

Does the treatment of arrear maintenance claims of children under the Insolvency Act 24 of 1936 constitute a violation of their constitutionally protected rights to social welfare and human dignity? An exposition

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SUMMARY

The time and space for the reformation of the Insolvency Act 24 of 1936 has presented itself through the introduction of a constitutional order in 1996. However, the legislature has thus far proven to fail in its responsibility to align consumer insolvency legislation with the values and rights that are contained in the Constitution of the Republic of South Africa, 1996. The Constitution appreciates the vulnerability of children and thus affords special protection to the rights of children, including their rights to social welfare. It further guarantees children that their best interest reign supreme in every matter concerning them. The Constitution also guarantees children the right to human dignity, which right is also a value underlying South African constitutional jurisprudence. These constitutionally guaranteed rights of children to social welfare and human dignity do not enjoy protection under South African consumer insolvency law, particularly in the treatment of arrear maintenance claims of children against the estate of an insolvent debtor. Children's maintenance arrear claims do not enjoy any preference as they are treated as concurrent claims. This also burdens them with the liability to contribute towards the costs of sequestration if they have successfully proven claims and where there are insufficient funds in the free residue account. Children's maintenance arrear debts are not exempt from the discharge of pre-sequestration debt under South African consumer insolvency jurisprudence. The overall approach to the treatment of children's arrear maintenance claims compromises the rights of children to social welfare and human dignity as guaranteed in the Constitution.

1 Introduction

The constitutional dispensation in South Africa has introduced a completely new societal paradigm that is founded on the values of human dignity, the achievement of equality, and the advancement of human rights and freedoms.¹ The 1996 Constitution enjoys supremacy

* This article is partially drawn from my LLM dissertation.

1 S 1(a) of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution).

over any other law in the Republic.² This implies that any law (including the Insolvency Act 24 of 1936 (hereinafter the Insolvency Act or the Act)) that is inconsistent with it is invalid.³ The Insolvency Act has been in existence before the constitutional dispensation was ushered in 1996. Despite the backdrop of the new constitutional dispensation, the legislator has failed to drastically reconsider the Insolvency Act in an attempt to align it with the values that the constitutional era is founded. In the premise, this article aims to evaluate whether the treatment of child arrear maintenance claims under the consumer insolvency legislation as concurrent claims, burdening such creditors with the liability to contribute towards the costs of sequestration, and not exempting such claims from discharge constitutes a violation of the rights of children to social welfare and human dignity.

2 An overview of consumer insolvency law in South Africa

2.1 Policy perspective

Consumer insolvency in South Africa is primarily regulated by the Insolvency Act. The Act is primarily aimed to provide for an effective debt collection mechanism for creditors, for the fair and orderly distribution of an insolvent debtor's estate among creditors, where he has been sequestered as a result of insufficient assets in his estate to cover all the claims of creditors.⁴ Where an insolvent debtor has been sequestered as a result of insolvency, the *concursum creditorum* comes into being. This means that the interests of the creditors as a group are prioritised over the interests of an individual creditor.⁵ It was held in the *locus classicus* of consumer insolvency in South Africa that:

The object of the [Insolvency Act] is to ensure a due distribution of assets among creditors in the order of their preference ... The sequestration crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to the estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.⁶

The object of consumer insolvency in South Africa is to afford creditors a financial advantage by providing for the fair and orderly distribution of an insolvent debtor's estate.⁷ Its objective is not necessarily to relieve

2 S 2 of the Constitution.

3 As above.

4 Bertelsmann (ed) *Mars: The law of insolvency in South Africa* (2019) 3.

5 As above.

6 *Walker v Syfret* 1911 AD 141 para 166.

7 Ss 6, 10 and 12 of the Insolvency Act.

debtors from excessive debt.⁸ An application for sequestering an insolvent debtor's estate is granted once a court is satisfied that the requirements set out in sections 6(1) and 12(1) of the Insolvency Act are met, of these requirements, the most decisive one is that the granting of the order would be advantageous to creditors.⁹ The Constitutional Court in *Stratford v Investec Bank Ltd*¹⁰ held that the requirement for "advantage for creditors" entails that the sequestration order will yield reasonable prospects that the body of creditors as a whole will eventually yield a financial benefit from the insolvent debtor's estate. In *Gardee v Dhamanta Holdings*,¹¹ the presiding judge remarked that the sequestration of an insolvent estate will be advantageous if it is likely to result in better proceeds to creditors than what the ordinary execution procedures have to offer. The courts exercise judicial discretion in determining whether or not the granting of a sequestration order will be to the advantage of creditors.¹² The order for sequestration is granted when a court has satisfied itself that the order will have a prospect of bearing a financial benefit to the body of creditors as a whole.¹³ The effect of the order is that the insolvent debtor will be discharged from all pre-sequestration debts.¹⁴ However, this effect is not necessarily the main object of consumer insolvency in South African law, it is merely a consequence thereof.¹⁵

2 2 Sequestration of an insolvent debtor

The sequestration of an insolvent debtor takes place either by way of voluntary surrender or by way of compulsory sequestration.¹⁶ An application for voluntary surrender is brought by the insolvent debtor or a person acting on his behalf.¹⁷ Where the debtor is married in community of property, both parties must jointly apply for the surrender.¹⁸ The applicant(s) for voluntary surrender must comply with procedural and substantive requirements outlined in the Act before an order for sequestration can be granted by the court.¹⁹ The applicant(s) is vested with the obligation to publish a notice of surrender in the Government Gazette and in the newspaper circulating in the magisterial

8 Roestoff and Coetzee "Consumer debt relief in South Africa; lessons from America and England; and suggestions for the way forward" 2012 *SA Merc LJ* 75.

9 Boraine 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" 2014 *World Bank Legal Rev* 94.

10 2015 3 SA (CC) para 43.

11 1978 1 SA 1066 (N).

12 *Julie Whyte Dress (Pty) Ltd v Whitehead* 1970 3 SA 218 (D).

13 *Meskin and Co v Friedman* 1948 2 SA 555 (W) para 558.

14 S 129(1)(b) of the Insolvency Act.

15 *Ex Parte Ford* 2009 3 SAC 376 (WCC) para 383.

16 See ss 6 and 12 of the Insolvency Act.

17 S 3(1) of the Insolvency Act.

18 S 17(4)(a) of the Matrimonial Property Act 88 of 1984.

19 See ss 4 and 6 of the Insolvency Act.

district where he resides or where his principal business is located.²⁰ The notice ought to be published no less than fourteen days and no more than thirty days before the application is heard by the court.²¹ The effect of the notice of surrender is that it stays all executions against the insolvent debtor's estate,²² the debtor commits an act of insolvency,²³ and a *curator bonis* may be appointed by the Master of the High Court to temporarily take control over the estate.²⁴ All the possible creditors of the applicant(s) must be served with a notice of surrender within seven days of publishing the notice.²⁵ The registered trade unions representing the employees of the insolvent debtor, the employees, and the South African Revenue Services (SARS) must be served with the notice as well.²⁶ The Insolvency Act also prescribes that the insolvent debtor must prepare a statement of affairs confirming his assets and liabilities, and send a copy thereof to the Master where he resides or carries on his business.²⁷ In the event that there is no Master's office in that area, the debtor must send the copy to the provincial Master's office and the local magisterial office.²⁸ There are three substantive requirements that an applicant for voluntary surrender must comply with before a sequestration order can be granted by the High Court. First, he must prove that he is actually insolvent.²⁹ Second, there will be sufficient value in the free residue to cover the costs of sequestration.³⁰ Third, the sequestration order will be to the advantage of creditors.³¹ When a court is satisfied that the procedural and substantive requirements have been met, the court will grant an order for the sequestration of the insolvent debtor's estate.³²

An application for compulsory sequestration transpires where a creditor(s) of a debtor initiates an application to the effect that the estate of the debtor must be sequestered.³³ Applicants for compulsory sequestration are required to furnish the Master of the High Court with security for the payment of all the costs of sequestration until a

20 S 4(1) of the Insolvency Act.

21 As above.

22 S 5 of the Insolvency Act. The executions against the insolvent debtor are stayed because of the principle of the *concursum creditorum* as discussed in para 2.1.

23 S 8 of the Insolvency Act. An act of insolvency entitles a creditor to apply for compulsory sequestration against the estate of his creditor without the burden of proving that the debtor is actually insolvent; See *Horace Sudar & Co (Pty) Ltd v Cassja & Co* 1950 1 SA 203 (N) and *De Villiers v Maurser Properties (Pty) Ltd* 1983 4 SA 670 (T) para 676E for the definition of "acts of insolvency" as described in the latter sentence.

24 S 5(2) of the Insolvency Act.

25 S 4(2)(a) of the Insolvency Act.

26 S 4(2)(c) of the Insolvency Act.

27 Ss 4(4) – (5) of the Insolvency Act.

28 S 4(5) of the Insolvency Act.

29 S 6(1) of the Insolvency Act.

30 As above.

31 As above.

32 As above.

33 S 9 of the Insolvency Act.

provisional trustee or trustee is appointed.³⁴ The Master in acknowledging receipt thereof will issue a certificate which must accompany the application for sequestration.³⁵ A copy of the application must be furnished to interested parties, who are the debtor, registered trade unions representing the employees of the debtor, the employees and SARS.³⁶

The applicant is required to prove that granting the sequestration order will be advantageous to creditors.³⁷ The applicant must also prove an allegation of insolvency or an act thereof.³⁸ The nature, value, and cause of action of the applicant's claim must be disclosed in the application.³⁹ The nature and value of the applicant's security, as well as the personal details of the applicant and the insolvent debtor must be furnished in the application.⁴⁰ When the court is satisfied that these substantive requirements are met, it will grant a provisional sequestration order.⁴¹ The provisional sequestration order is then served on the debtor, registered trade unions representing the employees of the debtor, his employees, and SARS; to bring the application to their attention and thus allow them to make input, if any.⁴² Once the court is satisfied that all these requirements are met, it will grant an order of final sequestration as envisaged in section 12 of the Act.

3 Consumer insolvency and maintenance creditors

3 1 The place of maintenance creditors within the ranking system

The sequestration of an insolvent debtor means that his estate will vest in the Master of the High Court and later in the trustee, upon his appointment.⁴³ The effect of the latter is that the trustee acquires ownership over the insolvent debtor's estate for the purpose of distributing the proceeds to secured and unsecured creditors.⁴⁴ The ranking of creditors entails that secured creditors are first in line, while unsecured creditors come second in line. Secured creditors are those

34 S 14(1) of the Insolvency Act.

35 S 9(4) of the Insolvency Act.

36 S 9(4A)(a) of the Insolvency Act.

37 Ss 10(c) and 12(1)(c) of the Insolvency Act.

38 Ss 8 and 10(b) of the Insolvency Act.

39 S 9(3)(a)(iii) of the Insolvency Act.

40 Ss 9(3)(a)(i), (ii) and (iv) of the Insolvency Act.

41 S 10 of the Insolvency Act.

42 S 11(2A) of the Insolvency Act.

43 S 20(1)(a) of the Insolvency Act.

44 Evans "Who owns the insolvent estate?" 1996 *TSAR*724. Ss 2 and 84(1) describe secured creditors as those creditors that have a preferential right over a specific asset that forms part of the insolvent debtor's estate; The preferential right can be created by a special mortgage, lessor's tacit

creditors holding a preferential right over a specific asset in the insolvent debtor's estate.⁴⁵ These creditors are those that have some form of security such as a special mortgage, a lessor's tacit hypothec, a pledge, a right of retention, and an instalment agreement hypothec against the debtor.⁴⁶ They are paid out first from the proceeds of the asset over which they hold security, after the expenses of realising such an asset are covered.⁴⁷ The surplus amount is transferred to the free residue for distribution among unsecured creditors, if there is a deficit, the secured creditor will have a concurrent claim for the deficit amount if he does not solely rely on his security.⁴⁸

Unsecured creditors are divided into statutory preferential and concurrent creditors. Statutory preferential creditors enjoy preference over concurrent creditors.⁴⁹ The surplus amount from the encumbered assets and also the proceeds of assets not subject to security are paid out to statutory preferential creditors and concurrent creditors from the free residue.⁵⁰ Funeral and death-bed expenses, the costs of sequestration and execution, salaries and remuneration for employees, statutory obligations, income tax, and claims of general notarial bond holders are afforded preference from the free residue.⁵¹ Once these creditors are paid out, and if there is any surplus, the concurrent creditors will share in the remaining proceeds according to their proportionate dividend.⁵² Concurrent creditors include claimants for arrear child maintenance debt, who are paid out last in the whole scheme of consumer insolvency law. This entails that they do not enjoy any form of preference whatsoever. Roestoff questions this legal position and submits that arrear maintenance debt should be afforded statutory preference and must be paid out immediately after the costs of sequestration are covered.⁵³

3 2 Maintenance creditor's liability to contribute towards the costs of sequestration

The Insolvency Act places the liability for contributions towards the costs of sequestration on concurrent creditors who have proven claims when there are insufficient funds in the free residue account to cover such

hypothec, a pledge, a lien or an instalment agreement hypothec; These group of creditors enjoy preferential treatment in relation to the security they rely on. After the costs of realising their assets are fully covered, they are paid out the remaining proceeds thereof.

45 S 2 of the Insolvency Act.

46 Ss 2 and 84(1) of the Insolvency Act.

47 Ss 2, 89, and 95 of the Insolvency Act.

48 S 83(12) of the Insolvency Act.

49 See ss 96 – 99 and 101 – 103 of the Insolvency Act.

50 As above.

51 As above. These claims are afforded preference in the order of their appearance.

52 S 103 of the Insolvency Act.

53 Roestoff "Onderhoudseise en sekwestrasie ingevolge die Insolvensiewet 24 van 1936" 2019 *LitNet Akademies* 17.

costs.⁵⁴ Maintenance creditors who have successfully proven their claims are not spared of this liability. They have the burden to contribute even when sequestration does not proffer a preference to them in the distribution of the insolvent estate. Roestoff correctly points out that the treatment of maintenance debt as a concurrent claim could potentially be a threat to the constitutional rights of such creditors.⁵⁵ To remedy this, it is proposed that maintenance creditors be excluded from liability to contribute towards the costs of sequestration.⁵⁶

3 3 Discharge of pre-sequestration maintenance debt

The sequestration of the estate of an insolvent debtor has the effect of discharging all his pre-sequestration debts.⁵⁷ However, it must be noted that although sequestration discharges all pre-sequestration debts of an insolvent debtor, this is not its' main object, its main object is to afford creditors a financial advantage.⁵⁸ The implication of the discharge is that the pre-sequestration debt in favour of a maintenance creditor becomes discharged, because the Insolvency Act does not exempt such debt from the discharge. Although the discharge of pre-sequestration debt is regarded as a progressive policy stunt in consumer insolvency regulation, it has been argued that maintenance debt must be excluded to an unlimited extent, from the discharge in line with the approach taken by the American system.⁵⁹ The American system excludes maintenance debt from the discharge.⁶⁰ This is a progressive approach as it seeks to balance the competing interest of the insolvent debtor to be relieved from excessive debt and that of the vulnerable maintenance creditor (child) to access social welfare and to have their dignity protected.

4 Treatment of arrear child maintenance debt under the Insolvency Act and the constitutional rights of children

4 1 The constitutional right of children to social welfare

The Constitution affords special protection to children due to their vulnerability.⁶¹ It is a constitutionally protected right for children to access basic nutrition, basic health care services, and social services.⁶² Maintenance by its nature includes the provision of basic nutrition,

54 S 106 of the Insolvency Act.

55 Roestoff 2019 *LitNet Akademies* 1.

56 Roestoff 2019 *LitNet Akademies* 17.

57 S 129(1)(b) of the Insolvency Act.

58 See para 2.1.

59 Roestoff 2019 *LitNet Akademies* 17.

60 S 523(a)(5) of the Bankruptcy Reform Act of 1978.

61 S 28(3) of the Constitution defines a child as a person under the age of 18 years.

62 S 28(1)(c) of the Constitution.

shelter, health care services, and social services.⁶³ The duty to provide maintenance for a child primarily rests with the parents of such a child.⁶⁴ The universal principle of ensuring that the rights of children reign supreme in every matter concerning them has been adopted and incorporated into section 28(2) of the Constitution. This implies that where children could possibly be affected by the sequestration of an insolvent debtor, their best interests must supersede the interests of other parties affected by such sequestration.⁶⁵

4 2 The right to human dignity

The Constitution provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected”.⁶⁶ The right to human dignity cannot be overemphasised firstly because it forms the basis of South African jurisprudence,⁶⁷ and secondly, because it is inherent in nature.⁶⁸ The inherent nature of this right is construed by Chaskalson as “an attribute to life itself”.⁶⁹ The right informs and animates all the other fundamental rights,⁷⁰ as well as children’s right to social welfare. The right to human dignity is construed as a moral justification for other fundamental rights such as the right to physical, mental, and moral integrity.⁷¹ The Constitutional Court in *Dawood v Minister of Home Affairs*⁷² held that

The value of human dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution; it is a justifiable and enforceable *right* that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily

63 Van Zyl *Handbook of the South African law of maintenance* (2010) 3.

64 Van Zyl (2010) 4.

65 Reference to “other parties” means creditor(s) and the insolvent debtor himself or herself.

66 S 10 of the Constitution.

67 S 1(a) of the Constitution.

68 S 10 of the Constitution.

69 Chaskalson “Human dignity as a foundational value of our constitutional order” 2000 SAHRJ 196.

70 Haysom “Dignity” in Cheadle (ed) *South African Constitutional law: The Bill of Rights* (2002) 123.

71 Haysom (2020) 5 – 6.

72 2000 3 SA 936 (CC) para 35.

integrity, the right to equality or the right not to be subjected to slavery, servitude of forced labour.

Failure to conclude that the right to human dignity serves as a moral justification for children's rights to social welfare will be reckless and naive. Furthermore, to conclude that the right to the social welfare of children as guaranteed in section 28(1)(c) of the Constitution is not tantamount to affording them human dignity will be disappointing, to say the least.

4 3 Infringement of the rights of children to social welfare and dignity: Justifiable?

Sometimes an infringement of a constitutionally protected right, such as the right to social welfare and dignity of children can be legally justifiable and thus permissible. The Constitution articulates that the rights contained in the Bill of Rights can be limited in terms of the law of general application, provided the limitation is reasonable and justifiable in an open and democratic society based on the values of human dignity, equality, and freedom.⁷³ When assessing whether the limitation of a constitutionally protected right is reasonable and justifiable, factors such as the nature of the right, the importance of the purpose of limitation, the nature and extent of limitation, the relation between the limitation and purpose thereof, and whether less restrictive means are undertaken to achieve such purpose are considered.⁷⁴ It is important to note that these factors do not necessarily carry the same weight.⁷⁵ Furthermore, these are not the only factors that must be considered when assessing the constitutionality of the limitation of a constitutionally guaranteed right. In addition to these factors, courts have the discretion to consider other factors they may deem fit and necessary.

The treatment of maintenance creditors' claims as concurrent in nature, holding such creditors liable for contribution in circumstances where there are insufficient funds in the free residue, and the discharge of such debt is provided for in the Insolvency Act. The source of these rules is legislation and therefore qualifies as the law of general application. In other words, the right of children to social welfare and dignity has been limited in terms of the law of general application, which means the first requirement for the limitation of rights has been met. The next step is to ascertain whether the limitation is reasonable and justifiable in an open and democratic society based on the values of human dignity, equality, and freedom. To answer this question, a proportionality analysis must be conducted.⁷⁶ This analysis aids in ascertaining whether the harm caused by the infringement outweighs the

73 S 36(1) of the Constitution.

74 As above.

75 Cheadle "Limitation of rights" in Cheadle (eds) *South Africa Constitutional law: The Bill of Rights* (2002) 707 – 708.

76 See *S v Makwanyane* 1995 6 BCLR 665 (CC) para 104.

benefits achieved through such infringement.⁷⁷ This means an infringement of a constitutionally protected right of children to social welfare and human dignity can only be constitutionally legitimate if the harm caused by such an infringement does not outweigh the benefits achieved through such an infringement. Maintenance debt is treated as a concurrent claim, while funeral and death-bed expenses, execution and sequestration costs, salaries and remuneration for employees, statutory obligations, income tax, and claims of general notarial bond holders are afforded preference. Although affording preference to some of these claims is a rational move, some of these claims cannot supersede the significance of affording child maintenance debt preference over them. In other words, treating maintenance debt as concurrent claims which cause harm to children's social welfare and dignity does not create any benefit whatsoever. This means that the harm caused by the infringement does not outweigh the benefits achieved through the infringement. Maintenance creditors by virtue of their concurrent claims are burdened with the liability to contribute towards the costs of sequestration where there are insufficient funds in the free residue account to cover such costs.⁷⁸ It is unjustifiable to burden maintenance debtors (children) with the liability to contribute when they are in a position of attempting to ensure the realisation of their social welfare rights through securing arrears maintenance debt from an insolvent debtor's estate. This unquestionably goes against the universal principle of the paramountcy of the best interests of children in every matter concerning them.⁷⁹ The inclusion of maintenance debt in the discharge of pre-sequestration debt of insolvent debtor's aims to relieve such debtors from excessive debt. The latter is the benefit achieved in limiting the maintenance creditor's right to access social welfare and to have human dignity through claiming maintenance from an insolvent debtor. It is my considered view that the harm caused to maintenance creditors through the discharge of pre-sequestration debts does not outweigh the benefit achieved, which is to free the debtor from excessive debt. The best interests of children to access social welfare cannot be superseded by the desire to free an insolvent debtor from excessive debt.

5 Discussion

South African jurisprudence is founded on the values of human dignity, achievement of equality, and advancement of human rights and freedoms.⁸⁰ To achieve this, the Constitution provides a Bill of Rights which is regarded as the cornerstone of democracy.⁸¹ The values that underpin South African jurisprudence are affirmed in the Bill of Rights.⁸²

77 As above.

78 See para 3.2.

79 S 28(2) of the Constitution.

80 S 1(a) of the Constitution.

81 S 7(1) of the Constitution.

82 See s 7(1) of the Constitution.

It is unequivocal that for the rights contained in the Bill of Rights to be realised, there should be some mechanisms in place to achieve this. For this reason, the Constitution places an obligation on the state to respect, protect and fulfil the rights guaranteed in the Bill of Rights.⁸³ The state can achieve this through various means, including the reformation of existing legislation and the introduction of new legislation that seeks to advance the rights and values underpinning the South African constitutional order. Among the rights protected in the Constitution, is the right of children to social welfare. Section 28(1)(c) of the Constitution affords children the right to basic nutrition, shelter, basic healthcare services, and social services. The treatment of child arrear maintenance claims against an insolvent debtor's estate as concurrent, rather than statutory preferential claims hampers the rights of children to social welfare. The violation becomes direr when child arrear maintenance claimants are expected to contribute towards the costs of sequestration.⁸⁴ It is common cause that children are vulnerable and must be afforded the greatest protection by any caring legislator. This protection includes ensuring that the fundamental rights of children to access social welfare is protected and advanced through the law. The failure to afford preference to child maintenance claims in consumer insolvency and exempt them from contribution is a failure by the legislature to protect children's rights congruent with their obligation in terms of the Constitution.⁸⁵ It is unequivocally in the best interest of children to protect their maintenance rights in consumer insolvency by affording their claims preference ranking and exempting them from liability to contribute towards the costs of sequestration. The need to protect children and their basic rights is of paramount importance. It is no surprise that international organisations such as the United Nations (UN) and African Union (AU) have dedicated special attention and measures to the protection of children and their rights.⁸⁶

The UN Convention on the Rights of the Child, 1989 (CRC) recognises that in all actions concerning children, their best interests must be the primary consideration.⁸⁷ It also recognises the rights of children to social welfare in the form of access to social security and to enjoy the highest attainable standard of health and facilities for the treatment of illness.⁸⁸ The UN dictates to member states to undertake appropriate legislative, administrative, and other measures in the implementation of the rights that are recognised in the Charter.⁸⁹ The UN requires that, with regard to economic, social, and cultural rights, the state parties must undertake the measures to the maximum extent of their available resources.⁹⁰

83 See s 7(2) of the Constitution.

84 See para 3.2 on the liability of maintenance creditors to contribute towards the costs of sequestration.

85 See s 7(2) of the Constitution.

86 South Africa is a member state to both the UN and the AU.

87 Art 3 of the CRC.

88 Arts 26(1) and 24(1) of the CRC.

89 Art 3 of the CRC.

90 As above.

The failure to amend the Insolvency Act to allow for claims of child arrear maintenance debt to have a preference in consumer insolvency and to exempt them from liability to contribute towards the cost of sequestration is a failure by the South African legislature to undertake measures to the maximum extent of its resources to ensure that the social welfare rights of children are protected.

The AU also recognises the best interest of the child in all actions undertaken by any person or authority to be the primary consideration in every matter concerning the child.⁹¹ An obligation to member states to ensure the survival, protection, and development of children to the maximum extent possible.⁹² This includes affording protection to children in the consumer insolvency realm, which South African consumer insolvency legislation fails to do. Children's rights as contained in section 28 of the Constitution are of paramount importance and ought to be protected.

The Constitutional Court in *Grootboom v Oostenberg Municipality*⁹³ stressed the significance of protecting the rights of children as guaranteed in the Constitution because these rights are not qualified either by "available resources" or the "progressive" realisation clause. The unqualified nature of these rights warrants the legislature to afford them protection under consumer insolvency legislation.

The failure to protect the right to social welfare of children in consumer insolvency constitutes a violation of the right to dignity of children. The basis of this is that a violation of a constitutionally guaranteed right such as the right of children to social welfare is tantamount to the violation of the right to dignity of such a person.⁹⁴ Dignity as a constitutional value has informed the recognition and development of children's right to social welfare. The development of the right to dignity gave birth to other rights,⁹⁵ which include children's right to social welfare. Further, the right to dignity also informs the adjudication and interpretation of other rights,⁹⁶ including the right of children to social welfare.

The legislature must reconsider consumer insolvency legislation in the interest of advancing the rights of children to dignity, which is a pivotal right as it is also recognised as one of the founding values of South African jurisprudence.⁹⁷ Failure to do this will constitute a serious violation of the foundational values that define South African jurisprudence.

91 Art IV of the African Charter on the Rights and Welfare of the Child, 1999.

92 Art v(2) of the African Charter on the Rights and Welfare of the Child, 1999.

93 2000 3 BCLR 277 (CC) para 35.

94 See para 4.2.

95 Haysom (2020) 2.

96 See para 4.2.

97 See s 1(1) of the Constitution.

It is acknowledged that the rights guaranteed in the Bill of Rights are not absolute and can be limited in terms of the Constitution.⁹⁸ However, it has been discussed that the limitation of the rights of children to social welfare and dignity is unjustifiable as it fails to meet the proportionality test. It is unjustifiable to afford preference to state institutions such as SARS at the expense of the rights of children to social welfare and dignity. Heath submits that to afford preference to another creditor over the other, there must be a social, political, or economic justification.⁹⁹ There is no social and political justification to afford state institutions with great financial muscle and less vulnerability, preference for consumer insolvency over children with little financial muscle and great vulnerability. It is my considered view that preference should be given to maintenance debt over state institutions in line with the submissions made to the South African Law Reform Commission that claims of state institutions must be kept at a bare minimum.¹⁰⁰

It is also unjustifiable to expect children to be burdened with the liability to contribute towards the costs of sequestration while they are in pursuit of an endeavour to secure their rights to social welfare and dignity through their claim of arrear maintenance against an insolvent estate. It is further unjustifiable to discharge arrear maintenance claims of children against the insolvent debtor's estate. Relieving an insolvent debtor from excessive debt is recognised as an important policy of consumer insolvency,¹⁰¹ however, the best interest of the child ought to prevail, and thus it is imperative to exclude child maintenance debt from the discharge.

The South African legislature must reconsider the treatment of child maintenance claims under consumer insolvency. I tend to agree with the call for the treatment of maintenance claims as statutory preferential, rather than concurrent.¹⁰² These claims must be ranked immediately after sequestration costs,¹⁰³ in an endeavour to promote and protect the rights of children to social welfare and dignity. Child maintenance claims must also be exempt from liability to promote these rights.¹⁰⁴ These rights could be promoted and protected if child maintenance claimants are not burdened with the liability to contribute towards the costs of sequestration.

98 Ss 7(2) and 36 of the Constitution.

99 Heath "The Stace Hammond grace lecture: Preferential payments on bankruptcy and liquidation in New Zealand: Are they justifiable exceptions to the *parti passu* rule" 1996 *Waikato L Rev* 31.

100 Discussion Paper 66. This discussion paper was published by the South African Law Reform Commission together with the Draft Bill on insolvency.

101 World Bank *Report on the treatment of the insolvency of natural persons* (2013) para 354.

102 Roestoff 2019 *LitNet Akademies* 17.

103 As above.

104 As above.

6 Conclusion

Human rights considerations in insolvency law and practice have increasingly assumed significance in recent times.¹⁰⁵ The fundamental rights of children as recognised in the Constitution ought to be advanced and protected in the realm of consumer insolvency in South Africa, particularly because children are vulnerable. The legislature must urgently reform the Insolvency Act to resolve the plight of child maintenance creditors. The move to resolve this plight will be consistent with the responsibility of the legislature to ensure that the rights of children are protected. Furthermore, the move will affirm the supremacy of the Constitution and the state's commitment to advancing the values of the Constitution and the rights guaranteed therein. The approach will be congruent with the policy considerations underlying South African constitutional jurisprudence by ensuring that the safety net of children is uncompromised by the Insolvency Act.

105 Boraine, Evans, Roestoff and Steyn "The pro-creditor approach in South African insolvency law and the possible impact of the Constitution" 2015 *NIBLeJ* 59.