

Zimbabwe's natural person debt relief system: Much-needed relief for No Income No Asset (NINA) debtors or 'out with the new'?¹

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SUMMARY

Access to debt relief measures and a concomitant discharge of debts are some of the most fundamental elements of an effective natural person debt relief system. Failure to gain access to debt relief measures – due to, among others, stringent access requirements has plagued No Income No Asset (NINA) debtors in many jurisdictions worldwide. In response to this plight of NINA debtors, a remarkable trend in insolvency law has been witnessed which seeks to accommodate the needs of this widely excluded group of debtors. Zimbabwe is one of the countries which has responded positively to this trend by reforming its natural person debt relief system. This has seen the introduction of a consolidated Insolvency Act 7 of 2018. The Insolvency Act introduces the novel pre-liquidation and post-liquidation compositions to the debt relief system. This paper examines the treatment of NINA debtors in the recently reformed natural person debt relief system of Zimbabwe. This examination has reviewed that the natural person debt relief system affords relief to over-committed debtors with excess income and/or disposable assets while ostracising NINA debtors. Additionally, this paper also juxtaposed Zimbabwe's natural person debt relief system with internationally regarded principles and policies in insolvency law as outlined in the World Bank *Report on the treatment of the insolvency natural persons* and provided necessary recommendation for the reform of the prevailing debt relief measures.

1 Introduction

The plight of No Income No Asset (NINA) debtors has been brought to the fore by researchers in many jurisdictions worldwide.² This plight is characterised by the failure of NINA debtors from accessing debt relief measures and obtaining a much-needed discharge of debts.³ This exclusion from accessing debt relief measures results in NINA debtors being perpetually trapped in debt and left vulnerable to creditor intimidation.⁴ This paper seeks to explore the under-researched natural person debt relief system of Zimbabwe and critically examine its treatment of the NINA group of debtors. This examination will especially

1 This article is partly based on an on-going research currently titled *Debt relief as part of the social safety net: A comparative appraisal of natural person insolvency in Zimbabwe* (LLD thesis UP).

be directed towards determining the extent to which the natural person debt relief system affords or inhibits access and facilitates a concomitant discharge of debts to NINA debtors.

No published research of the Zimbabwean natural person debt relief system has been undertaken thus far, therefore; this paper provides a ground-breaking analysis of the system by exploring the treatment of NINA debtors at the background of worldwide exclusion of this group of debtors. On a secondary level, this paper utilises the non-prescriptive guidelines stipulated in the World Bank *Report* as the benchmark to measure the treatment of Zimbabwe's NINA debtors and provide recommendation for reform of the system, where necessary. The World Bank *Report* is of interest in this article because it provides internationally regarded policies, principles and guidelines which are essential in facilitating reform of the natural person debt relief system into an effective and inclusive system that balances the interests of all stakeholders in insolvency,⁵ especially, the NINA category which form the subject of this paper.

2 Zimbabwe's natural person debt relief landscape

Zimbabwe's debt relief system has recently been reformed by the introduction of the Insolvency Act 7 of 2018⁶ that is aimed at regulating the administration of insolvent and assigned estates and the consolidation of insolvency legislation.⁷ The Insolvency Act consolidates the natural and juristic person regulation by repealing Chapter 6:04,

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- 2 See, Ramsay "The new poor person's bankruptcy: Comparative perspectives" 2020 *Int Insol Rev* 4-24; Coetzee and Roestoff "Rectifying an unconstitutional dispensation? A consideration of proposed reforms relating to no income no asset debtors in South Africa" 2020 *Int Insol Rev* 95-115; Schwartz and Ben-Ishai "Establishing the need for a low-cost Canadian debt relief procedure" 2020 *Int Insol Rev* 25-43; Littwin 2020 *Int Insol Rev*; Heuer "Hurdles to debt relief for "no income no assets" debtors in Germany: A case study of failed consumer bankruptcy law reforms" 2020 *Int Insol Rev* 44-76; Frade and de Jesus "NINA?LILA debtos under the Portuguese Insolvency Act: A hidden problem in plain sight?" 2020 *Int Insol Rev* 77-94.
 - 3 See, among others, World Bank *Report on the treatment of natural persons*, 2013 45 (hereafter 'the World Bank Report'), where access and discharge are regarded as some of the core legal attributes of an insolvency regime for natural persons.
 - 4 See, among others, Boterere *The proposed debt intervention measure 1* (LLM mini-dissertation UP, 2019); World Bank *Report on the treatment of the insolvency of natural persons* 36 (hereinafter the World Bank Report)
 - 5 Madhuku "Insolvency and the corporate debtor: Some legal aspects of creditors' rights under corporate insolvency in Zimbabwe" 1995 *Zim Law Review* 85.
 - 6 The Insolvency Act 7 of 2008 (hereinafter the Insolvency Act). The Insolvency Act came into operation on 25 June 2018.
 - 7 Preamble of the Insolvency Act.

which previously regulated the natural person debt relief system in Zimbabwe through the liquidation procedure.⁸ The consolidated Insolvency Act incorporates the liquidation measure,⁹ pre-liquidation composition,¹⁰ post-liquidation composition,¹¹ and juristic person liquidation.¹²

The pre-liquidation and post-liquidation compositions are novel features in Zimbabwe's debt relief system that were introduced into the system by the Insolvency Act.¹³ No explanatory notes were provided to indicate the objectives of these newly introduced measures, however, the pre-liquidation composition's origins can be traced to South Africa's natural debt relief system.¹⁴ The procedure, which is yet to be operational in South Africa's insolvency regime,¹⁵ was proposed at the background of NINA debtor exclusion and was advanced with the aim of remedying this exclusion.¹⁶ South Africa's NINA debtor exclusion has been aptly described as an unfair discrimination that is tantamount to an unconstitutionality of the debt relief system.¹⁷

This paper comprehensively analyses the pre-liquidation and the post-liquidation compositions along with the liquidation procedure regulated by the Insolvency Act. This analysis seeks to determine whether Zimbabwe's natural person insolvency regime comprehensively caters for the needs of NINA debtors. Furthermore, the paper juxtaposes Zimbabwe's natural person debt relief system's treatment of NINA debtors with internationally regarded principles as outlined in the landmark World Bank *Report*. This juxtaposition is aimed at aligning Zimbabwe's natural person debt relief system's regulation of NINA

8 *Ibid.*

9 Part II – XXI of the Insolvency Act.

10 S 119 of the Insolvency Act.

11 S 120 of the Insolvency Act.

12 Juristic person liquidation will not be discussed in this paper as it does not fall within the scope of this study. It is mentioned here to provide a holistic understanding of the general insolvency landscape in Zimbabwe.

13 However, it should be noted that compositions were previously recognised in Zimbabwe's debt relief system in terms of s 136 of Chapter 6:04.

14 See, National Credit Amendment Act 7 of 2019.

15 The National Credit Amendment Act of 2019 was signed by the president of the Republic of South Africa on 13 August 2019.

16 For a detailed discussion of South Africa's natural person debt relief system, see, among others, Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* (LLD thesis UP, 2015). It should be noted that South Africa's natural person debt relief system is in active process of reform by seeking to accommodate NINA debtors through the introduction of the debt intervention measure in terms of the National Credit Amendment Act 7 of 2019. The National Credit Amendment Act 7 of 2019 was signed by the president of the republic of South Africa on 13 August 2019, however, it is not yet operation. South Africa's debt relief system is not discussed in detailed because it will derail the focus of this paper.

17 See, Coetzee "Is the unequal treatment of debtors in natural person insolvency law justifiable?: A South African exposition" 2016 *Int Insolv Rev* 36.

debtors with internationally regarded principles and trends in insolvency law.

3 The liquidation procedure

The primary natural person debt relief measure in Zimbabwe is the liquidation procedure. Pursuant to a liquidation order, available to debtors whose liabilities exceed their assets or unable to pay their debts,¹⁸ custody and control over a debtor's non-exempt property¹⁹ is transferred to the Master.²⁰ Thereafter, a liquidator must dispose the property and utilise the proceeds from such disposition to, among others, defray the costs of the procedure and to repay unsecured creditors from the free residue.²¹ Summarily, it is essential that a debtor has disposable assets, thus, the procedure excludes NINA debtors who lack the requisite assets.

The liquidation procedure may be commenced by a voluntary application by the debtor to a court,²² or through a compulsory application by his creditors.²³ Debtors who have gained access to the procedure may automatically be rehabilitated after the effluxion of a 10 year period.²⁴ Rehabilitation has the effect of discharging all debts of the debtor²⁵ and this gives the debtor an opportunity to restart his life, without the burden of debts. Discharge of debts is in line with international principles in insolvency, this enables a debtor to re-enter the credit economy.²⁶

18 S 14(b)(ii) of the Insolvency Act.

19 *Idem* s 19(a). Property exemption is essential and is connected to discharge. Through an exemption of property, a debtor who has obtain a discharge of debts will be provided with sufficient property to meet post-insolvency minimum domestic needs for himself and his family; World Bank *Report* 76.

20 *Idem* s 19(1)(a) read with s 42(7). The property will be in custody and under the control of the Master until a liquidator is appointed.

21 *Idem* s 89.

22 S 4(1) of the Insolvency Act. A trend has been noted in insolvency law which has seen a widespread preference of out of court debt settlement informal procedures over formal court based insolvency procedures; World Bank *Report* 45.

23 S 6 of the Insolvency Act.

24 *Idem* s 108. This period may be shortened through a court application in terms of s 106. This is in contrast with international trends where it is noted that the most common repayment terms tend to fall between three to five years; World Bank *Report* 88. Therefore, Zimbabwe's liquidation procedure is unnecessarily long and cumbersome on debtors who are hindered from re-entering the credit economy because of their participation in the insolvency system.

25 *Idem* s 109(b).

26 Effective discharge or economic rehabilitation must be accompanied by three elements, namely, freeing a debtor from excessive debt, non-discrimination of debtors and avoidance of future over-indebtedness; World Bank *Report* 117.

Despite the benefits arising to debtors through the discharge option, the liquidation measure does not cater for the needs of NINA debtors because access to the measure is a ‘privilege’ only available to debtors who can afford the costs associated with the procedure.²⁷ Additionally, to access the liquidation procedure a debtor must provide:

“A certificate of the Master, issued not more than 14 days before the date on which the application is to be heard by the Court, that sufficient security has been given for the payment of all cost in respect of the application that might be awarded against the applicant, and all costs of the liquidation of the estate that may be incurred until the appointment of a liquidator”.²⁸

Consequently, because of the procedure’s stringent access requirements, NINA debtors are hindered from accessing the liquidation procedure because they lack the requisite income to offer security for the payment of costs related to the application. Therefore, this paper argues that the liquidation procedure ostracises NINA debtors through the stringent financial requirements that do not allow access to the measure to indigent consumers.

Additionally, the liquidation procedure further ostracises NINA debtors through its pro-creditor requirements. The creditor-oriented nature of the liquidation procedure is highlighted through the ‘advantage for creditor’ requirement, that runs throughout the Act.²⁹ In terms of the ‘advantage for creditors’ requirement, a court can only grant an order of liquidation if it is proven that such liquidation is to the advantage of creditors.³⁰ Therefore, the liquidation procedure excludes NINA debtors because they lack the any excess income and/or disposable assets which can offer the necessary advantage to creditors. Consequently, it can be concluded the liquidation procedure does not cater for the needs of NINA debtors.

4 Alternative debt relief measures

An insolvent debtor who wishes to access Zimbabwe’s natural person debt relief system, can utilise the composition procedure.³¹ The composition procedure is a voluntary debt restructuring agreement between the insolvent debtor and his creditors. The World Bank *Report* notes that informal voluntary debt restructuring agreements are crucial to an insolvency regime because of their advantages they offer which

27 See s 88 of the Insolvency Act for an indication of the costs of liquidation which must be repaid from the debtor’s estate.

28 *Ibid* s 4(4)(b).

29 Ss 4(8)(a)(ii), 14(1)(b)(i), 15(1)(c) and 50(6) of the Insolvency Act.

30 This is in contrast with international trends in insolvency that have witnessed a departure from creditor-oriented insolvency regimes to regimes that balance the interests of all stakeholders in insolvency; Borraine and 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 (1)” 2014 77 *THRHR* 351 and Coetzee 2016 *Int Insolv Rev* 36.

31 Part XXII of the Insolvency Act.

includes aiding debtors in avoiding the stigma attached to insolvency, lower procedural costs compared to formal procedures, providing an incentive to debtors to make a higher offer to creditors to avoid the inconveniences of the court procedure and flexible thereby accommodating the needs of all stakeholders in insolvency.³²

The World Bank *Report* indicates that a trend has emerged in natural person insolvency which favours the use of informal debt relief procedures over formal procedures and that it is essential for a formal debt relief system to encourage informal negotiation and resolution between a debtor and his creditors.³³ Additionally, the World Bank *Report* notes that this has resulted in a two-stage approach to insolvency in many jurisdictions whereby debtors are required to access informal negotiated settlements before they can gain access to formal measures.³⁴

Despite the many benefits emanating from utilising informal procedures, the World Bank *Report* cautions against the illusory nature of voluntary settlements and the possibility of creditors using their bargaining power to pressure debtors into accepting onerous payment plans.³⁵ Zimbabwe's composition procedure is divided into two processes, namely, pre-liquidation composition,³⁶ and post-liquidation composition,³⁷ and these are discussed below.

4 1 The pre-liquidation composition

The pre-liquidation composition supports out-of-court negotiated settlements between a debtor and his creditors.³⁸ The procedure is a transplant of the proposed pre-liquidation composition in South Africa's debt relief system, in terms of the 2015 Insolvency Bill.³⁹ The use of the term 'pre-liquidation' is misleading, because it creates the impression that the procedure is only available to debtors who intend or are in the process of accessing the liquidation procedure, but who have not yet obtained an order for liquidation or where the liquidator is yet to

32 World Bank *Report* 46.

33 *Idem* 45.

34 *Idem* 46.

35 *Idem* 47.

36 S 119 of the Insolvency Act.

37 *Idem* s 120.

38 See, World Bank *Report* 46. This is in line with international principles as debt relief matters are dealt with by institutions or bodies which are better suited to handle financial matters. Furthermore, where an attempt to settle the debt voluntarily has failed, the well matter can be filed to the court thereby making it easier to process and alleviating pressure on the judiciary system.

39 For a detailed analysis of the proposed procedure in the South African debt relief system, see, among others, Coetzee "Does the proposed pre-liquidation composition proffer a solution to the No Income No Asset (NINA) debtor's quandary and, if not, what would?" 2017 *THRHR* 18-26.

liquidate the debtor's assets.⁴⁰ However, it might be interpreted that the use of the term merely points to the procedure being accessible to debtors who have not applied for and/or accessed the liquidation procedure. The latter interpretation is preferred, because it accommodates debtors who cannot meet the stringent access requirements of the liquidation procedure.⁴¹

The pre-liquidation composition can be accessed by a debtor with debts of less than \$20 000, who cannot satisfy his financial obligations.⁴² A debtor may initiate the pre-liquidation composition by lodging a signed copy of the composition and a sworn statement with an administrator.⁴³ Thereafter, the administrator must arrange a hearing between the debtor and his creditors.⁴⁴ The administrator is better suited to handle financial matters compared to the court system, however, this paper calls for the introduction of a low or free cost assistance to debtors by mediators with credibility to both debtors and creditors. Jurisdictions where trusted mediators play a role in negotiations have indicated a higher percentage of creditor participation thereby increasing the effectiveness of the insolvency regime.⁴⁵ The mediator can also offer free financial counselling to debtors thereby empowering them to make better financial decisions as a benefit for accessing the insolvency regime.

A moratorium on debt enforcement becomes effective between the determination of a date for a hearing and the conclusion of the hearing.⁴⁶ This is a praiseworthy feature which is in line with international trends. It has been remarked that voluntary negotiations have been successful in jurisdictions where debtors are not threatened with debt enforcement while the negotiations are ongoing.⁴⁷ At the hearing, the administrator and any interested credit provider may investigate and question the debtor on his financial circumstances.⁴⁸ The composition must be accepted by two-thirds of the concurrent creditors for it to be binding between the debtor and all his creditors.⁴⁹ This provision assists in alleviating non-acceptance of settlements due to creditor passivity which is an essential feature for voluntary debt agreements.⁵⁰

40 *Ibid.* Similar observation was made regarding the proposed pre-liquidation composition in the South African debt relief system.

41 If the former interpretation is utilised, all debtors who cannot meet the access requirements of the liquidation procedure will also be hindered from accessing the pre-liquidation procedure because access to the liquidation procedure will be a pre-requisite to access the pre-liquidation procedure.

42 S 119(1) of the Insolvency Act.

43 *Ibid.*

44 S 119(6) read with s 119(7) of the Insolvency Act.

45 World Bank *Report* 49.

46 S 119(29) of the Insolvency Act. See, Coetzee 2017 *THRHR* 23 in the context of the South Africa's proposed pre-liquidation composition, where it is argued that the moratorium on debt enforcement must become effective once a debtor applies for the procedure.

47 World Bank *Report* 49.

48 S 119(8) of the Insolvency Act.

49 S 119(15) of the Insolvency Act.

50 World Bank *Report* 49.

The pre-liquidation composition is not suited to NINA debtors' needs. Despite being a streamlined procedure, which does not carry the same procedural costs associated with the liquidation procedure, this procedure cannot be successfully utilised by the NINA group of debtors. This is because the measure requires an agreement between a debtor and his creditors despite the two parties occupying an unequal bargaining position in relation to one another. Because NINA debtors do not have anything to offer creditors, they do not have any bargaining power, thus, concluding a favourable agreement is highly improbable.⁵¹ This unequal bargaining position occupied by the debtor may be detrimental because they can be pressured by creditors into accepting onerous payment plans that are not viable.⁵² However, where a debt restructuring proposal is accepted, NINA debtors will not be able to meet their obligations because they lack the requisite income and/or assets to enable a debt re-arrangement. Owing to this inequality, the *World Bank Report* has indicated that voluntary settlements have often had illusory benefits because they usually lead to the conclusion of unenforceable agreements reached through undue pressure by creditors.⁵³

Non-acceptance of the composition by creditors triggers the second part of the procedure, which leads to a discharge of debts. Where a majority of creditors have rejected the composition and the debtor cannot make a substantially different offer to creditors than that which he had offered,⁵⁴ the administrator must declare that the proceedings have ceased.⁵⁵ Thereafter, the administrator must lodge a copy of the declaration with the Master of the High Court.⁵⁶ Upon application by the debtor, the Master may grant a discharge of unsecured debts if:⁵⁷

- (i) the debtor satisfies the Master that the administrator and all known creditors were given standard notice of the application for the discharge with a copy of the debtor's application at least 28 days before the application to the Master; and
- (ii) the Master is satisfied after consideration of comments, if any, by creditors and the administrator and the application by the debtor –
 - (a) that the composition was the best offer which the debtor could make to creditors;
 - (b) that the inability of the debtor to pay debts in full was not caused by criminal or inappropriate behaviour by the debtor.

51 See, Coetzee 2017 *THRHR* 25.

52 *World Bank Report* 47.

53 *Ibid.*

54 S 119(28) of the Insolvency Act.

55 S 119(28)(a) of the Insolvency Act.

56 As above. Master of the High Court (hereafter 'the Master').

57 S 119(28)(b) of the Insolvency Act.

It is notable that the pre-liquidation composition may lead to a possible discharge of debts for *bona fide* debtors. However, the procedure is not suited to NINA debtor's needs.⁵⁸ The composition procedure is initiated by an offer for a debt re-arrangement, which NINA debtors cannot make, because they neither have the income nor the assets to make an offer for composition. Where a NINA debtor, who lack the necessary income and/or assets, makes an offer for composition, the offer will not result in a financial benefit for creditors, because the debtor is incapable of meeting his obligations in terms of the offer. The negotiation phase of the pre-liquidation composition is not suitable to the financial circumstances of NINA debtors who lack any negotiating power.⁵⁹ While evaluating South Africa's proposed pre-liquidation composition, Coetzee puts forward that "administrators would further not be willing to set security where there is insufficient value in the estate to cover costs".⁶⁰ Furthermore, the procedural costs, which include the expenses of the administrator, render the procedure unaffordable to NINA debtors who cannot afford the costs.

4 2 The post-liquidation composition

Alternatively, a debtor who has gained access to the liquidation procedure can enter into a settlement with his creditors through the post-liquidation composition.⁶¹ This requirement excludes NINA debtors who are excluded from accessing the liquidation procedure because of the lack of income and/or assets necessary for the procedure.⁶² A debtor can initiate the post-liquidation composition by lodging a written offer of composition with the liquidator.⁶³ The offer of composition may be lodged "at any time after the issuing of the first liquidation order but after he has sent his statement of affairs".⁶⁴ The post-liquidation composition is a debt re-arrangement settlement, which does not lead to a discharge of debts. The procedure is not suited to the needs of NINA debtors, because it is only available to debtors who have already gained access to the liquidation procedure. As indicated above, NINA debtors cannot access the liquidation process because of the procedure's stringent access requirements.

58 See, among others, Coetzee 2017 *THRHR* 25 who makes the same determination in her evaluation of the proposed procedure in the South African debt relief system.

59 *Ibid.*

60 Coetzee 2017 *THRHR* 25.

61 S 120 of the Insolvency Act.

62 See part 3 above for the discussion of the exclusion experienced by NINA debtors in the liquidation procedure.

63 S 120(1) of the insolvency Act.

64 *Ibid.*

5 Concluding remarks and way forward

The World Bank *Report* indicates that access and a discharge of debts are essential features of an effective and inclusive debt relief system. Failure to gain access to a debt relief system has left many NINA debtors vulnerable to creditor intimidation and being perpetually trapped in debt. This failure to access debt relief measures is experienced by NINA debtors worldwide because of the stringent access requirements which prohibit such debtors from accessing the insolvency regime and obtaining a much-needed discharge of debts.

This paper examined the treatment of NINA debtors in Zimbabwe's debt relief system and highlighted the side-lining of this category of debtors which is characterised by their failure from accessing Zimbabwe's insolvency regime. Despite, the liquidation procedure providing a discharge of debts to debtors who had a 'privilege' of accessing the measure – it fails to cater to the needs of NINA debtors who lack an income and/or assets necessary for the procedure.

With the reform of Zimbabwe's debt relief system, through the introduction of the pre-liquidation composition whose origins can be traced in the South African debt relief system and the post-liquidation composition, Zimbabwe's legislature has attempted to accommodate the excluded NINA debtors. It is notable that the pre-liquidation composition offers a discharge options, however, it fails to accommodate the needs of NINA debtors who cannot participate in a negotiation phase because they lack the necessary bargaining power. This paper has argued that the pre-liquidation composition is not suited to the needs of NINA debtors. However, it can be utilised by other groups of debtors who can meet the procedure's stringent financial requirements and are thus capable of successfully utilising this informal streamlined procedure which does not carry the costs of the formal liquidation procedure and affords a discharge of debts.

This paper's examination of the post-liquidation composition has reviewed that the procedure also excludes NINA debtors. This exclusion emanates from the procedure's access requirement that requires a debtor to gain access to the liquidation procedure before applying for the post-liquidation composition.

This paper has indicated that Zimbabwe's natural person debt relief system is exclusionary in nature because it excludes NINA debtors. This emanates from stringent access requirements associated with debt relief measures that are not in line with international trends in insolvency law. This paper calls for the reform of Zimbabwe's natural person debt relief system into an inclusive and effective system that caters for the needs of all debtors, especially the excluded NINA debtors. Zimbabwe's natural person debt relief system can be reformed through various means, which include, among others:

- Implementing a means-test in all insolvency measures which is aimed at identifying debtors who cannot afford to pay the costs associated with debt relief and offering a discharge option to such debtors thereby accommodating the indigent NINA debtors;
- Implementing a two-stage approach to debt relief. This entails making access to informal procedures a pre-requisite for applicants to be granted access to the primary debt relief measure, namely, the liquidation procedure. This will assist in encouraging debtors to seek relief by accessing the debt relief system thereby avoiding the stigma which accompany formal debt relief measures. Furthermore, this will potentially assist in alleviating the delays associated with court related settlements and aligning Zimbabwe's debt relief system with international trends in insolvency;
- Government oversight over the informal alternatives to insolvency procedures. This can be achieved by utilising government funded mediators with experience in financial matters and is trusted by both creditors and debtors; and
- Aligning Zimbabwe's natural person debt relief system with international trends in insolvency law by, among others, shifting from a pro-creditor system which seeks to uphold and protect the interests of creditors at the expense of debtors.