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TRIBUTE TO AKHO NTANJANA

Why should young and promising eagles suddenly perish and be taken away from us forever? I am gutted and unable to understand why.

Akho Ntanjana was on a meteoric rise – he was excelling in his career and slowly transforming into a trailblazer in his own unique way. He was a quiet, focused, forward looking young man and destined to reach great heights.

Akho worked tirelessly on the accreditation of this journal by the Department of Higher Education and Training – a long and arduous process. The receipt of the accreditation letter made him smile – he was relieved and fulfilled when he achieved his objective. He reminded us all that the real work was about to begin to maintain the accreditation.

Akho will be sorely missed by his SAJEI colleagues, the SAJEI Editorial Board members, the authors, the JUTA team and, more specifically, by his mother, wife, and siblings. May his soul rest in peace and rise in glory.

DR GOMOLEMO MOSHOEU

Production editor

Well done, Akho!

You have run your race; now, it is for us to take the baton and continue on your well-defined route.

Thank you for being our guiding light.

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Enhancing Judicial Excellence

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AUTOMATIC REHABILITATION, NOT SO AUTOMATIC: *ENGELBRECHT NO v NAIDOO* [2023] ZAGPJHC 866 (3 AUGUST 2023)

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I INTRODUCTION

It seems that the South African rehabilitation procedures provided for by the Insolvency Act 24 of 1936 ('Insolvency Act' or 'Act') are in some respects tedious and our courts are applying such procedures quite conservatively. In short, these are not well-aligned with a modern fresh start approach. For instance, the advantage to the body of creditors is not only a prime access requirement to sequestration and viewed by some as a stumbling block to the sequestration process, but it is now also seemingly an overarching key consideration to exit the process through rehabilitation (Melanie Roestoff 'Rehabilitation of an insolvency and advantage to creditors under the Insolvency Act of 1936' 2018 *THRHR* 306 at 314).

The court went further in *Ex parte Purdon* 2014 JDR 0115 (GNP) (para 15). It said that an application for rehabilitation requires full and frank disclosure of the relevant facts and this requires an explanation by the insolvent of how sequestration has benefitted the body of creditors or at least an explanation of why sequestration did not benefit the body of creditors as a pre-condition for granting the rehabilitation order (see also Roestoff at 314). This approach was followed in a similar set of facts in *Ex parte De Villiers* [2024] 2 All SA 67 (NWM) (9 February 2024) paras 30–33. In both these judgments, the respective courts relayed the applications to the fact that the initial sequestration applications amounted to friendly sequestrations and the absence of advantage to creditors (*Purdon* para 13 and *De Villiers* para 29). However, it is not clear how these matters will be ultimately resolved since an insolvent is not intended to remain in a state of sequestration indefinitely. At the same time if the sequestration orders were granted without observing all the requirements properly it becomes a question of – if a court should try to rectify it by denying a rehabilitation order (see also Meskin PM et al

Insolvency Law and its operation in winding-up (last updated June 2024) Chapter 2 para 2.1).

In South Africa, if an insolvent debtor is not rehabilitated through a motion procedure directed to the court (section 124 of the Act), an insolvent will be automatically rehabilitated by effluxion of time after the passing of 10 years from the date of sequestration of their estate unless a court orders otherwise because an interested person objected to the automatic rehabilitation (section 127A(1) of the Act). However, as will be shown in *Engelbrecht NO v Naidoo* [2023] ZAGPJHC 866 (3 August 2023), automatic rehabilitation is not always so automatic. The honesty or dishonesty and cooperation or non-cooperation of the debtor may play an important role in showing the court that the sequestration of the debtor's estate has been a benefit to the body of creditors thus, giving the debtor a better chance to be considered for unconditional rehabilitation.

In *Engelbrecht NO v Naidoo* the court considered an urgent application requesting it to exercise its discretionary power in section 127A(1) to delay or deny the automatic rehabilitation of an unrehabilitated insolvent because such rehabilitation would prejudice the creditors of the insolvent estate and the public since the affairs and transactions of the insolvent had not been investigated thoroughly. This note discusses this judgment and focuses on the procedural aspects of an application to extend the automatic rehabilitation period and the guidelines applicable to the court's discretionary power in section 127A(1). This note also pays special attention to the international practice of distinguishing between dishonest debtors and honest but unfortunate debtors and cooperative and uncooperative insolvents concerning rehabilitation or when considering whether or not an insolvent should receive a fresh start and early discharge. In this context, such practices will be compared with South African insolvency law and the approach of our courts regarding such insolvents as well. To this end, this note will include some references to the English, Australian, Canadian and American fresh start and discharge policy, ie, rehabilitation of a natural person debtor.

II FACTS OF THE *ENGELBRECHT* CASE

The facts were that the respondent, Mr Naidoo, was provisionally sequestrated on 21 August 2013 and would be automatically rehabilitated through the effluxion of time on 21 August 2023 (para 2). However, the applicants who were the trustees of Mr Naidoo's insolvent estate launched an urgent application in the High Court requesting the court to exercise its discretionary power in section 127A(1) of the Act to delay or deny the automatic rehabilitation (para 1). Section 127A(1) provides that an insolvent not rehabilitated by court order within a 10-year period from the date of sequestration of their estate will be

deemed to be rehabilitated at the expiry of that period, unless a court on the application of an interested party orders otherwise, before the expiration of the said 10-year period.

(a) The applicant's legal arguments

The trustees argued that the rehabilitation of Mr Naidoo would prejudice the creditors of the insolvent estate and the public, as the affairs and transactions of Mr Naidoo had not been investigated thoroughly (para 2). They alleged that this was because Mr Naidoo's conduct showed a complete lack of *bona fides* and cooperation with his duly appointed trustees and it was 'a clear disdain for the rule of law and an intent to evade his creditors' (para 2). Therefore, the trustees contended that such behaviour should not be tolerated and the court should be convinced to exercise its discretion in terms of section 127A(1) of the Act to delay or deny Mr Naidoo's imminent rehabilitation (para 2).

To prove their allegations, the trustees stated that since Mr Naidoo's provisional sequestration, 14 appeals and applications to stay and/or rescind orders and/or proceedings were launched in bad faith and with no legitimate aim but with the sole purpose of causing delay (para 3). Further, Mr Naidoo failed to pursue any of the many appeals and/or applications with genuine intent.

Furthermore, while Mr Naidoo was failing to comply with the statutory obligations imposed on him as an insolvent, he continued to live a prosperous life by spending money in casinos. According to the trustees, Mr Naidoo contravened the Act and other legislation by (para 4):

- Failing to inform the trustees of his residential and postal address. Mr Naidoo bluntly denied this but supplied no proof that it was not true and did not disclose his residential address in this urgent application.
- Failing to provide the trustees with a duly completed statement of affairs in contravention of section 16 of the Act. For this omission, Mr Naidoo blamed his previous attorneys and accused them of failing to apprise him with the statement of affairs. However, Mr Naidoo made no promises of submitting it otherwise.
- Failing in his obligation to appear at the first and second meetings of creditors, including an enquiry into his affairs at the second meeting in contravention of section 64 of the Insolvency Act which was set down on various dates. Again, Mr Naidoo blamed his previous attorneys for not informing him of the notices. However, despite stating that he was unaware of the meetings, he briefed counsel to appear in the second meeting on his behalf and was represented by various legal teams, proving that he knew about the sittings.

- Being involved in the management of a Close Corporation while being an unrehabilitated insolvent, in violation of section 47(1)(*b*)(i) of the Close Corporations Act 69 of 1984 (para 5). Further, in his capacity as sole member of M & M Hiring Marquee CC, Mr Naidoo passed a resolution, without the trustees' consent to proceed with the liquidation proceedings against a creditor after he had already been sequestrated (para 5).

Central to the trustee's application was their allegation that as a direct result of these delays, they were unable to investigate Mr Naidoo's affairs and transactions fully, and consequently, could not report to the creditors in terms of section 81(1) of the Act (para 6). Therefore, they contended that sequestration proceedings were still ongoing. The trustees further stated that the enquiry was important because they could not know the full extent of Mr Naidoo's debts as it could only be established by Mr Naidoo at the enquiry (para 7). As a result of Mr Naidoo's non-cooperation in not attending the enquiry proceedings, the Master transferred the matter to the Palm Ridge Magistrates Court since only a judge or a magistrate may issue a warrant committing an examinee to prison for failure to participate in an enquiry (para 7).

Further, the trustees explained the importance of the enquiry to the sequestration process in that it allows trustees to investigate the affairs and transactions of the insolvent with the hope of establishing various facts such as:

- Mr Naidoo's pre-sequestration assets and liabilities;
- whether there are impeachable transactions;
- the entities in which Mr Naidoo had an interest before sequestration; and
- Mr Naidoo's pre- and post-sequestration income and expenses and liabilities (para 8).

The trustees, therefore, sought an order in terms of section 127A(1), as the expiry of the period would preclude interrogation of the insolvent, which in turn would prejudice the creditors (para 9).

(b) The respondent's legal arguments

However, Mr Naidoo disagreed with the trustee's allegations and argued instead that the trustees had many years to conduct the necessary meetings and enquiries and failed to do so (para 10). He said that respectively 14 and two months ago, the trustees discovered and froze bank accounts. Further, they waited too long before launching these proceedings, creating their own

urgency and placing him under pressure to oppose, and the court under unnecessary pressure to adjudicate the application (para 10).

Mr Naidoo contended that the trustees focused excessively on his alleged delaying tactics and obstructive behaviour to the extent that they failed to set out the exact stage of administration of the estate, the dividend available to the creditors, or the prejudice the creditors may suffer (para 11). Further, none of the creditors brought an application for relief similar to those of the Applicants.

Mr Naidoo's counsel further argued that when considering rehabilitation, case law set out that a court should consider how the insolvent conducted his trade before becoming insolvent and not how he conducted his trade during insolvency (para 12).

Further, Mr Naidoo's counsel referred the court to a directive by the Master in terms of section 71(1) of the Close Corporations Act which deals with the evidence led at sittings of the insolvency inquiry of his close corporation, M & M Hiring Marquee CC. The directive stated that during a certain period, Mr Naidoo received a direct or indirect salary or other remuneration in the amount of R2 250 000, which payment was, in the Master's opinion, 'not bona fide or reasonable in the circumstances of commercial insolvency' the CC was trading under at the time (para 12). However, despite the Master stating that it was not *bona fide* or reasonable, Mr Naidoo's counsel maintained that Mr Naidoo's insolvency did not flow from negligent or reckless conducting of his personal business affairs but rather from his inability to repay his salary received whilst being a member of his commercially insolvent close corporation (para12).

Mr Naidoo and his counsel listed other factors which they alleged the court should have considered regarding the trustee's allegations, namely (para 13):

- That the primary purpose of section 127A(1) is to provide for automatic rehabilitation: As regards Mr Naidoo's alleged obstructive behaviour, they said that he was exercising his constitutional right of access to courts by bringing applications and engaging in the appeal processes.
- Mr Naidoo's failure to present the trustees with a statement of affairs: They alleged that that should have been disregarded because a statement had to be presented to the Master and that did not happen.
- Mr Naidoo's failure to submit monthly income and expense statements: They alleged that this was also not something the court could consider, as the trustees never required it from him. They made a similar argument regarding Mr Naidoo's earnings, and the recovering or liquidating of assets.

- Mr Naidoo's failure to provide his address: They alleged that the trustees never took any steps to compel compliance with the Act. They made a similar argument regarding the second meeting of creditors.
- The various contraventions: They alleged that Mr Naidoo had not been charged or convicted, and as for the other allegations, that the trustees did not make out a case for them. Thus, they contended that the trustees should not have been allowed to rely on it.

In a nutshell, Mr Naidoo and his counsel's response to an allegation was either Mr Naidoo was not requested, compelled, not charged or convicted, or a case was not made out (para 13). However, the court was still not informed about what Mr Naidoo did to comply with the obligations placed on him as an insolvent in terms of the Act.

Furthermore, Mr Naidoo and his counsel questioned the usefulness of the enquiry process because, after 10 years, any claim not already proven against the estate would have been prescribed years ago (para 14). They lastly argued that a less invasive measure was conditional rehabilitation in terms of section 127(2) and (3) of the Act.

(c) The applicant's response to the respondent's arguments

Regarding the urgency of this application, the trustees argued that the matter was sufficiently urgent because the automatic rehabilitation of Mr Naidoo would result in him being discharged from his debts due or arising before his sequestration (para 15). The trustees indicated that the lodged and proven claims amounted to R7 million and that there was a shortfall of approximately R5,7 million. Further, it was difficult to set out the dividend and the prejudice since, because of Mr Naidoo's lack of cooperation, there was not enough information (para 15).

In addition, the trustees said that there was a reasonable chance that Mr Naidoo committed various statutory offences and failed to comply with his obligations in terms of the Insolvency Act (para 16). Thus, this would be reported to the creditors and the Master in terms of section 81(1) of the Insolvency Act once the sequestration process has been completed (para 16). In the meantime, the matter was moved to a Magistrate to compel compliance with the Act. Further, the trustees said that it was in the general public's interest that Mr Naidoo's automatic rehabilitation be prevented to ensure that he is held accountable (para 16).

The trustees said that the urgency of this matter hinged on the fact that Mr Naidoo would automatically be rehabilitated on 21 August 2023 but because of Mr Naidoo's obstructive behaviour and after numerous steps

taken by the trustees, it became impossible for the trustees to complete the sequestration before the expiry of the 10 years (para 17).

The trustees relied on the judgment of *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd* 2011 JDR 1832 (GSJ) para 8 regarding the question of why the proceedings were only being instituted then (para 18). In that judgment, the court held that:

> *the delay in instituting proceedings is not, on its own a ground, for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course.*

Therefore, the trustees, said that they were satisfied that there was no other remedy to prevent the prejudice to the creditors of the insolvent estate should Mr Naidoo be automatically rehabilitated on 21 August 2023 because there was no other substantial redress at a hearing in due course (para 19). The trustees concluded that Mr Naidoo should not be allowed to delay accountability for 10 years and then plead delay in bringing the action on the part of the trustees to escape accountability (para 19).

(d) The court's reasoning

Du Plessis AJ first stated that insolvency law regarding sequestration exists primarily for creditors' benefit (para 20). However, sequestration also has the inevitable effect of relieving a debtor from legal proceedings by creditors through rehabilitation since they are freed from all unpaid pre-sequestration debts upon rehabilitation (para 20).

As regards Mr Naidoo's contention that giving an order preventing his rehabilitation would limit his rights to freely choose his trade, occupation and profession as guaranteed in terms of section 22 of the Constitution of the Republic of South Africa, 1996, Du Plessis AJ held that both parties did not labour on that point during their arguments, nor did they question the constitutionality of the Act (para 21). Further, the Constitution allows for the limitation of rights, as long as it is in line with section 36 of the Constitution (para 21) but importantly the limitation does not endure forever but ends through rehabilitation (para 22).

Du Plessis AJ explained that an insolvent person may be rehabilitated by an order of the court after applying for rehabilitation in line with sections 123 to 126, or automatically by effluxion of time in terms of section 127A of the Act (para 22). Both methods end the sequestration and relieve the insolvent of all the limitations that sequestration imposes on an insolvent. An insolvent is deemed to be rehabilitated after 10 years from the date of sequestration of

his estate (para 23). In terms of section 127A(1), a court can order otherwise upon the application of an interested person.

Du Plessis AJ held that the effect of automatic rehabilitation is the same as rehabilitation by application to the court (para 24). When the court considers an application for rehabilitation, the court must determine whether the insolvent ought to be rehabilitated and ought to be allowed to trade with the public on the same basis as any other honest person. In essence, the court must determine whether the insolvent is a fit and proper person to participate in commercial life without any constraints and disabilities (para 24).

Although there is no case law on section 127A(1), Du Plessis AJ held that commentators on the Insolvency Act state that this section may be appropriate if 'the expiry of such period would preclude interrogation of the insolvent which in the interest of creditors ought to occur (eg, as a result of newly discovered information)' (para 25).

Since there is no case law on section 127A(1), the court also drew insights from earlier judgments on rehabilitation in stating that it is helpful to look at factors that can be considered when the court must exercise its discretion when faced with the reverse: an application for rehabilitation in terms of section 127(2) (para 26). As regards an application for rehabilitation, case law emphasises that:

- the courts must exercise their discretion judicially and not arbitrarily (*Ex parte Phillips* 1928 CPD 381 384);
- the lapse of time cannot outweigh other factors that justify the court's refusal of rehabilitation (*Ex parte Fourie* [2008] 4 All SA 340 (D) 343);
- the Master and trustee's opinions must be properly considered;
- the court does not only focus on the interest of the insolvent but on the interests of his creditors (whether claims are proven or not), the State in relation to any prosecution of him, and the public, specifically the commercial public; and
- the central question is whether the insolvent is a fit person to participate in the commercial life of the community, free of the constraints and disabilities affecting an insolvent (*Ex parte Heydenreich* 1917 TPD 657 at 658659).

Du Plessis AJ further listed the following examples of factors that persuaded the court to refuse an order for rehabilitation, namely that the insolvent:

- conducted his business improperly and negligently;
- failed to keep proper books of account;
- ran up excessive debts before sequestration;

- he was difficult and refused to cooperate with the trustees in the administration of his estate;
- he was highly obstructive in the administration of his estate, making unfounded allegations against his trustees and members of the Master's staff;
- he 'sidestepped the inhibitions of insolvency' by living a life of luxury without making contributions to the creditors;
- he failed to set out in his application for rehabilitation the circumstances that led to his insolvency;
- his application discloses nothing to suggest that he had learned the lessons of insolvency, or that he appreciates the possible hardship his sequestration might have caused his creditors (para 27).

Du Plessis AJ held that most importantly, when the court refuses an application for rehabilitation, the court will usually indicate the period after which the application may be renewed, in the absence of which the insolvent may apply again when he considers it appropriate (para 28). Du Plessis AJ listed the factors that have favoured unconditional rehabilitation under section 127(1), namely that the insolvent:

- incurred only very small debts;
- is not to blame for his sequestration, which came about through misfortune;
- neither creditors nor the trustees took steps under section 23(5) to obtain part of the insolvent's earnings during his insolvency; and
- has no opposition to his application from creditors, the trustee, or the Master (para 29).

Du Plessis AJ held that in terms of section 127(2), it is possible to grant rehabilitation subject to a condition and where the circumstances make it just and equitable, to impose the condition. However, in the present matter, no such special conditions were motivated in the urgent court (para 30).

Regarding the question of whether the court should intervene in terms of section 127A(1) and prevent Mr Naidoo from being automatically rehabilitated, Du Plessis AJ held that considering:

- the indications of fraudulent conduct during Mr Naidoo's sequestration process by concealing his assets;
- his failure to disclose material information during the sequestration process;
- his non-compliance with the legal obligations that the Act imposes on him during sequestration;

- his failure to cooperate with the trustees, to provide the necessary information and documents;
- his failure to attend the enquiry proceedings and to keep his trustees appraised of his residential and postal address; and
- his general failure to be accountable to his creditors, the trustees and the Master.

Du Plessis AJ stated that should Mr Naidoo have been rehabilitated on 21 August 2023, he would have escaped accountability to his creditors, the trustees and the Master, thereby evading all the consequences of his insolvency (para 31). This led him to conclude that Mr Naidoo should not be rehabilitated yet (para 31).

As regards Mr Naidoo's contention that the trustees should have compelled his compliance with the provisions of the Act through the years, and that his non-compliance should therefore be excused, Du Plessis AJ said that did not hold water (para 32). The Insolvency Act places obligations on the insolvent, requiring the compliance of the insolvent, with non-compliance with certain provisions even constituting an offence which the Director of Public Prosecution may prosecute (para 32). Du Plessis AJ held that compliance is not optional, and the fact that there was no compulsion from the trustees did not excuse non-compliance from the insolvent. Further, Mr Naidoo offered no reasons for non-compliance other than that he was not compelled to do so (para 32).

Du Plessis AJ said that initially, the trustees requested that Mr Naidoo not be rehabilitated and nothing else (para 33). However, Du Plessis AJ said that this seemed to be too open-ended even though he did not deem it appropriate to extend Mr Naidoo's insolvency with a specific number of years because that would possibly merely provide a new target date for Mr Naidoo to evade his obligations (para 33). Therefore, Du Plessis AJ, found it sensible to provide Mr Naidoo with the option to, at any time, apply for his rehabilitation in terms of the Act. In such an application, Mr Naidoo would have to prove to the court that he has complied with his obligations under the Act and should be rehabilitated (para 33).

III ANALYSIS AND EVALUATION

(a) The court's discretion

As indicated above, a benefit or advantage to the body of creditors is also considered when the court exercises its discretion to grant rehabilitation orders by application, or to extend the 10-year period prescribed for automatic rehabilitation by the effluxion of time. The consideration of the benefit to creditor's requirement – also at this final stage of the process, is somewhat

disconcerting since this requirement for obtaining a sequestration order in the first place, is already subject to much criticism (see Melanie Roestoff & Hermie Coetzee '"Advantage to creditors" and the Insolvency Act 32 of 1916: Lessons to be learned' in 2023 *De Serie Legenda: Developments in Commercial Law* 1 et seq; and A Boraine & M Roestoff 'Revisiting the state of consumer insolvency in South Africa after twenty years: The courts' approach, international guidelines and an appeal for urgent reform' 2014 *THRHR* at 351, and 2014 *THRHR* at 527.)

It is further clear from the above judgment that the conduct of the insolvent is a paramount element that the court considers when exercising its discretion to determine whether sequestration either benefitted or prejudiced the body of creditors and whether the insolvent has learnt any lesson from the circumstances which led to the sequestration of their estate, and how differently they would manage their financial affairs if rehabilitated.

Another important consideration is that the court grants a sequestration order on the hope or possibility presented by the trustee that more assets could be discovered through impeachable dispositions and inquiries, thus proving an advantage to creditors. Where the insolvent debtor through delays or non-cooperation prevents the trustees from holding the enquiries, as is seen in *Engelbrecht*, this hope or possibility cannot be realised thereby prejudicing the creditors. The delays and non-cooperation also signal that the insolvent has not learnt the lesson of time, the insolvent disregards the prejudice that their sequestration has caused their creditors and through the abuse of the sequestration process, the insolvent's only aim is to escape accountability to their creditors, the trustees and the Master, thereby evading all the consequences of their insolvency. To this extent, it seems the insolvent in fact prevented the realisation of the optimum benefit to creditors arising from the sequestration.

After all of these considerations, the court may exercise its discretion to either grant unconditional rehabilitation, conditional rehabilitation or refuse rehabilitation irrespective of whether the consideration for rehabilitation was prompted by an application as per section 124 or as opposition to automatic rehabilitation as per section 127A of the Insolvency Act. The court will seemingly consider unconditional rehabilitation when an insolvent cooperated with the trustee, and there is substantial realisation of an advantage to creditors, linked with the consideration that the insolvent is deemed to be a fit person to participate in the commercial life of the community, free of the constraints and disabilities affecting an insolvent (see *Ex parte Heydenreich* at 658–659 above).

However, the court will consider granting conditional rehabilitation when the facts are such that the court holds the opinion that the insolvent can make a further payment to the creditors (*Ex parte Matthee* 1975 (3) SA 804

(O)), or repay contributions to creditors who were compelled to contribute towards the sequestration cost (*Ex parte Goshalia* 1957 (2) SA 182 (N); see also section 127(2)–(4) of the Insolvency Act). The court may also postpone the hearing of the application as a sign of disapproval of the applicant's conduct (*Ex parte Rupert* 1947 (1) SA 147 (C)) or where it requires further information (*Ex parte Isaacs* 1952 (SA) 128 (O)) or where criminal proceedings against the applicant are pending (*Ex parte Joselowitz* 1957 (2) SA 120 (W)).

As seen in the *Engelbrecht* judgment, the court may also refuse rehabilitation when an insolvent refuses to cooperate with the trustee, thereby minimising or preventing the advantage to creditors' principle from being realised. In this case, the court, however, also found some fraudulent conduct on the side of the insolvent which factor surely also weighed heavily as a consideration in granting the extension of the sequestration period order, and thereby preventing the rehabilitation at the effluxion of the 10-year period.

(b) Distinguishing between dishonest and honest but unfortunate debtors

Presently, South African insolvency law does not formally distinguish between dishonest and honest but unfortunate insolvent debtors as is done in other jurisdictions such as the United States of America, England and Wales. Actually, South African insolvency law has either had very little development (re rehabilitation applications see *Ex parte Meine* 1937 CPD 154 where it was held that the insolvent was not to blame for his sequestration, which came about purely through misfortune; *Engelbrecht* where the insolvent debtor's honest or dishonest conduct was considered during rehabilitation application) or no development in this regard (see the rather excessive period that has to pass before automatic rehabilitation).

However, in line with international policy considerations, the South African Law Reform Commission ('SALRC') acknowledged that a debtor may become insolvent through no fault of their own and that such a debtor should be allowed to make a fresh start (para 4.6 of the South African Law Report Commission (Project 63) Explanatory Report on the review of the law of insolvency: Draft memorandum Insolvency Bill and explanatory memorandum (2000) ('2000 Discussion Paper,' '2000 Explanatory Memorandum' and '2000 Draft Bill'); see also Zingapi Mabe *A Comparative Analysis of an Insolvent's Capacity to Earn a Living Within the South African Constitutional Context* (PhD thesis, University of Pretoria 2022) 126. It must also be noted that apart from the above SALRC 2000 Discussion Paper etc, the Department of Justice and Constitutional Development also made a working document in the form of a Draft Insolvency Bill and Explanatory Memorandum available, the latest available version being the 2015 version, ie, the '2015 Draft Insolvency Bill' and '2015 Explanatory Memorandum'). It was also acknowledged that

creditors are sometimes to blame for a debtor's insolvency in that they extend credit to debtors who cannot repay it. Thus, a balance should be struck between creditors' rights and allowing debtors to make a fresh start, although, debtors should still be expected to act honestly and assist in the winding up of their insolvent estates. In line with this acknowledgement, proposals were made for the simplification of the rehabilitation application (clause 96(1) of the 2000 Explanatory Memorandum) and the amendments to sections 124, 125, 126 and 127 were indicated in clause 96 of the 2000 Draft Insolvency Bill and clauses 101 and 102 of the 2015 Explanatory Memorandum. Clause 101 of the 2015 Draft Insolvency Bill thus prescribes a four-year minimum period calculated from the date of confirmation of the first liquidation account by the Master as the general waiting period for an insolvent to apply for their rehabilitation.

It was further proposed that a court should not grant a rehabilitation order until 10 years after the liquidation of a debtor's estate if the court is satisfied, based on the Master's certificate or other evidence, that the debtor has intentionally impeded, obstructed, or delayed the administration of their insolvent estate (para 4.6.4 of the Discussion Paper 'Review of the law of Insolvency'; see also clause 97(2) of the 2000 Explanatory Memorandum; Mabe *A comparative analysis* at 129). The 10 years in this recommendation was criticised because it would delay rehabilitation since it was peremptory in all cases where the Master issues a certificate. The SALRC stated that there should be a real danger of penalisation for an insolvent and a wide discretion from the court is undesirable (clause 97.4 of the 2000 Explanatory Memorandum and clause 102.4 of the SALRC 2015 Explanatory Memorandum on the review of the law of insolvency). Thus, the recommendation was effected in clauses 97(2) of the 2000 Draft Insolvency Bill and 102(2) of the 2015 Draft Insolvency Bill. The reasoning behind the recommendation is that although a sanction is required to induce an insolvent to cooperate, it does not have to be a criminal sanction.

The commentators to the 2000 Explanatory Memorandum also criticised the 10-year period that has to pass before automatic rehabilitation. It was suggested that as the period is arbitrary, it should be reduced or a different period should apply to insolvents who have been sequestrated multiple times (clause 98.1 of the 2000 Explanatory Memorandum; Mabe *A comparative analysis* at 131). Further, in line with international trends where some countries have reduced the period for automatic rehabilitation, alternatively, there could be different periods for different scenarios. However, the Law Reform Commission stated that simplicity is desirable and advised that a rule that rehabilitation takes place after a fixed number of years unless there is a court order is simple and is recommended (see also clause 103.1 of the 2015 Explanatory Memorandum). Further, because there were limited comments

in this regard and the fact that the 10-year period in the current legislation is well known, no reduction of the period was proposed. Thus, the 10 years is retained in clause 103(1) of the 2015 Draft Insolvency Bill. This is contrary to international trends that favour shorter discharge periods and also has the potential to limit the outcome of a fresh start (Mabe *A comparative analysis* at 131). Therefore, the notion of honest and dishonest debtors still needs further development in our law.

(c) Comparative insights

In America for instance, the principle of non-discrimination in that a bankruptcy declaration does not constrain a bankrupt debtor through employment disqualifications is supported (section 525(*a*) of the Bankruptcy Reform Act of 1978 ('Bankruptcy Code'); Mabe *A comparative analysis* at 211) and a long discharge period. This is because a fresh start through discharge can occur almost immediately after filing in America (Rule 4004(c) of the Federal Rules of Bankruptcy Procedure; Mabe *A comparative analysis* at 200). However, to curb the abuse of the bankruptcy process, American bankruptcy law distinguishes between the dishonest debtor and the honest but unfortunate debtor and only the 'worthy debtors' are eligible for a fresh start through the discharge of prebankruptcy debts (Howard M 'A theory of discharge in consumer bankruptcy' (1987) 48 *Ohio State Law Journal* at 1050–1057; JT Ferriell & EJ Janger *Understanding Bankruptcy* 3ed (2013) at 1–2; Mabe *A comparative analysis* at 31). As such a fresh start through discharge is exclusively available to the honest but unfortunate debtor. However, such a discharge does not include fraudulent debts such as those incurred using false financial statements to secure credit and any debt relating to the misconduct of the debtor in the bankruptcy proceedings (section 523 of the Bankruptcy Code; Mabe *A comparative analysis* at 217). Even more, dishonest or fraudulent bankrupt debtors are harshly punished by a denial of discharge in America (section 727(*a*)(*2*) of the Bankruptcy Code; Mabe *A comparative analysis* at 219).

In England and Wales, automatic discharge of bankruptcy debts occurs after twelve months from the date of the bankruptcy order (section 279(1) of the Insolvency Act 1986 ('IA 1986') and discharge frees a bankrupt debtor from all disabilities and disqualifications to which they were subjected while having a bankruptcy status (IF Fletcher *The Law of Insolvency* 5ed (2017) at 342; SS Miller & E Bailey *Personal Insolvency: Law and Practice* 4ed (2008) at 464; Mabe *A comparative analysis* at 249). As in America, bankruptcy debts such as those incurred by fraud or fraudulent breach of trust to which the bankrupt was a party are not released by an automatic discharge in England and Wales (rule 10.146 of Insolvency Rules 2016; section 281(3) of the IA 1986; Mabe

A comparative analysis at 250). However, similar to section 127A of the South African Insolvency Act, where it appears that the undischarged bankrupt who is eligible for automatic discharge fails to comply with an obligation to which they are subject because of their bankruptcy, automatic discharge can be postponed thereby extending it until the end of a specified period or on the fulfilment of a specific condition (section 279(3) of the IA 1986; Fletcher *The Law of Insolvency* at 339). Similar to America however, England and Wales distinguish between bankrupts based on their conduct and only deserving debtors are eligible for a fresh start (paras 1.2–1.6 of The Productivity and Enterprise: Insolvency – A Second Chance Cm 5234 (2001)). Those whose conduct is not deserving of a fresh start are awarded a bankruptcy restriction order or bankruptcy undertaking (BRO or BRU) which may subject them to bankruptcy restrictions for up to fifteen years from the date of discharge (section 281A and of Schedule 4 to the IA 1986). A BRO or BRU has the effect of distinguishing between the honest and dishonest debtor, and only the bankrupt whose conduct justifies a restriction will be subjected to all the bankruptcy restrictions abolished by the Enterprise Act 2002 (Mabe *A comparative analysis* at 451).

In Australia, there is automatic discharge of dischargeable debt, that is debts that are 'provable' under section 89 of the Australian Bankruptcy Act 1966 ('Australian Bankruptcy Act'), thus by operation of law, as a rule, sets in three years from the commencement of bankruptcy (section 149 of the Australian Bankruptcy Act) which is the date on which the bankrupt files their statement of affairs. In the case of voluntary bankruptcy (debtor's petition), filing and acceptance of a statement of affairs will be on the same date as the date of bankruptcy. However, in the case of compulsory bankruptcy (creditor's petition), the 'discharge clock' doesn't start ticking until the bankrupt filed the statement of affairs (see section 149(2)*(c)*), even where the bankruptcy order has been granted. Thus, in the case of voluntary bankruptcy, the discharge clock starts earlier in Australia. In South Africa, the discharge clock starts when the sequestration order is granted, irrespective of whether it is voluntary surrender or compulsory sequestration. However, similar to the South African section 127A, the term in Australia may be extended by court order where the trustee for instance applies for an extension based on prescribed grounds set out in section 149D, in which case the discharge will be extended for a prescribed time period (section 149A of the Bankruptcy Act 1966). The term may be extended for up to five years in the case of the general grounds of objection or eight years in the case of special grounds of objection. The grounds to apply for an extension include amongst others: misleading conduct by the bankrupt; failure to provide written information about the bankrupt's property or income to the trustee; the bankrupt intentionally providing false or misleading information to the trustee; the bankrupt's failure

to disclose any particulars of income or expected income as required by a provision of the Bankruptcy Act referred to in section 6A(1) or by section 139U of the Act; or the bankrupt failed to pay to the trustee an amount that the bankrupt was liable to pay under section 139ZG (section 149D*(c)–(f)*). These grounds are similar to the grounds upon which a South African court relies to refuse or postpone automatic rehabilitation although not set out in the South African Insolvency Act as such.

The Canadian default position is that a bankrupt debtor whose estate has not been declared bankrupt before, and where no surplus income is involved, obtains an automatic discharge of dischargeable debts within nine months from the date of commencement of their bankruptcy (section 168.1(1)*(a)* of the Bankruptcy and Insolvency Act of 1985 'Bankruptcy and Insolvency Act'), unless, in those nine months, opposition to the discharge has been filed. Also, depending on prescribed conditions, or where the insolvent has been bankrupt before, the time period will be longer (section 168.1(1)*(a)*(ii) and *(b)*). For example, in terms of section 168.1*(a)*(ii), the minimum time to discharge is 21 months if the bankrupt is required to pay surplus income. Therefore, the nine-month period for discharge only applies to cases where there is no surplus income involved. Section 168.1(2) provides that a bankrupt may, however, apply to the court for a discharge before the bankrupt would otherwise be automatically discharged. Nevertheless, like in South Africa, England Wales, America and Australia, the Canadian Bankruptcy and Insolvency Act also makes provision for instances where a court may refuse a discharge such as where the bankrupt was involved in fraud or commits certain statutory offences (section 173(10)*(k)* and *(l)*), or, for instance where the bankrupt failed to comply to statutory duties in terms of the Act or court order (section 173(1)(O)).

It seems that all the countries mentioned above approach rehabilitation, within the context of the discharge of debts from the point of view that it sets in automatically after the expiration of prescribed time periods. In all the instances the minimum time periods are much lower than the automatic time period in South Africa – namely less than three years in Australia, after twelve months in England and Wales, nine months in Canada and almost immediately after filing in America.

In Australia, the objection to discharge is filed with the Official Receiver (section 149B of the Australian Bankruptcy Act) whereas in the Canadian and English systems, a court may be approached to prevent the discharge, ie, rehabilitation to set in at the expiration of the prescribed periods. In this regard, the grounds are set out clearly and amongst others relate to the prescribed conduct of the bankrupt debtor that would include acts of dishonesty or lack of cooperation with the estate representative. In America,

the 'immediate discharge' is refused for dishonest or fraudulent bankrupt debtors.

In South Africa, apart from an excessively long time period for automatic rehabilitation, namely 10 years, the insolvent who wants to rehabilitate earlier must approach the High Court by means of an application and rely on one of the prescribed grounds for rehabilitation as set out in section 124 of the Insolvency Act. Apart from the extensive period for automatic rehabilitation, the alternative being a High Court process comes with risks and a rather high-cost element. On a matter of principle, the Canadian, Australian and English systems also provide for extending the automatic discharge period but unlike South Africa, the time periods are much shorter than the local 10-year period, the process, the grounds and conditions for such extensions are more clearly set out in the legislation as well as the grounds.

Although in South African insolvency law a debtor is required to indicate the cause of their insolvency in the statement of affairs, the knowledge of the cause of insolvency does not result in a distinction between different types of debtors based on their honesty or dishonest conduct. This is because a sequestration order in South Africa imposes disqualifications on all insolvent debtors irrespective of whether the debtor became insolvent because of factors beyond their control. However, as evidenced by the factors the court considers when exercising its discretion to grant a rehabilitation order, it appears that it is only in rehabilitation applications where a real distinction is drawn between honest and dishonest debtors and in the *Engelbrecht* judgment between the cooperative and non-cooperative insolvent debtors.

Without a previous judgment on section 127A of the Insolvency Act, the *Engelbrecht* judgment has shown as is the route in America, England and Wales, Australia and Canada that dishonest conduct not only before sequestration but also during sequestration will have the harsh result of a denial of rehabilitation not only on applications for a discharge but also when automatic rehabilitation has been opposed. This punishment is even harsher in South Africa than in America, England and Wales, Australia and Canada because already in South Africa, and following our 1936 Insolvency Act, the insolvent must wait 10 years for automatic rehabilitation which is already an unreasonable and excessive period when compared to more modern systems. Moreover, during those 10 years, the insolvent is disqualified from being employed in certain employments which leads to the insolvent's descent to precarity (Z Mabe & TC Maloka 'Insolvency, employment disqualification and precarity' *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* (2024) 87 at 138). Therefore, the denial of rehabilitation inadvertently denies a debtor the opportunity to start afresh by restoring their ability to enter into contractual relations and engage in trade freely. However, despite the harsh consequences of the denial and subsequent discharge, as regards dishonest debtors, as in

America and England and Wales, this consequence may be justifiable (Z Mabe 'The Constitutional disqualification of unrehabilitated insolvents from being Members of Parliament' (2023) 56 *De Jure* at 33). However, it may be argued that it may become unreasonable due to the extensive 10-year period prescribed for automatic rehabilitation.

(d) Procedural aspects relating to an application to extend the automatic rehabilitation time period and some questions

From a procedural point of view, any interested person, like the trustee in this instance, or a creditor, will have *locus standi* to bring the application for extension (section 127A(1)). From a jurisdictional point of view, it is submitted that the same court as the court that issued the sequestration order should ordinarily be approached for such an extension order due to practical considerations. Section 127A(1)(*a*) makes it clear that the insolvent must be notified of such application. The section makes it imperative that the application must be brought, and the extension order be granted before the expiration of the 10-year period otherwise rehabilitation would have set in by operation of law.

Unlike the comparative systems referred to above, the Act is silent on the grounds for extension, but it is submitted that extension is a drastic measure – especially in view of the very long 10-year period prescribed for automatic rehabilitation as discussed above – therefore good reasons must exist for such an order to be granted. In this case, a list of reasons varying from lack of cooperation, delaying tactics to alleged dishonest shenanigans of the insolvent were cited by the applicant as a basis for the application.

The alleged dishonest and uncooperative attitude of the insolvent and the prejudicial effect of such actions on the timely completion of the administration of this insolvent estate did play a role in this judgment. Ultimately, and on a more principled basis the case turned on the fact that the insolvent through his actions prevented the trustee from being able to wind up the insolvent estate to the benefit of the creditors.

The relevant provision of the Act does not guide as to the period of extension of the rehabilitation beyond the 10-year period, or the grounds for ending it with the view of rehabilitating the insolvent. In this regard, the court merely indicated that the insolvent may apply for rehabilitation at a later stage – assumingly based on one of the grounds provided for in section 124 of the Act. Section 127A(2) to (3) tasks the Registrar of the court to inform the Deeds Registry of such extension to enter insolvency caveats in its records, and section 127A(4) states that such interdicts would remain in force until the date on which the insolvent is rehabilitated.

It is submitted that an insolvent entertaining a rehabilitation application under such circumstances should consider the reasons on which the extension was granted and apart from basing the application on one of the prescribed grounds, will have to address such reasons to establish a basis for rehabilitation by court order.

(e) Approach of courts and insolvency law regarding fraudulent insolvents

As mentioned, the conduct of the insolvent in this matter was a consideration in granting the extension order.

As to the consequences of an extension, it may be asked if the aim is to give the insolvent time to become fit for rehabilitation, and/or to meet the statutory obligations placed on them as an insolvent, and/or to ensure a more beneficial distribution to the creditors if the extension has the propensity to uncover more estate property, or to uncover fraudulent conduct on the side of the insolvent and their collaborators, and/or if it merely serves as a kind of punishment, or coercive measure for non-cooperative insolvents?

It is also not clear from either the Insolvency Act or from this judgment how long such extension should last. At some unspecified time after an open-ended extension has been granted, as in this case, a rehabilitation application will nevertheless be required and the court hearing it in the end will probably have to consider the reasons for the extension order, and if these considerations have been addressed.

(f) Duties of trustees and the insolvent

In spite of the fact that the court in this matter, did not give much weight to the respondent's argument that the trustees could have acted against him by compelling him to adhere to his obligations etc, it remains a question in general if a proper case can be argued on a particular set of facts that the trustees did not act diligently in such respect, and if the insolvent should carry the burden of an extended period of being subject to sequestration under such circumstances. Whilst agreeing that non-compliance on the side of the insolvent as well as that of the trustees in exercising their functions, may ultimately be prejudicial to the creditors, the fact that the creditors themselves did not take action, for instance, to compel the trustees to abide by their statutory duties, or to be replaced with other trustees, and/or against the insolvent, may also be a consideration for the court to consider in such applications. (It is to note that creditors may also intervene and join in opposition to such an application.) In the matter under discussion, the court was clearly influenced by the conduct of the insolvent, and in relation to the argument of inaction by the trustees etc, the court stated '[t]he compliance

is not optional, and the fact that there is no compulsion from the trustees does not excuse non-compliance from the insolvent' (para 32). The court also noticed that the insolvent did not offer reasons for not complying with his obligations except to say that the trustees (and creditors) did not compel him to do so (para 31).

Still in view of the general duties of an insolvent during sequestration, it may for instance be asked: Why did the trustees not act earlier? Did they execute their duties diligently? Yes, these are all valid questions as mentioned above. The question is whether there were effective measures to be taken, or not, and if there were, whether the trustees utilised them properly. If not, it may be asked if the insolvent should now be punished. But at the same time and on this set of facts, his conduct was not conducive to rehabilitation either.

IV SOME GENERAL RECOMMENDATIONS

In general, and as indicated, South African insolvency law does not formally distinguish between honest but unfortunate debtors and dishonest debtors, although relevant. Such distinction should, amongst others, be important when it comes to the ultimate rehabilitation of an insolvent debtor that may afford them a discharge of unpaid pre-sequestration debt. To align South African insolvency law with more progressive international jurisdictions, it is thus recommended that a proper scrutiny of the debtor's conduct before sequestration and their probable future behaviour must be required at the initial application for sequestration stage, where possible, to reveal whether the insolvency was caused by the debtor's fraudulent or dishonest dealings or whether it resulted from unfortunate financial disruptions (Mabe *A comparative analysis* at 291 and 292). In this regard, it is to be noted that the debtor must in Annexure VII of the Statement of Affairs as prescribed in Form B of the First Schedule to the Insolvency Act, provide detailed causes of their insolvency. This Statement of Affairs must lay open for inspection at the Master's Office prior to the hearing of a voluntary surrender application by the debtor and be attached to the application as such, as per section 4(3) and (6) of the Insolvency Act.

In the case of sequestration by compulsory sequestration, the debtor must in terms of section 16(2)*(b)* provide such a statement after the granting of the sequestration order. This requirement, although useful, should be further developed. The sole aim of such early enquiry into the debtor's conduct should, however, not be to deny or restrict access to the sequestration process to certain debtors if all the requirements for a sequestration order have been met (although the court still has the discretion to grant or reject the sequestration order, if not a duty, when it would amount to an abuse of process). Instead, the aim should be to identify and distinguish between the types of debtors

entering the sequestration process so the honest but unfortunate debtor can benefit from a fresh start more easily. Thus, for constitutional imperatives, all debtors should in principle have access to the sequestration process but a distinction between the types of debtors should be drawn early on so that not only the honest debtor can be protected but the public can still be protected from fraudulent debtors as well. An early inquest also allows for a consideration of the circumstances of each insolvent debtor, and the balancing of the rights in the Bill of Rights (Mabe *A comparative analysis* at 291). Further, the conduct of the insolvent during sequestration and the presence of an abuse of the sequestration process should also be factors to be considered to determine honesty or dishonesty on the part of the insolvent as evidenced in the *Engelbrecht* case (see further Mabe *A comparative analysis* at 292).

As indicated in South Africa, the court has a discretion on an application by an interested person, like the trustee, to order that automatic rehabilitation not set in after 10 years, thereby extending the period of insolvency to longer than 10 years as in the *Engelbrecht* case. This denial of automatic rehabilitation occurs after an already unreasonably long period of 10 years when compared to some modern systems, as referred to above. Thus, it is recommended that the 10 years for automatic rehabilitation be reduced to between one and three years (Mabe *A comparative analysis* at 307). South African natural person insolvency law should have an earned discharge and fresh start policy that only allows honest but unfortunate debtors to be automatically rehabilitated. Further, if the 10 years for automatic rehabilitation is reduced to between one to three years, the postponement of automatic rehabilitation to a later date under certain circumstances, as those in the *Englebrecht* case, should, in general, be retained for dishonest debtors.

Alternatively, if the 10 years for automatic rehabilitation is reduced to one to three years, dishonest debtors could obtain automatic rehabilitation. Still, they should be subjected to restriction orders after rehabilitation, similar to those in England and Wales. This should also apply to applications for early rehabilitation. In this regard, the current section 127 of the Insolvency Act clothes the courts' hearing rehabilitation applications with wide powers when hearing rehabilitation orders, and the court may set conditions and even order that some pre-sequestration debt not be discharged at the granting of rehabilitation – as such this section sets the scene for further development along the lines proposed above. Within the law reform context, circumstances that could lead to the postponement of automatic rehabilitation and awarding of restriction orders could be the same as those the court currently relies on to deny an application for rehabilitation (Mabe *A comparative analysis* at 242). Therefore, whether upon an early rehabilitation application or by operation

of law through effluxion of time, only the honest but unfortunate debtor should be rehabilitated within a much-reduced period.

V CONCLUSION

This judgment, the first reported one on this matter, is important in that it provides some guidance as to the basis for applying to the court to extend the rehabilitation period before the expiration of the 10-year period provided for so-called automatic rehabilitation, or rehabilitation by the effluxion of time.

In the absence of statutory guidance for an application of this nature, the court, by exercising its wide discretionary powers in this context, applied considerations developed by our courts over many years to consider if an insolvent who applies for rehabilitation is fit and proper to be rehabilitated. To this extent, the judgment cannot be faulted and within the current statutory requirements for rehabilitation, it certainly portrays the local approach to grant rehabilitation, or not.

Although it was raised by the insolvent-respondent in this application the court did not attach much weight to the argument that the trustees (or creditors for that matter) should have acted earlier by compelling the insolvent to cooperate. In this regard, the insolvent's actions were seemingly enough to convince the court that the trustees could do no more.

It is also clear from the judgment that the notion of the benefit of creditors remains relevant even at the stage of rehabilitation, either by means of court application or through effluxion of time as in this case. The conduct of the insolvent during the post-commencement period (ie, during the administration of the insolvent estate phase) remains highly important and will be a consideration when such insolvent applies for rehabilitation, but also where an interested person, like the trustee in this case, applies for an extension of rehabilitation beyond the prescribed 10-year period as discussed. It is also clear that dishonest or fraudulent acts by the insolvent will play a definite role in both instances in order to lead the court to hear such applications to grant the respective orders or not.

From a procedural point of view, some aspects concerning the application have been highlighted in view of the absence of specific rules in the Insolvency Act in this regard. It is, however, clear that uncertainties remain, like clear guidelines as to the duration of such an order and how rehabilitation should be effected in the end. In this regard, it seems the procedure will require a rehabilitation application by the insolvent and some recommendations were made.

On a comparative note, some modern approaches concerning rehabilitation were discussed and it is clear that the South African insolvency law relating to the rehabilitation of natural person debtors is somewhat lagging behind in

general, in that a very long period for automatic rehabilitation is prescribed amongst other things. It is submitted that our rules for rehabilitation need to be reconsidered.

It is also evident from the brief comparative study that much can be done from a procedural and substantive point to improve the grounds and conditions for an extension order, whilst a formal distinction between honest and dishonest insolvents will also be helpful in this regard. The comparative systems included in this note also provide for discharge by operation of law (or rehabilitation, to use the South African term) within a much shorter time period than the 10-year default position prescribed by the South African Insolvency Act in this regard.

A final word (or two) on the judgment is that although the judgment on the facts seems to be rational, the facts of each case must of course be considered before an extension is granted. It is submitted that such an extension remains a drastic measure, especially in view of the excessively long period for automatic rehabilitation prescribed by our dated Insolvency Act. In general, it is submitted that the inaction of creditors and trustees should at least be a consideration when considering such an extension. Nevertheless, the rehabilitation rules and conditions need an overhaul as part of the ongoing insolvency law reform process, and these must be considered using a proper policy-based approach. Spelling out some rules regarding the extension of rehabilitation in particular would also be conducive in a modern paradigm.

Lastly, on the importance of the role of rehabilitation of insolvent debtors in economic development, it is apt to conclude with some quotes from a book chapter by Jose Garrido, titled 'The role of personal insolvency in economic development' in the *World Bank Legal Review* (2014) Vol 5 at 111–127, available at https://openknowledge.worldbank.org/handle/10986/16240, where he, with reference to the *2014 World Bank: Report on the Treatment of the Insolvency of Natural Persons*, states at 118 that '[a] personal insolvency regime provides relief to "honest but unfortunate" debtors and their families, and it benefits society as a whole by addressing wider social issues', and at 124 that '[o]ne of the principal purposes of an insolvency system for natural persons is to reestablish the debtor's economic capability, in other words, economic rehabilitation, and discharge is the most effective way in which the debtor can resume productive activity for society. It is also the most effective incentive for the use of a personal insolvency regime.'