Onlangse regspraak/Recent case law

Ferris v Firstrand Bank Ltd 2014 3 SA 39 (CC)

Enforcement of a credit agreement after breach of a debt rearrangement order and the ineffectiveness of debt review in terms of the National Credit Act

1 Introduction

The decision of the Constitutional Court in *Ferris v Firstrand Bank Ltd* (2014 3 SA 39 (CC); (*Ferris*)) deals with the right of a credit provider to enforce a credit agreement in terms of the National Credit Act 24 of 2005 (NCA) pursuant to a debt rearrangement order which was breached by a consumer. The Constitutional Court held that the credit provider, in such an instance, was in terms of the provisions of the NCA, independently entitled to enforce the agreement without further notice. In *Ferris*, breach of the rearrangement order thus immediately exposed consumers to enforcement actions by their credit providers which would not only automatically terminate the rearrangement order, but also the debt relief afforded by such an order.

One of the purposes of the NCA is to address consumer over-indebtedness by providing mechanisms for resolving over-indebtedness (s 3(g)). In this regard, section 86 of the NCA provides that a consumer may apply to a debt counsellor for debt review, which may ultimately result in an application to a magistrate's court to grant an order for the rearrangement of the consumer's obligations in terms of agreements that qualify as credit agreements under the NCA (see ss 86(1), 86(8)(b) & 87; see also s 8 for the definition of a 'credit agreement'). In practice a rearrangement in terms of the NCA usually entails an extension of payment dates accompanied by a reduction of the amount of the instalments payable in terms of the agreement (see s 86(7)(c)(ii)). The debt relief provided by the NCA's debt review process thus entails the possibility of a court granting a debt rearrangement order and a moratorium being placed on enforcement (see s 88(3)). Section 88(3)(b)(ii) is relevant for the purposes of this discussion as it provides that a credit provider may not proceed to enforce a credit agreement, which is subject to the order, until the consumer defaults on any obligation in terms of the order. However, unlike the income restructuring debt relief mechanisms in most foreign jurisdictions, which provide debtors with the opportunity to obtain a discharge of debt obligations after completion of a payment plan, the process of debt review does not provide for any such discharge, as the NCA's objective of providing debt relief is subject to the principle 'of satisfaction by the

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consumer of all responsible financial obligations' (s 3(g); see also s 3(h)). The NCA, furthermore, does not prescribe any maximum periods for repayment and a consumer may thus be bound to a repayment plan indefinitely. Moreover, as indicated, should the consumer at any stage of the repayment period not be able to comply with the terms of the rearrangement order, enforcement actions may immediately ensue and the debt relief provided by the rearrangement order will then immediately come to an end. This outcome is so since the NCA does not provide for the setting aside or variation of a rearrangement order.

In January 2011, the World Bank's Insolvency and Creditor/Debtor Regimes Task Force (Task Force) was convened in order to commence an investigation into the policies and characteristics of effective insolvency systems for natural persons. At the conclusion of the Task Force meeting it was, *inter alia*, stated that (see The World Bank – Insolvency and Creditor/Debtor Regimes Task Force *Report on the treatment of the insolvency of natural persons* (2013) par 6 available from http://bit.ly/Oft3hp; hereafter the World Bank Report or Report):

> [O]ne of the lessons from the recent financial crisis was the recognition of the problem of consumer insolvency as a systemic risk and the consequent need for the modernization of domestic laws and institutions to enable jurisdictions to deal effectively and efficiently with the risks of individual over-indebtedness.

In 2013, the Task Force's investigation led to the publication of the World Bank's Report on natural person insolvency. The main objective of the Report is 'to provide guidance on the characteristics of an effective insolvency system for natural persons and on the opportunities and challenges that would be encountered in the developing of such a regime' (see Report parr 10-13).

The absence of provisions that provide for a discharge and a maximum payment period, has often led to the NCA's debt review process being criticised for its inability to provide effective and efficient debt relief to over-indebted consumers. Several commentators have called for the reform of the process, and correctly so (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* 353 and the sources cited in n 17). The aim of this case discussion is, thus, not only to analyse the Constitutional Court's decision as regards the applicable provisions of the NCA, but also to consider the implication of the case and to comment on the NCA's apparent pro-creditor orientation and accordingly its inability to provide effective and efficient debt relief to over-indebted consumers. In light of a brief outline of some of the modern international trends as well as guidelines provided by the World Bank, a further purpose is to identify some of the apparent shortcomings of the debt review process and the lessons to be learned by South African lawmakers regarding reform of the debt review process.

2 Facts and Decision

Ferris concerned an application to overturn a High Court's refusal to rescind a default judgment granted in terms of the NCA (*Ferris supra* par 1). In October 2007 the applicants, Mr and Mrs Ferris (hereafter the consumers), borrowed money from the first respondent (hereafter the credit provider) in order to purchase their home. The loan was secured by a mortgage bond over the property. The consumers fell behind with their bond repayments and in February 2009 they applied for debt review in terms of section 86(1) of the NCA. In March 2009, the consumers' debt counsellor made a repayment offer to the credit provider on terms more favourable to the consumers than initially agreed. The consumers contended that this offer was ignored, but the credit provider maintained that it was refused because it was not allowed in terms of the NCA. Apparently the credit provider did not make any counter-offer (par 2).

In September 2009, the debt counsellor applied to the magistrate's court for an order declaring the consumers over-indebted and for an order rearranging their debt obligations. However, while this application was pending, the credit provider sent a notice in terms of section 86(10) to the consumers and the debt counsellor to terminate the debt review. The consumers maintained that this notice was not delivered properly. After initially disputing this claim, the credit provider eventually conceded, before the Constitutional Court, that it was indeed not delivered properly. On 30 April 2010, shortly after dispatch of the notice, the magistrate's court granted a rearrangement order on the terms requested by the consumers. The order also specified that the original credit agreement would 'be revived and be fully enforceable' if the rearrangement order were breached (par 3).

A week later, the consumers fell behind with their payments on the debt restructuring order and on 14 June 2010, after they had fallen even further into arrears with their repayments having paid only R1 000 out of almost R9 000 owed, the credit provider proceeded with enforcement and issued summons for payment of the full balance of the loan plus interest. The credit provider also requested an order declaring the consumers' home specially executable. The consumers defended the matter and contended that the debt review had not been terminated by the section 86(10) notice. In replication the credit provider contended that it was entitled to enforce the loan on the basis of the consumers' breach of the debt rearrangement order. On 20 August 2010, the credit provider applied for summary judgment which was successfully resisted. However, on 8 November 2011 default judgment was granted against the consumers due to their failure to make discovery on time (par 4).

Six months later, the consumers applied for the rescission of the judgment in terms of rule 42(1)(a) of the Uniform Rules of Court, the common law or rule 31. They blamed their attorneys for their failure to defend the matter and contended that the default judgment was erroneously granted because the section 86(10) notice was not properly delivered and that the sale in execution would unjustifiably infringe their right of access to adequate housing (par 5).

The high court dismissed the application for rescission. The court held that there was no basis for rescission under rule 42(1)(a) as the section 86(10) notice had validly terminated the debt review. Moreover, even if the debt review was still in place, this would, according to the court, still not be a complete defence on the merits. The court thus concluded that there was no *bona fide* defence to the enforcement action which precluded rescission. An application for leave to appeal was refused. The consumers petitioned the Supreme Court of Appeal for leave to appeal which was also refused. Two months later they applied to the Constitutional Court for leave to appeal, well outside the time allowed under the rules (par 6).

With regards to the issue of jurisdiction, Moseneke ACJ, delivering the unanimous judgment of the Constitutional Court, quoted the following passage from *Sebola v Standard Bank of South Africa Ltd* (2012 5 SA 142 (CC) par 36) in which the Constitutional Court referred to the purposes of the NCA in terms of section 3(a) and (g) (par 7):

> The means by which the [Act's] purposes are to be achieved include promoting of the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit and promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers. These goals, and the means by which they are to be pursued, are intimately connected to the Constitution's commitment to achieving equality. Our jurisdiction is thus plain.

Moseneke ACJ found that the matter in *Ferris*, as was the case in *Sebola*, raised a constitutional issue and that the court was thus seized with the task of interpreting the NCA, as it was in *Sebola*. Moseneke ACJ, therefore, held that it was unnecessary to decide whether it would have jurisdiction in terms of section 167(3)(b), which came into effect as part of the Constitution Seventeenth Amendment Act of 2012 (par 8).

The remaining issues to be dealt with by the Constitutional Court in *Ferris* were (a) whether the Court should condone the late filing of the application for leave to appeal, (b) whether the application had reasonable prospects of success, and (c) whether in light of the answer to (b) and other considerations, it was in the interests of justice to grant leave to appeal (par 9).

Referring to the decision in *Bertie van Zyl (Pty) Ltd v Minister for Safety and Security* (2010 2 SA 181 (CC) par 14) – namely, that the test for condonation is whether it is in the interests of justice to grant condonation and in light of the fact that the credit provider stated that a pronouncement by the Constitutional Court on the issues raised are important to the banking sector – the court granted condonation. According to the credit provider, a pronouncement by the Court would bring certainty on the question when a credit provider may enforce a loan that is subject to a debt restructuring order that had been breached (*Ferris supra* parrs 10-12).

As regards the question whether the application had reasonable prospects of success and, thus, whether the requirements for rescission were met, the Court first dealt with the requirements of rule 42(1)(a). The Court pointed out that unlike under the common law or rule 31, an applicant is not required to show good cause (including a *bona fide* defence) in order to succeed in terms of rule 42(1)(a). Under this rule, a court may rescind a default judgment if it was 'erroneously sought or erroneously granted' (par 13). However, the court held that there was no error in the default judgment. The court explained as follows (par 14):

> [The consumers] breached the debt-restructuring order. Once the restructuring order had been breached, [the credit provider] was entitled to enforce the loan without further notice. This is clear from the wording of the relevant sections of the Act. Section 88(3)(b)(ii) does not require further notice – it merely precludes a credit provider from enforcing a debt under debt review unless, among other things, the debtor defaults on a debt restructuring order.

The Court also pointed out that section 129(1) of the NCA expressly provides that the requirement to send a notice in terms of section 129(1) does not apply to debts that are subject to a debt restructuring order (par 14). Moreover, the debt restructuring order in *Ferris* itself provided that 'the rights and obligations as amended by the [debt-restructuring order] will be revived and be fully enforceable should the applicant default in terms of this court Order' (par 15).

Referring to *Firstrand Bank Ltd v Fillis* (2010 6 SA 565 (ECP)), Moseneke ACJ held that the breach of the debt restructuring order thus entitled the credit provider to enforce the original credit agreement without further notice (parr 16-17). The Court was also of the view, even if further notice was required, that its absence would be a mere dilatory defence and thus a defence that suspends proceedings rather than precludes a cause of action. It is, therefore, not an irregularity that would indicate that a judgment was erroneously granted and thus justify a rescission in terms of rule 42(1)(a) (par 17).

The consumers raised a number of arguments as to why the credit provider was not entitled to proceed with enforcement even though they had breached the debt restructuring order. First, they contended that the defective delivery of the section 86(10) notice precluded enforcement of the credit agreement as the debt review was not properly terminated. However, according to the Court, this argument was not convincing. Referring to the provisions of section 88(3)(b)(ii), the Court explained as follows (par 18):

> While [the credit provider] is not entitled to rely on this section for enforcement of the loan because notice was not properly given, it was independently entitled to enforce the loan on the basis of the breach of the

> debt restructuring order and the provisions of the debt-restructuring order itself.

The consumers further contended, because the credit provider refused the debt counsellor's initial instalment offer without making a counter-offer, that it did not participate in the debt review process in good faith as required by section 86(5)(b) of the NCA. Moseneke ACJ was of the view even if this was the case, that this contention missed the point. He explained as follows (par 19):

> The good-faith requirement is aimed at the parties reaching agreement on debt- restructuring before a debt- restructuring order is needed. Once a debt-restructuring order is granted, reaching agreement is no longer necessary and the good-faith requirement for participating in the debt-review proceedings becomes irrelevant.

Moseneke ACJ emphasised the fact that the debt-restructuring order was granted on the very terms sought by the consumers. According to the Court, it was thus difficult to see how they were adversely affected by any lack of good faith (par 19).

The consumers also contended that they 'substantially' complied with the debt restructuring order and did not, therefore, breach the order to allow the credit provider to proceed with enforcement of the loan (par 20). Moseneke ACJ dismissed this argument as follows (par 21):

> While our law recognises that substantial compliance with statutory requirements may be sufficient in certain circumstances, [the consumers] have not given compelling reasons why a substantial- compliance standard would be useful or appropriate in determining compliance with a debt-restructuring order. On the contrary, there is no indication in the wording of the Act or debt- restructuring order that anything less than actual compliance is required. Further, it was raised for the first time at the hearing before this court, and this court has held that it should be wary of deciding issues raised for the first time on appeal.

The Court held, even if substantial compliance was appropriate *in casu*, that it was not persuaded that the consumers had indeed substantially complied at the stage when the summons was issued as they had, by then, paid only R1 000 of the almost R9 000 owing in terms of the order (par 21). The Court also dismissed the consumers' argument that the credit provider was not entitled to raise non-compliance with the debt restructuring order in replication (par 22).

Moseneke ACJ finally held that the requirements for rescission in terms of rule 42(1)(a) were not fulfilled as the default judgment was not erroneously granted (par 23). The Court also held that the requirements for rescission in terms of rule 31 or the common law were also not complied with (par 27). The consumers did not show good cause for rescission as they did not provide a reasonable explanation for their default. The consumers blamed the negligence of their attorneys for the default, but the Court pointed out that the consumers knew about the default judgment soon after it was granted, which was long before the application for rescission was brought (parrs 24-25). The consumers also did not prove that they had a *bona fide* defence. They breached the debt restructuring order, which entitled the credit provider to enforce the loan and they raised no other defence as to the merits of the default judgment against them (par 26). The court finally held that the consumers had failed to show that the High Court acted in any way that would justify it to interfere with the exercise of its discretion (parr 28-29), that the consumers did not have reasonable prospects of success (par 30) and that it would, furthermore, not be in the interests of justice to grant leave to appeal (par 31). In this regard the court explained as follows (par 31):

> Given that [the consumers] do not have reasonable prospects of success, is it nevertheless in the interests of justice for us to grant leave to appeal? I do not think so. First, were we to grant the relief sought, it would merely delay the inevitable. They might get their house back for a time, but [the credit provider] would be entitled to enforce the loan again. We also do not know if they are able to comply with the debt-restructuring order or the terms of the revived loan.

The Court also criticised the consumers for not taking the Court into their confidence by, amongst others, claiming that they were not aware of the default judgment. Furthermore, the Court pointed out that the consumers had another remedy to their avail as they could sue their attorneys (par 31). Accordingly, the Court denied leave to appeal on the basis that it was not in the interests of justice to hear the matter, primarily because it lacked any prospect of success (par 32).

3 Analysis of Decision

3 1 The Constitutional Issue

In *Ferris* the Constitutional Court based its jurisdiction on the right to equality as enshrined in section 9 of the Constitution. The Court was of the view that the purposes of the NCA to provide equal access to all South Africans and to promote equity in the credit market by balancing the respective rights and responsibilities of consumers and credit providers (see ss 3(a) & (g)) were linked to the constitutional objective of achieving equality and that the matter thus fell within its jurisdiction (see ss 167(3)(b)(i) & (c) of the Constitution). According to the Court, (par 8) it was thus unnecessary to decide whether it had jurisdiction in terms of section 167(3)(b)(ii) and, therefore, whether the Court should grant leave to appeal 'on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court' (s 167(3)(b)(ii)).

3 2 Applicable Provisions of the NCA

3 2 1 Right to enforce

As indicated the Constitutional Court in *Ferris* held that the credit provider had the right to enforce the credit agreement purely on the basis of the consumers' default in respect of the rearrangement order. There is no faulting the Court's judgment in this regard as section 88(3)(b)(ii), in effect, allows the credit provider to 'enforce by litigation or other judicial process any right or security under that credit agreement' without requiring any further notice as soon as, amongst other things, 'the consumer defaults on any obligation in terms of a re-arrangement … ordered by a court' (s 88(3)(b)(ii)). The NCA does not provide for the setting aside or variation of rearrangement orders and enforcement is thus allowed without any notice and without having to apply for a variation or a setting aside of the order of the magistrate (see *Jili v Firstrand Bank Ltd t/a Wesbank* 2015 3 SA 586 (SCA) par 12; and *Firstrand Bank Ltd v Kona* 20003/2014 [2015] ZASCA 11 (2015-03-13)). That the Court's interpretation in this regard is correct also appears from section 129(2) which provides that the requirement to draw any default under a credit agreement to the notice of a consumer, in terms of section 129(1) of the NCA, 'does not apply to a credit agreement that is subject to a debt restructuring order'. Moreover, as pointed out by the Court in *Ferris* (par 15), the wording of the debt restructuring order itself indicated that the original loan would be enforceable without further notice if the debt restructuring order was breached.

In *Jili*, the consumer argued that the credit provider had not been entitled simply to issue summons while the rearrangement order remained in force and, without the order being rescinded or varied, that any action to enforce the agreement was premature (par 21). In this regard the consumer argued that an important purpose of the NCA is to promote non-litigious methods of resolving consumer defaults and referred to the Constitutional Court's judgment in *Sebola* that 'weight must be given to constitutional considerations in assigning meaning to the statute's provisions' (*Jili supra* par 10). However, the Supreme Court of Appeal in *Jili* dismissed the consumer's appeal (see the judgment of Wallis JA (*Jili supra* par 16) and Leach JA (*Jili supra* par 31)). It also rejected the argument of the consumer, namely, that the Constitutional Court's interpretation in *Ferris* of the relevant sections was merely *obiter* and should not be followed (*Jili supra* parr 12 & 24). In this regard Leach JA stated (par 24):

> Although that order recorded that the rights and obligation amended by the order would be 'fully enforceable' in the event of the order being breached, this did no more than spell out the effect of section 88(3). The clear *ratio decidendi* of the case was that the breach of the debt rearrangement order entitled the bank to enforce the loan without further notice.

Willis JA observed as follows (par 12):

> In any event remarks of the Constitutional Court, even if merely obiter, carry great weight indeed. To refuse to follow Moseneke ACJ's observations and remarks on this point would create huge confusion among credit providers and consumers. Moreover, if every other credit provider affected by a debt restructuring order had to be given notice of an application for summary judgment, it would create a potentially never ending merry-go-round.

3 2 2 Termination of debt review

In *Ferris*, the consumers also contended that the defective delivery of the section 86(10) notice to terminate the debt review precluded enforcement. The Constitutional Court correctly dismissed the consumers' arguments in this regard.

Before amendment of the NCA by the National Credit Amendment Act 19 of 2014 (NCAA), section 86(10) allowed a credit provider to terminate a debt review by giving notice at least 60 business days after the consumer applied for debt relief – provided that the consumer was in default under the credit agreement. There were conflicting decisions and opinions as regards the right of credit providers to terminate a debt review while an application for a rearrangement order was pending (see Van Heerden & Coetzee '*Wesbank v Deon Winston Papier and the National Credit Regulator* (unreported Western Cape High Court case no 14256/10 (WCC) – Termination of debt review in terms of section 86(10) of the National Credit Act 34 of 2005' 2011 *De Jure* 463 for a discussion of cases prior to the decision of the Supreme Court of Appeal (SCA) in *Collett v Firstrand Bank Ltd* 2011 4 SA 508 (SCA)). In *Collett* the SCA held that a credit provider is indeed entitled to terminate a debt review in terms of section 86(10), after a debt counsellor had referred the matter to the magistrate's court for an order envisaged by section 86(7)(c) and while the hearing in terms of section 87 is still pending (*Collett supra* par 11). However, after amendment of the NCA, section 86(10)(b) now precludes a termination when an application for a rearrangement order is pending. This subsection provides that '[n]o credit provider may terminate an application for debt review lodged in terms of this Act, if such application for review has already been filed in a court or in the Tribunal'.

In *Ferris* the old section 86(10) applied and the credit provider, on the basis of the decision in *Collett*, was thus entitled to terminate even though the application for a debt rearranging order was still pending. However, the defectiveness of the notice still did not affect the credit provider's right to enforce as a section 86(10) notice is only required when a credit provider wishes to enforce before a rearrangement order has been granted. Once a rearrangement order has been granted, the credit provider is entitled to enforce as soon as the consumer has breached the order (see s 88(3)(b)(ii)). Application of the new section 86(10) to the facts in *Ferris* would also not change the position, as section 88(3)(b)(ii) still applies. Thus, although termination was disallowed as the application for a rearrangement order was already pending, a section 86(10) notice is not a requirement for enforcement when the consumer has breached the order.

3 2 3 Requirement of good faith

In *Ferris* the consumers argued, *inter alia*, that the credit provider's lack of good faith at the negotiating stage of the debt review proceedings precluded the credit provider from enforcing the loan. However, the

Court was of the view that the requirement of good faith in terms of section 86(5)(b) becomes irrelevant as soon as a debt rearrangement order has been granted and thus dismissed the consumers' argument in this regard (par 19). Section 86(5)(b) provides as follows:

> A consumer who applies to a debt counsellor, and each credit provider contemplated in subsection(4)(b), must –
>
> (b) participate in good faith in the review and in any negotiations designed to result in responsible debt-rearrangement.

From the wording of section 86(5)(b), it appears that the requirement of good faith relates only to the negotiation stage of the proceedings and, thus, to proceedings which occur before the granting of a debt rearrangement order. The requirement of good faith will become relevant where, for example, the credit provider ignored a repayment offer made by the consumer and thereafter terminated the debt review with a view to proceed with enforcement of the credit agreement. In such a case, the consumer would be entitled to apply to court for a resumption of the debt review process (see s 86(11) and *Collett supra* par 15). It is submitted that a lack of good faith is also an aspect which the court may take into consideration when exercising its discretion in terms of section 87(1) to grant a rearrangement order. However, once a debt rearrangement order has been granted, the requirement becomes irrelevant and it is submitted that the Constitutional Court's decision in this regard is correct.

3 2 4 Substantial compliance with order

As regards the consumers' contention that they had substantially complied with the order, the court pointed out that there was no indication in the wording of the NCA that anything less than actual compliance is acceptable (par 21). In this regard it should also be noted that the NCA, unlike the administration procedure that provides for the possibility that the order may be amended (s 74Q of the Magistrates' Courts Act 32 of 1944 (MCA)), does not provide for the variation of a rearrangement order as regards the time and amount of payments. Anything less than full compliance with the order will, thus, automatically terminate the order and allow the credit provider to proceed with enforcement.

4 Implication of the Case – Ineffectiveness of Debt Review

The observations made by Moseneke ACJ regarding his ruling to deny the consumers' application for leave to appeal on the basis that it was not in the interests of justice are indicative of the inability of the debt review process to deal effectively and efficiently with the problems of consumer over-indebtedness. Moseneke ACJ stated that if the court were to grant the relief sought, it would merely delay the inevitable. The consumers might get their house back for a time, but the credit provider would be entitled to enforce the loan again. The Court also doubted whether the consumers would have been able to comply with the debt-restructuring order or the terms of the revived loan (par 31).

The Constitutional Court stressed the fact that the debt-restructuring order was granted on terms proposed by the consumers and the Court, therefore, did not have much sympathy with their case (par 19). However, the fact of the matter, as already indicated, is that the debt review process does not provide for any discharge or maximum payment periods and, thus, would in many instances only perpetuate the consumers' over-indebtedness (see Roestoff & Coetzee 'Consumer debt relief in South Africa; Lessons from America and England, and suggestions for the way forward' 2012 *SA Merc LJ* 69). Therefore, the process cannot provide a realistic option for most over-indebted consumers and most debt rearrangement plans, most likely, are destined for failure. There seem to be no statistics available as regards the percentage of rearrangement plans in terms of the debt review process that are ultimately successfully completed. Nonetheless, it is submitted that the large number of section 86(10) terminations and enforcement actions found in court decisions pertaining to the debt review process, indicate that debt review is not a workable option for most over-indebted consumers.

At this point it would be apt to refer to the observations of Leach AJ in *Jili*, where the SCA followed the decision of the Constitutional Court in *Ferris* (see the discussion in par 3 2 1 above). In dismissing the consumer's appeal against the High Court's refusal to grant summary judgment, Leach AJ reasoned as follows (parr 29-30):

> The appellant has already enjoyed the considerable benefit afforded by a debt-rearrangement order that substantially reduced her monthly instalments and at the same time increased the period available to her to effect repayment … To allow the appellant, who has spurned the advantages flowing from the [debt rearrangement] order by defaulting in her payments, yet further opportunity to attempt to get her affairs in order at the expense of the respondent who is entitled to the relief it seeks, would not be in the interests of justice. To refuse summary judgment would be to afford the appellant a further advantage not envisaged by the NCA – and a second bite at the cherry, so to speak – to the detriment of the clear rights of the respondent.

It is submitted that cases like *Ferris* and *Jili* do not, in actual fact, deal with consumers who, to use the words of Leach AJ, have 'spurned' the advantages flowing from debt restructuring by defaulting in their payments, but with consumers who have to attempt to get their affairs in order in terms of a measure regulated by an Act that does not truly pursue the objective of providing debt relief (*Jili* par 30). The implication of these cases is clearly that a measure providing for a mere rescheduling of debt and an extension of payment dates is insufficient to provide effective relief. It is submitted that this shortcoming of the debt review process was the real reason why the consumers defaulted on their payments.

5 Some International Trends

Several countries over the past three decades have reformed their consumer insolvency systems regarding rearrangement plans in order to provide for maximum payment periods and for a discharge of debt obligations after completion of the plan. In the United States of America, law reform took place in 1979 with the promulgation of the Bankruptcy Reform Act of 1978 (generally known as the Bankruptcy Code) and the establishment of the so-called 'fresh start' policy. The American system is widely considered to be the frontrunner with regard to consumer debt relief. Apart from the relief provided by Chapter 7 of the Bankruptcy Code, which affords a consumer debtor a discharge of debt almost immediately after he or she has surrendered all non-exempt assets for liquidation and distribution, a consumer debtor may also opt for Chapter 13 as a form of relief. In terms of Chapter 13, the debtor receives a discharge of all unsecured pre-bankruptcy debt after completion of a payment plan which extends over a period of three to five years (w.r.t. ch 13, see generally Ferriel & Janger *Understanding Bankruptcy* (2007) 641).

During the 1980s and 1990s, several Northern European countries introduced legislation modelled on the American 'fresh start' example in an attempt to deal with the problem of rising consumer over-indebtedness (Roestoff & Renke 'Solving the problem of overspending by individuals: International guidelines' 2003 *Obiter* 3). From a South African perspective, the French process of law reform regarding consumer debt relief is especially instructive and this discussion will, thus, focus on the developments in France (for a detailed discussion of the developments in France see Kilborn '*La responsabilisation de l'economie*: What the United Sates can learn from the new French law on consumer overindebtedness' 2005 *Michigan Journal of International Law* (*Mich J Int'l L*) 619; see also Spooner 'Fresh start or stalemate? European insolvency law reform and the politics of household debt' 2013 *European Review of Private Law* (*ERPL*) 751). The French experience with over-lengthy payment plans, that place unrealistic payment obligations on debtors and allow them unrealistically low budgets (World Bank Report *supra* par 287), is especially significant for the purposes of this discussion. In addition, the French legislator's initial reluctance to provide the debtor with the opportunity to obtain a discharge and the further developments culminating in the introduction of a discharge provision providing a proper 'fresh start', may provide South African lawmakers with useful lessons regarding the reform of the debt review process.

In 1989, French consumer debt relief legislation provided for a measure in terms of which the debtor's obligations could be rescheduled into a repayment plan. Initially, creditors' consent was required before a plan could come into effect, but amendments introduced in 1999 empowered courts to impose a plan on creditors if agreement could not be reached voluntarily (Spooner 2013 *ERPL* 752-753). Most payment plans were subject to a repayment period of eight to ten years, but since 2003 all plans are limited to a maximum payment period of ten years, unless more time is required to reschedule a home loan in order to avoid the loss of the debtor's home (Kilborn 2005 *Mich J Int'l L* 641). Unlike the South African debt review process, the French process was, and still is, not court orientated but is, rather, built around administrative bodies called 'commissions on individual over-indebtedness' (*commissions de surendettement des particuliers*). A debtor must apply to one of these commissions to obtain access to the procedure (Spooner 2013 *ERPL* 752). These commissions comprise of eight members, amongst others a representative of the French Central Bank (the *Banque de France)* – who acts as secretary and whose primary task is to develop and negotiate a payment plan between the debtor and his or her creditors (Kilborn 2005 *Mich J Int'l L* 639). The other members are representatives of local government and tax authorities, representatives of the credit industry and consumer associations and two consultative members, namely, a social worker and a lawyer. The social worker is required to provide advice to the commission as regards the best way to treat the debtor and his family's situation and how to develop a workable payment plan to avoid future financial problems. The lawyer has to assist in verifying the validity of creditors' claims and to ensure that court documents comply with legal standards (Kilborn 2005 *Mich J Int'l L* 637).

Initially payment plans in France could only provide for 'ordinary' measures such as debt rescheduling or interest rate reductions and a court-imposed plan could not provide for a discharge of any obligation. A discharge was allowed in only one exceptional case, namely, a discharge of the residual obligation after the forced sale of the debtor's home (Kilborn 2005 *Mich J Int'l L* 647). However, contrary to the present position in South Africa, where courts will not confirm payment plans that are not viable (*Seyffert v Firstrand Bank Ltd* 2012 6 SA 581 SCA par 13), a lack of resources was not a proper basis for dismissal of a plan in France. Initially, some courts dismissed cases of debtors who did not have adequate resources to form the basis of a feasible payment plan. However, in 1993 the French High Court rejected this approach and required courts to deal with these 'terminal' cases 'as best they could' (Kilborn 2005 *Mich J Int'l L* 649 n 228).

The 'ordinary' measures soon proved to be insufficient and it was clear that most consumers needed relief in the form of a discharge of at least a part of their debts. The 1998 amendments to the French legislation thus provided for 'extraordinary' measures which could be recommended by the commission in the form of a partial discharge of debt, or in cases where the debtor's insolvency was 'irremediable', a full discharge following a two year moratorium on enforcement and a subsequent assessment of the debtor's financial situation. The two year moratorium was designed to allow the debtor's financial situation to stabilise. If, upon expiry of this two year period, the debtor's situation had improved and he or she was no longer insolvent, the commission was obliged to recommend a payment plan which included some or all of the 'ordinary' measures mentioned above. However, if the debtor was still insolvent, the commission had to recommend a discharge of the debtor's obligations. The percentage of the debtor's obligations that could be discharged was in the discretion of the commission, but the debtor was entitled to such discharge only once every eight years (Kilborn 2005 *Mich J Int'l L* 650).

The data from a survey done by the *Banque de France* in 2001 indicated that the commissions were still not able to implement effective relief for the most over-indebted consumers. Most consumers' insolvency was clearly not a temporary situation and the 'moratorium' was a mere formality, thus placing an unnecessary administrative burden on the commissions. Therefore, lawmakers introduced a 'fresh start' procedure in 2003, the *rétablissement personnel* (personal recovery) procedure, eliminating the payment plan requirement and providing an immediate discharge of the debtor's obligations in return for a liquidation of the debtor's assets. However, this form of relief is available only to debtors whose financial circumstances, according to the commission, are 'irremediably compromised' – thus, so overburdened with debt that no payment plan with ordinary or extraordinary measures would be able to ensure the repayment of at least a significant portion of their debts. Where the debtor does not possess any assets of significance, the commission can merely recommend personal recovery and the court may confirm it without a liquidation of assets (Kilborn 2005 *Mich J Int'l L* 655; Spooner 2013 *ERPL* 753).

With the introduction of the personal recovery procedure the French legislator acknowledged the right of debtors falling into the category of debtors with no income and no assets (NINAs) not to be excluded from a discharge procedure. In 2005, the Belgian legislator also introduced a NINA procedure in terms of which a total discharge may be granted to the debtor if it appears to the mediator that a payment plan is impossible due to the inadequate resources of the debtor (see Spooner 2013 *ERPL* 754 for a brief overview of the developments in Belgium). It is interesting to note that this NINA procedure was introduced following a decision of the Belgian Constitutional Court which held that it was contrary to the equality guarantee of the Constitution (see Art 10 of the Belgian Constitution of 1831) to exclude debtors who are unable to repay a substantial portion of their debt from debt relief (Spooner 2013 *ERPL* 755; World Bank Report *supra* par 300).

Since 2009, English law also provides relief to NINA debtors by allowing them to apply for a so-called Debt Relief Order (DRO). Once the debtor is allowed into the procedure, he or she is protected from enforcement for a period of twelve months, at which point the debtor also receives a discharge of debt obligations (as regards the NINA procedure in England and Wales see Roestoff & Coetzee 2012 *SA Merc LJ* 73 *et seq*; Spooner 2013 *ERPL* 758).

Even the Irish legislator, which has traditionally been extremely conservative as far as consumer debt relief is concerned, has introduced reforms to accommodate over-indebted consumers (see Spooner 2013 *ERPL* 759 for a brief overview of recent developments in Ireland; see also Spooner 'Long overdue: What the belated reform of Irish personal insolvency law tells us about comparative bankruptcy' 2012 *American Bankruptcy Law Journal* (*Am Bankr LJ*) 243). In terms of the Debt Settlement Agreement (DSA) procedure, a debtor, through an insolvency practitioner, may negotiate a repayment arrangement with his or her unsecured creditors under court protection. If 65% in value of the creditors agree to the proposal and the court approves the proposal, the DSA will come into effect. Repayment plans cannot endure for longer than six years and the debtor receives a discharge of all remaining obligations at the end of the repayment period. Preferred and secured creditors are protected, while at least procedural, if not substantial, protection is provided to the debtor's home (Spooner 2013 *ERPL* 760).

The Personal Insolvency Arrangement (PIA) procedure is analogous to the DSA. Although the requirements for access and creditor approval are more burdensome, both secured and unsecured debt may be renegotiated. The debtor receives a discharge of all non-excluded unsecured debt at the end of a maximum repayment period of seven years, while secured debts may be discharged to the extent provided for in the arrangement. Irish law also provides for a NINA procedure similar to the English DRO procedure. This procedure, known as the Debt Relief Notice (DRN), is administrative in nature and provides for a discharge after three years (Spooner 2013 *ERPL* 760-761).

6 International Guidelines and Lessons for South Africa

From the above discussion, it should be clear that South Africa has fallen behind the rest of the world and reform of the system's income restructuring measures, to bring them in line with modern trends, is vital. In order to ensure the effectiveness of the system, payment plans must clearly provide for some discharge of debt obligations. This view is also reflected in the World Bank Report (see par 444) and in this regard Kilborn ('Reflections of the World Bank's Report on the treatment of the insolvency of natural persons in the newest consumer bankruptcy laws: Columbia, Italy, Ireland' 2015 *Pace International Law Review* (*Pace Int'l L Rev*) 312) notes that the 'most powerful overarching theme' of the Report is that countries who have not already done so should implement a formal legal mechanism by which over-indebted consumers may seek debt relief in the form of a forced discharge of some or all of their debt obligations. Kilborn (2015 *Pace Int'l L Rev* 312) furthermore points out that a discharge of debt 'has been a unifying and consistent theme of previous recommendations from international organisations spanning the past twenty years' (see e.g., Insol International *Consumer Debt Report:*

Report of Findings and Recommendations (2001) 15 & 22 (hereafter Insol Report)). Further to this, achieving equality between the debtor and his or her creditors has also been a central theme of international instruments (see, e.g., World Bank Report parr 115 & 393; Insol Report 15). In this regard the following is stated in the World Bank Report (par 393):

> [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.

However, the need for striking a balance between debtor and creditor interests also requires debtors to earn their fresh start by making at least some payments in terms of a payment plan in exchange for the relief in the form of a discharge of debt (Kilborn 2015 *Pace Int'l L Rev* 313; World Bank Report parr 262 & 356). In the United States, for example, initially a debtor automatically qualified for a Chapter 7 'straight' discharge of all remaining debt obligations after he or she has surrendered all non-exempt assets for liquidation and distribution to creditors. However, with the introduction of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCA), some debtors are now required to earn their new start by making payments in terms of a Chapter 13 payment plan. In this regard, BAPCA introduced a means test (s 707(b)(2)) that channels debtors to the Chapter 13 procedure where their income exceeds the median in the debtors' state of residence.

It should be noted that section 129(1)(b) of the South African Insolvency Act 24 of 1936 indeed provides debt relief in the form of a forced discharge of debt after sequestration and subsequent rehabilitation. It thus provides the debtor with a 'fresh start' and, accordingly, a 'straight discharge' without the requirement of a payment plan. However, in South Africa, the 'straight discharge' is subject to the advantage for creditors principle and the applicant in a sequestration application is required to prove that there are sufficient realisable assets in the estate to ensure that a not-negligible dividend is paid to creditors (see e.g., *Ex parte Kelly* 2008 4 SA 615 (T) 617). Furthermore, as indicated, debt review in terms of the NCA and administration in terms of section 74 of the MCA do not provide for any discharge of debt obligations (for a detailed discussion of administration and its comparison with debt review see Boraine, Van Heerden & Roestoff 'A comparison between formal debt administration and debt review – the pros and cons of these measures and suggestions for law reform' 2012 *De Jure* 80 & 254). Consequently, debtors who are unable to prove advantage will be denied the opportunity of obtaining any discharge – not even an 'earned discharge'. However, the new section 71 of the NCA (as amended by s 21 of the NCAA) has improved the position of the consumer as regards his or her right to rehabilitation. Before the amendment of section 71 a debt counsellor could issue a clearance certificate only once the consumer had fully satisfied all the obligations under every credit agreement in terms of the debt rearrangement order. This meant that a consumer who, for example, had a home loan agreement with a repayment period of 30 years as one of his or her credit agreements under debt rearrangement, would be able to be relieved from the consequences of debt review only after a period of at least 30 years (see Roestoff *et al* 'The debt counselling process – Closing the loopholes in the National Credit Act 34 of 2005' 2009 *PER* 285). Under the new section 71, such a consumer may be issued with a clearance certificate if he or she has demonstrated that he or she has the financial ability to satisfy the future obligations in terms of the rearrangement order under the home loan agreement, that there are no arrears in respect of the rearrangement order, and that all other obligations under every credit agreement included in the rearrangement order have been settled in full (see s 71(1)(b)).

The World Bank Report identifies two important issues pertaining to payment plans, namely, plan duration and the amount that debtors are required to pay over the life of the plan (see parr 262-301). According to the Report, experience has proved that overly-extended repayment periods will not result in the successful completion of a payment plan (see Report parr 264-265 & 269). In the United States, for example, despite the relatively short maximum payment period of three years required in respect of Chapter 13 plans, only about one-third of debtors who opt for this form of relief successfully complete their plan and receive a discharge (Kilborn 2005 *Mich J Int'l L* 633). Payment plans in terms of the NCA's debt review provisions, that are not subject to a maximum period and do not provide for any discharge, are (as was the case in *Ferris*) thus clearly destined for failure. According to the Report, the issue of plan duration is especially relevant with regard to developing countries (and thus also South Africa) where rapidly changing economic conditions can make successful planning for even a short period extremely difficult (Report par 270).

As regards the question of how much payment may be expected or demanded from debtors, experience in every major insolvency regime has revealed that few debtors will have the resources to produce anything substantial for creditors beyond covering the debtor's basic needs and the administrative costs of the insolvency system, no matter how long or short the repayment period might be. Extending the repayment period is thus likely to actually depress creditor returns and to reduce the number of debtors who can be assisted by the system (Report par 264). A more generally attainable goal of requiring payment plans is, according to the Report, to inculcate payment responsibility and thus rather to pursue the moral or educational goal of payment plans (Report parr 265 & 315).

Most policymakers thus agree that this issue is more a question of defining a predetermined level of sacrifice for debtors than defining a predetermined benefit for creditors. An important factor in determining the potential payment to creditors is, first of all, to determine the amount to be reserved for the reasonable support of the debtor and those dependent on him or her (Report par 274). Systems should also create incentives that will encourage maximum productivity by debtors. In this regard the observation that '[t]he most prominent, fundamental, and effective way of encouraging debtors to be as productive as possible is simply to offer the relief of a discharge of unpaid debts' is especially relevant from the South African legislator's perspective (see Report par 281). The Report also highlights the importance of addressing the problems of debtors who are unable to generate significant disposable income for the duration of the plan (the so-called 'NINA debtors'). At present, a significant number of debtors in all consumer insolvency systems fall into this category, and the preferred approach is to avoid this discrimination and provide equivalent relief to all debtors, regardless of their financial resources (Report par 298). It is submitted that South African lawmakers should pay urgent attention to this issue as the current regime may be open to constitutional challenge since the exclusion of NINA debtors from a discharge procedure infringes their fundamental right of equality (see Boraine *et al* 'The pro-creditor approach in South African consumer insolvency law and the possible impact of the Constitution' 2015 *Nottingham Business and Insolvency Law e journal* (*NIBLeJ*) 59.

A further important theme of the World Bank Report, is the prevalent policy preference for out-of-court settlement procedures rather than costly court-orientated procedures (Report parr 128-138). In this regard it should be noted that the NCA indeed provides for an out-of-court settlement procedure. However, it applies only in the event of a finding by the debt counsellor that the consumer is not over-indebted but is experiencing, or is likely to experience, difficulty in satisfying all of his or her obligations in time (see s 86(7)(b)). The NCA therefore does not require negotiations in the case of over-indebted consumers but, in terms of section 86(5)(b), it is actually expected from credit providers to participate in the debt review process and negotiations for debt rearrangement. However, in practice credit providers are often not eager to participate in the negotiation process. A research report by the Law Clinic of the University of Pretoria submitted to the National Credit Regulator (NCR) in 2009 indicated that credit providers not co-operating in the debt review process was an important cause of the ineffectiveness of the process (Haupt *et al The debt counselling process: Challenges to consumers and the credit industry in general* (2009) 308).

As regards the issue of creditor participation it is thus suggested that the South African legislature could learn from the reforms introduced in France (see the discussion in par 5 above). Apart from the French legislator's unique approach in introducing commissions comprising of members with the necessary expertise to assist in the developing and negotiating of workable repayment plans, the crux of the effectiveness of the new French system, it is suggested, clearly lies in the 'moral power' of the *Banque de France* (Huls 'Towards a European approach to overindebtedness of consumers' 1993 *Journal of Consumer Policy* 218). According to Kilborn, the involvement of the *Banque de France* in the process is one of the most effective elements of the new French system. He explains that (2005 *Mich J Int'l L* 639):

> The participation and support of the central bank was seen as critical to ensuring smooth operation of the new law. The central bank's pivotal role lent crucial legitimacy to the radical new law in the eyes of lending establishments. The central bank was all too happy to lend its support, as it sought ways to exert greater oversight (and ultimately restraint) over the credit activities of French commercial lenders. The Banque the France was instrumental in overcoming the initial reticence of many creditors toward the new system. In the face of obstructionist attitudes from many institutional creditors during the first years of the new system, working groups constituted by the Banque de France successfully lobbied their constituent credit organizations in support of the new law. This lobbying effort produced a strong upsurge in creditor cooperation and a 150% increase in the success rate of out-of-court plan negotiations between 1990 and 1993.

In light of the generally apathetic attitude of credit providers, as well as their apparent distrust of the debt review process, it is submitted that South African lawmakers should consider a system similar to the French system in which the involvement of the NCR in the negotiation process may perhaps provide the necessary legitimacy and trust in the system (see also World Bank Report par 136 which notes the involvement of a government regulator as one of the factors that contribute to the higher success rate of voluntary settlements). Moreover, limiting the courts' involvement to a mere supporting role, for example, to approve recommendations of the administrative body that are not voluntarily accepted by credit providers, will also address the problem of overburdened courts that has been experienced with regard to applications for debt rearrangement in terms of the NCA (see *Standard Bank of South Africa Ltd v Kruger*; *Standard Bank of South Africa Ltd v Pretorius* 2010 4 SA 635 (GSJ) par 17).

According to the World Bank Report, the effectiveness of an insolvency system is also assessed by the system's ability to properly monitor debtor compliance and whether it allows modifications to payment plans for changed circumstances (parr 262 & 302). In practice, debt counsellors are required to monitor payments by the consumer for the full period of the debt review process (Roestoff *et al* 2009 *PER* 285). However, the NCA does not require such monitoring. Moreover, unlike the administration procedure that provides for the possibility that the order may be amended, suspended or rescinded on application by the debtor or any interested party (see s 74Q of the MCA), the NCA does not provide for the variation, suspension or setting aside of a debt rearrangement order. In *Ferris*, the consumer was thus denied the opportunity to deal with possible changed circumstances by applying for a suspension or variation of the rearrangement order, as the credit provider was entitled to proceed with enforcement in terms of section 88(3)(b)(ii). The absence of provisions dealing with monitoring and plan modifications to cater for changed circumstances, such as a temporary disability to make repayments, it is submitted, is a shortcoming in the system and should be addressed by the South African legislator (see Boraine & Roestoff 2014 *THRHR* 545).

A further important issue regarding payment plans is the question as to how secured debt should be dealt with. In light of the facts in *Ferris*, where the credit agreement involved was a home loan and thus a mortgage agreement in terms of the NCA (see s 8(4)(d)), this is an important issue for the purposes of the current discussion. It should be noted that the NCA's debt review process allows a court to impose a rescheduling of debt upon credit providers and that such rescheduling may also be ordered with regard to secured debt which would, amongst others, include obligations with regard to home mortgages. This is quite revolutionary when compared to foreign systems where secured creditors are, in principle, protected in insolvency procedures (see Boraine, Van Heerden & Roestoff 2012 *De Jure* 264). The World Bank Report points out that the strong position of secured creditors is defendable as confidence in the credit markets should be protected. Moreover, the constitutional right to property justifies the rights of secured creditors as security interests are normally defined as property rights (Report par 321). In a Chapter 13 reorganisation bankruptcy, in terms of the American Bankruptcy Code, for example, modification of plans in respect of the time and amount of payments is not allowed where the claim is secured only by 'real property that is the debtor's principal residence' (s 1322 (b)(2) of the Bankruptcy Code). Should the debtor therefore opt to retain the property and should he or she wish to deal with the debt in terms of a Chapter 13 plan, such a plan must provide for payment of the regular mortgage instalments as originally agreed. The court is not empowered to reduce the instalments and extend the period of the agreement. However, any amount that is in arrears may be repaid over the duration of the plan (see Boraine, Van Heerden & Roestoff 2012 *De Jure* 265).

By not providing any preference as to the repayment of mortgage debt, the South African legislator has most likely contributed to credit providers' distrust in the system. It is submitted that South African lawmakers should consider the American example as regards the treatment of housing loans (Boraine, Van Heerden & Roestoff 2012 *De Jure* 271). In addition, the consumer could also be allowed to budget for the instalments in respect of home loans as part of his or her minimum living expenses, provided they are reasonable and thus qualify as necessary living expenses (see World Bank Report par 291; see also s 74(C)(2)(d) of the MCA which provides for the possibility that the court may exclude a certain amount from the instalments to be made to the administrator to enable the debtor to make periodical payments under mortgage bond obligations if the court is of the opinion that the instalments are reasonable and that it is desirable to safeguard the mortgaged property). Regulation 24(7) of the National Credit Regulations currently provides that minimum living expenses be based upon a budget provided by the consumer and adjusted by the debt counsellor with reference to guidelines issued by the NCR. However, thus far the NCR has not issued any such guidelines. Although some discretionary element, regarding the issue of what is considered to be ‘reasonable needs and expenses’, is desirable, it is submitted that basic budgetary guidelines should be issued in order to overcome the problem of variable decision making by debt counsellors and our courts (see World Bank Report par 285; see also its criticism against the practice of assigning debtor budgets to the discretion of system administrators and courts).

It is suggested that secured creditors’ rights should, in principle, be protected in the debt review process, but measures providing for rescheduling of repayment periods and/or the reduction of interest rates or the principal amount owed by the debtor on the loan should be possible on the basis of a negotiated agreement between consumers and credit providers. However, the inclusion of a provision for a discharge of unsecured debt obligations is of the utmost importance. In *Ferris*, such an inclusion would have improved the consumers’ chances of bringing their arrears under the home loan agreement up to date and to complete the remainder of the payment plan successfully and, eventually, to overcome their over-indebtedness.

7 Concluding Remarks

It is submitted that the Constitutional Court has correctly applied the relevant provisions of the NCA to the facts in *Ferris* and that the credit provider was thus entitled to enforce the credit agreement without further notice once the consumers had breached the debt rearrangement order. However, the implication of *Ferris* is that the minor measures currently provided for by the NCA – namely, a mere rescheduling of debt and an extension of payment dates – are insufficient to provide effective and efficient relief to all South African (including NINA) debtors. International developments and guidelines discussed above indicate that overly-extended payment plan periods and plans which provide for a limited discharge of debt obligations will eventually lead to the failure of such plans. Therefore, payment plans that provide for no maximum period and no discharge, such as those in terms of the debt review process, are obviously even more destined for failure.

As indicated, one of the central themes of the World Bank Report is that consumer insolvency systems should strive to obtain a balance among debtor and creditor interests. In this regard it is indeed one of the NCA’s objectives to promote equity in the credit market. However, from the discussion of *Ferris* it should be clear that this objective and the South African Constitution’s commitment to achieving equality are, in actual fact, not attained by the NCA’s debt review process. The outcome of *Ferris* clearly demonstrates that the NCA does not truly pursue the objective of providing debt relief to debtors as it is mainly oriented towards debt collection and thus the principle of maximising returns to creditors.

South African consumer over-indebtedness is still at an unacceptably high level. The latest statistics provided by the NCR (see the *Credit Bureau Monitor* (March 2016)) indicate that the percentage of consumers with impaired records (i.e. consumers who, amongst others, are in arrears with three or more instalments) currently stands at 40 %. Law reform of the NCA's debt-review process, thus, is vital and proper measures that would deal effectively and efficiently with the problem of consumer over-indebtedness should be introduced.

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