.[365]

With reference to the comments of HVDM Attorneys in paragraph 5.188, should attorney administrators be required to provide security despite the fact that they have fidelity fund cover?

Training of non-attorney administrators

5.227 There are no prescribed qualifications, training, experience or other requirements with which an administrator must comply before he or she is appointed as an administrator by the court. This is in contrast with the strict requirements set for the registration of debt counsellors.[366] An applicant for registration as a debt counsellor must satisfy prescribed education,[367] experience or competency requirements.[368] A person may not be registered as a debt counsellor if he or she is listed in the register of excluded persons in terms of section 14 of the National Gambling Act 7 of 2004; is mentally unfit or disordered; has been removed from an office of trust on account of misconduct relating to fraud or the misappropriation of

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364 Amendment of section 74E(3) (Bill: option 2)

365 See the discussion under paragraphs 5.368 – 5.375.

366 See sections 44, 45, 46, and 48 of the NCA.

367 Regulation 10(a), contained in GN R.489 of 31 May 2006, provides that a person who applies for registration as a debt counsellor must have a Grade 12 certificate or equivalent Level 4 qualification issued by the South African Qualifications Authority and must have successfully completed a debt counselling course approved by the National Credit Regulator and provided by an institution approved by the National Credit Regulator.

368 Regulation 10(b) contained in GN R.489 of 31 May 2006 provides that a person who applies for registration as a debt counsellor must have a minimum of two years' working experience in any of the following fields: consumer protection, complaints resolution or consumer advisory service; legal or para-legal services; accounting or financial services; education or training of individuals; counselling of individuals; or general business environment. See also section 44(3)(a) of the NCA.

money; has been a director or member of a governing body of an entity at the time that entity has been involuntarily deregistered in terms of a public regulation; brought the consumer credit industry into disrepute, or acted with disregard for consumer rights generally; has been convicted during the previous 10 years of theft, fraud, forgery, uttering a forged document, perjury, an offence under the Prevention and Combating of Corrupt Activities Act 12 of 2004 or a crime involving violence against another natural person; or has been sentenced to imprisonment without the option of a fine.[369] A person is further disqualified from registering as a debt counsellor if he or she is subject to an administration order in terms of the MCA; subject to a debt rearrangement in terms of the NCA; or is engaged in, employed by or acting as an agent for a person that is engaged in debt collection, the operation of a credit bureau, credit provision, or any other activity prescribed by the Minister.[370]

5.228 The Commission recommend that the Minister make regulations regarding the training of administrators, in particular concerning the education, experience and competency requirements for administrators[371].

Information to be furnished to debtor by administrator

5.229 It was brought to the Commission's attention that although attorney administrators are regulated by the provincial councils of their respective law societies,[372] most debtors are unaware that they can report abuse to the law societies (provincial councils) with which their attorney administrators are registered. Hence the Commission recommend that all administrators provide debtors with the contact details of their respective regulatory bodies,[373] which would be (the provincial councils of) the different law societies in the case of attorney administrators.

5.230 The Commission is of the view that the administrator is best suited to provide a debtor with the information set out in subsection (5). Hence the Commission confirm their recommendation that debtors should, by means of a prescribed letter, be informed of their rights and obligations, the administrator's rights and obligations, and the remedies provided for in the proposed legislation if the administrator fails to carry out his or her duties properly.

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369 Section 46(3) of the NCA.

370 Section 46(4) of the NCA.

371 Clause 30*(c)* (Bills: option 1) and clause 27(1)*(a)* (Bills: option 2).

372 See section 23 of the Legal Practice Act, 28 of 2014.

373 Clause 74E(6)*(c) (*Bills: option 1&2).

In addition, the Commission recommend that the debtor be provided with information regarding the procedure to refer a complaint against the administrator to the professional body with which the administrator is registered. Further, the letter should be available in an official language that the debtor understands best.[374] This would be a *pro forma* letter and would not have to be drafted by the administrator.

Interrogation of debtor by court

5.231 With reference to the comment made by Matthee Attorneys that it often happens that administrators convince persons to sign documents which they either have not read or do not understand, the Commission recommend that section 74B(1) of the MCA be amended to provide that the court must, at the hearing of the application, interrogate the debtor about whether the person to be appointed as his or her administrator or the person who has prepared the statement of affairs has explained to the debtor the administration order process and whether the debtor understands it.

Withdrawal of appointment as administrator

5.232 The Commission agree with the respondents that the proposed subsection (6) of section 74E in paragraph 5.176 should not impose a prison sentence for a contravention of subsection (5). The Commission believe a more appropriate sanction would be that a finding by a court that an administrator has contravened subsection (5) should serve as a ground for the withdrawal of his or her appointment as an administrator in the case concerned.[375]

L Section 74F: Notice of and objections to administration orders

1 Proposed amendment

5.233 The workshop paper has not recommended amendments to section 74F. However, the provisions of this section are set out below as comments were received on them.

(1) A copy of an administration order shall be handed or sent by registered post to the debtor

374 Clause 74E(7)*(a) (*Bills: option 1&2).

375 Insertion of subsection (5) (Bills: option 1) and subsection (4) (Bills: option 2) in section 74N.

and the administrator by the clerk of the court.

(2) The administrator shall forward a copy of the administration order by registered post to each creditor whose name is mentioned by the debtor in the statement of his affairs or who has given proof of a debt.

(3) A creditor who has not received notice of the application for an administration order and who wishes to object to any debt listed with the order or to the manner in which payments shall be made in terms of the order shall, within a reasonable time as laid down in the rules, give notice of his objection and the grounds therefor to the clerk of the court, the debtor and the administrator and, if he objects to the inclusion of any debt, also to the creditor concerned.

(4) In considering the objection referred to in subsection (3) the court may—

(a) uphold it;

(b) refuse it; or

(c) postpone consideration thereof for hearing after notice given to the persons concerned and on such conditions as to costs or otherwise as the court may deem fit.

2 Comments received

5.234 The Magistrates Court Committee of the Cape Law Society remark that subsection (1), which provides that a copy of the administration order be handed or sent by registered post to the debtor and the administrator by the clerk of the court, is never complied with in practice. The Committee say that the budgets of many divisions in the Department of Justice have become strained over the years. As a result, attorneys send self-addressed envelopes to the courts in order to ensure that their documents or court processes are returned. The Committee recommend that the draft order include a paragraph for the signatures of the various parties to confirm their receipt of the administration order.

5.235 As registered mail is expensive, some respondents recommended that subsection (2) also give the administrator the option of sending a copy of the administration order by fax or e-mail.[376]

3 Evaluation and recommendations

5.236 In line with the Commission's recommendation that delivery of notice may be made by e-mail or fax, it is recommended that a copy of the administration order may also be delivered to creditors by e-mail or fax.[377]

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376 HVDM Attorneys and the Magistrates Court Committee of the Cape Law Society.

5.237 With reference to the comments of Booysen & Co. Inc. Attorneys on section 74G, the Commission recommend that a creditor, within ten business days after receipt of a copy of the administration order, provide the administrator with a certificate of balance showing the amount owed by the debtor as at the date of the granting of the order and the interest rate applying to the amount owed. If a creditor fails to submit the certificate of balance within the said period, the administrator should use the balance of the claim as reflected in the application for the administration order or the most recent statement the debtor received from the creditor, whichever is the latest.[378]

Should this section provide that a creditor would not be entitled to claim any amount other than the amount referred to in the certificate of balance or, if such certificate was not received from the creditor, the balance of the claim as reflected in the application for an administration order and any amounts which accrued after the granting of the administration order?

5.238 The Commission supports the Magistrates' Court Committee of the Cape Law Society's proposal that the draft administration order should make provision for the signatures of all the parties confirming receipt of the administration order.

M Section 74G: List of creditors and debts and additions thereto

1 Proposed amendments

5.239 The workshop paper has not recommended amendments to section 74G. However, the provisions of this section are set out below as comments were received on them.

(1) The administrator shall as soon as may be draw up and lodge with the clerk of the court a complete list on which shall appear the case number under which the application for an administration order has been filed, and which shall contain the names of the creditors and the amounts owing to them severally as at the date on which the administration order was granted.

(2) Any creditor who wishes to provide proof of a debt owing before the making of an administration order and not listed in such order, shall lodge his claim in writing with the administrator, who shall thereupon give the debtor notice thereof in the form prescribed in the rules.

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377 Amendment to section 74F(2) (Bills: options 1 & 2).

378 Insertion of subsections (2A) and (2B) in section 74F (Bills: options 1 & 2).

(3) If, within the period allowed in the notice referred to in subsection (2), the debtor admits the claim or does not dispute it, the claim shall be deemed to be proved, subject to the right of any other creditor who has not received notice of the claim to object to the debt, and the administrator shall by notice lodged with the clerk of the court add the name of the creditor and the amount of the debt owing to him to the list referred to in subsection (1) and shall inform the creditor in the form prescribed in the rules that this has been done.

(4) If, within the period allowed in the notice referred to in subsection (2), the debtor gives notice in writing to the administrator that he disputes the claim, the administrator shall notify the creditor thereof and the creditor may request the clerk of the court to appoint a day and time for the hearing of the objection by the court and shall notify the debtor in writing of such day and time.

(5) At the hearing of the objection referred to in subsection (4) the court may—

(a) refuse the claim as a whole;
(b) allow the claim as a whole or in part;
(c) require that the claim be supported by evidence; or
(d) postpone the hearing on such conditions as it may deem fit.

(6) If the court allows a claim as a whole or in part under subsection (5), the debt shall, to the extent to which it has been allowed, be added to the list referred to in subsection (1).

(7) If any person who sold and delivered goods to the debtor under a credit agreement as defined in section 1 of the National Credit Act, 2005 (Act 34 of 2005), before the administration order was granted, is entitled or becomes entitled, by reason of the debtor's failure to fulfil any obligation under such agreement, to demand immediate payment of the sum of the purchase price then still owing, and if such person advises the administrator in writing that he elects so to do, such agreement shall be deemed to create a hypothec on the goods in favour of the seller whereby the amount still owing to him in terms of the agreement is secured, and any term or condition of the agreement with regard to the seller's right to dissolve or terminate such agreement or his right to the return of the goods to which the agreement relates shall not, in consequence of the debtor's non-compliance with any term or condition thereof, notwithstanding anything to the contrary in any law contained, be enforceable.

(8) The court may by order of court authorize the seller referred to in subsection (7) to take possession of the goods referred to in that subsection and to sell them by public auction by an auctioneer nominated by the court after giving the administrator and all the creditors written notice of the time and place of the sale and, if the court has so ordered, after publishing the notice or notices in the manner prescribed by the court, in one or more newspapers designated by the court or, if the seller, buyer and administrator so agree, to sell them by private treaty.

(9) Where the seller has sold the goods in terms of a court order referred to in subsection (8) he shall, if the sale was by public auction, forthwith lodge the auction list with the administrator and pay to the administrator the amount of the proceeds of the sale in excess of the amount of his debt and the costs connected with the sale or, if the net proceeds of the sale are insufficient to pay his debt in full, he may lodge a claim with the administrator in respect of the balance of the purchase price owing to him for inclusion in the list of creditors who are entitled to share in the pro rata distribution of funds received by the administrator.

(10)*(a)* The list of creditors referred to in subsection (1) shall be open to inspection by the creditors or their attorneys in the office of the clerk of the court and the office of the administrator at any time during office hours.

(b) Any creditor may, in the manner and within the period prescribed in the rules, object to any debt included in the list of creditors.

2 Comments received

5.240 With respect to subsection (1), Booysen & Co. Inc. Attorneys note that there is no mechanism by which the administrator can determine what the amount of the claims was on the date of granting of the order because payments could have been made subsequent to the listing of the claim in the statement of affairs and interest would in any event have accrued. With reference to section 74F(2), which provides that the administrator shall forward a copy of the administration order to each creditor, they are of the opinion that an obligation should be placed on the creditors to furnish, within one month after receipt of the order, the administrator with a certificate of balance as at the date on which the order was granted. Failure to do so should entitle the administrator to use the balance of the claim as reflected in the application less any subsequent payments made by the debtor.

5.241 According to HVDM Attorneys suggest that the order should also reflect the interest rate applicable to each claim.

5.242 Matthee Attorneys state that, in view of the fact that the notice can take up a lot of the administrator's time, a creditor who wishes to list his debt should pay an amount equal to double the cost of receiving the documentation from the administrator and the cost of sending the documentation to the debtor, including the cost of registered mail. If the debtor does not deny the debt and it is listed, the cost of listing the claim should be paid back to the creditor as a preferred claim.

3 Evaluation and recommendations

5.243 The Commission support the proposal by Booysen & Co. Inc. Attorneys that section 74F be amended to provide that creditors must, within a specific period of receipt of the administration order, furnish the administrator with a certificate of balance in respect of the amount owed by the debtor as at the date on which the order was granted. The Commission further agree that failure to do so should entitle the administrator to use the balance of the claim as reflected in the application for the administration order or the most recent statement received by the debtor from the creditor, whichever is the latest.[379]

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379 Insertion of subsections (2A) and (2B) in section 74F (Bills: options 1 & 2).

5.244 The Commission agree with HVDM Attorneys that the interest rate applicable to each claim should be reflected.

5.245 With reference to the submission made by Matthee Attorneys, the Commission has recommended the repeal of section 74G(2) to (6) for the reasons set out in paragraph 5.256.

N Section 74H: Inclusion of creditors in list after granting of administration order

1 Proposed amendments

5.246 This section can conceivably be employed by an *in futuro* creditor, provided the debt has become due and owing,[380] but the workshop paper has not proposed amendments to section 74H. The provisions of this section are nevertheless set out below as comments were received on them.

(1) Any person who becomes a creditor of the judgment debtor after an administration order has been granted and who is desirous of providing proof of debt, shall lodge his claim in writing with the administrator, who shall thereupon advise the debtor thereof in the form prescribed in the rules.

(2) If the debtor admits the claim or does not dispute it within the period allowed in the notice referred to in subsection (1), the provisions of section 74G(3) shall, *mutatis mutandis*, apply, but the creditor shall not be entitled to a dividend in terms of the administration order until the creditors who were creditors on the date of the granting of the order have been paid in full.

(3) If the debtor disputes the claim within the period allowed in the notice referred to in subsection (1), the provisions of section 74G(4), (5) and (6) shall, *mutatis mutandis*, apply, but if the court allows the claim as a whole or in part, such claim shall be subject to the rights referred to in subsection (2), of creditors who were creditors on the date on which the administration order was granted.

(4) The provisions of section 74G(7), (8) and (9) and of subsections (1), (2) and (3) of this section shall, *mutatis mutandis*, apply to any person who after the granting of an administration order sold and delivered goods to the debtor under a credit agreement as defined in section 1 of the National Credit Act, 2005, and is desirous of providing proof of debt.

2 Comments received

5.247 HVDM Attorneys remark that many additional claims are included in administration orders based on consent of judgments obtained by “unscrupulous creditors”. They report that numerous creditors add claims for interest and many administrators are more than

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380 ***Mnisi v Magistrate, Middelburg*** [2004] 3 All SA 734 (T) at 740 G-H; see also Jones & Buckle Vol 1: The Act 10 ed (service 10, 2016) 515.

willing to list these claims without any questions asked. They consequently suggest that, upon application by the administrator, the magistrate should determine whether the credit in respect of the claim was provided recklessly. They add that it would be in the interest of the debtor and the other creditors if a creditor who wishes to lodge a claim does so through an application to court.

5.248 Baker and McKenzie Attorneys submit that administrators add more creditors to the administration immediately after the administration order was granted. This in their view is used as a mechanism to get past the threshold of R50 000. They said that the addition of creditors following the granting of the administration order makes it very difficult for the debtor to calculate when all his debts would be paid. They add that new creditors are often added without the permission of the debtor.

3 Evaluation and recommendations

5.249 The provisions of section 74H are being considered by the North Gauteng High Court, Pretoria, in the matter between *Anglo American Platinum Ltd and Others v Jacomina Johanna Pienaar and Others*.[381]

5.250 The applicants in the matter have issued a notice of motion in the High Court of South Africa, Pretoria, against the Minister of Justice and Correctional Service for an order in the following terms:

(a) The respondents[382] are obliged to investigate whether any credit advanced to the third to ninth applicants (or other debtors under administration) constitutes reckless credit in terms of section 80 of the NCA and whether the credit agreements were liable to be suspended or set aside in terms of section 83 of the NCA.

(b) The cost of such an investigation and/or procuring the suspension or setting aside of reckless credit agreements is administration costs within the meaning of section 74L(1)(a) of the MCA.

(c) In the alternative, that section 74H(1) of the MCA is unconstitutional and invalid to the extent that it fails to require the administrator to investigate whether additional credit

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381 Case 89567/14.

382 Jacomina Johanna Pienaar (first respondent), H van der Merwe Inc. (second respondent), HVDM Administrators (Pty) Ltd (third respondent), Minister of Justice and Constitutional Development (fourth respondent).

ought to have been extended to a debtor under administration, and/or to curtail the debtor's obligation to repay reckless debt.

5.251 Jones and Buckle[383] are of the view that section 74 and its related provisions do not operate in isolation or exclusion of the provisions of sections 80(1), 81(4) and 83 of the NCA. Accordingly, a court, in considering an application for an administration order, can *mero motu* raise the issue of the recklessness or otherwise of a credit agreement that it considers as part of the application. Most important, the court can consider the same issue in an application for an administration order based on the debtor's inability to meet his or her financial obligations. However, if the application for an administration order is based on the applicant's inability to satisfy an existing judgment, section 74 would operate in isolation or exclusion of the provisions of the NCA. This is because the court that granted the judgment has considered whether the credit advanced was reckless and whether the applicant was over-indebted.

5.252 Section 74C(2) of the MCA provides that the amount of the payments to be made by the debtor to the administrator must approximate the difference between the debtor's future income and the sum of the periodical payments the debtor is obliged to make under a credit agreement. It could therefore be argued that, by virtue of the provisions of this section, a debtor's credit agreements are considered by the court during the hearing of an administration order application. This consideration is contextualised within the meaning of section 85 of the NCA in particular, which provides as follows:

> Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may—
>
> (*a*) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86 (7); or
>
> (*b*) declare that the consumer is over-indebted, as determined in accordance with this Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness.

5.253 In terms of section 87 of the NCA, the court may make an order declaring any credit agreement to be reckless.

5.254 The MCA imposes no obligation on an administrator to determine whether credit advanced to a debtor constitutes reckless credit. Reckless credit ought to be determined

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383 *The Civil Practice of the Magistrates' Courts in South Africa* Vol 1: The Act 10 ed [service 14, 2017] 491.

when the initial application for an administration order is made in terms of section 74. The Commission therefore recommend that the administrator determine whether any of the debtor's credit agreements appear to be reckless. If the administrator reasonably concludes that one or more of the debtor's credit agreements appear to be reckless, he or she should be able to recommend that the court declare such credit agreements to be reckless credit.[384] Furthermore, the MCA should clearly state that the court may, during the hearing of an application for an administration order, consider whether a credit agreement is reckless.[385] Consequently, an administration order may include a declaration of reckless credit by the court that considered the application for an administration order.[386] However, an administrator would not be able to recommend that the court declare a credit agreement to be reckless credit in case of a judgment debt if the court that granted the judgment did not consider whether the credit advanced was reckless.[387] This is because one magistrate's court may not review the judgment of another magistrate's court. The administrator will first have to apply for the judgment to be rescinded.

5.255 In terms of subsection 74H(2), if the debtor admits the creditor's claim and does not dispute it, the creditor will be added to the administration; however, no dividend will be paid to such creditor until the prior creditors (who were creditors at the date the order was granted) have been paid in full. This subsection deprives the debtor of the opportunity to have the credit agreement declared reckless credit because the matter is not referred to court. In terms of subsection 74H(3), if the debtor disputes the claim, the court must hear the matter and may refuse the claim or allow it as a whole or in part. The latter instance does not limit the debtor's right of access to court

5.256 In line with the recommendation made by HVDM Attorneys that a creditor who wishes to lodge a claim should do so through a court application, the Commission recommends that a creditor who becomes a creditor of the debtor after the granting of an administration order should apply to court to be included in the list of creditors referred to in section 74G(1). This should also apply to those who were creditors of the debtor on the date the administration order was granted or on the date the application for the administration

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384 Clause 74AA (Bills: options 1 & 2).

385 Insertion of paragraph (h) in section 74B(1) (Bills: options 1 & 2).

386 Insertion of paragraph (c) in section 74C(1).

387 See section 85 of the NCA which provides that in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may declare that the consumer is over-indebted and make an order declaring the credit agreement to be reckless.

order and the statement of affairs were lodged with the clerk of the court, but who were not included in the list of creditors. It is, however, important that notice of the application be given to the administrator and each of the creditors mentioned in the section 74G(1) list of creditors.[388] In light of this recommendation the Commission recommends that section 74G(2) to (6) should be repealed because these provisions allow the addition of a creditor to the debtor's administration without a court order. The Commission further recommends that the proposed legislation should explicitly state that an administrator may not add a creditor to the administration of a debtor without following the process set out in the proposed section 74H. Furthermore, an administrator should be liable to pay the debtor's estate the amount which was paid to a creditor who was unlawfully added to the debtor's administration.[389]

5.257 Regarding the submission of Baker and McKenzie Attorneys that new creditors are added without the permission of the debtor, the Commission would like to point out that the current section 74H places an obligation on the administrator to advise the debtor of creditors who have lodged claims with the administrator. This section is also clear on the process the administrator has to follow before a new creditor may be added to the administration. The addition of new creditors outside the framework of section 74H is not permitted.

Should administrators be required to do a determination of reckless credit in respect of claims lodged after the granting of an administration order? If yes, please consider and comment on the following proposed provision:

Court may declare credit agreement reckless

Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement, in respect of which the credit provider under that credit agreement has proceeded to take steps to enforce that agreement, is being considered, if it appears to the court that the debtor under that credit agreement is over-indebted or if the debtor has an administration order in respect of his other debts, the court may refer the matter directly to an administrator with a request that the administrator evaluates the credit agreement concerned and make a recommendation to the court in terms of section 74AA(3).

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388 Amendment of section 74H(1) (Bills: option 1&2).

389 See the inclusion of subclauses (2) and (3) in section 74N (Bill: option 1) and the inclusion of subclauses (2)*(d)* and (3) in section 74N (Bill: option 2).

O Section 74I: Payments by debtor in terms of administration order

1 Proposed amendments

5.258 The workshop paper has not recommended amendments to section 74I. However, the provisions of this section are set out below as comments were received on them.

(1) The debtor shall, subject to the provisions of this section, pay the administrator the amounts of the weekly or monthly or other payments that he is required to make in terms of the administration order.

(2) If a debtor fails to make the payments to the administrator that he is required to make in terms of the administration order, the provisions of sections 65A to 65L shall *mutatis mutandis* apply, while any reference in the said provisions to the judgment concerned, the judgment creditor or the judgment debtor shall be construed as a reference to the administration order concerned, the administrator or the debtor, respectively.

(3) If, in addition to the administration order, the court has authorised the issue of an emoluments attachment order or a garnishee order and has suspended such authorization conditionally and the debtor fails to comply with the conditions of suspension, the administrator may lodge a certificate to this effect with the clerk of the court, and the clerk of the court shall thereupon issue the emoluments attachment order or garnishee order, as the case may be.

(4) An emoluments attachment order or garnishee order referred to in subsection (3) shall be prepared by the administrator or his attorney, shall be signed by the administrator or his attorney and the clerk of the court, and shall be served on the garnishee by the messenger of the court by registered post.

(5)*(a)* When an emoluments attachment order or garnishee order referred to in subsection (3) has been served on the garnishee, he shall be obliged to pay to the administrator the amounts concerned as provided by the order and such payments shall constitute a first preference against the debtor's income.

(b) The provisions of section 65J(4) to (8) and (10) shall *mutatis mutandis* apply to the emoluments attachment order referred to in paragraph (a), and in such application any reference in the said provisions to the judgment creditor shall be construed as a reference to the administrator.

2 Comments received

5.259 According to Booysen & Co. Inc. Attorneys the main difficulty with an emoluments attachment order (EAO) under section 74 is that it instructs the payment of the monthly instalment due by the debtor to the administrator. They point out that payment is not for a specific claim, for example judgment for R10 000. Booysen & Co. Inc. Attorneys indicate that the total amount due under an administration order keeps on varying because costs are added in terms of sections 74O and 74L and claims are added in terms of sections 74G and 74H. Furthermore, the courts and the Government's PERSAL payment system insist and

require that the total amount of debt be reflected in the EAO and that that amount be the total debt as reflected in the application. Once this amount has been paid, the EAO must be reissued and there is no guideline for that process. Hence they propose that the proposed legislation should provide that the clerk of the court, from time to time and at the request of the administrator, must reissue the EAO while the distribution accounts still reflects a balance outstanding.

5.260 Booysen & Co. Inc. Attorneys submit that the current provisions of section 74I(5)(b) be amended because it appears that the administrator is liable for the 5% commission in terms of section 65J(10).

3 Evaluation and recommendations

5.261 The Commission are cognisant of the fact that the comment by Booysen & Co. Inc. Attorneys was made prior to the recent amendments to section 65J of the MCA. Section 65J(2) clearly stipulates that the issuing of an EAO must be authorised by the court after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate. The Commission therefore do not support the suggestion that the clerk of the court must, at the request of the administrator, reissue the EAO while the distribution account still reflects a balance.

5.262 The court that issued the administration order would have considered whether the debtor is able to pay the monthly instalments in terms of the administration order. As the financial position of a debtor might have changed since the EAO was issued, the reissuing of the EAO without a financial enquiry into the debtor's circumstances to determine whether he or she can actually afford the deductions to be made from his or her salary might be problematic. The lack of a financial enquiry into the state of affairs of an already over-indebted debtor who cannot afford the monthly instalments set out in the EAO could have severe ramifications in that the debtor might be unable to provide in his or her basic needs such as food, shelter, etc. Hence it is imperative that judicial oversight be exercised over the issuing of EAOs.

5.263 Concerning the comment made in respect of section 74I(5)(b), see the Commission's recommendation in paragraph 5.173.

P Section 74J: Duties of administrator

1 Proposed amendments

5.264 In the workshop paper it was recommended that section 74J be amended as follows:

(1) An administrator shall collect the payments to be made in terms of the administration order concerned and shall keep up to date a list (which shall be available for inspection, free of charge, by the debtor and creditors or their attorneys during office hours) of all payments and other funds received by him from or on behalf of the debtor, indicating the amount and date of each payment.

(1A) The administrator shall, subject to section 74L, distribute such payments *pro rata* among the creditors at least once every three months: Provided that **[unless all the creditors otherwise agree or the court otherwise orders in any particular case]**:

(a) payments are not made to conditional creditors until the condition has been met;[390]

(b) payments are not made to creditors whose debts are not yet due; and[391]

(c) interest according to the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), on any unsecured debts due after the date of application is paid after the capital amount of the debt has been paid, but the interest is limited to the capital amount of the claim.[392]

(2) If any debt or the balance of a debt be less that R10, the administrator may in his discretion pay such debt in full if such action will facilitate the distribution of funds in his possession.

(3) Claims that would enjoy preference under the laws relating to insolvency shall be paid out in the order prescribed by those laws.

(4) An administrator may, out of the moneys which he controls, pay any urgent or extraordinary medical, dental or hospital expenses incurred by the debtor after the date of the administration order.

(5) Every distribution account in respect of the periodical payments and other funds received by an administrator shall be numbered consecutively, shall bear the case number under which the administration order has been filed, shall be in the form prescribed in the rules, shall be signed by the

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390 The workshop document indicates that is unfair to allow a creditor to share in distributions while the claim of such creditor is not enforceable.

391 The workshop document states that in terms of section 74C(2)(e) obligations which are payable *in futuro* are paid outside the administration and are therefore deducted before the amount payable to the administrator is determined. As a result, the following difficulties arise:

- Debtors try to have debts excluded in order to keep the total debts under R50 000.
- Moneylenders try to have their debts qualified as *in futuro* so that they are not included in the administration order. Emoluments attachment orders are obtained by the moneylenders and the debtor cannot afford to make contribution to other debts.
- It is argued that a provision that the whole debt is due upon default has the effect that a debt is no longer *in futuro* after default. Contracts are drawn up to give the creditor a choice whether the whole amount becomes due upon default or not.
- There is uncertainty whether claims are *in futuro* or not.

392 The Commission previously argued as follows: If payments are allocated first to interest, according to common law, capital cannot be reduced substantially. In the case of insolvency, interest on concurrent claims is paid only if the capital claim has been paid in full. The position should be similar when an administration order is granted. If a discharge is granted a number of years after the administration order was granted, interest payments will be limited to what can be paid within a reasonable time. The common-law *in duplum* rule, which allows interest to run up to the capital amount, should apply when an administration order is granted. In order to be fair to all parties, interest due after the date of the application should be limited to interest according to the Prescribed Rate of Interest Act 55 of 1975.

administrator and shall be lodged at the office of the clerk of the court where it may be inspected free of charge by the debtor and the creditors or their attorneys during office hours.

(6) A distribution account referred to in subsection (5) shall at the request of any interested party be subject to review free of charge by any judicial officer.

(7) An administrator shall deposit all moneys received by him from or on behalf of debtors whose estates are under administration—

(a) if he is not a practising attorney, in a separate trust account with any bank in the Republic, and no amount with which any such account is credited shall be deemed to be part of the administrator's assets or, in the event of his death or insolvency, of his deceased or insolvent estate;

(b) if he is a practising attorney, in the trust account that he keeps in terms of section 33 of the Attorneys, Notaries and Conveyancers Admission Act, 1934 (Act No. 23 of 1934).

(8) If a debtor should at any time, despite a registered letter of demand from the administrator, be 14 days in arrear with the payment of any instalment and if steps in terms of section 74I(3) cannot be taken or have been taken unsuccessfully, or if the debtor has disappeared, the administrator shall forthwith notify the creditors in writing thereof and request their instructions.

(9) If within the period allowed in a notice contemplated in subsection (8) the majority of the creditors instruct him to do so, or fail to respond, the administrator shall institute legal proceedings against the debtor for his committal for contempt of court or take such steps as may be necessary to trace the debtor who has disappeared, as the circumstances may require.

(10) If within the period allowed in a notice contemplated in subsection (8) the majority of the creditors instruct him to do so, the administrator shall apply to the court for the rescission of the administration order.

(11) If an administrator fails to lodge a distribution account with the clerk of the court within one month from the time his obligation to do so commenced, any interested party may apply to the court for an order directing him to lodge a distribution account with the clerk of the court within the time laid down in the order or relieving him of his office as administrator.

(12) If an administrator has lodged a distribution account with the clerk of the court but has failed to pay any amount of money due to any creditor in terms of such account within one month thereafter, the court may upon the application of the creditor or the debtor order the administrator to pay the creditor the amount concerned within such period as may be fixed in the order and furthermore to pay to the debtor's estate an amount which is double the amount which he failed so to pay.

(13) The court may order an administrator to pay the costs of an application in terms of subsection (11) or (12) *de bonis propriis*.

(14) If any debt which was due at the time of the granting of an administration order in respect of a debtor's estate is paid in full or in part to the creditor by the debtor after the granting of the order, otherwise than by way of payments in terms of the administration order, such payment shall be invalid and the administrator may recover the amount paid from the creditor, unless the creditor proves that the payment was effected without his knowledge of the administration order, and, in addition, the creditor shall forfeit his claim against the estate of the debtor if the payment was effected at the request of the creditor whilst he had knowledge of the administration order.

(15) The administrator shall, one year after his or her appointment as administrator and every year thereafter, review the regular payments to be made by the debtor and file a report in the court file.[393]

(16) If the debtor's regular contribution is reduced, a formal application for amendment should be made with 10 court days' notice to creditors.

2 Comments received

Distribution of payments

5.265 As regards section 74J(1A), the Banking Association of South Africa submit that, in the light of the Commission's recommendation that the interest a creditor of an unsecured debt may receive be limited, the distribution of payments received by the administrator should be distributed more regularly, for instance at least once a month.

Conditional creditors and debts not yet due (in futuro debts)

5.266 With reference to the proposed section 74J(1A)(a), Norman Shargey notes that because "conditional creditor" is not defined, it might lead to confusion and uncertainty.

5.267 HVDM Attorneys state that the proposed paragraphs (a) and (b) of section 74J(1A) will not suffice in practice. They submit that as soon as a creditor is listed as a concurrent creditor and the particulars regarding the claim, such as the interest rate, are determined by the court, they should be regarded as undisputed concurrent creditors and should receive pro rata payments. They are of the view that this would benefit both the consumer and the credit provider.

5.268 Krüger and Van Eeden Attorneys question why *in futuro* creditors should benefit outside of the administration just because their contracts so provide. They argue that *in futuro* claims should be included in the administration, but that a full study and discussion of the jurisdiction of the magistrates' courts with regard to the law of contract would have to be considered first.

5.269 Concerning *in futuro* claims, Capital Data submit that a distinction should be made in respect of preferred creditors, concurrent creditors and *in futuro* creditors. They feel that the

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393 This provision has been proposed because a requirement that a debtor keep detailed records of income and expenditure and lodge it with the administrator once a year would place a heavy burden on debtors who may be unsophisticated.

current section 74A(e)(ii) is misused. They mention that creditors write the words "*in futuro*" into their contracts and that administrators knowingly exclude creditors as *in futuro* creditors to keep the total debt under R50 000. They support the proposed paragraph (b) of section 74J(1A).

5.270 Christo van der Merwe says that all claims other than claims in respect of secured assets (i.e. bonds and leased assets) should be included. According to him, this would bring clarity and fairness to all creditors, prevent administrators and creditors from colluding, and solve the problem relating to fees because the 12,5% would be claimed on a bigger instalment.

5.271 Matthee Attorneys believe that *in futuro* debts should be claimable and payable, especially seeing that many creditors are sometimes the reason why a person ended up in a straitened financial position. Furthermore, there is no reason why such creditors should be viewed as preferred creditors.

5.272 In Booysen & Co. Inc. Attorneys' view payment can only be made in respect of claims which are due, owing and payable.[394] According to them, this excludes conditional claims and debts that are not due. In their opinion *in futuro* claims under an administration order have to a large extent become a non-event since the commencement of the NCA because debtors who are experiencing difficulties with paying *in futuro* debts (credit agreements) have all the remedies under the NCA to fall back on, such as the declaration of reckless credit, to be declared over-indebted and a debt review order to secure assets.

5.273 Booysen & Co. Inc. Attorneys acknowledge that the need may arise to deal with *in futuro* claims during the administration order application, but submit that this should not be done in terms of section 74 of the MCA but under the legislation specifically designed to deal with such agreements, namely the NCA. They say that credit agreements should be left to the NCA and comment that the last thing any administrator wants is to bring some form of quasi debt review application.

5.274 Booysen & Co. Inc. Attorneys explain that the magistrates' courts lack the necessary jurisdiction under the MCA (sections 29 and 46) either to order specific performance (i.e. payment or performance under a contract) without a claim for damages or to amend or vary the contractual terms of an agreement concluded between a debtor and a creditor. On the

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394 Claims to be listed under section 74G(1).

other hand, the NCA gives the magistrates' courts the power to amend or vary the contract in terms of sections 85, 86 and 87 of the NCA but not to enforce a credit agreement under section 74 of the MCA.

5.275 Booysen & Co. Inc. Attorneys argue that by virtue of the provisions of section 74C(2)(b) a debtor's credit agreements are considered by the court during the hearing of an administration order application within the meaning of, in particular, section 85 of the NCA. They suggest that, if this submission is not correct, section 74 should be amended to provide that it must be deemed to be so. In their opinion this would eliminate confusion between the provisions of the NCA and those of section 74 of the MCA. Furthermore, the court hearing the administration order application may implement the following provisions of the NCA:

- Section 83 of the NCA – setting aside reckless credit agreements.
- Section 85 of the NCA – despite any provisions of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that a debtor is over-indebted, the court may declare a consumer (debtor) over-indebted and make any order in terms of section 87 of the NCA (including an order to reduce the instalment and extend the terms of the agreement).

5.276 According to Booysen & Co. Inc. Attorneys the process should work as follows: The debtor will –

- claim in his or her administration order application that he or she is over-indebted (which he or she in any event must be to qualify for an administration order);
- ask the court to make a finding that he or she is over-indebted; and
- ask the court to make an order in terms of section 85 of the NCA and reduce his or her credit agreement instalments in terms of section 87 of the NCA (the debtor can propose an amount in his or her application, taking into account the principle that the payments must result in the eventual satisfaction of the claims concerned).

5.277 The result would be that the administration order would include an order made by the court in terms of section 85 of the NCA. This is something which is clearly envisaged and encouraged by the NCA, hence the references to "despite any provisions of law or agreement" and "in any court proceedings" in sections 83 and 85 of the NCA. It would also allow debt rearrangement relief for a person who simply does not have the necessary funds to make an application to a debt counsellor in terms of section 86(1) of the NCA.

Interest

5.278 With reference to paragraph (c) of the proposed section 74J(1A), the Banking Association of South Africa explain that unsecured debt is predominantly unsecured credit agreements, which are regulated by the NCA. They mention that, in terms of section 172 of the NCA, in the case of conflict between the provisions of the NCA and Chapter IX of the MCA, the provisions of the NCA will prevail. This, according to the Association, leads to the conclusion that the apportionment of payments made by a debtor in terms of a credit agreement in terms of an administration order would be governed by the provisions of section 126(3) of the NCA and not the provisions of the MCA. They suggest, therefore, that this section be aligned with the provisions of the NCA rather than remain in conflict with them.

5.279 Booysen & Co. Inc. Attorneys remark that not even the NCA allows the court to change the interest rate under a credit agreement. In their view, the second part of paragraph (c) would be found unconstitutional. They add that it is also contrary to the provisions of section 103 of the NCA, which were confirmed by the SCA.

5.280 The first part of paragraph (c), namely that section 74G(1) claims should be settled in full before the interest claims in terms of section 74H, is, according to Booysen & Co. Inc. Attorneys, the correct interpretation. They point out that such payments are regulated by statutory and common-law *in duplum* rules and that the proposed method may result in a creditor's receiving more than what he or she is entitled to under section 103 of the NCA (*in duplum* in terms of section 103 starts at default and includes not only interest but all costs and charges).

5.281 The Magistrates Court Committee of the Cape Law Society, however, emphasise that clarity should be obtained as to whether the terms of a contract, and specifically the provisions relating to interest, may be altered once a debtor is placed under administration.

5.282 Norman Shargey submits that while the provisions of section 74J(1A)(c) and (15) appear to be fair, he envisages problems as far as they relate to limiting interest payments and what can be paid within a reasonable time, given the propensity of debtors not to cooperate in increasing their instalments while they are under administration. He explains further by giving the following example: "If a debtor is paying, say, R500 pm, they will pay this for the duration of the order, so that if the capital amount of the debts are [*sic*]

R50 000.00 when they applied for administration, not even the capital amount would be paid after 8 years".

5.283 Christo van der Merwe mentions that some of the bigger credit providers decided to stop the interest on debts that are subject to an administration order, while others resolved to stop the interest a year after the date the administration order has been granted and/or their claim has been listed. He suggests that this be made applicable to all credit providers and proposes the following provision:

> A creditor may add to the capital amount and in respect of interest/cost/charges/fees an amount being equal to 1 (one) year's contractual interest and shall do so by lodging such claim within 1 (one) month of the date of the Order, or date whereon the claim was so listed. This is on proviso that such amount may not exceed the limit set by the in duplum rule. In those instances where no specific contractual interest rate has been set, the creditor may claim the rate set by the Prescribed Rate of Interest Act.

5.284 According to Christo Van der Merwe, the above provision would allow the calculation of the precise term of the administration order upfront. He states that this would benefit both the debtor and the creditor as the debtor would know how long he or she will be subjected to the administration order, while the creditor would be able to anticipate the quarterly distributions and the term of payments to be received.

5.285 Noelene points out that creditors have no obligation to stop interest and other charges on receipt of an administration order notice. She says that if creditors do not stop interest and other charges, administrators have to make corrections to distribution accounts when they receive updated balances from creditors.[395]

Payment of debt in full

5.286 The respondents are of the opinion that the amount referred to in subsection (2) be increased to R25,[396] R50,[397] R500 or an amount equal to or less than the debtor's monthly instalment.[398] Matthee Attorneys state that in the past they have always applied for two additional orders, requesting, amongst other things, that they may pay a creditor in full if the

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395 Email message received on 12 April 2012.

396 Booysen & Co. Inc. Attorneys.

397 HVDM Attorneys.

398 Christo van der Merwe.

debt or the amount accepted in final payment of his claim is equal to or less than the monthly amount paid over to the administrator. This enables the administrator to pay off smaller claims faster and allows the creditor to decide whether to take a larger amount and write off the balance. According to them, this greatly benefits both the debtor and the creditors because the debtor saves money and other creditors receive larger dividends.

5.287 Some respondents propose that a minimum distribution amount, for instance R25,[399] R50 or a similar realistic amount,[400]should be provided for.

Distribution account

5.288 Christo van der Merwe says that most clerks of the magistrates' courts do not file the distribution accounts in the court files and that the quarterly filing of distribution accounts places an unnecessary burden on administrators, who has to print reams of account information and rent or purchase the office space to keep such records. Furthermore, clerks are burdened with the filing of each distribution account in the respective court files. He therefore proposes that subsection (5) be replaced by the following:

> The administrator shall, at the reasonable request of the debtor, magistrate or a listed creditor with *locus standi*, deliver and thereafter file with the court a copy or a statement of the account reflecting the periodical payments and other funds received by the administrator during a specified period, which statement shall be drafted in plain and understandable language, be signed by the administrator or his attorney, and clearly bear the heading "Distribution Account".

5.289 Baker and McKenzie Attorneys submit that distribution accounts filed with the court do not state the nature of the charges levied. They suggest that all costs relating to a debtor's administration should be delineated in the distribution account.

Payments in arrear

5.290 With reference to subsection (8), Matthee Attorneys recommend that if the majority of creditors do not give instructions to the administrator, he or she should apply to court for the rescission of the administration order without further notice to creditors.

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399 Booysen & Co. Inc. Attorneys.

400 Matthee Attorneys.

5.291 However, the Magistrates Court Committee of the Cape Law Society propose that the requirement that the administrator notify the creditors in writing of the debtor's default and then request their instructions be dispensed with. The Committee argue that the administrator should simply proceed with an application to rescind the order after taking all reasonable steps.

5.292 The above-mentioned respondents indicate that creditors seldom respond to the notice contemplated in subsection (8).

5.293 Christo van der Merwe remarks that most debtors do not collect the registered letter of demand referred to in subsection (8). He suggests that, in addition to registered post, the letter of demand should be delivered by way of "any recorded form of demand", including an SMS[401] This, in his view, would reduce the cost.

5.294 As regards subsection (9), the Magistrates Court Committee of the Cape Law Society caution that the committal of a debtor for contempt of court raises constitutional issues, and hence they propose that the words "committal for contempt of court" be deleted.

Annual review of regular payments

5.295 The Banking Association of South Africa and HVDM Attorneys welcome the proposed subsection (15).

5.296 The Banking Association of South Africa emphasise that the obligations of an administrator in conducting the review should be defined more specifically, namely the administrator's duty should be to conduct annually an investigation into the financial affairs of a debtor to determine whether the financial position of the debtor has improved or deteriorated. In addition, the administrator should prepare a report in respect of his or her findings; file the report with the court and send a copy of the report to each of the debtor's creditors. The Banking Association of South Africa contend that, if the debtor's financial position has deteriorated owing to factors other than fault on his or her part, the administrator should have the choice to recommend to the court that the debtor's monthly obligations be reduced. On the other hand, if the debtor's financial position has improved, the administrator should file an application with the clerk of the court requesting the court to amend the

401 Short message service.

administration order by increasing the payments the debtor has to make to his or her creditors.

5.297 HVDM Attorneys suggest that if the debtor fails to respond to the administrator's request to visit the latter's office for such a review, the administrator should have the option of applying to court to enforce the financial evaluation.

5.298 Booysen & Co. Inc. Attorneys aver that an administrator can only review payment in terms of section 74Q and that he or she needs the assistance of the debtor to do so. They submit that a yearly increase would necessitate an annual reissuing of the emoluments attachment order and an annual section 74Q application. In their view, the cost of this does not warrant a review on an annual basis.

5.299 Krüger and Van Eeden Attorneys state that the court orders they obtain provide, on average, for two automatic future increases, which increases are based either on an *in futuro* or secured debt that will be paid in full on that date, or on an increase in salary. They say that this would save the debtor the unnecessary costs of reviewing the administration annually.

5.300 Norman Shargey submits that given the tendency of debtors not to co-operate when requested to increase their instalments while they are under administration, administrators would find it difficult to review the payments made without the assistance of the debtor.

5.301 Matthee Attorneys argue that the proposed subsection (15) would create unnecessary work that would result in additional costs. They are of the view that if any creditor suspected that more money was available, he or she should be allowed to notify the administrator to apply for an increase, or to bring the application him-, her- or itself.

5.302 The Magistrates Court Committee of the Cape Law Society observe that the proposed subsection (15) does not indicate what the format of the report should be and what the costs of such report would be.

5.303 Christo van der Merwe submits that this provision would place an additional load on the clerks of the court and an extra financial burden on administrators. He mentions that many administrators and creditors have over the years made attempts to increase the payments payable in terms of administration orders, but to no avail because the courts would not allow any increase without the participation of the debtor. He adds that in the

absence of legislative provisions on which the administrator can rely to have the amount payable in terms of an administration order increased, this proposed subsection would have no value in practice.

Reduction of regular contribution

5.304 With reference to the proposed subsection (16), the respondents indicate that section 74Q already provide for a reduction of contributions made.[402]

5.305 Matthee Attorneys submit that the proposed amendment would have cost implications because creditors have to be notified by registered post and there would be court appearances. They recommend that, in addition to the 12,5% referred to in section 74L, provision be made for the payment of these costs.

3 Evaluation and recommendations

Distribution of payments

5.306 The Commission do not support the suggestion made by the Banking Association of South Africa that the distribution of payments be made at least once a month. Doing so would not only add to the administrator's duties but would also result in additional cost for the debtor. However, payments should be distributed on a monthly basis as far as they relate to clause 74J(1)(c) of the Magistrates' Courts Amendment Bill (option 1) as these payments will be made from the Justice Administered Fund through the MojaPay application.[403]

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*Conditional creditors and debts not yet due (*in futuro *debts)*

5.307 The current provisions of the MCA relating to administration orders exclude *in futuro* debts[404] from administration orders.[405] Hence *in futuro* debts are paid outside the administration order process. It appears that many of the debts included under debt review

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402 Booysen & Co. Inc. Attorneys, HVDM Attorneys, and the Magistrates Court Committee of the Cape Law Society.

403 See the discussion under paragraphs 5.368 – 5.381.

404 For example, periodical payments in respect of a credit agreement, maintenance order, mortgage bond and future interest on such debts.

405 Section 74C(2)(b)-(e) of the MCA.

orders in terms of the NCA, unlike under administration orders, are of an *in futuro* nature.[406] *In futuro* debts are payable in instalments on specified dates.

5.308 Administration orders provide a remedy for debtors who are unable to pay the amount of judgment obtained against them or to meet their financial obligations. Administration orders are made in respect of debt the whole of which is due, owing and payable. This is confirmed by section 74C(2)(e) of the MCA, which provides that the payments to be made by the debtor in terms of the administration order must, among other things, approximate the difference between the debtor's future income and the sum of payments to be made by the debtor by virtue of his or her *in futuro* obligations. In *Cape Town Municipality v Dunne*,[407] Corbett J held that the word "debts" in section 74(1) of the MCA means debts which are due and payable and does not include obligations to pay money *in futuro*.[408] The court further stated that —

> [I]t seems clear that the creditors referred to in sub-sec. (10) as the recipients of the periodical distributions are the persons whose names appear upon the list compiled in terms of sub-sec. (9) and it is significant that sub-sec. (9) twice speaks of the amount 'due' to each such creditor. The word 'due', although also not a very precise term, does suggest that the amount in question is immediately payable (cf. *Whatmore v Murray, supra)*. Furthermore, the machinery of sec. 74 has been said to provide a 'cheap and easy method of administering the estate of a debtor who is unable to meet his liabilities' (see *Levine v Viljoen*, 1952 (1) SA 456 (W) at p. 459). The granting of an administration order is no bar to the sequestration of the debtor's estate (sub-sec. (18)) but its aim is, no doubt, to assist a debtor over a period of financial embarrassment without the need for sequestration. An interpretation of sub-secs. (9) and (10) which confines the administrator's duties of compiling a list of creditors and of making distributions amongst creditors to those creditors who have claims which are due and payable would thus certainly be in conformity with the general aims of sec. 74.

5.309 *In futuro* debts, which are mainly credit agreements, are dealt with in terms of the NCA that provides for a process in terms of which a consumer who is unable to satisfy in a timely manner all his or her obligations under credit agreements may be declared over-indebted, after which the consumer's obligations could be rearranged.

5.310 It has been argued that *in futuro* debts should also form part of administration orders because moneylenders try to qualify their debts as *in futuro* in order to exclude them from

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406 Boraine A "A comparison between formal debt administration and debt review – the pros and cons of these measures and suggestions for law reform (Part 2)" (2012) 45:2 *De Jure* 254-271 at 255.

407 1964 (1) SA 741 (C).

408 1964 (1) SA 741 (C) at p. 746.

the administration order process. This argument is no longer relevant. The court in *Bafana Finance Mabopane v Makwakwa and Another* found that a clause in a moneylending contract in terms of which a debtor purports to undertake not to apply for an order placing his or her estate under administration and to agree that the loan debt will not form part of an administration order for which he or she might apply is unenforceable.[409]

5.311 It could be argued that there is no justification for giving *in futuro* creditors preference outside the administration order process[410] and that only secured creditors or other creditors with a preference under insolvency law should enjoy a preference. However, the inclusion of *in futuro* debt under administration orders will deny *in futuro* creditors the rights they have under the NCA. Section 86(10) of the NCA provides that if a consumer is in default under a credit agreement that is being reviewed for debt review, the credit provider in respect of that credit agreement may, at least 60 business days after the date on which the consumer applied for the debt review, give notice to terminate the review. Furthermore, the credit provider may proceed to enforce that agreement in terms of Part C of Chapter 6 of the NCA.[411] Hence, the credit provider may terminate the debt review, within the specified period, if the consumer is in default without having to go to court to do so. Furthermore, if a debtor is in default under a credit agreement after the granting of a debt re-arrangement order, the credit provider may take legal steps to enforce that credit agreement as provided for in section 86(3) of the NCA. In the case of an administration order, the credit provider would have to go to court to rescind the administration order or to apply for an EAO to ensure the payments in terms of the administration order.

5.312 Furthermore, debtors with *in futuro* debt stand to benefit from the measures contained in the Debt Review Task Team Agreements.[412] These Agreements are non-statutory measures aimed at addressing operational and process issues not covered in the NCA. In accordance of Annexure D of the Agreements, the credit industry has developed a set of rules aimed at providing, among other things, substantial relief to resolve as many cases of severe over-indebtedness as possible within a reasonable time frame. Subject to certain conditions, the concessions agreed to by the industry include the following:

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409 2006 (4) SA 581 at 588; see also Jones & Buckle Vol 1: The Act 10 ed (service 5, 2014) 490-491.

410 Obligations payable *in futuro* are paid in preference to other creditors.

411 Section 86(11) of the NCA.

412 National Credit Regulator Circular 02 of 2015 (available on www.ncr.org.za).

(a) The upfront waiver of any transactional or other non-finance charge related fees related to debt facilities as well as waiver of interest penalties etc. on pre-NCA agreements.
(b) The reduction of the monthly service fees (as per the NCA) as part of the finance charges on the agreement to zero.
(c) In respect of secured loans (mortgages and vehicle and asset finance transactions) a reduction in the contractual interest rate to the rate at which the case solves subject to a floor limit of the prevailing repo rate plus 2%, to be fixed for the rehabilitation term, after which the rate and fees will revert to contractual (if the debt is not settled).
(d) In respect of all unsecured debts a reduction in the interest rate to the rate at which the case solves subject to a floor limit of 0%, to be fixed for the rehabilitation term.

5.313 Jones and Buckle argue that if obligations which are payable *in futuro* in instalments are to be included in an administration order, it would almost certainly follow that the amount of the instalments would have to be changed and the court cannot, without express authorisation, alter a contract between the parties.[413] Similarly, the court in *Fortuin and Others v Various Creditors*[414] was of the view that interest which has yet to accrue on a debt cannot be regarded as part of a debtor's debts at the time of the application for an administration order. Hence, a debtor does not have to show that he or she has the ability to make immediate progress in reducing the claims of his or her listed creditors.

5.314 It should also be kept in mind that section 172 of the NCA provides that the provisions of Part D of Chapter 4 (debt relief provisions) of the NCA prevail in case of conflict with Chapter IX (administration order provisions) of the MCA. The inclusion of *in futuro* debts in administration orders would therefore most likely create such conflict.

5.315 The Commission agree with the argument of Booysen & Co. Inc. Attorneys in support of excluding *in futuro* debts from administration orders. As the NCA makes sufficient provision for dealing with *in futuro* debts, there is no justification for including such debts in administration orders. The Commission are therefore of the view that *in futuro* debts should not be included in administration orders and recommend that this be made clear in the proposed legislation.

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413 Jones and Buckle *The Civil Practice of the Magistrates' Courts in South Africa* Vol 1: The Act 10 ed (service 10, 2016) 497. See also *Da Mata v Firstrand Bank Ltd* 2002 (6) SA 506 at 511C-D, where Flemming DJP said that instalments which are in arrear cannot be regarded as due for the reason that the debtor is not obliged to pay such instalment at that specific point in time.

414 2004 (2) SA 570 (C) at 574B-C.

5.316 The Commission's argument above also applies in respect of conditional creditors. It would be unfair to allow such creditors to share in distributions while their claims are not enforceable.

With reference to paragraph 5.18 and paragraphs 5.307 - 5.316, how should "debt" be defined?

Interest

5.317 The Commission agree with the Banking Association of South Africa that, as far as credit agreements are concerned, the proposed section 74J(1A)(c) should be brought in line with the provisions of section 126(3) of the NCA, as the latter section will prevail in the case of conflict with Chapter IX of the MCA,[415] which means a credit provider has to credit each payment received from an administrator in respect of a credit agreement to the debtor as follows:

(a) First, to satisfy any due or unpaid interest charges;
(b) second, to satisfy any due or unpaid fees or charges; and
(c) third, to reduce the amount of the principal debt.

5.318 The Commission realise that interest due after the date of an administration order application cannot in all cases be limited to interest according to the Prescribed Rate of Interest Act 55 of 1975 because the interest rate prescribed by that Act applies only if the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner.[416] In 1993, the prescribed interest rate was set at 15,5%. This rate was maintained for more than 20 years, until it was changed recently.[417] Since 1 September 2019, the prescribed rate of interest is 10% per annum.[418] However, though the interest rate a person is charged is based on the credit provider's assessment of the person's financial position, an interest rate higher than the maximum prescribed interest rate is not permissible.[419] While the court cannot change the interest rate

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415 See section 172 of the NCA.

416 See section 1 of the Act.

417 Article published by Webber Wentzel Attorneys on 18 August 2014; available at http://www.polity.org.za/article/new-prescribed-rate-of-interest.

418 Patrick Bracher "Prescribed rate of interest is 10% from 1 September 2019" Financial Institutions Legal Snapshot 22 September 2019.

419 Section 105 of the NCA provides that the Minister, after consulting the National Credit Regulator, may prescribe a method for calculating the maximum rate of interest. This calculation is set out under Chapter 5: Interest and Fees of GNR.489 of 31 May 2006: Regulations made in terms of the NCA, 2005.

without the authorisation of the contracting parties, it should intervene in cases where the interest rate relating to a specific debt is higher than that allowed by law. The Commission therefore recommends that a court, when considering an application for an administration order, reduce the interest rate in respect of a debt if it finds that the interest rate charged on the debt is higher than that permitted by law. Furthermore, the court should order that the interest charged in excess of the maximum prescribed interest rate since the first payment by the debtor be deducted from the unpaid balance.[420]

5.319 In response to the submissions that the court may not reduce the interest rate in respect of a debt without the expressed authorization of the contracting parties, the Commission is of the view that the court would be able to reduce the interest rate if such a power is legislated. Hence the Commission recommends that the court should be empowered determine the maximum rate of interest for such a period as the court deems fair and reasonable. However, the court's power to do so should be limited to unsecured debts.[421]

5.320 An analysis of the comments would not be complete without a discussion of the *in duplum* rule. The common-law *in duplum* rule provides that if the total amount of arrear and unpaid interest has accrued to an amount equal to the outstanding capital sum, interest ceases to run, but any payment made by the debtor thereafter will lead to the amount of interest decreasing, after which interest again starts to accrue to an amount equal to the outstanding capital amount. The purpose of the rule is to "ensure that debtors are not endlessly consumed by charges and also to ensure that debtors whose affairs are declining should not be entirely drained dry". Secondly, the *in duplum* rule is suspended *pendente lite*, and the *lis* is said to commence upon service of the initial process, after which interest runs again. The common-law rule thus effectively limits the interest recoverable by preventing interest from accruing further once it becomes equal to the unpaid capital amount.[422]

5.321 Section 103(5)[423] of the NCA, in so far as it relates to credit agreements, provides for what is in some of the literature referred to as a statutory *in duplum* rule. Kelly-Louw

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420 Inclusion of paragraph *(e)*(ii)-(iii) (Bill: option 1) and paragraph *(d)*(ii)-(iii) (Bill: option 2) in section 74C(1).

421 Inclusion of paragraph (l) in section 74B(1) (Bills: option 1&2). See also section 86(7)(c)(ii)(ccA) of the NCA which contains a similar provision.

422 ***Nedbank Ltd V the National Credit Regulator*** 2011 (3) SA 581 (SCA) at 600A-C.

423 Section 103(5) provides as follows: "Despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in section 101(1)*(b)* to *(g)* that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs."

summarises the difference between the common-law *in duplum* rule and section 103(5) as follows:[424]

> From this exposition it is apparent that the vital difference between the common-law and the statutory in duplum rules lies in the fact that under the common-law rule it is only interest (contractual and default) that ceases to run if it equals the outstanding capital amount. By contrast, under the statutory rule, all the amounts — such as the initiation fees, service fees, interest (contractual and default), costs of any credit insurance, default administration charges, and collection costs — cease to run if they combine to exceed the outstanding principal debt.

5.322 Under an administration order, the statutory *in duplum* rule is applicable to credit agreement debts, and the common-law *in duplum* rule to all other debts covered by the administration order.

5.323 In *National Credit Regulator v Nedbank Ltd* the National Credit Regulator[425] complained about the fact that banks have interpreted section 103(5) as if it were a codification of the *in duplum* rule that enables them to levy interest as soon as the consumer makes a further payment and so reduces the outstanding interest.[426] The respondents contended, however, that section 103(5) must be interpreted in conformity with the common-law *in duplum* rule, that is, that interest stops running when the unpaid interest equals the outstanding capital, but when the debtor repays a part of the interest, interest again runs until it equals the capital amount. Du Plessis J held that once the total charges referred to in sections 101(1)(b) – (g) equal the amount of the unpaid balance, further payments made by a consumer during a period of default do not have the effect of permitting the credit provider to charge further interest while the default persists.[427] This was confirmed, on appeal, by Malan JA in *Nedbank v National Credit Regulator*.[428] Regarding the respondents' contention that section 103(5) should be interpreted in conformity with the common-law *in duplum* rule, Malan JA said that—

> [s]ection 103(5) is not a code and embodies no more than a specific rule applicable to specific circumstances, that is, to credit agreements subject to

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424 Michelle Kelly-Louw "Better Consumer Protection under the Statutory 'in duplum' Rule" in Kelly-Louw *et al*. (eds) *The Future of Consumer Credit Regulation: Creative Approaches to Emerging Problems* (Ashgate 2008) 155-164 at p. 163.

425 2009 (6) SA 295 (GNP).

426 ***National Credit Regulator v Nedbank Ltd*** 2009 (6) SA 295.

427 ***National Credit Regulator v Nedbank Ltd*** 2009 (6) SA 295 at 319D.

428 2011 (3) SA 581 (SCA) at 607E.

> the NCA. It is thus a statutory provision with limited operation. It seeks not only to amend the common-law in duplum rule but also to extend it. It deals with the same subject-matter as the common-law rule but this does not mean that it incorporates all or any of the aspects of the common-law rule. It is a self-standing provision and must be construed as such.[429]

5.324 With regard to the discussion above, the question is how the law relating to administration orders should be amended in order to ensure that the accruing of interest and other cost does not fly in the face of the need to enable debtors to pay off their debts as soon as possible. The Magistrates' Courts Act should be amended to include a provision similar to section 103(5) of the NCA, but with the necessary changes. The Commission recommend that the MCA be amended to provide that the amounts referred to in section 103(5) of the NCA or interest that accrues during the time that a debtor is in default in respect of a debt under administration may not, in aggregate, exceed the unpaid balance of the principal debt as at the time that the default occurs and these amounts or interest may not accrue while the default persists.[430] Furthermore, an administrator who adds such amounts or interest to the debt concerned should be liable to pay to the debtor's estate the amounts or interest so added.[431]

Payment of debt in full

5.325 The Commission recommend that the amount referred to in subsection (2) be increased to R100. However, this subsection should be repealed in respect of the proposed Magistrates' Courts Amendment Bill (option 1) in terms of which the collection and distribution of funds paid by debtors must be done through the Justice Administered Fund.[432]

5.326 With regard to the suggestion that the amount be increased to an amount equal to or less than the debtor's monthly instalment, the Commission are of the view that this would give an unjustified preference to smaller creditors.

Should provision be made for a minimum distribution amount?

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429 2011 (3) SA 581 (SCA) at 601C-D.

430 Insertion of subsection (6) in section 74I (Bills: options 1 & 2).

431 Insertion of subsection (8) in section 74I (Bills: options 1 & 2).

432 Amendment to section 74J(2).

Distribution account

5.327 The Commission are not in favour of the suggestion by Christo van der Merwe that the distribution account be made available only upon request by the debtor, creditor or magistrate. In fact, having to deal with several requests to inspect the distribution account might be more burdensome for the administrator. Moreover, the below case law indicates that the administrator must draw up a distribution account if payments were made to the debtor's creditors.

5.328 In *Nashua Maritzburg v Groenewald*,[433] Flemming DJP considered the question whether a distribution account should be produced when there is no money available to be paid to the creditors. He responded to this question as follows:

> There is no real need for a distribution account when no money is available for distribution (either because nothing was received at all or the amounts received left nothing over after payment of legal expenses and expenses mentioned in s 74J(4)). A spectrum of remedies is available to a creditor. A creditor may require the 'expenses and remuneration' to be taxed by the clerk of the court in terms of s 74L(2). All reasonable information about, for example, a payment of hospital expenses can be obtained in terms of s 74M*(a)*. To know whether a distribution became due in the specific case, a creditor armed with the said tools needs to know only one further fact: what 'payments' and what 'other funds' were received by the administrator. In terms of s 74J(1) the administrator must keep a list of all such receipts. That list is available for inspection free of charge by a creditor.[434]
> The inference is that if the administrator distributes money, there must be a distribution account. If he does not distribute money, s 74J does not indicate an obligation to deliver a distribution account.[435]

5.329 This exposition by Flemming DJP was endorsed by Jamie AJ in *African Bank Ltd v Jacobs and Another*, as follows:

> I find the reasoning in *Nashua Maritzburg v Groenewald* 2002 (4) SA 356 (W) compelling, viz that there is no need for a distribution account where there has not in fact been any payment to creditors, and where there is no money available for distribution, either because nothing was received or the amounts received left nothing over after legal expenses and expenses mentioned in s 74J(4).[436]

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433 ***Nashua Maritzburg v Groenewald*** 2002 (4) SA 356 (W).

434 ***Nashua Maritzburg v Groenewald*** 2002 (4) SA 356 (W) at 361B-D.

435 ***Nashua Maritzburg v Groenewald*** 2002 (4) SA 356 (W) at 361G-H; see also Jones & Buckle Vol 1: The Act 10 ed (service 14 , 2017) 521.

436 ***African Bank Ltd v Jacobs and Another*** 2006 (3) SA 364 (CPD) at 368B.

> As pointed out in the *Nashua Maritzburg v Groenewald* case, a creditor has a spectrum of remedies in the event that an account is not lodged. He may require expenses and remuneration to be taxed by the clerk of the court, and can inspect free of charge the administrator's list of all moneys received. This would inform him quickly and cheaply as to whether a distribution is due.[437]

5.330 The Commission support Baker and McKenzie Attorneys' suggestion that all costs relating to a debtor's administration should be delineated in the distribution account. The Commission consequently recommend that the Rules Board amend Form 52 to reflect the interest charged by each creditor and the legal costs (per item) relating to a debtor's administration. Furthermore, each creditor and the amount paid to them should be listed under paragraph B(2), which deals with claims that enjoy preference in terms of section 74J(3). Each expense under paragraph B(3) that deals with urgent or extraordinary medical, dental or hospital expenses should be listed. As suggested in paragraph 5.420, the section 74O cost of an application for an administration order should be listed in Form 52. In this regard, see the proposed amendments to Form 52 in chapter 7 of this discussion paper. The proposed amendments will assist debtors to understand the costs that were charged by their administrators and creditors and to query charges that should not have been deducted.

5.331 Concerning the option (see MCA Bill, option 2) in terms of which the administrator is responsible for collecting and distributing the funds paid by debtors, the Commission would like to emphasise that the distribution account is the only tool that the debtor has to ascertain whether the correct deductions and payments were made by the administrator. It is therefore important that the distribution account correctly accounts for all expenses and cost in a debtor's administration. An incorrect distribution account that, for instance, does not correlate with the actual payments made by the debtor and does not correctly reflect the deductions for administration costs, legal costs and payments to creditors should serve as a ground for the removal of the administrator as the drawing-up of the distribution account is a statutory duty that must be fulfilled.[438] Paragraph 8 of the Tariff of Part III of Table B of Annexure 2 provides for a payment of R4 per page for a copy of the distribution account, so debtors are paying not only for the printed pages but also for the information reflected on those pages. It is vital therefore that the distribution account should contain the correct information.

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437 ***African Bank Ltd v Jacobs and Another*** 2006 (3) SA 364 (CPD) at 368C-D. See also Jones & Buckle Vol 1: The Act 10 ed (service 14, 2017) 521 .

438 Insertion of section 74N(2)*(d)*, (4), (5) and (6) (Bill: option 2).

5.332 The Commission recommend that an administrator who fails without reasonable grounds to distribute timeously the payments to the creditors of the debtor is liable to repay to the debtor's estate any additional costs and interest that accrue as a result of such failure.[439]

5.333 Furthermore, the administrator must, by ordinary post, fax or e-mail, furnish the debtor with a quarterly statement containing particulars of the payments received up to the date concerned and the balance owing.[440]

Payments in arrear

5.334 An administration order gives a debtor who is unable to pay the amount of a judgment against him or her or to meet his or her financial obligations the opportunity to make payment in smaller amounts without having to lose his or her assets. Regular payments by the debtor are therefore essential in order for this process to work effectively and in the interest of all parties concerned. Debtors who do not have the intention to honour their obligations set out in their administration orders should not be allowed to continue benefiting from this form of debt relief. Only those who are serious about meeting all their financial obligations over a reasonable period of time should be assisted to do so. If an administrator has done everything under the Act to obtain payment from the debtor but has not succeeded, he or she should not be hampered in applying for the rescission of the order.[441]

If a debtor has disappeared or failed to make payments in terms of his or her administration order, there are usually little funds left for distribution to the debtor's creditors. Also, applying to court for a rescission order could result in additional costs, for which funds might also not be available. Furthermore, the issuing of a section 74U certificate is not an option because that section is only applicable if the creditors have been paid in full. The Commission invite comments on how the problem should be dealt with.

5.335 The Commission support the suggestion by Christo van der Merwe that the demand referred to in subsection (8) should also be delivered in other ways than registered post only. Furthermore, the Commission agrees with the recommendation of the Magistrates'

439 Insertion of subsection (15) in section 74J (Bills: option 2).

440 Insertion of subsection (3) in section 74L (Bills: option 2).

441 Clause 74JA(6) (Bills: option 1) and amendment to section 74J(9) (Bills: option 2).

Committee of the Cape Law Society that the words “for his committal for contempt of court” should be deleted from subsection (9).

Annual review of regular payments

5.336 The Commission realise that it might be problematic to obtain the cooperation of debtors to help with the review of their financial position with the aim to increase or reduce their monthly or weekly contributions. An annual review would also add to the workload of administrators.

5.337 The Commission agree with Booysen & Co. Inc. Attorneys that an annual review would require an annual reissuing of the EAO. This would be for the cost of the debtor. The Commission are of the view that the financial burden of the debtor should not be increased without a compelling reason. Section 74Q provides for a mechanism by means of which the debtors’ contributions may be increased. If the administrator or any of the creditors have reason to believe that the debtor’s financial position has improved, he or she may bring an application in terms of section 74Q for an amendment of the administration order, albeit the administrator must have the written consent of the debtor to do so. Although this would have cost implications for the debtor, it would not be done annually but only when necessary. The Commission accordingly recommend that the proposed subsection (15) be deleted. The Commission believes that its recommendations regarding the realisation of debtors’ assets will go a long way in reducing the debt of debtors.[442] These recommendations, in a way, will “force” debtors to co-operate when requested to increase their instalments because administrators are empowered to approach the court for authorization to realise an asset of a debtor for the purpose of distributing the proceeds among the creditors of that debtor.

5.338 With regard to the automatic increases suggested by Krüger and Van Eeden Attorneys, the Commission have recommended in paragraphs 5.168, 5.169 and 5.262 that judicial oversight over the issuing of EAOs be required.

Reduction of regular contribution

5.339 The Commission agree that subsection (16) is not necessary because section 74Q provides for a reduction of payment by the debtor.

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442 See the amendments to section 74K (Bills: option 1&2).

Q Section 74K: Realization of assets by administrator

1 Proposed amendments

5.340 The workshop paper proposed that section 74K of the MCA be amended as follows:

(1) An administrator may**[, if authorized thereto by the court, subject to the provisions of subsection (2),]** realize any asset of the estate under administration, except a security asset, on the terms and conditions directed by the court or, in the absence of such directions, after 14 days' notice to the debtor and creditors**[and in granting any such authorization the court may impose any such conditions as it may deem fit]**.

(2) An asset mentioned in subsection (1) which is the subject of any a [*sic*] credit agreement regulated by the National Credit Act, 2005 (Act 34 of 2005), shall not be realized except with the written permission of the credit provider.

(3) If the credit provider as defined in section 1 of the National Credit Act, 2005 (Act 34 of 2005), is obliged to pay to the debtor an amount in terms of the said Act, that amount shall be paid to the administrator for *pro rata* distribution among the creditors.

(4) Whenever the court authorizes any administrator to realize any asset, the court may amend the payments to be made in terms of the administration order accordingly.

2 Comments received

5.341 The Commission have received no comments in respect of the above section and proposed amendment.

3 Evaluation and recommendations

5.342 After further consideration, the Commission are of the view that the administrator should obtain the written permission of the debtor before he or she realises an asset of the estate under administration.[443] However, an asset which is the subject of a credit agreement should not be realised except with the written permission of the credit provider. If the debtor without good reason refuses to give the administrator permission to realise an asset, the administrator should approach the court for authorisation to realise the asset. When considering whether an asset, including investments and shares in a company, should be realized, the court must consider whether the asset is essential for the debtor or his or her

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443 Assets of a debtor under administration which are not subject to security are usually of little value and authority by the court should not be required in all cases.

dependants' daily living, whether the asset is needed for the debtor's occupation, trade or business, and what the value and equity of the asset is.[444]

R Section 74L: Remuneration and expenses of administrator

1 Proposed amendments

5.343 As several administrators are charging remuneration and expenses in excess of the prescribed tariff,[445] the workshop paper proposed that section 74L of the MCA be amended as follows:

(1) An administrator may, before making a distribution—

(a) deduct from the money collected his necessary expenses and a remuneration determined in accordance with a tariff prescribed in the rules;

(b) retain a portion of the money collected, in the manner and up to an amount prescribed in the rules, to cover the costs that he may have to incur if the debtor is in default or disappears.

(2) The expenses and remuneration mentioned in subsection (1)(a) shall not exceed 12½ per cent of the amount of collected moneys received and such expenses and remuneration shall, upon application by any interested party, be subject to taxation by the clerk of the court and review by any judicial officer.

(3) An administrator who contravenes the provisions of subsection (2) is guilty of an offence and on conviction liable to—

(a) a fine or to imprisonment for a period not exceeding 10 years or to both a fine and such imprisonment; and

(b) payment of the amount that exceeded the percentage referred to in subsection (2) to the debtor's estate.

2 Comments received

5.344 The Banking Association of South Africa point out that there is abuse in the market in that "advisors" currently charge consumers a fee for recommending that they be placed under administration. Such a fee is usually paid in preference to the claims of other creditors and is, in many instances, not reflected on the distribution schedule. The Association therefore propose that the only costs that should be deducted prior to the distribution being

444 Amendments to section 74K (Bills: options 1 & 2)

445 See paragraphs 5.356 – 5.367 for the discussion of the Tariff.

made to creditors are legal costs set out in duly taxed bill of costs contemplated in the Magistrates Courts rules. If any costs are not taxed, those costs should not be paid before a distribution is made to creditors but should rank on the same basis as unsecured creditors' claims. This change would ensure that the fees that are currently being charged by "advisors" would be disclosed, which would prevent them from being paid to the prejudice of the creditor body.

5.345 Booysen & Co. Inc. Attorneys submit that, as with section 74G inclusions, provision should be made for a separate fee for work done by the administrator which cannot be part of the 12,5% fee cap. They mention that inclusion of a claim in terms of section 74G or 74H involves –

- notice to the debtor (registered post);
- notice to creditors;
- notices to be filed with the court;
- amendment of the section 74G(1) list of creditors;
- recalculation of all pro rata payments; and
- dealing with objections.

5.346 Booysen & Co. Inc. Attorneys further state that despite numerous High Court and, previously, Supreme Court rulings on remuneration relating to administration orders, the whole matter is still not clear at all. They are of the view that the proposed subsection (3) is extreme considering this uncertainty and the fact that no other profession has such a penalty. In addition, the issue of fees should be addressed and made absolutely clear (hopefully as uncomplicated as the total fee of 22,5% prior to the Weiner judgments).

5.347 According to HVDM Attorneys the proposed amendments are based on emotional perceptions that administrators are exploiting debtors. In their words: "I have not yet seen any cost analyses done by a true objective analyst based on real research of the actual cost of an administration. For some reason 12.5% sounds far more than the 5% an employer may collect for doing less than 1% an administrator are obliged to do according to sec 74? For some reason the cost of bank charges, software, paper, basically all overheads which is an essential part of assisting the debtor and performing effective duties as an administrator is not taken in consideration." They conclude that this section needs to be re-evaluated and that a true cost analysis should be done.

5.348 Krüger and Van Eeden Attorneys explain that they regularly consult with their clients. Besides financial problems, their clients have problems relating to and or need advice on maintenance, eviction orders, damages claimed from them following motor vehicle accidents, labour issues, deceased estates and divorce, and sometimes they even need help in criminal courts. They advise and assist their clients, where possible, without charging them the usual fees on the scale between attorney and client. In addition, they fight for their clients in that they don't accept outstanding balances from creditors without question, especially in relation to attorney accounts and interest charged.

5.349 According to Krüger and Van Eeden Attorneys, they cannot do all the above and still answer thousands of letters to attorneys with only an amount of 12,5% of the amount of collected moneys. They mention that the Law Society is very strict about answering attorney's letters and that they therefore do not ignore any letter received by their office. They propose that the 12,5% be increased drastically or that an attorney administrator be allowed to charge fees as between party and party. They add that any of their files can be taxed at court and that they would be able to tax the account for a higher amount, because of the 5% drafting fee and 5% attendance fee.

5.350 Norman Shargey, like some of the other respondents, is of the view that the proposed penalty is excessive. He adds that it is not possible to run an efficient administration practice on a 12,5% fee for expenses and remuneration, while expenses increase enormously but income remains static. According to him, administrators render an essential service to distressed debtors and act as "collection agents" for creditors, who do not have to pay attorneys' fees for collections. Similarly, debtors do not have to pay the enormous legal fees involved in cases where judgment has been taken against them. While legal fees are charged according to a tariff, there is no limit on the costs incurred; a debt of R300, for example, could easily escalate to R3 000 together with the legal fees involved, yet an administrator may only charge 12,5% of the amount of collected monies received..

5.351 Ms Pillaye supports the 12½ per cent for expenses and remuneration as set out in section 74L(2).

5.352 The Magistrates Court Committee of the Cape Law Society state that the proposed amendments cannot be read in isolation from the Supreme Court of Appeal decision in *African Bank vs Melvyn Weiner*,[446] which dealt with the remuneration and expenses to which

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446 2005 (4) SA 363 (SCA).

an administrator is entitled; in paragraph 18 on page 12 of the judgment the court stated that "[a]ll this shows that 'the costs' the administrator 'may have to incur' are distinctive and separate from the ordinary expenses of an administration. ... Where the administrator employs an attorney, the attorney's reasonable charges for the steps authorised, duly taxed and scrutinised, will be recoverable as 'costs' under s 74L(1)(b)". Furthermore, in paragraph 22 on page 14 the court indicated that "[f]or the purposes of s 74L(1)(b) this enables an attorney administrator to carry out the legal work required by the section, and to charge the reasonable costs so incurred to the administration."

5.353 The Magistrates Court Committee of the Cape Law Society argue that the proposed penalty does not take cognisance of the following:

- possible cost of a tracing agent
- possible cost of the review of the application
- any legal work for which an attorney may charge

5.354 The Committee further propose that the 12,5% be increased to 15% of the amount of collected monies received, which is deemed a reasonable remuneration.

5.355 Christo van der Merwe says that although the 12,5% remuneration is crystal clear, there is a grey area with respect to the initial cost (section 74O cost) chargeable, disbursements, attorney cost and collection cost.

3 Evaluation and recommendations

The current legal position

5.356 The comments received should be evaluated with reference to the existing legal position on the fees and cost an administrator may charge or reasonably recover. The current legal position may be set out as follows.

5.357 Section 74L of the MCA deals with the remuneration and expenses of administrators and states as follows:

> (1) An administrator may, before making a distribution—
>
> *(a)* deduct from the money collected his necessary expenses and a remuneration determined in accordance with a tariff prescribed in the rules;

> *(b)* retain a portion of the money collected, in the manner and up to an amount prescribed in the rules, to cover the costs that he may have to incur if the debtor is in default or disappears.
>
> (2) The expenses and remuneration mentioned in subsection (1)*(a)* shall not exceed 12½ per cent of the amount of collected moneys received and such expenses and remuneration shall, upon application by any interested party, be subject to taxation by the clerk of the court and review by any judicial officer.

5.358 Subsection (1)(a) gives an administrator an entitlement to necessary expenses and remuneration determined in accordance with a prescribed tariff. The tariff is set out in items 1 to 9 of the Tariff to Part III of Table B of Annexure 2 of the Magistrates' Courts rules (the rules). The necessary expenses and remuneration are qualified by subsection (2), which provides that they may not exceed 12,5% of the amount of collected moneys received from the debtor. For ease of reference, the first portion of Part III of Table B is quoted below:

> **PART III**
> **GENERAL PROVISIONS IN RESPECT OF PROCEEDINGS IN TERMS OF SECTION 74 OF THE ACT**
>
> 1. The following fees shall be allowed in addition to those laid down in the Tariff to this Part:
>
> *(a)* All necessary disbursements incurred in connection with the proceedings.
>
> *(b)* An addition to the fees stated below, the administrator shall be entitled to a fee of 10% on each instalment collected for the redemption of capital and costs.
>
> 2. For the purposes of items 4 and 5 of the Tariff to this Part, a folio shall consist of 100 written or printed words or figures and four figures shall be reckoned as one word.

(Under a separate heading, a nine-item tariff then follows.)

5.359 Part III of Table B seems to create recovery for the items expressly specified in the tariff, plus necessary disbursements, plus, in addition to the tariff fees, a fee of 10% on each instalment collected. This has contributed to the confusion regarding the fees and the costs administrators may charge. Griesel J, in *African Bank Ltd v Weiner and Others*[447] for example, mentioned that various administrators were of the view that they were entitled to deduct a minimum of 22,5% from each distribution.

5.360 In reconciling section 74(1)(a) with the 10% fee referred to in Part III of Table B, Cameron JA in *Weiner NO v Broekhuysen*[448] said that section 74L is the sole source of any power to determine a "fee" in Part III. He therefore concluded that Part III should be read as

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447 2004 (6) SA 570 at 584D.

448 2003 (4) SA 301 (SCA) at 314E-F.

subordinating the administrator's entitlement to a 10% fee on moneys collected to the 12,5% total cap. Meaning, the “tariff” referred to in section 74L(1) is Part III in its entirety, not just the nine-item list headed “Tariff”. This view was endorsed by Griesel J in *African Bank Ltd. v Weiner and Others.*[449]

5.361 Cameron JA in *African Bank Ltd v Weiner and Others*[450] considered the question of whether an attorney administrator is entitled to levy the collection fee[451] referred to in Part I of Table B to the rules under section 65 and its associated provisions, and claim it as a “cost” under section 74L.[452] The court said that –

> [24] … [t]he two statutory debt-recovery mechanisms – s 65 and s 74 – must after all be interpreted together. Section 65 proceedings are invoked to enforce the primary mechanism of s 74 debt administration. Section 65's provisions apply 'with the necessary changes' (*mutatis mutandis*), and s 65I expressly provides that an application for an administration order has preference over s 65 proceedings. Section 65 proceedings are therefore subsidiary to administration order proceedings.
> [25] Against this background it would be unconscionable, on any basis, if the 10% collection fee in Part I of Table B for s 65 proceedings were drawn in addition to the 10% collection fee permitted in Part III for s 74 administrations. There is only one operative collection, and that is the collection under s 74, for which the collection fee of 10% is specified as part of the 12,5% maximum permitted in s 74L(2). If a further collection is alleged to take place by virtue of s 65, no additional fee can be collected in respect of it as a 'cost' under s 74L.

5.362 In *Marsha Coetzee v Charles Edward Erasmus NO and Various Creditors* (Case A682/10, judgment delivered in the Western Cape High Court on 5 October 2011), Le Grange J echoed the decision of the court in *African Bank Ltd v Weiner and Others* regarding collection fees. With reference to the latter case, Le Grange J said that “it was stated in no uncertain terms that an attorney administrator can only claim one collection fee,

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449 2004 (6) SA 570 (C) at 584F.

450 2005 (4) SA 363 (SCA) at 373A-C.

451 Paragraph 3(b) of Part I (General provisions in respect of proceedings in terms of sections 65 and 65A to 65M of the Act) of Table B of Annexure 2 to the Rules of the Magistrates' Courts provides that, in addition to the fees laid down in the tariff specified in that part, a fee of 10% on each instalment collected in redemption of the capital and costs of the action, subject to a maximum amount of R330 on every instalment. Where the amount is payable in instalments the collection fees shall be recoverable only on payment of every instalment. Such fee shall be in substitution for and not in addition to the collection fees (the 10% collection fee recoverable where a judgment debt is payable in instalments) prescribed in paragraph 13 of Part 1 of Table A.

452 Cameron JA at page 372G mentioned that the court was informed that some attorney administrators levy an additional 10% collection fee in the section 65 setting, adding it as a s 74L 'cost' on top of other section 65 costs and section 74L 'expenses and remuneration.

and that is the collection fee that forms part of the total 'expenses and remuneration' allowed by section 74L(2)".[453]

5.363 In line with the aforementioned cases, the Rules Board for Courts of Law has recommended that paragraph 1(b) of Part III of Table B of Annexure 2 to the rules be amended as follows: "In addition to the fees stated below, the administrator shall be entitled to a fee of 10% on each instalment collected for the redemption of capital and costs, which amount is included in the 12,5% in terms of section 74L(2) of the Act."

5.364 In *African Bank Ltd v Weiner and Others*,[454] the court was confronted with the question of whether the cost (up to an amount of R600 in terms of rule 48) that may have to be incurred when a debtor under administration defaults or disappears as envisaged in section 74L(1)(b), forms part of the 12,5% cap. In considering this question, Cameron JA analysed the interrelation between section 74 and section 65, and their associated provisions, as follows:[455]

> … The expression 'defaults or disappears' brings s 74I(2) into play. This provides that where a debtor fails to make the payments to the administrator required under the administration order, the provisions of ss 65A to 65L apply with the necessary changes. These create a procedure whereby the debtor can be called up and interrogated and a fresh order to pay by instalments can be made.
>
> … Where an administration order provides for payments out of future emoluments or income, s 74D requires the court to authorise so far as is applicable the issue of an emoluments attachment order (s 65J) or a garnishee order (attaching debts owed to the debtor) (s 72), but permits the suspension of the orders. Where the debtor breaches the conditions of suspension, s 74I(3) provides a quick way to activate a suspended emoluments attachment order or a garnishee order. Legal steps entailing costs pursuant to default or disappearance are contemplated also in subsecs 74J(8) and (9).

5.365 Cameron JA concluded, therefore, that the costs an administrator has to incur are distinct and separate from the ordinary expenses of an administration. They are not included under "necessary expenses and remuneration". They can be recovered separately.[456] He further stated that section 74L(1)(b) distinguishes between retention and recovery, and that it

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453 See paragraph 18.

454 2005 (4) SA 363 (SCA).

455 See pages 370I and 371B.

456 See page 371C.

does not limit the costs the administrator can recover to the R600 retainer. He expressed the view that if the retainer was meant to place a limit on recovery, that intention could and would have been expressed much more clearly. He continued that the provision does not specify the precise nature of the costs that the administrator "may have to incur", nor does it limit their recovery. It merely permits the administrator to retain some money "to cover" – meaning "to help cover" or "towards covering" – the costs actually incurred in the case of default or disappearance.[457]

5.366 Cameron JA further explained that where the administrator employs an attorney, the attorney's reasonable charges, duly taxed and scrutinised, will be recoverable as costs under section 74L(1)(b).[458] Furthermore, an attorney who is appointed as an administrator acts in the capacity of an attorney throughout, and he or she does not dispense with professional functions or duties at any point in the administration. The attorney administrator therefore takes both the benefits and the burdens of a practitioner's professional position and responsibilities. For the purposes of section 74L(1)(b), this enables an attorney administrator to carry out the legal work required by the section and to charge the reasonable costs so incurred to the administration.[459]

5.367 Having regard to the preceding paragraphs, the Commission are of the view that the above-mentioned case law has clarified the interpretation of section 74L of the MCA, read with Parts I and III of Table B of Annexure 2 of the rules. However, these provisions have to be amended accordingly for the sake of legal certainty.

The DOJCD Justice Administered Fund

5.368 The Commission have evaluated the feasibility of using the Justice Administered Fund (hereafter "the JAF") of the DOJCD to distribute funds paid by debtors. The JAF is a fund within the DOJCD's Third Party Fund system. The JAF was established by the Justice Administered Fund Act 2 of 2017. The following monies on behalf of third parties must be administered through the Fund:[460]

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457 See page 370G-H.

458 See page 371D.

459 See page 372C-D.

460 Section 3 of the Justice Administered Fund Act.

- Money received in terms of maintenance orders made in terms of the Maintenance Act 99 of 1998;
- money received as bail, payable in terms of the Criminal Procedure Act 51 of 1977 or any other Act;
- money paid to court in terms of any Rule of Court or any other law, of which the intended beneficiary is a third party;
- money received which cannot immediately be allocated into any of the categories listed in the bullet points above; and
- interest earned, or bank charges raised on money paid into or retained by the Fund.

5.369 The accounting officer, who is the Director-General of the DOJCD, must, within the JAF, open and maintain bank accounts and assign to each such bank account a name that clearly identifies the account.[461] The money in the JAF, except interest earned, may only be used for the purposes for which it has been paid into the JAF and must be paid directly from the JAF to the party entitled to the payment in question.[462] Furthermore, the Minister of Justice and Correctional Services may make regulations,[463] in consultation with the Minister of Finance, regarding the manner in which money—

- is received by the Department and paid into the JAF;
- in the JAF is accounted for; and
- in the JAF is paid to parties entitled to that payment.

5.370 Currently, the DOJCD uses of an application called MojaPay[464] as a payment method to receive money into its Third Party Fund (including into the JAF) and to distribute such money to parties entitled to payment. MojaPay is a fully automated financial accounting system, which eliminates the need for office level staff to perform bank reconciliations and repetitive manual transactions.

5.371 The Commission have liaised with the Corporate Services: Information and Systems Management Branch (ISM) of the DOJCD regarding the functionality of the MojaPay application to perform several of the functions currently performed by administrators, in particular, to receive payments from debtors and to distribute such funds to the debtors'

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461 Section 5(1) of the Justice Administered Fund Act.

462 Section 6(1) of the Justice Administered Fund Act.

463 Regulations under the Justice Administered Fund Act have not been enacted yet.

464 *Moja* means 'everything is fine' or 'everything is in order'.

creditors. According to ISM, payments made by debtors in terms of an administration order can be deposited through MojaPay into the JAF, from where the payment will be distributed to the creditors.

5.372 The process will be as follows: A product type for administration orders will be created. Based on the information the administrator furnished to the court, the accounting clerk at the court will create the master data by capturing the relevant information on MojaPay. The information will include the details of the debtor and creditors, the amount to be deposited, the date and frequency of payments, the amount to be paid to each creditor, bank account details of the creditors, other details on the court order, etc. In the system the debtor will be created as a depositor and each creditor as a beneficiary. After approval of the master data by the accounting clerk's supervisor, a request will be created on the system. The system will issue a unique account reference number (ARN), which will be provided to the debtor. The ARN is used as reference every time the debtor deposits money into any one of the four major the banks.[465] Debtors will also use the ARN when making enquiries. The details of the bank account into which the debtor has to make deposits will be given to the debtor. Alternatively, the debtor can make deposits at the magistrate's court by using his or her unique ARN. The ARN ensures that the money is allocated to the correct case, following which payment will be made into the bank accounts of the debtor's creditors. The system detects and flags non-payments as soon as the due date has passed and is customized to send an e-mail or SMS to beneficiaries if payment is not received within a specified time period.

5.373 ISM mentioned that the functionality to perform the process explained above is already in place and is currently used for payments in respect of maintenance and bail. They said that the system could be customised to send a reminder e-mail or SMS to a debtor if a deposit is not received on a specific date.[466]

5.374 ISM indicated that MojaPay could be customised to perform other specific functionalities. With regard to administration orders, the system could be customised[467]—

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465 The JAF, through the DOJCD, only banks with reputable banking institutions, i.e. ABSA, Nedbank, Standard Bank and First National Bank. See in this regard DOJCD "Annual Report on Third Party Funds 2016/2017" 37.

466 Meeting with ISM officials held on 7 September 2018.

467 Written submission received from ISM.

- to generate an up-to-date list of all payments received, indicating the amount, date and time of each payment, and a report (distribution account/list) indicating the amounts paid to each creditor;
- in such a manner that, if a debtor deposited a lesser amount than the amount required, each creditor would receive a pro rata payment based on that amount;
- automatically to adjust the pro rata payments made to the remaining creditors once the debtor has paid off one or more debts;
- to generate a certificate/document stating that all the listed creditors have been paid in full.

5.375 No fees are charged for the services rendered in respect of the DOJCD's Third Party Fund in instances where assistance is rendered to those most vulnerable in society, e.g. maintenance beneficiaries.[468] Those under administration are also in a vulnerable position and they need assistance to get out of debt and to become economically viable again. By not having to pay a fee to the DOJCD, debtors would be able to pay off their debt faster.

5.376 In view of the information set out above, the Commission recommend that an option to be presented to the Minister is that payments and the distribution of funds in terms of an administration order be made into and from the JAF through MojaPay. In this regard, the Commission recommend as follows:

5.377 The Director-General of the Department must, in terms of section 5(1) of the Justice Administered Act, open and maintain a bank account into which debtors under administration make their payments with their unique ARNs as reference. It is suggested that the account be named Administration Account.[469] It would not be possible to make unreferenced or incorrectly referenced deposits into the proposed account because participating banks (ABSA, Nedbank, Standard Bank and FNB) will reject any deposit that does not meet the validation requirements, as currently happens with other justice-administered funds.[470]

5.378 Section 74I(1) of the MCA should be amended to require a debtor to deposit the payments in terms of his or her administration order into the proposed Administration

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468 DOJCD "Annual Report on Third Party Funds 2016/2017" 15.

469 Clause 74HA.

470 DOJCD "Annual Report on Third Party Funds 2015/2016" 13.

Account.[471] Furthermore, section 74I(5) should be amended to require that payments in terms of an emoluments attachment order or a garnishee order referred to in that section be made into the proposed Administration Account as well.[472]

5.379 Section 74J of the MCA should be amended to provide that the DOJCD collect the payments made in terms of administration orders, keep up to date a list of all payments and other funds received from or on behalf of debtors (indicating the amount and date of each payment) and distribute such payments pro rata to the creditors monthly. Furthermore, the list must be provided to the administrator concerned. The administrator must ensure that the list is available for inspection by the debtor and creditors or their attorneys at the office of the administrator during office hours free of charge. Also, if the debtor fails to make payment, the Department must inform the administrator that payment was not received from the debtor.[473] Concerning the distribution account, section 74J(5) should be amended to make it clear that the Department must draw up the account and lodge it with the office of the clerk of the court.[474]

5.380 Section 74J(14) provides that if debt which was due at the time of the granting of an administration order is paid to the creditor by the debtor after the granting of the order, otherwise than by way of payments in terms of the administration order, that such payment is invalid and the administrator may recover the amount paid from the creditor, unless the creditor proves that the payment was effected without his knowledge of the administration order. The Commission recommend that the amount so recovered by the administrator be paid by the creditor into the Administration Account for the benefit of the debtor.[475]

5.381 Section 74K should be amended to provide that if a credit provider is obliged to pay to the debtor an amount in terms of the NCA, the creditor must pay that amount into the proposed Administration Account for the benefit of the debtor for pro rata distribution to the creditors.[476]

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471 Clause 74I(1) (Bills: option 1).

472 Clause 74I(5) (Bills: option 1).

473 Amendment to section 74J(1) (Bills: option 1).

474 Amendment to section 74J(5) (Bills: option 1).

475 Clause 74JA(8).

476 Amendment to section 74K(3) (Bills: option 1).

Expenses and remuneration of administrator

Collection fee

5.382 The Commission support the proposal by the Rules Board for Courts of Law that paragraph 1(b) of Part III of Table B of Annexure 2 to the rules be amended to make it clear that the 10% collection fee is included in the 12,5% cap. However, if the MojaPay system is introduced, as explained in paragraphs 5.400 – 5.402, the 12.5% cap may need to be reduced in view of the fact that there will be no collection fee payable to the administrator.

Legal fees

5.383 Pursuant to case law, the Commission believe that an administrator is entitled to claim legal costs (apart from the ordinary expenses of an administration) in addition to the 12,5%. As regards the section 74L(1)(b) legal costs, the court in *African Bank Ltd v Weiner and Others* held that such costs should be reasonable. Baker and McKenzie Attorneys hold a different view and suggested the following:

- A cap should be placed on the legal costs that an administrator may charge.
- It is not sufficient that the money an administrator may retain to defray costs of recovery proceedings if the debtor defaults or disappears is capped at R600 by rule 48(4) of the Magistrates' Courts rules. A cap should be placed on the costs that the administrator may recover in terms of section 74L(1)(b).
- A debtor and administrator should be prohibited from agreeing to an arrangement over and above those legal fees that have been capped.
- Administrators should obtain the expressed and informed consent of debtors before they incur legal costs.

5.384 The suggestion that the legal cost an administrator may incur should be capped necessitates a brief exposition of different legal costs and whether such costs are provided for in the rules. It seems that an administrator is entitled to the following legal costs:

5.385 The legal costs of applying for an administration order are recoverable under section 74O. They differ entirely from the costs of the actual administration, with which section 74L

deals. In *Weiner NO v Broekhuysen*,[477] the respondent contended that the costs of the application for the administration order form part of the maximum of 12,5% fixed for the administrator's necessary expenses and remuneration in section 74L(2). The court held a contrary view, however, and stated that whereas section 74O deals with the costs of an administration order application, section 74L relates to the expenses and remuneration that arise during the administration process as well as costs that may result from the debtor's default or disappearance whilst an administration order is in force.[478]

5.386 The costs of an application for an administration order would be paid in priority to any other claims before the first distribution of the moneys paid to the administrator. However, section 74O does not entitle an administrator simply to deduct his or her application costs from the payments the debtors make (although these costs would be a first charge against the moneys he or she controls). Section 74J(5) requires the administrator to complete a distribution account (Form 52).[479]

5.387 The section 74O costs of the administration order application is not listed in the Tariff in Part III of Table B of Annexure 2. The Commission see no reason why such costs should not be included in the tariff and recommend that the Rules Board make rules concerning the fees for an application for an administration order.[480]

5.388 With regard to an application for an emoluments attachment order to attach the emoluments of a debtor under administration, paragraph 5 of Part I of Table B of Annexure 2 to the rules states that items 1 to 5 of Part IV of Table A of Annexure 2 are applicable in terms of section 65J of the MCA. Legal costs are capped only for item 4. Legal fees relating to the rest of the items are prescribed but not capped.

5.389 Section 74J(9) legal proceedings for the debtor's committal for contempt of court or steps taken to trace a debtor who has disappeared should be read with sections 74L(1)(b) and 74I(2). Section 74L(1)(b) provides that an administrator may retain a portion of the money collected to cover the costs that he or she may have to incur if the debtor is in default or disappears. The process the administrator has to follow if the debtor fails to make payments is set out under section 74I(2). This section provides that the provisions of

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477 2001 (2) SA 716 (C) at 723.

478 See also Jones & Buckle Vol 1: The Act 10 ed (service 10, 2016) 531.

479 ***Weiner NO v Broekhuysen*** 2003 (4) SA 301 at 311F-G.

480 Clause 74L(6)*(a)* (Bills: option 1) and clause 74L(8)*(a)* (Bills: option 2).

sections 65A to 65L of the MCA apply, with the necessary changes, to the said process. The court in *African Bank Ltd v Weiner and Others* held that legal cost in this instance should be reasonable.

5.390 Section 74J(10) provides that an administrator must apply to the court for the rescission of an administration order if the majority of the creditors instruct him to do so. Section 74Q sets out the requirements and process to be followed for an application to rescind an administration order. The legal costs for such an application are not prescribed in the rules. The same is true for a section 74Q(1) application for the suspension, amendment or rescission of an administration order and for a section 74Q(2) application for the amendment of an administration order. These costs may be recovered through Rule 48(4). If the amount retained by an administrator in terms of this rule is not sufficient to cover the costs incurred, the administrator should be able to claim them as legal costs in terms of the proposed section 74L.[481] Furthermore, section 74J(14) provides for the recovery of an amount paid directly to the creditor by the debtor after the granting of the administration order. An administrator might have to institute legal proceedings to recover such amount. Legal costs for the recovery of the amount are not prescribed in the rules.

5.391 Similar to the court's view in *African Bank Ltd v Weiner and Others* that the section 74I(1)(b)[482] costs should be reasonable, it could be argued that the above-mentioned costs should also be reasonable. However, there have been several allegations that some administrators overcharge debtors. This raises the question whether legal fees should be capped. There is no "one size fit all" solution to this. A fine balance should be struck between an attorney that needlessly incur costs and an attorney that incur necessary expenses in the reasonable administration of an administration order.

5.392 The Commission are of the view that the suggestion by Baker and McKenzie that administrators obtain the express and informed consent of debtors before they incur legal costs cannot be a general limitation. The administrator cannot be expected to obtain the debtor's consent in cases where the debtor has failed to make payment or has disappeared. In section 74J(8) and (10), the creditors of a debtor may instruct the administrator to make an application for the rescission of the administration order if the debtor is in arrear with payment or has disappeared. It is doubtful whether such debtor would give consent.

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481 See 74L(2) (Bill option:1) and 74L (4) (Bill: option 2)

482 Read with sections 74J(10) and 74I(2) of the MCA.

5.393 With regard to an application for an emoluments attachment order, the recent amendments to section 65J[483] contain several built-in safeguards for the protection of debtors. Once again, a debtor will most likely not give the administrator permission to apply for an emoluments attachment order if the debtor fails to make regular payments.

5.394 The Commission are of the view that a creditor should not require a debtor's consent for an application for the suspension or amendment of an administration order in terms of section 74Q(1). However, legal costs should only be incurred with the debtor's written consent in respect of[484] –

- a section 74O application for an administration order;
- proceedings for the recovery of the amount contemplated in section 74J(14) from the creditor.

5.395 As it is, section 74Q(2) provides that an administrator must have the debtor's written consent to apply for the amendment of an administration order.

5.396 The Commission are cognisant of the fact that administrators may charge a fee for every consultation they have with a debtor. This raises the question whether these fees should be prescribed, taking into account that a substantial number of administrators are attorneys. Should attorney administrators be allowed to charge fees as between attorney and client for such consultations? In the light of the purpose of an administration order, for example to provide a debtor with the opportunity to make payment in smaller amounts over a relatively short period, it would defeat the purpose of an administration order if such fees were too high. The Commission therefore recommend that the Rules Board make rules regarding the fees for consultations between the debtor and the administrator in connection with the debtor's administration.[485] This would improve debtors' access to their administrators. Debtors would be able to make inquiries regarding payments made to creditors, the fees and remuneration of the administrator, etc., without running the risk of being charged huge fees for doing so.

- *If the receipt and distribution of monies are done through the MojaPay system,*

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483 See section 9 of Act 7 of 2017.

484 Clause 74L(5) (Bills: option 1) and clause 74L(7) (Bill: option 2).

485 Clause 74L(6)*(c)* (Bills: option 1) and clause 74L(8)*(c)*.

should the 12,5% for remuneration and expenses be reduced in view of the fact that administrators would no longer receive and distribute monies, draw up a distribution account and ultimately account for such monies?

- *Should the Rules Board be mandated to make rules regarding the maximum amount in legal fees an administrator may charge?*
- *Should the amount of R600 which an administrator may retain in terms of rule 48 be increased?*
- *If it is decided to cap the legal fees an administrator may charge, should an administrator be prohibited from agreeing with the debtor to an arrangement to pay an amount higher than the capped fees?*
- *Should a debtor and an administrator be prohibited from agreeing to a higher fee over and above those legal fees that have been capped?*
- *In your view, are there any administration costs or legal costs relating to administration orders that have not been referred to above? If yes, please provide particulars in your response.*

Reckless-credit fee

5.397 The Commission believe that a determination whether credit has been recklessly granted should be made when the initial application for an administration order is made. For this reason the Commission recommend in paragraph 5.254 above that an administrator should determine whether any of the debtor's credit agreements appear to be reckless. The Commission further recommend that, in addition to the 12,5% fee for remuneration and expenses and legal costs, an administrator should be entitled to a separate amount prescribed in a tariff in the rules for determining whether a credit agreement appears to be reckless.[486] The fee for determining reckless credit would be payable only once at the beginning of the administration and then every time a new creditor is added to the list of creditors.

5.398 The NCR fixed a reckless-lending fee of R1 500 per debt counselling application, taking into account the amount of work a debt counsellor has to do before he or she can recommend that the court declare a credit agreement to be reckless credit.[487] This fee was to cover the reckless-lending assessment and the furnishing of reckless-lending documents to the attorney to draft the affidavit on the assessment outcome. The reckless-lending fee was,

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486 See clause 74AA.

487 NCR Debt Counselling Fee Guidelines, issued on 22 February 2018..

however, withdrawn by the NCR as debt counsellors tended to abuse it.[488] In the light of this information, the Commission recommend that the proposed reckless lending fee for administrators be payable to the administrator only if the court has made a declaration of reckless credit. This would ensure that administrators obtain all the relevant information to enable them to consider whether a credit agreement constituted reckless credit.

Administrator's claim a first preference

5.399 The Commission further recommend that the amount of 125% of each instalment paid by the debtor, the amount in respect of the determination of reckless credit and the amounts relating to legal costs should be a first preference against the payments received from the debtor. Furthermore, the two last-mentioned amounts should, upon application by an interested party, be subject to taxation by the clerk of the court and review by any judicial officer.[489]

Payment through the Justice Administered Fund

5.400 Concerning the recommendation that the Justice Administered Fund of the DOJCD be used to distribute funds paid by debtors, the Commission recommend that an administrator should be entitled to an amount of 12,5% of each instalment paid by the debtor for his or her necessary expenses and remuneration. This amount should be for work performed by the administrator, as currently set out in the Tariff in Part III of Table B of Annexure 2 to the rules. The current section 74L(2) provides that the administrator's expenses and remuneration may not exceed 12,5% of the amount collected. The proposed amendments to section 74L(1) allow the administrator a flat percentage of 12,5%. This is because ISM pointed out that it would be difficult to customise the MojaPay application to make payments of different amounts to a total of 12,5%. Hence 12,5% of each deposit would automatically be paid to the administrator.

5.401 Unlike the 12.5% which will automatically be paid to the administrator, claims in respect of legal cost and the determination of reckless credit would be paid only once a claim has been submitted by the administrator.[490] In order to prevent a situation in which administrators submit claims other than those set out in the proposed section 74L(2), the

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488 NCR circular 05 of 2018.

489 Clause 74L(4) (Bills: option 1) and clause 74L(6) (Bills: option 2).

490 Clause 74L(2) and (3) (Bill: option 1).

types of claims and the maximum amounts that may be claimed for such claims should be built into MojaPay. MojaPay should also be customised to reject claims which do not fall under subsection (2) or which exceed the maximum amount that may be claimed. This should also apply to claims under the proposed section 74L(3).

In the light of the proposal that, in order for a debtor to remain eligible for an administration order, the maximum amount of all his or her debts should be increased from R50 000 to R300 000, the fact that administrators would be freed from the huge administrative task of distributing payments to the creditors and drawing up a distribution account, and the fact that an administrator would claim for cost in respect of legal work and the determination of reckless credit should the current 12,5% for remuneration and expenses be reduced? If yes, what would be an appropriate percentage? Please consider whether the percentage should be the same as that received by debt counsellors, and give reasons for your view.

5.402 In order to facilitate the smooth payment to the administrator through the MojaPay Application, the Commission recommend that the DOJCD develop and maintain a claims system through which administrators could be able to submit electronically their claims for payment as well as preferred claims for payment to creditors. After submission of the claims, payment should be made through MojaPay directly into the administrator's bank account or that of the preferred creditor.[491]

Response to comments received

5.403 As regards the Banking Association of South Africa's submission that advisors charge consumers a fee for recommending that they be placed under administration, the Commission would like to point out that neither section 74 and its associated provisions, nor the rules provide for such a fee. If such a fee is charged, it cannot be paid as part of the debtor's administration. The Commission therefore recommend that the proposed legislation stipulate that an administrator may not pay to any person a fee for recommending that the debtor be placed under administration.[492]

5.404 With regard to the submission by Booysen and Co. Inc. Attorneys that provision be made for a separate fee for the inclusion, after the granting of an administration order, of creditors in the section 74G list, the Commission recommends in paragraph 5.256 that

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491 Clause 74LA (Bill: option1).

492 Insertion of subsection (2)(c) in section 74N.

section 74G(2) to (6) should be repealed because these provisions allow the addition of a creditor to the debtor's administration without a court order. As a result, the credit agreement concerned cannot be declared as reckless credit. Hence, the Commission recommends that a creditor who wishes to be included in the debtor's administration should do so through a court application.

5.405 The Commission agree with HVDM Attorneys that a cost analysis of the actual cost of an administration should be done.[493] This would help to determine a just and fair amount for "expenses and remuneration" for administrators. It should, however, be borne in mind that the purpose of an administration order is to assist debtors to pay off their debt in smaller amounts over a relatively short period without forfeiting their assets. This purpose would be defeated if the necessary expenses, remuneration and other costs of administrators turn out to be so high, causing debtors to remain under administration for long periods.

5.406 Concerning the submission made by Krüger and Van Eeden Attorneys, the Commission find it strange that advice given to debtors on maintenance, eviction orders, damage resulting from motor vehicle accidents, labour issues, deceased estates, divorce and criminal matters are charged and deducted as fees payable in terms of debtors' administration orders. The Commission therefore recommend that administrators should be prohibited from adding to the debtor's debt in terms of the administration order fees for services that are unrelated to the administration of the debtor's estate.[494]

5.407 Some administrators might argue that 12,5% for remuneration and expenses is too little. The Commission believe, however, that the increase of the prescribed amount from R50 000 to R300 000 would result in an increase in the administrator's payment for remuneration and expenses.

5.408 The Commission reconsidered its proposed subsection 74L(3) and are of the view that it should be deleted.

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493 The DOJCD might not be able to conduct such a cost analysis as it would be an expensive and time-consuming process.

494 Insertion of subsection (2)(b) in section 74N.

S Section 74M: Furnishing of information by administrator

1 Proposed amendments

5.409 The workshop paper has not recommended changes to section 74M., but the section is set out below as comments have been received on it.

The administrator shall upon payment of the fees prescribed in the rules—
(a) furnish any creditor applying therefor with such information about the progress made in regard to the administration as he may desire; and
(b) furnish any person applying therefor with a copy of the debtor's application and statement of his affairs mentioned in sections 74 and 74A(1), or with a list or account mentioned in section 74G(1) or 74J, or with the debtor's statement of his affairs mentioned in section 65I(2).

2 Comments received

5.410 According to Matthee Attorneys some creditors make unnecessary enquiries that lead to added costs and work. They propose, therefore, that the costs relating to the enquiry be recovered from the amount payable to the creditor if that creditor does not pay such costs.

3 Evaluation and recommendations

5.411 The provision expressly provides that the information or documentation concerned may be accessed only once the administrator has received payment of the prescribed fees. However, the inference drawn from the comments made by Matthee Attorneys is that, in practice, creditors are provided with the information or documentation without having to pay the prescribed fees upfront. As a result, some creditors are reluctant to pay the prescribed fees afterwards or refuse to do so.

5.412 The Commission do not know why administrators do not demand payment prior to rendering the service, but are of the view that creditors must pay for the information and documentation they request in terms of this section. The Commission are of the view that administrators should strictly apply the provisions of section 74M.

T Section 74N: Failure by administrator to perform his or her duties

1 Proposed amendments

5.413 The workshop paper has not previously recommended changes to section 74N, but the section is set out below as the Commission now would like to propose an amendment to it.

An administrator shall take the proper steps to enforce an administration order, and if he fails to do so, any creditor may, by leave of the court, take those steps, and the court may thereupon order the administrator to pay the costs of the creditor *de bonis propriis.*

2 Comments received

5.414 The Commission have not received comments on section 74N.

3 Evaluation and recommendations

5.415 The Commission recommend that this section be amended to include a provision that a finding by a court that an administrator has failed to perform any of his or her duties serves as a ground for the withdrawal of his or her appointment as an administrator in the case concerned. Furthermore, the professional body of which the administrator is a member should be notified of the finding.[495] However, a person who contravenes the provisions of the proposed subsection (1D)(b)-(i) of section 74E should be bar from practising as an administrator.

U Section 74O: Costs of application for administration order

1 Proposed amendments

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[495] Inclusion of subclauses (5) to (7) in section 74N (Bill:option 1) and subclauses (4) to (6) in section 74N (Bill: option 2). See also paragraphs 5.90 – 5.91 and 5.232 of this paper.

5.416 The workshop paper has not recommended changes to section 74O, but the section is set out below as comments have been received on it.

Unless the court otherwise orders or this Act otherwise provides, no costs in connection with any application in terms of section 74 (1) shall be recovered from any person other than the administrator concerned, and then as a first claim against the moneys controlled by him.

2 Comments received

5.417 Melting the Darkness recommend that Form 52 be amended specifically to allow for section 74O charges.

5.418 The Magistrates Court Committee of the Cape Law Society state that debtors often are charged excessive amounts by non-attorney administrators for the costs of the court application. The Committee therefore suggest that section 74O costs (costs of the court application) be recoverable by an attorney administrator only.

5.419 The Banking Association of South Africa propose that specific provision be made for details of claims made in terms of section 74O, that is, costs (legal fees) in connection with the application for an administration order. Furthermore, details of the attorney and the amount of the claim should be clearly set out.

3 Evaluation and recommendations

5.420 Form 52 makes provision for the deduction of section 74L administration costs only. No express mention is made of section 74O application costs. Form 52, however, clearly provides for "other payments" made during the administration, and such payments would, if necessary, include section 74O application costs.[496] However, for the sake of certainty, the Commission recommend that the Rules Board amend Form 52 to reflect the section 74O costs of an application for an administration order.

5.421 With reference to the submission made by the Magistrates Court Committee of the Cape Law Society, it should be kept in mind that an administrator, other than an attorney administrator, sometimes has to draw up the application for an administration order and do

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496 ***Weiner NO v Broekhuysen*** 2003 (4) SA 301 at 312A.

the work involved in such application. Although a non-attorney administrator cannot claim the cost of the court appearance, he or she may recover the fees in connection with the application for an administration order in terms of the tariff in Part III of Table B of Annexure 2 to the rules. Legal costs relating to the application may not be claimed by the non-attorney administrator.

5.422 Unlike section 74L, section 74O does not stipulate that the costs of the application for an administration order are subject to taxation by the clerk of the court and review by any judicial officer. There is no reason why section 74O should not contain a similar provision. Hence, the Commission recommend that section 74O be amended accordingly.[497]

V Section 74Q: Suspension, amendment or rescission of administration order

1 Proposed amendments

5.423 The workshop paper has not recommended changes to section 74Q, but the section is set out below as comments have been received on it.

(1) The court under whose supervision any administration order is being executed, may at any time upon application by the debtor or any interested party re-open the proceedings and call upon the debtor to appear for such further examination as the court may deem necessary, and the court may thereupon on good cause shown suspend, amend or rescind the administration order, and when it suspends such an order it may impose such conditions as it may deem just and reasonable.

(2) The court may at any time at the request of the administrator in writing and with the written consent of the debtor, amend and administration order.

(3) Upon any application for the rescission of an administration order the court may—

(a) rescind the order under subsection (1); or
(b) if it appears to the court that the debtor is unable to pay any instalment, suspend the order for such period and on such conditions as it may deem fit or amend the instalments to be paid in terms thereof and make the necessary amendments to any emoluments attachment order or garnishee order issued so as to ensure payment in terms of the administration order, or set aside the said emoluments attachment order or garnishee order; or
(c) authorize the issue of an emoluments attachment order or garnishee order to ensure the payments in terms of the administration order; or
(d) set aside or amend any emoluments attachment order or garnishee order issued so as to ensure payments in terms of the administration order.

(4) Any order rescinding an administration order shall be in the form prescribed in the rules and a copy thereof shall be delivered personally or sent by post by the administrator to the debtor and to

497 Insertion of subsection in section 74O.

each creditor, who shall also be informed of the debtor's last known address by the administrator.

(5) When an order of court for the payment of any judgment debt in instalments or any emoluments attachment order or garnishee order has lapsed in consequence of the granting of an administration order and such judgment debt has not been paid in full upon the rescission of the administration order, such court order, emoluments attachment order or garnishee order shall revive in respect of such judgment debt, unless the court otherwise orders.

2 Comments received

5.424 The Magistrates Court Committee of the Cape Law Society remark that the reference to "interested party" in section 74Q applications has opened the door for abuse by individual entities who advertise their services to assist debtors to rescind their administration orders without first advising them to consult their administrator. According to the Committee, such applications are often defective and without merit. They say that the debtors are not made aware of the implications of such a rescission and are charged excessive amounts only to have the applications refused by the court. The Committee therefore propose that the subsection be amended to provide that the administrator must be consulted before such a rescission application and that the application for rescission may be made to court only if the administrator has refused to consent to the application.

5.425 Concerning subsection (4), the Magistrates Court Committee of the Cape Law Society submit that delivery by e-mail or fax should also be allowed.

3 Evaluation and recommendations

5.426 The proposal by the Magistrates Court Committee of the Cape Law Society that the administrator must be consulted before an interested party may apply to court for the rescission of the administration order would not solve the problem because it would not prevent a third party from approaching the court, even if the application has no merit. Furthermore, a creditor who wants to apply for the rescission of a debtor's administration order should not be delayed from doing so by the requirement that the administrator should first be consulted. An interested party's application for the rescission of the administration order must be made in good faith and in the interest of the debtor.

How should the problem identified by the Magistrates Court Committee of the Cape Law Society be dealt with?

5.427 The Commission support the recommendation to include fax or e-mail as a method of delivery of an order rescinding an administration order.[498]

W Section 74S: Incurring of debts by person subject to administration order

1 Proposed amendment

5.428 The workshop paper has not previously recommended changes to section 74S, but the section is set out below as the Commission now would like to propose amendments to it.

(1) Any person who is subject to an administration order and who during the currency of such order incurs any debt without disclosing that he is subject to an administration order shall be guilty of an offence and on conviction liable to imprisonment for a period not exceeding 90 days or to periodical imprisonment for a period not exceeding 2 160 hours in accordance with the laws relating to prisons and, in addition, the court may, upon application by any interested person, set aside the administration order.

(2) The provisions of the Criminal Procedure Act, 1955 (Act No. 56 of 1955), with regard to periodical imprisonment shall *mutatis mutandis* apply to periodical imprisonment imposed in terms of subsection (1).

2 Comments received

5.429 The Commission have not received comments on this section.

3 Evaluation and recommendation

5.430 Subsection (2) of the Act currently refers to the Criminal Procedure Act 56 of 1955. The whole of that Act has been repealed by section 344(1) of the Criminal Procedure Act 51 of 1977, except for section 319(3) (which deals with charges for giving false evidence) and section 384 (which deals with binding over of persons to keep the peace). The Commission recommend that subsection (2) be amended to refer to Act 51 of 1977.[499]

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498 Amendment to section 74Q(4).

499 See the proposed amendment to section 74S(2).

5.431 Section 88(4) of the NCA provides that if a credit provider enters into a credit agreement with a consumer who has applied for a debt rearrangement and that rearrangement still subsists, all or part of that new credit agreement may be declared to be reckless credit. A declaration of reckless credit may be made even if the circumstances for such a determination set out in section 80 of the NCA do not apply. The Commission recommend that section 88(4) be made applicable to a credit agreement debt referred to in subsection 74S(1).[500]

X Section 74U: Lapsing of administration order

1 Proposed amendments

5.432 The Commission were alerted to the fact that debtors stay under administration for long periods. The reasons given for the long duration of administration orders include failure by administrators to distribute money received to creditors and administrators' charging costs exceeding the prescribed fees. The workshop paper therefore proposed that section 74U of the MCA be amended as follows:

(1) An administration order granted—

(a) eight years or more prior to the date on which this provision comes into operation, lapses one year from that date; and

(b) after the date on which this provision comes into operation, lapses after a period of eight years from that date:

Provided that the debtor has not received a discharge from debts in terms of the Insolvency Act, 1936 (Act No. 24 of 1936), within four years before the date on which the order would have lapsed.

(2) All outstanding debts subject to an administration order referred to in subsection (1) shall be discharged unless the court, on good cause shown and on application by a creditor before the lapsing of the administration order, orders that the debtor shall not obtain a discharge of some or all of the outstanding debts.

(3) If an administration order has lapsed, the administrator shall lodge a certificate to that effect with the clerk of the court and send a copy thereof to the debtor and each creditor (who shall also be informed therein of the debtor's last known address).

(4) The debtor may, in the prescribed manner and form, file a copy of the certificate referred to in subsection (3) with the national register established in terms of section 69 of the National Credit Act, 2005 (Act No. 34 of 2005), or any credit bureau who, upon receipt of the certificate, shall expunge from its records—

(a) the fact that the consumer was subject to administration; and

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500 Amendment to section 74S.

(b) any information relating to any default by the consumer that relates to a debt which was subject to administration, unless the court has ordered that the debtor was not to obtain a discharge in respect of the debt.

[As soon as the costs of the administration and the listed creditors have been paid in full, an administrator shall lodge a certificate to that effect with the clerk of the court and send copies thereof to the creditors (who shall also be informed therein of the debtor's last known address), and thereupon the administration order shall lapse.]

2 Comments received

5.433 The Banking Association of South Africa submit that subsection (1)(a) has retrospective effect and is therefore unconstitutional.

5.434 Christo van der Merwe is in favour of the proposed section 74U, but states that the section would not protect creditors against debtors who abuse the system in order to avoid liability towards their creditors. In his opinion, creditors would, in blatant ignorance of the law, simply carry on with their collections after the order has lapsed. He says that creditors might also use the argument that section 74U certificates, just like prescription of a claim, would be a defence which would have to be raised in court. He states that the debtor would not have the financial capacity to defend such an action after the order has lapsed and his previous administrator would not enter into litigation free of charge. He argues that although the proposed amendment would free the debtor from the administration order, it would not necessarily free him or her from demanding creditors to whom forfeiture of their claims in terms of section 74J(14) would no longer be a threat once the administration order has lapsed.

5.435 Booysen & Co. Inc. Attorneys say that they are in agreement with the "spirit" of the proposed section 74U, but state that the proposed section fails to take the following into consideration:

- A debtor that defaulted on payments during the eight-year period;
- a debtor who did not increase his or her payment to creditors during the eight-year period;
- claims added in terms of sections 74G and 74H during the eight-year period;[501]

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501 HVDM Attorneys provide the following example: The doctor who lodges a valid claim against the administration in year 7, would have to be satisfied with receiving only one year's proportional payments. Christo van der Merwe adds that in addition to medical claims, the debtor could also add claims from a third party in respect of a motor vehicle accident a year before the lapsing of the order.

5.436 Booysen & Co. Inc. Attorneys recommend that the proposed section should apply to a debtor who has settled all his debt within eight years and that the effect of the lapsing of the administration order should be as contemplated in the proposed subsection (4). Furthermore, the section should also provide for the lapsing of the order during the eight-year period if the debtor has settled all his or her debts under administration, including costs. Nevertheless, the court should have the power, on application by the debtor, to order that all outstanding debts be discharged even though not all debts have been settled during the eight-year period, provided that due consideration is given to the issues raised in the bullet points above.

5.437 HVDM Attorneys view the proposed provision as very honourable, but feel the effect in practice would be that the creditor, who has already been penalised by the interest determination, would now be penalised again and forced to write off the outstanding balance after eight years. They submit that the proposed amendments should rather stipulate that the debtor may apply for such discharge after eight years and that notice should be given to all credit providers. They indicate that the certificate referred to in the current section 74U has no enforcement value in practice. They therefore recommend that the Act be amended to provide that with final payment, the administrator lodge an application and notify all the creditors that the court would be requested to issue an order to the effect that all the debts have been paid in full, that the debtor has been rehabilitated and that his or her records should be expunged from the credit bureaux.

5.438 Krüger and Van Eeden Attorneys note that no provision is made for the issuing of a section 74U certificate if the debts owing to the listed creditors and all costs have been paid before expiry of the period of eight years. They pose the following questions:

- Would the creditors be able to claim the outstanding debt from the debtor after the administration order has lapsed?[502]
- If so, would the debtor be able to apply for administration again if he or she is unable to pay the creditors?
- If so, would it not lead to further unnecessary costs for the debtor?

5.439 Norman Shargey disagrees with the reasons why debtors stay under administration for long periods. He indicates that the majority of queries received from debtors relate to high outstanding balances even though they have been under administration for lengthy periods.

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502 Capital Data want to know whether a creditor would have the right to proceed against a debtor after the lapsing of the order if the debtor was in default for two out of the eight years.

According to him, interest on debts is the single biggest cause of debtors' remaining under administration for a number of years. He mentions that in exceptional cases creditors have suspended charging interest, but the majority refuse to negotiate on the interest charges. He adds that debtors also do not play their part in that they continue to pay low instalments and refuse to increase their monthly payments.

5.440 Matthee Attorneys submit that although they are in favour of the proposed subsection (1), cognisance must be taken of medical costs incurred during the duration of the administration order, which may result in ordinary creditors receiving little or no money during the period concerned. They propose that a debtor should only qualify for a discharge of his or her outstanding debt if regular and timely payments had been made.

5.441 Matthee Attorneys mention that in some cases creditors wait until the section 74U certificate has been filed and then they proceed against the debtor. Therefore they suggest in addition to the proposed subsection (3) that, once a nil balance has been reached, the administrator must notify every creditor, who within 30 days after the date of the notice must inform the administrator of the outstanding balance. If a creditor fails to do so, he or she should lose his or her right to claim further payment from the debtor.

5.442 Matthee Attorneys propose that when a debtor fails to make payments for a continuous period of six months, the administrator should have the discretion to file a section 74U certificate to the effect that the administration has lapsed and that creditors may proceed directly against the debtor. Additionally, any party involved should have the right to apply for the setting aside of the certificate within 30 days after the filing thereof has come to his or her notice. Their justification for this proposal is that because so little funds are available in an administration, it should be unnecessary for the administrator to apply to court for the rescission of the administration order, as this would result in added costs.

5.443 Ms Elizabeth Barnes, on behalf of Nedbank, poses the following questions:

- Is the administrator under an obligation to ensure that the debtor settle his or her debts within the eight-year period?
- What recourse will a creditor have against an administrator if the debtor's payments are not structured in such a way as to ensure the debt is settled within the proposed time frame?

- When a debtor has made payments but does not settle his or her debts within the eight-year period and the administration order is due to lapse, what is the creditors' recourse against the debtor prior to the expiry of the eight-year period?
- If a debtor makes no or only a few payments toward his debts, is the creditor able to rescind the administration order to prevent it from lapsing upon expiry of the eight-year period and to ensure that the debt may still be collected?

5.444 The Magistrates Court Committee of the Cape Law Society welcome the proposed subsection (1), but recommend that it be brought into line with the automatic-rehabilitation provisions of the Insolvency Act 24 of 1936 by providing that the order must lapse after a period of 10 years. Provision should also be made for the copy of the certificate referred to in subsection (3) to be sent by e-mail or telefax transmission as well.

3 Evaluation and recommendations

5.445 The aim of an administration order is, no doubt, to help a debtor over a period of financial embarrassment without the need for sequestration.[503] It may be accepted, therefore, that it was never the intention of the legislator that a debtor should be bound up in an administration order indefinitely when there is no reasonable prospect of such order being discharged within a reasonable period of time. On the contrary, the mechanism of an administration order is intended to provide a debtor with a relatively short moratorium to help him or her to pay his or her debts in full and to ward off legal action and execution proceedings during such period.[504] Despite this, various factors cause debtors to remain in a debt trap for many years.

5.446 In summary, the Commission have identified the following factors:

- Irregular payments by debtors.
- Cessation of payments to the administrator, especially where the debtor has disappeared.
- Refusal by debtors to increase their monthly or weekly payments.
- Claims added after the granting of the administration order.
- Irregular or non-distribution of funds to creditors.

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503 ***Cape Town Municipality v Dunne*** 1964 (1) SA 741 (C) at 744G

504 ***African Bank Ltd v Weiner and Others*** 2004 (6) SA 570 (C) at 575; see also Jones & Buckle Vol 1: The Act 10 ed (service 14, 2017) 491.

- Expenses and remuneration deducted by administrators in excess of those prescribed by law.
- Escalating interest on debt under administration.
- Failure to apply the *in duplum* rule to the payment of interest on arrear instalments.
- The charging of interest in excess of that prescribed by law.
- In general, the high interest rates on debts

5.447 Furthermore, the instalments of a debtor who is making payments through an EAO are likely to be smaller because section 65J of the MCA obliges the court to take all the other existing EAOs against the debtor into consideration when determining the amount the debtor has to pay in terms of his or her administration order. The court also has to ensure that the total amount of the EAOs against the debtor does not exceed 25% of his or her basic salary.[505]

5.448 With regard to the above, it is difficult to provide for a "one size fits all" solution. The Commission believe that their recommendations in respect of the exclusion of one or more secured debts from the debtor's administration;[506] the obligation to ensure that the distribution account correctly reflects the amounts deducted for cost, payments made to creditors and expenses and remuneration;[507] the rights and responsibilities of administrators,[508] interests on debt under administration,[509] the determination of reckless credit,[510] realisation of assets,[511] expenses and remuneration of administrators,[512] and the prohibition against the addition of fees unrelated to the administration of a debtor[513] would go a long way to ensure that the periods debtors usually remain under administration are shortened.

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505 Section 65J(1)(c).

506 Inclusion of paragraph *(f)* in section 74C (Bill: option 1) and paragraph *(e)* in section 74C (Bill: option 2).

507 Inclusion of subclause (2)*(c)* in section 74N (Bill: option 2).

508 Insertion of subsection (5) in section 74E, insertion of subsection (2C) in section 74F (Bills: options 1 & 2).

509 Insertion of paragraphs (i) and (j) in section 74B(1) (Bills: options 1 & 2), insertion of paragraph (e) in section 74C(1) (Bills: option 1), insertion of paragraph (d) in section 74C(1) (Bills: option 2), insertion of subsection (2D) in section 74F (Bills: options 1 & 2), and insertion of subsections (6),(7) and (8) in section 74I (Bills: option 1 & 2), insertion of clause 74J(1) (Bills: option 1) and subsection (1B) in section 74J (Bills: option 2).

510 Insertion of clause 74AA, paragraph (h) in section 74B and paragraph (c) in section 74C(1) (Bills: option 1 & 2)

511 Amendments to section 74K (Bills: options 1 & 2).

512 Substitution of section 74L (Bills: option 1) and amendment of section 74L (Bills: option 2), clause 74EA(4) (Bills: option 1 & 2).

513 Insertion of subsection (2)(b) in section 74N.

5.449 The Commission urge the Department of Trade and Industry to review, as soon as possible, the high cost of credit, particularly the high interest rates on debt currently allowed by law. It is also pivotal that the Department should clamp down on credit providers who charge interest rates in excess of those prescribed by law.

Is there still a need to provide for the lapsing of administration orders? If yes, please give reasons for your response.

5.450 The Commission support the recommendation by Matthee Attorneys that creditors who fail to provide administrators with the outstanding balance on their debt should lose their right to claim the outstanding balance from the debtor.[514]

5.451 With regard to Matthee Attorneys' recommendation that if a debtor fails to make payments for a continuous period of six months, the administrator should lodge a section 74U certificate, following which the creditors may proceed directly against the debtor, the Commission would like to point out that the section 74U certificate is only applicable when the creditors have been paid in full.

Y Section 74W: Failure of administrator to carry out certain duty

1 Proposed amendments

5.452 The workshop paper suggested that section 74W of the MCA be amended as follows:

Any administrator who fails to carry out the duty assigned to him by section 74J(7) shall be guilty of an offence and on conviction liable to a fine **[not exceeding R500]** or **[in default of payment]** to imprisonment for a period not exceeding **[six months]** five years or to both a fine and such imprisonment.

514 Amendments to section 74U.

2 Comments received

5.453 HVDM Attorneys question why a term of imprisonment should be imposed on an administrator if no loss or damage was suffered, the contravention of section 74J(7) notwithstanding. They ask whether imprisonment for a period of up to five years would be sufficient if the administrator took, say, R10 million from his or her trust funds for personal use even though he or she has not contravened section 74J(7).

3 Evaluation and recommendations

5.454 The Commission recommend in paragraph 5.214 above that a person may not act as an administrator if he or she is not a member of a professional body. The proposed amendments to section 74N provide for the withdrawal of the appointment of an administrator under certain circumstances and for the court's referral of the matter to the professional body of which the administrator is a member.[515] The Commission further recommend the inclusion of clause 74NA, which provides for a process in terms of which a complaint against an administrator may be referred to his or her professional body for investigation and to the National Prosecuting Authority if an offence has been committed. The Commission believe that these measures would be sufficient to ensure that administrators properly carry out their duties. The Commission therefore recommend the repeal of section 74W. Where an administrator steals money from his or her trust account, he or she may also be charged with theft.

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515 Insertion of subclauses (4) to (6) in section 74N.

CHAPTER 6: REGULATION OF ADMINISTRATORS

1 Introduction

6.1 Attorney administrators are regulated by their respective law societies (provincial councils), but most debtors are not aware that they can report abuse to the law societies with which their attorney administrators are registered. Not all non-attorney administrators have a regulatory body that can hold them accountable for any misconduct relating to administration orders. Sections 74J, 74L, 74N and 74W of the MCA provide for certain safeguards and penalties to ensure that administrators comply with their duties. However, despite these provisions there are still numerous reports of abuse by administrators.

6.2 A respondent to the Commission's questionnaire who proposed that the administration order industry be regulated suggested that this should be done in a manner similar to the way the debt councillors and the debt collectors industries are regulated, the former through the NCA and the latter through the Debt Collectors Act 114 of 1998. He further stated that the regulation of administrators would best be done through the Debt Collectors Act.

6.3 The workshop paper invited comments on the following questions:

- Should administrators be registered with and regulated by the Council for Debt Collectors or by a separate body?
- If administrators are to be registered and regulated by the Council for Debt Collectors, should this be done through amendments to the Debt Collectors Act 114 of 1998?
- In view of the fact that attorney administrators are regulated by their respective law societies, should they also be registered with and regulated by the Council for Debt Collectors or any other body to be established for this purpose?

6.4 The workshop paper further stated the following:

> Whether or not the Council for Debt Collectors will be responsible for the registration and regulation of administrators and whether or not attorney-administrators are to be registered and regulated by the Council, the regulatory body to be proposed should have the following functions:

(a) The regulatory body should consider applications for registration as administrators. Provision should be made that the court may not appoint someone that is not registered with the regulatory body. Furthermore, the regulatory body should not register a person as an administrator if —

(i) he or she has been convicted of an offence of which dishonesty, extortion or intimidation is an element;

(ii) in case of an attorney-administrator, proceedings to strike his or her name of the roll of attorneys or to suspend him or her from practice as an attorney have been instituted or he or she has been found guilty of unprofessional, dishonourable or unworthy conduct relating to the management of his or her trust account; or

(iii) he or she is an unrehabilitated insolvent;

If a juristic person or partnership applies for registration, it should not be registered if any of its directors are guilty of the conduct as set out in paragraphs (i) – (iii) above.

(b) The regulatory body should investigate any allegation of misconduct by a registered administrator.

(c) If the regulatory body finds an administrator guilty of misconduct, it should be able to withdraw or suspend the registration or to impose on the administrator other penalties in order to remedy the situation.

(d) Keep and maintain a register of administrators.

(e) Keep and maintain a register of administration orders. A commentator to the Commission's Questionnaire suggested the introduction of a central register for administration orders as part of the regulatory body.

2 Comments received

Registration and regulation of administrators

6.5 HVDM Attorneys welcome the proposal for the establishment of a regulatory body because they believe the establishment of a trustworthy institution is much needed.[516] They add that they cannot see any harm in requiring registration for administrators. Regarding the functions of the regulatory body, they propose that it should ensure that the security on trust accounts is satisfactory before it issues a registration certificate as referred to in the proposed section 74E(1)(c). They believe that it would be in the interest of the industry if the first step in resolving disputes lodged against administrators should be to approach such a regulatory body.

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516 Capital Data also support the creation of a regulatory body for administrators.

6.6 Several respondents are against the creation of a regulatory body for attorney administrators.[517] The reasons they give for their view are the following:

- Attorneys are already subject to the oversight of their law societies.
- Attorneys would be required to pay fees for registration with two bodies, namely their law societies and the proposed regulatory body, whilst non-attorney administrators would pay only one registration fee.
- The fidelity guarantee fund makes sufficient provision for the protection of creditors and debtors in case an attorney administrator absconds with money.

6.7 Krüger and Van Eeden Attorneys want to know whether attorney administrators would be required to open two trust accounts and to give account of both trust accounts to their law societies[518] and to the proposed regulatory body. Doing so, in their opinion, would lead to higher audit costs. They mention that magistrates in the Vaal Triangle would immediately be able to identify the administrators who were diligent and doing a good job. Therefore they recommend that the courts be required to identify administrators who are not fulfilling their duties and to bring them before court in order to answer certain questions. Moreover, such administrators should not be appointed as administrators in new applications until answers have been given to those questions and a proper report on the matters concerned has been rendered.

6.8 Booysen & Co. Inc. Attorneys argue that the administration industry – i.e., the courts, administrators, debtors and creditors – have shown that they can regulate administration orders. They add that creditors have over the past years ensured that the rogue element amongst the administrators be identified and "taken out". This, in their view, has proved to be the most efficient regulatory mechanism. However, Capital Data submit that although creditors "compel and manage" administrators, debtors do not have an organisation that can deal with their grievances against administrators.

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517 Krüger and Van Eeden Attorneys, Norman Shargey and Matthee Attorneys.

518 See Chapter 2, read with section 117 of the Legal Practice Act 28 of 2014.

6.9 Matthee Attorneys remark that if it is decided that non-attorneys should continue to be appointed as administrators, interest earned on their trust accounts should be paid to their regulatory body to serve as security for the payment of claims against them.

6.10 Melting the Darkness are adamant that the law societies are not the appropriate bodies to regulate administration orders and therefore wholeheartedly welcome the registration and regulation of administrators by the Council for Debt Collectors. They submit that there are many similarities between the functions of a debt counsellor and those of an administrator, including applications to court. They agree with the proposed functions of the regulatory body.

6.11 Norman Shargey submits that non-attorney administrators should be registered and regulated by the Council for Debt Collectors. He does not see the benefit of a register for administration orders. He remarks that if a regulatory body is to be established, then, at best, a quarterly report along the lines of that submitted by debt counsellors should be submitted by all administrators.

6.12 Christo van der Merwe poses the following questions:

- Would an administrator who is also a debt counsellor and who will now be required to register and be regulated by the Council for Debt Collectors not have a serious problem because the National Credit Regulator prohibits debt counsellors from having any ties with debt collections?
- Would the Council for Debt Collectors not favour debt collectors over administrators?
- Would the administrator not in essence be a civil policeman scrutinising the claims and conduct of debt collectors?
- Would administrators not seize the opportunity by claiming additional collection fees if they were registered with the Council for Debt Collectors?
- Should attorneys administer separate trust accounts for administration orders?

6.13 Matthee Attorneys agree with the proposed information to be included in the register of administration orders as initially recommended by the Commission. They suggest that the information be provided quarterly in order to minimise cost for the debtor, that it be used for the purposes of the regulatory body only and that it not be accessible to any other person.

Appointment of attorneys only as administrators

6.14 Several respondents are in favour of appointing only attorneys as administrators, for the following reasons:[519]

- The trust accounts of attorneys are audited annually.
- Attorneys are subject to the rules of their respective law societies.
- Attorneys have fidelity fund cover.[520]
- Attorneys have the necessary legal training and experience.
- Attorneys can be struck from the roll if found guilty of any transgressions.
- There is no need for attorneys who are on the roll of practising attorneys to furnish security. [521]

6.15 The Banking Association of South Africa submit that even if non-attorney administrators were eventually regulated, the standard of conduct by which they would have to abide would not be as high and as regulated as that of attorneys. They argue that an attorney is well placed to inform a consumer of his or her rights and obligations in terms of the law; is appropriately skilled to assist a consumer with advice prior to embarking on the application; is in a position to provide a consumer with assistance regarding the different options the consumer could follow, depending on the consumer's circumstances; and is better equipped to provide consumers with a higher level of aftercare compared to what non-attorney administrators can give. In their view, these are typically the advantages that a person applying for insolvency has compared to those currently available to a consumer applying for debt administration. The Association recommend that non-attorney administrators should be regulated by the National Credit Regulator.

6.16 Melting the Darkness oppose the appointment of only attorney administrators and counter several of the points made above as follows:

6.17 Regarding the point that the trust accounts of attorneys are audited annually, Melting the Darkness submit that the auditing of an attorney's trust account in no way guarantees

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519 Booysen & Co. Inc. Attorneys, Norman Shargey, the Magistrates Court Committee of the Cape Law Society, Attorneys and the Banking Association of South Africa.

520 Matthee Attorneys indicate that they act against a number of non-attorney administrators who has become bankrupt because of maladministration. They reason that a non-attorney administrator is unable to give the kind of insurance as provided for by fidelity fund cover. They add that if such an administrator fails to pay their insurance premiums, the insurance cover will lapse.

521 The Magistrates Court Committee of the Cape Law Society mentions that many courts do not police the filing of security sufficiently in order to protect debtors whose funds have been misappropriated.

that a debtor would not be overcharged. They illustrate this with reference to an actual case the facts of which are as follows: A debtor paid over R20 000 to his administrator, who is also an attorney. Three days before an application for rescission was made the administrator had paid over to the creditors an amount of only R2 000.

6.18 With regard to the point that attorneys are subject to the rules of their respective law societies, Melting the Darkness point out that the Law Society of the Northern Provinces, the largest society, is completely overburdened with complaints from the public about attorneys.[522] According to them, the average person is not qualified to submit a complaint that a law society can act on. They mention that they have lodged a number of complaints with the Law Society of the Northern Provinces, but that in two years' time very little progress was made, despite the fact that they have submitted comprehensive proof of overcharging substantiated by taxations from the Taxing Master.

6.19 As regards the argument that attorneys have legal training and experience, Melting the Darkness point out that apart from the initial court application, which is done by an attorney, the administrator does little or no legal work that is reserved for attorneys. They say that they have had the fees of a number of administration orders taxed and that no legal fees over and above the administration fees had been charged. They claim that the work of an administrator more often is akin to the work of an accountant, auditor, financial advisor or financial planner than to that of an attorney.

6.20 On the issue of security, Melting the Darkness contend that attorney administrators provide no more cover than non-attorney administrators, as the latter are required to furnish security to the court. They add that whether they in fact do so is another question.

6.21 Melting the Darkness indicate that while non-attorney administrators may have perpetuated the culture of overcharging debtors, they have also developed the infrastructure, capacity, knowledge and market to be able to provide a service that is generally on a par with or better than the service attorneys currently often offer.

Establishing a centralised database

6.22 Law Credit Solutions submitted a comprehensive proposal for the creation of a centralised database, as follows:

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522 They say that the Society have admitted this privately.

Law Credit's understanding of the challenges within the administration order environment

6.23 Having worked and operated as a technology partner and service provider within the administration order environment, it has become abundantly clear that all the actors within the process are prone to similar frustrations. The actors are the following:

Consumers

6.24 Costs related to origination of application, costs related to the administrator, interest costs and how the *in duplum* rule applies to customer debt, all cause frustration owing to a lack of transparency. Obtaining balances from administrators in respect of amounts owed; obtaining term of debt; obtaining a paid-up letter from creditors to take to the credit bureaus; obtaining access to an attorney for a rescission application – all add to the frustration of the consumer. Consumers, in turn, do not always supply the correct account and balance information to administrators. This causes problems later on in the process when creditors make applications to Magistrates to include other accounts not listed in the application. The consumer has not been adequately dealt with in terms of access to their own information. In many cases the consumer and administrator might not be in the same vicinity, thereby making the ability to communicate even more frustrating.

Creditors

6.25 Creditors have for a long time been quite oblivious to this legal process simply because administration orders (as an option to consumers) form such a small percentage of the creditors' total debt portfolios. In many cases, through no fault of the administrators, creditors have not taken heed of notice by consumers to apply for administration. In many instances, the account becomes dormant (as the consumer has been granted an order of court) but the creditor pursues legal action. The attorney who assists the creditor contacts the debtor, who informs the attorney of their new status. The attorney contacts the administrator for confirmation. The attorney notifies the creditor. The creditor has to settle the attorney's invoice for time spent on the case, which in fact could have been avoided.

6.26 Creditors are also not providing accurate data back to administrators in terms of the balances of accounts and the number of accounts listed against a consumer. Administrators pay timeously to creditors' suspense accounts but funds are not allocated against debtors' accounts. Creditors do not understand the Act and therefore question the quarterly payment system currently being utilised by some administrators.

Credit Bureaus

6.27 These institutions are normally the last to be informed about the status of a consumer. Creditors will perform a bureau check and if the bureau has not been updated and no other record of judgment has been obtained previously, the applicant/consumer has access to more credit. A similar situation appears when an admin order judgment has been rescinded. The bureaus that have had no record of the consumer applying for administration and no record of a judgment being granted, suddenly have to deal with a consumer who has a rescission order as well as paid-up letters from the creditors.

Current Scenario

6.28 Law Credit is one of two official suppliers of civil judgments to the credit bureaus around the country. Contracted court agents are stationed at 95% of Magistrates' and High Courts around the country with digital cameras taking pictures of amongst other documents, administration order applications and administration application judgments. These images are taken prior to the court date for a number of reasons:

- All images are sent to a central point where the digital images are inserted into a capturing application.
- Each application and each court order are captured to create a data file which is inserted into a database.
- The list of creditors associated with each application is then notified electronically about the admin application. The court date provides an incentive for the creditor to view the application for information purposes.

- The notification for court appearance furnished to the creditors is sent prior to court date to ensure that the creditors are able to review the application and amend where possible.

6.29 Once the creditor has received notification that one of their customers has applied for voluntary relief in the form of an administration order, the creditor may perform the following functions:

- Ensure that the consumer is in fact on their books.
- Provide updated balance information on accounts listed in the application.
- Provide updated account information for accounts listed in the application.
- Provide interest rates being charged (if applicable).
- Include new accounts not listed in the original application with the same creditor or product (account number and balance).

6.30 At this point the creditor has two options:

- Acknowledge receipt of the notification of application for administration, provide the administrators with updated balance and account information, and await the outcome of the court hearing; or,
- Acknowledge receipt of the notification of application for administration, provide the administrators with updated balance and account informationand appoint an attorney to attend the hearing.

6.31 Once the matter has been heard and a decision has been made, the administrator files the order of court and obtains an EAO to be able to run debits against the consumer's salary in order to make payments to the creditors. Thereafter the payment process begins where administrators manage the debits and make pro rata distributions of collections to all creditors. Bulk amounts are deposited into creditor suspense accounts and a remittance advice is also provided as stipulated in the Act.

<u>Proposed Solution:</u>

6.32 The proposed solution looks at creating a centralised database of all activities for all actors within the process to access. The following table illustrates the method of access:

EVENT	DONE BY	ACTION	ACCESSIBLE TO	DISCUSSION POINTS
Origination of application form.	Administrator	Send to creditors within x no. of days prior to court date.	Administrator / Creditor / Consumer	These notifications can be sent electronically via fax or e-mail in terms of the ECT Act of 2002. No registered mail costs.
Application received by Law Credit.	Law Credit	Send electronic notification to creditors and credit bureaus.	Creditors / Administrators	Once the applications have been received, Law Credit will ensure electronic delivery to creditors within x number of hours. The creditors will have to acknowledge receipt of instruction electronically.
Creditor acknowledges electronic notification of application.	Creditors	Send electronic return of service back to administrators.	Creditors / Administrators	The return of service will include an electronic date and time stamp for the receipt of notice, which will be in line with section 74's timeframe stipulation.
Law Credit submits return of service to administrators.	Law system	E-mail notification sent back to administrators in respect to an application.	Administrators / Creditors	
Creditors are able to append information already contained in the application, append new information and	Creditors	Send information back to administrators to take to court.	Administrators / Creditors / Attorney	This functionality allows creditors to append information to the application to ensure that the administrators have the correct number of accounts,

instruct an attorney should they wish to do so to oppose the application.				account numbers, balances, interest rates and possibly copies of the credit agreements. Functionality will also exist whereby creditors will have a chance to liaise and instruct attorneys to represent their interests at the court venues. Once attorneys have made their appearance in court, functionality will exist to provide feedback to the creditors.
Administrator, consumer and possibly the creditors' attorney make an appearance at court. A court order is granted or matter is postponed or dismissed.	Administrator / Attorney	Order granted: Administrator provides Law Credit capturers with order. Matter Dismissed / Postponed: Administrator / Attorney updates system.	Administrators / Creditors / Attorney	Once the court order (judgment) has been granted, this information will be submitted to various stakeholders in the process, including to various credit bureaus.
Based on the outcome at court, administrator provides amortisation table indicating proposed payment schedule.	Administrator	Administrator provides a spreadsheet indicating their costs to be recovered, court order amount. Based on the creditor's input an amortisation table is generated.	Consumers / Administrators / Creditors / Attorney	Administrators should be able either to populate or to provide an amortisation table showing expected payments and term of payments.
Notification sent to credit	Law system	Updated notice sent to credit bureaus as	Consumers /	This allows the credit bureaus to

bureaus 24 hours of order being sent to Law Credit.		confirmation of judgment.	Administrators / Creditors / Attorney / Credit Bureaus	update the profile of the consumer as a risk management tool for obtaining credit in the future.
Notification of payments made by consumer to administrators to creditors.	Administrators	Update of amortisation table to reflect either a payment of a status.	Consumers / Administrators / Creditors	These events should be compared against the amortisation table and should there be short or no payments, explanations would need to be provided to create transparency for all. Once all the debt has been paid up with a respective creditor, a 'Paid-Up' letter could be requested via the interface to be sent to the credit bureaus.
Notice of rescission made by the administrator.	Administrator	Notification sent to all process participants with reasoning.	Consumers / Administrators / Creditors / Attorney / Credit Bureaus	Once the applications have been received, Law Credit will ensure electronic delivery to creditors within x number of hours. The creditors will have to acknowledge receipt of instruction electronically.
Rescission judgment granted.	Administrator	Notification sent to all process participants with reasoning.	Consumers / Administrators/ Creditors / Attorney / Credit Bureaus	Once the court order (judgment) has been granted, this information will be submitted to various stakeholders in the process, including to various credit bureaus.

Conclusion

6.33 Law Credit believe that unless there is a centralised vantage point of information-flow, there will always be room to manoeuvre in, as well as various interpretations of the Act itself, with respect to costs and allowances thereof.

6.34 According to Law Credit, the above diagram shows that consumers will have access to all information either via the web or via sms. Consumers will be able to liaise with their administrators and creditors should they have any queries or comments on their situation. Creditors will have access to their clients (the consumers) as well as the consumers' representatives (the administrators). Credit bureaus will have access to the correct information at the appropriate time.

6.35 All role players will be bound by the time limits stipulated in the Act and this will be monitored systematically. All information will be digitally secured within Law Credit's vault (even though the information is a matter of public record). There are no changes proposed to any interaction with the Magistrates' Courts themselves or any of the clerks and/or magistrates.

3 Evaluation and recommendations

Dedicated regulatory body for administrators

6.36 The courts play a pivotal role in regulating administrators because they can hold administrators accountable for not complying with their statutory duties. An administrator may on good cause shown be relieved of his or her appointment by the court.[523] If an administrator fails to lodge a distribution account with the clerk of the court, any interested party may apply to the court for an order directing him or her to lodge the distribution account or withdrawing his or her appointment as administrator. If an administrator has lodged a distribution account but has failed to pay any amount of money due to any creditor, the court may upon the application of the creditor order the administrator to pay the creditor the amount concerned and to pay to the debtor's estate an amount which is double the amount which the administrator failed so to pay. The court may order an administrator to pay the

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523 Section 74E(2) of the MCA.

costs of the court applications out of his or her own pocket.[524] Furthermore, if an administrator fails to take the proper steps to enforce an administration order, any creditor may, by leave of the court, take those steps, and the court may thereupon order the administrator to pay the costs of the creditor out of his or her own pocket.[525]

6.37 However, several problems experienced in the administration order industry are attributed to the fact that there is no dedicated regulatory body for administrators. The Commission have considered whether a separate regulatory body should be established to regulate administrations. Currently, there are no national statistics on the number of administrators in South Africa,[526] because administrators are not required to be registered. In view of the high number of registered debt counsellors in the country, the Commission assume that the number of administrators has not increased significantly since the commencement of the NCA. It seems not to be cost-effective, therefore, to have a separate regulatory body for a relatively small number of full-time administrators in South Africa.

Establishment of Help Desk in the DOJCD

6.38 The Commission recommend that their proposed Magistrates' Courts Amendment Bills[527] provide that the Director-General of the DOJCD establish in the Department a dedicated Help Desk to receive, assess and refer complaints against administrators for investigation to the professional bodies[528] of which they are members. The Help Desk should, where necessary, refer complainants to any other appropriate forum for relief.

6.39 A professional body that receives a complaint against an administrator who is a member of that body should be required to investigate the complaint. The investigation should be done in terms of the legislation, rules or processes regulating that professional body. The provisions of the proposed legislation especially the code of conduct for administrators, should guide the professional body's investigation.

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524 Sections 74J(11)-(13) of the MCA.

525 Section 74N of the MCA.

526 On 6 September 2018, Information Management-NOC at the DOJCD indicated that statistics on the number of administration orders that have been issued by the magistrates' courts and statistics on the number of persons under administration were not available.

527 Clause 74NA (Bill: option 1 and 2).

528 See the insertion of subsection (1D) in section 74E of the Magistrates' Courts Amendment Bill (options 1 & 2), discussed in paragraph 5.214 above. The subsection provides that a person may not act as an administrator if he or she has not been appointed by the court to act as such.

6.40 Despite any law regulating the professional body, the Director-General should be provided with the outcome of the investigation and he or she should communicate the outcome to the complainant. The Director-General should also be empowered to refer the outcome of the investigation to the National Prosecuting Authority, if an offence has been committed in terms of the proposed Act.

6.41 The proposed Act should make it clear that a debtor would not be barred from lodging a complaint directly with the professional body of which his or her administrator is a member.

6.42 The Commission believe that the referral of complaints against administrators to their professional bodies would go a long way towards ensuring that administrators perform their duties within the legislative framework applicable to them.

Judicial oversight, removing the function of collecting and distributing payments from the administrator, and code of conduct

6.43 The Commission are of the view that several of its recommendations would, to some extent, contribute to the regulation of administrators. For ease of reference, these recommendations are briefly highlighted below.

6.44 As far as improving judicial oversight of the granting of administration orders is concerned, the Commission recommend that the debtor's statement of affairs include a certificate by the administrator or the person who has prepared it stating that the statement of affairs is a true reflection of the debtor's instructions; that he or she has no reason to doubt the accuracy of any of the statements made by the debtor; and that he or she has advised the debtor of the consequences of administration and is satisfied that the debtor understands them.[529] The court should interrogate the debtor on whether the administrator or the person who prepared the statement of affairs has explained to the debtor the benefits, consequences, cost and administration order process and whether the debtor understands them.[530] The court may not grant an administration order if it finds that the debtor does not understand the administration order process and its consequences, unless good cause is shown why the order should be granted.[531] These provisions would ensure that

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529 Insertion of paragraph *(p)* in section 74A(2) (Bills: options 1 & 2).
530 Insertion of paragraph *(g)*(i) in section 74B(1) (Bills: options 1 & 2).
531 Insertion of subsection (3)*(g)* in section 74 (Bills: options 1 & 2).

administrators provide debtors with relevant information so that they can make informed decisions about whether an administration order is the appropriate remedy for them.

6.45 Furthermore, the court of the district in which the debtor resides or carries on business or is employed may hear an application for an administration order.[532] The court must ascertain from the debtor whether he or she resides, carries on business or is employed in the court's district.[533] These provisions would prevent forum shopping by administrators. Furthermore, the head office or branch office of an administrator should be within a 50-kilometre radius of the place where the debtor resides, is employed or carry on business. However, the court may appoint an administrator who does not comply with this requirement if it is satisfied that the financial burden to the debtor caused by travelling to the head office or branch office of the administrator would not be greater than it would have been if an administrator was appointed whose office was within a radius of 50 kilometres of the place where the debtor resides, is employed or carries on business, or may so appoint an administrator if the office of the nearest administrator was situated more than 50 kilometres from the place where the debtor resides, is employed or carries on business.[534] These provisions would make the offices of administrators more accessible to the debtors under administration with them.

6.46 In paragraph 5.214 above, the Commission recommend that certain categories of persons not be eligible to act as an administrator. A court may, upon a finding that such a person has acted as an administrator, withdraw his or her appointment as administrator. For purposes of investigation, the clerk of the court must notify the professional body of which such a person is a member of the finding. The professional body should consider revoking or cancelling the registration or admission that that person requires to conduct his or her business.

6.47 Taking away the function of collecting and distributing payments from the administrator as provided for in the proposed Magistrates' Courts Amendment Bill (option 1)[535] would in some way contribute to the regulation of administrators as the "temptation" to charge fees in excess to that prescribed by law would be removed.

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532 See section 74(1). However, a court should continue to have jurisdiction to make an administration order in section 65I proceedings in terms of the MCA.

533 Insertion of paragraph (g)(ii) in section 74B(1) (Bills: options 1 & 2).

534 Insertion of subsections (1A) and (1B) in section 74E (Bills: options 1 & 2).

535 Amendments to sections 74G(2) and (9), 74I(1), 74J, 74K(3) and 74L of the MCA and section 3 of the Justice Administered Fund Act 2 of 2017, and the Insertion of clauses 74HA, 74JA, 74LA and 74N(4) in the MCA. See also paragraphs 5.368-5.381 of the discussion paper.

6.48 The Commission recommend that administrators must comply with a code of conduct.[536]

The Commission invite comments on the proposal by Law Credit Solutions that a centralised database for administration orders be created.

536 Clause 74X of the Magistrates' Courts Amendment Bills (option 1 and 2).

CHAPTER 7: RULES AND FORMS

GENERAL EXPLANATORY NOTE:

[ ] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

A Rules

1 Proposed amendments

7.1 The workshop paper has not recommended any changes to rule 48, but it is reflected below as comments have been received on it.

Rule 48: Administration orders

(1) A creditor who, in terms of section 74F(3) of the Act, wishes to object to any debt listed with an administration order or to the manner in which the order commands payments to be made, shall do so within 20 days after the granting of the order has come to his or her notice.

(2) A creditor who, in terms of section 74G(10)*(b)* of the Act, wishes to object to any debt included in the list of creditors shall, within 15 days after he or she has received a copy of the administration order, notify the administrator in writing of his or her objections and the grounds whereupon his or her objections are based.

(3) In a matter referred to in subrule (2) the administrator shall obtain from the clerk of the court a suitable day and time for the hearing of the objections by the court and thereupon, in writing, notify the creditor referred to in subrule (2), the debtor and any other involved creditors, of the said day and time.

(4) An administrator may, in terms of section 74L(1)*(b)* of the Act, before making a distribution referred to in that section detain an amount not exceeding 25 per cent of the amount collected to cover the costs that he or she may have to incur if the debtor is in default or disappears: Provided that the amount in the possession of the administrator for this purpose at any stage shall not exceed the amount of R600.

(5) Should an administrator be an officer employed by the State the remuneration referred to in section 74L of the Act shall accrue to the State

2 Comments received

7.2 With reference to rule 48(2), Matthee Attorneys propose that the 15 days referred to should be increased to 20 days and suggest that the amount of R600 be increased regularly

as required by the circumstances.

7.3 Capital Data submit that rule 48, which allows an administrator to hold R600 to cover the costs that he or she may incur if the debtor is in default, is often exploited as administrators retrospectively collect such funds from debtors.

3 Evaluation and recommendations

7.4 With regard to the comment made by Capital Data, the rule entitles the administrator to retain the specified amount to cover the cost that he or she may have to incur if the debtor is in default or disappears. Moreover, the administrator may do so at any time during the administration order process.

7.5 Concerning the suggestion by Matthee Attorneys that the amount of R600 be increased regularly, the Commission recommend that the Rules Board for Courts of Law should consider whether this amount should be increased and how regularly it should be done.[537] Increasing this amount to R1500 seems appropriate. The Commission recommend that the Rules Board should review this amount every time the tariffs are increased.

The Commission invite comments on the proposal made by Matthee Attorneys that the number of days referred to in rule 48(2) be increased to 20 days.

B Forms

1 Introduction

7.6 The workshop paper has proposed changes to some of the forms. Only such forms and those to which the Commission propose amendments are reflected below.

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537 The Rules Board consider representations from users of the rules for amendment of the rules.

2 Comments received

7.7 Some respondents[538] are of the view that it would only be possible to comment on the forms when there is clarity on the proposed amendments to sections 74 to 74W of the MCA.

Form 45 (statement of affairs)

7.8 The Banking Association of South Africa propose that Form 45 be amended to allow creditors to provide the court with evidence that could affect its decision and would not require a postponement of the application. Avoiding a postponement of the application would also mean avoiding unnecessary legal costs.

7.9 With reference to the proposed amendments to the statement of affairs as outlined in the workshop paper,[539] HVDM Attorneys want to know whether the court would have the authority to order the spouse to work or not to grant the order based on the fact that the spouse is unemployed. They further state that new terminology is introduced by requiring that the statement also refer to "conditional debts and debts payable on a date after the date of application". In their opinion, this is confusing and should be omitted completely. They are of the view that the current provisions regarding the information to be provided are sufficient and that there is enough case law in support thereof.

Form 52 (distribution account)

7.10 HVDM Attorneys submit that Form 52 should be amended as "no one really understands the statement ending up in a lot of uncertainty and various disputes".

7.11 Melting the Darkness recommend that Form 52 be changed to allow specifically for section 74O charges.

3 Evaluation and recommendations

7.12 Although the Commission have not received comments on Form 44 (application for an administration order) and Form 51 (administration order), it is recommended that these

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538 Booysen & Co. Inc. Attorneys, HVDM Attorneys, Norman Shargey.

539 See paragraph 5.94 of the discussion paper.

forms be amended as set out below. The Commission further recommend that the form set out below be substituted for Form 45 (statement of affairs). Furthermore, Form 52 should be amended as shown below. Amendments to these forms are based on the Commission's proposed Magistrates' Courts Amendment Bill (option 2). With regard to the Magistrates' Courts Amendment Bill (option 1), consideration may need to be given to the amendment of Form 51 to authorise the court to order a debtor's employer to deduct from the debtor's salary the amount payable in terms of the debtor's administration order and to deposit it through MojaPay into the proposed Administration Account.

No. 44 — Application for an Administration Order — Section 74(1) of the Magistrates' Courts Act, 1944 (Act 32 of 1944)

***Only for use in the District Court**

In the Magistrate's Court for the District of
……..……..……

held at ……... Case No. …… of 20……..

APPLICATION FOR AN ADMINISTRATION ORDER BY

…….(Full names and surname)

To: (1) The Clerk of the Court at
.....…….....
.

(2) ……

Take notice that I shall apply to the above-mentioned Court on the…….....day of …… 20……., at …… (time), to make an order providing for the administration of my estate under the provisions of section 74 of the Magistrates' Courts Act, 1944.

[A full statement of my affairs confirmed by an affidavit in support of this application is attached.]

I attach the following:

- A full statement of my affairs in the prescribed form;
- a draft order in the prescribed form; and
- documentary proof that I have given notice to my creditors as required.

Dated at …….. this ..... day of ……... 20…….....

…….
Applicant

Full address …….....

NOTE: Section 74A(5) of the Magistrates' Courts Act, 1944, provides that the applicant shall deliver to each of his or her creditors and disputed creditors at least **[3]** 10 days before the date appointed for the hearing of the application personally or by fax, e-mail or registered post a copy of this application and statement of affairs (Form 45) on which shall appear the case number under which this application was filed.

No. 45 — Statement of Affairs of Debtor in an Application for an Administration Order — Section 65I(2) or 74A of the Magistrates' Courts Act, 1944 (Act 32 of 1944)

***Only for use in the District Court**

Case No …… of 20…..……

In the application for an Administration Order of

……

(hereinafter referred to as "the Applicant")

- In this statement of affairs, "date of application" means the date set down for the hearing of the application.
- The Applicant must attach, where appropriate, documentation in support of information reflected in this form or explain why documentation cannot be attached.
- This form sets out the minimum information and, where appropriate, the additional information that the Applicant must give.
- The Applicant must add information in annexures if the space on the form is not sufficient.

Part A: Personal particulars of Applicant

1. Full names and surname: .....……..…
   Date of birth …….....…… Identity number ……..…….
2. Residential address ....……

(Documents will be delivered to the Applicant at this address until such time as the Applicant has notified the administrator of a change of address.)

3. Marital status …….
   3.1 Date of marriage: …….
   3.2 Matrimonial property system: ……
   3.3 Whether matrimonial property system has changed since entering into marriage, and if so nature of change …….
   3.4 If the Applicant and spouse are living apart, state from what date ……..

4. Spouse of Applicant
   4.1 Full names and surname of spouse: ……
   4.2 Date of birth .....……
   4.3 Identity number …….

*"Spouse" means a person's -

(a) partner in a marriage;
(b) partner in a customary union or customary marriage according to customary law;
(c) civil union partner as defined in section 1 of the Civil Union Act, 2006 (Act 17 of 2006); or
(d) partner in a relationship in which the parties live together in a manner resembling a partnership contemplated in paragraphs (a), (b) or (c).

Information about a spouse married out of community of property or a spouse referred to in paragraph (d) of the definition of "spouse" is relevant only as far as it relates to the income of such spouse who lives with the Applicant for the purpose of determining the expenses referred to in section 74A(2)(d)* of the Magistrates' Courts Act.

5. Dependants of Applicant and, where applicable, the Applicant's spouse:

Full names	Date of birth	Relationship

Part B: Insolvency and debt rearrangement history

6. Has the Applicant made an unsuccessful application for the granting of an administration order or has an administration order been rescinded, within 12 months before the date of application? Yes/No.

If yes:

6.1 Date of application or administration order:……

6.2 Court: …….

6.3 Case Number: ……..

6.4 Date of conclusion: ……...

6.5 If administration order was rescinded or refused during the last 12 months before the date of application, state the date and reason: ……..
…….…….

7. Has the Applicant received a discharge in terms of the Insolvency Act, 1936 (Act 24 of 1936), within four years before the date of application? Yes/No

If yes:

7.1 Date of discharge ……...

7.2 Case number and reference of Master of the High Court ……

7.3 Date of rehabilitation (if applicable) ……

8. Has an order for debt rearrangement in terms of section 87*(b)* or a consent order in terms of section 138 of the National Credit Act, 2005 (Act 34 of 2005), been made in respect of a debt referred to in this statement of affairs? Yes/No…

If yes:

8..1 Date of order…….

8..2 Court……..

8..3 Case no. ……..

8..4 Reason for termination of debt review……..……

Part C: Income and expenditure

9. Applicant

9.1 Name and business address of employer:……..……..

9.2 If unemployed, furnish reasons: ……

9.3 Trade or occupation…… ……

10. Spouse

10.1 Name and business address of employer…….

10.2 If unemployed, furnish reasons: ……

10.3 Trade or occupation: ……..

11. Gross regular weekly/monthly income :

Applicant	Spouse

12. Full particulars of all deductions from income (by way of stop order or otherwise), supported as far as possible by written statements:

12.1 Applicant

Amount	Particulars
R	
R	
R	
Total:	

12.2 Spouse

Amount	Particulars
R	
R	
R	
Total:	

13. Detailed particulars of essential weekly or monthly expenses, including travelling expenses:

13.1 Applicant

Amount	Particulars
R	
R	
R	
Total:	

13.2 Spouse

Amount	Particulars
R	
R	

R	
Total:	

13.3 Dependants

Amount	Particulars
R	
R	
R	
Total:	

Part D: Assets the Applicant wishes to retain as necessary goods

14. Assets subject to secured debt

Description and estimated value[540]	Balance outstanding (total arrears between brackets)	Instalment	Why asset is necessary and reasonable in view of Applicant's income

15. Assets excluded from administration and other assets not subject to secured debt

Description	Estimated value	Why asset is excluded or why it is necessary and reasonable in view of Applicant's income

Part E: Liabilities

* Provide court case number, where applicable.

16. Secured creditors

Name and business address of creditor	Estimated value, and balance due	Monthly/weekly instalment	Nature of security and description of assets subject to security	Date debt incurred (if less than 6 months before date set down for hearing)[541]

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[540] A requirement to reflect market value is burdensome. The purchase price and other available information can be used to estimate the value.

[541] Abuses may occur if a debtor incurs debt shortly before application for an administration order. Administration orders should not help persons who try to abuse the system. According to the proposed clause 74(3), no administration order may be granted if the court finds that the debtor obtained credit or the extension of credit with fraudulent intent within six months before the date of application. Information on debts incurred within six months before the date of the application would help the magistrate to decide whether or not the application should be granted.

17. Unsecured creditors

Name and business address of creditor	Estimated value, and balance due	Monthly/weekly instalment	Description of asset	Date debt incurred (if less than 6 months before date set down for hearing)

18. Disputed creditors

*Claims by creditors which are disputed by the Applicant must be reflected here

Name and business address of creditor	Amount	Amount admitted by Applicant (if any)	Date debt incurred (if less than 6 months before date set down for hearing)

19. Unsecured conditional debts and debts due after the date set down for the hearing

*This information is required because special provision is made in sections 74J(1A) and 74JA(3) for payment of conditional claim

Name of creditor	Condition before debt becomes due or date when due

20. Other persons liable for debts of the Applicant (for instance, sureties)

Name and business address of person	Capital amount	Name of creditor or creditors

Part F: Miscellaneous

21. All movable property not specified above, including goods pawned, mortgaged, subject to retention or attached for the execution of a judgment:

Description of debt	Estimated value for which laden	Nature of encumbrance if any	Amount	Name and address of creditor in favour of whom encumbered

22. Full particulars of outstanding claims, bills, investments, shares, bonds or other securities in favour of Applicant investing moneys in a savings or other account with a bank or elsewhere:

Name and address of Applicant or institution	Particulars	Amount

23. If you have answered yes to any of the questions in Part B, give reasons why an administration order should nevertheless be granted:
……..……

24. Affidavit

I, ……., of …… (address),
declare under oath:

(1) I am the Applicant.

(2) I am unable forthwith to pay the amounts in respect of a judgment or judgments obtained against me, or to meet my financial obligations and have insufficient assets capable of attachment to satisfy such judgment or obligations.

(3) If an administration order is granted, I offer to pay ……. (state the amount of the weekly, monthly or other instalments which the Applicant offers to pay) to the administrator for the settlement of my debts:
R…….. with effect from …… and weekly/monthly thereafter, for the period that I will be under administration and I undertake to pay this amount to my administrator for the period that I will be under administration and I understand that the administration order may be set aside if I fail to make payment of this amount or the amount determined by the court as reasonable, when such amount is due.
In addition to the payment specified in the previous paragraph, I intend to continue with the monthly instalments in paragraph 17 above.

(4) The total amount of all my debts due does not exceed R300 000.

(5) All particulars contained in this statement are, to the best of my knowledge, true and correct and this statement contains all particulars, assets, income and debts of me and my spouse, including my obligations.

(6) I understand that my ability to obtain credit will be hampered by the administration order and it will be a criminal offence if I, while I am under administration, incur any new debt without the prior permission of my administrator.

.....
Signature of declarant

*Sworn to / solemnly declared before me on: ..... (date) at ..... (place)

.....
Commissioner of oaths
.....
Full names
.....
Business address
.....
Designation and area or office

25. Certificate by administrator or his or her representative

I, ... (full names), declare as follows:

This statement of affairs is a true reflection of the Applicant's instructions and I have no reason to

doubt the accuracy of any of the statements by the Applicant. I have advised the Applicant of the consequences of administration and I am satisfied that the Applicant understands them.

Signed at ..... on this ..... day of …..... 20……..

No. 51 – Administration order – Section 74 (1) of the Magistrates' Courts Act, 1944 (Act 32 of 1944)

*Only for use in the District Court

In the Magistrate's Court for the District of ……
held at …….. this …… day of …….. 20…….
Case No ……of 20……..……..

In the application of…… (hereinafter referred to as "the Applicant"):

1. It is ordered –

(a) that the estate of the Applicant be placed under administration in terms of section 74 of the Magistrates' Courts Act, 1944;

(b) that ……. from …… be appointed Administrator of the Applicant's estate in terms of section 74E/74EA on condition that he gives the following security for the due and prompt payment by the Administrator **[him]** to all the parties entitled thereto of all the moneys which come into his or her possession by virtue of this appointment;

(c) that the Applicant pays the amount of R…… weekly/monthly to the Administrator for distribution among the creditors, the first payment to be made on or before the …… day of …….. 20 …… and weekly/monthly thereafter on or before every ……. /the …….. of each month;

(d) that the Applicant pays the following arrear amounts and instalments in respect of secured debts:

.....

.....

.....

(e) that the Applicant pays the following amounts in terms of existing maintenance orders:

……

(f) that the Applicant retains the following assets not subject to a secured claim as necessary goods:

.....

....., and that the Applicant may not dispose of these assets except:

.....

2. Authority is granted –

(a) for the issue of an Emoluments Attachment Order under section 65J of the Magistrates' Courts Act, 1944, against the Applicant's employer for payment to the Administrator of the

said amount on or before the said times until the costs of administration and the creditors have been paid in full. This authority is suspended on condition that……;

(b) for the issue of a Garnishee Order under section 72 of the Magistrates' Courts Act, 1944, against …… from …… This authority is suspended on condition that ……..…;

(c) for the realization and distribution of the proceeds of the following assets among the creditors:

(i) …….

(ii) ……

(iii) …….

[**(iv) of the following assets that are the subject of an agreement in terms of the Hire-Purchase Act, 1942 (Act 36 of 1942), or the Credit Agreements Act, 1980 (Act 75 of 1980) or the National Credit Act, (Act 34 of 2005), with the written permission of the seller:**

(aa) .....

(bb) .....;

(d) **for the return of the following assets to the seller in terms of the Hire-Purchase Act, 1942 or section 17 of the Credit Agreements Act, 1980 or provisions of the National Credit Act, 2005:**

(i) .....

(ii) .....]

(e) other (give details) ……..

Dated at …….. this…… day of …….. 20……

…….

Magistrate

NOTE. In terms of section 74F(1) of the Magistrates' Courts Act, 1944, the Clerk of the Court shall hand or send by registered post a copy of this order to the debtor and in terms of section 74F(2) the administrator shall forward a copy hereof by registered post to each creditor whose name is mentioned in the debtor's statement of affairs (Form 45) or who has given proof of a debt.

No. 52—Distribution Account in terms of section 74J(5) of the Magistrates' Courts Act, 1944

***Only for use in the District Court**

Distribution Account No. ……..

To: The Clerk of the Court……

Case No. …….. of 20…….

Distribution account for the period ……... to …….

		A	B	C
A.	(1) Amount payable to creditors in terms of the Administration Order/outstanding amount carried forward from previous statement	…..		..…
	(2) Total amount due to additional creditors listed after granting of Administration Order/since lodging of previous statement.	..…		…..
	(3) Interest:			

Creditor	Amount
.....	…….
……..	…….
……..	…….

B. (1) Administration costs paid for the said period in terms of section 74L:

Item	Cost
.....	…….
…….	…….
…….	…….

(1A) Legal costs relating to the debtor's administration:

Item	Cost
.....	……
……	……
……	……

(2) Claims paid during the said period that enjoy preference in terms of section 74J(3):

Creditor	Amount
.....	…….
…….	…….
…….	…….

(3) Urgent or extraordinary medical, dental or hospital expenses paid during the said period:

Expense (name specific expense)	Amount
.....	.....
.....	.....
.....	.....

(3A) Cost of application for Administration Order paid in terms of section 74O[542] .....

(4) Other payments during the said period (supply details) ....

	Total	.....		.....
		A	B	C
	Totals carried forward from previous page			
C.	Total amount received by the Administrator during the said period	.....		.....
	Total of C minus total of B	.....		.....
	Disposal for *pro rata* distribution			
	Pro rata distribution			
	……..*	.....		.....
	....*	.....		.....
	……..*	.....		.....
	*Total amount paid during the said period	.....		..…

Total of A minus total of B

Outstanding amount carried forward to the next statement .....

Dated at……... this…… day of ……. 20…..

Administrator

* The names of creditors to whom *pro rata* amounts were paid by the Administrator during the said period to be inserted here. (The relevant amounts to be completed in column B.)

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542 In ***Weiner NO v Broekhuysen*** (2001 (2) SA 716 (C) at 723), the respondent contended that the costs of the application for the administration order forms part of the maximum of 12,5% in respect of the administrator's necessary expenses and remuneration as referred to in section 74L(2). The court, however, held a contrary view and stated that whereas section 74O deals with the costs for an administration order application, section 74L relates to the expenses and remuneration that arise during the administration process, as well as costs that may result from the debtor's default or disappearance whilst an administration order is current (see also Jones & Buckle Vol 1: The Act 10 ed (service 10, 2016) 531).

* Section 74J(15) provides that an administrator who without reasonable grounds fails timeously to distribute the payments referred to in section 74J(1A) among the creditors is liable to repay to the debtor's estate any additional costs and interest which have accrued as a result of such failure.

CHAPTER 8:
DEBT REARRANGEMENT: MERGING THE ADMINISTRATION ORDER AND DEBT REVIEW PROCESSES TO BE REGULATED BY A SINGLE ACT

A Introduction

8.1 In view of the high rate of over-indebtedness in South Africa,[543] it is important that we use our debt rescheduling procedures optimally. As the aim of debt re-arrangement is to help over-indebted persons to become economically active again as soon as possible, any debt re-arrangement procedure must take into account all the debts of a person. This is vital because a person's debts, whether they emanate from a credit agreement, delictual claim or judgment, affect his or her financial position. Hence it is difficult to make an accurate assessment of a person's financial position if some debts are excluded from the debt re-arrangement procedure for which he or she applies. South Africa can benefit from the experience of countries that deal with over-indebtedness and debt rearrangement measures in a single statute. As indicated in chapter 3 above, the following countries are of relevance.

8.2 In Australia, the Bankruptcy Act, 1966, apart from addressing the issue of bankruptcy, provides alternatives to bankruptcy in the form of debt agreements and personal insolvency agreements. In New Zealand, bankruptcy and all the alternatives to bankruptcy are dealt with in the Insolvency Act, 2006. Similarly, the United States of America deals with all forms of bankruptcy, including debt relief in the form of repayment plans, in the Bankruptcy Code. Although Ireland deals with bankruptcy in a separate Act (Bankruptcy Act, 1988), all the alternatives to bankruptcy are addressed in the Personal Insolvency Act 44 of 2012. By dealing with all forms of debt relief in the same enactment, the legislatures of these countries were able to limit the number of regulatory bodies and to expand the roles of functionaries to deal with more than one form of debt relief. This is evident from the following examples:

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543 As at the end of June 2020, consumers classified in good standing decreased by 559,318 to 16,96 million and the number of consumers with impaired accounts increased from 19.88 million to 20.66 million. See in this regard National Credit Regulator *Credit Bureau Monitor* June 2020, available at http://www.ncr.org.za.

8.3 In Australia, the functions of the Inspector-General extend beyond bankruptcy in that he or she has been assigned specific functions in respect of debt agreements and personal-insolvency agreements. In addition, registered trustees may act as a debt agreement administrator, a trustee for a personal-insolvency agreement or a trustee for the estate of a bankrupt.

8.4 The New Zealand Insolvency and Trustee Service, through the office of the Official Assignee, administer and monitor bankruptcies as well as summary instalment orders and no-asset procedures. Assignees in the office of the Official Assignee play a central part in all three procedures. The debtor must file an application for adjudication with an assignee. Furthermore, the debtor must apply to an assignee for a summary instalment order or for entry into the no-asset procedure.

8.5 In the United States of America, the United States Trustee Program oversee not only the administration of bankruptcy cases in which all the debtor's non-exempted property is sold for the benefit of the creditors, but also monitor the debtor's re-organisation plan in terms of which the debtor is allowed to retain his or her assets but pay off his or her debts according to a repayment plan. The estates of the debtors are administered by a trustee in both instances.

8.6 The Insolvency Service of Ireland play a key part in the debt relief notice, debt settlement arrangements and personal-insolvency arrangements. An application for a debt relief notice must be made to the Insolvency Service, who must check whether the debtor complies with the requirements for a debt relief notice. Before making a proposal for a debt settlement arrangement to the creditors, an application for a protective certificate must be made to the Insolvency Service, who must issue the certificate if the eligibility criteria and other relevant requirements have been met. Similar to a proposal for a debt settlement arrangement, a debtor must, prior to submitting a proposal for a personal-insolvency arrangement to his or her creditors, submit an application for a protective certificate to the Insolvency Service. A personal insolvency practitioner assists with the application for both a debt settlement arrangement and a personal-insolvency arrangement. These applications are made by a personal-insolvency practitioner on behalf of a debtor.

8.7 Conspicuous in the laws of the mentioned countries is that they do not restrict debt to credit agreements only. However, some might exclude certain types of debt, for example

debt obtained through fraud or child maintenance. The terms “creditor” and “debtor” are also defined broadly.

8.8 In contrast to the laws of the above-mentioned countries, South African law provides for a different professional for each of its statutory debt relief measures.[544] That is, administrators for administration orders, debt counsellors for debt review and trustees for insolvency. Moreover, South African law addresses the problem of over-indebtedness through different procedures set out in three separate statutes. Those who are unable to pay their judgment debt or to meet their financial obligations may apply for an administration order in terms of section 74 of the Magistrates’ Courts Act.[545] They fall in the category of those who are unable to apply for sequestration as they do not have sufficient assets that can be attached to satisfy such judgment or obligations. Debtors who are unable to satisfy in a timely manner all their credit agreement obligations may apply for debt review in terms of section 86 of the National Credit Act.[546] Those who are insolvent but have sufficient assets to ensure that the sale thereof can realise at least the minimum benefit for the creditors may apply for sequestration in terms of the Insolvency Act.[547] In addition, there are several regulators. Debt counsellors are regulated by the National Credit Regulator and trustees are regulated by the Office of the Master of the High Court. There is, however, no formal regulatory body for administrators.

8.9 Surely, having multiple procedures to deal with over-indebtedness is counter-productive. This situation results in persons having to apply for more than one debt relief measure, as it often happens that different courts deal with the various types of debt of the same person. Besides the fact that these courts do not have a bird’s-eye view of the debtor’s financial position, it is a waste of government resources to deal with over-indebtedness in this manner.

8.10 The fragmented manner in which over-indebtedness is dealt with makes it difficult to conduct a comprehensive assessment of a debtor’s financial situation.[548] As regards the different statutory debt relief procedures, Roestoff and Coetzee correctly states that —[549]

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544 They are administration orders, debt review and insolvency.

545 32 of 1944

546 34 of 2005

547 24 of 1936

548 See also Roestoff and Coetzee “Consumer Debt Relief in South Africa; Lessons from America and England; and Suggestions for the Way Forward” (2012) 24 *SA Mercantile Law Journal* 53 at 66.

549 Roestoff and Coetzee (2012) 24 *SA Mercantile Law Journal* 53 at 75–76.

> [e]xisting South African procedures should be streamlined by doing away with the overlapping between the different procedures and the unnecessary duplication of regulators, forums and intermediaries.
>
> When devising a new income-restructuring procedure that provides for all debt repayment cases, lawmakers should build on the existing and well established system of debt counselling provided for by the National Credit Act.

8.11 A review of the three statutory debt relief measures must be conducted with a view to aligning some of the procedures and to determining the best way of utilising available resources. Undoubtedly, such a review will be a mammoth task. Hence it should be done in phases. As a first step, 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 should be merged into a single procedure.

8.12 Any debate on a single debt rearrangement procedure should be preceded by a discussion of the available procedures for debt rearrangement. For now, such a discussion is confined to the administration order and debt review procedures. Chapters 5 to 7 outline the shortcomings of the administration order procedure. Paragraphs 8.13 to 8.21 set out the debt review procedure in terms of the NCA.

B Discussion

1 Debt review

8.13 The NCA provides debt relief in the form of debt review to over-indebted consumers by affording them the opportunity to survive the immediate consequences of their financial predicament and to attain a manageable financial position.[550] The debt review procedure is designed to assist over-indebted consumers by rearranging their financial obligations under credit agreements, with the objective of enabling them eventually to settle their debts.[551] Unfortunately, debt review is limited to credit agreement debts.

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550 Roestoff, Haupt, Coetzee, Erasmus "The debt counselling process – closing the loopholes in the National Credit Act 34 of 2005" (2009) 12:4 *PER* 247–360 at 251.

551 Mabe Z "Alternatives to bankruptcy in South Africa that provide for a discharge of debts: Lessons from Kenya" *PER / PELJ* 2019 (22) at 2.

8.14 Section 86 sets out the process to be followed by the debt counsellor[552] once he or she receives an application for debt review. This process includes the payment of an application fee and a restructuring fee of less than or equal to the first instalment of the rearrangement plan;[553] the notification of the debtor's credit providers and every registered credit bureau of the application;[554] a determination of whether the applicant appears to be over-indebted; and a determination whether any of the applicant's credit agreements appear to be reckless.[555] If, as a result of such determination, a debt counsellor concludes that the debtor is not over-indebted, the debt counsellor must reject the application even if the debt counsellor has concluded that a particular credit agreement was reckless at the time it was entered into.[556] In such a case, however, the consumer may still, with leave of the court, apply directly to that court for an order in terms of section 86(7)(c).[557] If the debt counsellor is of the view that the applicant is not over-indebted, but is nevertheless experiencing, or is likely to experience, difficulty in meeting all his or her obligations under credit agreements in a timely manner, the debt counsellor may recommend that the applicant and his or her credit providers voluntarily consider and agree on a debt rearrangement plan.[558] If the proposed debt rearrangement plan is accepted by the consumer and each credit provider concerned, the debt counsellor must record it in the form of an order and file it as a consent order in terms of section 138.[559] However, if the proposed debt rearrangement plan is rejected by one or more credit providers, the debt counsellor must refer the matter to court.[560] Interestingly, the NCA does not oblige the debt counsellor to get the credit providers' approval of the debt rearrangement plan if the consumer is indeed over-indebted. The debt counsellor must refer the matter directly to court.[561] This contradicts the requirement of section 86(5)(b) that the consumer and each credit provider concerned must participate in good faith in the debt review process and negotiations relating to the debt rearrangement plan.

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552 Debt counselling services are offered by debt counsellors registered with the NCR. Prior to registration, debt counsellors must satisfy prescribed education, experience and competency requirements.

553 Mabe Z "Alternatives to bankruptcy in South Africa that provide for a discharge of debts: Lessons from Kenya" *PER / PELJ* 2019 (22) at 6.

554 Section 86(4)(b).

555 Section 86(6).

556 Section 86(7)(a).

557 Roestoff *et al.* (2009) 12:4 *PER* 247–360 at 271.

558 Section 86(7)(b) of the NCA..

559 Section 86(8)(a) of the NCA.

560 Section 86(8)(b) of the NCA.

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

8.15 Payment Distribution Agents accredited with the NCR are responsible for collecting monies from consumers following debt rearrangement and for distributing the monies to the credit providers.[562]

8.16 The debt counsellor must issue a clearance certificate to a consumer who has repaid all his or her debts under every credit agreement that was subject to debt rearrangement.[563]

8.17 In terms of section 86(10), a credit provider may, at least 60 business days after the date of the debt review application, give notice to terminate the debt review if the consumer is in default under that credit agreement.[564] In such an instance the debtor would no longer be under debt review. However, his or her debts would not be discharged and payment would have to continue according to the original credit agreement or the terms of the set-aside debt review order.[565] The NCA provides that a credit provider may not commence any legal proceedings to enforce a credit agreement before first giving notice to the consumer in terms of section 129(1)(a) or section 86(10) and after complying with any further requirements set out in section 130.[566] If a credit provider proceeds to enforce that agreement, the court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances.[567]

8.18 Instead of applying for debt review, a consumer who is in default may raise the issue of over-indebtedness in court. In terms of section 85 of the NCA, if it is alleged in any court proceedings in which a credit agreement is being considered that the consumer is over-indebted, the court may either refer the matter to a debt counsellor or declare the consumer to be over-indebted and make an order to relieve the over-indebtedness.[568]

8.19 Section 88 deals with the consequences of debt review or debt rearrangement for the consumers and their credit providers.[569] A consumer who has applied for debt review or who has alleged in court that he or she is over-indebted, may not incur any further charges under

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562 See regulation 10A of the National Credit Regulations, 2006.

563 Section 71 of the NCA.

564 Section 86(10) of the NCA.

565 Mabe Z "Alternatives to bankruptcy in South Africa that provide for a discharge of debts: Lessons from Kenya" *PER / PELJ* 2019 (22) at 7.

566 Roestoff *et al.* (2009) 12:4 *PER* 247–360 at 259-360.

567 Section 86(11) of the NCA.

568 Roestoff *et al.* (2009) 12:4 *PER* 247–360 at 256.

569 Roestoff *et al.* (2009) 12:4 *PER* 247–360 at 286.

a credit facility or enter into any further credit agreement until one of the following has occurred:[570]

(a) The debt counsellor rejects the application for debt review and the period within which the consumer may apply directly to court for a debt rearrangement order has expired.
(b) The court has determined that the consumer is not over-indebted, or has rejected a debt counsellor's proposal or the consumer's application.
(c) A court having made an order or the consumer and credit providers having made an agreement rearranging the consumer's obligations, all the consumer's obligations under the credit agreements as rearranged are fulfilled, unless the consumer fulfilled the obligations by way of a consolidation agreement.

8.20 A credit provider who enters into a credit agreement in contravention of the above-mentioned prohibition runs the risk of having that agreement declared to be reckless credit, whether the circumstances set out in section 80 apply or not.[571] If a consumer applies for or enters into a credit agreement while he or she is under debt review, the provisions of the NCA pertaining to over-indebtedness and reckless credit will not apply to such an agreement.[572]

8.21 Unfortunately, the debt counselling process is not fully regulated by the NCA. The NCR has, in consultation with major credit providers and established debt counsellors, agreed to certain guidelines set out in the Task Team Agreements issued by the NCR in January 2015. As many credit providers and debt counsellors did not form part of the work stream processes that informed the Task Team Agreements, they cannot be bound by those agreements.

2 Merging the administration order and debt review processes

8.22 Both the NCA and the MCA deal with debt rearrangement. Each Act provides for a different procedure to obtain the required relief. The NCA applies to debt that emanates from credit agreements, while the MCA applies to other debts, such as judgment debts and credit agreements where legal proceedings have been instituted to enforce such agreements. As a

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570 Section 88(1) of the NCA.

571 Roestoff *et al.* (2009) 12:4 *PER* 247–360 at 286.

572 Section 88(5) of the NCA. See also Roestoff *et al.* (2009) 12:4 *PER* 247–360 at 286-287.

result, debtors could find themselves in a situation where they have to apply for both debt review and administration because certain debts are excluded from one or the other of these debt re-arrangement measures. This defeats the purpose of providing relieve to over-indebted debtors as an already financially strained person would have to pay the cost of two separate applications. Hence the Commission is of the view that the law should provide for a single debt rearrangement measure that, subject to certain exclusions, deals with all forms of debt, irrespective of the amount of debt involved. That is, a hybrid system, using best practices from both the administration order and debt review processes. A single debt rearrangement measure would ensure that a holistic assessment of a person's financial position is conducted and would make debt rearrangement simple and cost-effective. The Commission therefore recommend that the debt review provisions set out in the NCA and the administration order provisions set out in the MCA be repealed and then, where feasible, be merged into a single statute to be called the Debt Rearrangement Act which would provide for an improved debt review process. Similarly, the provisions relating to payment distribution agents in the NCA should be repealed and incorporated into the proposed Bill. It is important that the following issues are addressed in the proposed Bill.

Definitions and terminology

8.23 Considering the fact that applications for debt review greatly outnumber applications for administration orders, that there is no dedicated regulatory body for administrators, and that there seems to be a growing negative perception regarding administration orders, the Commission believe that the name "debt counsellor" should be retained[573] but that the name "administrator" should be done away with.

8.24 The MCA refers to an over-indebted person who applies for an administration order as "debtor", while the NCA refers to an over-indebted person who applies for debt review as "consumer". The outcome of the respective applications for both these persons is a re-arrangement of their debts. The Commission is of the view that an over-indebted person should be referred to as a "debtor" instead as a "consumer". The Commission therefore recommend that "debtor" be defined as "a person, including a person who is unable to pay the amount of a judgment obtained against him or her in court or is unable to pay his or her debts, who has made an application for debt review". The proposed definition covers persons who are currently able to apply for debt review as well as those who are able to

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573 Likewise, the functions and duties of debt counsellors should be retained.

apply for an administration order. The Commission are mindful of the fact that the term "consumer" in the NCA is not limited to those applying for debt review. Therefore the Commission recommend that the following subclause be added at the end of clause (2) of the NCA: "Any reference to a consumer in this Act, in so far as it applies to the Debt Re-arrangement Act, must be construed as a reference to a debtor as defined in the latter Act.".

8.25 The proposed definition of "debtor" necessitates a definition of "creditor" that goes beyond the definition of "credit provider" in the NCA. The Commission therefore recommend that the proposed Bill define "creditor" as a person to whom a debt referred to in the proposed legislation is owed including a credit provider and a judgment creditor.[574]

8.26 The NCA uses the term "financial obligation" instead of the word "debt". However, the word "debt" is a more commonly used both internationally and locally, so the Commission recommend that the word "debt" be used in the proposed Bill.

Registration and codes of conduct

8.27 The NCA provides for the registration with the NCR of persons as debt counsellors or payment distribution agents. As the Commission recommend that the debt review provisions of the NCA and the administration order provisions of the MCA be merged into a single statute, it is recommended that the proposed Bill provide for the registration with the NCR of debt counsellors and payment distribution agents.[575]

8.28 The NCR has compiled the "Debt Counsellors' Code of Conduct for Debt Review", which came into effect on 1 May 2013. The code of conduct is, however, not mandated by the NCA. This raises the question whether the code of conduct is enforceable. The code of conduct provides that the NCR will monitor the implementation of and compliance with the code.

8.29 The NCR has not drafted a code of conduct for payment distribution agents, though. The Commission would like to stress the importance of codes of conduct for debt counsellors and payment distribution agents to set the standards of professional conduct in the performance of their functions. The Commission therefore recommend that the Minister

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574 See the definition of creditor in clause 1 of the Bill.

575 Clauses 3, 4, 5 and 7 of the Bill.

prescribe a code of conduct for debt counsellors and payment distribution agents, respectively.[576]

Role and functions of the National Credit Regulator

8.30 The Commission are of the view that the National Credit Regulator is best suited to deal with all forms of debt under the broad banner of consumer debt, taking into account the similarities between the functions of administrators and debt counsellors. Hence, the NCR must, subject to certain exclusions,[577] deal with debt which falls within the ambit of administration orders e.g judgment debt and debt where enforcement proceedings have commenced. As the functions of the National Credit Regulator are not limited to debt review, the provisions relating to the Regulator should remain in the NCA. However, the NCA and the proposed Debt Rearrangement Bill should be aligned to make the National Credit Regulator responsible for regulating the implementation of the proposed legislation.[578]

Accessibility of the office of the debt counsellor

8.31 As in the case of administrators,[579] the offices of debt counsellors sometimes are not within easy reach of the debtors to whom they provide a service. As debt counsellors are not restricted to practising within a certain area of jurisdiction, they tend to operate countrywide in order to run their businesses profitably. In order to ensure that debtors have access to the offices of their debt counsellors, the Commission recommend that the office of a debt counsellor must be within a 50-kilometre radius of the debtor's home, work place or business.[580]

8.32 The Commission are aware of the fact that debtors who reside or work in remote areas may be more than 50 kilometres from the nearest debt counsellor. In such cases, the court should hear the application for debt review if it is satisfied that the financial burden to the debtor caused by travelling to the office of the debt counsellor would not be greater than it would have been if the office of the debtor's debt counsellor was within a 50-kilometre

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576 Clause 8 of the Bill.

577 See paragrpahs 8.34 – 8.39 below.

578 See the proposed amendments to the provisions relating to the functions of the NCR set out in the Schedule to the Bill.

579 See paragraphs 5.211–5.213 above.

580 Clause 9(1) of the Bill.

radius from the place where the debtor resides, is employed or carries on business, or if the office of the nearest debt counsellor is situated more than 50 kilometres from the place where the debtor resides, is employed or carries on business.[581]

8.33 The Commission's recommendation in no way prevents debt counsellors from establishing branch offices in order to expand their clientele. However, any service, information or document provided by or in possession of the head office of a debt counsellor should be available at any of its branch offices as well.[582]

Debt excluded from debt review

8.34 The Commission's recommendation that the debt review and administration order processes be combined necessitates a discussion of how debt should be defined and the kind of debt that should be included under debt review. Debts included under debt review in terms of the NCA are of an *in futuro* nature and are payable in instalments on specified dates, while administration orders are made in respect of debt the whole of which are due, owing and payable. The Commission therefore recommend that debt should be defined as any amount owing by a debtor, irrespective of whether such amount is immediately due and payable, or payable in future, or in future instalments.[583]

8.35 However, the Commission are of the view that a judgment debt that emanates from a debt that was under debt review should be excluded from debt review.[584] Persons who initially failed to meet their financial obligations under debt review should not be allowed to apply for debt review again once judgment has been obtained against them. Debt review should be reserved for those who are serious about meeting their financial obligations over a reasonable period of time, if they are assisted to do so. Those who want to use it as an escape route not to comply with their financial obligations should not benefit from debt review.

8.36 Parties contemplated in section 4(2)(b) are excluded from debt review, which means loans between family members, partners and friends on an informal basis are excluded from

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581 Clause 9(2) of the Bill.

582 Clause 9(3) of the Bill.

583 See the definition of "debt" in clause 1 of the Bill.

584 Clause 11(2)(a) of the Bill.

debt review. This exclusion should be retained in the proposed Bill.[585]

8.37 Agreements envisaged in section 4(6)(b), except any overdue amount in terms of such agreements, are excluded from debt review. In terms of this section a utility or continuous service agreement (e.g. fitness service contracts, internet contracts, cell phone service contracts, garden and security services) does not constitute a credit facility, except overdue amounts in terms of such agreements., The proposed Bill should likewise reflect this exclusion.[586]

8.38 The Commission are of the view that payment towards the maintenance of any person, including arrear maintenance, should be excluded from debt review. This should include maintenance in terms of a maintenance order and maintenance in terms of an agreement between two or more persons. The exclusion of arrear maintenance from debt review would prevent the non-payment of maintenance in order to include the arrear maintenance under debt review.

8.39 The Commission would like to point out that section 86(2) provides that an application for debt review may not be made in respect of a particular credit agreement if the credit provider under that credit agreement has proceeded to take steps to enforce that agreement. Professor Coetzee is of the view that this provision "does not align with international trends and guidelines that prefer a holistic approach towards and solution of all the debtor's debt problems". She is of the opinion that it is in contrast to sequestration and administration, where all debt, regardless of whether credit providers have commenced enforcement proceedings, is included.[587] It is not clear why this provision has been included in the NCA. The Commission, however, recommend that it be excluded from the proposed Bill because its inclusion would conflict with the Commission's recommendation that judgment debt (that arises from debt that was not under debt review) should be included under debt review. If debtors are allowed to apply for debt review after creditors have taken legal action to enforce their debts, creditors should be allowed to include in the debtor's debt review the cost incurred in respect of the recovery of such debts and the concomitant interest.[588]

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585 Clause 11(2)(b) of the Bill.

586 Clause 11(2)(c) of the Bill.

587 Comment received on 24 May 2019.

588 Clause 10 of the Bill.

Should delictual claims be included under debt review? If yes, to what extent?

Reckless credit

8.40 Section 81(2) provides that a credit provider may not enter into a credit agreement with a person without first taking reasonable steps to assess the person's understanding and appreciation of the risks and costs of the proposed credit, the person's debt repayment history, existing financial means, prospects and obligations. Section 80 provides that a credit agreement would be reckless if the credit provider failed to conduct this assessment, irrespective of the outcome of the assessment.[589]

8.41 Section 83 stipulates the consequences of the granting of reckless credit. The court may make an order setting aside all or a part of a person's rights and obligations, or the court may suspend the force and effect of the credit agreement if the credit provider failed to conduct the required assessment or the person entered into the credit agreement without understanding the risks, costs or obligations under the credit agreement. The court must further consider whether the person is over-indebted at the time of the court proceedings, and if so, the court may suspend the force and effect of the credit agreement until a date determined by the court. The court may also restructure the person's obligations.[590]

8.42 Section 86(6)(b) requires the debt counsellor to determine whether any of the consumer's credit agreements appear to be reckless. The NCR announced a reckless lending fee of R1 500 per debt counselling application, taking into account the amount of work a debt counsellor has to do before he or she can recommend that the court declare a credit agreement to be reckless credit. This fee was, however, withdrawn by the NCR as it was abused by debt counsellors.[591] The Commission recognise the importance of providing for a fee for determining reckless credit, but to prevent the abuse of such a fee the Commission recommend that the fee be payable only if the court has made a declaration of reckless credit.[592] This would ensure that debt counsellors obtain all the relevant information to enable them to consider whether or not a credit agreement is reckless credit.

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589 Stoop PN and Kelly-Louw M "The National Credit Act regarding suretyships and reckless lending" PER / PELJ 2011(14)2 67.

590 Stoop PN and Kelly-Louw M PER / PELJ 2011(14)2 87.

591 NCR Debt Counselling Fee Guidelines, issued on 22 February 2018 and NCR circular 05 of 2018.

592 Clause 12(3) of the Bill.

Application for debt review

8.43 The Commission are of the view that the Bill should provide that the following occur after the debt counsellor has received an application for debt review:

Information to be provided to debtor

8.44 The Commission consider it important that debtors who enter into debt review have a clear understanding of what is expected of them, the obligations of their debt counsellors and the debt review process in general. Hence the Commission recommend that a debt counsellor inform the debtor of the benefits, consequences, cost and process of debt review; the remedies available to the debtor should the debt counsellor fail to perform his or her duties; the procedure for referring a complaint against the debt counsellor to the NCR; and the rights and duties of the debtor and the debt counsellor.[593]

8.45 The Commission are mindful that it would not always be possible to have a one-on-one discussion with a debtor about the issues concerned. The Commission therefore recommend that the required information be set out in a *pro forma* letter that is available in the official language the debtor understands best.[594] The proposed letter must be made available by the Department of Trade and Industry.

Meeting of creditors

8.46 As explained in paragraph 8.14 above, the NCA does not oblige a debt counsellor to submit a debt rearrangement proposal to the credit providers of a debtor if it has been found that the debtor is indeed over-indebted. This was confirmed by Du Plessis J in *National Credit Regulator v Nedbank Ltd and Others* 2009 (6) SA 295 (GNP), who disagreed that the rearrangement proposal for an over-indebted person should first be submitted to the credit providers; he was of the view that "section 86(7)(c) sets in motion a debt rearrangement process that is not voluntary". However, some credit providers have argued that this is not in

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593 Clause 21(1) of the Bill. Debtors have a right to apply for debt counselling; to request and be provided with reasons if the application for debt counselling is rejected; to disclosure of the applicable fees and the debt counselling process; and to receive distribution monthly statements. Debtors have a duty to ensure full and correct financial disclosure at the time of application; to make monthly repayments as agreed; and to ensure that they understand the debt review process, applicable fees and the consequences of the process.

594 Clause 21(2) of the Bill.

line with section 86(5)(b) of the NCA, which requires the parties to participate in good faith. The argument that the proposal should first be submitted to the debtor's credit providers has merit because the burden placed on the courts would be eased if credit providers in such cases agree to the debt rearrangement proposal.

8.47 The Commission are of the view that the proposed Debt Rearrangement Bill should provide for the submission of the debt rearrangement proposal to the debtor's creditors prior to taking the matter to court. The Commission are aware that some credit providers do not respond to debt counsellors' requests to consider rearrangement proposals, while others tend to prolong the negotiation process. The process to be followed should therefore be crafted in a manner that would ensure the participation of creditors. In this regard, the Commission recommend the following:

8.48 The debt counsellor should arrange a meeting of the debtor's creditors for the purpose of considering and approving the debtor's proposed debt rearrangement plan. However, the debt counsellor need not hold a meeting if the majority of the creditors approve the debt rearrangement plan before the date of the meeting. The Commission is mindful of the fact that the majority of the debtor's creditors could be creditors to whom the debtor owes small debts. In order to avoid a situation in which such creditors outnumber one or more creditors to whom the debtor owes large debts, the Commission recommend that the majority of creditors be reckoned in value.[595]

8.49 The debt counsellor should preside over the meeting of creditors and keep a record of the proceedings, which record should reflect the names of the creditors who attended the meeting; who voted for or against the debt rearrangement plan; and what modifications to the plan were requested and made.[596] It could be argued that convening a meeting of creditors would have cost implications for the debtor as the debt counsellor would have to be remunerated for calling and presiding over such a meeting. However, a meeting of creditors to discuss the debtor's proposed debt rearrangement plan would reduce the number of debt review cases that would have to be referred to court. Furthermore, it would reduce the number of postponements in debt review cases as a result of insufficient information, thereby reducing legal costs.

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595 Clause 13 of the Bill.

596 Clause 14(1) of the Bill.

8.50 Creditors who do not approve the proposed debt rearrangement plan before the meeting of creditors should have the opportunity to do so at the meeting if the debt counsellor did not receive the approval of the majority of the creditors. The creditors who approved the debt rearrangement plan prior to the meeting of the creditors need not attend the meeting and their approval should have the same effect as if they were present and voted at the meeting.[597] Creditors or their representatives should be allowed to participate in the meeting through communication facilities such as Skype and conferencing software. Participation in the meeting through such means should be done with the permission of the debt counsellor. A creditor participating in the meeting by such means should be deemed to be present at the meeting.[598]

8.51 Every matter upon which a creditor may vote should be determined by the majority of votes, reckoned in value, of the creditors present at the meeting.[599] This would encourage creditors to attend the meeting as no specific quorum is required for the meeting. The majority vote, reckoned in value, will be the deciding factor. The meeting of creditors should approve the proposed debt rearrangement plan with or without modifications, but no modifications may be made unless the debtor consents to each modification.[600] In order to avoid the need for a second meeting of creditors (which may have cost implications for the debtor), the debt counsellor should contact the debtor (by phone, Skype, e-mail etc.) during the meeting to obtain his or her consent. This means that the debt counsellor has to arrange with the debtor to be available on the day of the meeting.

8.52 A debt rearrangement plan approved by the majority of creditors, reckoned in value, whether before or at the meeting of creditors, should be binding on every creditor entitled to vote at the meeting of creditors.[601]

Should the proposed Debt Rearrangement Bill provide for the communication facilities that debt counsellors have to put in place to ensure that creditors or their representatives who choose to participate in the creditors' meeting through such facilities are able to do so? For which communication facilities should the Bill provide?

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597 Clause 14(3) of the Bill.

598 Clause 14(2) of the Bill.

599 Clause 14(6) of the Bill.

600 Clause 14(7) of the Bill.

601 Clause 14(8) of the Bill.

8.53 The Commission realise that there may be instances where not all creditors who participate in the meeting of creditors will approve a debtor's proposed debt rearrangement plan. The Commission therefore recommend that a creditor who was entitled to vote at the meeting of creditors should be allowed to apply to court to review the decision to approve the debt rearrangement plan on the grounds that the plan unfairly prejudices his or her interests and/or that there has been a material irregularity at or in relation to the meeting of creditors.[602] In order not to delay the process, the court should deal with the issues in dispute in a summary manner.[603] If the court is satisfied as to either of the grounds mentioned above, it should make an order revoking the approval of the debt rearrangement plan by the meeting of creditors and direct the debt counsellor to call a further meeting of creditors to consider the original or a revised debt rearrangement plan, subject to such conditions as the court may impose.[604] It is vital that creditors participate in the meeting of creditors in good faith. Those creditors who challenge the decision taken at the meeting of creditors should be penalised with a cost order if the court finds that they have refused without reasonable grounds to approve the debt rearrangement plan[605] or they neither provided their approval of the debt re-arrangement plan to the debt counsellor nor attended the meeting of creditors.[606]

Filing of debt rearrangement plan or referral of application to court

8.54 Section 86(8)(a) implies that a debtor and each of the credit providers concerned should accept the proposal for debt rearrangement before the debt counsellor may record the proposal in the form of an order and file it as a consent order in terms of section 138. The unintended consequence of this provision is that the debt counsellor has to refer the matter to court, even if only one credit provider rejects the proposal. Whether or not the credit provider's refusal to accept the proposal is unreasonable is not a factor that is taken into account. This problem would be remedied through the proposed meeting of creditors as explained above in that the vote of the majority of the creditors, reckoned in value, is the only requirement for the approval of the debt rearrangement plan. The Commission recommend that if the meeting of creditors approve the debt rearrangement plan, the debt counsellor

602 Clause 15(1) of the Bill.

603 Clause 15(4) of the Bill.

604 Clause 18(4)(a) of the Bill.

605 Clause 18(4)(b) of the Bill.

606 Clause 18(4)*(b)*(ii) of the Bill.

must record the debt rearrangement plan in the form of an order and file it as a consent order in terms of section 138.[607] The application for debt review should be referred to court only if the meeting of creditors reject the debt rearrangement proposal in that the debt counsellor failed to obtain the approval of the majority of the creditors reckoned in value.[608]

Court hearing of an application for debt review

(a) Interrogation of debtor

8.55 Unlike sections 64, 65, 66 and 152 of the Insolvency Act, which provide for a sophisticated interrogation procedure, the NCA does not contain provisions for the interrogation of debtors, despite the fact that the Act puts no monetary limitation on the debts that may be placed under debt review. It is important that the court be guided as to the kind of information it must acquire from the debtor and the debt counsellor to get a comprehensive view of the debtor's financial position. This would enable the court to determine which of the debtor's assets should be sold as provided in clauses 18(d)(i) and 19(3)-(5) of the proposed Debt Rearrangement Bill. Therefore, the Commission recommend that the proposed Bill state that the debtor may be interrogated by the court with regard to his or her assets and liabilities; standard of living and the possibility of economising; and present and future income of the debtor and that of his or her spouse living with him or her.[609] The court's power to interrogate the debtor should not be confined to these issues but the court should be empowered to interrogate the debtor on any other matter it deems relevant. The creditors of the debtor or their legal representatives should also have the right to interrogate the debtor on these issues.[610] However, the court should disallow a question it considers to be irrelevant or which may prolong the interrogation unnecessarily.[611] Furthermore, the debt counsellor should be allowed to furnish evidence or make submissions to justify the proposed debt rearrangement plan of the debtor.[612] Also, the court

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607 Clause 16(1) of the Bill.

608 Clause 16(2) of the Bill.

609 This should not apply to a spouse married out of community of property or a partner living with the debtor, except as far as it relates to the income of such spouse or partner for the purpose of determining the debtor's essential weekly or monthly expenses. See further clause 18(5)(a)(i).

610 Clause 18(5)(a)(i) of the Bill.

611 Clause 18(5)(c) of the Bill.

612 Clause 18(5)(a)(ii) of the Bill. See also ***National Credit Regulator v Nedbank Ltd*** 2009 (6) SA 295.

should require the debt counsellor to provide any information or to answer any question by the court in respect of the application.[613]

8.56 As mentioned above,[614] debtors often enter into debt review without a full understanding of the debt review process. Many debtors want to exit debt review a few months after their debt review began, often because they find it too stressful to be cut off from credit.[615] Some debtors feel that they were tricked into agreeing to debt counselling.[616] The Commission consider it important that the debt review process, in particular its benefits and restrictions, be explained to debtors. The Commission is mindful of the fact that, because of the sheer number of debtors under debt review with a specific debt counsellor, it is not always possible for the counsellor to conduct one-on-one consultations with each debtor. However, the debt counsellor or his or her employee, in the process of obtaining the necessary information from the debtor to prepare the application for debt review, should at least explain to the debtor what debt review is all about. It is inconceivable that a counsellor can advise a debtor to enter into debt review without explaining to that debtor what debt review entails.

8.57 In addition to recommending that the office of a debt counsellor must be within a 50-kilometre radius of the debtor's home, work place or business,[617] the Commission also recommend that the referral of the debt review application be made to the court of the district in which the debtor resides, carries on business or is employed or the court of the district in which judgment was obtained against the debtor. This would prevent debt counsellors from doing forum shopping and ensure that the debt review application is heard in the court nearest to the debtor.

8.58 The Commission feel that the issues addressed in paragraphs 8.56 and 8.57 are matters over which the court should exercise judicial oversight. Accordingly, the Commission recommend that the court interrogate the debtor on whether—[618]

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613 Clause 18(5)(a)(iii) of the Bill.

614 See paragraphs 5.138, 5.231 and 8.44.

615 Maya Fischer-French "When can you exit debt review?" *City Press* 18 September 2019, available at https://city-press.news24.com/Personal-Finance/when-can-you-exit-debt-review-2019.

616 "When can I exit debt review?" *City Press* 15 September 2019, available at https://www.pressreader.com/south-africa/citypress/20190915/282110638309717.

617 Clause 9(1) of the Bill.

618 Clause 18(5)(d) of the Bill.

(a) the debt counsellor or the person who prepared the application has explained to the debtor the benefits, consequences, cost and the debt review process and whether the debtor understands them; and

(b) the debtor resides, carries on business or is employed in the district of the court, except if the application for debt review was lodged with the court referred to in section 65I of the Magistrates' Courts Act.[619]

8.59 The court should not grant a debt rearrangement order if it finds that the debtor does not understand the benefits, consequences, costs and process of debt review, unless good cause is shown why the order should nevertheless be granted.[620]

(b) Reduction of interest rate

8.60 The High Court in *P v Vosloo and Others*[621] had to consider whether a magistrate's court has the authority to make an order rearranging the debtor's debts based on the parties' agreed amended interest rate.[622] The magistrate's court declined to grant the order having regard to the fact that the court is a creature of statute. The court was of the view that it had no power to vary the contractual interest rate as that would effectively change the terms of the original agreement.[623] Section 87 stipulates what orders the court may make when rearranging the debtor's debts but fails to provide a legislative basis for the court to alter the contractual interest rate relating to credit agreements when the parties have negotiated and consented to a reduced interest rate. The High Court tried to remedy this lacuna by interpreting section 87 in line with the purpose of the NCA. It held that, based on a purposive interpretation of the NCA, the magistrate's court has jurisdiction to make orders rearranging a debtor's debt based on an amended interest rate agreed on by the parties.[624] The Commission are of the view that this deficiency in the NCA should be remedied in the

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619 The SALRC recommend that section 65I of the Magistrates' Courts Act be amended by replacing all references to an administration order and section 74 by the relevant provisions of the proposed Debt Re-arrangement Bill. Keep in mind that an application for a debt rearrangement order may not be made in respect of a judgment debt that arises from a default on a credit agreement that formed part of a consent order in terms of section 138 of the National Credit Act or a debt rearrangement order in terms of clause 18 of the proposed Debt Re-arrangement Bill. See in this regard clause 11(2)(a) of the Bill.

620 Clause 18(6)(d) of the Bill.

621 (A113/17) [2017] ZAWCHC 158; 2018 (5) SA 2016 (WCC) (23 October 2017).

622 Paragraph 1.

623 Paragraph 3. See also ***First Rand Bank Ltd v Adams and Another*** 2012 (4) SA 14 (WCC), and Van Zyl J in ***SA Taxi Securitization (Pty) Ltd v Lennard*** (an unreported decision of the Eastern Cape High Court, Grahamstown, delivered on 21 October 2010) at paragraph 10.

624 Paragraph 14.

proposed Debt Rearrangement Bill. The Bill should provide that the court may rearrange the debtor's debt based upon a reduced interest rate agreed on between the debt counsellor and the creditor.[625]

(c) Court must be satisfied that debtor will have sufficient means after payment of instalment

8.61 If a debtor is in default under a credit agreement that is being reviewed, the creditor to whom the debt is owed may terminate the review.[626] It is not so easy to terminate a defaulting debtor's debt review if the court has made a formal debt rearrangement order. The court will have to be approached for the rescission of the order.[627] To ensure that debtors honour their orders by making regular payments, the Commission recommend that the proposed Debt Rearrangement Bill provide that the court may authorise the issue of an emoluments attachment order in terms of section 65J or a garnishee order in terms of section 72 of the MCA.[628]

8.62 The Commission believe that before making an order to rearrange a debtor's debts the court concerned should be satisfied that the debtor will have sufficient means for his or her maintenance and that of his or her dependants after payment of the instalment. The court will have to consider all relevant information before it and, where necessary, ask for such information. This may include any existing emoluments attachment orders.[629] It should be kept in mind that not all debtors who apply for debt review will enjoy the protection of section 65J of the Magistrates' Courts Act as it would be problematic to issue an emoluments attachment order in instances where debtors are self-employed or financially assisted by family members. Section 65J(1A) of the MCA provides that the amount of the instalment payable or the total amount of instalments payable, when there are more than one emoluments attachment order payable by the judgment debtor, may not exceed 25 per cent of the judgment debtor's basic salary. The court may make an order regarding the division of the available amount to be committed to each of the EAOs. Furthermore, the

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625 Clause 18(5)(e) of the Bill.

626 Section 86(10) of the NCA.

627 Termination of a debt review application or order, dated 25 January 2018; available at https://www.schoemanlaw.co.za.

628 Clause 25 of the Bill.

629 Clause 18(5)(f) of the Bill. The proposed provision will apply only in cases where an application for a debt re-arrangement order is referred to court as contemplated in clause 16(2)(a). See also clause 25, which provides for the authorising of the issue of an emoluments attachment order or garnishee order.

court should be satisfied that each EAO is just and equitable and that the sum of the total amount of the EAOs is appropriate.

Orders that the court may make when rearranging the debtor's debts

8.63 The NCA empowers the court to rearrange a debtor's debts by declaring any credit agreement to be reckless, following which the court may set aside all or part of the debtor's debts under that agreement or suspend the force and effect of the agreement for a specified period.[630] Furthermore, the court may rearrange the debtor's debts by—[631]

(a) extending the period of the agreement and reducing the amount of each payment due accordingly;
(b) postponing, for a specified period, the dates on which payments are due under the agreement;
(c) extending the period of the agreement and postponing, for a specified period, the dates on which payments are due under the agreement; or
(d) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6.

8.64 The National Credit Amendment Act 7 of 2019 provides for additional orders a court may make when rearranging a debtor's debts. In terms of this Act, the court may—[632]

(a) extend the period of the agreement and postpone, for a specified period, the dates on which payments are due under the agreement; or
(b) determine the maximum rate of interest, fees or other charges, excluding section 101(1)(e) charges, under a credit agreement.

8.65 The Commission are of the view that the orders the court may make should be broadened as discussed below.

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630 Section 87(1)(b)(i). See also section 83(2) and (3) of the NCA.

631 Section 87(1)(b)(ii). See also section 86(7)(c)(ii).

632 These provisions will come into effect on a date to be proclaimed by the President by proclamation in the *Government Gazette*.

Exclusion of certain secured debts from debt review

8.66 The NCA allows debtors to include secured debts in their application for debt review. Such secured debts often include luxury items. It is untenable that debtors should be allowed to hold on to such items while creditors receive a reduced payment over an extended period of time. Prof Coetzee is of the view that the inclusion of secured debts in debt review dilutes the notion of security. Moreover, secured creditors are forced to lock their security in the debt review process. She further commented as follows: "The inclusion of secured credit was probably due to debt review being designed as a measure to assist a person with temporary or slight financial difficulties, who can be assisted with meagre concessions. In such circumstances, secured rights will not be drastically affected and should be included. However, due to the lack of alternatives coupled with the economic downturn, debt review is also used in more destitute financial circumstances."[633]

8.67 The Commission recommend that the court be given the authority to exclude one or more secured debts from a debtor's debt review when rearranging the debtor's debts. In doing so, the court must consider whether the assets relating to the secure debts listed in the debtor's application for debt review are essential for the debtor or his or her dependant's daily living or needed for the debtor's occupation, trade or business.[634] Creditors of debts so excluded would be able to commence enforcement proceedings against the debtor or to take possession of the goods and sell them to cover cost. If there is an outstanding balance after the goods have been sold, a creditor to whom such balance is owed may, as an unsecured creditor, apply for the amendment of the debtor's debt re-arrangement order to be included as a creditor under the debtor's debt review.The court's exclusion of certain secured debts from debt review would encourage debtors to live within their means.

Should secured creditors, who became unsecured creditors in respect of an outstanding amount after they have sold their secured goods, be excluded from receiving a dividend in terms of the debtor's debt re-arrangement order until all the other creditors have been paid?

633 Comment received from Prof Hermie Coetzee, Department of Mercantile Law, University of Pretoria, on 24 May 2019.

634 Clause 18(1)(b)(iv) of the Bill.

Suspension of payment of the debtor's debts

8.68 The NCA provides that debtors' debts may be rearranged by providing them with a period during which they will not be liable to make payments, in order to give them an opportunity to generate liquidity.[635] The Commission are of the view, however, that specific attention should be pated to the middle class, who are often too well off to apply for debt intervention but too poor to apply for sequestration. The Commission therefore recommend that when considering an application for debt review, the court should have the option of rearranging the debtor's debts by suspending payment of the debts for a six-month period.[636] This should be limited to cases where the debtor or the joint estate of the debtor is unable to propose a viable debt rearrangement plan; does not qualify for a sequestration order; and receives a gross income that exceeds the qualifying amount for debt intervention.[637] However, the granting of the order suspending the payment of the debtor's debts should be dependent on the fact that the court must be satisfied that there is a likelihood that the debtor would be able to propose a viable debt re-arrangement plan after the six month period.[638] Moreover, an order for the suspension of payment should not be extended for a further period.[639]

8.69 Debtors who are unable to propose a viable debt rearrangement plan ought to be willing to get out of the debt spiral that entraps them through their own efforts. They cannot claim that they are unable to pay their creditors a reasonable instalment but still want to retain their assets. Consequently, the Commission recommend that the court, when making an order suspending payment of the debtor's debts, should order that the debt counsellor realise any asset that is not essential for the debtor or his or her dependant's daily living or needed for the debtor's occupation, trade or business.[640]

8.70 As regards debt intervention applicants, the NCA provides that the NCR give a debt intervention applicant counselling on financial literacy and access to training to improve that

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635 Section 86(7)(c)(cc).

636 As regards the suspension of the payment of credit agreement debt, reference may have to be made to section 84 of the National Credit Act, which deals with the effect of suspending credit agreements.

637 Clause 18(1)(c) of the Bill.

638 Clause 18(1)*(c)* of the Bill.

639 Clause 18(3) of the Bill.

640 Clause 18(1)(d)(i) of the Bill.

applicant's financial literacy.[641] The Commission recommend that such services be rendered to the categories of debtors mentioned above as well, subject to available resources.[642]

8.71 Debtors should be required to submit their revised debt rearrangement plan to court within 10 days after expiry of the six-month period.[643] The realisation of the debtor's assets and the financial-literacy training should preferably take place before the expiry of the six-month period.

Debtors under debt review who are no longer over-indebted

8.72 Debtors do not realise that once they are under debt review they may exit the process only if they have paid off all their debts in full or have paid off all their short-term debts and settled the arrears on their home loans and any other long-term loans.[644] In this regard, section 71(1) provides as follows:

> 1) A consumer whose debts have been re-arranged in terms of Part D of this Chapter, must be issued with a clearance certificate by a debt counsellor within seven days after the consumer has—
> *(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—
> (i) financial ability to satisfy the future obligations in terms of the re-arrangement order or agreement under—
> *(aa)* a mortgage agreement which secures a credit agreement for the purchase or improvement of immovable property; or
> *(bb)* any other long term agreement as may be prescribed;
> (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.

8.73 The court in *Van Vuuren v Roets and Others*[645] recently considered the case of two applicants who said that their financial circumstances had improved dramatically, yet neither

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641 Section 86A(5) of the NCA.

642 Clause 18(1)(d)(ii) of the Bill.

643 Clause 18(1)(d)(iii) of the Bill.

644 Arde "Court looks at early escape from debt review: Consumers whose finances improve want a way out", dated 4 August 2019, available at https://www.businesslive.co.za/bt/money/2019-08-04-court-looks-at-early-escape-from-debt-review/.

645 (37407/2018) [2019] ZAGPJHC 286; [2019] 4 All SA 583 (GJ) (3 September 2019)

of them was able to settle their debts in full.[646] Mr Van Vuuren's application for debt review was successful in that he obtained a court order in terms of which his debts were rearranged. However, 18 months after the initial application, his financial circumstances had so improved that he was able to pay his creditors on the original terms of the agreements and no longer needed to rely on the debt review relaxations of the order.[647] Mr Nel's application for debt review was accepted by the debt counsellor, after which he was found to be over-indebted. His creditors and the credit bureaus were notified accordingly. The matter was filed with the court, but no debt re-arrangement order was made by the court. Mr Nel nevertheless paid his creditors in accordance with the debt rearrangement proposal submitted to the court.[648] Both applicants have requested the debt counsellor to release them from debt review but the debt counsellor denied their request on the basis that he lacks the power to do so. In both instances, the applicants were trapped in debt review because they were unable to settle their debts in full, even though they were no longer over-indebted. The debt counsellor could not provide them with a section 71 clearance certificate as they did not comply with the requirements for such a certificate.

8.74 The court held that Mr Van Vuuren cannot exit debt review because he is bound by the provisions of section 88(1)(c) and (2) of the NCA, which provides as follows:

> (1) A consumer who has filed an application in terms of section 86(1), or who has alleged in court that the consumer is over-indebted, must not incur any further charges under a credit facility or enter into any further credit agreement, other than a consolidation agreement, with any credit provider until one of the following events has occurred:
> …
> *(c)* a court having made an order or the consumer and credit providers having made an agreement re-arranging the consumer's obligations, all the consumer's obligations under the credit agreements as re-arranged are fulfilled, unless the consumer fulfilled the obligations by way of a consolidation agreement.
> (2) If a consumer fulfils obligations by way of a consolidation agreement as contemplated in subsection (1)*(c)*, or this subsection, the effect of subsection (1) continues until the consumer fulfils all the obligations under the consolidation agreement, unless the consumer again fulfilled the obligations by way of a consolidation agreement.

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646 Arde "Court looks at early escape from debt review: Consumers whose finances improve want a way out", dated 4 August 2019.

647 Paragraph 5.1 of the judgment.

648 Paragraph 5.2 of the judgment.

8.75 The court further held that a debtor in the position of Mr Van Vuuren must satisfy the requirement of section 71(1)(b)(iii). If he or she is unable to comply with this provision, he or she has no right to exit debt review.[649]

8.76 The court held that the predicament of Mr Nel could be resolved by his debt counsellor presenting the debt rearrangement proposal to the court together with additional information about his improved financial position, whereupon the magistrate may reject the application for debt review in accordance with section 87.[650]

8.77 Although the court provided guidance as to how the problem relating to the position of Mr Nel should be dealt with, the Commission are of the view that the process to be followed should be clearly set out. The Commission believe that the problem could be addressed in two ways. First, the proposed Debt Rearrangement Bill could provide that a debtor who has applied to a debt counsellor for debt review, but who is no longer over-indebted, may apply to court to declare him or her to be no longer over-indebted and order the cancellation of the application for debt review.[651] The Commission know that, unlike the High Court, a magistrate's court cannot make declaratory orders. However, the proposed provision confers a limited power on the magistrate's court with a specific intent. Second, a debt counsellor who has accepted an application for debt review but before the application is referred to court may, with the written consent of a debtor, cancel the application for debt review if he or she is satisfied that the debtor is no longer over-indebted.[652] The Commission prefer this option, as it holds fewer cost implications for the debtor. As with the clearance certificate with which a person must be issued in terms of section 71, the debtor in this case should be issued with a clearance certificate that he or she is no longer over-indebted.

8.78 To address the type of problem Mr Van Vuuren had, the Commission recommend that the proposed Debt Rearrangement Bill provide that a debtor who has obtained a court order rearranging his or her debts may apply to the court to have the order set aside when he or she is no longer over-indebted.[653]

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649 Paragraph 36 of the judgment.

650 Paragraph 32 of the judgment.

651 Clause 22(1)(a).

652 See the alternative clause 22(1).

653 Clause 22(1)(b).

8.79 When considering an application relating to both instances (the cases of Mr Van Vuuren and Mr Nel), the court must ensure that the interests of the creditors would not be negatively affected. It is therefore imperative that the court consider several factors, including any change in the debtor's financial position, whether the debtor has paid all the arrears on the debts under his or her debt rearrangement plan, and whether the debtor is able to pay off the rest of his or her debts in a satisfactory manner.[654]

Determination of the rate of interest by the court

8.80 Section 86(7)(c)(ii)(ccA) provides that if a debt counsellor concludes that a person is over-indebted, the debt counsellor may issue a proposal recommending that the court rearrange that person's debts by "determining the maximum rate of interest, fees or other charges, excluding charges contemplated in section 101(1)*(e)*, under a credit agreement, for such a period as the Magistrate's Court deems fair and reasonable but not exceeding the period contemplated in section 86A(6)*(d)*".

8.81 In the case of debt intervention, section 87(1A)(b)(ii)(dd) provides that the Tribunal or a member of the Tribunal may order that the debt intervention applicant's debts be rearranged by "determining the maximum interest, fees or other charges, excluding charges contemplated in section 101(1)*(e)*, under a credit agreement, which maximum may be zero, for such a period as the Tribunal deems fair and reasonable but not exceeding the period contemplated in section 86A(6)*(d)*".

8.82 Section 171 provides that the Minister may make regulations regarding the orders the court may make in respect of the above-mentioned sections and must, when making these regulations, distinguish between the reduction of rate of interest the court may determine in respect of unsecured debt, which reduction may be to zero, and the reduction of rate of interest in respect of secured debt, which reduction may not result in the rate being less than the repurchase rate plus such percentage as is indicated in the industry guidelines.

8.83 The Commission agree with the provisions of section 171 as regards secured debt, but are of the view that the court's power to reduce the interest rate to zero in respect of unsecured debt should not be limited to debt intervention applications. The Commission recommend that the proposed Debt Rearrangement Bill provide that the court may arrange

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654 Clause 22(2).

the debtor's debt by determining the rate of interest, which may be zero in respect of unsecured debt, may not be less than the repurchase rate, plus such percentage as is indicated in the industry guidelines referred to in clause 24 of the Bill, in respect of secured debt, and may not exceed the interest rate prescribed under the Prescribed Rate of Interest Act, 1975, or the fees or other charges, excluding charges contemplated in section 101(1)(e) of the National Credit Act, under a credit agreement, for such a period as the court deems fair and reasonable.[655]

8.84 If a debtor is in default under a debt that is being reviewed, the creditor to whom the debt is owed may terminate the review.[656] However, it is not so easy to terminate a defaulting debtor's debt review where the court has made a formal debt re-arrangement order. The court will have to be approached for the rescission of the order.[657] To ensure that debtors honour their orders by making regular payments, the Commission recommends that the proposed Debt Re-arrangement Bill should provide that the court may authorise the issue of an emoluments attachment order in terms of section 65J of the MCA or a garnishee order in terms of section 72 of the MCA.[658]

Realization of the debtor's assets by the debt counsellor

8.85 Paragraph 3.2 of Annexure D of the Debt Review Task Team Agreements issued by the NCR in 2015 as guidelines encourages debt counsellors to ask debtors to identify assets that can possibly be sold to reduce their debt. Such assets include luxury items, cash investments, shares, holiday homes and additional vehicles. However, debt counsellors have no mechanism through which they can force debtors to sell such assets. The Commission believe that their recommendation that the court should have the authority to exclude one or more secured debts from a debtor's debt review would go a long way towards ensuring that only assets essential for the debtor's or his or her dependants' daily living and needed for his or her occupation, trade or business are included under debt review.

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655 Clause 18(1)(b)(iii)(dd).

656 Section 86(10) of the NCA.

657 Termination of a debt review application or order 25 January 2018 available at https://www.schoemanlaw.co.za.

658 Clause 25 of the Bill.

8.86 The Commission believe that debt counsellors should be empowered to realise an asset of a debtor even before referring an application for debt review to court for the purpose of distributing the proceeds to the creditors of the debtor. This will reduce the amount of debts to be placed under debt review. However, a debt counsellor should not do so without the written permission of the debtor.[659] If the application for debt review has been referred to court and the court has not excluded a debt relating to a specific asset, the debt counsellor will have to obtain the debtor's permission to realise that asset. However, a debt counsellor should be prohibited from realising an asset that is the subject of a credit agreement regulated by the National Credit Act, unless he or she has obtained the written permission of the credit provider concerned.[660]

8.87 The Commission understand that some debtors might refuse to give their debt counsellor permission to realise an asset. Hence the Commission recommend that if a debtor without reasonable ground refuses to give the debt counsellor permission to realise an asset, the court should have the authority to authorise the debt counsellor to realise the asset.[661] Furthermore, when the court authorises a debt counsellor to realise an asset, the court should, if it deems fit, amend the payments to be made in terms of the debt rearrangement order.[662]

Debt Review Task Team Agreements

8.88 In January 2015, the National Credit Regulator (NCR) issued the industry guidelines under the Debt Review Task Team Agreements, 2010. The Task Team Agreements (TTAs) are voluntary non-statutory measures aimed at addressing operational and process weaknesses in the implementation of the debt review provisions of the NCA.

8.89 Circular 02 of 2015 issued by the NCR states that credit providers, credit bureaus, payment distribution agents and debt counsellors are requested to comply by applying the TTAs to debt review matters. It further states that non-compliance should be reported to the NCR. However, paragraph 4 of the Covering Report to the TTAs states that the Task Team recommendations are largely directed at voluntary, non-statutory measures and that the TTAs are issued by the NCR as a guideline for implementation by all credit industry

659 Clause 19(1) of the Bill.

660 Clause 19(2) of the Bill.

661 Clause 19(3) of the Bill.

662 Clause 19(4) of the Bill.

stakeholders. Non-compliance with the TTAs should be reported to the Credit Industry Forum (CIF) for intervention. Moreover, should the CIF intervention not effect the required cooperation the matter should be referred to the NCR. The Covering Report is silent on the measures the NCR may take to enforce compliance with the TTAs, which is not surprising because the TTAs do not have the force of law.

8.90 The Commission notes that section 29 of the National Credit Amendment Act 7 of 2019 attempts to give force and effect to the TTAs by stating that the Minister must, when making regulations relating to orders that can be made by the court in respect of sections 86(7)(c)(ii)(ccA) and 87(1A)(b)(ii)(dd), replicate the requirements set out in the industry guidelines under the TTAs. The Commission are of the view that the enforcement of the TTAs should go beyond the orders contemplated in that section because they are relevant to the whole debt review process. Hence the Commission recommend that the proposed Debt Rearrangement Bill provide that the Minister of Trade and Industry must, when making the regulations under the proposed legislation, take existing industry standards and practices into account and replicate the requirements set out in the industry guidelines. Furthermore, the regulations should provide that debt counsellors, payment distribution agents, credit providers and credit bureaus must comply with these requirements and any amendments thereto.[663] Additionally, the regulations must provide that a finding by a court that a debt counsellor, payment distribution agent, credit provider or credit bureau has contravened any regulation relating to the industry standards, practices and guidelines serves as a ground for the revocation or cancellation of his, her or its registration and that the clerk of the court that made the finding must notify, in writing, the NCR of the finding.[664]

Suspension, amendment or rescission of debt rearrangement order

8.91 Debtors under debt review, like all other South Africans, are exposed to the volatility of the economy. They might be retrenched or experience a reduction in their income for a variety of reasons. It is therefore important that any debt rearrangement measure should provide for this reality. A debt rearrangement order can be rescinded or amended in terms of section 36(1)(d) of the MCA, which provides that the court may, upon application by any affected person, rescind or vary any judgment in respect of which no appeal lies. This provision is limited as it does not give the court sufficient guidance. The Commission

663 Clause 24(1) of the Bill.

664 Clause 24(2) of the Bill.

therefore recommend that the proposed Debt Rearrangement Bill provide for the rescission, suspension or amendment of a debt rearrangement order. The court should, upon application by the debtor or any interested party, reopen the proceedings and, on good cause shown, rescind, suspend or amend the debt rearrangement order.[665] If the debt counsellor applies for the amendment of a debt rearrangement order, it must be done with the written consent of the debtor.[666] The court should have the authority to make the following orders:[667]

(i) If the debtor is unable to pay any instalment, to suspend the debt re-arrangement order for a period not exceeding six months and suspend, for the corresponding period, the operation of any emoluments attachment order or garnishee order issued;

(ii) to amend the instalments to be paid in terms of the debt rearrangement order and make the necessary amendments to any emoluments attachment order or garnishee order issued; or

(ii) to authorise the issuing of an emoluments attachment order or garnishee order to ensure payments in terms of the debt rearrangement order.

8.92 When considering an application for the rescission of the order, the court should have the option of rescinding the order or making any order mentioned above.[668]

Transitional provisions

8.93 With regard to the Commission's recommendation that the laws concerning administration orders be repealed, it is important to provide administrators with the opportunity to register as debt counsellors if they choose to do so. A person who operates as an administrator on the date the proposed legislation comes into operation should be able to register as a debt counsellor on condition that he or she satisfies any prescribed education, experience or competency requirements.[669] Consequently, administrators who become debt counsellors will come under the regulation of the NCR. Furthermore, a debtor who is subject to an administration order on the date the proposed legislation comes into operation should be able to apply to court to convert his or her administration order to a debt rearrangement

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665 Clause 27(1) of the Bill.

666 Clause 27(2) of the Bll.

667 Clause 27(4) of the Bill.

668 Clause (5) of the Bill.

669 Clause 34(1).

order in terms of proposed legislation.[670] As regards debt counsellors, a person who was registered as a debt counsellor at the time of the commencement of the proposed legislation should be deemed to have been registered as such in terms of the proposed legislation.[671] Those who are under debt review in terms of the NCA should be deemed to be under debt review in terms of the proposed legislation.[672]

Discharge of debts

8.94 A problem faced by over-indebted consumers in South Africa is not that there are no alternatives to sequestration, but rather that the available alternatives – administration orders and debt review – do not provide for a discharge of debt.[673] According to Roestoff and Coetzee, the sequestration procedure is regarded as South Africa's principal debt relief measure, as it is the only procedure that leads to a discharge of debt.[674] The NCA provides for a limited form of discharge of debt in no-income or low-income circumstances. In terms of the NCA, consumers with unsecured debt amounting to a total of no more than R50 000 who receive no income or have a gross monthly income of R7 500 or less (on average for the preceding six months), and who are over-indebted may apply for debt intervention.[675] Debt intervention is available to those who do not qualify for sequestration and who are not subject to an administration order.[676] In terms of section 86A of the NCA the National Credit Regulator should consider whether the debts of a debt intervention applicant can be rearranged and refer the application either for such rearrangement or for suspension for a period of 12 months (which may be extended for one further period of 12 months) by the Tribunal if the assets of the debt intervention applicant are insufficient to allow for his or her debts to be rearranged. If the debtor after a period of 24 months still does not have sufficient income or assets to allow for his or her debts to be rearranged, the Tribunal may declare all or part of the consumer's debts extinguished.[677]

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670 Clause 34(2).

671 Clause 35.

672 Clause 36.

673 Mabe Z "Alternatives to bankruptcy in South Africa that provide for a discharge of debts: Lessons from Kenya" *PER / PELJ* 2019 (22) at 2.

674 Roestoff M and Coetzee H "Debt relief for South African NINA debtors and what can be learned from the European approach" *The Comparative and International Law Journal of Southern Africa* 2017 (50:2) 251–274 at 254.

675 See paragraphs (a) – (c) of the definition of "debt intervention applicant". The Commission do not recommend the inclusion of the debt intervention provisions in the proposed Debt Rearrangement Bill.

676 See paragraphs (d) of the definition of "debt intervention applicant".

677 Section 87A(5)(c)(ii).

8.95 In South Africa, an insolvent is automatically rehabilitated and discharged from debts after 10 years from the date of sequestration. As 10 years is a long period of time, there is an urgent need for alternative legislative interventions that would allow debtors in various financial positions to obtain a discharge of debts.[678] The Commission are of the view that the Department of Trade and Industry should consider providing for the discharge of unsecured debts, in particular of those debtors who qualify to apply neither for debt intervention in terms of the NCA nor for sequestration in terms of the Insolvency Act. As said previously, they are typically too well off to qualify for debt intervention and too poor to qualify for sequestration. The Commission believe that a debtor who has been under debt review for a period of seven years or more should have the right to apply to court for a discharge of the whole or a portion of one or more of his or her unsecured debts. However, the law should set strict conditions with which the debtor must comply in order to qualify for the discharge of his or her debts. Such conditions should include the requirement that the debtor should have made full and regular payments in terms of his or her debt rearrangement order and that the creditors concerned should have received at least the amount of their principal debt. "Principal debt" could be defined as follows: "**principal debt**, in relation to—

(a) a credit agreement, has the meaning ascribed to it in section 1 of the National Credit Act;

(b) a judgment debt, means the amount owed by the debtor in terms of the judgment, including the cost of recovery thereof as awarded by the court, but excluding interest; and

(c) any other debt in terms of this Act, means the original debt, fees or charges, excluding interest.

8.96 Consideration should be given to whether the debtor should still be over-indebted in order to qualify for a discharge. The discharge of a debt should also be linked to the review of a debtor's financial position. If a debt counsellor on reasonable grounds believes that the debtor's financial position has improved, he or she should review the regular payments made by the debtor with a view to increasing the debtor's weekly or monthly payments. If the debt counsellor concludes that the debtor's payments should be increased, he or she should apply to court for an amendment to the debtor's debt rearrangement order.[679] No creditor

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678 Mabe Z "Alternatives to bankruptcy in South Africa that provide for a discharge of debts: Lessons from Kenya" *PER / PELJ* 2019 (22) at 2.

679 An application for amendment of the debtor's debt rearrangement plan would be done in terms of clause 27(2) of the proposed Debt Rearrangement Bill.

should have a remedy against a debtor in respect of a debt or a portion of the debt that has been discharged.

8.97 The conditions for the discharge of a debt should include the requirement that the debtor must have complied with all reasonable requests of the debt counsellor to provide him or her with the information necessary to conduct a review of the debtor's financial position. This is important because it is very likely that debtors would refuse to provide their debt counsellors with information that would result in an increase of their payments; they might, however, be more willing to do so if they knew that it would help them to obtain a discharge.

8.98 However, debtors who do not qualify for debt review because they are unable to propose a viable debt rearrangement plan are left without a remedy.

8.99 With reference to the discussion in paragraph 8.94, the NCA provides that the NCR must assist a debt intervention applicant who does not qualify for debt intervention with the process of being declared over-indebted and to have his or her obligations rearranged.[680] For this purpose, a suitable employee of the NCR or any other suitable government official may be appointed as a debt intervention officer and as such is deemed to have been registered as a debt counsellor.[681] The Commission would like to point out that such an employee or official might not be able to assist with debt rearrangement according to the process set out in the proposed Debt Rearrangement Bill, which provides for a meeting of creditors. Hence the debt rearrangement of a debt intervention applicant should be limited to the provisions of the NCA, which provide that if the NCR, as a result of an assessment to determine whether the debt intervention applicant is over-indebted, concludes that the debt intervention applicant does not qualify for debt intervention, but is nevertheless experiencing difficulty in satisfying all his or her obligations under credit agreements in a timely manner, the NCR must recommend that he or she and the credit providers concerned voluntarily consider and agree on a debt rearrangement plan.[682] Furthermore, if each credit provider concerned accepts the proposal for a debt rearrangement plan, the NCR must comply with section 86A(8)(a), which provides that the debt counsellor must record the proposal in the

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680 Section 15A(1)(a) and (b) of the NCA.

681 Section 15A(2) of the NCA.

682 Section 86A(6)(b) of the NCA.

form of an order and file it as a consent order in terms of section 138 of the NCA.[683] However, if one of the credit providers concerned does not accept the proposal, the NCR must refer the matter to the Tribunal.[684]

8.100 The clause of the proposed Debt Rearrangement Bill that corresponds with section 86A(8)(a) of the NCA is clause 16(1). As the proposed Bill has changed the process to be followed to obtain the approval of the debtor's creditors for the debt rearrangement plan, the Commission recommend that section 86A(8)(a) of the NCA be amended as follows:

> (a) each credit provider concerned accept that proposal, the National Credit Regulator must record the proposal in the form of an order and if it is consented to by the debt intervention applicant and each credit provider concerned, file it as a consent order in terms of section 138 **[comply with section 86(8)*(a)* with the necessary changes]**; or

683 Section 86A(8)(a) of the NCA.

684 Section 86A(8)(b) of the NCA.

REPUBLIC OF SOUTH AFRICA

DEBT REARRANGEMENT BILL

(The English text is the official text of the Bill)

(MINISTER OF TRADE AND INDUSTRY)

BILL

To deal with the rearrangement of debt in a comprehensive manner; to amend the National Credit Act, 2005, so as to delete certain definitions and amend certain provisions; to provide for the registration of debt counsellors and payment distribution agents; to broaden the categories of persons who may apply for debt review; to provide for an improved debt review system that will assist debtors to pay all their debts over a reasonable period of time; to provide for debt rearrangement in cases of over-indebtedness, taking into account all the debtor's debts; to provide for a meeting of creditors; to provide for the cancellation of an application for debt review or the setting aside of a debt rearrangement order if the debtor is no longer over-indebted; to provide for the suspension of the payment of a debtor's debts under certain circumstances; to provide for the realisation of the assets of a debtor by the debt counsellor; to provide for the issuing of an emoluments attachment order or garnishee order; to provide for the suspension or amendment of a debt rearrangement order; to provide for codes of conduct; to repeal sections 74 to 74W of the Magistrates' Courts Act, 1944, and the provisions relating to debt review in the National Credit Act, 2005; to provide for certain offences; and to provide for matters connected therewith.

Parliament of the Republic of South Africa enacts as follows:—

ARRANGEMENT OF SECTIONS

CHAPTER 3
OVER-INDEBTEDNESS, DEBT REVIEW APPLICATION AND REMOVAL OF RECORD

CHAPTER 4
EXECUTION OF DEBT REARRANGEMENT ORDER

CHAPTER 5
ENFORCEMENT OF ACT
Part A
Searches and Offences

CHAPTER 1
DEFINITIONS AND OBJECTS OF THE ACT

Definitions

1. (1) In this Act—

'administration order' means an order made in terms of section 74 of the Magistrates' Courts Act;

'administrator' means a person appointed as an administrator by the court in terms of section 74E of the Magistrates' Courts Act;

'asset' includes investments and shares in a company;

'clerk of the court' means a clerk of the court appointed in terms of section 13 of the Magistrates' Courts Act and includes an assistant clerk so appointed;

'confidential information' means personal information that belongs to a person and is not generally available to or known by others;

'court' means a district court;

'credit bureau' has the meaning ascribed to it in section 1 of the National Credit Act;

'credit agreement' has the meaning ascribed to it in section 1 of the National Credit Act;

'creditor' means a person to whom a debt referred to in this Act is owed and includes a credit provider and a judgment creditor;

'credit provider' has the meaning ascribed to it in section 1 of the National Credit Act;

'date of application' means the date set down for the hearing of the application;

"debt" means any amount owing by a debtor, irrespective of whether such amount is immediately due and payable, or payable in future, or in future instalments, and includes an amount for the payment of damages ordered by a court or agreed to between the creditor and the debtor.[685]

'debt rearrangement order' means one or more orders made in terms of section 18;

'debtor' means a person, including a person who is unable to pay the amount of a judgment obtained against him or her in court or to pay his or her debts, who has applied for debt review in terms of section 11;

'deliver' means, subject to subsection (2), delivery by hand, by registered mail or, if agreed to by the intended recipient, by fax or e-mail, in which instance Part 2 of Chapter III of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002), applies; and "delivery" and "delivered" have corresponding meanings;

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685 See the exclusions under clause 11(2).

'income' means weekly or monthly or other periodical income derived from any source whatsoever;

'Insolvency Act' means the Insolvency Act, 1936 (Act No. 24 of 1936);

'inspector' means an inspector referred to in Part A of Chapter 8 of the National Credit Act;

'judgment creditor' means a judgment creditor as contemplated in the Magistrates' Courts Act;

'juristic person' includes a partnership, association or other body of persons, corporate or unincorporated, or a trust if—

(a) there are three or more individual trustees; or

(b) the trustee is itself a juristic person;

but does not include a stokvel;

'Magistrates' Courts Act' means the Magistrates' Courts Act, 1944 (Act 32 of 1944);

'Minister' means the member of Cabinet responsible for consumer credit matters or, where the context indicates another Minister, that Minister;

'mortgage agreement' has the meaning ascribed to it in section 1 of the National Credit Act;

'National Credit Act' means the National Credit Act, 2005 (Act No. 34 of 2005);

'national credit register' means the national register of credit agreements established in terms of section 69 of the National Credit Act;

'National Credit Regulator' means the body established in terms of section 12 of the National Credit Act;

'payment distribution agent' means a person who, on behalf of a debtor who has obtained a debt rearrangement order in terms of this Act, distributes payments to creditors or persons to whom that debtor owes a debt in terms of a court order, order of the Tribunal or an agreement;

'person', for purposes of this Act, means a natural person, unless the context indicates otherwise;

'prescribed' means prescribed by regulation and **'prescribe'** has a corresponding meaning;

'prohibited conduct' means an act or omission in contravention of this Act by—

(a) an unregistered person who is required to be registered to engage in such an act or omission;

(b) a debt counsellor; or

(c) a payment distribution agent;

'provincial credit regulator' has the meaning ascribed to it in section 1 of the National Credit Act;

'reckless credit' has the meaning ascribed to it in section 1 of the National Credit Act;

'registrant' means a person and, where the context so indicates, a juristic person that has been registered in terms of Chapter 2 of this Act;

'Republic' means the Republic of South Africa;

'spouse' means a person's—

(a) partner in a marriage in terms of the Marriage Act, 1961 (Act No. 25 of 1961);

(b) partner in a customary marriage in terms of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998);

(c) civil union partner as defined in section 1 of the Civil Union Act, 2006 (Act No. 17 of 2006);

(d) partner in a relationship in which the parties live together in a manner resembling a partnership contemplated in paragraph *(a)*, *(b)* or *(c)*;

'this Act' includes any regulation or code of conduct made under this Act or Schedule to this Act;

'Tribunal' has the meaning ascribed to it in section 1 of the National Credit Act.

(2) Proof of delivery is satisfied by—

(a) the signature or identifying mark of the recipient of the delivery made by hand;

(b) written confirmation by the postal service or its authorised agent of delivery to the relevant post office or postal agency;

(c) a transmission report that the fax was transmitted successfully; or

(d) a notification that the electronic mail was delivered successfully.

Objects of Act

2. The objects of this Act are to—

(a) address and relieve over-indebtedness of debtors through debt rearrangement;

(b) encourage debtors to pay their debts;

(c) provide for a consistent and harmonised system of debt rearrangement that gives priority to the eventual payment of all the debtor's debts; and

(d) discourage reckless credit granting by credit providers and contractual default by debtors.

CHAPTER 2
REGISTRATION REQUIREMENTS AND CODES OF CONDUCT

Registration of debt counsellors[686]

3. (1) A person may apply to be registered as a debt counsellor.

(2) A person may not offer or engage in the services of a debt counsellor or hold himself or herself out to the public to be authorised to offer any such service, unless that person is registered as such in terms of this Chapter.

(3) In addition to the disqualifications set out in section 6, an applicant for registration as a debt counsellor must—

(a) satisfy any prescribed[687] education, experience or competency requirements; or

(b) be in a position to satisfy within a reasonable period such requirements as the National Credit Regulator may determine as a condition for the applicant's registration.

(4) A debt counsellor may not collect and distribute monies on behalf of debtors.

(5) A credit provider may not have any direct or indirect interest that is inconsistent with the objects of this Act in the management or control of the business operations of a debt counselling business.[688]

Registration of payment distribution agents[689]

4. (1) A juristic person—

(a) may apply to be registered as a payment distribution agent; and

(b) may not offer or engage in the services of a payment distribution agent or hold itself out to the public to be authorised to offer any such service, unless it is registered as a payment distribution agent in terms of this Chapter.

(2) A debtor is not obliged to use the services of a payment distribution agent: Provided that he or she submits proof of payments to the debt counsellor on a monthly basis for record keeping.

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686 See section 44 of the NCA.

687 Regulation 10 of the National Credit Regulations sets out the education, experience and competence requirements a person who applies for registration as a debt counsellor must meet.

688 See section 44A(5) of the NCA.

689 See section 44A of the NCA.

(3) In addition to the disqualifications set out in section 6, an applicant for registration as a payment distribution agent must satisfy any prescribed[690] education, experience or competency requirements.

(4) Payment distribution agents must—[691]

(a) perform and adhere to the prescribed duties and obligations;[692]

(b) maintain fidelity insurance and trust accounts; and

(c) submit such financial accounts as may reasonably be required by the National Credit Regulator for purposes of a financial audit.

(5) A credit provider or a debt counsellor may not have any direct or indirect interest that is inconsistent with the objects of this Act in the management or control of the business operations of a payment distribution agent.[693]

Application for registration[694]

5. (1) An application for registration as a debt counsellor or a payment distribution agent must be made, in the prescribed manner and form,[695] to the National Credit Regulator.

(2) The National Credit Regulator may—

(a) require such further information relevant to an application contemplated in subsection (1) as it deems fit; and

(b) refuse an application if the applicant has not within the prescribed time submitted any information required in terms of paragraph *(a)*.

(3) If an application complies with the provisions of this Act and the applicant meets the criteria for registration set out in this Act, the National Credit Regulator must—

(a) further consider the application by balancing the applicant's education, experience and competence against any prescribed standards; and

(b) after considering the application, register the applicant subject to such conditions of registration as the National Credit Regulator may propose.

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690 Regulation 10A of the National Credit Regulations stipulates the education, experience and competence requirements with which a person applying to be registered as a payment distribution agent must comply.

691 See section 44A(4) of the NCA.

692 See Regulation 10A(9).

693 See section 44A(5) of the NCA.

694 See section 45 of the NCA.

695 Regulation 4 of the National Credit Regulations deals with the manner and form of an application for registration as a debt counsellor or payment distribution agent.

(4) The provisions of section 48(4) to (7) of the National Credit Act apply, with the necessary changes, to an application for registration as a debt counsellor.

(5) The Minister must prescribe—

(a) the criteria for registration;

(b) the duties and obligations of a registrant; and

(c) the fees that may be charged by a registrant.

Disqualification to operate as debt counsellor or payment distribution agent[696]

6. (1) A credit provider registered in terms of section 40 of the National Credit Act, a juristic person or an association of persons may not be registered as a debt counsellor.

(2) A person may not be registered as a debt counsellor or payment distribution agent if that person—

(a) is under the age of 18 years;

(b) is insolvent;

(c) as a result of a court order, is listed on the register of excluded persons in terms of section 14 of the National Gambling Act, 2004 (Act No. 7 of 2004);

(*d)* is subject to an order of a competent court holding that person to be mentally unfit or disordered;

(e) has ever been removed from an office of trust on account of misconduct relating to fraud or the misappropriation of money, whether in the Republic or elsewhere;

(f) has ever been a director or member of a governing body of an entity at the time that such an entity has—

(i) been involuntarily deregistered in terms of a public regulation;

(ii) brought the consumer credit industry into disrepute; or

(iii) acted with disregard for consumer rights generally;

(g) has been convicted during the preceding 10 years, in the Republic or elsewhere, of—

(i) theft, fraud, forgery or uttering a forged document, perjury, or an offence under the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), or comparable legislation of another jurisdiction;

(ii) a crime involving violence against another person; or

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696 See sections 46, 47 and 48 of the NCA.

(iii) an offence in terms of this Act or the National Credit Act, a repealed law or comparable provincial legislation, and has been sentenced to imprisonment without the option of a fine, unless that person has received a grant of amnesty or free pardon for the offence; or

(h) has been struck off the roll of attorneys or if proceedings to strike his or her name off the roll of attorneys or to suspend him or her from practice as an attorney have been instituted.

(3) In addition to the disqualifications set out in subsection (2), a person may not be registered as a debt counsellor if that person is—

(a) on the date of commencement of this Act, subject to debt review in terms of this Act; or

(b) engaged in, employed by or acting as an agent for a person that is engaged in—

(i) debt collection;

(ii) the operation of a credit bureau;

(iii) credit provision; or

(iv) any other activity prescribed by the Minister on the grounds that there is an inherent conflict of interest between that activity and debt counselling.

(4) A juristic person may not be registered as a payment distribution agent if an individual who would be disqualified from registration in his or her own name in terms of subsection (5) exercises general management or control of or has a financial interest in that juristic person, alone or in conjunction with others.

(5) If an individual contemplated in subsection (4) becomes disqualified from registration in his or her own name after the juristic person was registered as a payment distribution agent, he or she must advise, in the prescribed manner and form, the registrant and the National Credit Regulator of the facts relating to such disqualification.[697]

(6) The National Credit Regulator must deregister—

(a) a person referred to in subsection (2) or (3); or

(b) subject to subsection (7), a juristic person referred to in subsection (5);

if that juristic person or individual contemplated in subsection (5) becomes disqualified in terms of this section at any time after registration.

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697 See clause 8(5)*(d)*(i).

(7) The National Credit Regulator may impose such reasonable conditions as it deems fit for the continuation of the registration of a juristic person referred to in subsection (5) with the aim of ensuring continued compliance with this Act.

Application of the National Credit Act to registration

7. Sections 49 to 59 of the National Credit Act apply, with the necessary changes, to an application for registration in terms of Chapter 2 of this Act.[698]

Codes of conduct

8. (1) Subject to subsections (2), (3) and (4), the Minister must prescribe a code of conduct for—

(a) debt counsellors;[699] and

(b) payment distribution agents.[700]

(2) The Minister, before putting into operation a code of conduct contemplated in subsection (1), must publish the proposed code of conduct in the *Gazette* together with a notice stating that he or she intends to issue the code and inviting interested persons to submit to him or her, within such period as is specified in the notice, any objections to or representations concerning the proposed code of conduct.

(3) The National Credit Regulator must, after publication of the code of conduct as provided in subsection (2) and within the prescribed period—

(a) consult with the persons conducting business in the industry concerned with a view to familiarising them with the content of the code of conduct and to obtaining their views and comments on that code;

(b) give due consideration to the submissions made on the code of conduct; and

(c) revise, as may be required, the code of conduct published in terms of subsection (2).

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698 This provision might not be necessary in the light of the proposed amendments to sections 49 to 59 of the NCA as set out in the Schedule.

699 The NCR has drafted the "Debt Counsellors' Code of Conduct for Debt Review", which came into effect on 1 May 2013. The code of conduct is, however, not mandated by the NCA, which raises the question whether the code of conduct is enforceable. However, the code of conduct does provide that the NCR will monitor the implementation of and compliance with the code.

700 The NCR has not drafted a code of conduct for payment distribution agents as it did for debt counsellors. However, DC Partner (Pty) Ltd, Hyphen Technology (Pty) Ltd, Intuitive PDA (Pty) Ltd and CollectNet (Pty) Ltd are the four NCR accredited payment distribution agents and are also members of the Payment Distribution Agent Association of South Africa (PDASA), a non-profit association established in 2009.

(4) The Minister may, after consultation with the National Credit Regulator, publish in the *Gazette* the revised code of conduct for public comment, after which the provisions of subsection (3), with the necessary changes, apply.

(5) A code of conduct as contemplated in subsection (1) must at least ─

(a) set standards of professional conduct for the performance of functions in terms of this Act;

(b) provide for cooperation amongst all role-players concerned;

(c) in the case of debt counsellors ─

(i) give information for debtors about the benefits, consequences, costs and process of debt review;

(ii) provide for ongoing assistance to debtors to ensure that they continue to pay their debts under debt review; and

(iii) introduce measures to be taken if a debtor without reasonable grounds fails to pay his or her debts;

(d) in the case of payment distribution agents—

(i) set out the consequences of non-compliance with section 6(5); and

(ii) introduce measures to ensure effective communication with debtors about payments received and distributions made;

(e) establish a procedure for making and dealing with complaints alleging a contravention of the code of conduct; and

(f) establish a process for appeal against a decision taken in respect of an alleged contravention of the code of conduct.

(6) A code of conduct issued in terms of this section comes into operation on a date fixed by the Minister by notice in the *Gazette* and is binding on every industry or profession to which that code refers and applies.

(7) The National Credit Regulator─

(a) must monitor the effectiveness of a code of conduct issued in terms of this section;

(b) may, on reasonable grounds, request persons who conduct business within the industry or profession concerned to provide the information necessary for purposes of─

(i) monitoring in terms of paragraph *(a)*; and

(ii) reviewing the effectiveness of a prescribed code of conduct to meet the purposes of this Act;

(c) must take all reasonable steps to─

(i) publicise the existence and contents of a code of conduct issued in terms of this section to inform the public; and

(ii) inform the public on how and where to obtain a copy of a code of conduct referred to in subparagraph (i); and

(d) must, as long as the code of conduct remains in force, make—

(i) it available on the National Credit Regulator's website; and

(ii) copies of it available for inspection by members of the public free of charge at the offices of a provincial credit regulator.

(8) *(a)* The Minister may amend a code of conduct issued in terms of this section.

(b) The provisions of subsections (2), (3) and (4) apply, with the necessary changes, to any amendment referred to in paragraph *(a)*.

Head office or branch office of debt counsellor

9.(1) The head office or a branch office of a debt counsellor must be within a 50-kilometre radius of the place where the debtor resides, is employed or carries on business.

(2) Despite subsection (1), the court may hear an application for debt review if—

(a) it is satisfied that the financial burden to the debtor caused by travelling to the head office or a branch office of the debt counsellor would not be greater than it would have been if a debt counsellor was appointed whose office was within a 50-kilometre radius of the place where the debtor resides, is employed or carries on business; or

(b) the office of the nearest debt counsellor was situated more than 50 kilometres from the place where the debtor resides, is employed or carries on business.

(3) Any service, information or document relating to a debt review application or debt rearrangement order provided by or in possession of the head office of a debt counsellor must be accessible through or at any of its branch offices.

CHAPTER 3

OVER-INDEBTEDNESS, DEBT REVIEW APPLICATION AND REMOVAL OF RECORD

Over-indebtedness

10. For purposes of determining whether an applicant for debt review is over-indebted as contemplated in section 79 of the National Credit Act, the obligations referred to in

subsection (1) of that section include debt as defined in this Act and any interest on and costs in respect of the recovery of such debt.

Application for debt review[701]

11. (1) A debtor may, in the prescribed manner and form,[702] apply to a debt counsellor to have him or her declared over-indebted as contemplated in section 79 of the National Credit Act.

(2) An application in terms of this section may not be made in respect of and does not apply to—

(a) a judgment debt that arises from a default on a credit agreement which formed part of a consent order in terms of section 138[703] of the National Credit Act or a debt rearrangement order in terms of section 18;[704]

(b) debt between parties contemplated in section 4(2)*(b)* of the National Credit Act;[705]

(c) an agreement contemplated in section 4(6)*(b)* of the National Credit Act, except any overdue amount in terms of that agreement; and[706]

(d) payment towards the maintenance of any person, including arrear maintenance.[707]

(3) A debt counsellor—

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701 See section 86 of the NCA.

702 Regulation 24(1) of the National Credit Regulations sets out the form and content with which an application for debt review must comply.

703 See also clause 16(1) of this Bill and the proposed amendment to section 138 of the National Credit Act as set out in the Schedule.

704 Persons who initially failed to comply with their financial obligations under debt review should not be allowed to apply again for debt review once judgment has been obtained against them. Debt review should be reserved for those who are serious about meeting their financial obligations over a reasonable period of time, if assisted to do so. Those who want to use it as an escape route not to comply with their financial obligations should not benefit from it.

705 Loans between family members, partners and friends on an informal basis are excluded from debt review.

706 According to section 4(6) of the NCA, a utility or continuous service agreement (e.g. fitness service contracts, internet contracts, cellphone service contracts, garden and security services) does not constitute a credit facility, except overdue amounts in terms of such agreements.

707 This will include maintenance in terms of a maintenance order as well as maintenance in terms of an agreement between two or more persons. The exclusion of arrear maintenance from debt review will prevent the non-payment of maintenance for the purpose of including the arrear maintenance under debt review.

(a) may require the debtor to pay an application fee, not exceeding the prescribed amount, before accepting an application in terms of subsection (1); and

(b) may not require or accept a fee from a creditor in respect of an application in terms of this section.

(4) On receipt of an application in terms of subsection (1), a debt counsellor must—

(a) provide the debtor with proof of receipt of the application;

(b) deliver notice, in the prescribed manner and form, to—[708]

(i) all creditors that are listed in the application; and

(ii) every registered credit bureau;

(c) verify, in the prescribed manner, the information provided in terms of subsection (1); and

(d) request each creditor of the debtor to consider reducing the interest rate on the debt the debtor owes him or her.

(5) A debtor who applies to a debt counsellor, and each creditor referred to in subsection (4)*(b)*(i), must—

(a) comply with any reasonable request by the debt counsellor to facilitate the evaluation of the debtor's state of indebtedness and the prospects for responsible debt rearrangement; and

(b) participate in good faith in the review and in any negotiations designed to result in responsible debt rearrangement.

(6) A debt counsellor who has accepted an application in terms of this section must, in the prescribed manner[709] and within the prescribed period, determine—

(a) in terms of section 79 of the National Credit Act whether the debtor appears to be over-indebted; and

(b) in terms of section 80 of the National Credit Act whether any of the debtor's credit agreements appear to be reckless.

(7) If, as a result of a determination in terms of subsection (6), a debt counsellor concludes on reasonable grounds that—

(a) the debtor is not over-indebted, the debt counsellor must reject the application, in the prescribed manner,[710] even if he or she has concluded that a particular credit agreement was reckless at the time it was entered into;

(b) the debtor—

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708 See form 17.1 contained in Schedule 1 of the National Credit Regulations.

709 See regulation 24(7) and (8) of the National Credit Regulations.

710 See regulation 25 of the National Credit Regulations.

(i) is over-indebted; or

(ii) is not over-indebted, but is nevertheless experiencing, or is likely to experience, difficulty in paying all his or her debts in a timely manner,

the debt counsellor must recommend that the debtor and his or her creditors voluntarily consider and agree on a debt rearrangement plan, which must be considered at a meeting of creditors contemplated in section 14.

(8) If a debt counsellor rejects an application as contemplated in subsection (7)*(a)*, the debtor, with leave of the court, may, in the prescribed manner[711] and form, apply directly to the court for a debt rearrangement order.

(9) For purposes of section 19 of this Act, the debt counsellor must, upon a conclusion in terms of subsection 7*(b)* and prior to the date of the meeting of creditors contemplated in section 14, assist the debtor to identify assets that is not essential for the debtor or his or her dependants' daily living or needed for the debtor's occupation, trade or business.

(10) A debt counsellor is entitled to a prescribed fee for the determination of reckless credit, only if the court has made a declaration of reckless credit.[712]

Reckless credit[713]

12. (1) If during a determination contemplated in section 11(6)*(b)* there are reasonable grounds to suspect that one or more of the debtor's credit agreements included in that determination is a reckless credit agreement, the debt counsellor must report that suspected reckless credit agreement to—

(a) the National Credit Regulator, if the debt counsellor rejects the application as contemplated in section 11(7)*(a)*; or

(b) the magistrate's court, if the debt counsellor makes a recommendation contemplated in section 11(7)*(b)*.

(2) A credit provider must, within seven business days of receipt of a request and at a fee not exceeding the maximum prescribed fee, provide a debt counsellor with the following information requested in relation to the debtor concerned:

(a) The application for credit concerned;

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711 See regulation 26 of the National Credit Regulations.

712 The NCR announced a reckless lending fee of R1500 per debt counselling application, taking into account the amount of work a debt counsellor have to do before he or she can recommend that the court should declare a credit agreement to be reckless credit,. This fee was, however, withdrawn by the NCR as it was being abused by debt counsellors. The inclusion of the words "only if the court has made a declaration of reckless credit" will ensure that debt counsellors obtain all the relevant information to enable them to consider whether a credit agreement may be reckless credit.

713 See also section 82A of the NCA.

(b) the pre-agreement statement;

(c) the quotation;

(d) the credit agreement entered into with the debtor;

(e) documentation in support of the steps taken in terms of section 81(2) of the National Credit Act;

(f) a record of payments made; and

(g) documentation in support of any steps taken after default by the debtor.

(3) The report to the National Credit Regulator referred to in subsection (1)*(a)* is deemed to be a complaint in terms of section 136 of the National Credit Act, and the National Credit Regulator must investigate that report in accordance with section 139 of the National Credit Act.

(4) The Tribunal may impose an administrative fine contemplated in section 151 of the National Credit Act if a credit provider intentionally failed to comply with subsection (2).

Call for meeting of creditors

13. (1) The debt counsellor must, in the prescribed manner, convene, at such time, date and place as he or she considers to be most convenient for all parties concerned, a meeting of all creditors to whom notice was delivered in terms of section 11(4)*(b)*(i) for the purpose of considering and approving the debtor's proposed debt rearrangement plan.

(2) The debt counsellor must deliver notice of the meeting to the creditors at least 10 days before the date on which the meeting is to be held and must in such notice state the time and place at which the meeting is to be held.

(3) The notice referred to in subsection (2) must include the proposed debt rearrangement plan.

(4) A debt counsellor need not hold a meeting of creditors if the majority, reckoned in value, of the creditors who are entitled to vote at that meeting have, before the date of the meeting, delivered, in writing, their approval of the debt rearrangement plan to the debt counsellor.

(5) If the debt counsellor has received approval of the debt rearrangement plan as contemplated in subsection (4), he or she must, before the date of the meeting, deliver in the prescribed manner notice of such approval to all the creditors referred to in subsection (1).

Meeting of creditors[714]

14. (1) The debt counsellor must preside over the meeting of creditors and must keep a record of the proceedings, which record must—

(a) indicate the names of the creditors who attended the meeting, who at the meeting voted for or against the debt rearrangement plan, and what modifications were requested and made; and

(b) be available during business hours for inspection, free of charge, by the debtor and creditors or their representatives.

(2) A creditor may, with the permission of the debt counsellor, participate in the meeting of creditors by such communication facility as would permit all persons participating in the meeting to communicate concurrently with each other, and a creditor participating in the meeting by such means is deemed to be present at the meeting.

(3) A creditor who approved the debt rearrangement plan as contemplated in section 13(4) does not need to attend the meeting of creditors, and such approval will have the same effect as if the creditor was present and voted at the meeting.

(4) The debt counsellor must seek a decision from the creditors on whether or not they approve the proposed debt rearrangement plan.

(5) Every creditor is entitled to vote at the meeting of creditors unless his or her claim against the debtor is in dispute.

(6) Every matter on which a creditor may vote must be decided by a majority of votes, reckoned in value, of the creditors present at the meeting,[715] and every creditor may vote either personally or by a representative specially authorised to do so or acting under a general power of attorney.

(7) The meeting of creditors may approve the proposed debt rearrangement plan with or without modifications, but may not modify the plan unless the debtor consents, in the prescribed manner, to every modification.[716]

(8) A debt rearrangement plan that was approved as contemplated in subsection (7) is binding on every creditor who was entitled to vote at the meeting of creditors.

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714 Having a meeting of creditors to discuss the debtor's proposed debt rearrangement plan will reduce the number of debt review cases that must be referred to court. Furthermore, it will reduce the number of postponements in debt review cases as a result of insufficient information, thereby reducing legal costs.

715 The inclusion of the words "of the creditors present at the meeting" will encourage creditors to attend the meeting as no specific quorum is required for the meeting. The majority vote in value will be the deciding factor.

716 In order to avoid calling a second meeting of creditors (which may have cost implications for the debtor), the debt counsellor should contact the debtor (by phone, skype, e-mail etc.) during the meeting to obtain his or her consent. This means that the debt counsellor must arrange with the debtor to be available on the day of the meeting.

Challenging decision of meeting of creditors

15. (1) A creditor who was entitled to vote at the meeting of creditors may make an application to court to review the decision to approve the debt rearrangement plan as contemplated in section 14(7), on one or both of the following grounds, namely—

(a) that the debt rearrangement plan unfairly prejudices his or her interests; and

(b) that there has been a material irregularity at or in respect of the meeting of creditors.

(2) A creditor who makes an application contemplated in subsection (1) must, within the prescribed period, deliver notice of the application to the debt counsellor.

(3) A debt counsellor who has received a notice in terms of subsection (2) may, with the written consent of the debtor, oppose the application of the creditor.

(4) The court must deal with the issues in dispute in a summary manner and may make an order contemplated in section 18(4)*(a)* and *(b)*.

Filing of debt rearrangement plan and referral of application to court

16. (1) If—

(a) the meeting of creditors approve the debt rearrangement plan as contemplated in section 14(7); and

(b) the debt counsellor does not receive a notice in terms of section 15(2) within the time period provided for in that section,

the debt counsellor must record the debt rearrangement plan in the form of an order and file it as a consent order in terms of section 138 of the National Credit Act.[717]

(2) If the meeting of creditors contemplated in section 14 reject the debt rearrangement plan of the debtor, the debt counsellor must—

(a) refer the application for debt review to court by lodging the application, including the debt rearrangement plan, and proof of notice to the creditors in terms of paragraph *(b)* with the clerk of the court;

(b) at least 10 days before the date of application, deliver to each of the creditors a copy of such application, on which must appear the case number under which the original application was filed; and

(c) deliver notice, in the prescribed manner, to every registered credit bureau.

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[717] See Schedule for proposed amendment to section 138 of the NCA.

(3) A referral in terms of subsection (2)*(a)* must be made to the court of the district in which the debtor resides, is employed or carries on business or the court of the district in which judgment was obtained against the debtor.

(4) The application contemplated in subsection 2 must be supported by an affidavit, which should contain the prescribed information,[718] by the debt counsellor.

Termination of debt review by creditor

17. (1)*(a)* If a debtor is in default of a debt that is under debt review or being reviewed in terms of this Act, the creditor in respect of that debt may, at any time at least 60 business days after the date on which the debtor for the first time applied for the debt review, deliver notice to terminate the review in the prescribed manner to—

(i) the debtor;

(ii) the debt counsellor; and

(iii) the National Credit Regulator.

(b) No creditor may withdraw an application for debt review lodged in terms of this Act, if such application for review has already been filed in a court.

(2) If a creditor who has delivered notice to terminate a review as contemplated in subsection (1)*(a)* proceeds to enforce that debt in terms of Part C of Chapter 6 of the National Credit Act or any other law, the court hearing the matter may order that the debt review resume on such conditions as the court considers just in the circumstances.

(3) Sections 65A to 65K of the Magistrates' Courts Act apply, with the necessary changes, to the termination of debt review in respect of a judgment debt and any reference in those sections to the judgment concerned, the judgment creditor and the judgment debtor must be construed as a reference to the debt rearrangement order concerned, the debt counsellor and the debtor, respectively.

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718 Regulation 2 of the Debt Counselling Regulations, 2012, provides that the following should be set out in the affidavit:

(a) An exposition of the debt counsellor's assessment conducted in terms of section 86(6) of the Act, read with sections 78(3), 79 and 80 of the Act and regulation 24 of the Regulations;
(b) the relief claimed in terms of section 86(7)*(c)*;
(c) full particulars of each credit provider;
(d) full particulars of the consumer and the debt counsellor; and
(e) confirmatory affidavit from the affected consumer.

Rearrangement of debtor's debts by court[719]

18. (1) If a debt counsellor refers an application to court[720] in terms of section 16(2)*(a)* or 22(1),[721] or if a debtor applies to the court in terms of section 11(9), the court must conduct a hearing and, having regard to the information before it and the debtor's financial means, prospects and obligations, may—

(a) reject the application;

(b) make an order—

(i) declaring any credit agreement to be reckless as contemplated in section 80 and section 83(1) of the National Credit Act;

(ii) contemplated in section 83(2) or (3) of the National Credit Act, if the court concludes that the agreement is reckless;

(iii) that one or more of the debtor's debts be re arranged by—

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

(bb) postponing for a specified period the dates on which payments for the debt are due;

(cc) extending the period of the debt and postponing for a specified period the dates on which payments are due for the debt;

(dd) determining the rate of interest, which may be zero in respect of unsecured debt, may not be less than the repurchase rate, plus such percentage as is indicated in the industry guidelines referred to in section 24, in respect of secured debt, and may not exceed interest according to the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), or the fees or other charges, excluding charges contemplated in section 101(1)*(e)* of the National Credit Act, under a credit agreement for such a period as the court deems fair and reasonable; and

(ee) recalculating the debtor's debts because of contraventions of Part A or B of Chapter 5 or Part A of Chapter 6 of the National Credit Act;

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719 See section 87 of the NCA.

720 An application for debt review will always be heard in the magistrate's court even though it might exceed the monetary jurisdiction of the court. This view is supported by section 86 of the NCA, which expressly provides that a debt review matter must be referred to the magistrate's court.

721 See also the alternative to clause 22(1), i.e. clause 22(2).

(iv) excluding one or more secured debts from the debtor's debt review: Provided that such an asset concerned is not essential for the debtor or his or her dependant's daily living or needed for the debtor's occupation, trade or business; and

(v) that a judgment debt be paid in specified instalments or otherwise;

(c) make an order suspending payment of the debtor's debts for a period not exceeding six months if the debtor or the joint estate of the debtor[722]—

(i) is unable to propose a viable debt rearrangement plan;

(ii) does not qualify for a sequestration order in terms of the Insolvency Act; and

(iii) receives a gross income that exceeds the qualifying amount for debt intervention in terms of the National Credit Act,

provided that the court is satisfied that there is a likelihood that the debtor would be able to propose a viable debt rearrangement plan after the six month period.

(d) if the court makes an order in terms of subsection *(c)*, order that—

(i) the debt counsellor must realise any asset that is not essential for the debtor or his or her dependant's daily living or needed for the debtor's occupation, trade or business;

(ii) subject to available resources, the National Credit Regulator must provide the debtor with—

(aa) counselling on financial literacy; and

(bb) access to training to improve the debtor's financial literacy; and

(iii) the debtor's revised debt rearrangement plan must be submitted to court within 10 days after expiry of the six-month period referred to in paragraph *(c)*;

(e) make an order declaring the debtor no longer over-indebted and cancelling the application for debt review or setting aside the debt rearrangement order, after which any order, agreement or concession regarding any of the debts under the debtor's debt rearrangement plan will cease to exist.[723]

OR

(e) make an order declaring the debtor no longer over-indebted and setting aside the debt rearrangement order, after which any order, agreement or

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722 As regards the suspension of the payment of credit agreement debt, reference may have to be made to section 84 of the National Credit Act, which deals with the effect of the suspension of credit agreements.

723 See the first clause 22.

concession regarding any of the debts under the debtor's debt rearrangement plan will cease to exist.[724]

(2) Section 19(2) and (5) applies, with the necessary changes, when the court makes an order in terms of subsection (1)*(d)*(ii).

(3) An order in terms of subsection 1*(c)* may not be extended for a further period.

(4) If, on an application in terms of section 15(1), the court—

(a) is satisfied as to either of the grounds provided for in that section, it may make an order—

(i) revoking the approval of the debt rearrangement plan by the meeting of creditors; and

(ii) directing the debt counsellor to call a further meeting of creditors to consider the original or a revised debt rearrangement plan subject to such conditions as the court may impose; and

(b) finds that a creditor referred to in section 15—

(i) has refused unreasonably to approve the debt rearrangement plan;

(ii) neither provided his or her approval of the debt rearrangement plan to the debt counsellor as contemplated in section 13(4) nor attended the meeting of creditors as contemplated in section 14,

the court may make a cost order against such a creditor.

(5)*(a)* At the hearing of an application for debt review─

(i) the debtor may be questioned by the court and by any creditor who has received notice in terms of section 16(2)*(b)* or by the legal representative of such creditor with regard to─

(aa) his or her assets and liabilities;

(bb) his or her present and future income and that of his or her spouse living with him or her;

(cc) his or her standard of living, and the possibility of economising; and

(dd) any other matter that the court may deem relevant;

(ii) the debt counsellor or his or her representative may furnish evidence or make submissions in substantiation of the proposed debt rearrangement plan;

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[724] See the second clause 22.

(iii) the court may request the debt counsellor to provide any information or to answer any question by the court in respect of the application.

(b) Paragraph *(a)*(i)*(bb)* does not apply to a spouse married out of community of property or a spouse referred to in paragraph *(d)* of the definition of "spouse", except in so far as it relates, for the purpose of determining the debtor's essential weekly or monthly expenses, to the income of such spouse who lives with the debtor.

(c) The court may disallow a question which the court considers to be irrelevant or which may prolong the questioning unnecessarily.

(d) The court must question the debtor on whether—

(i) the debt counsellor or the person who has prepared the application has explained to the debtor the benefits, consequences, costs and debt review process and whether the debtor understands it; and

(ii) the debtor resides, is employed or carries on business in the district of the court, except if the application for debt review was lodged with the court referred to in section 65I of the Magistrates' Courts Act.[725]

(e) The court may rearrange the debtor's debt based on a reduced interest rate agreed to between the debt counsellor and the creditor.

(f) After having called for and considered all relevant information, including, but not limited to, any existing emolument attachment order, the court must be satisfied that the debtor will have sufficient means for his or her maintenance and that of his or her dependants after payment of the instalment.

(6) No debt rearrangement order may be granted if the court finds that—[726]

(a) the debtor obtained credit or the extension of credit with fraudulent intent within six months before the date of application;

(b) either an unsuccessful application was made for the granting of a debt rearrangement order or a debt rearrangement order was rescinded within 12 months before the date of application;

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725 The SALRC recommend that section 65I of the Magistrates' Courts Act be amended by replacing all references to an administration order and to section 74 with the applicable provisions of this Act. It should be kept in mind that an application for a debt rearrangement order may not be made in respect of a judgment debt that arises from a default on a credit agreement that formed part of a consent order in terms of section 138 of the National Credit Act or a debt rearrangement order in terms of clause 18. See in this regard clause 11(2)*(a)* of the Bill.

726 Form 16 (in Schedule 1 to the National Credit Regulations) and regulation 24(1)(b) should be amended to require furnishing information relating to subparagraphs *(a –(c)*.

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(c) the debtor has received a discharge in terms of the Insolvency Act within four years before the date of application; or

(d) the debtor does not understand the benefits, consequences, costs and process of debt review,

unless good cause is shown why the order should nevertheless be granted.

(7) A debt rearrangement order must be in the prescribed form and must lay down the amount of the weekly or monthly or other payments to be made by the debtor in terms of the order, taking into account the future income, if any, of a spouse married in community of property.

Realisation of assets by debt counsellor

19. (1) A debt counsellor may, with the written permission of the debtor, realise an asset of the estate of the debtor for the purpose of distributing the proceeds to the creditors of the debtor.

(2) An asset referred to in subsection (1) which is the subject of a credit agreement regulated by the National Credit Act may not be realised except with the written permission of the credit provider and on such reasonable conditions as the credit provider may impose.

(3) If the debtor without reasonable grounds refuses to give the debt counsellor permission to realise an asset, the court may authorise the debt counsellor to realise the asset, and in granting any such authorisation the court may impose such conditions as it deems fit.

(4) Whenever the court authorises a debt counsellor to realise an asset, the court may amend the payments to be made in terms of the debt rearrangement order accordingly.

(5) When considering whether or not an asset should be realised, the court must consider, but is not limited to, the following factors:

(a) whether the asset is essential for the debtor or his or her dependants' daily living;

(b) whether the asset is needed for the debtor's occupation, trade or business; and

(c) the value and equity of the asset.

Duties of debtor

20. (1) A debtor must continue with payment in respect of each debt listed in his or her debt review application while awaiting the outcome of that application and, if the debt counsellor

has referred the application to court in terms of section 16(2)*(a)*, while awaiting the outcome of the court application.

(2) A debtor who is subject to a debt rearrangement order and changes his or her place of residence, business or employment must, in the prescribed manner and form, deliver notice to the clerk of the court and the debt counsellor of his or her new place of residence, business or employment, and if he or she moves to any other district, the court under whose supervision the debt rearrangement order is executed may transfer the proceedings to the court of that district.

Duties of debt counsellor

21. (1) A debt counsellor who has accepted an application for debt review made in terms of section 11(1) must provide the debtor with a prescribed letter setting out—

(a) the debtor's rights and duties;

(b) the benefits, consequences, costs and process of debt review;

(c) the debt counsellor's rights[727] and duties;

(d) the remedies provided for in this Act and the National Credit Act if the debt counsellor fails to carry out his or her duties in terms of this Act; and

(e) the procedure to refer a complaint against the debt counsellor to the National Credit Regulator.

(2) The letter referred to in subsection (1)—

(a) must be available in the official language the debtor understands best; and

(b) may be delivered to the debtor by registered mail, fax or electronic mail, or by personal delivery to an address or number indicated by the debtor as his or her physical or electronic-mail address or fax number.

(3) A debt counsellor must—

(a) in the prescribed manner, maintain records relating to his or her registered activities ;[728] and

(b) in the prescribed form and by the prescribed date submit to the National Credit Regulator an annual compliance report and statistical return.[729]

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727 This would include fees etc.

728 See regulation 55(1)(a) and (2) to (5) and regulation 60(1) of the National Credit Regulations.

729 See regulation 69 of the National Credit Regulations.

Debtor no longer over-indebted[730]

22. (1) A debtor—

(a) who has applied to a debt counsellor for debt review in terms of section 11 may apply to court to—

(i) declare[731] him or her no longer over-indebted; and

(ii) order the cancellation of the application for debt review; or

(b) who was granted a debt rearrangement order in terms of section 18 may apply to court to have the order set aside if he or she is no longer over-indebted.

(2) The court that hears an application in terms of subsection (1) must consider, but is not limited to, the following matters:

(a) any change in the debtor's financial position;

(b) whether or not the debtor has paid all the arrears on the debts under his or her debt rearrangement plan; and

(c) whether or not the debtor is able to pay off the rest of his or her debts in a satisfactory manner.

(3) The court referred to in subsection (2) may make an order that the debtor is no longer over-indebted as contemplated in subsection 18(1)*(e)*.

(4) The debt counsellor must deliver notice, in the prescribed manner and form, to all the creditors referred to in section 11(5)*(b)*(i) and every registered credit bureau of the cancellation of the application for debt review or the setting aside of the debt rearrangement order.

(5) On receipt of a copy of a court order declaring the debtor no longer over-indebted and cancelling the application for debt review or setting aside the debt rearrangement order, a credit bureau must expunge from its records—

(a) the fact that the debtor has applied for debt review or was subject to a debt rearrangement order;

(b) any information relating to any default by the debtor that may have—

(i) brought about the debt rearrangement; or

(ii) been considered in making the debt rearrangement order; and

(c) any record that a particular credit agreement was subject to the debt rearrangement order concerned.

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730 See *Van Vuuren v Roets and Others* (37407/2018) [2019] ZAGPJHC 286 (3 September 2019).

731 Unlike the High Court, a magistrate's court cannot make declaratory orders. However, the proposed provision confers a limited declaratory power on the magistrates' courts with a specific purpose.

OR

Debtor no longer over-indebted

22. (1) A debt counsellor who has accepted an application for debt review in terms of section 11 may, before the application is referred to court in terms of section 16(2)*(a)*, with the written consent of the debtor concerned, cancel the application for debt review if he or she is satisfied that the debtor is no longer over-indebted.

(2) A debtor who was granted a debt rearrangement order in terms of section 18 may apply to court to have the order set aside if he or she is no longer over-indebted.[732]

(3) When considering the cancellation of the application for debt review in terms of subsection (1) or the setting aside of the debt rearrangement order in terms of subsection (2), the debt counsellor or the court must consider, but is not limited to, the following matters:

(a) any change in the debtor's financial position;

(b) whether or not the debtor has paid all the arrears on the debts under his or her debt rearrangement plan; and

(c) whether or not the debtor is able to pay off the rest of his or her debts in a satisfactory manner.

(4) A debtor whose application for debt review has been cancelled in terms of subsection (1) must, within seven days of such cancellation, be issued by the debt counsellor with a clearance certificate, in the prescribed form that he or she is no longer over-indebted.

(5) The court referred to in subsection (2) may make an order that the debtor is no longer over-indebted as contemplated in section 18(1)*(e)*.

(6) The debt counsellor must deliver notice, in the prescribed manner and form, to all creditors referred to in section 11(5)*(b)*(i) and every registered credit bureau of the cancellation of the application for debt review or the setting aside of the debt rearrangement order.

(7) On receipt of a copy of a clearance certificate indicating that the debtor is no longer over-indebted and that the debtor's application for debt review has been cancelled, or a court order declaring the debtor no longer over-indebted and setting aside the debt rearrangement order, a credit bureau must expunge from its records—

(a) the fact that the debtor has applied for debt review or was subject to a debt rearrangement order;

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732 Consideration should be given to issuing a clearance certificate as provided for in subsection (4) also in cases where there is a debt rearrangement order in place. This would be cost effective and a less cumbersome process.

(b) any information relating to any default by the debtor that may have—

(i) brought about the debt rearrangement; or

(ii) been considered in making the debt rearrangement order; and

(c) any record that a particular credit agreement was subject to the debt rearrangement order concerned.

Removal of record of debt rearrangement or judgment[733]

23. (1) A debtor whose debts have been rearranged in terms of this Chapter must be issued with a clearance certificate[734] by a debt counsellor within seven days after the debtor has—

(a) paid all the debts that were subject to that debt rearrangement order in accordance with that order; or

(b) demonstrated—

(i) financial ability to pay his or her future debts in terms of the debt rearrangement order under—

(aa) a mortgage agreement which secures a credit agreement for the purchase or improvement of immovable property; or

(bb) such other long-term agreement as may be prescribed;

(ii) that there are no arrears on the rearranged agreements contemplated in subparagraph (i); and

(iii) that all debts included in the debt rearrangement order, other than those contemplated in subparagraph (i), have been settled in full.

(2) A debt counsellor must, for the purposes of demonstrating as envisaged in subsection (1)*(b)*, apply such measures as may be prescribed.

(3) If a debt counsellor decides not to issue or fails to issue a clearance certificate as contemplated in subsection (1), the debtor may apply to the Tribunal to review that decision, and if the Tribunal is satisfied that the debtor is entitled to the certificate in terms of subsection (1), the Tribunal may order the debt counsellor to issue the clearance certificate to the debtor.

(4)*(a)* A debt counsellor must, within seven days after issuing the clearance certificate, file a certified copy of that certificate with the national register established in terms of section 69 of the National Credit Act and all registered credit bureaux.

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733 See section 71 of the NCA.

734 See regulation 27 of the National Credit Regulations.

(b) If the debt counsellor fails to file a certified copy of a clearance certificate as contemplated in paragraph *(a)*, a debtor may file a certified copy of such certificate with the National Credit Regulator and lodge a complaint against that debt counsellor with the National Credit Regulator.

(5) On receipt of a copy of a clearance certificate, a credit bureau or the national credit register must expunge from its records—

(a) the fact that the debtor was subject to the debt rearrangement order concerned;

(b) any information relating to any default by the debtor that may have—

(i) brought about the debt rearrangement; or

(ii) been considered in making the debt rearrangement order; and

(c) any record that a particular debt was subject to the relevant debt rearrangement order.

(6) On receipt of a copy of a court order rescinding any judgment, a credit bureau must expunge from its records all information relating to that judgment.

(7) Failure by a credit bureau to comply with a notice issued in terms of section 55 of the National Credit Act in so far as it relates to this section is an offence.

CHAPTER 4
EXECUTION OF DEBT REARRANGEMENT ORDER

Debt Review Task Team Agreements

24. (1) The Minister must, when making regulations in terms of section 37(1), take existing industry standards and practices into account and replicate the requirements set out in the industry guidelines issued by the National Credit Regulator under the Debt Review Task Team Agreements, 2010, which requirements and any amendments thereto must be complied with by debt counsellors, payment distribution agents and credit providers.

(2) The regulations contemplated in subsection (1) must provide that a finding by a court that a debt counsellor, payment distribution agent or a credit provider has contravened any regulation relating to the industry standards, practices and guidelines as contemplated in subsection (1) serves as a ground for the revocation or cancellation of his, her or its registration and that the clerk of the court which made such finding must, in writing, deliver notice to the National Credit Regulator of that finding.

Authorising issuing of emoluments attachment order or garnishee order

25. If the debt rearrangement order provides for the payment of instalments out of future emoluments or income, the court may authorise the issuing of an emoluments attachment order in terms of section 65J of the Magistrates' Courts Act in order to attach emoluments at present or in the future owing or accruing to the debtor by or from his employer, or may authorise the issuing of a garnishee order in terms of section 72 of the Magistrates' Courts Act in order to attach any debt at present or in the future owing or accruing to the debtor by or from any other person (excluding the State), in so far as either of the said sections are applicable, and the court may suspend such an authorisation on such conditions as it deems just and reasonable.

Failure to comply with conditions of suspension of emoluments attachment order or garnishee order

26. (1) If, in addition to the debt rearrangement order, the court has authorised the issuing of an emoluments attachment order or a garnishee order but has suspended such authorisation conditionally and the debtor fails to comply with the conditions of the suspension, the debt counsellor may lodge a certificate to this effect with the clerk of the court, and the clerk of the court must thereupon issue the emoluments attachment order or garnishee order.

(2) An emoluments attachment order or a garnishee order referred to in subsection (1) must be prepared and signed by the debt counsellor or his or her attorney, and must be served on the garnishee by registered mail at the garnishee's last known address or by delivering it to the garnishee by hand.

(3)(*a*) When an emoluments attachment order or a garnishee order referred to in subsection (1) has been served on the garnishee, he, she or it is obliged to pay the amounts stipulated by the order.

(*b*) The provisions of section 65J(3)*(b)* and (4) to (10) apply, with the necessary changes, to the emoluments attachment order referred to in paragraph *(a)*, and in such application any reference in the provisions to the judgment creditor must be construed as a reference to the debt counsellor.

Suspension, amendment or rescission of debt rearrangement order[735]

27. (1) The court under whose supervision any debt rearrangement order is being executed may, on application by the debtor or any interested party, reopen the proceedings and call upon the debtor to appear for such further examination as the court deems necessary, and the court may thereupon, on good cause shown, suspend, amend or rescind the debt rearrangement order on such conditions as it deems just and reasonable.

(2) The court may at any time, at the request of the debt counsellor in writing and with the written consent of the debtor, amend a debt rearrangement order.

(3) If the debtor brings the application referred to in subsection (1), he or she must deliver, in the prescribed manner and form, notice to all creditors concerned.

(4) On an application for the suspension or amendment of the order the court may—

(a) if it appears to the court that the debtor is unable to pay any instalment, suspend the debt rearrangement order for a period not exceeding six months on such conditions as it deems fit and suspend, for the corresponding period, the operation of any emoluments attachment order or garnishee order issued; or

(b) amend the instalments to be paid in terms of the debt rearrangement order and make the necessary amendments to any emoluments attachment order or garnishee order issued; or

(c) authorise the issuing of an emoluments attachment order or garnishee order to ensure the payments in terms of the debt rearrangement order.

(5) On an application for the rescission of the debt rearrangement order, the court may rescind the order or make any order referred to in subsection (4).

(6) Any order suspending, amending or rescinding a debt rearrangement order must be in the prescribed form and a copy of that order must be delivered by the—

(a) debt counsellor to the debtor and to each creditor and registered credit bureau, if the application was made by the debt counsellor; or

(b) by the debtor to the debt counsellor and to each creditor and registered credit bureau, if the application was made by the debtor.

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735 This provision gives protection to those debtors who have lost their jobs or who are experiencing a reduction in income or a financial crisis that demands a large capital outlay that was not planned for.

CHAPTER 5
ENFORCEMENT OF ACT
Part A
Searches and Offences

Searches

28. The provisions of Part A of Chapter 8 of the National Credit Act apply, with the necessary changes, in respect of prohibited conduct in contravention of this Act.

Breach of confidence

29. (1) It is an offence to disclose any confidential information concerning the affairs of any natural or juristic person obtained—

(a) in carrying out any function in terms of this Act; or

(b) as a result of participating in any proceedings in terms of this Act.

(2) Subsection (1) does not apply to information disclosed—

(a) for the purpose of the proper administration or enforcement of this Act;

(b) for the purpose of the administration of justice; or

(c) at the request of an inspector, regulator or member of the Tribunal entitled to receive the information.

Offences by unregistered person

30. A person who intentionally gives himself, herself or itself out to be—

(a) a debt counsellor without having been registered under section 3; or

(b) a payment distribution agent without having been registered under section 4,

is guilty of an offence.[736]

Interfering with administration of Act

31. It is an offence to hinder, oppose, obstruct or unduly influence any person who is exercising a power or performing a duty delegated to or conferred or imposed on that person by this Act.

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[736] See section 157C(1)(d) and (e) of the NCA..

Penalties

32. (1) A debt counsellor who accepts an application for debt review in terms of section 11(1) or has referred the matter to court in terms of section 16(2)*(a)* if—

(a) his or her registration as a debt counsellor has lapsed;

(b) his or her registration has been revoked or cancelled;

(c) in the case of a debt counsellor who is an attorney, he or she has been struck off the roll of attorneys; or

(d) he or she allows an unregistered person to conduct the business of a debt counsellor on his or her behalf,

is not entitled to remuneration for his or her services.

(2) A person convicted of an offence in terms of this Act is liable—[737]

(a) in the case of a contravention contemplated in section 30, to a fine or imprisonment not exceeding 10 years or to both a fine and such imprisonment or, if the convicted person is a juristic person, to a fine not exceeding 10 per cent of its annual turnover or R1 000 000, whichever amount is the greater; or

(b) in any other case, to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment.

(3) When determining an appropriate penalty for a conviction contemplated in subsection (2), the following matters must be considered:

(a) The nature, duration, gravity and extent of the offence;

(b) any loss or damage suffered as a result of the offence;

(c) the behaviour of the person convicted of the offence in terms of this Act;

(d) the market circumstances in which the offence took place;

(e) the value of the debt that formed the basis of the commission of the offence;

(f) the degree to which the person convicted of the offence in terms of this Act has co-operated with the National Credit Regulator or Tribunal; and

(g) whether the person convicted of the offence in terms of this Act has previously been found to have contravened this Act.[738]

(4) For purposes of determining the appropriate penalty contemplated in subsection (2)*(a)*, annual turnover must be calculated in accordance with section 151(4) of the National Credit Act.[739]

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737 See section 161(1)(aB) and (b) of the NCA.

738 See section 161(2) of the NCA.

739 See section 161(3) of the NCA.

(5) If a person who committed an offence in terms of this Act is a juristic person, every director or prescribed officer of that juristic person who knowingly was a party to the contravention is, subject to the provisions of this Act and any other law, guilty of an offence and subject to the same penalties as if he or she committed the offence in person.[740]

Part B

Miscellaneous matters

Training[741]

33. (1) A debt counsellor and payment distribution agent must ensure that his, her or its employees or agents are trained in respect of the matters to which this Act applies.

(2) The Minister must prescribe the requirements and standards for the training contemplated in subsection (1).

(3) Until the regulations envisaged in subsection (2) have been made, a debt counsellor and payment distribution agent must ensure that his, her or its employees or agents are trained to such an extent that they can further the purpose of this Act.

(4) A debt counsellor may only use agents for administrative tasks relating to debt review.

CHAPTER 6
TRANSITIONAL PROVISIONS

Registration of administrator as debt counsellor

34. (1) Subject to the disqualifications set out in section 6, a person who operates as an administrator on the date of the commencement of this Act may be registered as a debt counsellor in terms of this Act on condition that he or she satisfies the prescribed education, experience or competency requirements within a period of one year from the date on which he or she was so registered as a debt counsellor.

(2) A person who is subject to an administration order on the date of commencement of this Act may, in the manner prescribed, apply to the court to convert his or her administration order to a debt rearrangement order in terms of this Act.

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740 See section 157D of the NCA.

741 See section 163 of the NCA.

(3) Subsection (1) remains in force for a period of two years from the date of commencement of this Act.

Specific preservation of rights and registration

35. A person who, immediately before the date on which this Act or any applicable provision of this Act came into operation, was registered as a debt counsellor is deemed to have been registered as such in terms of this Act as from the date of its coming into operation.

General preservation of rights, obligations, notices and documents

36. (1) Any right or entitlement enjoyed by, or obligation imposed on, any person in terms of any provision of the National Credit Act which had not been spent or fulfilled immediately before the date on which this Act or any applicable provision of this Act came into operation must be considered a valid right or entitlement of, or obligation imposed on, that person in terms of any comparable provision of this Act as from the date that the right, entitlement or obligation first arose, subject to the provisions of this Act.

(2) A notice given by any person to another person in terms of any provision of the National Credit Act must be considered as notice delivered in terms of any comparable provision of this Act as from the date that notice was given under the National Credit Act.

(3) A document that, before the date on which this Act or any applicable provision of this Act came into operation, had been served in accordance with the National Credit Act must be regarded as having been satisfactorily served for any comparable purpose of this Act.

CHAPTER 7
GENERAL PROVISIONS

Regulations[742]

37. (1) The Minister must make regulations—

(a) expressly authorised or contemplated in this Act, in accordance with subsection (2);

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742 Please note that regulations have already been made in respect of most of the provisions taken from the NCA and incorporated into this Bill.

(b) regarding—

(i) any forms required to be used for the purposes of this Act;

(ii) orders that may be made by the court in respect of section 18(1)*(b)*(iii)*(dd)*;[743] and

(iii) in general, any ancillary or incidental matter that is necessary to be prescribed for the proper implementation or administration of this Act.

(2) Before making any regulations in terms of subsection (1)*(a)*, the Minister—

(a) must publish the proposed regulations for public comment; and

(b) may consult the National Credit Regulator and provincial regulatory authorities.

(3) A regulation in terms of this Act must be made by notice in the *Gazette*.

Repeal and amendment of laws

38. (1) The laws specified in the Schedule are hereby repealed or amended to the extent indicated in the third column of the Schedule.

(2) Anything done in terms of a law repealed or amended by this Act—

(*a*) remains valid if it is consistent with this Act, until repealed or overridden; and

(*b*) is deemed to have been done in terms of the corresponding provision of this Act.

Short title and commencement

39. This Act is called the Debt Rearrangement Act, 2020, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

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743 See section 171(1)(*b*B)(i) of the NCA.

SCHEDULE

LAWS REPEALED OR AMENDED BY SECTION 38

[ ] Words in bold type in square brackets indicate omissions from existing enactments

___Words underlined with a solid line indicate insertions in existing enactments

No. and year of law	**Short title**	**Extent of repeal or amendment**
Act No. 32 of 1944	Magistrates' Courts Act	1. The amendment of the Division of Act by the deletion of the following: Administration orders 74 2. The repeal of sections 74 to 74W.
Act No. 34 of 2005	National Credit Act	1. The amendment of section 1— (a) by the deletion of the following definition: **['payment distribution agent' means a person who on behalf of a consumer, that has applied for debt review in terms of this Act, distributes payments to credit providers in terms of a debt rearrangement, court order, order of the Tribunal or an agreement]**; (b) by insertion after the definition of "credit co-operative" of the following definition: "**'debt counsellor'** means a person registered in terms of section 3 of the Debt Rearrangement Act;"; (c) by the substitution for the definition of "prohibited conduct" of the following definition:[744] "**'prohibited conduct'** means an act or omission in contravention of this Act and includes prohibited conduct as defined in the Debt Rearrangement Act;"; (d) by the insertion after the definition of "debt counsellor" of the following definition: "**'Debt Rearrangement Act'** means the Debt Rearrangement Act, 20… (Act … of 20…);"; (e) by the substitution for paragraph *(d)* of the definition of "debt intervention applicant" of the following paragraph: "*(d)* is not sequestrated **[or subject to an administration order]**;".

744 Please note that in the Protection of Personal Information Act 4 of 2013 the definition will be amended as follows:

"**'prohibited conduct'** means an act or omission in contravention of the Act, other than an act or omission as contemplated in section 55(2)(b) or that constitutes an offence under this Act, by—
(a) an unregistered person who is required to be registered to engage in such an act; or
(b) a credit provider, credit bureau or a debt counsellor;".
This amendment above will come into operation on a date to be proclaimed.

		2. The amendment of section 2 by the insertion after subsection (7) of the following subsection: "(8) Any reference to a consumer in this Act, in relation to the Debt Rearrangement Act, shall be construed as a reference to a debtor as defined in that Act." 3. The amendment of section 3 by the substitution for paragraph (i) of the following paragraph: "*(i)* providing for a consistent and harmonised system of **[debt restructuring,]** enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements." 4. The amendment of section 14 by— (a) the substitution for paragraph *(a)* of the following paragraph: "*(a)* registering credit providers**[,]** and credit bureaux **[and debt counsellors]**;"; (b) the insertion after paragraph *(a)* of the following paragraph: "*(aA)* registering debt counsellors and payment distribution agents provided for in the Debt Rearrangement Act;" . 5. The amendment of section 15 by the substitution for that section of the following section: "**15 Enforcement functions of National Credit Regulator** The National Credit Regulator must enforce this Act and the Debt Rearrangement Act by— *(a)* promoting informal resolution of disputes arising in terms of this Act between consumers on the one hand and a credit provider or credit bureau on the other, without intervening in or adjudicating any such dispute; *(b)* receiving complaints concerning alleged contraventions of this Act and the Debt Rearrangement Act; *(c)* monitoring the consumer credit market and industry to ensure that prohibited conduct is prevented or detected and prosecuted; *(d)* investigating and ensuring that— (i) national and provincial registrants comply with this Act and their respective registrations; and (ii) registrants provided for in the Debt Rearrangement Act comply with the provisions of that Act and their respective registrations; *(e)* issuing and enforcing compliance notices; *(f)* investigating and evaluating alleged contraventions of this Act

		and the Debt Rearrangement Act; *(g)* negotiating and concluding undertakings and consent orders contemplated in section 138(1)*(b)*; *(h)* referring to the Competition Commission any concerns regarding market share, anti-competitive behaviour or conduct that may be prohibited in terms of the Competition Act, 1998 (Act 89 of 1998); *(i)* referring matters to the Tribunal and appearing before the Tribunal, as permitted or required by this Act; and *(j)* dealing with any other matter referred to it by the Tribunal.". 6. The amendment of section 15A by the substitution for paragraph *(b)* of subsection (2) of the following paragraph: "*(b)* must issue each debt intervention officer with a certificate in the prescribed form stating that the person has been appointed as a debt intervention officer and as such is deemed to have been registered as a debt counsellor, as contemplated in **[section 44]** section 3 of the Debt Rearrangement Act, for purposes of the services contemplated in subsection (1) only.". 7. The amendment of subsection (1) of section 16 by— (a) the substitution for paragraph *(a)* of the following paragraph: "*(a)* implementing education and information measures to develop public awareness of the provisions of this Act and the Debt Rearrangement Act;"; (b) by the substitution for paragraph *(b)* of the following paragraph: *"(b)* providing guidance to the credit market and industry by— (i) issuing explanatory notices outlining its procedures, or its non-binding opinion on the interpretation of any provision of this Act; or (ii) applying to a court for a declaratory order on the interpretation or application of any provision of this Act or the Debt Rearrangement Act;". 8. The amendment of section 23 by the substitution for subsection (3) of the following subsection: "(3) The Chief Executive Officer is the accounting authority for the National Credit Regulator, and as such is responsible for— *(a)* all income and expenditure of the National Credit Regulator; *(b)* all revenue collected by the National Credit Regulator; *(c)* all assets, and the discharge of all duties and liabilities of the National Credit Regulator; and *(d)* proper and diligent implementation of this Act and the Debt

		Rearrangement Act in order to achieve the objects stipulated in both **[this]** Acts.". 9. The amendment of section 26 by the substitution for subparagraph (i) of paragraph *(b)* of subsection (5) of the following subparagraph: "(i) has or acquires a direct or indirect financial interest in a registrant in terms of this Act or the Debt Rearrangement Act; or". 10. The amendment of section 27 by— (a) the substitution for subparagraph (i) of paragraph *(a)* of the following subparagraph: "(i) application or referral that may be made to it in terms of this Act or the Debt Rearrangement Act, and make any order provided for in this Act or the Debt Rearrangement Act in respect of such an application or referral; or"; (b) the substitution for subparagraph (ii) of paragraph *(a)* of the following subparagraph: "(ii) allegations of prohibited conduct by determining whether prohibited conduct has occurred and, if so, by imposing a remedy provided for in this Act or the Debt Rearrangement Act;". 11. The amendment of section 38 by the substitution for subsection (4) of the following subsection: "(4) A credit regulator must, on request from another credit regulator, provide a copy of all prescribed information in its possession concerning a registrant or applicant for registration in terms of this Act or the Debt Rearrangement Act.". 12. The repeal of section 44. 13. The repeal of section 44A. 14. The amendment of section 46 — (a) by the deletion in subsection (2) of the words "debt counsellor or payment distribution agent"; (b) by the deletion in subsection (3) of the words "debt counsellor, or payment distribution agent"; and (c) by the deletion of subsection (4). 15. The amendment of section 47— (a) by the deletion of subsection (1); (b) by the substitution for subsection (2) of the following subsection:

		"(2) Subject to subsection (4), a juristic person or an association of persons may not be registered as a credit provider or credit bureau if any natural person who would be disqualified from individual registration in terms of section 46(3) or section 6(2) of the Debt Rearrangement Act exercises general management or control of that person or association, alone or in conjunction with others.". 16. The amendment of section 48— (a) by the deletion of subsection (2); (b) by the substitution for subsection (3) of the following subsection: "(3) The National Credit Regulator, having regard to the objects and purposes of this Act and the Debt Rearrangement Act, the circumstances of the application and the applicable criteria set out in subsection (1) and subsection (5)(3)*(a)* of the Debt Rearrangement Act, may propose any conditions on the registration of an applicant by delivering a written notice in the prescribed manner and form setting out the proposed conditions, and the reasons for them.". 17. The amendment of section 49 by the substitution for subsection (1) of the following subsection: "(1) The National Credit Regulator may review, and propose new conditions on, any registration in terms of this Act or the Debt Rearrangement Act— *(a)* on request by the registrant submitted to the National Credit Regulator in the prescribed manner and form; *(b)* if at least five years have passed since the National Credit Regulator last reviewed or varied the conditions of registration; *(c)* if the registrant has contravened this Act or the Debt Rearrangement Act; *(d)* if the registrant— (i) has not satisfied any conditions attached to its registration; (ii) has not met any commitment or undertaking it made in connection with its registration; or (iii) has breached any approved code of conduct applicable to it, and cannot provide adequate reasons for doing so; or *(e)* if the National Credit Regulator, on compelling grounds, deems it necessary for the attainment of the purposes of this Act or the Debt Rearrangement Act and efficient enforcement of **[its]** the functions of these Acts." 18. The amendment of section 50 by the substitution for that section of the following section: "**50 Authority and standard conditions of registration** (1) A registration issued in terms of this Act or the Debt Rearrangement Act

		is valid throughout the Republic and authorises the registrant to conduct, engage in, or make available the registered activities at any place within the Republic. (2) It is a condition of every registration issued in terms of this Act or the Debt Rearrangement Act that the registrant must— *(a)* permit the National Credit Regulator or any person authorised by the National Credit Regulator to enter any premises at or from which the registrant conducts the registered activities during normal business hours, and to conduct reasonable inquiries for compliance purposes, including any act contemplated in section 154(1)*(d)* to *(h)*; *(b)* comply with every applicable provision of— (i) this Act or the Debt Rearrangement Act; (ii) the Financial Intelligence Centre Act, 2001 (Act 38 of 2001); and (iii) applicable provincial legislation within any province in which the registrant conducts, engages in, or makes available the registered activities.". 19. The amendment of section 51 by the substitution for paragraph *(a)* of subsection (1) of the following paragraph: "(a) an application fee to be paid in connection with any application in terms of this Chapter or Chapter 2 of the Debt Rearrangement Act;" 20. The amendment of section 52— (a) by the substitution for subsection (3) of the following subsection: "(3) A valid certificate or duplicate certificate of registration, or a certified copy of it, is *prima facie* proof that the registrant is registered in terms of this Act or the Debt Rearrangement Act."; and (b) by the substitution for paragraph *(c)* of subsection (5) of the following paragraph: *"(c)* comply with its conditions of registration and the provisions of this Act or the Debt Rearrangement Act;". 21. The amendment of section 53 by the substitution for subsection (1) of the following subsection: "(1) The National Credit Regulator must establish and maintain a register in the prescribed form of all persons who have been registered— *(a)* under this Act; *(aA)* the Debt Rearrangement Act; or *(b)* in terms of applicable provincial legislation, as reported by provincial credit regulators in terms of section 38, including those whose registration has been altered or cancelled.".

22. The amendment of section 54—

(a) by the substitution for subsection (1) of the following subsection:

"(1) Subject to subsection (2), the National Credit Regulator may issue a notice in the prescribed form to any person who, or association of persons, that—

(a) is engaging in an activity that, in terms of this Act or the Debt Rearrangement Act, requires registration, or offering to engage in such an activity, or holding themselves out as authorised to engage in such an activity; and

(b) is not registered in terms of this Act or the Debt Rearrangement Act to engage in that activity,

requiring that person or association to stop engaging in, offering to engage in or holding themselves out as authorised to engage in, that activity."; and

(b) by the substitution for paragraph *(e)* of subsection (3) of the following paragraph:

"(e) any penalty that may be imposed in terms of this Act or the Debt Rearrangement Act if the person fails to discontinue that activity.".

23. The amendment of section 55—

(a) by the substitution for paragraph *(a)* of subsection (1) of the following paragraph:

"(a) a person or association of persons whom the National Credit Regulator on reasonable grounds believes-

(i) has failed to comply with a provision of this Act or the Debt Rearrangement Act; or

(ii) is engaging in an activity in a manner that is inconsistent with this Act or the Debt Rearrangement Act; or"; and

(b) by the substitution for paragraph *(a)* of subsection (6) of the following paragraph:

"(a) to the National Prosecuting Authority, if the failure to comply constitutes an offence in terms of this Act or the Debt Rearrangement Act; or".

24. The amendment of section 57—

(a) by the substitution for subsection (1) of the following subsection:

"(1) Subject to subsection (2), a registration in terms of this Act or the Debt Rearrangement Act may be cancelled by the Tribunal on request by

		the National Credit Regulator, if the registrant repeatedly— *(a)* fails to comply with any condition of its registration; *(b)* fails to meet a commitment contemplated in section 48 (1); or *(c)* contravenes this Act or the Debt Rearrangement Act."; and (b) by the substitution for paragraph *(a)* of subsection (9) of the following paragraph: *"(a)* a registrant under this Act, the Debt Rearrangement Act or under any credit agreement in respect of which it is the credit provider, survive any suspension or cancellation of its registration; and". 25. The amendment of section 58 by the substitution for that section of the following section: "**58 Voluntary cancellation of registration** A registrant registered in terms of this Act or the Debt Rearrangement Act may cancel its registration by giving the National Credit Regulator written notice in the prescribed manner and form— (a) stating the registrant's intention to voluntarily cancel the registration; and (b) specifying a date, at least five business days after the date of the notice, on which the cancellation is to take effect.". 26. The amendment of section 59 by the substitution for subsection (2) of the following subsection: "(2) An order contemplated in subsection (1) may include an order setting aside any condition attached to a registration if the Tribunal is not satisfied that the condition is reasonable and justifiable, having regard to the objects and purposes of this Act or the Debt Rearrangement Act, the circumstances of the application or review, as the case may be, and the provisions of section 48.". 27. Section 61 is amended by the substitution for paragraph *(c)* of subsection (2) of the following paragraph: *"(c)* a debt counsellor when offering or holding out the ability to serve as a debt counsellor in terms of **[this Act]** the Debt Rearrangement Act, or in accepting or refusing a referral of such a matter, or in delivering any such service to consumers; and". 28. The insertion of following section after section 65 in Part A of Chapter 4: "**63A** The provisions of sections 63, 64 and 65, read with the changes

		required by the context, apply to a consumer contemplated in the Debt Rearrangement Act." 29. The amendment of section 68 by the substitution for subsection (1) of the following subsection: "(1) Any person who, in terms of this Act or the Debt Rearrangement Act, receives, compiles, retains or reports any confidential information pertaining to a consumer or prospective consumer must protect the confidentiality of that information, and in particular, must— *(a)* use that information only for a purpose permitted or required in terms of this Act, other national legislation or applicable provincial legislation; and *(b)* report or release that information only to the consumer or prospective consumer, or to another person— (i) to the extent permitted or required by this Act, other national legislation or applicable provincial legislation; or (ii) as directed by— *(aa)* the instructions of the consumer or prospective consumer; or *(bb)* an order of a court or the Tribunal.". 30. The amendment of section 70 by the substitution for paragraph *(a)* of subsection (1) of the following paragraph: *"(a)* a person's credit history, including applications for credit, credit agreements to which the person is or has been a party, pattern of payment or default under any such credit agreements, debt rearrangement in terms of **[this Act]** the Debt Rearrangement Act, incidence of enforcement actions with respect to any such credit agreement, the circumstances of termination of any such credit agreement, an application for, status of and orders granted in respect of debt intervention and related matters;". 31. The amendment of section 71 by the substitution for that section of the following section: "**Removal of record of debt adjustment or judgment** **[(1) A consumer whose debts have been re-arranged in terms of Part D of this Chapter, must be issued with a clearance certificate by a debt counsellor within seven days after the consumer has—** ***(a)* **satisfied all the obligations under every credit agreement that was subject to that debt rearrangement order or agreement, in accordance**

		with that order or agreement; or ***(b)*** **demonstrated—** **(i) financial ability to satisfy the future obligations in terms of the rearrangement order or agreement under-** ***(aa)*** **a mortgage agreement which secures a credit agreement for the purchase or improvement of immovable property; or** ***(bb)*** **any other long term agreement as may be prescribed;** **(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 rearrangement order or agreement, other than those contemplated in subparagraph (i), have been settled in full.]** (1) A debt intervention applicant whose debts have been rearranged in terms of **[Part D of this Act]** Chapter 3 of the Debt Rearrangement Act, must be issued with a clearance certificate by the National Credit Regulator within seven business days after the debt intervention applicant has— *(a)* satisfied all the obligations under every credit agreement that was subject to that debt rearrangement 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 rearrangement order; or (ii) that there are no arrears on the rearranged agreements contemplated in subparagraph (i); and (iii) that all obligations under every credit agreement included in the rearrangement order or agreement, other than those contemplated in subparagraph (i), have been settled in full, and the National Credit Regulator must submit a copy of the clearance certificate to all registered credit bureaux. **[(2) A debt counsellor must for the purposes of the demonstration envisaged in subsection (1) *(b)*, apply such measures as may be prescribed.**

		(2) …
		(3) If a debt counsellor decides not to issue or fails to issue a clearance certificate as contemplated in subsection (1), the consumer may apply to the Tribunal to review that decision, and if the Tribunal is satisfied that the consumer is entitled to the certificate in terms of subsection (1), the Tribunal may order the debt counsellor to issue a clearance certificate to the consumer.]
		(3A) If the National Credit Regulator decides not to issue or fails to issue a clearance certificate as contemplated in subsection (1A), or fails to submit a copy to all registered credit bureaux, the debt intervention applicant may apply to the Tribunal to review that decision or failure to issue, and if the Tribunal is satisfied that the debt intervention applicant is entitled to the certificate in terms of subsection (1A), the Tribunal may order the National Credit Regulator to—
		(a) issue a clearance certificate to the debt intervention applicant; or
		(b) submit a copy to all registered credit bureaux.
		[(4) *(a)* A debt counsellor must within seven days after the issuance of the clearance certificate, file a certified copy of that certificate, with the national register established in terms of section 69 of this Act and all registered credit bureaux.
		***(b)* If the debt counsellor fails to file a certified copy of a clearance certificate as contemplated in subsection (1), a consumer may file a certified copy of such certificate with the National Credit Regulator and lodge a complaint against such debt counsellor with the National Credit Regulator.]**
		(4) …
		(5) Upon receiving a copy of a clearance certificate, a credit bureau, or the national credit register, must expunge from its records–
		(a) the fact that the consumer was subject to the relevant debt rearrangement order or agreement;
		(b) any information relating to any default by the consumer that may have—
		(i) precipitated the debt rearrangement; or
		(ii) been considered in making the debt rearrangement order or agreement; and
		(c) any record that a particular credit agreement was subject to the relevant debt rearrangement order or agreement.
		(6) Upon receiving a copy of a court order rescinding any judgment, a credit bureau must expunge from its records all information relating to that judgment.

		(7) Failure by a credit bureau to comply with a notice issued in terms of section 55, in relation to this section, is an offence.". 32. The amendment of section 78 by the substitution for subsection (2) of the following subsection: "(2) Sections 81 to 84, **[and]** any other provisions of this Part and the provisions of the Debt Rearrangement Act, to the extent that they relate to reckless credit, do not apply to— *(a)* a school loan or a student loan; *(b)* an emergency loan; *(c)* a public-interest credit agreement; *(d)* a pawn transaction; *(e)* an incidental credit agreement; or *(f)* a temporary increase in the credit limit under a credit facility, provided that any credit extended in terms of paragraph *(a)* to *(c)* is reported to the National Credit Register in the prescribed manner and form, and further provided that in respect of any credit extended in terms of paragraph *(b)*, reasonable proof of the existence of the emergency as defined in section 1 is obtained and retained by the credit provider.". 33. The repeal of section 82A. 34. The amendment of section 83 by the substitution for subparagraph (ii) of paragraph *(b)* of subsection (3) of the following subparagraph: "(ii) restructuring the consumer's obligations under any other credit agreements, in accordance with section **[87]** 18 of the Debt Rearrangement Act.". 35. The amendment of section 85 by the substitution for that section of the following section: "**85 Court may declare and relieve over-indebtedness** Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged or it appears to the court that the consumer under a credit agreement is over-indebted, the court may— *(a)* refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation in terms of section 11(8)*(b)* of the Debt Rearrangement Act **[to the court in terms of section 86 (7)]**; *(b)* declare that the consumer is over-indebted, as

		determined in accordance with this Part, and make any order contemplated in section **[87]** 18 of the Debt Rearrangement Act to relieve the consumer's over-indebtedness; or *(c)* where the consumer may qualify for debt intervention, enquire whether the consumer wishes to participate in debt intervention and if the consumer confirms— (i) refer the matter to the National Credit Regulator for consideration; or (ii) where the court has sufficient information to do so, consider the matter and make an order contemplated in sections 87(1A) or 87A.". 36. The repeal of section 86. 37. The amendment of section 86A— (a) by the substitution for subsection (3) of the following subsection: "(3) On receipt of an application contemplated in subsection (1), the National Credit Regulator must comply with section **[86(4) and (6)]** 11(5)*(a)* and *(b)* and (7) of the Debt Rearrangement Act, with the necessary changes."; (b) by the substitution for subsection (4) of the following subsection: "(4) A debt intervention applicant, and each credit provider listed in the application for debt intervention, must comply with section **[86(5)]** 11(6) of the Debt Rearrangement Act, with the necessary changes."; and (c) by the substitution for paragraph *(a)* of subsection (8) of the following paragraph: "*(a)* each credit provider concerned accept that proposal, the National Credit Regulator must record the proposal in the form of an order and if it is consented to by the debt intervention applicant and each credit provider concerned, file it as a consent order in terms of section 138;" 38. The substitution for section 87 of the following section: "**[Magistrate's Court or]** Tribunal may re-arrange consumer's obligations **[(1) If a debt counsellor makes a proposal to the Magistrate's Court in terms of section 86 (8) *(b)*, or a consumer applies to the Magistrate's Court in terms of section 86 (9), the Magistrate's Court must conduct a hearing and, having regard to the proposal and**

		information before it and the consumer's financial means, prospects and obligations, may- **(a) reject the recommendation or application as the case may be; or** **(b) make-** **(i) an order declaring any credit agreement to be reckless, and an order contemplated in section 83 (2) or (3), if the Magistrate's Court concludes that the agreement is reckless;** **(ii) an order re-arranging the consumer's obligations in any manner contemplated in section 86 (7) *(c)* (ii); or** **(iii) both orders contemplated in subparagraph (i) and (ii).]** (1A) If the National Credit Regulator makes a recommendation to the Tribunal in terms of section 86A(6)*(d)*, the Tribunal or a member of the Tribunal acting alone in accordance with this Act, must conduct a hearing and, having regard to the recommendation and other information before it and the consumer's financial means, prospects and obligations, may— *(a)* reject the recommendation or application as the case may be; or *(b)* make— (i) an order declaring any credit agreement that forms part of the application to be reckless, and make an order contemplated in section 83(2) or (3), if the Tribunal concludes that agreement is reckless; (ii) an order that one or more of the debt intervention applicant's obligations be rearranged by— *(aa)* extending the period of the agreement and reducing the amount of each payment due accordingly; *(bb)* postponing during a specified period the dates on which payments are due under the agreement; *(cc)* extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; *(dd)* determining the maximum interest, fees or other charges, excluding charges contemplated in section 101(1)*(e)*, under a credit agreement, which maximum may be zero, for such a period as the Tribunal deems fair and reasonable but not

		exceeding the period contemplated in section 86A(6)*(d)*; or *(ee)* recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6; or (iii) both orders contemplated in subparagraphs (i) and (ii). (1B) The National Credit Regulator must notify the debt intervention applicant of any order contemplated in subsection (1A), and serve a copy thereof in the prescribed manner and form, on— *(a)* all credit providers that are listed in the application; and *(b)* every registered credit bureau. (2) The National Credit Regulator may not intervene before the Magistrate's Court in a matter referred to it in terms of this section.". 39. The amendment of section 88 by the substitution for that section of the following section:[745] "**88 Effect of debt review or rearrangement order or agreement** (1) A consumer who has filed an application in terms of section **[86 (1)]** 11(1) of the Debt Rearrangement Act, or who has alleged in court that **[the consumer]** he or she is over-indebted, **[must]** may not incur any further charges under a credit facility or enter into any further credit agreement, other than a consolidation agreement, with any credit provider until one of the following events has occurred: *(a)* The debt counsellor rejects the application and the prescribed time period for direct filing in terms of section **[86 (9)]** 11(9) of the Debt Rearrangement Act has expired without the consumer having so applied; *(b)* the court has determined that the consumer is not over-indebted, or has rejected **[a debt counsellor's proposal]** the application for debt review made in terms of section 16(2)*(a)* of the Debt Rearrangement Act or the consumer's application made in terms of section 11(9) of the Debt Rearrangement Act; or *(c)* a court having made an order in terms of section 18 of the of the Debt Rearrangement Act or the consumer and credit providers having made an agreement rearranging the consumer's obligations in terms of section 16(1) of the Debt Rearrangement Act, all the consumer's obligations under the credit agreements as rearranged are fulfilled, unless the consumer fulfilled the obligations

745 Consideration should be given to repealing section 88 and incorporating it into the proposed Debt Rearrangement Bill.

		by way of a consolidation agreement. (2) If a consumer fulfils obligations by way of a consolidation agreement as contemplated in subsection (1)*(c)*, or this subsection, the effect of subsection (1) continues until the consumer fulfils all the obligations under the consolidation agreement, unless the consumer again fulfilled the obligations by way of a consolidation agreement. (3) Subject to sections **[86 (9) and (10)]** 11(9) and 17 of the Debt Rearrangement Act, a credit provider who receives notice of court proceedings contemplated in section 83 or 85 of this Act or section 27(5) of the Debt Rearrangement Act or notice in terms of section **[86(4)*(b)*(i)]** 11(5)*(b)*(i) of the Debt Rearrangement Act, may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until— *(a)* the consumer is in default under the credit agreement; and *(b)* one of the following has occurred: (i) An event contemplated in subsection (1)*(a)* through *(c)*; or (ii) the consumer defaults on any obligation in terms of a rearrangement agreed **[between the consumer and credit providers]** in terms of section 16(1) of the Debt Rearrangement Act, or ordered by a court in terms of section 18 of the Debt Rearrangement Act or the Tribunal. (4) If a credit provider enters into a credit agreement, other than a consolidation agreement contemplated in this section, with a consumer who has applied for a debt rearrangement in terms of section 11 of the Debt Rearrangement Act and that rearrangement still subsists, all or part of that new credit agreement may be declared to be reckless credit, whether or not the circumstances set out in section 80 apply. (5) If a consumer applies for or enters into a credit agreement contrary to this section, the provisions of **[this section]** the Debt Rearrangement Act will **[never]** not apply to that agreement.”. 40. The amendment of section 89 by the substitution for paragraph *(a)* of subsection (2) of the following subsection: “(2) Subject to subsections (3) and (4), a credit agreement is unlawful if- *(a)* at the time the agreement was made the consumer was an unemancipated minor unassisted by a guardian, or was subject to— (i) an order of a competent court holding that person to be mentally unfit; **[or]**

		[(ii) an administration order referred to in section 74 (1) of the Magistrates' Courts Act, and the administrator concerned did not consent to the agreement,] and the credit provider knew, or could reasonably have determined, that the consumer was the subject of such an order;". 41. Section 129 is amended by the substitution for paragraph *(b)* of subsection (1) of the following paragraph: "(*b*) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before— (i) first **[providing]** giving notice to the consumer, as contemplated in paragraph *(a)*, or in section **[86(10)]** 17 of the Debt Rearrangement Act, as the case may be; and (ii) meeting any further requirements set out in section 130.". 42. The amendment of section 130— (a) by the substitution for paragraph *(a)* of subsection (1) of the following paragraph: "*(a)* at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section **[86(10), or]** 129(1) of this Act or section 17 of the Debt Rearrangement Act, as the case may be;"; (b) by the substitution for subsection (4) of the following subsection: "(4) In any proceedings contemplated in this section, if the court determines that— *(a)* the credit agreement was reckless as described in section 80, the court must make an order contemplated in section 83; *(b)* the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3)*(a)*, or has approached the court in circumstances contemplated in subsection 3*(c)* the court must— (i) adjourn the matter before it; and (ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed; *(c)* the credit agreement is subject to a pending debt review in terms of **[Part D of Chapter 4]** the Debt Rearrangement Act, the court may—

		(i) adjourn the matter, pending a final determination of the debt review proceedings; (ii) order the debt counsellor to report directly to the court, and thereafter make an order contemplated in section 85*(b)*; or (iii) if the credit agreement is the only credit agreement to which the consumer is a party, order the debt counsellor to discontinue the debt review proceedings, and make an order contemplated in section 85*(b)*; (*d*) there is a matter pending before the Tribunal, as contemplated in subsection (3)(b), the court may— (i) adjourn the matter before it, pending a determination of the proceedings before the Tribunal; or (ii) order the Tribunal to adjourn the proceedings before it, and refer the matter to the court for determination; or *(e)* the credit agreement is either suspended or subject to a debt rearrangement order in terms of section 18 of the Debt Rearrangement Act or agreement in terms of section 16(1) of the Debt Rearrangement Act, and the consumer has complied with that order or agreement, the court must dismiss the matter.". 43. The amendment of section 136 by the substitution for subsection (1) of the following subsection: "(1) Any person may, subject to section 55(2)*(b),* submit a complaint concerning an alleged contravention of this Act, or the Debt Rearrangement Act to the National Credit Regulator in the prescribed manner and form.". 44. The amendment of section 137 by the substitution for subsection (2) of the following subsection: "(2) A registrant, or applicant for registration in terms of this Act or the Debt Rearrangement Act, may file an application in terms of section 59 at any time within— *(a)* 20 business days after the National Credit Regulator makes the decision that is the subject of the application; or *(b)* such longer time as the Tribunal may allow on good cause shown.".

		45. The amendment of section 138 by the substitution for subsection (1) of the following subsection: "(1) If a matter has been— *(a)* resolved through the ombud with jurisdiction, consumer court or alternative dispute resolution agent; **[or]** *(b)* investigated by the National Credit Regulator, and the National Credit Regulator and the respondent agree to the proposed terms of an appropriate order**[,]**; or *(c)* agreed to in the form of a debt rearrangement proposal as provided for in section 86A(8)*(a)*[746] of this Act or section 16(1) of the Debt Rearrangement Act, the Tribunal or a court, without hearing any evidence, may confirm that resolution or agreement as a consent order.". 46. The amendment of section 142 by the substitution for paragraph *(d)* of subsection (3) of the following paragraph: "*(d)* review of requests for additional information, in terms of section 45(2) of this Act and section 5(2) of the Debt Rearrangement Act;" 47. The amendment of section 150 by the substitution for paragraph *(f)* of the following paragraph: "*(f)* confirming an order against an unregistered person to cease engaging in any activity that is required to be registered in terms of this Act or the Debt Rearrangement Act;" 48. The amendment of section 157C by the deletion of paragraphs *(d)* and *(e)* of subsection (1). 49. The amendment of section 163 by the substitution for subsections (1) to (1C) of the following subsections: "(1) A credit provider**[, debt counsellor or payment distributing agent]** must ensure that its employees or agents are trained in respect of the matters to which this Act applies. (1A) The Minister must prescribe the requirements and standards for the training contemplated in subsection (1). (1B) Until the regulations envisaged in subsection (1A) have been made, credit providers**[, debt counsellors and payment distributing agents]** must ensure that its employees or agents are trained to such an extent that they can contribute to the purpose of this Act.

746 See the proposed amendment to this section above.

		[(1C) A debt counsellor may only make use of agents for administrative tasks relating to debt review.]" 50. The amendment of the long title by the substitution for the long title of the following long title: "To promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information; to promote black economic empowerment and ownership within the consumer credit industry; to prohibit certain unfair credit and credit-marketing practices; to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting; to provide for **[debt re-organisation or]** <u>debt intervention</u> in cases of over-indebtedness; to regulate credit information; to provide for registration of credit bureaux**[,]** <u>and</u> credit providers **[and debt counselling services]**; to establish national norms and standards relating to consumer credit; to promote a consistent enforcement framework relating to consumer credit; to establish the National Credit Regulator and the National Consumer Tribunal; to repeal the Usury Act, 1968, and the Credit Agreements Act, 1980; and to provide for related incidental matters.".

OPTION 1

MAGISTRATES' COURTS AMENDMENT BILL

GENERAL EXPLANATORY NOTE:

[ ] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Magistrates' Courts Act, 1944, so as to insert definitions; to increase the monetary limit in order to allow more debtors to qualify for an administration order; to provide for circumstances under which no administration order may be granted; to increase the period of notice of application; to require an administrator to determine whether any of a debtor's credit agreements appear to be reckless; to require the court to question the debtor on whether the benefits, consequences, costs and the administration order process have been explained to the him or her and whether he or she or understands them; to empower the court to reduce the interest rate on a debt if it exceeds the prescribed interest rate set by law; to require the head office or branch office of an administrator to be within a 50-kilometre radius of the place where the debtor resides, is employed or carries on business; to provide for categories of person who may not act as an administrator for the estate of a debtor; to make providing the debtor with certain information mandatory; to provide for a court process for the substitution of an administrator; to set out the remuneration and expenses of the administrator and legal costs that may be deducted from the money collected; to provide for the receipt of payments by and distribution of payments through the Justice Administered Fund; to provide for a claims system for administrators; to provide for consequences for failure of administrator to perform his or her duties; to provide for delivery by fax or e-mail; and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts as follows:—

Insertion of section 73A in Act 32 of 1944

1. The following section is hereby inserted after section 73 of the Magistrates' Courts Act, 1944 (hereinafter referred to as the principal Act):

"**73A Definitions**

(1) In sections 74 to 74W, unless the contrary intention appears—

"Administration Account" means the account referred to in section 74HA;

"administration order" means an order issued in terms of section 74 in accordance with section 74C;

"administrator" means a natural person appointed as an administrator by the court in terms of section 74E or section 74EA;[747]

In view of the fact that some administrators use juristic persons to administer their administration order files, should the Act provide for the appointment of a juristic person as an administrator? A comparison could be drawn with the Debt Collectors Act 114 of 1998, which provides for a company or close corporation to carry on business as a debt collector. In terms of section 8 of the Act, in addition to the company or close corporation itself, every director of the company and member of the close corporation and every officer of such company and close corporation, not being himself or herself a director or member but who is concerned with debt collecting, must be registered as a debt collector.

"asset" includes investments and shares in a company;

"credit agreement" means a credit agreement as defined in section 1 of the National Credit Act;

"date of application" means the date set down for the hearing of the application;

"debtor" means a natural person who is a debtor in the usual sense of the word and, in the event of the debtor being married in community of property, includes the spouse of the debtor;

"Department" means the Department of Justice and Constitutional Development;

"disputed creditor" means a creditor the amount of whose claim or the settlement of whose claim is in dispute;

"financial lease" means a contract in terms of which a lessor leases specified movable property to a lessee at a specified rent over a specified period subject to a term of the contract that—

(a) at the expiry of the contract the lessee may acquire ownership of the leased property by paying an agreed or determinable sum of money to the lessor; or

(b) the rent paid in terms of the contract will at the expiry of the contract be applied in reduction of an agreed or determinable price at which the lessee may purchase the leased property from the lessor; or

(c) the proceeds of the realisation of the leased property at the expiry of the lease will accrue wholly or partly to the lessee;

"Insolvency Act" means the Insolvency Act, 1936 (Act 24 of 1936);

"Minister" means the Minister responsible for Justice;

"National Credit Act" means the National Credit Act, 2005 (Act 34 of 2005);

"notice" means, subject to subsections (2) and (3), notice by registered post, fax, e-mail or

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747 See also footnote 9.

personal delivery to an address, number or electronic address given by the intended recipient as the address, number or electronic address where he or she will receive notice;

"preferred claim" means the right to payment of that claim, out of the moneys deposited into the Administration Account for *pro rata* distribution to the creditors of the debtor, in preference to other claims; and **"preference"** has a corresponding meaning;

"regular income" means weekly or monthly or other periodical income derived from any source whatsoever;

"reservation-of-ownership contract" means a contract in terms of which corporeal or incorporeal movable property is sold to a debtor, the purchase price is payable wholly or partly in the future, the property is delivered to or placed at the disposal of the debtor and the ownership in the property does not pass to the debtor upon delivery of the property, but remains vested in the seller until the purchase price is paid in full or until the occurrence of some other specified event;

"secured debt" means—

(a) a debt in respect of which a creditor can assert ownership of property delivered under a reservation-of-ownership contract or a financial lease in so far as payment can be obtained as a result of such assertion of ownership;

(b) a debt that is secured by property of the debtor under administration over which a creditor has a secured right by means of any special bond, landlord's hypothec, pledge (including a cession of rights to secure a debt), right of retention, or preferential right over property in terms of any other Act;

"spouse" means a person's—

(a) partner in a marriage in terms of the Marriage Act, 1961 (Act 25 of 1961);

(b) partner in a customary marriage in terms of the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998);

(c) civil union partner as defined in section 1 of the Civil Union Act, 2006 (Act 17 of 2006); or

(d) partner in a relationship in which the parties live together in a manner resembling a partnership contemplated in paragraphs (a), (b) or (c);

(2) A notice by fax is regarded as notice if according to a transmission report the fax has been transmitted successfully, and notice sent by e-mail is regarded as notice on receipt of a notification that the e-mail has been successfully delivered, and if no report is received that the e-mail could not be delivered.

(3) The administrator may inform a creditor that any notice, application for or copy of an administration order or other related matter that shall be brought to the attention of the creditor in respect of a debt under administration with the administrator will be delivered to an address, number or electronic address given by the creditor as his, her or its address, number or electronic address, unless the creditor gives a different address, number or

electronic address for the purpose of delivery."

Amendment of section 74 of Act 32 of 1944

2. The following section is hereby substituted for section 74 of the principal Act:

"**Granting of administration orders**

(1) Where a debtor—

(a) is unable forthwith to pay the amount of any judgment obtained against him in court, or to meet his financial obligations, and has not sufficient assets capable of attachment to satisfy such judgment or obligations; and

(b) states that the total amount of all his or her debts due does not exceed the amount **[determined by the Minister from time to time by notice in the *Gazette*]** of R300 000,[748]

[such] a court referred to in section 65I or the court of the district in which the debtor resides or carries on business or is employed may, upon application by the debtor or under section 65I, **[subject to such conditions as the court may deem fit with regard to security, preservation or disposal of assets, realization of movables subject to hypothec (except movables referred to in section 34 of the Land Bank Act, 1944 (Act 13 of 1944)), or otherwise,]** make an administration order **[(in this Act called an administration order providing for the administration of his estate and for the payment of his debts in instalments or otherwise]**.

(1A) The Minister may from time to time by notice in the *Gazette* increase the amount provided in subsection (1)*(b)*.

(2) An administration order **[shall]** is not **[be]** invalid merely because at some time or other the total amount of the debtor's debts are found to exceed the amount provided in subsection (1)*(b)* or the amount determined by the Minister **[from time to time by notice in the *Gazette*]** in terms of subsection (1A), but in such a case the court may, if it deems fit, rescind the order.

(3) No administration order may be granted if it appears[749] that—

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748 It is recommended that the current amount of R50 000 be increased to R300 000. The inclusion of the amount in the legislation eliminates the delay that might be caused while waiting for the Minister to determine the amount. The proposed amount is higher than the monetary jurisdiction of the magistrates' court. However, an application for an administration order should always be heard in the magistrates' court although the amount concerned may exceed the monetary jurisdiction of that court, In this regard, see the inclusion of subclause (4).

749 The words "if it appears" instead of the words "if the court finds" are used as there is no need for the court to make any final finding at this stage. The matter may be sent for further investigation where the circumstances in paragraphs (a) to (g) appear.

(a) the debtor obtained credit or the extension of credit with fraudulent intent within six months before the date of application;

(b) either an unsuccessful application was made for the granting of an administration order or an administration order was rescinded, because of the debtor's non-compliance with that order, within 12 months before the date of application;

(c) the debtor has received a discharge in terms of the Insolvency Act within four years before the date of application;

(d) a debt rearrangement order in terms of section 87*(b)* of the National Credit Act or a consent order in terms of section 138 of that Act was made in respect of a debt referred to in the debtor's statement of affairs and that the debtor has defaulted on that debt rearrangement or consent order;

OR

(d) a credit agreement included in the debtor's statement of affairs was part of a debt rearrangement order in terms of section 87*(b)* of the National Credit Act or a consent order in terms of section 138 of that Act and that the debtor has defaulted on that debt rearrangement or consent order;

(e) the debtor has knowingly or recklessly furnished false or misleading information in the statement of affairs referred to in section 74A or during the hearing referred to in section 74B(1);

(f) If the debtor failed to fully and truthfully furnish the credit provider with the information contemplated in section 81 of the National Credit Act and the debtor's failure to do so materially affected the ability of the credit provider to make a proper assessment required by that section.

(g) the debtor does not understand the administration order process and its consequences,

unless good cause is shown by the debtor why the order should be granted."

(4) An application for an administration order should be heard in the district court.

Amendment of section 74A of Act 32 of 1944

3. Section 74A of the principal Act is hereby amended—

(a) by the substitution for subsection (2) of the following subsection:

"(2) Subject to subsection (2A), **[I]**in the **[form]** statement of affairs referred to in subsection (1) provision shall be made for the following particulars, **[*inter alia*]** among other, namely—

(a) the name and business address of the employer of the debtor or the debtor's **[employer]** spouse or, if the debtor or spouse is not employed, the reason **[why he is unemployed]** for his or her unemployment;

(aA) personal particulars of the debtor and the debtor's spouse;

(b) a detailed list of the debtor's assets and their **[current market]** estimated values, including— **[and full particulars of interests in property and claims in his favour, including moneys in a savings or other account with a bank or elsewhere]**

(i) assets subject to secured debt which the debtor wishes to retain as necessary goods; and

(ii) assets not subject to secured debt which the debtor wishes to retain as necessary goods;

(c) the debtor's trade or occupation and proof of his or her gross regular **[weekly or monthly]** income and that of **[his wife]** his or her spouse living with **[him]** him or her, and particulars of all deductions from such income by **[stop]** debit order or otherwise, supported as far as possible by written statements by the employers of the debtor and **[his wife]** his or her spouse;

(d) a detailed list of the debtor's **[essential]** necessary weekly or monthly expenses and those of the persons dependent on him, including **[his own transport]** the travelling expenses **[and those of his wife to and from work, and those of his children to and from school]** of the debtor and of his spouse and dependents;

(e) a complete list of all the debtor's creditors and their addresses, and the amount owing to each creditor, including the interest rate in respect of each amount and, where applicable, the reduced interest rate in respect of each amount, in which a clear distinction shall be made between—

(i) debts the whole amount of which is owing, including judgment debts payable in instalments in terms of a court order, an emoluments attachment order or a garnishee order; **[and]**

(ii) obligations which are payable *in futuro* in periodical payments or otherwise or which will become payable under a maintenance order, agreement, stop order or otherwise, and in which the nature of such periodical payments is specified in each case or when the obligations will be payable and how they are then to be paid, the balance owing in each case and when, in each case, the obligation will terminate;

(iii) debts due to disputed creditors, if any;

(iv) conditional debts and debts payable on a date after the date of application; and

(v) payment towards the maintenance of any person, including arrear maintenance;

(f) the security and the estimated value of the security that a creditor has or the name and address of any other person who, in addition to the debtor, is liable for any debt;

(g) full particulars, supported as far as possible by a statement and a copy of the credit agreement, as defined in section 1 of the National Credit Act, 2005 (Act 34 of 2005),

of goods purchased under that credit agreement, the purchase price, the instalments payable, the balance owing and the date on which the purchase price will be paid in full, and the reasons adduced by the debtor why provision should be made for the payment of the remaining instalments;

(h) full particulars of any mortgage bond on immovable property owned by the debtor, the instalments payable, the balance owing, the date on which the mortgage debt will be paid in full and the reasons adduced by the debtor why provision should be made for the payment of the instalments payable in terms of such mortgage bond;

(i) full particulars of any asset purchased under a written agreement other than a credit agreement referred to in paragraph *(g)*, the instalments payable, the balance owing, and the date on which the purchase price will be paid in full, and the reasons adduced by the debtor why provision should be made for the payment of the instalments that become payable under such agreement;

(j) whether any administration order was made at any time in respect of the debtor's estate and, if so, whether such order lapsed or was set aside and, if so, when and for what reasons;

(k) the **[number]** names and ages of the persons dependent on the debtor and his or her spouse and the **[kinship]** relationship of the dependents with **[them]** the debtor and his or her spouse;

(l) if an administration order is made, the amount of the weekly or monthly or other instalments which the debtor offers to pay towards settlement of the debts referred to in paragraph *(e)*(i).

(m) whether the debtor has received a discharge in terms of the Insolvency Act within four years before the date of application;

(n) whether an unsuccessful application was made for the granting of an administration order or whether an administration order was rescinded within 12 months before the date of application;

(o) whether a debt rearrangement order in terms of section 87*(b)* of the National Credit Act or a consent order in terms of section 138 of that Act was made in respect of a debt referred to in the statement of affairs and, if so, the reason for the termination of the debt review;

(p) a certificate by the administrator or the person who has prepared the statement of affairs, stating that—

(i) the statement of affairs referred to in subsection (1) is a true reflection of the debtor's instructions;

(ii) he or she has no reason to doubt the accuracy of any of the statements made by the debtor; and

(iii) he or she has advised the debtor of the consequences of administration and is satisfied that the debtor understands them.";

(b) by the insertion after subsection (2) of the following subsection:

"(2A) Subsection (2) does not apply to a spouse married out of community of property or a spouse referred to in paragraph *(d)* of the definition of "spouse", except in so far as it relates, for the purpose of determining the expenses referred to in subsection (2)*(d)*, to the income of such spouse who lives with the debtor.";

(c) by the substitution for subsection (5) of the following subsection:

"(5) The debtor shall, in the form prescribed in the rules, at least 10 days before the date of application—

(a) lodge an application for an administration order, **[and]** together with the statement of affairs referred to in subsection (1), a draft order, proof that the debtor has delivered the application and statement as provided for in paragraph *(b)*, and an affidavit confirming such delivery, with the clerk of the court; and **[shall]**

(b) deliver to each of his or her creditors, including all known disputed creditors, **[at least 3 days before the date appointed for the hearing,]** personally or by registered post, fax or e-mail a copy of **[such]** the application and statement, on which shall appear the case number under which the original application was filed."; and

(d) by the insertion after subsection (5) of the following subsection:

"(6) If an administrator is of the view that the interest rate referred to in subsection 2*(e)* exceeds the maximum interest rate set by law, the application referred to in subsection (5) may include a request that the court reduce the interest rate as the court deems fair and reasonable.".

Insertion of section 74AA in Act 32 of 1944

4. The following section is hereby inserted after section 74A of the principal Act:

"74AA Determination of reckless credit

(1) An administrator shall determine, in accordance with section 80 of the National Credit Act and within the prescribed time, whether any of the debtor's credit agreements listed in the statement of affairs referred to in section 74A appear to be reckless.[750]

(2) A credit provider shall, within seven business days of receipt of a request to do so and at a fee not exceeding the maximum prescribed fee, provide an administrator with the information mentioned in section 82A(2) of the National Credit Act to enable that administrator to consider whether or not a credit agreement is a reckless credit agreement.

(3) If as a result of an assessment conducted in terms of subsection (1), an administrator concludes on reasonable grounds that one or more of the debtor's credit agreements appear to be reckless, the administrator shall recommend that the magistrate's court declare such credit agreements to be reckless credit.

(4) Section 82A(4) of the National Credit Act applies, with the necessary changes, if a credit provider intentionally fails to comply with subsection (2).".

Amendment of section 74B of Act 32 of 1944

5. Section 74B of the principal Act is hereby amended—

(a) by the substitution for paragraph *(c)* of subsection (1) of the following paragraph:

"*(c)* any creditor, including a disputed creditor, to whose debt an objection is raised by the debtor or any other creditor or who is required by the court to substantiate his debt with evidence shall provide proof of debt;";

(b) by the substitution for subparagraph (ii) of paragraph *(e)* of subsection (1) of the following subparagraph:

"(ii) his or her present and future income and that of **[his wife]** his or her spouse living with him or her;";

(c) by the insertion after paragraph *(e)* of subsection (1) of the following paragraphs:

"*(f)* the court may disallow a question which it considers to be irrelevant or which may prolong the questioning unnecessarily;

(g) the court shall question the debtor as to whether—

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750 Please note that, in terms of clause 74L(3) an administrator is entitled to an amount for the determination of reckless credit only if the court has made a declaration of reckless credit.

(i) the person to be appointed as the administrator or the person who has prepared the statement of affairs has explained to the debtor—

(aa) the benefits, consequences, costs and administration order process and whether the debtor understands them; and

(bb) what debt intervention is and that he or she may apply for debt intervention, if he or she qualifies for debt intervention in terms of the National Credit Act;

(ii) the debtor resides, carries on business or is employed in the district of the court, except if the application for the administration order was lodged with the court referred to in section 65I;

(h) the court may consider whether a credit agreement is reckless as determined in accordance with Part D of Chapter 4 of the National Credit Act, with the necessary changes;

(i) the court shall consider the interest rate in respect of each debt mentioned in the statement of affairs for the purpose of reducing that interest rate if it exceeds the maximum interest rate set by law;"[751]

(j) the court may rearrange the debtor's debt based upon an reduced interest rate agreed on between an administrator and a creditor;[752] and

(k) after having called for and considered all relevant information, including but not limited to any existing emoluments attachment order, the court shall satisfy itself that the debtor will have sufficient means for his maintenance and that of his dependents after payment of the instalment."[753];

(l) the court may determine the maximum rate of interest in respect of an unsecured debt for such a period as the court deems fair and reasonable.

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751 The National Credit Act goes further by stipulating that if a consumer is over-indebted, the debt counsellor may recommend that the magistrates' court make an order that the consumer's obligations be rearranged by determining the maximum rate of interest, fees or other charges, excluding charges contemplated in section 101(1)*(e)* of the NCA, under a credit agreement for such period as the court deems fair and reasonable.

752 See also clauses 74A(2)*(e)* and 74JA(2).

753 This provision has been included here because not all debtors who apply for an administration order will enjoy the protection of section 65J (emoluments attachment orders) of the Magistrates' Courts Act. Section 65J(1A) provides that the amount of the instalment payable or the total amount of instalments payable where there is more than one emoluments attachment order (EAO) payable by the judgment debtor, may not exceed 25 per cent of the judgment debtor's basic salary. The court may make an order regarding the division of the available amount to be committed to each of the EAOs. In addition, the court must be satisfied that each EAO is just and equitable and that the sum of the total amount of the EAOs is appropriate. It will be problematic to issue an EAO in instances where debtors are self-employed or financially assisted by family members. Furthermore, an administrator is not obliged to bring an application for an EAO at the same time an administration order is granted. Only a debtor referred to in section 65D will come under the protection of section 65J. The inclusion of the proposed provision may also have the effect that the court might refuse to grant an administration order if it finds that the debtor will not have sufficient means after the order becomes effective. On the other hand, it is not fair towards the creditors to receive a very small amount over a long period of time, while the debtor refuses to sell his or her assets some of which might be luxury items.

- *Should an administration order be granted even if the amount that the debtor can afford to pay is so little that the granting of the order will be to the detriment of the creditors? Keep in mind that debtors will remain under administration for a long period if they do not pay a reasonable instalment. Should the protection of the debtor against execution proceedings outweigh all other factors? Bear in mind that the consequences for a debtor who applies for an administration order are different from those of a judgment debtor under section 65J. If the application of a judgment creditor who seeks to attach the salary of a judgment debtor is rejected, he or she will have to pursue other avenues, whereas a debtor who applies for an administration order is an indebted person trying to obtain relief*.

(d) by the insertion after subsection (1) of the following subsection:

"(1A) Subsection (1) does not apply to a spouse married out of community of property or a spouse referred to in paragraph *(d)* of the definition of "spouse", except in so far as it relates, for the purpose of determining the expenses referred to in section 74A(2)*(d)*, to the income of such spouse who lives with the debtor.";

(e) by the deletion of subsection (5).

Amendment of section 74C of Act 32 of 1944

6. Section 74C of the principal Act is hereby amended by the substitution for that section of the following section:

"**Contents of administration order**

(1) An administration order shall be in the form prescribed by the rules and—

(a) shall lay down the amount and date of the weekly or monthly or other payments to be made by the debtor in terms thereof, which amount shall, as nearly as possible, approximate the difference between the debtor's future income, which includes the future income, if any, of a spouse married in community of property and the sum of—

(i) the amount determined by the court as the reasonable amount required by the debtor for his or her necessary expenses and those of the persons dependent on him or her;

(ii) the future and arrear instalments in respect of secured debts for the retention of assets that the court regards as necessary for the requirements of the debtor and his or her dependants if the court regards the payments and the payment

of arrear instalments as reasonable in view of the debtor's income;

(iii) the periodical payments to be made by the debtor in terms of an existing maintenance order;

(aA) shall make provision for the payment of future payments and arrear payments in respect of the secured debts contemplated in paragraph *(a)*(ii); and

(b) may specify—

(i) the assets, if any, of the estate under administration which are not subject to a secured claim and which must be retained by the debtor because the assets are necessary for his or her requirements and those of his or her dependants, and the retention of which is reasonable in view of the debtor's income;

(ii) the assets, if any, of the estate under administration which may be realised by the administrator for the purpose of distributing the proceeds to the creditors as contemplated in section 74K **[: Provided that no such asset that is the subject of any credit agreement regulated by the National Credit Act, 2005 (Act 34 of 2005), shall be realized without the written permission of the seller]**;

(iii) that particular deductions from the regular income of the debtor which are justified by his or her reasonable needs be continued and that other deductions, except statutory deductions or payments to be made in terms of an existing maintenance order, be discontinued;

[(iii) the debtor's obligations which the court took account of in determining the amount of the weekly or monthly or other instalments to be paid by the debtor to the administrator;

(iv) the assets, if any, which shall not be disposed of by the debtor except by leave of the administrator or the court;]

[v](iv) such other provisions or conditions as the court may deem necessary or expedient;

(c) may include a declaration of reckless credit made by the court referred to in section 74B(1)*(h)*;

(d) shall include the name and bank account details of each creditor;[754]

(e) shall, where applicable—

(i) include the interest rate in respect of each amount owed by the debtor;

(ii) include the reduced interest rate in respect of one or more debts considered by the court in terms of section 74B*(i)*; and

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754 This information (as well as the other information on the order) will be needed by the accounting clerk to create the master data on MojaPay.

(iii) direct that the amount in interest, which was charged in excess of the prescribed interest rate since the first instalment on the debt must be deducted from the unpaid balance of the debt.

(f) may exclude one or more secured debts, provided that the assets concerned are not essential for the debtor or his or her dependant's daily living or needed for the debtor's occupation, trade or business.

(2) The debtor may not dispose of assets referred to in subsection (1)*(a)*(ii) and subsection (1)*(b)*(i) and (ii) except by leave of the administrator or the court or subject to such other conditions as the court may order. **[The amount of the weekly or monthly or other payments to be made by the debtor to the administrator in terms of the administration order shall, as nearly as possible, approximate the difference between the debtor's future income and the sum of-**

(a) **the amount determined by the court as the reasonable amount required by the debtor for his necessary expenses and those of the persons dependent on him;**

(b) **the periodical payments which the debtor is obliged to make under a credit agreement as defined in section 1 of the National Credit Act, 2005 (Act 34 of 2005): Provided that the court may in its discretion refuse to take into account the periodical payments which the debtor undertook to pay under such a transaction for the purchase of goods which are not exempt from execution in terms of section 67 or which, in the opinion of the court, cannot be regarded as the debtor's household requirements, unless the court is of opinion that in all the circumstances it is desirable to safeguard the goods concerned;**

(c) **the periodical payments to be made by the debtor in terms of an existing maintenance order;**

(d) **the periodical payments to be made by the debtor under a mortgage bond or any other written agreement for the purchase of any asset in terms of which the liabilities thereunder are payable in instalments, if in all the circumstances the court is of opinion that the instalments payable are reasonable in view of the judgment debtor's income and the sums of money due by him to other creditors or that it is desirable to safeguard the mortgaged property or the asset to which the written agreement relates; and**

(e) **the payments to be made by the debtor by virtue of any other obligation referred to in section 74A (2) (e) (ii).**

(3) The court may take into account the income of the debtor's wife, who is living with him, in determining the amount referred to in subsection (2) (a) and, where the debtor is married in community of property, in determining the debtor's income.]".

Repeal of section 74D of Act 32 of 1944

7. Section 74D of the principal Act is hereby repealed.

Amendment of section 74E of Act 32 of 1944

8. Section 74E of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

"(1) Subject to subsections (1A) and (1B), [**W**]when an administration order has been granted under section 74(1), the court shall appoint a person as administrator, which appointment shall become effective only after a copy of the administration order has been handed or sent to him or his legal representative by registered post **[and, in the event of his being required as administrator to give security, after he has given such security]**.";.[755]

(b) by the insertion after subsection (1) of the following subsections:

"(1A) The head office or branch office of a person referred to in subsection (1) shall be within a 50-kilometre radius of the place where the debtor resides, is employed or carries on business.

(1B) Despite subsection (1A), the court may appoint a person referred to in subsection (1) as an administrator if—

(a) the court is satisfied that the financial burden to the debtor caused by travelling to the head office or a branch office of such person would not be greater than what it would have been if an administrator was appointed whose office was within a 50-kilometre radius of the place where the debtor resides, is employed or carries on business; or

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755 In the light of the fact that payment is no longer to be made to the administrator, it is recommended that the words "in the event of his being required as administrator to give security, after he has given such security" at the end of subsection (1) be deleted.

(b) the office of the nearest administrator was situated more than 50 kilometres from the place where the debtor resides, is employed or carries on business.

(1C) Any service, information or document in respect of an administration order provided by or in possession of the head office of an administrator shall be accessible through or at any of its branch offices.

(1D) A person may not act as an administrator for the estate of a debtor if he or she—

(a) was not appointed by the court to act as an administrator for the estate of the debtor concerned;

(b) has been struck off the roll of attorneys or if proceedings to strike his or her name off the roll of attorneys or to suspend him or her from practice as an attorney have been instituted;

(c) has been found guilty of unprofessional, dishonourable or unworthy conduct relating to the management of his or her trust account that he or she keeps in terms of section 86 of the Legal Practice Act, 2014 (Act 28 of 2014), or in terms of any other law relating to his or her profession;

(d) is of unsound mind and has been so declared or certified by a competent authority;

(e) is an unrehabilitated insolvent;

(f) is not a member of a professional body recognised in terms of subsection (1G);[756]

(g) subject to section 31*(b)*, does not comply with the prescribed education, experience or competency requirements;

(h) has been convicted of an offence of which dishonesty is an element; or

(i) does not reside in the Republic.

(1E) An administrator may not buy the debt of a debtor from the person to whom that debt is owed.

(1F) The provisions of section 74N(5), (6) and (7) apply, with the necessary changes, to a person referred to in subsection (1D) and an administrator referred to in subsection (1E).

(1G) The Minister may—

(a) from time to time, by notice in the *Gazette*, publish the name of a professional body that regulates the practice of a profession and

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[756] Section 74N(5) to (7) provides for certain consequences if the court finds that a person has contravened the provisions of subsection (1D). One of the consequences is that the professional body of which the person is a member must be notified of the contravention and that such body may revoke or cancel the registration or admission that the person concerned requires in order to conduct his or her business. However, if such a person is not a member of a professional body, he or she will not suffer the consequences intended by this provision. This will be problematic in the absence of a dedicated regulatory body for administrators.

maintains and enforces rules to ensure that its members are fit and proper persons to practice the profession;

(b) revoke a notice referred to in paragraph *(a)* if it appears to the Minister that the professional body no longer satisfies the requirements of paragraph *(a)*.

(1H) An administrator who is a member of a professional body referred to in subsection (1G)*(b)* may—

(a) continue to act as an administrator for the estate of a debtor for a period of six months, during which period he or she shall arrange with another person to replace him or her as an administrator in terms of section 74EA;

(b) in the manner prescribed, apply to the Minister to continue to act as an administrator for the estates of the debtors under administration with him or her.

(1I) The Minister may permit an administrator referred to in subsection (1H)*(b)* to continue to act as an administrator if he or she complies with the prescribed conditions.";

(c) by the deletion of subsections (3) and (4); and

(d) by the insertion after subsection (4) of the following subsections:

"(5) An administrator shall comply with the prescribed education, experience or competency requirements.

(6) An administrator shall, within 30 days after complying with the provisions of subsection (1), provide the debtor over whose estate he has been appointed as an administrator with a prescribed letter setting out—

(a) the debtor's rights and obligations;

(b) the administrator's rights and obligations;

(c) the contact details of the professional body of which the administrator is a member;

(d) the procedure for referring a complaint against the administrator to the professional body of which the administrator is a member; and

(e) the remedies provided for in this Act if the administrator fails to carry out his duties.

(7) The letter referred to in subsection (6)—

(a) shall be available in the official language the debtor understands best; and

(b) may be delivered to the debtor personally or by registered mail, fax or e-mail to an address, number or electronic address given by the debtor as his address or number.".

Insertion of section 74EA in Act 32 of 1944

9. The following section is hereby inserted after section 74E of the principal Act:

"**74EA Application for substitution of administrator**

(1) A person who wishes to take over as administrator the administration of the estates of debtors whose estates at that time are managed in terms of administration orders by an administrator who has been appointed by the court under section 74E or this section shall, in a single application, apply to court to be appointed as the administrator for all the debtors concerned.

(2) An administrator who was appointed by the court in terms of subsection (1) shall—

(a) within one month of his or her appointment, notify each debtor and creditor of his or her appointment and of his or her full contact details; and

(b) lodge with the clerk of the court where the administration order was granted a copy of the notice.

(3) An application in terms of subsection (1) shall not be for the cost of the debtors concerned.

(4) A person who knowingly acts as an administrator for the estate of a debtor without being appointed as an administrator in terms of section 74E or this section is not entitled to expenses and remuneration as contemplated in section 74L.

(5) Section 74E applies, with the necessary changes, to the appointment of a person referred to in subsection (1).".

Amendment of section 74F of Act 32 of 1944

10. Section 74F of the principal Act is hereby amended—

(a) by the substitution for subsection (2) of the following subsection:

"(2) The administrator shall **[forward]** deliver a copy of the administration order by registered post, fax or e-mail to each creditor whose name is mentioned by the debtor in the statement of his affairs or who has given proof of a debt."; and

(b) by the insertion after subsection (2) of the following subsections:

"(2A)A creditor who has received a copy of the administration order referred to in subsection (2) shall, within 10 business days after receipt of the order, furnish the administrator with a certificate of balance in respect of the amount owed by the debtor as at the date of the granting of the order and, where applicable, the interest rate in respect of the amount owed.

(2B) If the certificate of balance referred to in subsection (2A) is not received by the administrator within 10 business days from the date of the delivery of the copy of the administration order to the creditor as contemplated in subsection (2A), the administrator shall, for purposes of the list referred to in section 74G(1), use the balance of the claim as reflected in the application for the administration order or the most recent statement received by the debtor from the creditor, whichever is the latest.

(2C) In determining the balance of the claim referred to in subsection (2B), the administrator shall take into account any payments made by the debtor subsequent to the listing of the claim in the statement of affairs.".

Amendment of section 74G of Act 32 of 1944

11. Section 74G of the principal Act is hereby amended—

(a) by the deletion of subsections (2), (3), (4), (5) and (6).

(b) by the substitution for subsection (9) of the following subsection:

"(9) Where the seller has sold the goods in terms of a court order referred to in subsection (8) he shall, if the sale was by public auction, forthwith lodge the auction list with the administrator and pay **[to the administrator]** into the Administration Account for *pro rata* distribution to the creditors of the debtor[757] the amount of the proceeds of the sale in excess of the amount of his debt and the costs connected with the sale or, if the net proceeds of the sale are insufficient to pay his debt in full, he may lodge a claim with the administrator in respect of the balance of the purchase price owing to him for inclusion in the list of creditors who are entitled to share in the pro rata distribution of funds received by the administrator.".

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757 See also the proposed section 74JA(8) and the amendment to section 74K(3).

Amendment of section 74H of Act 32 of 1944

12. The following section is hereby substituted for section 74H of the principal Act:

"**74H Inclusion of creditors in list after granting of administration order**

(1) Any person who becomes a creditor of the judgment debtor after an administration order has been granted or who was a creditor of the debtor on the date the order was granted or on the date the application for the administration order and the statement of affairs were lodged with the clerk of the court but who was not included in the list of creditors, and who is desirous of providing proof of debt, shall—[758] **[lodge his claim in writing with the administrator, who shall thereupon advise the debtor thereof in the form prescribed in the rules.]**

(a) apply to court to be included in the list of creditors referred to in section 74G(1); and

(b) at least 10 days before the date of the application contemplated in paragraph *(a)* deliver to the administrator and each creditor referred to in section 74G(1) notice of that application.

[(2) If the debtor admits the claim or does not dispute it within the period allowed in the notice referred to in subsection (1), the provisions of section 74G (3) shall, mutatis mutandis, apply, but the creditor shall not be entitled to a dividend in terms of the administration order until the creditors who were creditors on the date of the granting of the order have been paid in full.[759]

(3) If the debtor disputes the claim within the period allowed in the notice referred to in subsection (1), the provisions of section 74G (4), (5) and (6) shall, mutatis mutandis, apply but if the court allows the claim as a whole or in part, such claim shall be subject to the rights referred to in subsection (2), of creditors who were creditors on the date on which the administration order was granted.]

(4) The provisions of section 74G(7), (8) and (9) and of subsection**[s]** (1)**[, (2) and (3)]** of this section shall, **[*mutatis mutandis*]** with the necessary changes, apply to any person who after the granting of an administration order sold and delivered goods to the debtor under a credit agreement as defined in section 1 of the National Credit Act, **[2005 (Act 34 of 2005),]** and is desirous of providing proof of debt.

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758 Such creditors must apply to court so that the court can consider matters such as reckless credit, reduction of the interest rate, whether the debtor will have sufficient means for his or her maintenance and that of his or her dependants or whether any asset of the debtor should be realised.

759 Having regard to the proposed amendments to section 74S and the fact that the court must consider reckless credit, there is no reason to provide that a person who becomes a creditor of the debtor after the administration order was granted is not be entitled to a dividend until the creditors who were creditors on the date of the granting of the order have been paid in full.

Insertion of section 74HA in Act 32 of 1944

13. The following section is hereby inserted after section 74H of the principal Act:

"**74HA Administration Account**

The Director-General of the Department shall, in terms of section 5(1) of the Justice Administered Fund Act, 2017 (Act 2 of 2017), open and maintain a bank account, which shall be known as the Administration Account, into which payments in terms of administration orders shall be made.".[760]

Amendment of section 74I of Act 32 of 1944

14. Section 74I of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

"(1) The debtor shall, subject to the provisions of this section, in the manner prescribed, pay **[the administrator]** into the Administration Account the amounts of the weekly or monthly or other payments that he is required to make in terms of the administration order.";[761]

(b) by the substitution for subsection (2) of the following subsection:

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760 It would not be possible to make unreferenced or incorrectly referenced deposits in the proposed bank account because participating banks (ABSA, Nedbank, Standard Bank and FNB) will reject any deposit that does not meet the validation requirements, as is currently the case with other Justice administered funds. See also the proposed amendment to the Justice Administered Fund Act 2 of 2017.

761 The process would be as follows. A product type for administration orders will be created. Based on the information with which the administrator provided the court, the accounting clerk at the court will create the master data by capturing the relevant information on MojaPay. The information will include the details of the debtor and creditors, the amount to be deposited, date and frequency of payments, bank account details, details of the court order, etc. In the system, the debtor will be created as a depositor and each creditor as a beneficiary. After approval of the master data, a request will be created on the system. The system will issue an account reference number (ARN), which will be given to the debtor. The ARN is used as reference every time the debtor deposits money into the bank. The details of the bank account (Administration Account) in which the debtor must make deposits will also be given to the debtor. Alternatively, the debtor can make deposits at the magistrate's court by using his or her unique ARN. The ARN ensures that the money is allocated to the correct case. It also allows the debtor to interact with the Department. The system is currently customised to send an e-mail or sms to beneficiaries if payment is not received within a specified time period. The functionality to perform the process explained above is already in place and is currently used for payments in respect of maintenance, bail and fines. ISM indicated that the system could be customised to send a reminder e-mail or sms to the debtor if a deposit is not received on a specific date.

"(2) If a debtor fails to make the payments **[to the administrator]** referred to in subsection (1) that he is required to make in terms of the administration order, the provisions of sections 65A to 65L shall, **[mutatis mutandis]** with the necessary changes, apply, while any reference in the said provisions to the judgment concerned, the judgment creditor or the judgment debtor shall be construed as a reference to the administration order concerned, the administrator or the debtor, respectively.";

(c) by the substitution for subsection (5) of the following subsection:

"(5)*(a)* When an emoluments attachment order or garnishee order referred to in subsection (3) has been served on the garnishee, he shall be obliged to pay, in the manner prescribed, **[to the administrator]** the amounts concerned as provided by the order into the Administration Account **[and such payments shall constitute a first preference against the debtor's income]**.

(b) The provisions of section 65J(4) to (8) and (10) shall**[*mutatis mutandis*]**, with the necessary changes, apply to the emoluments attachment order referred to in paragraph *(a)*, and in such application any reference in the said provisions to the judgment creditor shall be construed as a reference to the administrator."; and

(d) by the insertion after subsection (5) of the following subsections:

"(6) The amounts referred to in section 103(5) of the National Credit Act or interest that accrue during the time that a debtor is in default in respect of a debt under administration may not, in aggregate, exceed the unpaid balance of the principal debt as at the time the default occurs and these amounts or interest may not accrue while the default persists.[762]

(7) An administrator may not add an amount or interest charged to the debt concerned in contravention of subsection (6).

(8) An administrator who fails to comply with subsection (7) is liable to pay to the debtor's estate the amount or interest so added to the debt concerned.".

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762 In *National Credit Regulator v Nedbank Ltd* 2009 (6) SA 295 (GNP) Du Plessis J held that once the total charges referred to in section 101(1)*(b)–(g)* of the NCA equal the amount of the unpaid balance, payments made by a consumer thereafter during a period of default do not have the effect of permitting the credit provider to charge further interest while such default persists. This was confirmed, on appeal, by Malan JA in *Nedbank v National Credit Regulator* 2011 (3) SA 581 (SCA).

Substitution of section 74J of Act 32 of 1944

15. The following section is hereby substituted for section 74J of the principal Act:

"**74J Duties of Department**

(1) The Department shall, in the manner prescribed—

(a) collect the payments to be made in terms of the administration order concerned;

(b) keep up to date a list of all payments and other funds received from or on behalf of the debtor, indicating the amount and date of each payment;

(c) subject to section 74L, distribute such payments *pro rata* to the creditors monthly;[763]

(d) provide the administrator concerned with the list referred to in paragraph *(b)* and the list shall be available for inspection, free of charge, by the debtor and creditors or their attorneys during office hours at the office of the administrator; and

(e) inform the administrator if payment has not been received from the debtor.[764]

[(2) If any debt or the balance of a debt be less than R10, the administrator may in his discretion pay such debt in full if such action will facilitate the distribution of funds in his possession.]

(3) Claims that would enjoy preference under the laws relating to insolvency shall be paid out in the order prescribed by those laws.

[(4) An administrator may, out of the moneys which he controls, pay any urgent or extraordinary medical, dental or hospital expenses incurred by the debtor after the date of the administration order.]

(5) Every distribution account in respect of the periodical payments and other funds received by **[an administrator]** the Department shall be numbered consecutively, shall bear the case number under which the administration order has been filed, shall be in the form prescribed in the rules, **[shall be signed by the administrator]** and shall, in the manner prescribed,[765] be **[lodged at]** furnished to the office of the clerk of the court, where it may be inspected free of charge by the debtor and the creditors or their attorneys during office hours.

(6) A distribution account referred to in subsection (5) shall at the request of any interested party be subject to review free of charge by any judicial officer.

[(7) An administrator shall deposit all moneys received by him from or on behalf of debtors whose estates are under administration-

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763 The MojaPay system allows payments to be made to one or more creditors.

764 It is possible to customise MojaPay to send an e-mail message to the administrator.

765 ISM indicated that the distribution account could be created on the system, after which the clerk of the court would be able to display and print it.

(a) **if he is not a practising attorney, in a separate trust account with any bank in the Republic, and no amount with which any such account is credited shall be deemed to be part of the administrator's assets or, in the event of his death or insolvency, of his deceased or insolvent estate;**

(b) **if he is a practising attorney, in the trust account that he keeps in terms of section 33 of the Attorneys, Notaries and Conveyancers Admission Act, 1934 (Act 23 of 1934).]**

[(8) If a debtor should at any time, despite a registered letter of demand from the administrator, be 14 days in arrear with the payment of any instalment and if steps in terms of section 74I(3) cannot be taken or have been taken unsuccessfully, or if the debtor has disappeared, the administrator shall forthwith notify the creditors in writing thereof and request their instructions.

(9) If within the period allowed in a notice contemplated in subsection (8) the majority of the creditors instruct him to do so, or fail to respond, the administrator shall institute legal proceedings against the debtor for his committal for contempt of court or take such steps as may be necessary to trace the debtor who has disappeared, as the circumstances may require.]

(10) If within the period allowed in a notice contemplated in subsection (8) the majority of the creditors instruct him to do so, the administrator shall apply to the court for the rescission of the administration order.

(11) If an administrator fails to lodge a distribution account with the clerk of the court within one month from the time his obligation to do so commenced, any interested party may apply to the court for an order directing him to lodge a distribution account with the clerk of the court within the time laid down in the order or relieving him of his office as administrator.

(12) If an administrator has lodged a distribution account with the clerk of the court but has failed to pay any amount of money due to any creditor in terms of such account within one month thereafter, the court may upon the application of the creditor order the administrator to pay the creditor the amount concerned within such period as may be fixed in the order and furthermore to pay to the debtor's estate an amount which is double the amount which he failed so to pay.

(13) The court may order an administrator to pay the costs of an application in terms of subsection (11) or (12) *de bonis propriis*.]

(14) If any debt which was due at the time of the granting of an administration order in respect of a debtor's estate is paid in full or in part to the creditor by the debtor after the granting of the order, otherwise than by way of payments in terms of the administration order, such payment shall be invalid and the administrator may recover the amount paid from the creditor, unless the creditor proves that the payment was effected without his knowledge of the administration order, and, in addition, the creditor shall forfeit his claim against the estate of the debtor if the payment was

effected at the request of the creditor whilst he had knowledge of the administration order.]".

Insertion of section 74JA in Act 32 of 1944

16. The following section is hereby inserted after section 74J of the principal Act:

"**74JA Duties of administrator**

(1) An administrator shall, before making an application for an administration order, explain to a debtor who qualifies for debt intervention in terms of the National Credit Act what debt intervention is and inform the debtor that he or she may apply for debt intervention.

(2) An administrator shall request each creditor of the debtor to consider reducing the interest rate on the debt owed to him or her in order to shorten the period the debtor remains under administration.

(3) An administrator shall, after being appointed as an administrator in terms of section 74E, within the prescribed time, calculate the *pro rata* payments in percentages to be made to each of the debtor's creditors and provide the accounting clerk of the court, in the manner prescribed, with such percentages for purposes of creating the master data for the payments to be made from the Administration Account.

(4) *Pro rata* payments referred to in subsection (3) shall not include—

(a) payment to a creditor whose debt is not yet due;

(b) payment to a conditional creditor if the condition has not been fulfilled.

(5) Subsection (3) applies, with the necessary changes, every time a new creditor is included in the administration of the debtor's estate, a debt of a creditor is settled and a payment referred to in subsection (4) becomes due and payable.

(6) If a debtor at any time, despite a registered letter of demand from the administrator, is 14 days in arrear with the payment of any instalment and if steps in terms of section 74I(3) cannot be taken or have been taken unsuccessfully, or if the debtor has disappeared, the administrator shall forthwith notify the creditors in writing thereof and request their instructions.

(7) If within the period allowed in a notice referred to in subsection (6) the majority of the creditors instruct the administrator to apply to the court for the rescission of the administration order or fail to respond, the administrator shall **[institute legal proceedings against the debtor for his committal for contempt of court]** apply to the court for the rescission of the administration order or if the debtor has disappeared, take such steps as may be necessary to trace **[the]**that debtor **[who has disappeared]**, as the circumstances may require.[766]

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766 If the administrator manages to trace the debtor, a letter of demand could be sent to the debtor. If the debtor fails to give heed to the letter of demand, the administrator may apply for the rescission of the administration order.

With reference to subsections (6) and (7), it has been argued that, because so little funds are available in an administration, applying to court for the rescission of the administration order would result in added cost. As an alternative to these subsections, the Bill could provide that if a debtor, despite a registered letter of demand from the administrator, fails to make payment for a continuous period of six months, the administration order will lapse, unless the court decides otherwise. Furthermore, a creditor should be able to claim any outstanding debt directly from the debtor as soon as the creditor receives notice in this regard from the administrator.

(8) If any debt which was due at the time of the granting of an administration order in respect of a debtor's estate is paid in full or in part to the creditor by the debtor after the granting of the order, otherwise than by way of payments in terms of the administration order, such payment shall be invalid and the administrator may recover the amount paid from the creditor, unless the creditor proves that the payment was effected without his knowledge of the administration order, and if the creditor had knowledge of the administration order and nevertheless requested that the payment be made, the creditor shall forfeit his, her or its claim against the estate of the debtor .

(9) The creditor shall pay the amount referred to in subsection (8) into the Administration Account for *pro rata* distribution to the creditors of the debtor.

(10) An administrator shall arrange a debtor's payments on his or her debts in such a manner that monies becoming available once one debt is paid off are allocated to the payment of the remaining debt"

Amendment of section 74K of Act 32 of 1944

17. The following section is hereby substituted for section 74K of the principal Act:

"(1) An administrator may, **[if authorized thereto by the court, subject to the provisions of subsection (2),]** with the written permission of the debtor, **[realize any]** realise an asset of the estate under administration, **[and in granting any such authorization the court may impose any such conditions as it may deem fit]** for the purpose of distributing the proceeds to the creditors of the debtor.

(2) An asset mentioned in subsection (1)**[,]** which is the subject of **[any]** a credit agreement regulated by the National Credit Act**[, 2005 (Act 34 of 2005),]** shall not be **[realized]** realised except with the written permission of the credit provider.

(3) If the credit provider as defined in section 1 of the National Credit Act**[, 2005 (Act 34 of 2005),]** is obliged to pay to the debtor an amount in terms of the said Act, the credit provider shall pay that amount **[to the administrator]** into the Administration Account for *pro rata* distribution **[among]** to the creditors of the debtor.

(3A) If the debtor without reasonable grounds refuses to give the administrator permission to realise an asset, the court may authorize the administrator to realise the asset and in granting any such authorization the court may impose such conditions as it deems fit.

(4) Whenever the court authorizes **[any]** an administrator to **[realize any]** realise an asset, the court may amend the payments to be made in terms of the administration order accordingly.

(5) When considering whether an asset must be realised, the court must consider, but is not limited to, the following factors:

(a) whether the asset is essential for the debtor or his dependants' daily living;

(b) whether the asset is needed for the debtor's occupation, trade or business; and

(c) the value and equity of the asset.".

Substitution of section 74L of Act 32 of 1944

18. The following section is hereby substituted for section 74L of the principal Act:

"**74L Remuneration and expenses of administrator**

(1) The remuneration and expenses of an administrator shall be an amount equal to 12,5 per cent[767] of each payment made by the debtor, determined in accordance with the items in the Tariff to Part III of Table B of Annexure 2 to the rules.

(2) The amount referred to in subsection (1) excludes the legal costs relating to —[768]

(a) an application for an administration order as contemplated in section 74O;

(b) an application for an emoluments attachment order or garnishee order as contemplated in section 74D, determined in accordance with the items in Part IV of Table A of Annexure 2 to the rules;

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767 The current section 74L(2) provides that the administrator's expenses and remuneration *shall not exceed 12,5%* of the amount collected. The proposed provision gives the administrator a flat percentage of 12,5%, because ISM pointed out that it would be difficult to customise the MojaPay application to make different payments totalling 12,5%. Consideration should therefore be given to whether the 12,5% should be reduced in view of the fact that administrators would also claim for costs for work set out in subsections (2) and (3) and the fact administrators would no longer be tasked with the collection of fees (see in the latter regard paragraphs 5.360 – 5.362 of the discussion paper. The deduction of 12,5% from each payment received would have to be built into the MojaPay product type for administration orders, meaning that 12,5% of each payment would automatically be paid to the administrator.

768 The administrator would be able to claim for legal costs in addition to the 12,5% referred to in subsection (1). Unlike the 12,5%, which will automatically be paid to the administrator, claims in respect of subsection (2) and (3) would be paid only if such a claim is submitted by the administrator. Furthermore, in order to prevent a situation in which administrators submit claims other than those set out in subsections (2) and (3), the types of claim and the maximum amounts that may be claimed should be built into the MojaPay system. MojaPay should be customised to reject claims that do not fall under subsections (2) or (3) or that exceed the maximum amount that may be claimed.

(c) an application for the rescission of an administration order as contemplated in section 74JA(6);

(d) an application for the suspension, amendment or rescission of an administration order as contemplated in section 74Q(1);

(e) an application for the amendment of an administration order as contemplated in section 74Q(2);

(f) steps taken to trace a debtor who has disappeared as contemplated in section 74JA(6); [769] and

(g) proceedings for the recovery of the amount referred to in section 74JA(7) from a creditor.

(3) An administrator shall be entitled to an amount for the determination of reckless credit as contemplated in section 74AA, determined in accordance with a tariff prescribed in the rules,[770] only if the court has made a declaration of reckless credit.[771]

(4) The expenses and remuneration referred to in subsection (1), legal cost relating to work referred to in subsection (2) and the amount for the determination of reckless credit referred to in subsection (3) shall—

(a) constitute a first preference against the payments received from the debtor;

(b) upon application by an interested party, be subject to taxation by the clerk of the court and review by a judicial officer.

(5) Legal costs relating to subsection (2)*(a)*, *(d)*, *(e)* and *(g)* may not be incurred without the written consent of the debtor.

(6) The Rules Board for Courts of Law shall make rules regarding the fees for—

(a) an application for an administration order in terms of section 74O;

(b) the determination of reckless credit referred to in subsection (3);

(c) consultations between the debtor and the administrator relating to the debtor's administration;[772] and

(d) the prescribed letter[773] referred to in section 74E(6) that the administrator must provide to the debtor.

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769 Section 74L(1)*(b)*, which allows the administrator to retain an amount to cover the cost that may have to be incurred if the debtor is in default or disappears, has not been included in the Bill because the debtor will not make payment to the administrator but into the Justice Administered Fund.

770 As in the case of costs claimed in terms of subsection (2), the fee for determining reckless credit will be payable only once at the beginning of the administration and every time a new creditor is added to the list of creditors.

771 The NCR introduced a reckless-lending fee of R1 500 per debt counselling application, taking into account the amount of work a debt counsellor has to do before he or she can recommend that the court declare a credit agreement to be reckless credit. This fee was, however, withdrawn by the NCR as it was being abused by debt counsellors. Hence the recommendation that administrators should be entitled to an amount for the determination of reckless credit only if the court has made a declaration of reckless credit. This will ensure that administrators obtain all the relevant information to enable them to determine whether or not a credit agreement is reckless.

772 In the Anglo-American case (currently before the Gauteng Division of the High Court, Pretoria), the respondent in her answering affidavit acknowledged that the debt of one of the debtors under administration with her has increased significantly because this debtor insisted on regular consultations with her. As the respondent is an attorney administrator, it is very likely that she charged attorney and client fees for the consultations. Hence it is vital to set out in the tariff the fee that an administrator may charge for consultations relating to a debtor's administration.

(7) Except the fees referred to above, no other fees or costs shall be charged to a debtor's administration.".

- *Should the current 12,5% for remuneration and expenses be reduced in the light of the proposal that the maximum amount for administration orders should be increased from R50 000 to R300 000 and the fact that administrators will be freed from the huge administrative task of distributing payments to the creditors and drawing up a distribution account? If yes, what would be an appropriate percentage? Please consider whether the percentage should be the same as that received by debt counsellors and give reasons for your view.*
- *Legal costs relating to work referred to in subsection (2)(a) and (c) – (g) are not capped. Legal costs relating to subsection (2)(b) are capped only for item 4 of Part IV but legal fees relating to the rest of the items are prescribed but not capped. Should the Rules Board be mandated to make rules regarding the maximum legal fees an administrator may charge?*

Insertion of section 74LA in Act 32 of 1944

19. The following section is hereby inserted after section 74L of the principal Act:

"**74LA Claims system**

The Department shall, in the manner prescribed, develop and maintain a system through which administrators must submit electronically—

(a) their claims for payment in respect of costs referred to in section 74L(2) and (3); and

(b) preferred claims for payment to creditors.". [774]

Amendment of section 74N of Act 32 of 1944

20. The following section is hereby substituted for section 74N of the principal Act:

"**74N Failure by administrator to perform his duties**

(1) An administrator shall, in accordance with his duties in terms of this Act, take the proper steps to enforce an administration order, and if he fails to do so, any creditor may, by

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773 This will be a *pro forma* letter and will not have to be drafted by the administrator.

774 The idea is that an administrator should in the comfort of his or her office be able to submit electronically a claim for his or her cost, after which payment would be made into his or her bank account through MojaPay. Likewise, the administrator should be able to submit a preferred claim, after which payment would be made directly into the bank account of the creditor through MojaPay.

leave of the court, take those steps, and the court may thereupon order the administrator to pay the costs of the creditor **[*de bonis propriis*]** out of his own pocket.

(2) An administrator may not add a creditor to the administration of a debtor except in accordance with the process set out in section 74H.

(3) An administrator who contravenes subsection (2) is liable to pay the debtor's estate the amounts paid to the creditor concerned.

(4) The amounts referred to in subsection (3) shall be paid into the Administration Account for *pro rata* distribution to the creditors of the debtor.

(5) A court may, during any hearing in terms of this Act and upon a finding that an administrator has contravened sections 74E(1D)(a) or (1E) or has failed to comply with any provision of this Act,[775] withdraw the appointment of that administrator in the case concerned.

(6) The clerk of the court that made the finding referred to in subsection (5) shall notify the professional body of which the administrator concerned is a member in writing of the finding and that professional body shall thereupon investigate the matter.

(7) The professional body referred to in subsection (6) may, where necessary, revoke or cancel the registration or admission that the administrator requires in order to conduct his business.".

Insertion of section 74NA in Act 32 of 1944

21. The following section is hereby inserted after section 74N of the principal Act:

"**74NA Lodging of complaints**

(1) The Director-General shall—

(a) establish in the Department a dedicated Help Desk to receive, assess and refer complaints against administrators; and

(b) in order to enable the Help Desk to perform its duties and functions, assign one or more officials in the Department to perform the tasks set out in this section.

(2) Any person may, in the prescribed manner and form, submit to the Help Desk a complaint against an administrator in respect of an alleged contravention of this Act.

(3) The Help Desk—

(a) shall, within 10 business days of receipt of the complaint, acknowledge in writing receipt of the complaint and inform the complainant of the case number assigned to the complaint; and

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775 Administrators, among others, fail to comply with the provisions of the Act in that they add *in futuro* debts to administration orders, while only debts that are due and payable may be added.

(b) may request the complainant to submit further information and documentation in relation to the complaint.

(4) The Help Desk may, in the prescribed form, issue a notice of non-referral to the complainant—

(a) if the complaint does not allege any facts which, if true, would constitute grounds for a remedy under this Act or any other law relating to the administrator's profession; or

(b) if the complainant, without good reason, fails to provide within 30 days the information and documentation referred to in subsection (3)*(b)*.

(5) The Help Desk, after an assessment of the complaint—

(a) shall, in the manner prescribed, refer the complaint for investigation to the professional body of which the administrator is a member, if the Help Desk concludes on reasonable grounds that there is substance in the complaint submitted to it; and

(b) may refer the complainant to any other appropriate forum for relief.

(6) A professional body who receives a complaint in terms of subsection (5) shall—

(a) in terms of its applicable legislation, rules or processes, investigate the complaint against the administrator who is a member of that body;

(b) in its investigation, be guided by the provisions of this Act and the code of conduct for administrators referred to in section 74WA.

(7) Notwithstanding the provisions of any other law relating to the professional body, the outcome of the investigation contemplated in subsection (6) shall be submitted to the Director-General within 14 days after conclusion of the investigation.

(8) The Director-General—

(a) shall communicate the outcome of the investigation to the complainant;

(b) may refer the outcome of the investigation to the National Prosecuting Authority, if an offence had been committed in terms of this Act.

(9) An official referred to in subsection (1) shall receive training—

(a) in the provisions of the Magistrates' Courts Act and its regulations relating to administration orders;

(b) in the complaints procedure of a professional body recognised by the Minister in terms of section 74E(1G)*(a)*; and

(c) to assist him or her to execute effectively the tasks set out in subsections (4) and (5).

(10) Nothing in this section shall be construed as prohibiting a debtor from lodging a complaint directly with the professional body of which the administrator is a member.".

Amendment of section 74O of Act 32 of 1944

22. The following section is hereby substituted for section 74O of the principal Act:

"**Costs of application for administration order**

(1) Unless the court otherwise orders or this Act otherwise provides, no costs in connection with any application in terms of section 74(1) shall be recovered from any person other than the administrator concerned**[, and then as a first claim against the moneys controlled by him]**.

(2) The costs contemplated in subsection (1) shall, upon application by an interested party, be subject to taxation by the clerk of the court and review by a judicial officer.

(3) The Rules Board for Courts of Law shall insert in Form 52 of Annexure 1 to the rules an item for the cost of an application for an administration order.".

Amendment of section 74Q of Act 32 of 1944

23. Section 74Q of the principal Act is hereby amended by the substitution for subsection (4) of the following subsection:

"(4) Any order rescinding an administration order shall be in the form prescribed in the rules and a copy thereof shall be delivered personally or by fax or e-mail or sent by registered post by the administrator to the debtor and to each creditor, who shall also be informed of the debtor's last known address by the administrator.".

Amendment of section 74S of Act 32 of 1944

24. Section 74S of the principal Act is hereby amended—

(a) by the substitution for subsection (2) of the following subsection:

"(2) The provisions of the Criminal Procedure Act, **[1955 (Act No. 56 of 1955)]** 1977 (Act No. 51 of 1977), with regard to periodical imprisonment shall **[*mutatis mutandis*]**, with the necessary changes, apply to periodical imprisonment imposed in terms of subsection (1).".

(b) by the insertion after subsection (2) of the following subsection:

"(3) Section 88(4) of the National Credit Act applies, with the necessary changes, to a credit agreement debt incurred after the granting of an administration order.".

Amendment of section 74U of Act 32 of 1944

25. The following section is hereby substituted for section 74U of the principal Act:

"**Lapsing of administration order**

(1) As soon as the costs of the administration and the listed creditors have been paid in full, an administrator shall—

(a) notify the creditors that he or she intends to lodge a certificate to that effect with the clerk of the court; and

(b) request the creditors to furnish him or her with the outstanding balance in respect of the debt owed to them.

(2) A creditor who has received a request referred to in subsection (1)*(b)* shall furnish the administrator with the outstanding balance in respect of the debt owed to him or her.

(3) If the outstanding balance referred to in subsection (2) is not received by the administrator within 20 business days from the date of the request to the creditor—

(a) the administrator shall lodge the certificate referred to in subsection (1)*(a)* with the clerk of the court and send copies thereof by registered post, fax or e-mail to the creditors (who shall also be informed therein of the debtor's last known address), and thereupon the administration order shall lapse; and

(b) the creditor may not claim any outstanding balance from the debtor.

(4) The debtor may, in the prescribed manner and form, file a copy of the certificate referred to in subsection (3) with the national register established in terms of section 69 of the National Credit Act or with any credit bureau, which shall, upon receiving the certificate, expunge from its records—

(a) the fact that the debtor was subject to administration; and

(b) any information relating to any default by the debtor in connection with a debt that was subject to administration.".

Repeal of section 74W of Act 32 of 1944

26. Section 74W of the principal Act is hereby repealed.

Insertion of section 74X, section 74Y, section 74Z and section 74ZA in Act 32 of 1944

27. The following section is hereby inserted after section 74W of the principal Act:

"**74X Code of Conduct**

(1) Subject to subsections (2), (3) and (4), the Minister shall prescribe a code of conduct for administrators.

(2) The Minister shall first publish in the *Gazette* the code of conduct referred to in subsection (1) together with a notice that the Minister intends to issue such a code and he or she invites interested persons to submit to him or her, within such period as is specified in the notice, any objections to or representations concerning the proposed code of conduct.

(3) The Director-General shall, after publication of the code of conduct and within the prescribed period—

(a) consult with the persons conducting business in the administration order regime with a view to familiarising them with the contents of the code of conduct and obtaining their views and comments on the code;

(b) give due consideration to the submissions made on the code of conduct; and

(c) revise if necessary the code of conduct published in terms of subsection (2);

(4) The Minister may publish in the *Gazette* the revised code of conduct for public comment, after which the provisions of subsection (3) shall, with the necessary changes, apply.

(5) The code of conduct contemplated in subsection (1) shall at least provide for—

(a) standards of professional conduct for the performance of functions in terms of this Act;

(b) co-operation among all role-players concerned;

(c) information for debtors regarding the benefits, consequences, costs and process of administration;

(d) ongoing assistance to debtors to ensure that they continue to meet their financial obligations in terms of their administration orders; and

(e) measures to be taken if debtors without reasonable grounds fail to meet their financial obligations;

(f) effective communication with debtors regarding payments received and distributions made; and

(g) a procedure for making and dealing with complaints alleging a breach of the code of conduct;

(6) A code of conduct issued in terms of this section comes into operation on a date determined by the Minister by notice in the *Gazette* and is binding on all administrators.

(7) The Director-General—

(a) shall monitor the effectiveness of the code of conduct issued in terms of this Act; and

(b) may on reasonable grounds request persons who conduct business in the administration order regime to furnish information necessary for purposes of—

(i) monitoring in terms of paragraph *(a)*; or

(ii) reviewing the effectiveness of the code of conduct relative to the purposes of this Act;

(c) shall take all reasonable steps to—

(i) publicise the existence of and inform members of the public about the contents of the code of conduct issued in terms of this Act;

(ii) inform members of the public of how and where to obtain a copy of the code of conduct;

(d) shall, as long as the code of conduct remains in force, make—

(i) it available on the Department's website; and

(ii) copies of it available, free of charge, for inspection by members of the public at each provincial office of the Department.

(8)*(a)* The Minister may amend the code of conduct issued in terms of subsection (1), if necessary.

(b) The provisions of subsections (2), (3) and (4) shall, with the necessary changes, apply to any amendment contemplated in paragraph *(a)*.

74Y Delegation of powers and duties by Director-General

(1) Subject to subsections (2) and (3), the Director-General may delegate any power conferred on or duty assigned to him or her in terms of this Act to an officer in the employ of the Department above the rank of director.

(2) A delegation in terms of subsection (1)—

(a) is subject to such limitations, conditions and directions as the Director-General may impose;

(b) must be in writing; and

(c) does not divest the Director-General of the responsibility of exercising such a power or performing such a duty.

(3) The Director-General may—

(a) confirm, vary or revoke any decision taken in consequence of a delegation in terms of this section; and

(b) at any time withdraw a delegation.

74Z Delegation of powers and duties by Minister

(1) Subject to subsections (2) and (3), the Minister may delegate any power conferred on or duty assigned to him or her in terms of this Act, excluding the power to make regulations contemplated in section 30, to the Director-General or to any other senior officer in the employ of the Department above the rank of chief director.

(2) A delegation in terms of subsection (1)—

(a) is subject to such limitations, conditions and directions as the Minister may impose;

(b) must be in writing;

(c) may include the power to sub-delegate; and

(d) does not divest the Minister of the responsibility of exercising such a power or performing such a duty.

(3) The Minister may confirm, vary or revoke any decision taken in consequence of a delegation or sub-delegation in terms of this section.

(4) An annual report must be submitted to the Minister in respect of any power or duty delegated in terms of subsection (1).

74ZA Regulations

(1) The Minister must make regulations—

(a) in consultation with the Minister of Finance, about the manner in which—

(i) payments into the Administration Account referred to in section 74HA must be made;

(ii) the Department must collect money and distribute such money to creditors as contemplated in section 74J(1);

(iii) preferred claims contemplated in sections 74G(6A), 74J(3) and 74L(4)*(a)* should be paid to creditors;[776] and

(iv) the Claims System referred to in section 74LA should be developed and maintained;

(b) about the manner in which—

(i) the list referred to in section 74J(1) should be kept up to date and furnished to the administrator;

(ii) the administrator should be informed that payment was not received from the debtor as provided for in section 74J(1)*(e)*;

(iii) the distribution account referred to in section 74J(5) should be submitted to the office of the clerk of the court;

(c) about the education, experience and competency requirements of administrators as provided for in section 74E(5);

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776 ISM indicated that MojaPay could be customised to deal with the payment of preferred claims.

(d) about any matter required or permitted to be prescribed in terms of this Act; and

(e) generally about all matters that are reasonable, necessary or expedient to be prescribed in order to achieve the objects of this Act.

(2) Any regulation made in terms of subsection (1) may provide that any person who contravenes a provision thereof or fails to comply therewith is guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding three months.

74ZB Transitional provisions

(1) A person who, on the date of commencement of this Act, acts as an administrator for the estate of a debtor—

(a) without having been appointed as an administrator as contemplated in section 74E must, within six months from the date of commencement of this Act, make an application to court in terms of section 74EA to be appointed as the administrator; and

(b) who does not comply with the prescribed education, experience or competency requirements in terms of section 74E(5) must, within two years from the date of commencement of this Act, comply with such requirements.

(2) An administrator must—

(a) within 30 days from the date of commencement of this Act pay all moneys received by him or her from or on behalf of debtors under administration into the Administration Account for distribution to the creditors of the debtors; and

(b) notify each debtor that payment must be made into the Administration Account as contemplated in section 74I(1).

(3) Section 74JA(2) and (3) apply, with the necessary changes, to the payment and distribution of moneys referred to in subsection (2)*(a)*.

Amendment of section 3 of Act 2 of 2017

28. The Justice Administered Fund Act, 2017, is hereby amended by the insertion in section 3 after paragraph *(e)* of the following paragraph:

"*(f)* money received in terms of administration orders made under the Magistrates' Courts Act, 1944 (Act 32 of 1944).".

Short title and commencement

29. This Act is called the Magistrates' Courts Amendment Act, 2020, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

OPTION 2

MAGISTRATES' COURTS AMENDMENT BILL

GENERAL EXPLANATORY NOTE:

[ ] Words in bold typed in square brackets indicate omissions from existing enactments

_____ Words underlined with a solid line indicate insertions in existing enactments

BILL

To amend the Magistrates' Courts Act, 1944, so as to insert definitions; to increase the monetary limit in order to allow more debtors to qualify for an administration order; to provide for circumstances under which no administration order may be granted; to increase the period of notice of application; to require an administrator to determine whether any of a debtor's credit agreements appear to be reckless; to require the court to question the debtor on whether the benefits, consequences, costs and the administration order process have been explained to him and whether he understands them; to empower the court to reduce the interest rate on a debt if it exceeds the prescribed interest rate set by law; to require the head office or branch office of an administrator to be within a 50 kilometre radius of the place where the debtor resides, is employed or carries on business; to provide for categories of persons who may not act as an administrator for the estate of a debtor; to make providing the debtor with certain information mandatory; to provide for a court process for the substitution of an administrator; to set out the remuneration and expenses of the administrator and legal costs that may be deducted from the money collected; to provide for consequences for failure of administrator to perform his duties; to provide for delivery by fax or e-mail; and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts as follows:—

Insertion of section 73A in Act 32 of 1944

1. The following section is hereby inserted after section 73 of the Magistrates' Courts Act, 1944 (hereinafter referred to as the principal Act):

"**73A Definitions**

(1) In sections 74 to 74W, unless the contrary intention appears:

"administration order" means an order issued in terms of section 74 in accordance with section 74C;

"administrator" means a natural person appointed as an administrator by the court in terms of section 74E or section 74EA;

In view of the fact that some administrators use juristic persons to administer their administration order files, should the Act provide for the appointment of a juristic person as an administrator? A comparison could be drawn with the Debt Collectors Act 114 of 1998, which provides for a company or close corporation to carry on business as a debt collector. In terms of section 8 of the Act, in addition to the company or close corporation itself, every director of the company and member of the close corporation and every officer of such company and close corporation, not being himself or herself a director or member but who is concerned with debt collecting, must be registered as a debt collector.

"asset" includes investments and shares in a company;

"credit agreement" means a credit agreement as defined in section 1 of the National Credit Act;

"date of application" means the date set down for the hearing of the application;

"debtor" means a natural person who is a debtor in the usual sense of the word and, in the event of the debtor being married in community of property, includes the spouse of the debtor;

"Department" means the Department of Justice and Constitutional Development;

"Director-General" means the Director-General of the Department;

"disputed creditor" means a creditor the amount of whose claim or the settlement of whose claim is in dispute;

"financial lease" means a contract in terms of which a lessor leases specified movable property to a lessee at a specified rent over a specified period subject to a term of the contract that—

(a) at the expiry of the contract the lessee may acquire ownership of the leased property by paying an agreed or determinable sum of money to the lessor; or

(b) the rent paid in terms of the contract will at the expiry of the contract be applied in reduction of an agreed or determinable price at which the lessee may purchase the leased property from the lessor; or

(c) the proceeds of the realisation of the leased property at the expiry of the lease will accrue wholly or partly to the lessee;

"Help Desk" means the Help Desk established in terms of section 74NA;

"Insolvency Act" means the Insolvency Act, 1936 (Act 24 of 1936);

"Minister" means the Minister responsible for Justice;

"National Credit Act" means the National Credit Act, 2005 (Act 34 of 2005);

"notice" means, subject to subsections (2) and (3), notice by registered post, fax, e-mail or personal delivery to an address, number or electronic address given by the intended recipient as the address,

number or electronic address where he will receive notice;

"preferred claim" means the right to payment of that claim out of the moneys collected by the administrator for *pro rata* distribution to the creditors of the debtor, in preference to other claims; and **"preference"** has a corresponding meaning;

"regular income" means weekly or monthly or other periodical income derived from any source whatsoever;

"reservation-of-ownership contract" means a contract in terms of which corporeal or incorporeal movable property is sold to a debtor, the purchase price is payable wholly or partly in the future, the property is delivered to or placed at the disposal of the debtor and the ownership in the property does not pass to the debtor upon delivery of the property, but remains vested in the seller until the purchase price is paid in full or until the occurrence of some other specified event;

"secured debt" means—

(a) a debt in respect of which a creditor can assert ownership of property delivered under a reservation-of-ownership contract or a financial lease in so far as payment can be obtained as a result of such assertion of ownership;

(b) a debt that is secured by property of the debtor under administration over which a creditor has a secured right by means of any special bond, landlord's hypothec, pledge, (including a cession of rights to secure a debt), right of retention; or preferential right over property in terms of any other Act;

"spouse" means a person's -

(a) partner in a marriage in terms of the Marriage Act, 1961 (Act 25 of 1961);

(b) partner in a customary marriage in terms of the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998);

(c) civil union partner as defined in section 1 of the Civil Union Act, 2006 (Act 17 of 2006); or

(d) partner in a relationship in which the parties live together in a manner resembling a partnership contemplated in paragraphs (a), (b) or (c);

(2) A notice by fax is regarded as notice if according to a transmission report the fax has been transmitted successfully, and notice sent by e-mail is regarded as notice on receipt of a notification that the e-mail has been successfully delivered, and if no report is received that the e-mail could not be delivered.

(3) The administrator may inform a creditor that any notice, application for or copy of an administration order or other related matter that shall be brought to the attention of the creditor in respect of a debt under administration with the administrator will be delivered to an address, number or electronic address given by the creditor as his or its address, number or electronic address, unless the creditor gives a different address, number or electronic address for the purpose of delivery."

Amendment of section 74 of Act 32 of 1944

2. The following section is hereby substituted for section 74 of the principal Act:

"**Granting of administration orders**

(1) Where a debtor—

(b) is unable forthwith to pay the amount of any judgment obtained against him in court, or to meet his financial obligations, and has not sufficient assets capable of attachment to satisfy such judgment or obligations; and

(b) states that the total amount of all his debts due does not exceed the amount **[determined by the Minister from time to time by notice in the *Gazette*]** of R300 000,[777]

[such] a court referred to in section 65I or the court of the district in which the debtor resides or carries on business or is employed may, upon application by the debtor or under section 65I, **[subject to such conditions as the court may deem fit with regard to security, preservation or disposal of assets, realization of movables subject to hypothec (except movables referred to in section 34 of the Land Bank Act, 1944 (Act 13 of 1944)), or otherwise,]** make an administration order **[(in this Act called an administration order providing for the administration of his estate and for the payment of his debts in instalments or otherwise]**.

(1A) The Minister may from time to time by notice in the *Gazette* increase the amount provided in subsection (1)*(b)*.

(2) An administration order **[shall]** is not **[be]** invalid merely because at some time or other the total amount of the debtor's debts are found to exceed the amount provided in subsection (1)*(b)* or the amount determined by the Minister **[from time to time by notice in the *Gazette*]** in terms of subsection (1A), but in such a case the court may, if it deems fit, rescind the order.

(3) No administration order may be granted if it appears[778] that—

(a) the debtor obtained credit or the extension of credit with fraudulent intent within six months before the date of application;

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777 The inclusion of the amount in the legislation eliminates the delay that might be caused whilst waiting for the Minister to determine the amount. This amount is higher than the monetary jurisdiction of the Magistrates' Court. However, an application for an administration order should always be heard in the Magistrates' Court although it might exceed the monetary jurisdiction of the court. In this regard, see the inclusion of subclause (4).

778 The words "if it appears" instead of the words "if the court finds" are used as there is no need for the court to make any final finding at this stage. The matter may be sent for further investigation where the circumstances in paragraphs (a) to (g) appear.

(b) either an unsuccessful application was made for the granting of an administration order or an administration order was rescinded, because of the debtor's non-compliance with that order, within 12 months before the date of application;

(c) the debtor has received a discharge in terms of the Insolvency Act within four years before the date of application;

(d) a debt rearrangement order in terms of section 87*(b)* of the National Credit Act or a consent order in terms of section 138 of that Act was made in respect of a debt referred to in the debtor's statement of affairs and that the debtor has defaulted on that debt rearrangement or consent order;

OR

(d) a credit agreement included in the debtor's statement of affairs was part of a debt re-arrangement order in terms of section 87*(b)* of the National Credit Act or a consent order in terms of section 138 of that Act and that the debtor has defaulted on that debt re-arrangement or consent order;

(e) the debtor has knowingly or recklessly furnished false or misleading information in the statement of affairs referred to in section 74A or during the hearing referred to in section 74B(1);

(f) If the debtor failed to fully and truthfully furnish the credit provider with the information contemplated in section 81 of the National Credit Act and the debtor's failure to do so materially affected the ability of the credit provider to make a proper assessment required by that section.

(g) the debtor does not understand the administration order process and its consequences;

unless good cause is shown by the debtor why the order should be granted.

(4) An application for an administration order should be heard in the district court."

Amendment of section 74A of Act 32 of 1944

3. Section 74A of the principal Act is hereby amended—

(a) by the substitution for subsection (2) of the following subsection:

"(2) Subject to subsection (2A), **[I]**in the **[form]** statement of affairs referred to in subsection (1) provision shall be made for the following particulars, **[*inter alia*]** among other, namely-

(a) the name and business address of the employer of the debtor or the debtor's **[employer]** spouse or, if the debtor or spouse is not employed, the reason **[why he is unemployed]** for his unemployment;

(aA) personal particulars of the debtor and the debtor's spouse;

(b) a detailed list of the debtor's assets and their **[current market]** estimated values, including— **[and full particulars of interests in property and claims in his favour, including moneys in a savings or other account with a bank or elsewhere]**

(i) assets subject to secured debt which the debtor wishes to retain as necessary goods;and

(ii) assets not subject to secured debt which the debtor wishes to retain as necessary goods;

(c) the debtor's trade or occupation and proof of his gross regular **[weekly or monthly]** income and that of **[his wife]** the debtor's spouse living with **[him]** the debtor, and particulars of all deductions from such income by **[stop]** debit order or otherwise, supported as far as possible by written statements by the employers of the debtor and **[his wife]** the debtor's spouse;

(d) a detailed list of the debtor's **[essential]** necessary weekly or monthly expenses and those of the persons dependent on him, including **[his own transport]** travelling expenses **[and those of his wife to and from work, and those of his children to and from school]** of the debtor and of the debtor's spouse and dependents;

(e) a complete list of all the debtor's creditors and their addresses, and the amount owing to each creditor, the interest rate, including the reduced interest rate, if any, in respect of each amount, in which a clear distinction shall be made between—

(i) debts the whole amount of which is owing, including judgment debts payable in instalments in terms of a court order, an emoluments attachment order or a garnishee order; **[and]**

(ii) obligations which are payable *in futuro* in periodical payments or otherwise or which will become payable under a maintenance order, agreement, stop order or otherwise, and in which the nature of such periodical payments is specified in each case or when the obligations will be payable and how they are then to be paid, the balance owing in each case and when, in each case, the obligation will terminate;

(iii) debts due to disputed creditors, if any;

(iv) conditional debts and debts payable on a date after the date of application; and

(v) payment towards the maintenance of any person, including arrear maintenance.

(f) the security and the estimated value of the security that a creditor has or the name and address of any other person who, in addition to the debtor, is liable for any debt;

(g) full particulars, supported as far as possible by a statement and a copy of the credit agreement, as defined in section 1 of the National Credit Act, 2005 (Act 34 of 2005), of goods purchased under that credit agreement, the purchase price, the instalments payable, the balance owing and the date on which the purchase price will be paid in

full, and the reasons adduced by the debtor why provision should be made for the payment of the remaining instalments;

(h) full particulars of any mortgage bond on immovable property owned by the debtor, the instalments payable, the balance owing, the date on which the mortgage debt will be paid in full and the reasons adduced by the debtor why provision should be made for the payment of the instalments payable in terms of such mortgage bond;

(i) full particulars of any asset purchased under a written agreement other than a credit agreement referred to in paragraph *(g)*, the instalments payable, the balance owing, and the date on which the purchase price will be paid in full, and the reasons adduced by the debtor why provision should be made for the payment of the instalments that become payable under such agreement;

(j) whether any administration order was made at any time in respect of the debtor's estate and, if so, whether such order lapsed or was set aside and, if so, when and for what reasons;

(k) the **[number]** names and ages of the persons dependent on the debtor and **[his]** the spouse of the debtor and their [kinship] relationship of the dependents with **[them]** the debtor and spouse of the debtor;

(l) if an administration order is made, the amount of the weekly or monthly or other instalments which the debtor offers to pay towards settlement of the debts referred to in paragraph *(e)*(i).

(m) whether the debtor has received a discharge in terms of the Insolvency Act within four years before the date of application;

(n) whether an unsuccessful application was made for the granting of an administration order or whether an administration order was rescinded within 12 months before the date of application;

(o) whether a debt re-arrangement order in terms of section 87*(b)* of the National Credit Act or a consent order in terms of section 138 of that Act was made in respect of a debt referred to in the statement of affairs and, if so, the reason for the termination of the debt review;

(p) a certificate by the administrator or the person who has prepared the statement of affairs, stating that—

(i) the statement of affairs referred to in subsection (1) is a true reflection of the debtor's instructions;

(ii) he has no reason to doubt the accuracy of any of the statements made by the debtor; and

(iii) he has advised the debtor of the consequences of administration and is satisfied that the debtor understands them."

(b) by the insertion after subsection (2) of the following subsection:

"(2A) Subsection (2) does not apply to a spouse married out of community of property or a spouse referred to in paragraph *(d)* of the definition of "spouse", except in so far as it relates, for the purpose of determining the expenses referred to in subsection (2)*(d)*, to the income of such spouse who lives with the debtor.";

(c) by the substitution for subsection (5) of the following subsection:

"(5) The debtor shall, in the form prescribed in the rules, at least 10 days before the date of application —

(a) lodge an application for an administration order, **[and]** together with the statement of affairs referred to in subsection (1), a draft order, proof that the debtor has delivered the application and statement as provided for in paragraph *(b)*, and an affidavit confirming such delivery, with the clerk of the court; and **[shall]**

(b) deliver to each of his creditors, including all known disputed creditors, **[at least 3 days before the date appointed for the hearing,]** personally, or by registered post, fax or e-mail a copy of **[such]** the application and statement on which shall appear the case number under which the original application was filed."

(d) by the insertion after subsection (5) of the following subsection:

"(6) If an administrator is of the view that the interest rate referred to in subsection 2*(e)* exceeds the maximum interest rate set by law, the application referred to in subsection (5) may include a request that the court reduce the interest rate as the court deems fair and reasonable."

Insertion of section 74AA in Act 32 of 1944

4. The following section is hereby inserted after section 74A of the principal Act:

"74AA. Determination of reckless credit

(1) An administrator shall determine, in accordance with section 80 of the National Credit Act and within the prescribed time, whether any of the debtor's credit agreements listed in the statement of affairs referred to in section 74A appear to be reckless.

(2) A credit provider shall, within seven business days of receipt of a request to do so and at a fee not exceeding the maximum prescribed fee, provide an administrator with the

information mentioned in section 82A(2) of the National Credit Act to enable that administrator to consider whether or not a credit agreement is a reckless credit agreement.

(3) If as a result of an assessment conducted in terms of subsection (1), an administrator concludes on reasonable grounds that one or more of the debtor's credit agreements appear to be reckless, the administrator shall recommend that the magistrate's court declare such credit agreements to be reckless credit.

(4) Section 82A(4) of the National Credit Act applies, with the necessary changes, if a credit provider intentionally fails to comply with subsection (2).

Amendment of section 74B of Act 32 of 1944

5. Section 74B of the principal Act is hereby amended—

(a) by the substitution for paragraph (c) of subsection 1 of the following paragraph:

"*(c)* any creditor, including a disputed creditor, to whose debt an objection is raised by the debtor or any other creditor or who is required by the court to substantiate his debt with evidence shall provide proof of debt;"

(b) by the substitution for subparagraph (ii) of paragraph *(e)* of subsection (1) of the following subparagraph:

"(ii) his present and future income and that of **[his wife]** the spouse of the debtor living with **[him]** the debtor;""

(c) by the insertion after paragraph *(e)* of subsection (1) of the following paragraphs:

"*(f)* the court may disallow a question which it considers to be irrelevant or which may prolong the questioning unnecessarily;

(g) the court shall question the debtor as to whether—

(i) the person to be appointed as the administrator or the person who has prepared the statement of affairs has explained to the debtor—

(aa) the benefits, consequences, costs and administration order process and whether the debtor understands them; and

(bb) what debt intervention is and that the debtor may apply for debt intervention, if he or she qualifies for debt intervention in terms of the National Credit Act;

(ii) the debtor resides, carries on business or is employed in the district of the court, except if the application for the administration order was lodged with the court referred to in section 65I; and

(h) the court may consider whether a credit agreement is reckless as determined in accordance with Part D of Chapter 4 of the National Credit Act, with the necessary changes.

(i) the court shall consider the interest rate in respect of each debt mentioned in the statement of affairs for the purpose of reducing that interest rate if it exceeds the maximum interest rate set by law."

(j) the court may re-arrange the debtor's debt based upon an reduced interest rate agreed on between an administrator and a creditor.[779]

(k) after having called for and considered all relevant information, including but not limited to any existing emoluments attachment order, the court shall satisfy itself that the debtor will have sufficient means for his maintenance and that of his dependants after payment of the instalment."

(l) the court may determine the maximum rate of interest in respect of an unsecured debt for such a period as the court deems fair and reasonable.

- *Should an administration order be granted even if the amount that the debtor can afford to pay is so little that the granting of the order will be to the detriment of the creditors? Keep in mind that debtors will remain under administration for a long period if they do not pay a reasonable instalment. Should the protection of the debtor against execution proceedings outweigh all other factors? Bear in mind that the consequences for a debtor who applies for an administration order are different from those of a judgment debtor under section 65J. If the application of a judgment creditor who seeks to attach the salary of a judgment debtor is rejected, he or she will have to pursue other avenues, whereas a debtor who applies for an administration order is an indebted person trying to obtain relief*.

(d) by the insertion after subsection (1) of the following subsection:

"(1A) Subsection (1) does not apply to a spouse married out of community of property or a spouse referred to in paragraph *(d)* of the definition of "spouse", except in so far as it relates, for the purpose of determining the expenses referred to in section 74A(2)*(d)*, to the income of such spouse who lives with the debtor."

(e) by the deletion of subsection (5).

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779 See also clauses 74A(2)*(e)* and 74J(1B) .

Amendment of section 74C of Act 32 of 1944

6. Section 74C of the principal Act is hereby amended by the substitution for that section of the following section:

"**Contents of administration order**

(1) An administration order shall be in the form prescribed by the rules and -

(a) shall lay down the amount of the weekly or monthly or other payments to be made by the debtor in terms thereof, which amount shall, as nearly as possible, approximate the difference between the debtor's future income, which includes the future income, if any, of a spouse married in community of property and the sum of –

(i) the amount determined by the court as the reasonable amount required by the debtor for his necessary expenses and those of the persons dependent on the debtor;

(ii) the future and arrear instalments in respect of secured debts for the retention of assets that the court regards as necessary for the requirements of the debtor and the debtor's dependants if the court regards the payments and the payment of arrear instalments as reasonable in view of the debtor's income;

(iii) the periodical payments to be made by the debtor in terms of an existing maintenance order;

(aA) shall make provision for the payment of future payments and arrear payments in respect of the secured debts contemplated in paragraph *(a)*(ii); and

(b) may specify -

(i) the assets, if any, of the estate under administration which are not subject to a secured claim and which must be retained by the debtor because the assets are necessary for the requirements of the debtor and those of the debtor's dependants and the retention of which is reasonable in view of the debtor's income;

(ii) the assets, if any, of the estate under administration which may be **[realized]** realised by the administrator for the purpose of distributing the proceeds to the creditors as contemplated in section 74K **[: Provided that no such asset that is the subject of any credit agreement regulated by the National Credit Act, 2005 (Act 34 of 2005), shall be realized without the written permission of the seller]**;

(iii) that particular deductions from the regular income of the debtor which are justified by the reasonable needs of the debtor be continued and that other deductions, except statutory deductions or payments to be made in terms of an existing maintenance order, be discontinued;

[(iii) the debtor's obligations which the court took account of in determining the amount of the weekly or monthly or other instalments to be paid by the debtor to the administrator;

(iv) the assets, if any, which shall not be disposed of by the debtor except by leave of the administrator or the court;]

[v](iv) such other provisions or conditions as the court may deem necessary or expedient.

(c) may include a declaration of reckless credit made by the court referred to in section 74B(1)*(h)*.

(d) shall, where applicable, —

(i) include the interest rate in respect of each amount owed by the debtor;

(ii) include the reduced interest rate in respect of one or more debts considered by the court in terms of section 74B*(i)*; and

(iii) direct that the amount in interest, which was charged in excess of the prescribed interest rate since the first instalment on the debt must be deducted from the unpaid balance of the debt.

(e) may exclude one or more secured debts, provided that the assets concerned are not essential for the debtor or his dependant's daily living or needed for the debtor's occupation, trade or business.

(2) The debtor may not dispose of assets referred to in subsection (1)*(a)*(ii) and subsection (1)*(b)*(i) and (ii) except by leave of the administrator or the court or subject to such other conditions as the court may order. **[The amount of the weekly or monthly or other payments to be made by the debtor to the administrator in terms of the administration order shall, as nearly as possible, approximate the difference between the debtor's future income and the sum of-**

(a) **the amount determined by the court as the reasonable amount required by the debtor for his necessary expenses and those of the persons dependent on him;**

(b) **the periodical payments which the debtor is obliged to make under a credit agreement as defined in section 1 of the National Credit Act, 2005 (Act 34 of 2005): Provided that the court may in its discretion refuse to take into account the periodical payments which the debtor undertook to pay under such a transaction for the purchase of goods which are not exempt from execution in terms of section 67 or which, in the**

opinion of the court, cannot be regarded as the debtor's household requirements, unless the court is of opinion that in all the circumstances it is desirable to safeguard the goods concerned;

(c) **the periodical payments to be made by the debtor in terms of an existing maintenance order;**

(d) **the periodical payments to be made by the debtor under a mortgage bond or any other written agreement for the purchase of any asset in terms of which the liabilities thereunder are payable in instalments, if in all the circumstances the court is of opinion that the instalments payable are reasonable in view of the judgment debtor's income and the sums of money due by him to other creditors or that it is desirable to safeguard the mortgaged property or the asset to which the written agreement relates; and**

(e) **the payments to be made by the debtor by virtue of any other obligation referred to in section 74A (2) (e) (ii).**

(3) The court may take into account the income of the debtor's wife, who is living with him, in determining the amount referred to in subsection (2) (a) and, where the debtor is married in community of property, in determining the debtor's income.]"

Amendment of section 74D of Act 32 of 1944

7. The following section is hereby substituted for section 74D of the principal Act:

"**Authorizing of issue of emoluments attachment order or garnishee order**

Where the administration order provides for the payment of instalments out of future emoluments or income, the court **[shall]** may authorize the issue of an emoluments attachment order in terms of section 65J in order to attach emoluments at present or in future owing or accruing to the debtor by or from his employer, or shall authorize the issue of a garnishee order under section 72 in order to attach any debt at present or in future owing or accruing to the debtor by or from any other person (excluding the State), in so far as either of the said sections is applicable, and the court may suspend such an authorization on such conditions as the court may deem just and reasonable."

Amendment of section 74E of Act 32 of 1944

8. Section 74E of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

"(1) Subject to subsections (1A) and (1B), [**W**]when an administration order has been granted under section 74(1), the court shall appoint a person as administrator, which appointment shall become effective only after a copy of the administration order has been handed or sent to him or his legal representative by registered post and, in the event of his being required as administrator to give security, after he has given such security.

(b) by the insertion after subsection (1) of the following subsections:

"(1A) The head office or branch office of a person referred to in subsection (1) shall be within a 50 kilometre radius of the place where the debtor resides, is employed or carries on business.

(1B) Despite subsection (1A), the court may appoint a person referred to in subsection (1) as an administrator if—

(c) the court is satisfied that the financial burden to the debtor caused by travelling to the head office or a branch office of such person would not be greater than what it would have been if an administrator was appointed whose office was within a 50-kilometre radius of the place where the debtor resides, is employed or carries on business; or

(d) the office of the nearest administrator was situated more than 50 kilometres from the place where the debtor resides, is employed or carries on business.

(1C) Any service, information or document in respect of an administration order provided by or in possession of the head office of an administrator shall be accessible through or at any of its branch offices.

(1D) A person may not act as an administrator for the estate of a debtor if he—

(j) was not appointed by the court to act as an administrator for the estate of the debtor concerned;

(k) has been struck off the roll of attorneys or if proceedings to strike his name off the roll of attorneys or to suspend him from practice as an attorney have been instituted;

(l) has been found guilty of unprofessional, dishonourable or unworthy conduct relating to the management of his trust account that he keeps in terms of section 86 of the Legal Practice Act, 2014 (Act 28 of 2014) or in terms of any other law relating to his profession;

(m) is of unsound mind and has been so declared or certified by a competent authority;

(n) is an unrehabilitated insolvent;

(o) is not a member of a professional body recognised in terms of subsection (1G);[780]

(p) subject to section 28*(b)*, does not comply with the prescribed education, experience or competency requirements;

(q) has been convicted of an offence of which dishonesty is an element; or

(r) does not reside in the Republic;

(1E) An administrator may not buy the debt of a debtor from the person to whom that debt is owed.

(1F) The provisions of section 74N(4), (5) and (6) apply, with the necessary changes, to a person referred to in subsection (1D) and an administrator referred to in subsection (1E).

(1G) The Minister may—

(a) from time to time by notice in the *Gazette* publish the name of a professional body that regulates the practice of a profession and maintains and enforces rules to ensure that its members are fit and proper persons to practice the profession;

(b) revoke a notice referred to in paragraph *(a)* if it appears to the Minister that the professional body no longer satisfies the requirements of paragraph *(a)*.

(1H) An administrator who is a member of a professional body referred to in subsection (1G)*(b)* may—

(a) continue to act as an administrator for the estate of a debtor for a period of six months, during which period he shall arrange with another person to substitute him as an administrator in terms of section 74EA.

(b) in the manner prescribed, apply to the Minister to continue to act as an administrator for the estates of the debtors under administration with him.

(1I) The Minister may permit an administrator referred to in subsection (1H)*(b)* to continue to act as an administrator if he complies with the prescribed conditions.

(c) by the substitution for subsection (3) of the following subsection:

"(3) **[An administrator]** A person who is not an officer of the court or a practitioner shall, **[before a copy of the administration order is handed or sent to**

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780 Section 74N(4)-(6) provides for certain consequences if the court finds that an administrator has contravened the provisions of subsection (1D). One of the consequences is that the professional body of which the administrator is a member must be notified of the contravention and that such body may revoke or cancel the registration or admission that the person concerned requires in order to conduct his or her business. However, if an administrator is not a member of a professional body, he or she will not suffer the consequences intended by this provision.

him by registered post] before being appointed as an administrator, give security to the satisfaction of the court and thereafter as required by the court for the due and prompt payment by him to the parties entitled thereto of all moneys which come into his possession by virtue of his appointment as an administrator."

(d) by the insertion after subsection (4) of the following subsections:

(5) An administrator shall comply with the prescribed education, experience or competency requirements.

(6) An administrator shall, within 30 days after complying with the provisions of subsection (1), provide the debtor over whose estate he has been appointed as an administrator with a prescribed letter setting out —

(a) the debtor's rights and obligations;

(b) the administrator's rights and obligations;

(c) the contact details of the professional body of which the administrator is a member;

(d) the procedure for referring a complaint against the administrator to the professional body of which the administrator is a member; and

(e) the remedies provided for in this Act if the administrator fails to carry out his duties.

(7) The letter referred to in subsection (6)—

(a) shall be available in the official language the debtor understands best; and

(b) may be delivered to the debtor by hand or by registered mail, fax or e-mail or by personal delivery to an address, number or electronic address given by the debtor as his address or number."

Insertion of section 74EA in Act 32 of 1944

9. The following section is hereby inserted after section 74E of the principal Act:

"**74EA Application for substitution of administrator**

(1) A person who wishes to take over as administrator the administration of the estates of debtors whose estates at that time are managed in terms of administration orders by an administrator who has been appointed by the court under section 74E or this section shall, in a single application, apply to court to be appointed as the administrator for all the debtors concerned.

(2) An administrator who was appointed by the court in terms of subsection (1) shall—

(a) within one month of his appointment, notify each debtor and creditor of his appointment and of his full contact details; and

(b) lodge with the clerk of the court where the administration order was granted a copy of the notice.

(3) An application in terms of subsection (1) shall not be for the cost of the debtors concerned.

(4) A person who knowingly acts as an administrator for the estate of and for the payments of the debts of a debtor in instalments or otherwise without being appointed as an administrator in terms of section 74E or this section is not entitled to expenses and remuneration as contemplated in section 74L.

(5) Section 74E applies, with the necessary changes, to the appointment of a person referred to in subsection (1)."

Amendment of section 74F of Act 32 of 1944

10. Section 74F of the principal Act is hereby amended—

(a) by the substitution for subsection (2) of the following subsection:

"(2) The administrator shall **[forward]** deliver a copy of the administration order by registered post, fax or e-mail to each creditor whose name is mentioned by the debtor in the statement of his affairs or who has given proof of a debt."

(b) by the insertion after subsection (2) of the following subsections:

"(2A) A creditor who has received a copy of the administration order referred to in subsection (2) shall, within 10 business days after receipt of the order, furnish the administrator with a certificate of balance in respect of the amount owed by the debtor as at the date of the granting of the order, and where applicable, the interest rate in respect of the amount owed.

(2B) If the certificate of balance referred to in subsection (2A) is not received by the administrator within 10 business days from the date of the delivery of the copy of the administration order to the creditor as contemplated in subsection (2A), the administrator shall, for purposes of the list referred to in section 74G(1), use the balance of the claim as reflected in the application for the administration order or the most recent statement received by the debtor from the creditor, whichever is the latest.

(2C) In determining the balance of the claim referred to in subsection (2B), the administrator shall take into account any payments made by the debtor subsequent to the listing of the claim in the statement of affairs.

Amendment of section 74G of Act 32 of 1944

11. Section 74G of the principal Act is hereby amended by the deletion of subsections (2), (3), (4), (5) and (6).

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Amendment of section 74H of Act 32 of 1944

12. The following section is hereby substituted for section 74H of the principal Act:

"74H Inclusion of creditors in list after granting of administration order

(1) Any person who becomes a creditor of the judgment debtor after an administration order has been granted or who was a creditor of the debtor on the date the order was granted or on the date the application for the administration order and the statement of affairs were lodged with the clerk of the court but who was not included in the list of creditors, and who is desirous of providing proof of debt, shall[781] **[lodge his claim in writing with the administrator, who shall thereupon advise the debtor thereof in the form prescribed in the rules]**.

(a) apply to court to be included in the list of creditors referred to in section 74G(1); and

(b) at least 10 days before the date of the application contemplated in paragraph (a) deliver to the administrator and each creditor referred to in section 74G(1) notice of that application.

[(2) If the debtor admits the claim or does not dispute it within the period allowed in the notice referred to in subsection (1), the provisions of section 74G (3) shall, mutatis mutandis, apply, but the creditor shall not be entitled to a dividend in terms of the administration order until the creditors who were creditors on the date of the granting of the order have been paid in full.

(3) If the debtor disputes the claim within the period allowed in the notice referred to in subsection (1), the provisions of section 74G (4), (5) and (6) shall, mutatis mutandis, apply but if the court allows the claim as a whole or in part, such claim shall be subject to the rights referred to in subsection (2), of

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781 Such creditors must apply to court so that the court can consider matters such as reckless credit, whether the debtor will have sufficient means for his or her maintenance and that of his or her dependants or whether any asset of the debtor should be realised.

creditors who were creditors on the date on which the administration order was granted.]

(4) The provisions of section 74G(7), (8) and (9) and of subsection**[s]** (1)**[, (2) and (3)]** of this section shall, **[*mutatis mutandis*]** with the necessary changes, apply to any person who after the granting of an administration order sold and delivered goods to the debtor under a credit agreement as defined in section 1 of the National Credit Act, **[2005 (Act 34 of 2005),]** and is desirous of providing proof of debt.

Amendment of section 74I of Act 32 of 1944

13. Section 74I of the principal Act is hereby amended—

(a) by the substitution for subsection (2) of the following subsection:

"(2) If a debtor fails to make the payments to the administrator that he is required to make in terms of the administration order, the provisions of sections 65A to 65L shall **[mutatis mutandis]** with the necessary changes apply, while any reference in the said provisions to the judgment concerned, the judgment creditor or the judgment debtor shall be construed as a reference to the administration order concerned, the administrator or the debtor, respectively."

(b) by the substitution for subsection (5) of the following subsection:

"(5) *(a)* When an emoluments attachment order or garnishee order referred to in subsection (3) has been served on the garnishee, he shall be obliged to pay to the administrator the amounts concerned as provided by the order **[and such payments shall constitute a first preference against the debtor's income]**.

(b) The provisions of section 65J (4) to (8) and (10) shall **[*mutatis mutandis]*** with the necessary changes apply to the emoluments attachment order referred to in paragraph *(a)*, and in such application any reference in the said provisions to the judgment creditor shall be construed as a reference to the administrator."

(c) by the insertion after subsection (5) of the following subsection:

(6) The amounts referred to in section 103(5) of the National Credit Act or interest that accrue during the time that a debtor is in default in respect of a debt under administration may not, in aggregate, exceed the unpaid balance of the

principal debt as at the time the default occurs and these amounts or interest may not accrue while the default persists.

(7) An administrator may not add an amount or interest charged to the debt concerned in contravention of subsection (6).

(8) An administrator who fails to comply with subsection (7) is liable to pay to the debtor's estate the amount or interest so added to the debt concerned.

Substitution of section 74J of Act 32 of 1944

14. The following section is hereby substituted for section 74J of the principal Act:

"**74J Duties of administrator**

(1) An administrator shall—

(a) before making an application for an administration order, explain to a debtor, who qualifies for debt intervention in terms of the National Credit Act, what debt intervention is and inform the debtor that he may apply for debt intervention.

(b) collect the payments to be made in terms of the administration order concerned and shall keep up to date a list (which shall be available for inspection, free of charge, by the debtor and creditors or their attorneys during office hours) of all payments and other funds received by him from or on behalf of the debtor, indicating the amount and date of each payment**[, and]**

(1A) The administrator shall, subject to section 74L, distribute such payments *pro rata* **[among]** to the creditors at least once every three months, provided that— **[unless all the creditors otherwise agree or the court otherwise orders in any particular case]**

(a) payment is not made to a creditor whose debt is not yet due;

(b) payment is not made to a conditional creditor until the condition has been fulfilled.

(1B) An administrator shall request each creditor of the debtor to consider reducing the interest rate on the debt owed to him in order to shorten the period the debtor remains under administration.

(1C) An administrator shall arrange a debtor's payments on his or her debts in such a manner that monies becoming available once one debt is paid off are allocated to the payment of the remaining debt"

(2) If any debt or the balance of a debt be less than **[R10]** R100, the administrator may in his discretion pay such debt in full if such action will facilitate the distribution of funds in his possession.

(3) Claims that would enjoy preference under the laws relating to insolvency shall be paid out in the order prescribed by those laws.

(4) An administrator may, out of the **[moneys]** monies which he controls, pay any urgent or extraordinary medical, dental or hospital expenses incurred by the debtor after the date of the administration order.

(5) Every distribution account in respect of the periodical payments and other funds received by an administrator shall be numbered consecutively, shall bear the case number under which the administration order has been filed, shall be in the form prescribed in the rules, shall be signed by the administrator and shall be lodged at the office of the clerk of the court where it may be inspected free of charge by the debtor and the creditors or their attorneys during office hours.

(5A) An administrator is not obliged to draw up and lodge a distribution account at the office of the clerk of the court if no payment was received from the debtor for the preceding three months.

(6) A distribution account referred to in subsection (5) shall at the request of any interested party be subject to review free of charge by any judicial officer.

(7) An administrator shall deposit all **[moneys]** monies received by him from or on behalf of debtors whose estates are under administration—

(a) if he is not a practising attorney, in **[a separate trust account with any bank in the Republic, and no amount with which any such account is credited shall be deemed to be part of the administrator's assets or, in the event of his death or insolvency, of his deceased or insolvent estate]** the trust account that he keeps as required in terms of the legislation applicable to his profession;[782]

(b) if he is a practising attorney, in the trust account that he keeps in terms of **[section 33 of the Attorneys, Notaries and Conveyancers Admission Act, 1934 (Act 23 of 1934)]** section 86 of the Legal Practice Act, 2014 (Act 28 of 2014).

(8) If a debtor **[should]** at any time, despite a registered letter of demand from the administrator, **[be]** is 14 days in arrear with the payment of any instalment and if steps in terms of section 74I (3) cannot be taken or have been taken unsuccessfully, or if the debtor has disappeared, the administrator shall forthwith notify the creditors in writing thereof and request their instructions.

(9) If within the period allowed in a notice referred to in subsection (8) the majority of the creditors instruct the administrator to apply to the court for the rescission of the administration order or fail to respond, the administrator shall **[institute legal proceedings against the debtor for his committal for contempt of court]** apply to the court for the rescission of the

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782 The inspection and monitoring of the trust accounts of non-attorney administrators will be done in terms of the applicable legislation relating to their professions.

administration order or if the debtor has disappeared, take such steps as may be necessary to trace **[the]**that debtor **[who has disappeared]**, as the circumstances may require.[783]

With reference to subsections (8) and (9), it has been argued that because so little funds are available in an administration, applying to court for the rescission of the administration order would result in added costs. As an alternative to these subsections, the Bill could provide that if a debtor, despite a registered letter of demand from the administrator, fails to make payment for a continuous period of six months the administration order will lapse, unless the court decides otherwise. Furthermore, a creditor should be able to claim any outstanding debt directly from the debtor as soon as the creditor receives notice in this regard from the administrator.

[(10) If within the period allowed in a notice contemplated in subsection (8) the majority of the creditors instruct him to do so, the administrator shall apply to the court for the rescission of the administration order].

(11) If an administrator fails to lodge a distribution account with the clerk of the court within one month from the time his obligation to do so commenced, any interested party may apply to the court for an order directing him to lodge a distribution account with the clerk of the court within the time laid down in the order or relieving him of his office as administrator.

(12) If an administrator has lodged a distribution account with the clerk of the court but has failed to pay any amount of money due to any creditor in terms of such account within one month thereafter, the court may upon the application of the creditor order the administrator to pay the creditor the amount concerned within such period as may be fixed in the order and furthermore to pay to the debtor's estate an amount which is double the amount which he failed so to pay.

(13) The court may order an administrator to pay the costs of an application in terms of subsection (11) or (12) *de bonis propriis*.

(14) If any debt which was due at the time of the granting of an administration order in respect of a debtor's estate is paid in full or in part to the creditor by the debtor after the granting of the order, otherwise than by way of payments in terms of the administration order, such payment shall be invalid and the administrator may recover the amount paid from the creditor, unless the creditor proves that the payment was effected without his knowledge of the administration order, and, **[in addition, the creditor shall forfeit his claim against the estate of the debtor if the payment was effected at the request of the creditor whilst he had knowledge of the administration order]** if the creditor had knowledge of the administration order and nevertheless requested that the payment be made, the creditor shall forfeit his or its claim against the estate of the debtor .

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783 If the administrator manages to trace the debtor, a letter of demand could be sent to the debtor. If the debtor fails to give heed to the letter of demand, the administrator may apply for the rescission of the administration order.

(15) An administrator who unreasonably fails to timeously distribute the payments referred to in section 74J(1A) among the creditors is liable to repay to the debtor's estate any additional costs and interest which have accrued as a result of such failure.[784]

(16) The Rules Board for Courts of Law shall make a reference to the provisions of subsection (15) on Form 52 of Annexure 1 to the rules, containing the distribution account.

Amendment of section 74K of Act 32 of 1944

15. The following section is hereby substituted for section 74K of the principal Act:

"(1) An administrator may, **[if authorized thereto by the court, subject to the provisions of subsection (2),]** with the written permission of the debtor, **[realize any]** realise an asset of the estate under administration, **[and in granting any such authorization the court may impose any such conditions as it may deem fit]** for the purpose of distributing the proceeds to the creditors of the debtor.

(2) An asset mentioned in subsection (1)**[,]** which is the subject of **[any]** a credit agreement regulated by the National Credit Act**[, 2005 (Act 34 of 2005)]**, shall not be **[realized]** realised except with the written permission of the credit provider.

(3) If the credit provider as defined in section 1 of the National Credit Act**[, 2005 (Act 34 of 2005)],** is obliged to pay to the debtor an amount in terms of the said Act, the credit provider shall pay that amount to the administrator for *pro rata* distribution **[among]** to the creditors of the debtor.

(3A) If the debtor without reasonable grounds refuses to give the administrator permission to realise an asset, the court may authorize the administrator to realise the asset and in granting any such authorization the court may impose such conditions as it deems fit.

(4) Whenever the court authorizes **[any]** an administrator to **[realize any]** realise an asset, the court may amend the payments to be made in terms of the administration order accordingly.

(5) When considering whether an asset must be realised, the court must consider, but is not limited to, the following factors:

(a) whether the asset is essential for the debtor or his dependants' daily living;

(b) whether the asset is needed for the debtor's occupation, trade or business; and

(c) the value and equity of the asset.

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784 Interests charged by creditors must be reflected in the distribution account (Form 52). This would include interest charged by creditors on outstanding amounts in cases where an administrator failed to make payment to the creditors, whilst the debtor has made the necessary payments to the administrator.

Substitution of section 74L of Act 32 of 1944

16. The following section is hereby substituted for section 74L of the principal Act:

"**74L Remuneration and expenses of administrator**

(1) An administrator may, before making a distribution—

(a) deduct from the money collected his necessary expenses and remuneration determined in accordance with **[a tariff prescribed in the rules]** the items in the Tariff to Part III of Table B of Annexure 2 to rules.

(b) retain a portion of the money collected, in the manner and up to an amount prescribed in the rules, to cover the costs that he may have to incur if the debtor is in default or disappears.

(2) The expenses and remuneration mentioned in subsection (1) shall not exceed **[12 1/2 per cent]** 12.5 per cent of the amount of collected moneys received **[and such expenses and remuneration shall, upon application by any interested party, be subject to taxation by the clerk of the court and review by any judicial officer]**.

(3) An administrator must, by post, fax or e-mail, furnish the debtor with a quarterly statement containing particulars of the payments received up to the date concerned and the balance owing and the cost of such statement is included in the remuneration and expenses referred to in subsection (1).

(4) The expenses and remuneration referred to in subsection (1) excludes the legal costs relating to—

(a) an application for an administration order as contemplated in section 74O;

(b) an application for an emoluments attachment order or garnishee order as contemplated in section 74D, determined in accordance with the items in Part IV of Table A of Annexure 2 to the rules;

(c) an application for the rescission of an administration order as contemplated in section 74J(9);

(d) an application for the suspension, amendment or rescission of an administration order as contemplated in section 74Q(1);

(e) an application for the amendment of an administration order as contemplated in section 74Q(2);

(f) steps taken to trace a debtor who has disappeared as contemplated in section 74J(9); and

(g) proceedings for the recovery of the amount referred to in section 74J(14) from a creditor.

(5) An administrator shall be entitled to an amount for the determination of reckless credit as contemplated in section 74AA determined in accordance with a tariff prescribed in the rules,[785] only if the court has made a declaration of reckless credit.

(6) The expenses and remuneration referred to in subsection (1), legal cost relating to work referred to in subsection (4) and the amount for the determination of reckless credit referred to in subsection (5) shall—

(a) constitute a first preference against the payments received from the debtor;

(b) upon application by an interested party, be subject to taxation by the clerk of the court and review by a judicial officer.

(7) Legal costs relating to subsection (4)*(a)*, *(e)* and *(g)* may not be incurred without the written consent of the debtor.

(8) The Rules Board for Courts of Law shall make rules regarding the fees for—

(a) an application for an administration order in terms of section 74O;

(b) the determination of reckless credit referred to in subsection (5);

(c) consultations between the debtor and the administrator relating to the debtor's administration;[786] and

(d) the prescribed letter[787] referred to in section 74E(6) that the administrator must provide to the debtor"

(9) Except the fees referred to above, no other fees or costs shall be charged to a debtor's administration.

- *In the light of the proposal that the maximum amount for administration orders should be increased from R50 000 to R300 000, should the 12.5% for remuneration and expenses be reduced? If yes, what would be an appropriate percentage?*
- *Legal costs relating to work referred to in subsection (4)(a), and (c) – (g) are not capped. Legal costs relating to subsection (4)(b) are capped only for item 4 of Part IV but legal fees relating to the rest of the items are prescribed but not capped. Should the Rules Board be mandated to make rules regarding the maximum legal fees an administrator may charge?*

Amendment of section 74N of Act 32 of 1944

17. The following section is hereby substituted for section 74N of the principal Act:

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785 The fee for determining reckless credit will be payable only once at the beginning of the administration and every time a new creditor is added to the list of creditors.

786 In the *Anglo American* case (currently before the Gauteng Division of the High Court, Pretoria), the respondent in her answering affidavit acknowledged that the debt of one of the debtors under administration with her has increased significantly because this debtor insisted on regular consultations with her. As the respondent is an attorney administrator, it is very likely that she charged attorney and client fees for the consultations. Hence it is vital to set out in the tariff the fee that an administrator may charge for consultations relating to a debtor's administration.

787 This will be a pro forma letter and will not have to be drafted by the administrator.

"**74N Failure by administrator to perform his duties**

(1) An administrator shall take the proper steps to enforce an administration order, and if he fails to do so, any creditor may, by leave of the court, take those steps, and the court may thereupon order the administrator to pay the costs of the creditor *de bonis propriis*.

(2) An administrator may not—

(a) add fees for services that are unrelated to the administration of a debtor to the debtor's debt in terms of an administration order; and

(b) add an amount as payment to any person for recommending that the debtor be placed under administration to the debtor's debt in terms of an administration order.

(c) as a result of negligence, reflect the incorrect amounts for deductions for expenses and remuneration, costs and payment to creditors in the distribution account.

(d) add a creditor to the administration of a debtor except in accordance with the process set out in section 74H;

(3) An administrator who contravenes subsection (2)(a), (b), (c) and (d) is liable to pay the debtor's estate the amounts paid to the creditor concerned or person or for the concerned services.

(4) A court may, during any hearing in terms of this Act and upon a finding that an administrator has contravened sections 74E(1D)(a) - (1E), 74N(2)*(c)* and *(d)* or has failed to comply with any provision of this Act[788], withdraw the appointment of that administrator in the case concerned.

(5) The clerk of the court that made the finding referred to in subsection (4) shall notify the professional body of which the administrator concerned is a member in writing of the finding and that professional body shall thereupon investigate the matter.

(6) The professional body referred to in subsection (5) may, where necessary, revoke or cancel the registration or admission that the administrator requires in order to conduct his business.

Insertion of section 74NA in Act 32 of 1944

18. The following section is hereby inserted after section 74N of the principal Act:

"**74NA Lodging of complaints**

(1) The Director-General shall—

(a) establish in the Department a dedicated Help Desk to receive, assess and refer complaints against administrators; and

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788 Administrators, among others, fail to comply with the provisions of the Act in that they add *in futuro* debts to administration orders while only debts that are due and payable may be added.

(b) in order to enable the Help Desk to perform its duties and functions, assign one or more officials in the Department to perform the tasks set out in this section.

(2) Any person may, in the prescribed manner and form, submit to the Help Desk a complaint against an administrator in respect of an alleged contravention of this Act.

(3) The Help Desk—

(a) shall, within 10 business days of receipt of the complaint acknowledge in writing receipt of the complaint and inform the complainant of the case number assigned to the complaint; and

(b) may request the complainant to submit further information and documentation in relation to the complaint.

(4) The Help Desk may, in the prescribed form, issue a notice of non-referral to the complainant—

(a) if the complaint does not allege any facts which, if true, would constitute grounds for a remedy under this Act or any other law relating to the administrator's profession; or

(b) if the complainant, without good reason, fails to provide within 30 days the information and documentation referred to in subsection (3)*(b)*.

(5) The Help Desk, after an assessment of the complaint—

(a) shall, in the manner prescribed, refer the complaint for investigation to the professional body of which the administrator is a member, if the Help Desk concludes on reasonable grounds that there is substance in the complaint submitted to it; and

(b) may refer the complainant to any other appropriate forum for relief.

(6) A professional body who receives a complaint in terms of subsection 5 shall—

(a) in terms of its applicable legislation, rules or processes, investigate the complaint against the administrator who is member of that body;

(b) in its investigation, be guided by the provisions of this Act and the code of conduct for administrators referred to in section 74WA.

(7) Notwithstanding the provisions of any other law relating to the professional body, the outcome of the investigation contemplated in subsection (6) shall be submitted to the Director-General within 14 days after conclusion of the investigation.

(8) The Director-General—

(a) shall communicate the outcome of the investigation to the complainant;

(b) may refer the outcome of the investigation to the National Prosecuting Authority, if an offence had been committed in terms of this Act.

(9) An official referred to in subsection (1) shall receive training—

(a) in the provisions of the Magistrates' Courts Act and its regulations relating to administration orders;

(b) in the complaints procedure of a professional body recognised by the Minister in terms of section 74E(1G)*(a)*; and

(c) to assist him to execute effectively the tasks set out in subsections (4) and (5).

(10) Nothing in this section shall be construed as prohibiting a debtor from lodging a complaint directly with the professional body of which the administrator is a member."

Amendment of section 74O of Act 32 of 1944

19. The following section is hereby substituted for section 74O of the principal Act:

"**Costs of application for administration order**

(1) Unless the court otherwise orders or this Act otherwise provides, no costs in connection with any application in terms of section 74(1) shall be recovered from any person other than the administrator concerned**[, and then as a first claim against the moneys controlled by him]**.

(2) The costs contemplated in subsection (1) shall, upon application by an interested party, be subject to taxation by the clerk of the court and review by a judicial officer.

(3) The Rules Board for Courts of Law shall insert in Form 52 of Annexure 1 to the rules an item for the cost of an application for an administration order.".

Amendment of section 74Q of Act 32 of 1944

20. Section 74Q of the principal Act is hereby amended by the substitution for subsection (4) of the following subsection:

"(4) Any order rescinding an administration order shall be in the form prescribed in the rules and a copy thereof shall be delivered, personally or by fax or e-mail or sent by post by the administrator to the debtor and to each creditor, who shall also be informed of the debtor's last known address by the administrator."

Amendment of section 74S of Act 32 of 1944

21. Section 74S of the principal Act is hereby amended—

(a) by the substitution for subsection (2) of the following subsection:

"(2) The provisions of the Criminal Procedure Act, **[1955 (Act No. 56 of 1955)]** 1977 (Act No. 51 of 1977), with regard to periodical imprisonment shall **[*mutatis mutandis*]**, with the necessary changes, apply to periodical imprisonment imposed in terms of subsection (1)."

(b) by the insertion after subsection (2) of the following subsection:

"(3) Section 88(4) of the National Credit Act applies, with the necessary changes, to a credit agreement debt incurred after the granting of an administration order."

Amendment of section 74U of Act 32 of 1944

22. The following section is hereby substituted for section 74U of the principal Act:

"**Lapsing of administration order**

(1) As soon as the costs of the administration and the listed creditors have been paid in full, an administrator shall —

(a) notify the creditors that he intends to lodge a certificate to that effect with the clerk of the court; and

(b) requests the creditors to furnish him with the outstanding balance in respect of the debt owed to them.

(2) A creditor who has received a request referred to in subsection (1)*(b)* shall furnish the administrator with the outstanding balance in respect of the debt owed to him.

(3) If the outstanding balance referred to in subsection (2) is not received by the administrator within 20 business days from the date of the request to the creditor—

(a) the administrator shall lodge the certificate referred to in subsection (1)*(a)* with the clerk of the court and send copies thereof, by registered post, fax or e-mail, to the creditors (who shall also be informed therein of the debtor's last known address), and thereupon the administration order shall lapse; and

(b) the creditor may not claim any outstanding balance from the debtor.

(4) The debtor may, in the prescribed manner and form, file a copy of the certificate referred to in subsection (3) with the national register established in terms of section 69 of the National Credit Act, or with any credit bureau which shall upon receiving the certificate expunge from its records-

(a) the fact that the debtor was subject to administration; and

(b) any information relating to any default by the debtor in connection with a debt that was subject to administration."

Repeal of section 74W of Act 32 of 1944

23. Section 74W of the principal Act is hereby repealed.

Insertion of section 74X, section 74Y, section 74Z and section 74ZA in Act 32 of 1944

24. The following section is hereby inserted after section 74W of the principal Act:

"**74X Code of Conduct**

(1) Subject to subsections (2), (3) and (4), the Minister shall prescribe a code of conduct for administrators.

(2) The Minister shall first publish in the *Gazette* the code of conduct referred to in subsection (1) together with a notice that the Minister intends to issue such a code and inviting interested persons to submit to the Minister, within such period as is specified in the notice, any objections to or representations concerning the proposed code of conduct.

(3) The Director-General shall, after publication of the code of conduct and within the prescribed period—

(a) consult with the persons conducting business in the administration order regime with a view to familiarising them with the contents of the code of conduct and obtaining their views and comments on the code;

(b) give due consideration to the submissions made on the code of conduct; and

(c) revise if necessary the code of conduct published in terms of subsection (2);

(4) The Minister may publish in the *Gazette* the revised code of conduct for public comment, after which the provisions of subsection (3) shall, with the necessary changes, apply.

(5) The code of conduct contemplated in subsection (1) shall at least provide for—

(a) standards of professional conduct for the performance of functions in terms of this Act;

(b) co-operation among all role-players concerned;

(c) information for debtors regarding the benefits, consequences, costs and process of administration;

(d) ongoing assistance to debtors to ensure that they continue to meet their financial obligations in terms of their administration orders; and

(e) measures to be taken if debtors without reasonable grounds fail to meet their financial obligations;

(f) effective communication with debtors regarding payments received and distributions made; and

(g) a procedure for making and dealing with complaints alleging a breach of the code of conduct;

(6) A code of conduct issued in terms of this section comes into operation on a date determined by the Minister by notice in the *Gazette* and is binding on all administrators.

(7) The Director-General—

(a) shall monitor the effectiveness of the code of conduct issued in terms of this Act; and

(b) may on reasonable grounds request persons who conduct business in the administration order regime to furnish information necessary for purposes of—

(i) monitoring in terms of paragraph *(a)*; or

(ii) reviewing the effectiveness of the code of conduct relative to the purposes of this Act;

(c) shall take all reasonable steps to—

(i) publicise the existence of and inform members of the public about the contents of the code of conduct issued in terms of this Act;

(ii) inform members of the public of how and where to obtain a copy of the code of conduct;

(d) shall, as long as the code of conduct remains in force, make—

(i) it available on the Department's website; and

(ii) copies of it available, free of charge, for inspection by members of the public at each provincial office of the Department.

(8)*(a)* The Minister may amend the code of conduct issued in terms of subsection (1), if necessary.

(b) The provisions of subsections (2), (3) and (4) shall, with the necessary changes, apply to any amendment contemplated in paragraph *(a)*.

74Y Delegation of powers and duties by Director-General

(1) Subject to subsections (2) and (3), the Director-General may delegate any power conferred on or duty assigned to him in terms of this Act to an officer in the employ of the Department above the rank of director.

(2) A delegation in terms of subsection (1)—

(a) is subject to such limitations, conditions and directions as the Director-General may impose;

(b) must be in writing; and

(c) does not divest the Director-General of the responsibility of exercising such a power or performing such a duty.

(3) The Director-General may—

(a) confirm, vary or revoke any decision taken in consequence of a delegation in terms of this section; and

(b) at any time withdraw a delegation.

74Z Delegation of powers and duties by Minister

(1) Subject to subsections (2) and (3), the Minister may delegate any power conferred on or duty assigned to him in terms of this Act, excluding the power to make regulations contemplated in section 27, to the Director-General or to any other senior officer in the employ of the Department above the rank of chief director.

(2) A delegation in terms of subsection (1)—

(a) is subject to such limitations, conditions and directions as the Minister may impose;

(b) must be in writing;

(c) may include the power to sub-delegate; and

(d) does not divest the Minister of the responsibility of exercising such a power or performing such a duty.

(3) The Minister may confirm, vary or revoke any decision taken in consequence of a delegation or sub-delegation in terms of this section.

(4) An annual report must be submitted to the Minister in respect of any power or duty delegated in terms of subsection (1).

Regulations

25. (1) The Minister must make regulations about—

(a) the education, experience and competency requirements for administrators as provided for in section 74E(5);

(b) the training of an official referred to in section 74NA(9);

(c) any matter required or permitted to be prescribed in terms of this Act; and

(d) generally, all matters that are reasonable necessary or expedient to be prescribed in order to achieve the objects of this Act.

(2) The Minister shall make regulations regarding the amount of security that must be provided by an administrator in terms of subsection 74E(3).

(3) Any regulation made in terms of subsection (1) may provide that any person who contravenes a provision thereof or fails to comply therewith is guilty of an offence and on conviction liable to a fine, or to imprisonment for a period not exceeding three months.

Transitional provisions

26. A person who, on the date of commencement of this Act, acts as an administrator for the estate of and for the payments of the debts of a debtor in instalments or otherwise —

(a) without having been appointed as an administrator as contemplated in section 74E must, within six months from the date of commencement of this Act, make an application to court in terms of section 74EA to be appointed as the administrator; and

(b) who does not comply with the prescribed education, experience or competency requirements in terms of section 74E(5) must within two years from the date of commencement of this Act comply with such requirements.

Short title and commencement

27. This Act is called the Magistrates' Courts Amendment Act, 2020, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

Glossary of terms

Commission:	Members of the Commission appointed in terms of section 3 of the South African Law Reform Commission Act 19 of 1973
DOJCD:	Department of Justice and Constitutional Development
DTI:	Department of Trade and Industry
EAO:	emoluments attachment order
IVA:	individual voluntary arrangement
MCA:	Magistrates' Courts Act 32 of 1944
rules:	Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa
NCA:	National Credit Act 34 of 2005
NCR:	National Credit Regulator
PDA:	payment distribution agency
Rules Board:	Rules Board for Courts of Law
SALRC:	South African Law Reform Commission
Workshop paper:	A document entitled "Administration orders: Proposed amendments to section 74 to 74W of the Magistrates' Courts Act 32 of 1944", which served as a basis for discussion at a workshop held at the University of Pretoria on 31 May 2011.

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ANNEXURE A

WORKSHOP PARTICIPANTS

1. Adams Ricardo (Antalis South Africa)
2. Alt Eugene (Eugene Alt Administrators)
3. Avenant Theresa (Imali Matters)
4. Balanco Louis (Credit Reform)
5. Beckers Amanda (FNB Commercial Recoveries)
6. Bester Herman (Nedbank Limited)
7. Beukes Estelle (First National Bank)
8. Boraine Andre (Prof: Department of Mercantile Law, University of Pretoria)
9. Botha Moeshfiequoh (Imali Matters)
10. Budow Marilyn (ABIL Consumer Advocate's Office)
11. Cebekhulu Mpumi (Imali Matters)
12. Changa Martin (Imali Matters)
13. Coetzee Hermie (University of Pretoria)
14. Curtain Albert (JR Bester & Genote)
15. Daniels Helma (First National Bank)
16. De Beer Beatrice (BB Administrators)
17. De Meyer Schalk (Jan Lessing Attorneys)
18. Du Toit Rolandi (Summit)
19. Dube Hilton (Summit)
20. Fish Melvin (ABIL Consumer Advocate's Office)
21. Fourie Charl (Smith-Smith)
22. Gardner Clark (Summit)
23. Hartman Sunelle (Annali Erasmus Inc.)
24. Hersch Robyn (Bayport Financial Services)
25. Hoosen Fehmida (Acting Regional Magistrate, Kempton Park)
26. Joseph Lance (Law Credit Solutions)

27. Joubert Sunette (Charles Erasmus Attorneys)
28. Kelly-Louw Michelle (Prof: Department of Mercantile Law, UNISA)
29. Krüger Martheli (Corne Wilkens Attorneys)
30. Larsen Malcolm (Melting the Darkness)
31. Le Roux Salome (Randburg Magistrate Court)
32. Lessing Jan (Jan Lessing Attorneys)
33. Magerman Johan (African Bank Investments Limited)
34. Maritz Charike (Booysen & Co. Inc. Attorneys)
35. Matthee Eduan (Matthee Attorneys)
36. Miller Shireen (Imali Matters)
37. Moodley Shantel (Law Credit Solutions)
38. Mphahlele Magauta (National Debt Mediation Association)
39. Nariansamy Venecia (Creditworx)
40. Peters Joey (Krüger & Van Eeden Attorneys)
41. Pienaar / Van Der Merwe Hannatjie (HVDM Attorneys)
42. Pillaye Anila Jai Jai (Capital Data)
43. Pretorius Anton
44. Rangasamy Declan (Nedbank Limited)
45. Reynders Louis (National Debt Mediation Association)
46. Shargey Norman (Shargey Inc. Attorneys)
47. Sinthumule Thifulufheli (Black Sash)
48. Smit P.S (Booysen & Co. Inc. Attorneys)
49. Smith Ciska (African Bank Limited)
50. Van Der Merwe Christo (JC Vn Der Merwe Attorneys)
51. Van Der Walt Werner (Triangle Debt Counsellors and Administrators)
52. Van Heerden Corlia (University of Pretoria)
53. Van Rensburg Jan (LSSA)
54. Van Wyk Jani (University of Pretoria Law Clinic)
55. Visagie Theo (African Bank Limited)

56. Vormeulen Colin (First National Bank)
57. Wessels Jakkie (Regional Court President, Limpopo)
58. Whyatt Katy (Imali Matters)
59. Wilkens Corne (Corne Wilkens Attorneys)
60. Zulu Thandiwe (Black Sash)
61. Zulu Wendy (First National Bank)
62. Zwane Buhle (First National Bank)

ANNEXURE B

RESPONDENTS TO THE WORKSHOP PAPER

1. Barnes Elizabeth (Nedbank Group Ltd)
2. Bentley Attorneys (Brett Bentley)
3. Booysen & Co. Inc. Attorneys
4. Law Credit Solutions (Joseph Lance)
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7. Matthee Attorneys (Eduan Matthee)
8. Noelene (e-mail received on 12 April 2012)
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10. Krüger and Van Eeden Attorneys ((Peters Joey)
11. HVDM Attorneys (Pienaar Hannatjie)
12. Capital Data (Pillaye Anila Jai Jai -Executive: Specialised Collections at Capital Data)
13. The Banking Association of South Africa
14. Van Der Merwe Christo (Practicing Attorney)