Evaluating the Utilisation of the National Credit Act 34 of 2005 to Enhance the Recovery of Distressed Financial Entrepreneurs: Lessons from the United States of America

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Abstract: Debt relief involves various measures and strategies that are designed to alleviate and/or restructure debt obligations of the borrower so as to enhance their capacity to comply with such obligations when they are due. This article assesses the adequacy of Chapter 4 of the National Credit Act 34 of 2005 (NCA) in relation to the recovery processes of businesses operated by natural persons, especially sole proprietorships. Most natural persons operate their businesses as sole proprietorships and/or independent entrepreneurs. Accordingly, financially distressed sole proprietorships businesses should have access to flexible debt relief schemes rather than rigid consumer-based credit measures that are stipulated under Chapter 4 of the NCA. The consumer-based credit measures in Chapter 4 of the NCA are more favourable to individual consumer debtors than the needs of budding entrepreneurs such as sole proprietorships. In this regard, the South African policy makers should consider adopting possible lessons from Chapter 13 of the United States of America (US) Bankruptcy Code, Pub. L. 95-598, Title 1, 11 U.S.C. 101, 6 November 1978, 92 Stat.2549 (US Bankruptcy Code), especially sections 1301 to 1330, which deals with the adjustment of debts for individuals with regular income.

Keywords: Entrepreneurship; debt relief scheme; consumer debtors; business debtors; post-commencement finance; rehabilitation

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1. Introductory Remarks

The corona virus (covid-19 pandemic) containment measures that were imposed by various governments caused numerous economic challenges in all countries globally, particularly for small business owners and/or individual entrepreneurs. It is estimated that over a hundred thousand self-employed persons in South Africa lost their income during the covid-19 pandemic lockdowns. It is further submitted that the ongoing electricity load shedding is also negatively affecting small businesses and individual entrepreneurs in South Africa. For instance, Essay argues that load shedding is causing businesses to lose a lot of money in labour costs per day (Essay, 2012, p. 20). Considering that most small businesses in South Africa are undercapitalised and cannot afford alternative energy, the likelihood of such businesses to operate effectively is very slim. Currently, a debtor in financial distress may apply for debt review under the National Credit Act 34 of 2005 ("NCA", ss 60-66). For the purposes of this article, a debtor is a natural person who is involved in economic activities by operating, either as a sole proprietorship or a partner in a partnership business.

The NCA promotes the social and economic welfare of consumers in South Africa by encouraging the growth of a credit market that is accessible to all people, especially those who previously failed to obtain credit. The NCA discourages reckless lending and overborrowing by financial consumers (see ss 3-7 & 78-88 of the NCA; *Nedbank v National Credit Regulator* 2011 (3) SA 581 (SCA) para 2Otto and Otto, 2013, p. 7; Roestoff *et al*, 2009, p. 253; *National Credit Regulator v National Consumer Tribunal and Another* [2023] ZAGPPHC 24 "20 January 2023", paras 19-20). The NCA also provides for a re-arrangement order, an agreement order and a debt review process for all those who are overindebted (see ss 85 & 88 of the NCA). Debt relief involves various measures and strategies that are designed to alleviate and/or restructure debt obligations of the borrower so as to enhance their capacity to comply with such obligations when they are due (see s 86-88 of the NCA; Roestoff *et al*, 2009, p. 253; *First Rand Bank Ltd v Olivier* [2008] JOL 22138 (SE) 6; *Standard Bank of SA Ltd v Panayiotts* (08/00146) [2009] ZAGPHC 22).

Although the NCA has the potential to promote socio-economic growth in South Africa, it is mainly focused on natural person consumer debtors rather than business debtors. Business debtors usually incur debts when carrying out their business, whereas natural person consumer debtors incur debts through their acquisition of personal goods and services. This differentiation is easy to apply when dealing with registered companies and natural persons. However, the difficulty arises when a

natural person debtor is involved in commercial activities either as a sole proprietor or a member of a partnership (Loubser, 2007, p. 444). The term “consumer” is employed in the NCA to refer to a natural person who has a credit agreement, and this could suggest that other other debtors such as business debtors and/or those without credit agreements are not expressly covered (see s 1).

It appears that debt review process is not available to juristic persons, including partnerships under the NCA (ss 85-88). This means that while a partnership is traditionally recognised as an association of natural persons, any natural person who is a member of a partnership cannot file for debt review on behalf of their partnership (see s 1 read with ss 78; 85-88 of the NCA). Furthermore, a member of a partnership may not apply for debt review to restructure debts arising from that partnership. Although individual consumers may acquire debts to participate in businesses as entrepreneurs, it appears that the NCA limits the scope of debt review to individual consumer-related debts rather than juristic person-related business debts (see s 5 of the NCA). The NCA does not recognise a sole proprietorship as a consumer, but a natural person that engages in such business activities may utilise debt review proceedings for relief. In this regard, it is submitted that debt review should be carefully applied to both individual consumer-related debts and juristic person-related business debts.

In light of the above, the article discusses the promotion of entrepreneurship and related consumer rights under the NCA. Moreover, the article explores debt relief measures that are employed under the United States of America (US) Bankruptcy Code (US Bankruptcy Code), especially sections 1301 to 1330, which deals with the adjustment of debts for individuals with regular income.

2. Selected Aspects of Debt Review under the NCA

The current debt review provisions under the NCA do not expressly apply entrepreneurs who are business debtors. Accordingly, selected aspects of the debt review process under the NCA are scrutinised below to determine their adequacy in facilitating and providing relief to entrepreneurs and business debtors in financial distress.

2.1. Commencement Procedure

A debtor is obliged to follow the procedure stipulated in section 86 of the NCA before he or she is empowered to rely on any debt review scheme in South Africa. The debt review process may be commenced by an interested party in the court or the affected consumer (ss 85-86 of the NCA). Accordingly, a debt counsellor or a magistrate may review the affected consumer's financial situation and make recommendations to either declare the credit agreement reckless or restructure the credit agreement (see s 86(5)-(8) of the NCA; Van Heerden & Boraine, 2009, pp. 22–63; Boraine & van Heerden, 2010, pp. 84-124; Maghembe, 2011 p. 171-180; *Investec Bank Ltd v Mutemeri* 2010 (1) SA 265 (GSJ); *Ex Parte Ford*; *Ex Parte Venter*; *Ex Parte Botes* 2009 (3) SA 376 (WCC); *Naidoo v ABSA Bank* 2010 (4) SA 597 (SCA)). In terms of Regulation 24, the affected consumer should submit a completed form 16, which requires them to, inter alia, provide their monthly expenses, home and business loans. In addition, the affected consumer should also provide a list of all their debts. Thus, the determination of whether the affected consumer is overindebted is based on all their personal and business expenses and liabilities. If the consumer's personal estate is declared over-indebted, their business although it may be solvent, will follow the same fate. This follows the fact that the NCA does not expressly apply to sole proprietorships and they are not regarded as legal entities. Thus, the debts, expenses and liabilities of the sole proprietorship are the debts, expenses and liabilities of the owner of that sole proprietorship. In this regard, the debt review measure under the NCA should be carefully restricted to the debts, expenses and liabilities of the owner of a sole proprietorship. Put differently, the debts, expenses and liabilities of the owner of the sole proprietorship should be properly restructured without affecting the core business of their sole proprietorship.

Under insolvency law, an act of insolvency by a spouse to a marriage in community of property is regarded as an act of insolvency by both spouses which gives rise to a good ground for the sequestration of their joint estate (*Standard Bank of SA Ltd v Sewpersadh Another* 2005 (4) SA 148 (C) 152-153). Moreover, when the spouses are divorced and one spouse commits an act of insolvency, their joint estate will be sequestrated (see *BP Southern Africa (Pty) Ltd v Viljoen en 'n ander* 2002 (5) SA 630 (O) 638-639). In light of this, although an application for debt review is not an act of insolvency per se, if a spouse of the affected consumer (sole proprietor or partner) commits an act of insolvency, the debt review proceedings may be interrupted by compulsory sequestration of their joint estate (Investec *Bank Ltd v Mutemeri* 2010 (1) SA 265 (GSJ); *Ex Parte Ford*; *Ex Parte Venter*; *Ex Parte Botes*

2009 (3) SA 376 (WCC); *Naidoo v ABSA Bank* 2010 (4) SA 597 (SCA)). Given this background, the debt review proceedings under the NCA should be carefully amended to enact provisions that expressly apply to sole proprietorship, partnerships and business entrepreneurs that are in financial distress.

2.2. Debt Review Moratorium

When a consumer is under debt review, credit providers are restricted from commencing legal proceedings against that consumer. For instance, section 88(3) of the NCA stipulates that a credit provider who has received a notice of court proceedings in terms of section 83 or 85 or a notice in terms of section 86(4)(b)(i) of the NCA may not enforce by litigation or any other judicial process its right or security under a credit agreement unless the affected consumer is in default. This moratorium empowers the affected consumer to restructure their debts.

The scope of the moratorium under section 88(3) of the NCA has been a subject of discussion in the courts and among academics (see *Investec Bank Limited and Another v Mutemeri and Another* 2010 (1) SA 265 (GSJ); *Naidoo v ABSA Bank* 2010 (4) SA 597 (SCA); Boraine & van Heerden, 2010, pp. 84-124; Maghembe, 2011, pp. 171-180). Therefore, it is imperative to explore if an application for compulsory sequestration in terms of the Insolvency Act 24 of 1936 (Insolvency Act) constitute "enforcement proceedings" as contemplated in section 88 of the NCA. Under compulsory sequestration the court may grant an application for the sequestration of a debtor's estate if it is established that the applicant has a liquidated claim; or the debtor has committed an act of insolvency or is insolvent and there is a reason to believe that sequestration will be to the advantage of all creditors of the affected debtor's estate (s 9(1) read with 10(c) & 12(1)(c) of the Insolvency Act). When the court grants a final order for sequestration it means that debt review proceedings are terminated and the estate of the consumer is formally sequestrated (see ss 9, 10 & 12 of the Insolvency Act; *Amod v Khan* 1947 2 SA 432 (N) 438; Chitimira & Mabina, 2019, pp. 62-83; Sharrock, Van Der Linde & Smith, 2012, p. 33; Pepler, 2013, pp. 15-21; Mabe & Evans, 2014, pp. 651-667).

Notably, in *Investec Bank Limited and Another v Mutemeri and Another* 2010 (1) SA 265 (GSJ), it was held that an application for compulsory sequestration does not constitute an exercise or enforcement by litigation or other judicial processes of any right or security under a credit agreement between the credit provider and the consumer until certain conditions have been met (see s 86(4)(b) of the NCA). This

decision was later confirmed by the Supreme Court of Appeal in *Naidoo v ABSA Bank* 2010 (4) SA 597 (SCA), *Firstrand Bank v Kona & Another* 20003/2014 [2015] ZASCA 11 para 13 and *Firstrand Bank Ltd v Evans* 2011 4 SA 597 (KZD), where Wallis J held that the NCA does not preclude credit providers from sequestrating the estates of their debtors. The court further held that: "If sequestration of a person's estate whilst they are under debt review was to be rendered impermissible there appears to be no sound reason why it should be available to creditors who are not credit providers under the NCA. Conversely there is no obvious reason why credit providers should be a class of creditors excluded from invoking the mechanisms of the Insolvency Act" (see *Firstrand Bank Ltd v Evans* 2011 4 SA 597 (KZD)). This suggests that where a debtor has applied for debt review, creditors are not precluded from applying for compulsory sequestration of their debtors's estates under the Insolvency Act. Consequently, if a sole proprietorship applies for debt review, it could remain vulnerable to compulsory sequestration by credit providers that are not covered under the NCA. Generally, a sole proprietorship or an entrepreneur may not depend on the debt review moratorium to continue its operations without any lawful interruption from his or her creditors. Thus, section 88 of the NCA does not protect the debtor from all its creditors during debt review moratorium because it only stays proceeings of creditors that fall under the ambit of the NCA.

2.3. Debt Review Plan

The success of the debt review measures is mainly dependent on the debt restructuring plan. However, policy makers did not clearly provide guidelines on how the debt restructuring plan could be utilised. Moreover, it appears that section 8(e) of the Insolvency Act and section 86 of the NCA should be carefully utilised to avoid possible conflict regarding the application of these provisions which will be detrimental to the affected debtor. Section 8(e) of the Insolvency Act states that a debtor commits an act of insolvency if he or she makes or offers to make any arrangement with any of his or her creditors to be released wholly or in part, from his or her debts. Consequently, it remains unclear whether attempts by a debtor to arrange with the relevant creditors in terms of section 86 of the NCA will constitute an act of insolvency as envisioned in section 8(e) of the Insolvency Act. We concur with Chokuda who correctly argues that an application for debt review to a debt counsellor which results in re-arrangement of a credit agreement under section 86 of the NCA does not constitute an act of insolvency in terms of section 8(e) of the Insolvency Act (Chokuda, 2013, p. 15). A debtor's application for debt review in

terms of s 86 of the NCA is usually made to a registered debt counsellor. A debt counsellor cannot be treated like a creditor for the purposes of the Insolvency Act. This entails that a debtor's application for debt review does not constitute an act of insolvency for the purposes of section 8(e) of the Insolvency Act (Chokuda, 2013, pp. 14-15).

Section 8(e) of the Insolvency Act requires the debtor to initiate the negotiations for an arrangement and/or arrange or offer to arrange to his or her creditors for such an action to be considered as an act of insolvency. On the other hand, section 86 of the NCA empowers the affected consumer or debtor to apply to the debt counsellor in a prescribed manner for debt review and/or to be declared over-indebted. The debt counsellor must evaluate whether the debtor is over-indebted before he or she makes any decision in respect thereof. In terms of section 86(7)(b) NCA, the debt counsellor could decide that the consumer is not over-indebted, but is nevertheless experiencing, or likely to experience, some difficulty in satisfying all his or her obligations under credit agreements timeously. Moreover, the debt counsellor may recommend that the debtor or the affected consumer voluntarily consider and agree on a debt re-arrangement plan with his or her creditors. The debt counsellor may decide that the debtor or affected consumer is over-indebted and recommend that the Magistrate's Court make the order that: (a) one or more of the debtor or consumer's credit agreements be declared to be reckless credit; or (b) one or more of the debtor or consumer's obligations be re-arranged by the debt counsellor (section 86(7)(c) of the NCA).

As indicated above, if the consumer or debtor and his or her credit providers accept the debt counsellor's recommendation and agree on a plan of debt re-arrangement, such a re-arrangement will only qualify as an arrangement for the purposes of section 8(e) of the Insolvency Act if it meets all its requirements for an act of insolvency. Thus, a mere application for debt review to the debt counsellor by the debtor does not give rise to an act of insolvency in terms of section 8(e) of the Insolvency Act (section 86(8)(a) of the NCA).

It appears that the debtor or a third part with the debtor's consent may make an offer for debt re-arrangement. Thus, to constitute an act of insolvency in terms of section 8(e) of the Insolvency Act, the debtor does not have to personally make the arrangement offer to creditors. An offer or arrangement that is made to creditors by an agent or another person on behald of the debtor suffices for the purposes of section 8(e) of the Insolvency Act (*Walsh v Kruger* 1965(2) SA 756 (E) at 759, "*Walsh case*"; Chokuda, 2013, pp. 14-15). Nonetheless, provisions of section 86(7)(b) read

with section 86(8)(a) of the NCA do not expressly provide whether it is debtor or debt counsellor's responsibility to come up with the debt re-arrangement plan. Accordingly, it is submitted that where the debtor makes an offer for debt re-arrangement to creditors, such arrangement should be treated as an act of insolvency as contemplated in section 8(e) of the Insolvency Act. Likewise, if a debt re-arrangement plan is made by the debt counsellor, it should meet the requirements in *Walsh case*. Thus, the debt counsellor should act with the debtor's knowledge and consent.

Moreover, the debt re-arrangement plan made by the debtor should be indicative of his or her inability for it to constitute an act of insolvency in terms of section 8(g) of the Insolvency Act (Bertelsmann *et al*, 2019, pp. 40-200; Bertelsmann *et al*, 2008, pp. 96-98; Sharrock, Van Der Linde & Smith, 2012, pp. 33-36; *Koöperasie Bpk v Joubert* 1980 (3) SA 1117 (T) at 1125-1126). In this regard, it is important to note that the debt re-arrangement plan made in terms of section 86 of the NCA does not itself demonstrate an inability to pay on the part of the debtor. Therefore, the debt re-arrangement plan that is made under the NCA does not constitute an act of insolvency as contemplated in section 8(e) of the Insolvency Act. Moreover, it appears that the main basis for the acts of insolvency in terms of the Insolvency Act was probably aimed at aiding creditors who do not have sufficient evidence to prove that affected debtor is insolvent. For instance, in *De Villiers NO v Maursen Properties (Pty) Ltd* 1983 (4) SA 670 (T) at 676, the court held that a creditor may seek an order sequestrating the debtor's estate without having to prove that the debtor is actually insolvent or unable to pay its debts (see further *DP Du Plessis Prokureurs v Van Aarde* 1999 (4) SA 1333 TPD at 1335E-G). Therefore, the debtor's estate may be sequestrated even though the debtor is technically solvent. In this regard, it is crucial to note that the object of the debt re-arrangement plan should be carefully considered to determine if it amounts to an act of insolvency. If the object of the debt rearrangement plan is to release the debtor wholly or in part, from liability, then such plan will give rise to an act of insolvency (Bertelsmann *et al*, 2019, pp. 40-200; Bertelsmann *et al*, 2008, pp. 96-98; Sharrock, Van Der Linde & Smith, 2012, pp. 33-36). For example, a debt write-offs could enable the debtor not pay a certain amount of the debt or the whole debt. This means that the debtor under such an agreement will not be liable to pay the debt in terms of the credit agreement and this could constitute an act of insolvency. However, in *Mackay v Cahi* 1962 (2) 193 (O) 206, the court held that an offer of a certain amount in the rand, subject to the debtor being allowed an extension of time to pay the balance, does not amount to an act of insolvency.

It is submitted that the debt review plan in the NCA does not adequately protect entrepreneurs from possible sequestration by creditors in terms of the Insolvency Act. Put differently, the NCA is generally aimed at restructuring specific credit debts and this does not preclude debtors from being sequestrated by their creditors under the Insolvency Act. It appears that the NCA does not have specific business rescue measures for sole proprietorships and/or other business debtors.

2.4. New Credit Agreements

The NCA does not expressly empower creditors to finance debt review proceedings. For instance, a consumer or debtor who commences the debt review process should pay various costs such as application fee, rejection fee if he or she is declared not over-indebted and a rearrangement fee which must be less than or equal to the first instalment of the debt restructuring plan (s 86 of the NCA). The other expenses include a maximum fee of R9 000 excluding Value Added Tax (VAT) for joint applications, a monthly aftercare fee of 5 per cent of the restructuring agreement instalment and a consent order fee. The consumer or affected debtor should pay administrative and operational expenses to sustain the business during and after the debt re-arrangement plan (see ss 86(3)(a); (4) of the NCA read with schedule 2(2) of the National Credit Regulations Number 6, 2017, pp. 1-2; the National Credit Regulator, 2018, pp.1-4; Mabe, 2019, pp. 6-28). However, the NCA prohibits the affected consumer from entering into new credit agreements in terms of section 88(1). This was probably aimed at discouraging affected consumers from burdening themselves with new credit agreements which give rise to over-indebtedness (Van Heerden and Coetzee, 2019, pp. 2-62). Although this may be true, new and/or additional credit agreements could be vitally needed if the affected consumer or debtor is involved in economic activities. A sole proprietorship usually require operational finances for its business. Moreover, if creditors extend credit to the affected consumers, it could be regarded as reckless credit (s 88(4) of the NCA; Boraine *et al*, 2012, pp. 62-80; Van Heerden and Coetzee, 2019, pp. 2-62). Consequently, a credit agreement that is declared reckless credit will give rise to a court order setting aside all or part of the consumer's rights and obligations under that agreement (Boraine & Renke, 2007, pp. 222-235). The court may also suspend the affected credit agreement (ss 84 read with s 83(3) of the NCA). During the period of suspension, the affected consumer is not obliged to pay any interest, fees or other charges under the credit agreement. Furthermore, during the period of suspension, the credit provider's rights in respect of the affected credit agreement are not

enforceable. This discourages even creditors who are not regulated by the NCA from providing credit to a sole proprietorship that is under debt review.

2.5. Termination of Debt Review

The NCA does not expressly provide the guidelines and steps that must be followed for a consumer to terminate the debt review process (ss 78-123 of the NCA). This has led to procedural uncertainties and divergent court decisions. In terms of section 71 of the National Credit Amendment Act 19 of 2014 (NCAA 2014), the debt counsellor must issue a clearance certificate to a consumer whose debts were re-arranged in terms of section 88 of the NCA (Van Heerden and Coetzee, 2019, pp. 1-69). Furthermore, the consumer or debtor must demonstrate that they are financially stable to continue making payments of future obligations in terms of the rearrangement order. It follows that if the debt counsellor decides not to issue or fails to issue a clearance certificate, the consumer or affected debtor may apply for a review at the National Consumer Tribunal (Tribunal). If the Tribunal is satisfied it may issue an order directing the debt counsellor to issue a clearance certificate (ss 71(1) to (4) of the NCA). This is only done after debt review has run its course insofar as restructured short-term credit debts are concerned. This could suggest that where the debt counsellor or the consumer wishes to withdraw or terminate debt review, there are no provisions to cater for such as withdrawal or termination (*Daniels v Sensational Debt Relief (Pty) Ltd* (WC), unreported case number 10065/17 of 3 August 2017, where the court, *inter alia*, held that the NCA does not expressly empower the Magistrate's court to declare that a consumer is no longer over-indebted after a section 86(1) application was filed and form 17.2 was issued. The court held further that the consumer or affected debtor should approach a debt counsellor to get a clearance certificate and if the debt counsellor declines to issue a clearance certificate, he or she should approach the Tribunal for redress. Likewise, in *Phaladi v Lamara* 2018 3 SA 265 (WCC) paras 4 to 8, the court held that the inherent jurisdiction of the High Court could not be invoked to grant an order declaring that a consumer is no longer over-indebted. This decision is different from other High Court decisions which exercised their common law jurisdiction in related matters (see *Manamela v Du Plessis t/a Debt Safe and Others* (78244/2016) [2017] ZAGPPHC 289; *Mokubung v Mamela Consulting and Others* (87653/2016) [2017] ZAGPPHC 462).

A debtor who applies for debt review and wishes to be discharged will have to satisfy many requirements. For instance, the debtor or affected consumer should apply for

a clearance certificate from the debt counsellor. This can only be done if the debtor or affected consumer has paid some of the debts and/or has shown that he or she is capable of meeting all the relevant credit obligations in the future. Moreover, the Magistrate Court does not have jurisdiction to declare that a consumer or debtor is not over-indebted. Thus, the NCA does not expressly provide guidelines on how consumers or debtors may exit from debt review if their financial position has positively improved from the time they entered the debt review process (s 71 of the NCA). Apart from the voluntary debt review process where consumers or debtors could make a formal declaration of their over-indebtedness and apply for debt restructuring, no provision in the NCA deals with the debt review exit processes in South Africa (Van Heerden and Coetzee, 2019, pp. 1-69).

For this reason, the debt relief procedure in the NCA might not work very well for sole proprietorships. Sole proprietorships are likely to continue to struggle to withdraw or terminate debt review proceedings under the NCA. This is worsened by the fact that when a debtor is under debt review they cannot borrow any money to increase their share capital or continue to operate their businesses. The current debt discharge procedures are also not very easy to comply with for affected consumers and/or debtors.

3. Possible Lessons from the US Bankruptcy Code

The US was chosen for comparison because its bankruptcy measures in Chapters 11 and 13 of the US Bankruptcy Code offer flexible reorganisation of debts and adjustment of debts of an individual with regular income. However, it is evident that there is a dearth of comprehensive research concerning the specific provisions that pertain to sole proprietorships (see The Department of Trade & Industry (DTI), 2004, pp. 3-54); see also Loubser, 2007, pp. 444-461; Loubser, 2010, pp. 16-145). Therefore, there is a need to understand the limitations and potential remedies associated with business rescue of sole proprietorships in both the US and South Africa. The Bankruptcy Reform Act of 1978, P.L. 103-394, 107 Stat. 4106 (Bankruptcy Reform Act) regulates bankruptcy proceedings at a federal level in the US. The current US Bankruptcy Code was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Bankruptcy Abuse Prevention Act) and recently by the Small Business Reorganization Act of 2019 (Small Business Reorganization Act) which streamlined bankruptcy process for businesses that qualify as small businesses. The Small Business Reorganization Act took effect on

22 February 2020. The Bankruptcy Abuse Prevention Act obliges debtors filing for bankruptcy whose monthly income exceeds the median income for their household size in their state to use the Internal Revenue Service (IRS) expense standards rather than their current expenses to calculate their monthly disposable income.

Chapter 13 of the US Bankruptcy Code provides mechanism facilitates for individuals with a stable income to formulate a plan for the repayment of their debts, either in full or in part. Chapter 13 of the US Bankruptcy Code require debtors to present a proposed repayment plan wherein they intend to make periodic payments to creditors over a span of three to five years. For instance, sections 1301 to 1330 of the US Bankruptcy Code deals with the adjustment of debts for individuals with regular income. In the event that the debtor's present monthly income falls below the relevant state median, the proposed plan will span a duration of three years, unless the court grants approval for an extended period based on justifiable grounds. If the monthly income of the debtor exceeds the applicable state median, it is typically required for the repayment plan to have a duration of five years (sections 1301 to 1330 of the US Bankruptcy Code). The debtor's proposed repayment plan should not allow payments to be made over a duration exceeding five years. During this period, creditors are prohibited from initiating or persisting with debt collection activities and/or any related legal action (Chapter 13 of the US Bankruptcy Code).

It is submitted that South Africa should follow the example in Chapter 13 of the US Bankruptcy Code and make debt review measures more accessible to any natural person who has a steady income including salaried individuals and individuals operating a sole proprietorship business (*In re Bradley* (1982) 18 B.R. 105, 7 Collier Bankr. Cas. 2d (MB) 119 (Bankr. D. Vt); *Pearson* (1985) 773 F.2d 751, 753, 13 Collier Bankr. Cas. 2d (MB) 749, Bankr. L. Rep. (CCH) P 70787 (6th Cir). The US Bankruptcy Code has special provisions that facilitate the restructuring of small businesses that are run by individuals. It appears that a natural person involved in business is regarded as a business debtor rather than a consumer in the US. The process of restructuring enables the debtor to strategically undertake calculated risks rather than resorting to the cessation of operations as a means to salvage the affected business. In contrast to Chapter 4 of the NCA which is primarily consumer-oriented and emphasises debt counselling, Chapter 13 of the US Bankruptcy Code is business-oriented and places greater emphasis on the debtor's source of income. In essence, when an individual debtor engages in economic endeavours under Chapter 13 of the US Bankruptcy Code, it is imperative to facilitate the debtor's financial management and ensure the continuity of his or her commercial operations. On the other hand, the

debt review process in Chapter 4 of the NCA does not expressly provide for the business of the debtor since it is mainly focused on the payment of specific consumer debts.

Under the US Bankruptcy Code, the owner of a sole proprietorship may commence a Chapter 13 case by filing petitions to the district court where they reside or conduct business. It is possible for a debtor who is already subject to Chapters 7 or 11 proceedings under the US Bankruptcy Code to request such proceedings to be converted to Chapter 13 proceedings of the same Code. This conversion empowers the debtor to avoid liquidating its business under the US Bankruptcy Code (see ss 301(a), 706(a), 1112(d)).

Section 362 of the US Bankruptcy Code provides an automatic stay that is effective from the date and time the debtor files a Chapter 13 case in terms of the same Code. It should be noted that the automatic stay protects and activates the exclusive jurisdiction of the bankruptcy court over the debtor's estate. The primary goal of section 362 of the US Bankruptcy Code is to provide sometime to the debtor to prepare a proposal to satisfy outstanding obligations. Furthermore, it protects the rights and interests of creditors. It also prevents all creditors from enforcing their rights against the debtor's estate. In *Mann v Chase Manhattan Mortg.Corp,* the Bankruptcy Court held that, "[t]he automatic stay provision is designed to forefend against the disorderly, piecemeal dismemberment of the debtor's estate outside bankruptcy proceedings," (see section 362 of the US Bankruptcy Code; *Mann v Chase Manhattan Mortg*. Corp., (2003) 316 F. 3d 1, 3, 40 Bankr. Ct. Dec. (CRR) 189, 49 Collier Bankr. Cas. 2d (MB) 1715, Bankr. L. Rep. (CCH) P 78787 (1st Cir.); *In re Computer Communications, Inc*., (1987) 824 F. 2d). In contrast to this, the moratorium in Chapter 4 of the NCA is only restricted to creditors that are covered in terms of this Act (see s 88 read with s 84 of the NCA). Put differently, unlike the position under the NCA, Chapter 13 of the US Bankruptcy Code protects the debtor from all creditors, irrespective of whether their debts arose from a business or consumer-based transaction.

The unique feature of the automatic stay in Chapter 13 of the US Bankruptcy Code is that it also protects codebtors, whether spouse or life partner. In terms of section 1301 of the US Bankruptcy Code, a creditor may not act or commence or continue any civil action to enforce a debt from an individual who is jointly liable with the debtor (*Harris v Fort Oglethorpe State Bank* (1983) 721 F. 2d 1052 (6th Cir.); *In re Humphrey* (2004) 310 B.R. 735 (Bankr. W.D. Mo.). The co-debtor automatic stay insulates the debtor from possible enforcement actions or legal proceedings. This

automatic stay only applies during the pendency of the Chapter 13 case and ceases when the case is closed, dismissed or converted to a Chapter 7 or Chapter 11 case (s 1301(a)(2) of the US Bankruptcy Code). Although the automatic stays prohibit creditors from enforcing their rights against the co-debtor, it does not affect the liability of the co-debtor where the debt is partially paid after the re-organisation plan is implemented. Furthermore, creditors may only act against the co-debtor 30 days after receiving notice of the termination of Chapter 13 proceedings. During the subsistence of the moratorium, the debtor should prepare a business re-organisation plan and apply for confirmation (s 108 of the US Bankruptcy Code; *In re Zersen* (1995) 189 B.R. 732 (Bankr. W.D. Wis); *In re Harris* (1982) 16 B.R. 371).

The owner of a sole proprietorship has the authority to exercise the trustee's right to obtain post-petition credit without the court's authority (s 1304(b) of the US Bankruptcy Code). However, such credit must be obtained in the ordinary course of business. The credit also depends on whether it is secured or unsecured. *In re Caccamise* (2009) WL 5205980, 3 (Bankr. E.D. Va.), the court permitted a realtor to retain the use of her credit card for business purposes and allowed her to pay the relatively low prepetition balance on that card. This was probably done to allow the debtor to continue incurring trade-related debts.

The debtor's authority to incur further debts is normally treated as an administrative expense (s 503(b)(1) of the US Bankruptcy Code). Hence, if the debtor cannot obtain unsecured credit, he or she may rely on other methods to secure financing by offering additional protection to the creditors (s 364(c) of the US Bankruptcy Code). The court may intervene by granting an administrative expense priority to the new credit agreement over the other administrative expenses (see s.364(c)(1) of the US Bankruptcy Code). The court may allow the debtor to secure the loan with an unencumbered property of the business estate (see *In re Nesser* (1997) 206 B.R. 357 (Bankr. W.D. Pa). Although the debtor has the authority to obtain post-commencement finance, the courts monitor the conclusion of such new transactions. The impartiality of the courts is crucial to balance the interest of creditors and the legislature's desire to re-organise the debtor in financial distress.

The ultimate goals for re-organisation are to free the debtor from liability and ensure that creditors receive a substantial return. Chapter 13 of the US Bankruptcy Code provides two avenues for the discharge of a sole proprietorship, namely full payment discharge and hardship discharge. Full payment discharge is also known as the completion. When a debtor completes payments under the plan, either as originally confirmed or modified during re-organisation, the debtor receives a discharge in

section 1328 of the US Bankruptcy Code. It is important to note that a debtor does not have to pay debts in full to receive a discharge in terms of section 1328(a) of the US Bankruptcy Code. The affected debtor will be discharged when he or she has settled all of the dischargeable debts in terms of the confirmed or modified re-organised plan (*In re Moore* (2019) 602 B.R. 40 (Bankr. E.D. Tenn).

Hardship discharge happens when the debtor fails to complete payments due to unforeseen circumstances beyond its control. The US Bankruptcy Code only grant the discharge of a debtor if the modification of the re-organisation plan is not practicable and if unsecured creditors have received distributions under the plan that are not less than they would have received in a Chapter 7 case (s 1329 of the US Bankruptcy Code). Thus, section 1329 of the US Bankruptcy Code provides that where debtors are no longer able to make payments because of economic recession or loss of property in a storm or fire, the bankruptcy system should not accelerate their downfall. The South African policy makers should consider incorporating some of the measures that are provided under Chapter 13 of the US Bankruptcy Code into the relevant provisions of the NCA.

4. Concluding Remarks

As indicated above, small businesses and/or sole proprietorship are not adequately covered under the NCA. As a result, small businesses and/or sole proprietorship are usually prone to fail in the first three years (Essay, 2017, pp. 8-30). Thus, more needs to be done to ensure that the NCA protect natural persons that operate their businesses as sole proprietorships and/or independent entrepreneurs in South Africa. Accordingly, financially distressed sole proprietorships businesses should have access to flexible debt relief schemes rather than rigid consumer-based credit measures that are stipulated under Chapter 4 of the NCA. This follows the fact that the consumer-based credit measures in Chapter 4 of the NCA are more favourable to individual consumer debtors than the needs of budding entrepreneurs such as sole proprietorships. In other words, the debt review measures under the NCA are best suited for consumers who merely manage their debts to avoid overindebtness. In this regard, the South African policy makers should consider adopting possible lessons from Chapter 13 of the US Bankruptcy Code (ss 1301 to 1330).

The debt review processes in the NCA should be modelled on Chapter 13 of the US Bankruptcy Code to ensure that debtors who are under debt review in terms of the NCA are not concurrently subjected to sequestration proceedings in terms of the

Insolvency Act (Roestoff, 2010, pp. 782-792). The South African policy makers should consider imposing a moratorium that prohibit all creditors from invoking sequestration proceedings against debtors that are under debt review. The debt review provisions under the NCA prohibits any debtor under debt review from incurring more debts and/or expenses. In relation to this, it is submitted that the NCA should be carefully amended to impose a limit on the amount that a debtor under debt review could borrow for operational purposes of his or her business. The NCA only grants a fresh start were the debtor has paid a substantial amount of money to the creditors. This may take years, especially for debtors operating small businesses (Roestoff, Haupt, Coetzee & Erasmus, 2009, pp. 247-299). Therefore, the NCA should be amended in line with Chapter 13 of the US Bankruptcy Code to enact provisions that enable the debtor to apply for the hardship discharge (*Nedbank v National Credit Regulator* 2011 (3) SA 581 (SCA)). Lastly, the NCA should be amended to enact provisions that enable a debtor to be discharged from all the business debts if he or she encountered unforeseen circumstances such as natural disasters and/or economic recession.

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