

A CRITIQUE OF THE AVAILABLE DEBT RELIEF MEASURES AFFORDED TO NINA DEBTORS IN THE WAKE OF TRANSFORMATIVE CONSTITUTIONALISM AND INTERNATIONAL TRENDS

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Abstract

Insolvency law is well-established throughout the world and while there are measures in place for dealing with debtors who find themselves in varied circumstances, the issue of relief measures afforded to no-income, no-asset (NINA) debtors has posed quite an issue for many countries, South Africa particularly. When approaching bona fide NINA debtors, the concepts of equality and justice come into play with consideration to the socio-economic circumstances of many in South Africa, our woeful past, and the current ideals of transformative constitutionalism. This paper delves further into this issue and conclusively recommends that legislation be developed in line with other countries such as New Zealand and Kenya

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1 Introduction

Despite the overarching international trends aimed at assisting over-indebted debtors, South Africa still finds itself bound by an archaic approach to insolvency in that it is largely creditor-oriented.¹ Through the utilisation of this system, many honest yet unfortunate individuals find themselves unfairly discriminated against, one such category of individuals being that of the so-called ‘no income no assets’ debtors (NINA debtors). Such a category of debtors is comprised of individuals who, upon being declared insolvent, have neither income nor assets to distribute amongst their creditors.² South African insolvency law strives to maximise returns for creditors, whereas the international trend seems to be directed towards affording relief measures to debtors to eventually enable a discharge from said debt.³ One would attest to the South African system being seemingly ironic, particularly because of the socio-economic context in the wake of such conditions created by apartheid legislation.

In this paper, the current plight of NINA debtors amidst the COVID-19 pandemic and their available relief measures will be discussed in context of unfair discrimination and inequality in the wake of transformative constitutionalism. Following this, the discussion surrounding the international trends in this regard will be delved into. Finally, concluding remarks and reform recommendations are offered. Special note needs to be made of the fact that in this paper, the debtors discussed are *bona fide* debtors and not those individuals who seek to manipulate the judicial system for their personal gain.

2 The current plight of NINA debtors amidst COVID-19

Currently, NINA debtors in South Africa are comprised of working-class individuals, either in the formal or informal sector, who struggle financially to make ends meet. Prior to COVID-19, South Africa was experiencing an economic downturn and unemployment was substantially high with it sitting at 29.1% by the end of the third quarter in 2019.⁴ Nevertheless, COVID-19 and lockdown restrictions

1 H Coetzee & M Roestoff ‘Consumer debt relief in South-Africa – Should the insolvency system provide for NINA debtors? Lessons from New Zealand’ (2013) 22 *International Insolvency Review* at 1.

2 M Roestoff & H Coetzee ‘Debt relief for South African NINA debtors and what can be learned from the European approach’ (2017) 50 *Comparative and International Law Journal of Southern Africa* at 252.

3 Roestoff & Coetzee (n 2) 251.

4 StatsSA ‘Unemployment rises slightly in the third quarter of 2019’ 29 October 2019 http://www.statssa.gov.za/?p=12689&gclid=Cj0KCQjw6s2IBhCnARIsAP8RfAh7rlxQvY4oUKRJ1Rw8vJoUmH9A0UJChqenNwNN98NOBA_48Nl1LREaAvhaEALw_wcB (accessed 16 April 2021).

burdened the country even further and essentially led to the rate of unemployment increasing to 32.5% in the first three months of 2021.⁵ Naturally, the number of people borrowing money to pay off debts and maintain their standard of living increased, further supported by the already low borrowing rate (the rate which affects the amount of interest owed annually on money borrowed) of 7%.⁶ A 'lower cost of borrowing' encourages the consumer to utilise more credit as it seems to be a more worthwhile transaction for those in need of and usually utilise credit. Debt Buster's 2020 Quarter 3 Index revealed that those who earned less than R5 000 per month on average had to subsequently utilise 56% of that net income for debt repayments.⁷ Additionally, StatsSA reported that from a pool of 2 688 respondents, 15.4% had attested to losing their source of income by the sixth week of lockdown and were subsequently left with no income at all.⁸ From this, the current circumstance of the working-class individual is determined and in this next wave, NINA debtors are acknowledged and pre-empted, not necessarily due to their own maleficence but rather by being initially financially insecure amidst a time of economic turmoil.

3 Available debt relief measures

Three debt relief measures are provided in principle to over-indebted debtors in South Africa.⁹ They are sequestration in terms of the Insolvency Act,¹⁰ debt review in terms of section 86 of the National Credit Act,¹¹ and administration proceedings in terms of the Magistrate's Court Act.¹² Debt review and administration proceedings are in essence repayment plans and do not provide a debtor with eventual discharge from debt.¹³ With that said, these two statutory relief measures do, at some point, require that debtors dispose of their assets or income.¹⁴ These procedures also impose access requirements, in the form of disposable income, which satisfy the related sequestration expenses.¹⁵ However, your typical NINA debtor

5 Trading Economics 'South African Unemployment Rate' <https://tradingeconomics.com/south-africa/unemployment-rate> (accessed 16 April 2021).

6 CEIC 'South Africa Bank Lending Rate' <https://www.ceicdata.com/en/indicator/south-africa/bank-lending-rate> (accessed 16 April 2021).

7 Staff Writer 'SA Consumers are Borrowing Money to Pay Back Their Debt' *BusinessTech* 02 November 2020 <https://businesstech.co.za/news/finance/445250/sa-consumers-are-borrowing-money-to-pay-back-their-debt/> (accessed 16 April 2021).

8 Staff Writer (n 7).

9 Coetzee & Roestoff (n 1) 9.

10 Insolvency Act 24 of 1936.

11 National Credit Act 34 of 2005.

12 Magistrate's Court Act 32 of 1994.

13 Roestoff & Coetzee (n 2) 254.

14 Roestoff & Coetzee (n 2) 255.

15 Roestoff & Coetzee (n 2) 254.

would not be able to afford such fees. NINA debtors, therefore, find themselves expressly excluded from such typical relief measures.

Sequestration is viewed as South Africa's primary debt relief measure and is the only one that affords eventual discharge.¹⁶ However, it should be noted that this is not its purpose in principle, but rather a consequence thereof. It is, essentially, an asset liquidation procedure that still prioritises the creditor's repayment over the debtor's well-being – again contrary to international trends which seem to be directed towards debtor-relief measures.¹⁷ Sequestration still poses formidable access requirements in that sequestration costs would need to be covered and an evident benefit to creditors must also be derived.¹⁸ Sequestration is also a costly affair since, firstly, the High Court would be involved as this is an affair which would affect a natural person's status and, secondly, since the procedure is involved and cumbersome as it is designed for large estates.¹⁹ Once again, the express exclusion of NINA debtors is derived from the inclusion of assets or disposable income to the requirements necessary to access sequestration proceedings.

Consequently, and quite ironically, NINA debtors also have the option to enter voluntary negotiations with their creditors.²⁰ This would, however, be seemingly futile as a NINA debtor would (by the very premise that they are a NINA debtor) not have access to disposable income to furnish the creditor with at any point. There would also be clear power disparities in such a negotiation and NINA debtors would be left no better than when they entered these negotiations as the only option which is, in principle, appropriate for such a debtor is debt discharge or a fresh start. Therefore, the unfortunate reality of the current insolvency system procedures is that it purports the notion that one may be 'too poor to go bankrupt'.²¹

4 Unfair discrimination and substantive equality

The Constitution of the Republic of South Africa serves as host to the Bill of Rights and is the cornerstone to the principles of equality in the country.²² Section 8 of the Bill of Rights establishes that the executive, judicial, and legislative arms of government are bound by said Bill and that they have the express duty to promote, respect, protect, and fulfil the rights provisioned therein.²³ Such rights may

16 As above.

17 Roestoff & Coetzee (n 2) 254.

18 As above.

19 As above.

20 Coetzee & Roestoff (n 1) 3.

21 Coetzee & Roestoff (n 1) 2.

22 Constitution of the Republic of South Africa, 1996 (Constitution).

also, however, be limited internally or by section 36 of the Bill.²⁴ Of particular importance is the right to equality protected under section 9 of the Constitution which sets out that everyone has the right to benefit from the law,²⁵ that no one may be discriminated against unfairly,²⁶ and that legislation should strive to protect society's most vulnerable members.²⁷

Equality, as a principle, is highly controversial in that the circumstances of individuals may differ substantially, and the treatment of such individuals remains subjective. In a logical sense, however, individuals in similar circumstances should be treated as such. In the context of South African insolvency law, the treatment of debtors who have defaulted would rarely vary.²⁸ However, the distinguishing factor is that these debtors may have varying amounts available to repay their creditors.²⁹ Such similarities and distinguishing factors are raised and noted in determining whether insolvent debtors with varied repayment capacities would be treated differently.³⁰

As insolvency law relates to the economic status of individuals within society, it becomes increasingly important to acknowledge the differences in South Africa's dual economy portrayed by the formal and informal sectors.³¹ In respect of this, differing socio-economic classes are attributed to each sector in that the formal sector (or secondary and tertiary sectors) bear more wealth as it functions as part of the industrial and professional portion of the economy. Contrastingly, the informal, or primary sector of the economy, is primarily made up of hawkers, uncontracted workers, and manual labourers.³² NINA debtors, as noted in section two of this paper, form the primary constituency of this economy as they are either the portion of South Africa's unemployed or make up the informal or primary sector of the economy, and are expressly excluded from any viable measure of debt relief.³³

Transformative constitutionalism is essentially the most overt legal catalyst to the promotion of equality in South Africa. It is premised on achieving substantive equality which is described as equality in social and economic life and is arguably the most

23 Constitution (n 21) sec 8.

24 Constitution (n 21) sec 36.

25 Constitution (n 21) sec 9(1).

26 Constitution (n 21) sec 9(4).

27 Constitution (n 21) sec 9(2).

28 Coetzee & Roestoff (n 1) 39.

29 As above.

30 H Coetzee 'Is the Unequal Treatment of Debtors in Natural Person Insolvency Law Justifiable?: A South African Exposition' (2016) 25 *International Insolvency Review* at 41.

31 Coetzee & Roestoff (n 1) 5.

32 Coetzee (n 30) 41.

33 As above.

appropriate way to address the inequalities faced by NINA debtors.³⁴ Substantive equality recognises that inequality is not only the cause of the different treatment of persons but more often emerges from 'systemic group-based inequalities that shape relations of dominance and subordination and material disparities between groups'.³⁵ In noting this, substantive equality in relation to transformative constitutionalism seeks to acknowledge the economic and social realities faced by classes of individuals to strive towards the surreal ideal of equality. The premise of this concept is that no one should be unfairly discriminated against or disenfranchised purely because of inherent disadvantages completely out of their control.³⁶

The case of *Harksen v Lane*³⁷ was decided with regards to the interim Constitution, wherein the Constitutional Court established a three-step approach when investigating an alleged violation of the right to equality.³⁸ These steps contained the focal points on whether or not a provision discriminated between people or classes of people, whether such discrimination amounted to unfair discrimination and, whether such discrimination could be justified under the limitations clause should the discrimination be found to be unfair.³⁹ In her paper, Coetzee goes forward to analyse the state of NINA debtors in the context of this test and concludes that the current insolvency law, under the conditions outlined in this test, is unconstitutional not only because the system is clearly exclusionary towards a specific class of debtors, but also because it only provides one method of debt relief wherein discharge is resultant.⁴⁰

The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)⁴¹ serves as a cornerstone to transformation within our democracy.⁴¹ The Act gives effect to the right of equality as entrenched in the Constitution.⁴² The following quote from the Preamble of the PEPUDA is pertinent to this discussion:⁴³

Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy.

34 Roestoff & Coetzee (n 2) 274.

35 Coetzee (n 30) 41.

36 Roestoff & Coetzee (n 2) 274.

37 2008 (1) SA 300 (CC) para 40.

38 *Harksen v Lane* (n 37) para 53.

39 Constitution (n 21) sec 36; *Harksen v Lane* (n 37) para 53.

40 Coetzee (n 30) 47.

41 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

42 Constitution (n 21) sec 3(1).

43 PEPUDA (n 41) Preamble.

This quote corresponds to the rather direct conversation in acknowledging the realities of NINA debtors. As noted above, such debtors belonged to the class of *bona fide* individuals who are denoted as the ‘marginalised’ or ‘the working class of the primary or informal economies’.⁴⁴ In South Africa, that is often a synonym for people of colour and/or black people. NINA debtors are not exclusive to South Africa and for the very fact that their constraints are internationally recognised, it would be elementary to attribute this dilemma in its entirety to colonialism.⁴⁵ However, in a South African context, the past constantly plays a role in the present. The negligent treatment of such a broad class of society, who happen to hold the majority of previously disadvantaged individuals, is a stark reminder of the woeful discriminatory practices of our society.⁴⁶ South Africa’s insolvency system is thus counter-productive owing to its discrimination against groups of people who already find themselves discriminated against in every context of their lives. Furthermore, the remedial measures offered starkly contradict the provisions of PEPUDA in that only one such measure offers eventual discharge of debt.⁴⁷

5 International trends

Insolvency law is a crucial constituent of all international, judicial, and economic systems.⁴⁸ This section aims to outline the international trends and systems of insolvency law with the intention of contrasting these standards to the systems and reform measures held in South African systems. Three systems will be delved into, each within a specific context. The systems to be analysed are, firstly, that of the United States of America as its economy is founded on the principle of freedom of choice. Secondly, the New Zealand system will be analysed as it is regarded as the first country to expressly accommodate NINA debtors in legislation. Lastly, the Kenyan system will be analysed due to it serving as an example close to home and puts forward the answer to ‘what could be’, in the African context.

The United States of America establishes what is referred to as a ‘straight-discharge approach,’ therein enabling any debtor to make a fresh start.⁴⁹ Federal insolvency law regulates the United States in this regard and sets out specific provisions in Chapter 7 of the Bankruptcy Code⁵⁰ which outline that should a debtor surrender their

44 Coetzee (n 30) 41.

45 Coetzee (n 30) 48.

46 Roestoff & Coetzee (n 2) 274.

47 Coetzee (n 30) 53.

48 Roestoff & Coetzee (n 2) 253.

49 Roestoff & Coetzee (n 2) 260.

50 United States Bankruptcy Code, Ch 7.

assets swiftly, this surrender will automatically enable a discharge from all pre-insolvency debt.⁵¹ Other legislative mechanisms prescribed are in the form of repayment plans, namely the 'hardship-discharge', which enables debtors to have their debt discharge where they are unable to complete their payment plan.⁵² While such legislation does not expressly accommodate NINA debtors, it is evident that NINA debtors would qualify for a Chapter 7 discharge should they possess no assets or income.⁵³ This debtor-oriented approach is somewhat fitting to the economy of the United States, which prides itself on freedom of choice and its ever-consistent approach to economic progress.⁵⁴

What is known as the so-called 'No Asset Procedure' is outlined in Part 5 of the New Zealand Insolvency Act.⁵⁵ Such a procedure is purported with humanitarian, economic, and practical justifications.⁵⁶ In establishing this procedure, New Zealand seems to be the only country that has exercised resolve in addressing this neglected class of debtors upon insolvency.⁵⁷ This procedure lasts for 12 months and has, understandably, quite a strict entry criterion.⁵⁸ Upon application to the assignee, the debtor needs to satisfy that they do not possess any realisable assets or income to furnish the debt in question.⁵⁹ Further, the debtor must owe an amount between NZ\$1 000 and NZ\$40 000 and must not have been previously admitted to this procedure or been adjudicated bankrupt.⁶⁰ Furthermore, a debtor will be disqualified from these proceedings should they have concealed assets with the intent to defraud creditors or where they have conducted themselves in an offensive manner, have been adjudicated bankrupt, incurred debts while being aware of their inability to pay said debts, and, lastly, where one of the creditors intends on applying for the adjudication of the debtor as bankrupt.⁶¹ This will likely be materially better than the no-asset procedure.⁶² This is because once a debtor is admitted to this procedure, their creditors are impacted by an effective moratorium which ceases all debt enforcement.⁶³ This does not apply to maintenance orders and student loans.⁶⁴ Succeeding this, a debtor is, firstly, liable to notify

51 As above.

52 As above.

53 Roestoff & Coetzee (n 2) 260.

54 As above.

55 Insolvency Act 2006 No 55 (New Zealand Insolvency Act); Coetzee & Roestoff (n 1) 27.

56 Coetzee & Roestoff (n 1) 27.

57 As above.

58 Coetzee & Roestoff (n 1) 32.

59 New Zealand Insolvency Act (n 55) sec 363(1).

60 Coetzee & Roestoff (n 1) 29.

61 As above.

62 As above.

63 Coetzee & Roestoff (n 1) 30.

64 As above.

the assignee of circumstantial changes which may enable them to reimburse their creditors and, secondly, a debtor may not enter into a credit agreement for more than NZ\$1 000 and should they do so, such an offence is punishable by imprisonment, a fine, or both.⁶⁵ Termination of the procedure results in a termination of the moratorium.⁶⁶ Such termination may occur for a variety of reasons which include the fraudulent concealment of assets, and wrongful admittance to the procedure, to name a few.⁶⁷ Should the procedure not be terminated in an alternative manner, the debtor will be discharged from the procedure after 12 months from admittance, upon the assignee's approval.⁶⁸ Upon such discharge, all the debtor's debts (including charges and penalties) will be unenforceable.⁶⁹

Kenya's no asset procedure holds a stark similarity to that of New Zealand, in that it is also based on a debtor filing an application that includes a detailed scope of the debtor's financial standing.⁷⁰ The official receiver of said application must ensure that the debtor's total debt is between KSh100 000 and KSh400 000 and must be satisfied that the debtor does not have any realisable assets to satisfy their debts, has not been previously admitted to the procedure, and has not been previously declared bankrupt.⁷¹ The Official Receiver will then proceed to inform all the current creditors of the debtor's assets and liabilities.⁷² Similar to the New Zealand procedure, restrictions are placed on the debtor with regard to new debt once an application has been filed.⁷³ Upon admission of the debtor to the procedure, their debts become unenforceable unless the procedure is terminated in an alternate manner.⁷⁴ However, should it not be terminated, the procedure will terminate automatically after twelve months and all of the debtor's prior debts will be unenforceable.⁷⁵ Considering that Kenya's new set of insolvency legislation was enacted in 2015, it suffices to note that this system does have been prospect to operate within the African, and more specifically, within the South African context.⁷⁶ However, it will be of keen interest to the South African legislature to pay specific attention to the unfolding of these Kenyan procedures, particularly in the wake of the tumultuous economic times of COVID-19, wherein now more than

65 New Zealand Insolvency Act (n 55) sec 169(3); Coetzee & Roestoff (n 1) 31.

66 New Zealand Insolvency Act (n 55) sec 372; Coetzee & Roestoff (n 1) 31.

67 New Zealand Insolvency Act (n 55) sec 27; Coetzee & Roestoff (n 1) 31.

68 New Zealand Insolvency Act (n 55) sec 377(1); Coetzee & Roestoff (n 1) 33.

69 New Zealand Insolvency Act (n 55) sec 375; Coetzee & Roestoff (n 1) 33.

70 Z Mabe 'Alternatives to Bankruptcy in South Africa That Provides for a Discharge of Debts: Lessons from Kenya' (2019) 22 *Potchefstroom Electronic Law Journal* at 19.

71 Insolvency Act 18 of 2015 (Kenyan Insolvency Act) sec 345; Mabe (n 70) 2.

72 Kenyan Insolvency Act (n 71) sec 347; Mabe (n 70) 19.

73 Kenyan Insolvency Act (n 71) Division 15; Mabe (n 70) 19.

74 Mabe (n 70) 19.

75 As above.

76 Mabe (n 70) 26.

ever, debtors find themselves without assets, income, and an overall means to satisfy their debts. Special attention must be afforded to the impact that such discharge measures will have on creditors and the lending economy at large.⁷⁷ This, in essence, will be the make-or-break factor for its adoption in countries such as South Africa.

6 Reform

November 2017 saw the Portfolio Committee on Trade and Industry publish the Draft National Credit Amendment Bill.⁷⁸ This was accompanied by a Memorandum on the objects of the National Credit Amendment Bill in 2018.⁷⁹ Although this Bill is, essentially, a limited debt-intervention process, it is also indicative of the concerted effort made towards addressing the needs of vulnerable debtors and consumers within the country.⁸⁰ It seeks to afford relief to debtors who may be excluded from the current relief measures by extinguishing all or part of the obligations of certain classes of debtors.⁸¹ Essentially, the specific action taken through this amendment is to introduce ‘capped debt intervention’ within the National Credit Amendment Bill⁸² to provide statutory recourse to vulnerable consumers who are typically excluded from the previously mentioned relief measures.⁸³ This attempt made by the government to address the needs of a class unfairly discriminated against was long overdue particularly with reference to the international standards, as discussed above. As it stands, many countries are adopting a ‘fresh start’ approach toward NINA debtors.⁸⁴ In the introduction of this paper, the irony of the current relief measures (or lack thereof) was alluded to. This attempt by the government, while warranted and necessary, is much needed and somewhat late, particularly after the stifling economic conditions society finds itself in during the pandemic.

Not only would such discharge systems offer relief to unfairly discriminated debtors, but they would also offer comprehensive and effective rehabilitation that could afford the overall progression of the South African economy, much like that of the United States of America.⁸⁵ To afford NINA debtors (who comprise of mainly individuals who were previously disadvantaged) the opportunity to

77 As above.

78 H Coetzee ‘An opportunity for No Income No Asset debtors to get out of check? – An evaluation of the proposed debt intervention measure’ (2018) 81 *THRHR* at 597; Mabe (n 70) 3; Draft National Credit Amendment Bill, 2018.

79 National Credit Amendment Bill, 2018.

80 Coetzee (n 78) 593; Mabe (n 70) 3.

81 As above.

82 National Credit Act 34 of 2005.

83 Coetzee (n 78) 593.

84 Roestoff & Coetzee (n 2) 251.

85 Roestoff & Coetzee (n 2) 272.

effectively rid themselves of deadweight debt would be a step toward transformation and equal opportunity in South Africa.

South Africa often aims to purport transformative constitutionalism through the promulgation of progressive legislation.⁸⁶ The promulgation of any legislation aiming to alleviate the burden borne by those downtrodden by society is a metaphorical step in the right direction. In this paper, the actual constituency of the reform policy is less appreciated as opposed to the actual effort made.

Nevertheless, the simple notion that reform is needed in this field of the law is exclaimed. The legislature has ample international examples at its disposal and with such examples, the concept of discharge from debt, and facilitating a shortened but effective rehabilitation periods, are noted.⁸⁷ Not only have these systems worked positively in tandem with the relevant economic systems, but they have also been adopted and promulgated elsewhere.⁸⁸ South Africa, with its perplexing dual economy, should waste no time in adopting measures similar to those put in place by New Zealand and Kenya. This should be done with the intention to ensure a transformative and compassionate socio-economic environment affording a true opportunity for some sort of promotion of the downtrodden of society to thrive amidst trying economic times.

7 Concluding remarks

This paper sought to critique the judicial nature of the current debt relief measures put in place for NINA debtors in South Africa. After an in-depth analysis of the current relief measures and the operation thereof with relation to the current plight of the socio-economic class and COVID-19, it was concluded that these relief measures are unconstitutional in that they unfairly discriminate against a socio-economic class of society.⁸⁹

Such unfair discrimination violates basic constitutional values and principles which South African society strives towards through the promotion of the Bill of Rights and transformative constitutionalism.⁹⁰ Ironically, countries abroad have adopted methods of debt relief that would be seemingly more fitting in a South African context. These countries include New Zealand and Kenya which purport systems wherein debt rehabilitation is swift, and discharge is imminent to a well-intentioned, qualifying debtor.⁹¹

86 Coetzee (n 78) 597.

87 Coetzee (n 78) 604.

88 Mabe (n 70) 2.

89 Coetzee & Roestoff (n 1) 4.

90 Coetzee (n 30) 41.

91 Coetzee & Roestoff (n 1) 9; Mabe (n 70) 5.

As a final note, South Africa has made a concerted effort and needs to adopt progressive measures toward addressing the plight of NINA debtors.⁹² While such attempts are noteworthy, they may be said to have arrived a little late but still have enough time to be effective as the world economy finds itself impaled on the crippling backbone of credit.

92 Coetzee (n 78) 593.