# Some values and assumptions underlying South African debt law

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In *Advocate* August 2015 37 Bert Bester SC wrote (at 39) that judicial realists are of the opinion that judges decide cases by employing a process that allows the inferring of conclusion Y from X, because X presents a very good reason to accept Y even though Y does not necessarily follow from X and where X does not necessarily ensure Y.

In the logic of moral reasoning, from a factual premise, through the use of a (sometimes unstated, or inarticulate) general moral principle, a value judgment (also called a conclusion) is reached.

In the same vein in *S v Zuma* 1995 (2) SA 642 (CC) at 652 J, a unanimous Constitutional Court presided over by Chaskalson P confessed (per Kentridge, AJ) that it is not easy for a judge "to avoid the influence of one's personal intellectual and moral preconceptions".

And during the Judicial Service Commission interview of Willem van der Linde SC on 6 October 2015 Deputy Chief Justice Dikgang Moseneke asked the following question:

> *"My last point is this: judges bring their background to the job, their inarticulate premise. Our past intrudes into what we do and influences our decisions. How should judges overcome the biases their past creates? I have a background of being part of the broader liberation struggle, of being a prisoner, coming from the township and struggling through the profession to get where I am. Many suspect that it will intrude into my decision-making. How do judges overcome this?"*
> (Van der Linde deftly sidestepped the question. See: www.dgru.uct.ac.za/jsc-interviews-october-2015).

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A case in point regarding the inarticulate premises of judges might be *Firstrand Bank v Kona* 2015 (5) SA 237 (SCA) in which the discharge of a provisional sequestration order [See: www.saflii.org.za/cases/ZAGPPHC/2014/215.html] was taken on appeal to the SCA. In *Kona* the couple (married in community of property) initially defaulted on payments in terms of a loan agreement (which was secured by a first and second mortgage bond), obtained a debt restructuring order in terms of the National Credit Act (NCA), defaulted thereon as well, whereafter the Bank in terms of Section 88(3) of the NCA, sued them.

When summary judgment was refused, the Bank applied for the sequestration of their estate. Van Oosten J issued a provisional order but the order was discharged by Phatudi J who granted leave to appeal to the SCA.

In issue during the appeal was the question whether the Bank may sequestrate a consumer who is under debt restructuring.

So in the Gauteng Division, Pretoria (GD) a single judge at the provisional stage decided yes, but another single judge at the confirmation stage decided no. A unanimous SCA (Meyer AJA, with Mpati P, Cachalia JA, Mbha JA and Van der Merwe AJA concurring) decided that a debt rearrangement order was immaterial to an application for sequestration of the consumer's estate. For one court it followed from the existence of a debt restructuring order (the basic factual premise) that it precluded sequestration (the conclusion or value judgment). For the other court that conclusion simply did not follow.

There were some other skirmishes in the reasoning (e.g. whether for the purposes of the wording of s 88(3) of the NCA, a sequestration order was an order for the enforcement of the sequestration creditor's claim under a credit agreement, and whether the Bank indeed "opted to pursue the recovery of the debt by way of insolvency proceedings"), but neither of the above had a decisive bearing on the basic question of whether a debt restructuring order in terms of the NCA prevents a sequestration order under the Insolvency Act, 1936.

What then is the *"inarticulate premise"* that differed between the courts? What were the unwitting general moral principles that differed between them?

For easier logical (and philosophical) evaluation the train of thought in the GD (from factual premise to conclusion) can be set out as follows:

> *"a.* *The consumer's debt has been restructured in terms of the NCA.*
> *b.* ……
> *c.* *Therefore, the Bank should not be able to sequestrate the consumer."*


Or, in the SCA:

> *"a. The consumer's debt has been restructured in terms of the NCA.*
> *b. ……*
> *c. Therefore (or notwithstanding), the Bank should (nonetheless) be able to sequestrate the consumer."*

The point is, (c) does not necessarily follow (in the flow of thought and argument) directly from (a). There is some value or (inarticulate) premise (in logical parlance also called a general moral principle) in-between. What value, inserted automatically and subconsciously by the Judge as (b), implores her to reach (c)? What, therefore, "*turns*" on (a) so that (c) follows?

On the return date in the GD the Judge reasoned with reference to *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 CC at 65 B that the main purpose of the NCA is to promote the economic and social welfare of South Africans, that it is a legislative effort to improve relations between consumers and credit providers, and that it was enacted to assist consumers to recover from their economic recession. From these he concluded that the Bank's conduct in instituting sequestration proceedings to ensure "the execution of the respondent's house" does not improve relations between consumers and credit providers. He therefore discharged the provisional order. Syllogistically reframed he reasoned thus: All steps that damage relations and do not assist a consumer to recover, do not promote social welfare. Sequestration is one of those steps. Therefore sequestration of a person under debt restructuring is not in line with the main purpose of the NCA and consequently should not be allowed.

One detects in the GD judgment an unstated assumption that the NCA overrides the Insolvency Act. (It is a truism amongst logicians that (unstated) implied premises within arguments usually tend to be questionable.) Could it be that the Judge on historical grounds regarded the NCA of 2005 as more legitimate than the Insolvency Act of 1936?

In the final instance then, the lower court had a value preference for good relations and assistance with financial recovery, and a sensitivity for the situation of the consumer.

For the lower court (b) can thus be presumed to have been:

> *"b. The social welfare of an individual and a reprieve to enable him to recover financially are more desirable than efficient debt recovery".*

The SCA pointed out that the aim of debt restructuring under the NCA is that the consumer's debt should be paid within a reasonable time. (It mentioned that the evidence shows that the respondents did not comply with the debt rearrangement order and that the payments made in terms of that order did not even discharge the monthly interest accruing on the debt.) One detects here an Aristotelian approach to the heart of the controversy, namely to unearth the purpose, the end and the essential nature [See: Michael Sandel: *Justice*: *What's the right thing to do?* (Farrar, Strauss and Giroux, 2010) at 186)] of debt restructuring under the NCA, and then to resolve the matter from there.

The SCA's quintessential point of departure is, in my view, revealed by its quoting of the longstanding *Estate Logie v Priest* 1926 AD 312 at 319 : *"It appears to me that it is perfectly legitimate for a creditor to take insolvency proceedings against a debtor for the purpose of obtaining payment of his debt."* The SCA thus, in accordance with longstanding authority, regards insolvency proceedings as *"perfectly legitimate"*, notwithstanding all the purposes of the NCA set out in its s 3.

For the SCA (b) can (as general moral principle) be presumed to have been: *"b. The Insolvency Act is of equal rank to the NCA"*. (or, possibly also: *"b. The well-being of an individual is not more desirable than efficient means of debt recovery"*).

What needs to be recognised is that the SCA's preferred values (the aforementioned general moral principle), by way of the doctrine of precedent, became the preferred values of the South African debt law.

An elephant in the room in *Kona* was the mortgage bonds over the house in which the Konas resided. Can it really be said to be acceptable for them to have registered a bond over their house, then to default on payments but still to keep their bonded home (not having to scale down to a rented house or apartment)?

The effect of the SCA decision is that sequestration remains an option against a person under debt restructuring – even before s 88(3) gets triggered. A