Onlangse regspraak/Recent case law

Body Corporate Palm Lane v Masinge 2013 JDR 2332 (GNP)

Discretion and powers of the court in applications for sequestration

1 Introduction

In *Body Corporate Palm Lane v Masinge* (2013 JDR 2332 (GNP)) the court exercised its discretion in terms of section 12(1) of the Insolvency Act 24 of 1936 against the granting of a final order for sequestration even though all the requirements for the granting of such order in terms of section 12(1) were satisfied. The court thus came to the assistance of the respondent-debtor by allowing him the opportunity to pay off his debt rather than have his estate sequestrated and being obliged to surrender his assets and thus also being subjected to the stigma and restrictions of insolvency. In this respect, it is to be noted that it is currently a world-wide trend to accommodate insolvent or over-indebted debtors and to retreat from the principle of maximising returns for creditors as the only objective of consumer insolvency regimes. The following observation in a recent report of the World Bank is pertinent in this regard (see Working Group on the Treatment of the Insolvency of Natural Persons *Report on the treatment of the insolvency of natural persons* Insolvency and Creditor/Debtor Regimes Task Force, World Bank 2012 par 393 – available at http://bit.ly/Oft3hp – hereafter the World Bank Report):

> [A] regime for treating the insolvency of natural persons not only pursues the objectives of increasing payment to individual creditors and enhancing a fair distribution of payment among the collective of creditors, but, just as importantly, such a regime pursues the objectives of providing relief to debtors and their families and addressing wider social issues. In achieving those objectives, a regime for the insolvency of natural persons should strive for a balance among competing interests.

The court in *Masinge* did not elaborate much on its decision. References to relevant case law and provisions of the Insolvency Act are few and far between and the court's viewpoints and reasons for its decision have to be deduced from what is read between the lines. The aim of this case discussion is thus, first of all, to discuss and analyse the court's decision with specific reference to the applicable provisions of the Act and relevant case law that relate to the question as to what the discretion of the court pertaining to the granting or refusing of sequestration applications entails. *Masinge* concerned a compulsory sequestration application, but it should be noted that the Act also affords

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discretion to the court to grant or refuse a voluntary sequestration application even though the requirements in terms of the Act have been complied with. The provisions of the Act and relevant case law in this regard are therefore also investigated as it may shed some light on the issues under consideration. After discussing the issues relating to the court's discretion, the implications of the ruling in *Masinge* and the powers of the court when refusing a sequestration order are discussed. In light of this discussion, proposals are made for the amendment of the relevant provisions of the Act in order to allow the court to make certain orders when exercising its discretion to dismiss an application for sequestration. Paragraph 4 contains our proposals for amendment of the Act and concluding remarks.

2 Facts and Decision

Masinge concerned an application for the compulsory sequestration of the respondent's estate. A provisional order had already been obtained by the applicant and the matter was before Kubishi J for a final sequestration order (par 1). The court referred to the requirements for the granting of a final sequestration order in terms of section 12 of the Insolvency Act (par 3; see the discussion in par 3 1 below).

It was not in dispute that the respondent was indebted to the applicant in the amount of R32 003,16 for levies and costs payable to the applicant in terms of the Sectional Titles Act 95 of 1986. The levies and costs were payable in respect of immovable property situated in Pretoria and owned by the respondent. It was also common cause that the respondent had committed an act of insolvency in that he failed to satisfy a warrant of execution issued against him in respect of the debt. The act of insolvency (see s 8(b) of the Insolvency Act) entailed that the respondent was unable to point out any disposable goods, movable or immovable, to the sheriff and that the latter could not locate any goods for attachment (par 3).

The respondent opposed the application on the basis that the sequestration would not be to the benefit of the creditors (par 4). However, no details are provided in the judgment as to the grounds for such allegation.

Contrary to our courts' unsympathetic attitude generally as regards debtors' interests in sequestration applications (see Boraine & Roestoff 'Revisiting the state of consumer insolvency in South Africa after twenty years: The courts' approach, international guidelines and an appeal for urgent law reform' 2014 *THRHR* 351 361 *et seq*), Kubishi J was of the view that he should exercise his discretion against the applicant's request for a final sequestration order. Referring to *Epstein v Epstein* (1987 4 SA 606 (C) 612G–J) the court pointed out that even if a court is satisfied that the creditor has established his or her claim, that the debtor has committed an act of insolvency or is in fact insolvent, and there is reason to believe that it would be to the advantage of creditors that the debtor's estate be sequestrated, the court nevertheless has a discretion, which

must be exercised judicially, to grant or refuse a final sequestration order (par 5).

The court stated that it was inclined to give the respondent the benefit of the doubt. The respondent's evidence was that he initially was not aware that he had to pay levies to the applicant. By the time he realised that he had to pay he was in arrears to such an extent that he was not able to pay the amount due in one lump sum. The fact that his wife lost her employment further contributed to his inability to repay the levies in one lump sum. The respondent then approached his attorney to negotiate a settlement to repay the debt in instalments, but the settlement proposals were not acceptable to the applicant who insisted upon payment in one lump sum (par 6).

Kubishi J stated that the applicant's reasons for requiring the debt to be paid at once were understandable, but indicated that he was of the view that the respondent should be afforded the opportunity to repay the debt in instalments whilst continuing to pay the monthly levy. The court pointed out that the applicant's evidence was that the respondent did not have any other asset apart from the house. Accordingly the application for sequestration was refused. No order was made as to costs and each party had to pay its own costs of suit (parr 6–8).

3 Analysis of Decision

3 1 Requirements for Sequestration Applications

It is trite law that a High Court hearing an application for the sequestration of a debtor's estate must firstly decide whether the applicant has met the prescribed requirements for either sequestration by means of voluntary surrender or compulsory sequestration (see ss 6, 10 & 12 of the Insolvency Act discussed below). Proof of the advantage to creditors requirement is of paramount importance and a sequestration order cannot be granted unless the advantage to creditors requirement has been satisfied. Moreover, when the court has to exercise its discretion as to whether to grant or refuse the order after all requirements have been met, our courts, in line with the present pro-creditor approach in South African consumer insolvency law, will generally be guided by considerations which are more favourable to the interests of the creditors than those of the debtor (see Boraine & Roestoff *supra* 361 *et seq*, and the discussion of relevant case law below).

It is interesting to note that proof of the advantage to creditors requirement was not required in applications for voluntary surrender in terms of the previous Insolvency Act 32 of 1916 (see *Ex parte Terblanche* 1923 (TPD) 168 170) and orders for voluntary surrender were generally only refused when the granting thereof would be to the detriment of creditors (*Ex parte Theron* 1923 (OPD) 46; Wille & Millin *Mercantile Law of South Africa* (1925) 348) or if there was a clear indication of fraud or a lack of *bona fides* on the part of the debtor (*In re Spiers Brothers* 1932

(NLR) 618 624). Contrary to the approach of our courts today, the courts then took into consideration the interests of both debtors and creditors when exercising their discretion in voluntary surrender applications. In *Ex parte Packer* 1933 GWL 34 37 the court explained as follows:

> [I]t would seem that the Court in exercising its discretion should bear in mind the interest of both the debtor and those of the general body of creditors. On the one hand it would not come to the assistance of a debtor whose conduct is shown to have been dishonest or reprehensible; on the other hand it would not accept a surrender if that course would be unjustly detrimental to creditors, for instance, when it is shown that although the debtor at the time is insolvent through misfortune he has prospects which may later on enable him to pay his creditors. It seems to me that in a case of a debtor whose financial position has become intolerable and hopeless as a result of misfortune the Court could in the exercise of its discretion come to the conclusion that his interests should outweigh those of his creditors who would not receive any dividend and could not benefit by an order resulting in their debtor being freed from his liabilities.

The other requirements (ito ss 6, 10 & 12) must of course also be met before a sequestration order can be granted, and of paramount importance is that the advantage principle should logically only become relevant once it is accepted that the debtor is indeed factually insolvent, or in the case of compulsory sequestration, where the applicant may also rely on an act of insolvency, once such an act is established on the facts. The fact of the matter is that once the advantage principle is considered by the court it should be accepted that the court is in fact dealing with an insolvent debtor.

Where application is made for compulsory sequestration in terms of the current Insolvency Act, the court will initially place the estate under provisional sequestration. The insolvent or any creditor is then entitled to oppose the granting of a final order by addressing the court on the return date of the rule *nisi* as to the reasons why the application for the final order should be refused (s 11(1); Bertelsmann, Evans, Harris, Kelly-Louw, Loubser, Roestoff, Smith, Stander & Steyn *Mars The law of insolvency in South Africa* (2008) 130).

As regards the requirements for the granting of the provisional order and the applicant's burden of proof in this regard, section 10 provides as follows:

> If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that *prima facie* –
>
> (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section *nine*; and
>
> (b) the debtor has committed an act of insolvency or is insolvent; and
>
> (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,
>
> it may make an order sequestrating the estate of the debtor provisionally.

Section 10 states that the court "*may* make an order sequestrating the estate of the debtor" and it would therefore appear that the court has a discretion in this regard (see eg *Epstein v Epstein supra* 612; *Nedbank Ltd v Potgieter* unreported case no 2012/5210 (GSJ) par 15; *Julie Whyte Dresses (Pty) Ltd v Whitehead* 1970 3 SA 218 (D) 219).

As regards the requirements for the granting of a final sequestration order, section 12(1) provides as follows:

> If at the hearing pursuant to the aforesaid rule nisi the court is satisfied that –
>
> (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of subsection nine; and
>
> (b) the debtor has committed and act of insolvency or is insolvent; and
>
> (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,
>
> it may sequestrate the estate of the debtor.

In terms of section 12(2) the court, if it is not satisfied as regards the requirements set out in section 12(1),

> [S]hall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not *sine die*.

It is thus clear from the word "shall" in section 12(2) that the court is obliged to dismiss an application for sequestration and set aside the order for provisional sequestration where the requirements are not satisfied (*Amod v Khan* 1947 2 SA 432 (N) 435; *Braithwaite v Gilbert (Volkskas Bpk intervening)* 1984 4 SA 717 (W) 723G; Meskin, Galgut, Magid, Kunst, Boraine and Burdette *Insolvency law and its operation in winding-up* (1990) par 2 1 13; Bertelsmann *et al* 134–135).

In terms of section 12(1) it would appear from the use of the words "*may* sequestrate" that the court is not bound to grant a sequestration order where the requirements are indeed satisfied as the court is once again afforded a discretion (see eg *Amod v Khan supra* par 435).

The requirements for the acceptance by the court of the surrender of the debtor's estate are found in section 6(1) which reads as follows:

> If the court is satisfied that the provisions of section four have been complied with, that the estate of the debtor in question is insolvent, that he owns realizable property of a sufficient value to defray all costs of the sequestration which will in terms of this Act be payable out of the free residue of his estate and that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may accept the surrender of the debtor's estate and make an order sequestrating the estate.

It should be clear from the use of the words "*may* accept the surrender" that the court still has a discretion to reject the surrender of the estate even when it is satisfied as regards all the requirements in

section 6(1) (see eg *Ex parte Hayes* 1970 4 SA 94 (NC) 96; *Ex parte Bouwer and similar applications* 2009 6 SA 382 (GNP) 385). This is particularly the case where creditors appear to oppose the application (Bertelsmann *et al* 72).

It should be noted that the degree of proof with regard to the advantage to creditors requirement is more stringent in the case of voluntary surrender than in the case of compulsory sequestration (compare the wording of ss 6(1), 10(c) & 12(1)(c)). The reason for this difference is that a debtor knows about his own affairs and can adduce facts to show an advantage to creditors. A creditor, on the other hand, is seldom (except in the case of so-called "friendly sequestrations") in possession of sufficient facts relating to the debtor's assets to be able to provide details to the court. Consequently our courts have generally been inclined to accept, as proof, very little evidence that sequestration would be to the advantage of the creditors in compulsory sequestration applications (*Amod v Khan supra* par 438; *Hillhouse v Stott* 1990 4 SA 580 (W) 584; *Nedbank Ltd v Thorpe* 2009 JOL 24292 (KZP) par 51).

From the above discussion it should be evident that a court has to exercise its discretion at different stages of the sequestration proceedings. First of all it should exercise a discretion, after all relevant facts and circumstances have been taken into consideration, as to the question whether it is *prima facie* of the opinion (s 10) or satisfied (ss 6 & 12) that the relevant requirements have been met. Should the court be of such opinion, or if it is so satisfied, it must secondly decide, after consideration of all relevant facts and circumstances, whether it will in fact grant or refuse the order.

3 2 Discretion of Court

3 2 1 Advantage and Discretion

3 2 1 1 Case Law

Advantage to creditors upon sequestration is not the necessary concomitant with the commission of an act of insolvency (*London Estates (Pty) Ltd v Nair* 1957 3 SA 591 (N) 592) and advantage still needs to be proved even where the applicant is armed with a *nulla bona* return (see *Mamacos v Davids* 1976 1 SA 19 (C) 22 & *cf* the facts of *Masinge* as regards the commission of an act of insolvency in terms of s 8(b)).

With regard to the meaning of advantage to creditors our courts have repeatedly cited the *dictum* in *Meskin & Co v Friedman* (1948 2 SA 555 (W) 559) that there must be "a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to creditors". The court in *Meskin* referred to the so-called "indirect" advantages (see also *Stainer v Estate Bukes* 1933 (OPD) 86 90) which are not in themselves of a pecuniary character, such as the advantage of investigation of the insolvent's affairs under the powers of enquiry given by the Act. In this regard the court stated that the right of

investigation is not an advantage in itself (see also *London Estates (Pty) Ltd v Nair supra* par 559; *Mamacos v Davids supra* parr 21F–22C). The right of investigation is given as a possible means of securing ultimate material benefit for the creditors, for example in the form of the recovery of property disposed of by the insolvent or the disallowance of doubtful or collusive claims. According to the court in *Meskin* it is thus not necessary to prove that the insolvent has any assets. Even if there are none at all, it would be sufficient if it could be shown that there is a reasonable prospect that investigation in terms of the Insolvency Act may result in the discovery of assets to the benefit of the creditors (*Meskin supra* par 559; see also *Nedbank Ltd v Thorpe* parr 52 & 53; Smith 'The recurrent motif of the Insolvency Act – advantage of creditors' 1985 *Modern Business Law* 27 32).

It has been held that an advantage to creditors is proved generally in applications for compulsory sequestration when the petitioning creditor establishes that the debtor has a substantial estate to sequestrate and that the creditors cannot obtain payment except through sequestration (*Hill & Co v Ganie* 1925 (CPD) 242 245; *Trust Wholesalers & Woolens (Pty) Ltd v Mackan* 1954 2 SA 109 (N) 111; *Realizations Ltd v Ager* 1961 4 SA 10 (N) 11; *Mamacos v Davids supra* par 20C). However, in *Realizations* (*supra* parr 11–12), Williamson JP stated that a court, when considering the advantage to creditors requirement, should not consider the question whether alternative methods of obtaining payment might bring better results than sequestration. This is an issue to be considered at the stage of the proceedings when the court has to decide whether it should refuse an order despite the fact that all requirements entitling the applicant to an order have been established (see also *Trust Wholesalers supra* parr 112–113). However, in other cases our courts when considering the advantage to creditors requirement have indeed considered alternative procedures and debt repayment options in order to come to a decision as to whether sequestration is the best option to deal with the debt situation of the debtor (see eg *Ex parte Van den Berg* 1949 (WLD) 816 817; *Gardee v Dhanmanta Holdings* 1978 1 SA 1066 (N) 1070; *Madari v Cassim* 1950 2 SA 35 (N) 39; *Levine v Viljoen* 1952 1 SA 456 (W) 461H; *Behrman v Sideris* 1950 2 SA 366 (T) 370–372; *Sacks Morris (Pty) Ltd v Smith* 1951 3 SA 167 (O) 173).

Case law indicates that the machinery of sequestration should only be implemented in cases where it would be cost-effective to do so, namely, when the proceeds of the assets would be sufficient to cover at least the cost of sequestration. In *Van den Berg* (*supra* par 817), Ramsbottom J observed that to use the machinery of sequestration to distribute amongst the creditors the small amount which may be available from the realisation of the assets after paying the costs of administration is really "to use a sledge hammer to break a nut". The court was of the view that the administration procedure rather than the "expensive machinery" of sequestration was the best procedure to deal with the estate in this instance. In *Gardee* (*supra* par 1070), Didcott J held that where there is a single creditor who has a judgment against the debtor upon which he can

execute, compulsory sequestration is a more expensive course which is not to the advantage of creditors. This situation should, however, be distinguished from cases where there is no judgment against the debtor. In these cases it would probably not be more advantageous to the creditor to issue summons and to proceed to judgment and execution, especially where the creditor knows that the debtor is hopelessly insolvent and will not be able to meet the judgment. In such a case the machinery of sequestration would probably be more advantageous than trial procedure (*Absa Bank Ltd v De Klerk* 1999 SA 835 (E) 839; *Maxwell v Holderness* 2009 JOL 23740 (KZP) par 9).

In several other cases the court preferred the machinery of sequestration as a measure to deal with the debtor's financial situation. In *Julie Whyte Dresses* (*supra* 220), for example, the respondent-debtor requested the court to implement garnishee proceedings and to refuse the granting of a provisional sequestration order. However, Muller J refused to exercise its discretion in favour of the respondent-debtor as he found that there was nothing to show that garnishee proceedings would be less expensive or more advantageous to the general body of creditors than the administrative procedure provided for by section 23(5) and (11) of the Insolvency Act.

In *Levine v Viljoen* (*supra* 459–460), Roper J stated that the machinery of administration provides an inexpensive and convenient means of dealing with the estates of small debtors of the salaried or wage-earning class or those whose business affairs have been simple. However, the court was of the view that it is unsuitable for use in the case of more elaborate estates where transactions have been more complex, especially because of the limited facilities for investigation available to the trustee of the sequestrated estate.

As regards applications for voluntary surrender, our courts have also considered alternative measures such as debt review in terms of the National Credit Act 34 of 2005 (NCA) (*Ex parte Ford and two similar cases* 2009 3 SA 376 (WCC) 384; *Ex parte Arntzen (Nedbank Ltd as intervening creditor)* 2013 1 SA 49 (KZP) 56–57; *Ex parte Shmukler-Tshiko* 2013 JOL 29999 (GSJ) par 33). In *Ford* (*supra* par 18), the court refused to exercise its discretion in favour of the applicants for an order for the voluntary surrender of their respective estates, as it found that the machinery of the NCA was the more appropriate mechanism to be used and thus more advantageous than sequestration (Boraine & Van Heerden 'To sequestrate or not to sequestrate in view of the National Credit Act 34 of 2005: A tale of two judgments' 2010 *PER* 84 113). The court ultimately refused to grant the sequestration order, despite the fact that creditors did not intervene to oppose the matter and despite the fact that the applicants testified that debt review in terms of the NCA would not be a workable solution to their debt problems (see Roestoff & Coetzee 2012 'Consumer debt relief in South Africa; Lessons from America and England; and suggestions for the way forward' *SA Merc LJ* 53 62; *Ford supra* par 15).

A factor which according to the court in *Arntzen* (*supra* 57) plays an important role with regard to the advantage to creditors requirement in voluntary surrender applications is whether, despite the applicant-debtor being insolvent, his or her income exceeds his or her expenses as this would enable the applicant to liquidate his indebtedness over time (see also *Ex parte Bouwer supra* 385C–D). It should be noted that such a situation may convince the court to refuse a sequestration order as sequestration would see the debtor obtain a discharge of all his pre-sequestration debts. However, in order to ascertain whether the acceptance of the surrender of an estate would be to the advantage of creditors it is not only the income of the applicant that needs to be disclosed, but also all other relevant information regarding the applicant's estate as the surrender of an estate involves, amongst others, a financial enquiry (*Ex parte Bouwer supra* par 7).

3 2 1 2 Analysis

The advantage to creditors requirement clearly plays a central role in the exercise of the court's discretion and our courts' emphasis on the creditors' position when considering this requirement should obviously be attributed to the fact that the Act currently sets such a requirement for sequestration applications. It is thus noticeable that the court in *Masinge*, contrary to the current pro-creditor approach of our courts, has in fact taken the debtor's best interest and convenience into consideration when exercising its discretion.

From the case law discussed above and the facts and decision in *Masinge* in this regard, it would appear that our courts are generally willing to refuse a compulsory sequestration order when they are of the opinion that the repayment of a debt in instalments might be a better or more cost-effective option to deal with the debt situation of the debtor and thus be more advantageous to creditors. However, it should be noted that the court in *Masinge* apparently did not decline the order because it was of the view that the repayment option would be a better or less expensive solution and that the advantage requirement was thus not complied with. The court noted that the application was opposed by the respondent on the basis that sequestration was not to the benefit of the creditors, but it did not pronounce upon this issue. It merely stated that its view was that it should exercise its discretion against the granting of a final order despite the fact that the requirements of section 12 were complied with. The court held that the respondent should be afforded an opportunity to pay off his debt in instalments, and in this instance it appears that the court took into consideration the debtor's position and convenience when exercising its discretion rather than the interests of the creditor. The court mentioned that the applicant's evidence was that the respondent's house was his only asset and the fact that the debtor could lose his home when his estate was to be sequestrated was probably a factor which convinced the court to exercise his discretion in favour of the respondent-debtor, by allowing him the opportunity to repay his debt in instalments. The fact that the applicant's house was his only asset may

also have had a bearing on the advantage to creditors requirement as such a situation may imply that there is insufficient assets in the estate to establish an advantage to creditors. However, as indicated, the court apparently did not refuse the application on the basis that there was no advantage proven.

3 2 2 Discretion when all Requirements are Met

3 2 2 1 Case Law

Apart from exercising its discretion in relation to the various requirements of a sequestration application, be it voluntary or compulsory, the court still has a discretion to grant or deny the order (see eg *Firstrand Bank Ltd v Evans* 2011 4 SA 597 (KZD) par 27; *Nedbank Ltd v Potgieter supra* par 15; *Ex parte Ford supra* par 19; *Ex parte Bouwer supra* 385).

As regards the question as to how the court should exercise this discretion, it has been held that the court has an overriding discretion which must be exercised judicially and upon consideration of all the facts and circumstances (see eg *Julie Whyte Dresses (Pty) Ltd v Whitehead supra* 219; *Nedbank Ltd v Potgieter supra* par 15). The court has a wide discretion and may refuse to sequestrate an estate even where there has been an act of insolvency. However, it is a discretion to be exercised not capriciously, but in accordance with the correct principles (*Pelunsky & Co v Beiles* 1908 (TS) 370 372). No exhaustive or general rule can be laid down and each case thus depends on its own facts (*Consolidated Estates and Collection Agency v Choonara* 1929 (WLD) 92 93; see also Bertelsmann *et al* 141). So, for example, the court refused a final sequestration order where it was of the opinion that an administration order in terms of the Magistrates' Courts Act 32 of 1944 (MCA) was in existence and working satisfactorily (*Barlow's (Eastern Province) Ltd v Bouwer* 1950 4 SA 385 (E) 397; *Madari v Cassim supra* 39). In *Chenille Industries v Vorster* (1953 2 SA 691 (O) 701) the court refused to grant the order despite the fact that an act of insolvency was committed and proved where there was a substantial surplus of assets over liabilities and the court was of the view that the likelihood of injury or hardship to creditors was more remote than in the case where the excess was small or problematical. In *Amod v Khan* (*supra* 439), Hathhorn JP exercised his discretion in favour of the respondent-debtor where it appeared that the object of the applicant-creditor was not to obtain payment of his debt, but to prevent the debtor from obtaining payment against the creditor's son. Hathhorn JP made the following observation regarding the nature of the court's discretion:

> [T]he section enacts that if the Court is satisfied 'it may sequestrate the estate of the debtor', and in my judgment 'may' in that phrase does not mean 'must'. The word 'may' is frequently used by the legislature when it gives the power of decision to the Court, and it is natural that ordinarily the legislature should not intend to bind the Court to a particular course when it decides a

> case. If it does so intend, it uses appropriate words as it has done in sub-sec. (2) in the phrase 'it shall dismiss.

However, the general approach of our courts appears to be that the court is indeed bound to grant a sequestration order when all requirements are met and the court may not exercise its discretion in favour of the debtor-respondent unless special circumstances are present (*Millward v Glaser* 1950 3 SA 547 (W) 554; *Port Shepstone Fresh Meat and Fish Co (Pty) Ltd v Schultz* 1940 (NPD) 163 165; *Chenille Industries v Vorster supra* par 700; *Firstrand Bank v Evans supra* par 27). Furthermore, the exercising of the discretion should in all instances bear a close relation to considerations relating to the rights and best interests of the creditors (*Cyril Smiedt (Pty) Ltd v Lourens* 1966 1 SA 150 (O) 155). In *Firstrand Bank v Evans* (*supra* par 27) Wallis J explained as follows:

> There is little authority on how this discretion should be exercised, which perhaps indicates that it is unusual for a court to exercise it in favour of the debtor. Broadly speaking, it seems to me that the discretion falls within the class of cases generally described as involving a power combined with a duty. In other words, where the conditions prescribed for the grant of a provisional order of sequestration are satisfied, then, in the absence of some special circumstances, the court should ordinarily grant the order. It is for the respondent to establish the special or unusual circumstances that warrant the exercise of the court's discretion in his or her favour.

The view of Wallis J in *Evans* that the discretion provided for in sections 10 and 12 involves a "power combined with a duty", supports the view that the court is generally bound to grant an order for compulsory sequestration and will normally not have a residual power to dismiss an application for compulsory sequestration when it is satisfied as to the relevant requirements. Wallis J referred to *Schwartz v Schwartz* (1984 4 SA 467 (A) 473–474) where Corbett JA, referring to section 4(1) of the Divorce Act 70 of 1979, explained as follows:

> A statutory enactment conferring a power in permissive language may nevertheless have to be construed as making it the duty of the person or authority in whom the power is reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied. Whether an enactment should be so construed depends on, *inter alia*, the language in which it is couched, the context in which it appears, the general scope and object of the legislation, the nature of the thing empowered to be done and the person or persons for whose benefit the power is to be exercised ... this does not involve reading the word 'may' as meaning 'must'. As long as the English language retains its meaning 'may' can never be equivalent to 'must'. It is a question whether the grant of the permissive power also imports an obligation in certain circumstances to use the power.
>
> Section 4(1) empowers the Court to grant a decree of divorce on the ground of the irretrievable breakdown of the marriage 'if it is satisfied that'; and then follows a specified state of affairs which is in effect the statutory definition of irretrievable breakdown. Clearly satisfaction that the estate of affairs exists is a necessary prerequisite to the exercise by the court of its power to grant a decree of divorce on this ground. But once the Court is so satisfied, can it, in its discretion, withhold or grant a decree of divorce? It is difficult to visualize

> on what grounds a Court, so satisfied, could withhold a decree of divorce. Moreover, had it been intended by the Legislature that the Court, in such circumstances, would have a residual power to withhold a decree of divorce, one would have expected to find in the enactment some more specific indication of this intent and of the grounds upon which this Court might exercise its powers adversely to the plaintiff.

Applying the above explanation as regards the nature of the court's discretion to grant a decree of divorce to the discretion of the court in sequestration applications, it could be argued that the courts are generally bound to grant compulsory sequestration orders when all requirements are met. It could further be argued that, in light of the context in which the discretion is afforded to the court, namely, that the main purpose of the Insolvency Act is to ensure an orderly and fair distribution of the debtor's assets for the benefit of the creditors as a group (see Bertelsmann *et al* 2–3), as well as the fact that the interests of debtors are not specifically indicated as a possible ground for exercising its discretion against the applicant-creditor, a court is bound to grant an order unless other special circumstances exist which do not relate to the position and convenience of the debtor.

As regards the issue of the court being empowered to exercise its discretion in favour of the debtor when special circumstances are present, it should further be noted that the debt review provisions of the NCA do not preclude a credit provider from bringing an application for the sequestration of the debtor's estate (*Investec Bank Ltd v Mutemeri* 2010 1 SA 265 (GSJ) par 35; confirmed on appeal in *Naidoo v Absa Bank Ltd* 2010 4 SA 587 (SCA) par 4). In this regard it has been held that sequestration proceedings do not amount to proceedings to enforce a credit provider's rights in terms of a credit agreement (see s 88(3) which precludes a credit provider from enforcing a credit agreement debt once a debtor is under debt review). The purpose of sequestration proceedings is to set the machinery of the law in motion to have the debtor declared insolvent (*Mutemeri supra* parr 27–35; *Naidoo supra* par 4; *Firstrand Bank v Evans supra* par 25). Consequently, a creditor may proceed with sequestration proceedings and the mere fact that the debtor preferred debt review as the solution to his or her financial problems appears to be irrelevant when the court has to decide whether a sequestration order should be granted or not (see Roestoff & Coetzee *supra* 63). In *Firstrand Bank v Evans* (par 35) Wallis J held that the fact that a debt rearrangement order has been granted in terms of section 87 of the NCA will not affect the situation and will therefore also not preclude sequestration proceedings However, according to Wallis J the existence of a debt rearrangement order that provides for the payment of the debtor's debt within a realistic and reasonable time and in an orderly fashion, in conjunction with proof that the debtor is complying with the order, could constitute the special circumstances mentioned above and could thus be a powerful incentive for the court to exercise its discretion in favour of the debtor. However, the court emphasised that it is not necessarily

decisive, especially where, as was the position in this instance, the existence and validity of the order were debatable (par 36).

The burden of proving the special or unusual circumstances on a balance of probabilities rests upon the respondent and entails proof of facts showing that the dismissal of the provisional order will be more or at least as advantageous to the applicant and the other creditors as regards obtaining payment, than the administration of the estate in insolvency (Meskin *et al* par 2 1 13 and see *Cyril Smiedt (Pty) Ltd v Lourens supra* 155–156; *Realizations Ltd v Ager supra* 13; *Benade v Boedel Alexander* 1967 1 SA 648 (O) 655–656; *Firstrand Bank v Evans* par 27). In *Realizations* Williamson JP observed as follows (12):

> [B]efore I in effect grant a moratorium by refusing a sequestration order, I would have to be satisfied quite clearly that the creditors do, in fact, stand to lose nothing, that they will be paid fully or certainly paid not less than they would have if they obtained a sequestration order at this stage, and that any such payment would be made substantially at the time when a dividend would have been expected in insolvency.

Where a debtor cannot pay immediately, but is not insolvent and if given time would be able to repay his debt, it has been held that the court will be justified in exercising its discretion against sequestration (*Millward v Glaser supra* 553; *Barlow's (Eastern Province) Ltd v Bouwer supra* 396–397). In *De Waard v Andrew and Thienhaus, Ltd* 1907 (TS) 727 736 Solomon J observed as follows:

> [W]here it is clearly proved that a man has committed an act of insolvency it is a matter of discretion for the judge to decide whether or not he shall sequestrate the estate, and he is not debarred from doing so merely because the debtor produces evidence to show that his assets are in excess of his liabilities. In such cases he may either sequestrate the estate, or he may in the exercise of his discretion give the insolvent time to pay. If the insolvent comes to court and says, 'It is true I have committed an act of insolvency, but I am in a position to pay the debt, and if reasonable time is given me I undertake to pay my creditor,' then I for one should be disposed to give him that reasonable time within which to liquidate his debts.

However, the considerations that the respondent-debtor is solvent, despite the fact that an act of insolvency has been committed and that he or she will be able to pay all his debt in full, are not decisive in his favour (Meskin *et al* par 2 1 13; see also *Metje & Ziegler Ltd v Carstens* 1959 4 SA 434 (SWA) 435; *Realizations Ltd v Ager supra* 12–13; *Benade v Boedel Alexander supra* 655; *Brakpan Municipality v Chalmers* 1922 (WLD) 98 101). In the recent judgment of *Nedbank Ltd v Potgieter* (*supra* par 19), Mudau AJ held that a debtor who wishes to persuade a court to exercise its discretion in his or her favour should place evidence before the court that clearly establishes that the debts will be paid if a sequestration order is not granted. Should such contention furthermore be based on a claim that the debtor is in fact solvent then that should, according to the court, be shown by acceptable evidence (see also *Matthiesen v Glas* 1940 (TPD) 147 150; *Firstrand Bank v Evans supra* par 33).The creditor-orientated

approach and the emphasis on the best interests of the creditors is evident from Mudau AJ's reference to Holmes J's observation in *R v Meer* 1957 3 SA 641 (N) 619A "that the Insolvency Act was passed for the benefit of creditors and not for the relief of harassed debtors". According to Mudau AJ this statement remains as apposite today as it was then (par 20).

The fact that an act of insolvency has been proved thus clearly plays an important role in the exercise of the court's discretion against the respondent-debtor (*Millward v Glaser supra* 553–554; *Metje & Ziegler Ltd v Carstens supra* 435; *Pelunsky & Co v Beiles supra* 374; *Julie Whyte Dresses supra* 219; *Port Shepstone Fresh Meat and Fish supra* 164; *Firstrand Bank v Evans supra* par 33) In *De Waard* (*supra* 733), Innes CJ explained as follows:

> Now, when a man commits an act of insolvency he must expect his estate to be sequestrated. The matter is not sprung upon him; first a judgment is obtained against him, then a writ is taken out and he must expect, if he does not satisfy the claim, that his estate will be sequestrated. Of course, the Court has a large discretion in regard to making the rule absolute; and in exercising that discretion the condition of a man's assets and his general financial position will be important elements to be considered. Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, 'I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities.' To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes.

In *Realizations Ltd* (*supra* 12), Williamson JP stated that the court, when exercising its discretion whether to grant an order after all requirements have been met, may consider whether there are alternative methods of meeting creditor's claims. The main difficulty raised at this stage of the enquiry is often whether in fact the respondent is insolvent or whether it is merely a case of a temporary embarrassment which will be overcome in the near future if an order is not granted. However, the court indicated that it is not entitled to grant a debtor a moratorium, or a "breathing space to recover" by refusing a sequestration order if the result would be to deprive the creditors of the possibility of an early dividend. The court concluded as follows (par 15):

> A creditor in the applicant's position is entitled to enforce payment in the way he seeks to do – he has established a legal position to entitle him to it – and cannot be deprived of that right merely because one may have sympathy for a person who is perhaps – but not for certain – only financially embarrassed.

As regards the discretion of the court which is to be exercised in voluntary surrender applications, it also appears that the mere proof of the requirements will not necessarily lead to the granting of the order. In *Ex parte Ford supra* the major portion of each of the applicants' debts arose from credit agreements in terms of the NCA. In each case there were strong grounds for suspecting some degree of reckless credit

extension. Binns-Ward AJ observed (parr 19–20) as regards an argument advanced on the applicants' behalf that:

> it is for them to choose the form of relief that suits their convenience simply by mechanically and superficially satisfying the relevant statutory requirements under the Insolvency Act, is a misdirected approach, especially where the grant of the selected remedy is discretionary ... To the contrary, it is the duty of the court, in the exercise of its discretion in cases like the current, to have proper regard to giving due effect to the public policy reflected in the NCA. That public policy gives preference to rights of responsible credit grantors over reckless credit grantors and enjoins full satisfaction, as far as it might be possible, by the consumer of all 'responsible financial obligations'.

The court in *Arntzen* (*supra* 60 n 22) stated that it could not find any authority as regards the nature of the discretion in voluntary surrender applications. With reference to *Ex parte Ford* (*supra* parr 18–21) and *Ex parte Van den Berg* (*supra* 817–818), Gorven J pointed out that the courts have applied a more general approach without any discussion of the nature of the discretion. With reference to the statement of Wallis J in *Firstrand Bank v Evans* (*supra* par 27), that proof of the relevant requirements will ordinarily lead to the granting of a provisional order, Gorven J stated (60 n 22):

> It seems to me that, in voluntary surrender applications, a different approach may need to be considered, not least because the debtor is the applicant rather than the party opposing the application. In addition, a creditor brings sequestration applications and this indicates the attitude of at least that creditor.

The disregard for the debtors' interests when exercising its discretion appears from the court's response in *Ford* (*supra* par 21) to the further argument on behalf of the applicants that they had a "constitutional right" to the acceptance by the court of the surrender of their estate and that "the primary object of the machinery of voluntary surrender is not the relief of harassed debtors" (Binns-Ward AJ here referred to the observation by Holmes J in *Ex parte Pillay* 1955 2 SA 309 (N) 311E).

With reference to the above-mentioned observation of Holmes J, Marais AJ in *Ex parte Dube* (2009 JOL 24731 (KZD) parr 6–7) stated that where an application for surrender is motivated largely by the debtors' concerns with their own difficulties and less concerned with the interests of the creditors, this will indicate an ulterior motive which, in itself, will constitute a circumstance weighing against the exercise of the court's discretion in favour of the applicants (see also *Ex parte Gumede* 2010 JOL 24744 (KZD) parr 4–5). In *Ex parte Gumede* (*supra* par 4) Marais AJ further stated that the court must in actual fact be satisfied that an application was indeed brought for the benefit of creditors and not to assist the applicants as harassed debtors.

3 2 2 2 Analysis

From the above discussion it should be clear that the interests of creditors have been a consideration of utmost importance when our

courts exercised their discretion in sequestration applications. In summary, decisions in compulsory sequestration applications, where the courts were willing to refuse an order and thus be more lenient towards the debtor, appear to be based on the fact that the debtor, despite the fact that an act of insolvency was proved, could prove his or her solvency and that sequestration would not be to the detriment of the creditors in that they would not be paid less than they would have been paid if a sequestration order was granted. Furthermore the courts were in general also willing to refuse a sequestration order where they were of the opinion that there was an alternative procedure or repayment option that would provide a better solution to the debtor's financial problems and would thus be more advantageous to creditors. However, the court in *Masinge* did not indicate explicitly whether its decision to refuse the sequestration order was indeed based on the solvency of the respondent-debtor and his ability to repay his debt in instalments. Details regarding the respondent's financial situation were also not provided in the judgment. It also does not appear that Kubishi J was of the opinion that the repayment of the respondent's debt in instalments would bring better results than sequestration.

The judgment merely conveys the respondent's evidence that he was not able to pay the amount due in one lump sum and that his settlement proposals were not acceptable to the applicant. The court stated that in its view the respondent should be afforded the opportunity to pay off the debt in instalments while also mentioning the fact that the respondent does not have any other asset except the house. The court finally held that the application for sequestration must be refused and it is suggested that the court's decision in this regard may have been based on its viewpoint that the facts and circumstances of the case required the court to come to the respondent's assistance. As mentioned above, the fact that the respondent's house was his only asset may have convinced the court to refuse the application as sequestration would have caused the debtor to lose his house.

It is submitted that our courts' present creditor-orientated approach to sequestration applications is to be understood in light of the advantage to creditors requirement and the often-stated objective of the Insolvency Act, namely, to be for the benefit of creditors and not to bring relief to harassed debtors. However, in light of the world-wide trend that consumer insolvency regimes should strive to accommodate insolvent and over-indebted debtors as an additional objective of consumer insolvency law, the decision in *Masinge* is to be commended insofar as the court has apparently realised the importance of following a more balanced approach by also taking into consideration the interests of the respondent-debtor as to what would be the best solution to his debt problems.

At this point it would be apt to also refer to the World Bank's reservations as regards creditor-initiated proceedings. According to the World Bank Report (parr 186–187) the standards for access to consumer

insolvency systems should *inter alia* ensure against improper use by creditors. The Report points out that both creditors and debtors can initiate individual insolvency proceedings in several countries. However, almost all the countries that have introduced distinct consumer insolvency systems in recent decades only accept debtor petitions. Moreover, creditor petitions are uncommon even in most of the countries where such petitions are allowed. The World Bank's stance is that if creditor petitions are permitted controls should be implemented to prevent its abuse as a collection tool. This may be accomplished through a requirement that more than one creditor should initiate a petition, or by establishing a high financial threshold for an individual debt as a prerequisite for a petition.

4 Implications of Court's Ruling and Powers of Court

In *Masinge* the court dismissed the creditor's application and the question thus arises as to what the implications of the dismissal would be as regards to the creditor's and debtor's respective rights and obligations after refusal of the order. At this juncture of the sequestration proceedings the dire financial position of the respondent-debtor would have been further inflated by the costs involved. The further question arises as to what extent the court hearing the matter can actually provide a practical and cost effective solution to the debt situation, rather than just refusing the sequestration order and sending the debtor, and for that matter the creditor, back into the realm of individual debt collection procedures – given the history of the matter up to that point (namely, that the debtor failed to satisfy a warrant of execution and that his settlement proposals were not acceptable to the creditor) and the time and cost involved.

Outside the realm of the sequestration process, a debtor and his creditor or creditors may negotiate new terms that may give rise to a rearrangement of the debt, which may entail a repayment in instalments over a longer time period and/or a full or partial discharge of the debts or any part thereof. Since such an arrangement is contractual in nature, consensus is required and this may prove difficult to achieve in many instances – a situation that will be aggravated when the debtor has a number of different creditors to deal with. Of course, and in so far as some or all of the debts are credit agreements regulated by the NCA, the debtor may consider to apply for debt review in terms of section 86 of the NCA. The problem with debt review is of course that in many instances it may not provide a lasting solution, especially where only some of the debts are subject to the process (the NCA only applies to "credit agreements" as defined in s 8). As indicated, the court may also, in the exercise of its discretion, find that administration is the better procedure to be utilised. On the one hand this scenario should be rare in practice due to the monetary limitation of R50 000 (see s 74(1)(b) of the MCA and GN R3441 in *GG* 14498 of 1992-12-31) but at the same time the implication is further that the court will send the debtor off to initiate another procedure in a different court. The fact of the matter is that

neither the court hearing the sequestration proceedings, nor the debtor can force the creditor or creditors to accept the negotiation option, and the two statutory procedures mentioned are subject to further legal procedures that will entail further time and cost for an already insolvent debtor.

If a sequestration order is refused and the debtor is unwilling to negotiate an arrangement or to follow one of the statutory procedures, the creditor will have to consider debt enforcement by individual debt enforcement means. Usually, and following a court order in favour of the creditor, execution will follow if the debtor fails to meet the court order. This may entail executing against the property of the debtor with some additional procedural hurdles if the property consists of the family home of the debtor, or forced repayment procedures such as emoluments attachment orders. It is to be noted that the creditor may also call for a so-called section 65 procedure in terms of the MCA. However, it should be borne in mind that this process is only available in the Magistrates' Courts.

Although the court may consider alternative procedures or debt repayment options when considering the advantage to creditors requirement or when exercising its discretion either to grant or refuse a sequestration order (see the discussion of case law in parr 3 2 1 1 & 3 2 2 1 above), it should be clear that the High Court does not have the power at present to make any orders as regards the implementation of alternative procedures or alternative debt repayment options other than granting or denying a sequestration order. The only exception appears to be the discretionary power granted in terms of section 85 of the NCA to a court when considering a credit agreement to refer a matter to a debt counsellor for debt review or to declare that the consumer is over-indebted and simultaneously to grant an order for debt rearrangement in terms of section 87 (see *Ex parte Ford supra* par 12, where the court held that it may exercise the discretion provided for in s 85 when hearing an application for voluntary surrender; see also Boraine & Van Heerden *supra* 118 who submit that the provision may also be applied by a court hearing a matter for compulsory sequestration). Section 85 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.

It is submitted that the lack of a procedure to deal with the alternatives to sequestration at this point in time is cost and time consuming and that

the Act should be amended to specifically grant the court the power to make certain orders when refusing a sequestration order. In this context it should be noted that section 65 of the MCA, for instance, allows for various ways to recover a debt after judgment has been granted against a debtor (see in general Van Loggerenberg *Jones and Buckle Civil practice of the magistrates' courts in South Africa* (2015) 406 ff). A court has various powers and options to deal with the execution or repayment of the debt. This type of debt-collection procedure is available only in the Magistrates' Courts, but in terms of a section 65M procedure, a High Court judgment for any amount of money may also be enforced by a judgment creditor in the Magistrates' Courts.

In addition to the section 65 debt-collection procedure, emoluments attachment orders (see s 65J) and administration orders, the MCA also makes provision for the recovery of debts in terms of section 57 when the defendant admits liability for a debt and offers to pay in instalments, or in terms of section 58 when the defendant unconditionally consents to judgment and offers to pay in instalments.

The sections 65 and 65M procedures apply where an original judgment has been granted for payment of an amount of money or where the court has ordered payment in specified instalments of such amount and the judgment or order has not been complied with within ten days of the date on which the judgment was granted, became payable, or, where the court has suspended payment for a certain period in terms of section 48(e), and ten days have elapsed after expiry of such a suspension period (s 65A(1)(a)). Section 65C also allows for the joinder of more than one notice against the same debtor in order to be heard concurrently.

Where the debtor fails to meet the judgment debt, he or she may be called for a so-called section 65 hearing in terms of the MCA. On the day stated in the section 65A(1) notice, the judgment debtor appears *in camera* before the court. The judgment debtor takes the oath and presents oral evidence relevant to his or her financial situation (s 65D(1)). The judgment creditor's attorney is afforded the opportunity to cross-examine the judgment debtor on all issues regarding the judgment debtor's financial situation, the judgment debtor's ability to pay the judgment debt and costs, and the reasons for his or her failure to do so. In terms of section 65D(4)(a)–(b) the factors to be considered in judging an ability to pay a debt are:

(a) the nature of debtor's income;

(b) the amounts needed for necessary expenses; and

(c) the amounts needed to make periodical payments in terms of other court orders or other commitments.

The court may also call witnesses and receive further evidence in this regard by means of affidavit or in any other manner deemed appropriate

by the court. In reaching its decision the court may at its discretion (see ss 65D(5); 65E(1)(a)(i); 65E(1)(a)(ii); 65E(1)(b); and 65E(1)(c)):

(a) refuse to take into account periodical payments made by a judgment debtor in terms of a hire purchase agreement;

(b) authorise the issuing of a warrant of execution against movable or immovable property and issue a warrant together with an order for the payment of a judgment debt in periodical instalments in terms of section 73;

(c) authorise the attachment of a debt due to the judgment debtor in terms of section 72; and

(d) where the judgment debtor has made a written offer to pay in instalments and the debtor is able to pay, the court may order the debtor to pay in specific instalments and even order the issuing of an emoluments attachment order.

The court may in terms of sections 65D(2), 65K(1) and 65E(5) also:

(a) postpone the hearing at any time and to any future date;

(b) order the judgment debtor to pay the costs of the hearing except where the judgment creditor has refused a reasonable offer of settlement made by the judgment debtor; or

(c) suspend, amend or rescind its order.

5 Proposals for Amendment of the Act and Concluding Remarks

As mentioned, our courts' present creditor-orientated approach when hearing sequestration applications should be understood in light of the context in which the discretion to either grant or refuse a sequestration order is afforded to them. As indicated, it is generally accepted that the current South African consumer insolvency system has been designed for the benefit of creditors and not to provide debt relief to debtors. Moreover, advantage to creditors is a requirement which must be met in both compulsory and voluntary sequestration applications. It is submitted that the advantage to creditors requirement serves an additional goal insofar as it ensures that sequestration will only be resorted to if it would be cost effective to do so, that is, if the proceeds of the residue would be sufficient to cover the costs of sequestration and to provide a pecuniary benefit to creditors. We therefore believe that the requirement should be retained for that purpose (see also Roestoff & Coetzee *supra* 59).

Nonetheless, it is of concern that the South African system does not follow a balanced approach and that it has remained creditor orientated despite international developments to the contrary (see Boraine & Roestoff in Cisse *et al The World Bank Legal Review* (2013) 91). Insolvency law reform to address the Insolvency Act's failure to pursue the additional objective of providing relief to debtors as well as its failure to strive for a balance amongst the competing interests of creditors and

debtors is thus of paramount importance. In *Masinge*, the court apparently refused the sequestration order as it was of the opinion that the facts and circumstances of the case required the court to come to the assistance of the debtor. However, as is apparent from the case law discussed above, our courts have rarely been willing to be led by the best interests of the debtor when exercising their discretion. As indicated, case law confirming the nature of the discretion to be a "power combined with a duty" may furthermore be interpreted to actually oblige the court to grant a sequestration order when all requirements of the Act are met unless special circumstances exist, which circumstances may not relate to the position and convenience of the debtor. In order to ensure that our courts follow a balanced approach when exercising their discretion to grant or refuse a sequestration order, it is thus suggested that insolvency legislation be amended to explicitly require an advantage for the *debtor* as a prerequisite for compulsory sequestration applications. In voluntary surrender applications the legislator should expressly provide that the court, when exercising its discretion, should take into consideration the debtor's interests regarding what the best solution to his or her financial problems should be (see also Roestoff & Coetzee *supra* 63). In light of the World Bank's reservations regarding creditor-initiated insolvency petitions it is furthermore suggested that law makers should take notice of the controls suggested in the Report in order to prevent the abuse of compulsory sequestration as a collection tool (see the discussion in par 3 2 2 2 above).

As indicated, the lack of a procedure to allow the court to deal with the alternatives to sequestration after a sequestration order has been refused, is cost and time consuming. As regards the current consumer insolvency legislative framework it is thus submitted that a court hearing an application for sequestration should, in addition to the powers afforded to it in terms of section 85 of the NCA, be explicitly empowered to impose a suitable alternative measure or procedure in order to conclude the matter. Thus, instead of only being able to dismiss the matter and suggest a suitable alternative procedure, the court should for instance also be empowered to refer the matter to a Magistrate's Court to deal with it in terms of a section 65 type of procedure.

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