

# The Constitutional disqualification for unrehabilitated insolvents from being members of Parliament

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## SUMMARY

In South Africa, the status of being an unrehabilitated insolvent has many effects and one of them is the disqualification from being a member of parliament (MP). This article considers the constitutional disqualification of unrehabilitated insolvents to serve as MPs within the context of statutory restrictions that apply to such insolvents. It further discusses the rationale for the constitutional disqualification of unrehabilitated insolvents to serve as MPs in light of international guidelines that advocate for the protection of the income of the debtor that is necessary for the insolvent and his dependents to live decent lives taking into account possible changing living standards. The pertinent question is whether such reasons are still justifiable considering international policy considerations

## 1 Introduction

An insolvent person<sup>1</sup> in South Africa faces many disabilities in the form of statutory disqualifications as regards his or her capacity to earn a living. While this article focuses on statutory disqualifications that are imposed on insolvent debtors during sequestration, particularly the disqualification of an unrehabilitated insolvent from being a member of parliament (MP), for an understanding of how a debtor becomes an unrehabilitated insolvent, the nature and methods by which a debtor's estate can be sequestrated in South Africa will be discussed briefly.

Insolvency is a status of diminished legal capacity imposed by the courts on persons whose liabilities exceed their assets.<sup>2</sup> This diminished legal capacity deprives the insolvent of certain rights and certain legal capacities.<sup>3</sup> A person is legally insolvent in South Africa if his or her estate has been sequestrated by an order of the court.<sup>4</sup> The Insolvency Act

- 1 \*This article derives from my PhD doctoral thesis. The words "insolvent person" and "bankrupt person" are used interchangeably.
- 2 Bertelsmann *et al* *Mars The law of insolvency in South Africa* (2019) 189; Sharrock, Van der Linde and Smith *Hockly's insolvency law* (2012) 63; Wille, Du Bois and Bradfield *Wille's principles of South African law* (2007) 387.
- 3 *Spencer v Standard Building Society* 1931 TPD 481 (hereinafter *Spencer v Standard Building Society*) 484; Wille, Du Bois and Bradfield (2007) 387.
- 4 S 2 of the Insolvency Act 24 of 1936 (Insolvency Act or the Act). Bertelsmann *et al* (2019) 3; Sharrock, Van der Linde and Smith (2012) 3.

provides for two different methods by which a debtor's estate can be sequestrated namely voluntary surrender and compulsory sequestration.

In voluntary surrender, the debtor applies for the sequestration of his or her estate.<sup>5</sup> A court may accept the surrender of the debtor's estate and grant a sequestration order if the debtor is insolvent; if he owns realisable property of sufficient value to defray all costs of sequestration which will in terms of the Insolvency Act be payable out of the free residue of the estate; and that it will be to the advantage of creditors of the debtor if the estate is sequestrated.<sup>6</sup> However, before a court can even consider an application for voluntary surrender, the debtor must first satisfy the procedural requirements. He or she must publish a notice of surrender in the Government Gazette and in a newspaper circulating in the district in which he or she resides.<sup>7</sup> Further, a statement of affairs with supporting documents must be lodged at the Master's office for inspection by creditors.<sup>8</sup> It is important to note that amongst the things that must be listed in the statement are the causes of the debtor's insolvency.<sup>9</sup> Establishing the reason for the insolvency may reveal whether the insolvency was caused by the debtor's fraudulent or dishonest dealings, or whether it was caused by unfortunate financial disruptions. This has the effect of distinguishing between dishonest debtors and honest but unfortunate debtors.

In compulsory sequestration, creditors apply for the sequestration of a debtor's estate.<sup>10</sup> In an application for compulsory sequestration, the court has the discretion to grant a provisional order of sequestration if it believes that *prima facie*<sup>11</sup> the applicant has a claim which entitles him or her to apply for the sequestration of the debtor's estate. The debtor has committed an act of insolvency<sup>12</sup> or presents facts that indicate that the debtor is in fact insolvent, or other important facts showing the debtor's conduct leading to his or her insolvency.<sup>13</sup> Lastly, there is reason to believe that the sequestration will be to the advantage of creditors. The court will make a final order of sequestrations if it is satisfied that the above requirements have been met.<sup>14</sup>

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5 Ss 3 and 6 of the Act.

6 S 6 of the Act.

7 S 4(1) of the Act. See Van der Linde, Smith and Calitz *Hockly's law of insolvency* (2022) 28.

8 S 4(6) of the Act.

9 Sharrock, Van der Linde and Smith (2012) 22-23; Bertelsmann et al (2019) 65.

10 Bertelsmann et al (2019) 113.

11 S 10 of the Act. See Van der Linde, Smith and Calitz (2022) 29.

12 S 8 of the Act.

13 S 9(3)(a)(v) of the Act.

14 S 12 of the Act.

Once a sequestration order is granted, the consequences of sequestration commence and they include amongst others, a reduction in status, and a limitation of the capacity to contract, earn a living, and hold office.<sup>15</sup> Therefore, once the court has granted the sequestration order, the insolvent acquires the status of being an unrehabilitated insolvent. This exposes the insolvent to many statutory disqualifications that may impact his or her ability to earn a living. An insolvent continues to be an unrehabilitated insolvent until the eventual discharge of his or her debts upon his or her rehabilitation which may occur after 10 years if the insolvent had not already been rehabilitated by the court within that period.<sup>16</sup>

This article considers the constitutional disqualification of unrehabilitated insolvents to serve as members of parliament within the context of statutory restrictions that apply to such insolvents. The pertinent aspect is to consider the feasibility of the current rule in South African law. A commentator, Jaconelli, asked, “[i]n what circumstances, in a democracy, is it legitimate to bar a person from holding elective office?”<sup>17</sup> While this question relates to all disqualifications barring a person from holding an elective office, this article addresses this question only in respect of the disqualification of an unrehabilitated insolvent from being an MP. The report below depicts the reality of this disqualification in South Africa.

A *Business Day* report notes Malema has until 26 May to provide reasons why the provisional order should not be confirmed. If the order is finalised, any political aspirations he may have for a seat in Parliament would be dashed, as being an unrehabilitated insolvent prevents him from being a member of the National Assembly.<sup>18</sup>

While countries like the United States of America (America) do not disqualify a bankrupt debtor<sup>19</sup> from being a Senate or House of Representatives member, this kind of disqualification is not peculiar to

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15 *Spencer v Standard Building Society* 481; *Ex parte Taljaard* 1975 3 SA 106 (O) 108; *Standard Bank of SA Ltd v Essop* 1997 4 SA 569 (D) 575; Sharrock, Van der Linde and Smith (2012) 63; Roestoff “Insolvency restrictions, disabilities and disqualifications in South African consumer insolvency law: a legal comparative perspective” 2018 *THRHR* 393. The very nature of insolvency law limits the rights of most of its participants. See Evans “Waiving of rights to property in insolvent estates and advantage to creditors in sequestration proceedings in South Africa” 2018 *De Jure* 315.

16 S 127A of the Act.

17 Jaconelli “Constitutional Disqualification: A Critique of English and English-Derived Law” 2020 *ICL Journal* 167-197.

18 *Legalbrief* “Sequestration ruling puts Malema political future in balance” 2023 <https://bit.ly/42qCZJP> (review last accessed 2023-06-05).

19 In America, once the bankruptcy proceedings commence, a debtor becomes a bankrupt debtor. Once the debts of the bankrupt debtor are discharged, the debtor becomes a discharged debtor.

South Africa. The *Nigerian Bankruptcy Act*<sup>20</sup> and the *Constitution of the Federal Republic of Nigeria*<sup>21</sup> disqualify an adjudged bankrupt<sup>22</sup> from being elected to the office of the President, Vice President, Governor, or Deputy Governor<sup>23</sup> and the Senate House of Representatives of the State House of Assembly.<sup>24</sup> In England and Wales, an adjudged bankrupt is disqualified from being a member of the House of Parliament if he or she is subjected to a bankruptcy restriction order.<sup>25</sup>

Thus, while many countries still disqualify an unrehabilitated insolvent from being an MP because of his or her insolvency or bankruptcy status, the question arises as to whether such a disqualification is still justifiable. For instance, the World Bank Report<sup>26</sup> observed that the main goal of bankruptcy for natural consumer persons is the economic rehabilitation of the honest but unfortunate debtor which can be achieved by the provision of a fresh start through a discharge and the removal of unjust and unnecessary disqualifications that would create a stigma and hinder this goal. International guidelines further advocate for the protection of the income of the debtor that is necessary for the insolvent and his dependents to live decent lives taking into account possible changing living standards. This is because, according to international guidelines, the income of the insolvent is at the centre of the insolvent's right to a decent standard of living and it has an effect on the outcome of the discharge.<sup>27</sup>

Within the confines of its operation and application, this article discusses the rationale for the constitutional disqualification of an unrehabilitated insolvent from being an MP in South Africa. It addresses the question of whether such reasons are still justifiable considering international policy considerations. As natural-person insolvency is a

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20 S 126(1)(a) of the *Bankruptcy Act Ch 30 Laws of the Federation of Nigeria 1990* as amended by the *Bankruptcy (Amendment) Decree 109 of 1992*. This amendment gave rise to the *Nigerian Bankruptcy Act Cap B2 Laws of the Federation of Nigeria 2004*.

21 *Constitution of the Federal Republic of Nigeria 1999* (hereinafter the *Nigerian Constitution*).

22 Bankruptcy is the legal status whereby an adjudication order has been made by a court against an individual primarily because of his inability to meet his financial liabilities. Similar to South African insolvency law, an adjudged bankrupt in Nigeria is discharged and released from his debts after the passing of a certain period of time. See Thompson *The principles of Bankruptcy Law* (1967) 1.

23 S 126(1)(a) of the *Nigerian Bankruptcy Act*; ss 137(1) and 182(1)(f) of the *Nigerian Constitution*.

24 S 126(1)(b) of the *Nigerian Bankruptcy Act*; ss 107(1)(e) and 66(1)(e) of the *Nigerian Constitution*.

25 S 426A(1) of the *Insolvency Act of 1986* (hereinafter the *IA 1986*).

26 Insolvency and Creditor/Debtor Regimes Task Force "Publication: Report on the Treatment of the Insolvency of Natural Persons" 2013 <https://bit.ly/3qlnO7f> (last accessed 2023-06-05) (hereinafter World Bank Report) paras 123, 359, 402, and 449-452.

27 EU Final Report: 2003 Report on Consumer Over-Indebtedness and Consumer Law 2003 <https://bit.ly/3oMOIod> last accessed 2023-06-05) (hereinafter EU Final Report) 252.

universal problem, universal modern solutions should be considered and policymakers should not shy away from opening their thinking to solutions used by other insolvency systems in resolving the same or similar problems.<sup>28</sup> As such, the trends in America, England and Wales, and Nigeria are considered.

The trends in America are an important consideration because America has always been at the forefront of the fresh start policy and as indicated, the *Constitution of the United States of America*<sup>29</sup> does not disqualify bankrupts from being a member of the Senate or the House of Representatives. It is also important to consider the trends in England and Wales because after certain considerations, the *Enterprise Act*<sup>30</sup> in England and Wales amended the *IA 1986*<sup>31</sup> and the disqualification from being an MP was removed as an automatic disqualification.<sup>32</sup> Also important is that if the *Draft Insolvency Bill*<sup>33</sup> in Nigeria repeals the *Nigerian Bankruptcy Act*, almost all automatic disqualifications on bankrupt individuals will be removed, and bankruptcy will no longer disqualify an adjudged bankrupt from being elected to the office of the President, aligning Nigerian insolvency law with international policy considerations.

## 2 South Africa

When a debtor's estate is sequestrated in South Africa, certain assets are excluded or exempted from forming part of the debtor's insolvent estate, and the insolvent is allowed to keep those assets for himself or herself.<sup>34</sup> Amongst these assets are the remuneration or reward for work done or for professional services rendered by the insolvent or on his or her behalf, after sequestration.<sup>35</sup> This exemption or exclusion is intended to protect the insolvent from being destitute as a result of his or her insolvency and to ensure that he or she is not deprived of his or her dignity and basic life necessities.<sup>36</sup> Further, it is intended to make sure that the insolvent can start afresh financially and build a new estate.<sup>37</sup>

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28 Coetzee *A Comparative reappraisal of debt relief measures for natural person debtors in South Africa* (LLD thesis 2015 University of Pretoria) 40.

29 *Constitution of the United States of America* (hereinafter the *American Constitution*).

30 *Enterprise Act of 2002*.

31 S 426A(1) of the *IA 1986*.

32 Ss 266 and 267 of the *Enterprise Act*.

33 *2015 Draft Insolvency Bill*.

34 Evans *A critical analysis of problem areas in respect of assets of insolvent estates of individuals* (LLD thesis 2008 University of Pretoria) 250; Evans and Mthethwa "Can a debtor waive rights to property envisaged in s 82(6) of the Insolvency Act 24 of 1936 in an application for voluntary surrender?" 2014 *SAPL* 548, 558.

35 S 23(9) of the Act.

36 Evans (2008) 251.

37 *Ex parte Kroese* 2015 1 SA 405 (NWM) para 41. See also Evans 2018 *De Jure* 306; and Roestoff "The income of an insolvent and sequestration" 2017 *SA Merc LJ* 479.

However, upon application by the trustee, the Master may allow the trustee to claim a portion of the insolvent debtor's remuneration which is not necessary to support the insolvent and his or her dependants.<sup>38</sup> The money would then be used by the trustee to benefit the creditors of the estate. This prevents the situation where the insolvent lives a luxurious lifestyle at the creditor's expense.<sup>39</sup> Thus, in this regard, insolvency laws in South Africa balance the interests of creditors and those of the insolvent and his dependants.

However, while the Constitution<sup>40</sup> guarantees every person the right to choose their trade, occupation, and profession freely and only the law may regulate the practice of such trade, occupation, or profession,<sup>41</sup> it also prohibits an unrehabilitated insolvent from being an MP<sup>42</sup>. This prohibition in the Constitution disqualifies unrehabilitated insolvents without first identifying the cause of the insolvency and thus distinguishing between the dishonest and the honest but unfortunate debtors. While the statement of affairs may reveal the cause of the insolvent<sup>43</sup>cy and whether the debtor is a dishonest or honest but unfortunate debtor, such distinction is not acknowledged in South African insolvency legislation. This is because although fraudulent and dishonest debtors are identified, all unrehabilitated insolvent debtors are subjected to the same disqualifications.

Consequently, if a member ceases to be eligible to be in office as an MP, he or she loses the membership<sup>44</sup> and inadvertently loses the income that comes from that office. As automatic rehabilitation and the discharge of debts occurs after 10 years in South Africa,<sup>45</sup> it means that an insolvent debtor would only be relieved from disqualification after 10 years. If the insolvent does not have any other source of income, they may be out of income for 10 years.

Thus, in the case of an MP whose business is wound-up,<sup>46</sup> it is a double blow because there would be no money coming in from his business and no earnings. This appears to conflict with the intention to exclude or exempt income from the insolvent estate because, by virtue of the constitutional disqualification of MPs, the insolvent still forfeits the income that is protected by section 23(5) of the Insolvency Act from forming part of the insolvent estate.

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38 S 23(5) of the Act. See also Roestoff 2017 *SA Merc LJ* 478.

39 Roestoff 2017 *SA Merc LJ* 503.

40 Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution).

41 S 22 of the Constitution.

42 Ss 47(1)(c), 62, and 106(1)(c) of the Constitution.

43 Ss 4(3) and 16(2)(b) of the Act. See also Sharrock, Van der Linde and Smith 22-23; and Bertelsmann et al (2019) 65.

44 Ss 47(3)(a) and 106(3)(a) of the Constitution.

45 S 127A of the Act.

46 Constitution Education Fund "Why can't a bankrupt person sit in parliament?" 2016 <https://bit.ly/3NpnStm> (last accessed 2022-03-02).

According to Smith,<sup>47</sup> the constitutional disqualification of MPs aims to protect members of the public, more especially the creditors of the insolvent and people having dealings with the insolvent (as traders).<sup>48</sup> It aims to assure the public that people holding offices of responsibility are people of stability and integrity.<sup>49</sup> It appears that the assurance could only be attained after the passing of a period, after which it could be established that the insolvent has been rehabilitated and could be allowed to trade with the public and represent their interests as an honest person.<sup>50</sup> However, the Insolvency Act came into effect long before the adoption of the Constitution.<sup>51</sup> The values and principles on which the Constitution is built are very different from the values, principles, and policies on which the Insolvency Act and some of its amendments are founded.<sup>52</sup> The reason why the public needs protection from insolvent debtors was and still is that when the Insolvency Act was promulgated insolvent people were considered dishonest because some of them trade fraudulently with the public by maliciously incurring credit without any reasonable intention of repaying it.<sup>53</sup> This created the stigma<sup>54</sup> that all insolvent debtors are dishonest<sup>55</sup> and trade fraudulently and should be barred from responsibilities of trust until such a time that the insolvent has received a severe lesson of the need to trade honestly with others.<sup>56</sup> However, it appears that this lesson was only intended for debtors who acted dishonestly in their business dealings because it ignores the reality that a debtor could be insolvent without ever being dishonest. For instance, the World Bank Report refers to honest but unfortunate debtors which denote debtors who became insolvent because of unfortunate income disruptions beyond their control such as terminal illness (which may require time off work), caregiving to a terminally ill family member,

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47 Smith *The law of insolvency* (1988) 9.

48 Smith (1988) 104.

49 Smith (1988) 9.

50 As above. See also *Ex parte Heydenreich* 1917 TPD 657 (hereinafter *Ex parte Heydenreich*) 658.

51 Boraine, Evans, Roestoff and Steyn "The Pro-Creditor Approach in South African Insolvency Law and the possible impact of the Constitution" 2015 *NIBLeJ* 61.

52 Boraine et al 2015 *NIBLeJ* 61. The constitutionality of some of the foundations of the South African insolvency system is questionable. See also Evans 2018 *De Jure* 308.

53 Smith (1988) 290, n 25.

54 Stigma operates in bankruptcy as a product of competing social and economic norms and finite resources. Social norms dictate that individuals keep promises and pay back debts; but society emphasises consumption and makes credit readily available to those borrowing beyond their means. See Mols "Bankruptcy stigma and vulnerability: Questioning autonomy and structuring resilience" 2012 *Emory Bankr Dev J* 293; and Osunlaja *A comparative appraisal of debt relief measures for NINA debtors in Nigeria* (LLD thesis 2020 University of Pretoria) 7.

55 Dishonest debtors are described as fraudulent debtors who abuse the insolvency system and because of their behaviour should bear the negative consequences of an insolvency system. See also the World Bank Report paras 370-371, and 454.

56 *Ex parte Heydenreich* 658; Smith (1988) 9.

lack of adequate insurance, divorce, death, or lack of available employment.<sup>57</sup> Thus, the lesson to be learnt by dishonest debtors was not intended for the honest but unfortunate debtor who became insolvent through circumstances beyond his or her control.

An example of an alleged dishonest debtor who would have been disqualified from being an MP had his provisional order of sequestration been made final is Mr Malema the leader of the party Economic Freedom Fighters (EFF). In February 2014, the estate of Mr Malema was placed under provisional sequestration by the North Gauteng Court High Court for an unpaid tax bill on application by the South African Revenue Service (SARS).<sup>58</sup> The affidavit supporting the compulsory sequestration application contained statements as to Mr Malema's alleged dishonesty in dealing with SARS. It stated that Mr Malema had net assets to the value of R8.5 million, which were reduced to R5.6 million and further reduced to R1.4 million.<sup>59</sup> It revealed that the discrepancies were not conducive to concluding that Mr Malema had made full and frank disclosure to SARS and supported SARS' contention that it would be to the benefit of Mr Malema's creditors to sequester his estate.<sup>60</sup>

Among the other factors reflecting Mr Malema's alleged dishonest conduct was his failure to submit tax returns in 2009 and to declare to SARS any "indirect assets" such as the smallholding owned by the Ratanang Family Trust and the farm he lived on, that is owned by Gwama Properties.<sup>61</sup> Further, the Ratanang Family Trust that failed to register for tax received a "large number of deposits", mainly spent on Mr Malema's "personal expenses", and Mr Malema provided conflicting explanations of his financial affairs when asked.<sup>62</sup>

In May 2014 Mr Malema was sworn in as an MP after the EFF won seats in the 2014 general elections.<sup>63</sup> On 1 June 2015, the return date when the court had to decide whether the provisional order should be made a final order or whether it should be discharged, SARS withdrew

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57 World Bank Report paras 39, 190, and 278.

58 *Malema v Commissioner for the South African Revenue Service* 2016 ZAGPPHC 263 (hereinafter *Malema v SARS*) para 8; *Legalbrief* "Sequestration ruling puts Malema political future in balance" 2023 <https://bit.ly/42qCZJP> (review last accessed 2023-06-05); "Malema among 14,000 insolvent taxpayers" 2014 <https://bit.ly/3AzKMqG> (last accessed 2021-10-07); *News24* "SARS files for Malema bankruptcy" 2013 <https://bit.ly/3audZbY> (last accessed 2021-10-07).

59 *News24* "SARS files for Malema bankruptcy" 2013 <https://bit.ly/3audZbY> (last accessed 2021-10-07).

60 As above.

61 As above.

62 As above.

63 RSA Parliament "Members of Parliament: Mr Julius Sello Malema" <https://bit.ly/3oXg4FP> (last accessed 2021-10-13).



the sequestration application.<sup>64</sup> SARS stated that it had several legal instruments available to recover the outstanding tax debt owed by Mr Malema.<sup>65</sup> Further, Mr Malema had started complying with SARS' tax obligations including partially paying its outstanding tax debt and he withdrew his application for declaratory and interdictory relief.<sup>66</sup> Therefore, since sequestration has far-reaching consequences, SARS opted to first explore its other legal instruments to recover the outstanding debt from Mr Malema, as such sequestration was not necessary since it is usually a remedy of last resort. Consequently, the allegations regarding Mr Malema's alleged dishonesty were never finally tested by a court.

As indicated above the purpose of disqualifying unrehabilitated insolvents from certain offices is to protect the public, especially the creditors and people dealing with the insolvent as traders from dishonest debtors. While insolvency would hamper the debtor from incurring more debt, it is not clear how disqualifying a debtor from being an MP protects his or her creditors when his or her estate is sequestered. Instead, it appears that his or her creditors would be disadvantaged by the constitutional disqualification because, without earnings, there would not even be the possibility of the trustee claiming extra (unnecessary) money from the insolvent in terms of section 23(9) of the Insolvency Act. Further, if the insolvent does not have any other source of income, the insolvent and his dependants would become a burden on the state and the constitutional rights to dignity and basic necessities may be violated.

In the case of dishonest debtors, the constitutional disqualification appears justifiable and is aligned with international policy considerations that provide that bankruptcy is not intended to become a shelter for debtors who have engaged in dishonest or intentional disregard for the rights of other persons. Therefore, fraudulent debtors should not benefit from a fresh start, instead, they should be excluded. However, the disqualification from being an MP in South African law does not only disqualify the dishonest debtor but also the honest but unfortunate debtors. The inclusion of honest but unfortunate debtors in the disqualification from being an MP is not fit for the purpose of the disqualification and it is not justifiable when considering international best practices advocating for the protection of honest but unfortunate debtors.

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64 *Malema v SARS* para 41; eNCA "SARS withdraws Julius Malema sequestration order" 2015 <https://bit.ly/3oR6dBn> (last accessed 2021-10-11); Hunter "Julius Malema: sequestration withdrawn" 2015 <https://bit.ly/2X5tjsG> (last accessed 2021-10-11).

65 eNCA "SARS withdraws Julius Malema sequestration order" 2015 <https://bit.ly/3oR6dBn> (last accessed 2021-10-11).

66 As above.

### 3 America

In America, the liquidation of the estate of an individual debtor can take place in terms of Chapter 7 of the *Bankruptcy Code*.<sup>67</sup> As indicated, the *American Constitution* does not disqualify a person from being a member of the Senate or the House of Representatives because they are bankrupt. This makes sense because in America a bankrupt may be discharged after just 3 months in a no-asset procedure<sup>68</sup> under Chapter 7's asset liquidation.<sup>69</sup>

As in South Africa, certain property forms part of the bankrupt estate in America whereas other property such as the income that a bankrupt debtor acquires after the commencement of bankruptcy for services rendered after filing under Chapter 7, is excluded from the estate and may not be used by the trustee to benefit creditors.<sup>70</sup> This aligns with the *Bankruptcy Code's* fresh-start policy<sup>71</sup> because including a bankrupt's post-petition earnings in the bankrupt estate would nullify the debtor's earning capacity<sup>72</sup> and future income.<sup>73</sup> Inadvertently such a debtor would lose his or her motivation to work to earn a living and to acquire property as whatever money he or she may make would go to his or her creditors.<sup>74</sup> This would be contrary to the goal of economic rehabilitation which is at the centre of the fresh-start policy as it would make the debtor a virtual indentured servant.<sup>75</sup> However, if the earnings received after filing a petition are for services rendered before the petition, they will form part of the estate and will be available for distribution in his or her bankruptcy estate, although a substantial portion of the earnings will be exempt in terms of section 522(b) of the *Bankruptcy Code*.<sup>76</sup> Thus in America, there is no double blow as is the case in South Africa where an MP would lose both earnings from his or her business and income from being in office.

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67 *Bankruptcy Reform Act of 1978* (hereinafter *Bankruptcy Code* or the *Code*).

68 No-asset bankruptcies refer to bankruptcy cases initiated by individual debtors which produce no assets for equal distribution among creditors. Kilborn "Mercy, rehabilitation, and quid pro quo: A radical reassessment of individual bankruptcy" 2003 *Ohio State LJ* 865.

69 Rule 4004(c) of the *Federal Rules of Bankruptcy Procedure 2021*.

70 S 541(a)(6) of the *Bankruptcy Code*.

71 The term "fresh start" originated in *Local Loan Co v Hunt* 292 US 234 (1934) 244 wherein the US Supreme Court held that the principal aim of bankruptcy law was to give "the honest but unfortunate debtor" a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.

72 Noel *A history of the bankruptcy clause of the Constitution of the United States of America* (PhD thesis 1918 Harvard) 187.

73 Baird *Elements of bankruptcy* (2001) 33.

74 Kilborn 2003 *Ohio State LJ* 877.

75 Ferriell and Janger *Understanding bankruptcy* (2013) 201.

76 Ferriell and Janger (2013) 202.

## 4 England and Wales

As in South Africa, the income that the bankrupt acquires after bankruptcy does not form part of the bankrupt estate in England and Wales.<sup>77</sup> However, similar to section 23(9) of the Insolvency Act, the trustee of the bankrupt estate in England and Wales can make an application to the court for an income payment order that directs the bankrupt to pay the trustee of the bankrupt estate from his or her surplus income.<sup>78</sup> The advantage of the English income payment order is that it can be amended in the future on application to the court by the trustee or the bankrupt should the bankrupt's circumstances change.<sup>79</sup> However, in South Africa, the Insolvency Act does not guide whether the insolvent financial position can be reassessed in the future, or whether the Master's determination can be amended if circumstances change in the future.<sup>80</sup>

Alternatively, where there is consensus between the bankrupt and his trustee or between the bankrupt and the official receiver in England and Wales, an income payment agreement can be concluded whereby the bankrupt agrees to pay the trustee or the official receiver surplus income to benefit the creditors of his or her bankrupt estate.<sup>81</sup>

Also similar to South Africa, before the 2002 *Enterprise Act* in England and Wales bankruptcy law did not distinguish between the dishonest and the honest but unfortunate debtor, and the *IA 1986* imposed certain limitations on a bankrupt debtor because of his or her bankruptcy status. These limitations on a bankrupt debtor applied to all bankrupt debtors, irrespective of whether the bankruptcy was caused by the debtor's dishonesty or recklessness in handling his or her financial affairs or unfortunate circumstances.<sup>82</sup>

Before the *Enterprise Act*, an undischarged bankrupt was disqualified from being an MP,<sup>83</sup> and just like in South Africa the disqualification was intended to protect the public, particularly the business community.<sup>84</sup> As in South Africa, this disqualification had a consequential punitive element, that a bankrupt debtor is not worthy to take part in the legislative process.<sup>85</sup> Further, bankruptcy exhibits a certain degree of

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77 S 307(5) of the *IA 1986*; Fletcher *The law of insolvency* (2017) 228; Roestoff 2017 *SA Merc LJ* 501.

78 S 310(IA)(a) of the *IA 1986*; Fletcher (2017) 228; Roestoff 2017 *SA Merc LJ* 502.

79 S 310(6A) of the *IA 1986*.

80 Roestoff 2017 *SA Merc LJ* 511.

81 Fletcher (2017) 231; Roestoff 2017 *SA Merc LJ* 503.

82 DTI "Insolvency - A Second Chance The Insolvency Service" 2001 <https://bit.ly/3WKleDW> (last accessed 2023-06-02) (hereinafter Second Chance Report) para 1.21.

83 S 427 of the *IA 1986*.

84 Annex A, para 1.23 of the Second Chance Report.

85 Jaconelli 2020 *ICL Journal* 186.

recklessness that is not appropriate for an MP.<sup>86</sup> However, Jaconelli, says the real reason behind the disqualification is that a bankrupt debtor's inability to pay his or her debts renders him or her vulnerable to improper pressures.<sup>87</sup>

However, even though the disqualification is justified for protecting the public, it causes the stigma that a bankrupt debtor is not trustworthy because of his or her inability to pay his or her debts and this stigma makes the bankrupt debtor vulnerable to improper pressures. However, this stigma does not consider the risk that is in the ordinary part of business life.<sup>88</sup> Consequently, when the *Enterprise Act* came into effect in 2004 it aimed to reduce the stigma traditionally associated with bankruptcy by reducing the number of restrictions imposed on undischarged bankrupts.<sup>89</sup>

Thus, after the *Enterprise Act*, the automatic disqualification from being an MP was repealed and section 426A was inserted in the *IA 1986* to only disqualify an adjudged bankrupt from being an MP if he or she is subject to a bankruptcy restriction order which can subsist for up to fifteen years from the date of discharge.<sup>90</sup> The *Enterprise Act* also reduced the period that has to pass before automatic discharge from three years to one year.<sup>91</sup> Meaning, that if a bankrupt debtor is subject to a bankruptcy restriction order, he or she would be disqualified from being an MP during the one year before automatic discharge, and although he or she would be discharged after one year, he or she would still be disqualified from being an MP after discharge for up to 15 years.

In England and Wales, the conduct of a bankrupt determines whether a bankruptcy restriction order should be imposed. Such conduct includes amongst others, where the debtor incurred a debt that the bankrupt had no reasonable expectation of being able to pay before the commencement of the bankruptcy; failure to account satisfactorily to the court; carrying on any gambling; rash, and hazardous speculation, or unreasonable extravagance which may have materially contributed to or increased the extent of the bankruptcy, or which took place between the making of the bankruptcy application and the commencement of the

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86 As above.

87 Jaconelli 2020 *ICL Journal* 186-187.

88 Para 1.21 of the Second Chance Report.

89 Fletcher (2017) 348. The *Enterprise Act* abolished many of the restrictions that applied. See ss 266-267 of the *Enterprise Act*. Most of the disqualification after the *Enterprise Act* only ensues if a bankruptcy restriction order or a bankruptcy restriction undertaking is made or given. See s 426A(1) of the *IA 1986*. See Miller and Bailey *Personal insolvency: Law and practice* (2008) 457; Kelly "The Enterprise Act 2002: changes in Bankruptcy Law" 2003 <https://bit.ly/2RZV6VD> (last accessed 2019-06-05) at 7; and Walters "Personal insolvency law after the Enterprise Act: An Appraisal Journal of Corporate Law Studies" 2005 *Journal of Corporate Law Studies* 24.

90 Para 4.2(b) of Sch 4A to the *IA 1986*.

91 S 279(1) of the *IA 1986*.

bankruptcy; neglect of business affairs of a kind which may have materially contributed to or increased the extent of the bankruptcy; and fraud or fraudulent breach of trust.<sup>92</sup>

Therefore, in England and Wales, a bankruptcy restriction order is only imposed on dishonest debtors. Consequently, there is a link between the disqualification from being an MP and the purpose of the disqualification. Only the dishonest bankrupt whom the disqualification was intended for is disqualified from being an MP and the honest but unfortunate debtor is protected and receives a fresh start. Therefore, to answer Jaconelli's question of when it is legitimate to bar a person from an elective office, it appears that in England and Wales, it is justifiable to bar a bankrupt from an elective office when his or her conduct shows elements of dishonesty. Thus, in the case of an MP like Senator Bob Day whose homebuilding business was wound-up and who appears to be an honest but unfortunate debtor, he would be allowed to keep the income arising from his office unless an income payment order had been granted or an income payment agreement was concluded.

## 5 Nigeria

In Nigeria, as in South Africa, the income that the bankrupt acquires after bankruptcy does not form part of the bankrupt estate. Similar to section 23(9) of the South African Insolvency Act, section 54 of the *Nigerian Bankruptcy Act* provides that the pay or salary of a bankrupt will only be received by the trustee for distribution among the creditors on application by the trustee to the court and with the consent of the President or the Governor.

However, if the *Draft Insolvency Bill* is enacted into law, the fixed amount that the bankrupt is required to pay to the estate of the bankrupt can be amended to take into account material changes that have occurred in the personal or family situation of the bankrupt.<sup>93</sup> This is similar to the English income payment order which can also be amended in the future on application to the court by the trustee or the bankrupt should the bankrupt's circumstances change. In South African insolvency law, there is no guidance on whether the insolvent financial position can be reassessed in the future, or whether the Master's determination can be amended if circumstances change in the future.

Further, in Nigeria, it is not only the *Nigerian Constitution* that bars an adjudged bankrupt from being elected to the office of the President, Vice President, Governor, or Deputy Governor and the State House of Assembly, the *Nigerian Bankruptcy Act* also disqualifies an adjudged bankrupt from these offices. The Preamble to the *Nigerian Bankruptcy Act* specifically states that the aim of the Act is to:

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92 Paras 2.2(h)-(m) of Sch 4A of the *IA 1986*.

93 S 53(3) of the *Draft Insolvency Bill*.

An Act to make provisions for declaring as bankrupt any person who cannot pay his debts of a specified amount and to disqualify him from holding certain electives and other public offices or from practising any regulated profession (except as an employee).

Thus, the *Nigerian Bankruptcy Act* specifically aims to disqualify an adjudged bankrupt from holding elective offices.<sup>94</sup> An adjudged bankrupt in such an office or position is required to vacate such an office or position.<sup>95</sup> The perception is that a person who cannot apply due diligence in the conduct of his own affairs, cannot be expected to employ it in the affairs of the public and should thus not be given unlimited freedom to do what he wants.<sup>96</sup> Therefore, as in South Africa and England and Wales, the disqualifications are aimed at protecting the public as well as teaching people to be more careful when conducting their affairs.<sup>97</sup> The penalty for knowingly not complying with the disqualification is a liability for an offence which could either be a fine or 6 months imprisonment or both.<sup>98</sup> Therefore, like insolvency law in South Africa and England and Wales before the *Enterprise Act*, Nigerian bankruptcy law has a punitive consequence<sup>99</sup> in that all bankrupt debtors are barred from being an MP without first distinguishing between the dishonest and the honest but unfortunate debtor.

However, unlike in South Africa where automatic rehabilitation occurs after 10 years, the automatic discharge of debts occurs after 5 years after a receiving order was issued against an adjudged bankrupt in Nigeria.<sup>100</sup> Thus an adjudged bankrupt is disqualified from being elected to the office of the President for a shorter period in Nigeria. However, if the adjudged bankrupt applies for early rehabilitation, the disqualifications will only end if the bankrupt can show that the bankruptcy was caused by misfortune without misconduct on his part.<sup>101</sup>

However, if the *Draft Insolvency Bill* becomes law the *Nigerian Bankruptcy Act* will be repealed<sup>102</sup> and automatic discharge will occur nine months from the date of bankruptcy.<sup>103</sup> The *Draft Insolvency Bill*

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94 Opara, Okere and Opara “The legal regime of bankruptcy and winding up proceedings as a tool for debt recovery in Nigeria: An appraisal” 2014 *Canadian Social Sciences* 64; Nwobike “Whether Bankruptcy and Winding Up Proceedings are Veritable Tools for Debt Recovery in Nigeria” 2013 <https://bit.ly/3qrgyGW> (last accessed 2021-06-22) at 2.

95 S 127(1) of the *Nigerian Bankruptcy Act*.

96 Arop “Consumer protection in Nigeria: The Nigerian Bankruptcy Act in perspective” 2019 <https://bit.ly/3avp6PB> (last accessed 2020-03-12) 7-8.

97 As above.

98 Ss 128(1)-(6) of the *Nigerian Bankruptcy Act*.

99 See the Preamble and s 126 of the *BA*; Osunlaja (2020) 64; Opara, Okere and Opara 2014 *Canadian Social Sciences* 64; Nwobike “Whether Bankruptcy and Winding Up Proceedings are Veritable Tools for Debt Recovery in Nigeria” (2013) <https://bit.ly/3qrgyGW> (last accessed 2021-06-22) at 2.

100 S 31 of the *Nigerian Bankruptcy Act*.

101 S 126(2)(c) of the *Nigerian Bankruptcy Act*.

102 S 269 of the *Draft Insolvency Bill*.

103 S 161(1)(g) of the *Draft Insolvency Bill*.

does not have a section equivalent to section 126 of the *Nigerian Bankruptcy Act* which disqualifies bankrupts from certain positions including being elected to the office of the President, Vice President, Governor, or Deputy Governor, or the State House of Assembly. Despite this, section 167 of the *Draft Insolvency Bill* states that all statutory disqualifications because of bankruptcy will also end upon discharge if the bankrupt obtained a certificate from the court indicating that the bankruptcy was caused by misfortune, without any misconduct on his part. As adjudged bankrupt is not only prohibited from being elected to the office of the President by the *Nigerian Bankruptcy Act* but also by the *Nigerian Constitution*, it appears that the words “all statutory disqualifications because of bankruptcy” refer to disqualifications stemming from other Acts<sup>104</sup> such as section 137(1) of the *Nigerian Constitution*.

Similar to England and Wales, the *Draft Insolvency Bill* only ends the statutory disqualifications – such as the prohibition from being elected to the office of the President – of adjudged bankrupts whose conduct indicates that his or her bankruptcy was caused by misfortune i.e. honest but unfortunate debtors upon discharge. Thus, the statutory disqualifications that applied during the bankruptcy proceedings will continue after discharge for the bankrupt whose cause of bankruptcy was not misfortune and who contributed to his bankruptcy. Therefore, to answer Jaconelli’s question of when it is legitimate to bar a person from an elective office, it appears that in Nigeria like in South Africa, public interest justifies the prohibition of an adjudged bankrupt from being elected to the office of the President. In Nigeria, only upon discharge is a distinction made between dishonest debtors and honest but unfortunate debtors. Thus, it is only upon discharge that the elements of an adjudged bankrupt conduct are considered in determining whether an adjudged bankrupt should continue being disqualified from an elective office.

## 6 Conclusion and Recommendations

As indicated, in South Africa, the income of an insolvent person does not form part of the insolvent estate unless an order in terms of section 23(9) is made for the insolvent to contribute unnecessary income to the trustee for the benefit of creditors. This is similar to the position in America, England and Wales, and Nigeria where the income received by the

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104 S 182(1)(f) of the *Nigerian Constitution*, which disqualifies an adjudged bankrupt from being elected to the office of Governor of a State; s 107(1)(e), which disqualifies an adjudged bankrupt from being elected to the House of Assembly; s 66(1)(e), which disqualifies an adjudged bankrupt from being elected to the Senate or the House of Representatives. Also, see similar disqualifications for an Area Council in s 107(1)(e) of the *Electoral Act 6 of 2010*; company director in ss 253(1), 257(1)(c), and 258(1)(b) of the *Companies and Allied Matters Act 59 of 1990* of the Laws of the Federal Republic of Nigeria; Enabulele “Disqualifications of election candidates in Nigeria: Some reflections” 2008 *Commw L Bull* 562-563.

bankrupt after the commencement of bankruptcy does not form part of the bankrupt estate. In England and Wales, an income contribution order may be ordered for income contributions to be made by the insolvent to the bankrupt estate if there is surplus income. Also in Nigeria, the income or salary of a bankrupt will only be received by the trustee for distribution among the creditors on application by the trustee to the court and with the consent of the President or the Governor. However, in both England and Wales and Nigeria, the excess income claimed by the trustee can later be adjusted to cater to the bankrupt's changing circumstances. There is no guidance in this regard in South Africa.

Further, Constitution prohibits an unrehabilitated insolvent from being an MP, without first distinguishing between the dishonest and the honest but unfortunate debtor so that only the dishonest debtor is prohibited. As indicated, as regards dishonest debtors, the constitutional disqualification is justifiable and is aligned with international policy considerations that provide that bankruptcy is not intended to become a shelter for debtors who have engaged in dishonest or intentional disregard for the rights of other persons. Therefore, fraudulent debtors should not benefit from a fresh start, instead, they should be excluded. However, as regards honest but unfortunate debtors, the constitutional disqualification is not fit for the purpose of the disqualification, and it is not justifiable when considering international best practices advocating for the protection of honest but unfortunate debtors.

In America, there is no similar disqualification and in England and Wales, a similar disqualification applies if the bankrupt is subject to a bankruptcy restriction order. In Nigeria, if the *Draft Insolvency Bill* is enacted into law, the prohibition from being elected to the office of the President will only end upon discharge if the adjudged bankrupt's conduct indicates that his or her bankruptcy was caused by misfortune i.e. honest but unfortunate debtors upon discharge.

Therefore, it is recommended that each case be determined on its own facts to ascertain whether the insolvency was caused by the debtor's fraudulent or dishonest dealings or whether it resulted from unfortunate financial disruptions. It is recommended that an enquiry into the conduct of the debtor before sequestration is undertaken at the application stage to reveal whether the insolvency was caused by the debtor's fraudulent or dishonest dealings or whether it resulted from unfortunate financial disruptions. The aim of the early enquiry should not be to deny or restrict access 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). Instead, the aim should be to identify and distinguish between the types of debtors entering the sequestration process so that only the honest but unfortunate debtor can benefit from a fresh start. Thus, for constitutional imperatives, all debtors should have access to the sequestration process but a distinction between the types of debtors should be drawn early so that not only the honest debtor can be protected but the public can still be protected from fraudulent debtors.



An early inquest allows for a consideration of the circumstances of each insolvent debtor and the balancing of the rights in the Bill of Rights.

In some ways, an early inquest already takes place in the South African insolvency process. In a compulsory sequestration application, the petitioning creditor must indicate the act of insolvency committed by the debtor or the facts that indicate that the debtor is insolvent, or other important facts showing the debtor's conduct leading to his or her insolvency. Further, in both voluntary surrender and compulsory sequestration applications, a debtor is required to submit a statement of his or her affairs to indicate the reason for the insolvency and, as the circumstances of all debtors differ, the causes of their insolvency will also differ.

Further, should a court grant a sequestration order, the order should include a statement that the debtor's insolvency was caused by his or her acting fraudulently or dishonestly, or was due to unfortunate circumstances. In Nigeria, if the *Nigerian Bankruptcy Act* is repealed by the *Insolvency Bill*, statutory disqualifications imposed on an adjudged bankrupt during bankruptcy will only be discharged if the bankrupt obtains a certificate from the court indicating that the bankruptcy was the result of misfortune without any misconduct on the debtor's part. Similarly in South Africa, it is recommended that as an alternative to a statement in the sequestration order by the court stating the cause of the insolvency, the court can issue a certificate together with the sequestration order indicating that the sequestration was caused by misfortune without any misconduct by the insolvent.

In addition, it is recommended that if it is identified that the insolvency was caused by dishonest or fraudulent activities, only the insolvent whose insolvency was caused by dishonesty or misconduct should be prohibited from being elected as an MP. As indicated, the protection of public interests was intended to guard only against the dishonest insolvent, not the honest but unfortunate debtor who is adversely affected by the disqualification. Although the disqualification of dishonest debtors such as was alleged in the case of Mr Malema, from being a member of the National Assembly is justifiable as it meets the government's purpose of protecting the public against dishonest debtors, it does not appear to be justifiable in the case of honest but unfortunate debtors because the disqualification is based on the notion of the stigma that a debtor who becomes bankrupt, is not someone in whom society can have trust or confidence. Such a notion does not consider the risk that is in the ordinary part of business life. Further, as indicated for an MP like Senator Bob Day, it becomes a double blow, with no income from the wound-up business and no income from being an MP.

Therefore, disqualification from being elected as an MP only if the insolvency was caused by dishonesty or misconduct by the insolvent aligns with international guidelines that honest but unfortunate debtors should not be subjected to unnecessary disqualification and it adopts the

position in England and Wales where bankruptcy restriction orders are imposed on dishonest and fraudulent debtors. Thus, the conduct of the insolvent more especially the cause of the insolvency should be the decisive factor in determining whether he or she should be disqualified from being an MP in South Africa.