

PART 4D

VOLUNTARY LIQUIDATION UNDER A UNIFIED INSOLVENCY ACT

CHAPTER 11: VOLUNTARY LIQUIDATION UNDER A UNIFIED INSOLVENCY ACT 377

In this part the procedures for the voluntary liquidation of corporate entities will be discussed. Apart from summarising the current manner in which South African companies and close corporations are voluntarily wound up in terms of the Companies Act 61 of 1973 and the Close Corporations Act 69 of 1984, the manner in which corporations are voluntarily wound up in other jurisdictions will also be discussed. After analysing these aspects, proposals for the voluntary winding-up of corporate entities under a unified Insolvency Act will be made.

CHAPTER 11

VOLUNTARY LIQUIDATION OF JURISTIC PERSONS AND OTHER ENTITIES UNDER A UNIFIED INSOLVENCY ACT

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1 INTRODUCTION

Just as the prospective members of a company or close corporation have the right to incorporate a company or close corporation under the applicable enabling legislation, so too do the members have the right to bring about the demise of such entity and its resultant legal personality.¹ The reasons for wishing to bring about the dissolution of a company or close corporation may vary, as do the circumstances in which the members may do so.² For example, it is quite possible that a company is solvent, but the members, due to an internal problem, wish to discontinue the business they are operating. On the other hand a company or close corporation may be insolvent,

¹ See generally Cilliers *et al Corporate Law* 3rd ed (2000) paras 27.01-27.04 (hereinafter referred to as Cilliers *ea Corporate Law*).

² See Cilliers *ea Corporate Law* par 27.02.

and for this reason the members may wish to bring about its dissolution. Whatever the reason, it must be borne in mind that liquidation is the process by which the dissolution of a company is preceded.³ Stated differently, any company or close corporation which seeks to be dissolved by its members, must go through a process of liquidation. This is one of the most important differences between the liquidation (currently sequestration) of an individual and the liquidation (currently winding-up) of a juristic person.

This right of the members of companies and close corporations to bring about the demise of the entity they created, was already recognised in some of the earliest legislation governing company law.⁴ This right must be seen to be an entrenched right of the members of companies and close corporations, and any legislation purporting to regulate the liquidation of these entities will have to take cognisance of the mechanisms that have been in place for a number of years.

In light of this, the main questions that will be addressed in this chapter are the following:

- (a) Should a unified insolvency statute deal only with the liquidation of insolvent entities, or should it include the liquidation also of solvent ones?⁵

³ Cilliers *ea Corporate Law* par 27.01.

⁴ See par 2 below.

⁵ Currently the winding-up of both solvent and insolvent companies and close corporations are provided for in the Companies Act 61 of 1973 (hereinafter referred to as the Companies Act) and Close Corporations Act 69 of 1984 (hereinafter referred to as the Close Corporations Act).

- (b) Should voluntary liquidations be restricted to companies and close corporations, or should the principles be extended to include other entities such as trusts?⁶
- (c) Can the provisions relating to voluntary liquidations (by resolution) be simplified and streamlined?
- (d) Can the provisions relating to voluntary liquidations be drafted in such a way as to provide more protection to creditors than is the case under current South African company and close corporation law?
- (e) Is the role presently played by the members in the winding-up of a company or close corporation justified, or should their role in the liquidation process be reduced or even completely removed?

In addressing these questions the historical development⁷ of voluntary liquidation will be a valuable assessment tool, as will a comparative study of other jurisdictions.⁸ Finally, proposals to improve upon the current situation in South Africa will be made in the form of draft legislative provisions.⁹

⁶ It is necessary at this early stage of the discussion to point out that it was impossible to apply the principles of voluntary liquidations of companies and close corporations to individuals and partnerships. This is because the Law Commission retained the “benefit to creditors” requirement in the case of individuals and partnerships, while no such benefit needs to be proved in the case of a company or close corporation - see s 347(1) of the Companies Act where it is provided that a court may not refuse to grant a liquidation order merely on the grounds that a company has no assets, or that the assets have been mortgaged to an amount equal to or in excess of those assets. For a more detailed discussion of the “benefit to creditors” requirement, see ch 8 above.

⁷ See par 2 below.

⁸ See par 4 below.

⁹ See paras 5 and 6 below.

2 HISTORICAL DEVELOPMENT

It is important to note that voluntary winding-up is an innovation that was only introduced after company law had evolved over a number of years. As company law developed and became more advanced, so too did the mechanisms needed to wind up the affairs of a company after it had served its purpose, or at the stage where it could no longer meet its commitments towards its creditors. It is evident that South Africa introduced voluntary winding-up from English law statutes,¹⁰ as was the case with South African company law generally.¹¹

2.1 Voluntary winding-up in the Cape Colony

The earliest form of voluntary winding-up in the Cape Colony took place under the supervision of the court. Section II(1) of the Winding-up Act of 1868¹² provided as follows:

- “II. Every joint-stock company may be wound up under the following circumstances, that is to say:
1. Whenever the company has passed a special resolution that the same shall be wound up.”

This was not pure voluntary winding-up in the sense that it is applied today,¹³ but it was nevertheless the first form of winding-up whereby the company itself, through its members, could approach the court for a winding-up order. The process was still regulated by the court, but it

¹⁰ See ch 4 above.

¹¹ See ch 4 above.

¹² Act 12 of 1868.

¹³ This form of voluntary winding-up still exists today in the form of s 344(a) of the Companies Act. However, this is not a true form of voluntary winding-up as the court is not obliged to grant a winding-up order as a result of such a resolution having been passed - see *Byrom Motors (Pvt) Ltd v Dolphin House (Pvt) Ltd* 1958 3 SA 532 (SR) at 534; *Ex parte Three Sisters (Pty) Ltd* 1986 1 SA 592 (D) at 593.

was voluntary in the sense that the members could pass the resolution to approach the court to have the company wound up.

Voluntary winding-up proper was first introduced into the Cape Colony in the Companies Act of 1892.¹⁴ In this Act, for the first time, a separate chapter (or part) had been included that made provision for winding-up.¹⁵ The company could still be wound up by the court where the company had passed a special resolution to that effect, so the provision as it appeared in the 1868 Act was duplicated here.

However, for the first time the 1892 Act in section 178 contained separate provisions dealing with the voluntary winding-up of a company. The provisions differ quite radically from the provisions that appeared in later Acts,¹⁶ and even in regard to modern-day legislation, and for this reason the provisions are paraphrased below in their entirety:

- “178. A company under this Act may be wound up voluntarily -
- (1) Whenever the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs, upon the occurrence of which it is provided by the articles of association that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily;
 - (2) Whenever the company has passed a special resolution requiring the company to be wound up voluntarily;
 - (3) Whenever the company has passed an extraordinary resolution to the effect that it has been proved to its satisfaction that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same:

For the purposes of this Act any resolution shall be deemed to be extraordinary which is passed in such manner as would, if it had been confirmed by a subsequent meeting, have constituted a special resolution, as hereinbefore defined.”

¹⁴ Act 25 of 1892.

¹⁵ See part V of Act 25 of 1892.

¹⁶ At this early stage the terms “voluntary winding-up by members” and “voluntary winding-up by creditors” had not yet been introduced. These terms were later introduced under English law, and imported into South African law. This aspect is discussed in more detail below.

In addition to these provisions, section 182 regulated the manner in which the proceeds of the company's assets were to be applied. The importance attached to the members' continued interest in the company, even in winding-up, is noteworthy. For example, section 182(1) provided that any balance after the creditors had been paid, was to be repaid to the members.

2.2 Voluntary winding-up in Natal

The Natal Winding-up Law of 1866 was the first piece of legislation where any reference can be found to voluntary winding-up. These provisions, as was the case in the Cape Colony, were not pure voluntary winding-up provisions, but they did provide for the winding-up of the company by resolution under the supervision of the court. The relevant portions of this Act read as follows:

- “5. Any person who shall be a creditor of any Joint-stock or other Company, ..., or who shall claim to be a contributory of a Company, may present a petition to the Supreme Court in a summary way for the winding-up of the affairs of such company in any of the following cases, that is to say: ...
- 2nd. If any Company shall, by virtue of a resolution passed in that behalf at a meeting of the shareholders of such Company or of the directors of such Company, have filed, or have caused to be filed, in the office of the Registrar of the Supreme Court of this Colony, a declaration in writing that such company is unable to meet its engagements ...
- 8th. Whenever the Company in general meeting has passed a special resolution requiring the Company to be wound up by the Court ...”

Section 5(2nd) appears to be an early form of voluntary winding-up by creditors, hence the reference to the company being unable to meet its “engagements”. Clause 5(8th) appears to be the equivalent of the current section 344(a) of the Companies Act, which deals with the company being able to pass a resolution in order to be wound up by the court.

2 3 Voluntary winding-up in the Transvaal

Section 2 of the Transvaal *Wet op het Liquideeren van Maatschappijen*, Act 8 of 1891, is similar to the current section 344 of the Companies Act. As it has already been shown above,¹⁷ the Transvaal Acts regulating company and winding-up law were the most advanced of all four the provinces or colonies, and they eventually formed the basis for Union and subsequent legislation. The relevant part of section 2 read as follows:

2. *Iedere maatschappij zal kunnen geliquideerd worden door orde van het Hooggererechtshof, Rondgaand Hof of een der rechters in kamers ...*
 - b. *Wanneer de maatschappij tot een speciaal besluit gekomen is dezelve te liquideeren.”*

As was the case in the Cape Colony and Natal, this provision did not amount to pure voluntary winding-up, but the need was recognised for the company to be able to approach the court in order to be wound up. The *Wet op het Liquideeren van Maatschappijen*, Act 1 of 1894, had exactly the same provision and it will therefore not be repeated here.

The major changes that took place regarding voluntary winding-up in the Transvaal, can be found in the Transvaal Companies Act 31 of 1909. The relevant clauses read as follows:¹⁸

¹⁷ See ch 3 above.

¹⁸ For a discussion of the provisions relating to winding-up by the court in the Transvaal Companies Act of 1909, see ch 8 above.

- “106. (1) The winding-up of a company may be either -
(i) by the court; or
(ii) voluntary; or
(iii) subject to the supervision of the Court.”¹⁹
- “112. A company may be wound up by the court -
(i) If the company has by special resolution resolved that the company be wound up by the Court;”²⁰
- “156. A company may be wound up voluntarily -
(1) When the period (if any) fixed for the duration of the company by the articles expires, or the event (if any) occurs, on the occurrence of which the articles provide that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily:
(2) If the company resolves by special resolution that the company be wound up voluntarily:
(3) If the company resolves by extraordinary resolution that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up.”²¹

From the above provisions it is evident that it became necessary to create a special procedure, that was not necessarily under the supervision of the court, for the voluntary winding-up of companies. These provisions recognised the need for an informal procedure whereby the members themselves could bring about the demise of the company, and clearly set out the grounds upon which this could be done. Section 156(2) clearly had as its purpose a voluntary winding-up of a company in cases where it was solvent, and section 156(3) the winding-up of a company in insolvent circumstances.²²

¹⁹ This provision is the precursor of the current s 343 of the Companies Act. The only difference is that the provisions have since been refined and make a distinction between voluntary winding-up by members and voluntary winding-up by creditors.

²⁰ This provision is almost identical to the current s 344(a) of the Companies Act.

²¹ This section is the precursor to the current ss 349, 350 and 351. The latter provisions are far more refined than their predecessors, distinguishing between the different modes of voluntary winding-up.

²² This distinction was to manifest itself later in the form of “voluntary winding-up by members” and “voluntary winding-up by creditors”.

2 4 Voluntary winding-up in the Orange Free State

Section 2 of the Orange Free State's Law for the Winding-up of Joint Stock Companies of 1892, Law No 2 of 1892, provided for the winding-up of a company by the court based on a special resolution, but did not contain any other provisions whereby a company could be voluntarily wound up. Due to the similarity of this provision to the provisions as set out above, the section will not be repeated here. Suffice to state that the position was similar to the other provinces at the time.

2 5 Voluntary winding-up under Union legislation

The Companies Act 46 of 1926, the precursor to the current Companies Act of 1973, contained a framework very similar to the Transvaal Companies Act 31 of 1909. Chapter IV of the Act dealt with winding-up, and the provisions relating to winding-up by resolution were very similar to the provisions of the 1909 Transvaal Companies Act. Due to the similarity, these provisions will not be repeated here.²³

At the time this Act was promulgated (1926) the terms "voluntary winding-up by members" and "voluntary winding-up by creditors" had still not been introduced into South African legislation. This would only take place after an amendment recommended by the Lansdown Commission,²⁴

²³ The provisions dealing with these issues were ss 106, 111 and 160. For a detailed discussion of the position under the 1926 Companies Act, see Cilliers and Benade *Maatskappyereg* (1968) 373-386.

²⁴ *Report of the Companies Act Commission 1935-1936* (UG 45 of 1936) (hereinafter referred to as the Lansdown Commission Report). See paras 226-228, as well as the recommendations contained in par 229, of the report. See also appendix III to the Commission's report, where the necessary amendments to s 160 of the 1926 Companies Act were proposed in cl 74, effectively bringing about the current distinction between a members' and creditors' voluntary liquidation. However, see De la Rey "Creditors' Voluntary Liquidation: Theoretical Analysis and Practical Guide" 1980 *DJ* 47 (hereinafter referred to as De la Rey "Creditors' Voluntary Liquidation") where the author states that the Van Wyk de Vries Commission (*Kommissie van Ondersoek na die Maatskappywet* - there were two reports, the main report (*Hoofverslag* RP 45/1970) and a supplementary report with a draft Bill (*Aanvullende Verslag en Konsepwetontwerp* RP 31/1972) (hereinafter referred to as the Van Wyk de Vries Commission)) did not discuss the changes it made in regard to voluntary winding-up - it merely included the new provisions without any explanation.

which was the defining moment in making the distinction between the different modes of winding-up, and was probably modelled on the recommendations made by the Greene Committee in England.²⁵

The Van Wyk de Vries Commission of Enquiry into the Companies Act was directly responsible for the promulgation of the 1973 Companies Act. The Draft Act which was formulated by the Van Wyk de Vries Commission in its supplementary report, introduced a re-arrangement of the whole Companies Act and was eventually promulgated as the Companies Act 61 of 1973, the Act that still applies today. In its explanatory memorandum to the Draft Act, the Van Wyk de Vries commission's report stated the following under Chapter XIV dealing with the winding-up of companies:²⁶

“GENERAL

(i) In revising Chapter IV of the Act dealing with winding-up and in rearranging its provisions in an improved order it soon became clear that there was unnecessary duplication. Chapter IV of the Act separates the provisions in regard to winding-up by the Court from voluntary winding-up in its two forms (voluntary winding-up by creditors and by members) ...

If all the winding-up provisions of the Act are analysed it becomes apparent that they deal with two things. Firstly certain principles are laid down and secondly the majority of the provisions deal with procedural matters. It is in respect of these procedural matters that duplication seems to be quite unnecessary. There are variations in the procedures in respect of the different types of winding-up which are necessary but others appear to be unnecessary. It seems to be desirable to achieve as far as possible uniformity in the procedural requirements. It has been found that such uniformity can be brought about by combining provisions whereby unnecessary duplication is avoided.”

The above quotation is the main thrust of the commission's report regarding voluntary winding-up and, apart from a brief reference to the commission's own main report, there is no explanation of

²⁵ *Insolvency Law and Practice, Report of the Review Committee* (Cmnd 8558) 1982 par 88 (hereinafter referred to as the Cork Report).

²⁶ See 258-260 of the commission's supplementary report.

how or why the wording of the provisions relating to voluntary winding-up differed so drastically from the 1926 Act.

From the above (and other) provisions contained in legislation leading up to and including the Companies Act of 1926, it is evident that the members controlled the whole of the winding-up process in the case of voluntary liquidation. That this was not an ideal situation appears from the Lansdown Commission's report,²⁷ where the following was stated:

“225. Under the present law insufficient control is given to creditors in cases where a company is being liquidated voluntarily. No distinction is made between the case of the company which is in solvent circumstances and the company which is insolvent. Where the company which is being wound up is unable to pay its debts, the persons who are mainly interested are the creditors, and the shareholders have no real interest in the winding up except in so far as their shares may not be fully paid. In spite of this under the present law the shareholders control the winding up, and the winding up is treated as their affair and not that of the creditors. This position appears to us to be illogical, and we think that a distinction should be drawn between the case of the voluntary winding up of a company which is solvent and the winding up of a company which is unable to pay its debts.”²⁸

This important paragraph, and the others that followed it,²⁹ marked an important turning point in the manner in which the voluntary winding-up of companies was to be conducted in the future. Curiously enough, the Lansdown Commission's report referred to a “British Act” where this problem had already been addressed, although the Act itself is not mentioned in the report. It is submitted that this proposal by the Lansdown Commission brought about the current distinction

²⁷ Lansdown Commission Report par 225 37.

²⁸ It is submitted, with respect, that the Commission was not entirely correct in stating that s 160 of the 1926 Companies Act did not distinguish between solvent and insolvent companies. S 160(b) was clearly a reference to a solvent company while s 160(c) was a reference to insolvent companies. However, this does not detract from the most important recommendation by the Commission, namely that the creditors were to be given more say than the members if the company was being wound up due to its inability to pay its debts.

²⁹ See paras 226-228 and the recommendations contained in par 229 of the report. See also app III to the commission's report, where the necessary amendments to s 160 of the 1926 Companies Act were proposed in cl 74, effectively bringing about the current distinction between a members' and creditors' voluntary liquidation.

we find in our law between a members' and a creditors' voluntary winding-up. Apart from the proposal that extraordinary resolutions as provided for by the 1926 Companies Act be scrapped, the Millin Commission's report³⁰ did not add much to the development of voluntary winding-up under South African law.³¹

3 CURRENT POSITION IN RESPECT OF THE VOLUNTARY WINDING-UP OF COMPANIES AND CLOSE CORPORATIONS IN SOUTH AFRICA

3 1 Current position in respect of the voluntary winding-up of *solvent* companies and close corporations in South Africa³²

It has already been stated that winding-up or liquidation is a process that precedes the dissolution of a company or close corporation, whether such company or corporation is insolvent or not. It has also been pointed out above that the current distinction in South Africa between the liquidation of solvent and insolvent entities, can largely be attributed to English law and the resultant proposals made by the Lansdown Commission.

Since one of the questions that needs to be answered is whether or not the liquidation of solvent companies should resort under an insolvency or a company law statute, it is necessary to briefly examine the mechanics of the voluntary winding-up or liquidation of solvent companies and corporations in South Africa. In this way the need to re-categorise (or not) the administrative

³⁰ *Verslag van die Kommissie van Onderzoek insake die wysiging van die Maatskappywet* (UG 69 of 1948) (hereinafter referred to as the Millin Commission).

³¹ Millin Commission Report par 254 99.

³² For a general discussion of the position regarding companies, see Cilliers *ea Corporate Law* ch 27; Shrand *The Law and Practice of Insolvency, Winding-up of Companies and Judicial Management* 3rd ed (1977) 285-292 (hereinafter referred to as Shrand). For a general discussion of the position regarding close corporations, see Cilliers *et al Close Corporations Law* 3rd ed (1998) ch 11 (hereinafter referred to as Cilliers *ea Close Corporations Law*).

process for the winding-up of a solvent company or corporation can be determined. Although reference will also be made to close corporations, the main thrust of the discussion will be aimed at the voluntary liquidation of solvent companies.

It is trite law that the winding-up of a company or close corporation can be brought about in two ways, namely voluntarily or by an order of court.³³ In the case of a voluntary winding-up a further distinction is then made between a voluntary winding-up by members and a voluntary winding-up by creditors.³⁴ The main distinction between the two lies in the fact that in the case of a voluntary winding-up by members the company (or corporation) is wound up voluntarily due to reasons *other than* insolvency,³⁵ while in the case of a voluntary winding-up by creditors the company (or corporation) is being wound up due to the fact that it is unable to pay its debts.³⁶

In the case of a voluntary winding-up by members there are no creditors who suffer any loss, and therefore creditors have no say in the winding-up process. The initiative remains with the members throughout and the process is an inexpensive and simple one which allows for the efficient and speedy winding-up of the entity concerned.³⁷ Due to the fact that no creditor suffers any loss, no creditors meetings are held.

³³ S 343(1) of the Companies Act. See also Cilliers *ea Corporate Law* par 27.05. In the case of close corporations see the provisions of ss 67 and 68 of the Close Corporations Act. See also Cilliers *ea Close Corporations Law* paras 11.01, 11.02 and 11.04.

³⁴ S 343(2) of the Companies Act and s 67(1) of the Close Corporations Act.

³⁵ Cilliers *ea Corporate Law* par 27.12 and Cilliers *ea Close Corporations Law* par 11.04..

³⁶ For a discussion of voluntary winding-up by creditors, see Cilliers *ea Corporate Law* paras 27.07 and 27.18-27.21 and Cilliers *ea Close Corporations Law* par 11.05. Cilliers *ea Corporate Law* do not categorically state that a voluntary winding-up by creditors is used in cases where the company (or close corporation) is insolvent. However, it is respectfully submitted that the involvement of the creditors in the winding-up process is a clear indication of insolvency: why else would there be a need to involve them? This type of winding-up procedure is discussed in more detail in par 3.2 below.

³⁷ Cilliers *ea Corporate Law* par 27.06 and Cilliers *ea Close Corporations Law* par 11.05.

A voluntary winding-up by members is initiated by a resolution passed by the members of the company or corporation.³⁸ Such a resolution must state whether or not the winding-up is a voluntary winding-up by members or by creditors.³⁹ In the case of a company, the power of the members to pass such a resolution cannot be excluded by the company's articles.⁴⁰ Once the resolution has been passed, it must be lodged with the Registrar of Companies (or Close Corporations) who will then register the resolution in terms of section 200 of the Companies Act.⁴¹ The winding-up only commences after the resolution has been registered by the Registrar in terms of section 200.⁴² Within 28 days of the resolution having been registered by the Registrar, the company must lodge a certified copy of the resolution with the Master.⁴³

In addition to these requirements, the company also has to give notice of the voluntary winding-up in the *Government Gazette*.⁴⁴ Section 357(3) also requires a copy of the resolution to be sent to certain officers and registrars within 14 days of the registration of the resolution, although the subsection does not state by whom the copy must be sent.⁴⁵ When proof of registration of the

³⁸ In the case of a company a *special* resolution must be passed in order to place the company in liquidation as a voluntary winding-up by members (s 349 of the Companies Act), while in the case of a close corporation it must be a *written resolution* signed by all the members of the corporation (s 67(1) of the Close Corporations Act).

³⁹ S 349 of the Companies Act and s 67(1) of the Close Corporations Act. See also *De Leef Family Trust v Commissioner for Inland Revenue* 1993 3 SA 345 (A).

⁴⁰ *South Rand Exploration Co Ltd v Transvaal Coal Owners' Association Ltd* 1923 WLD 91.

⁴¹ See ss 350 and 356 of the Companies Act and s 67(2) of the Close Corporations Act. In the case of a close corporation, the resolution must be lodged with the Registrar of Close Corporations within 28 days of the passing of the resolution.

⁴² S 352 of the Companies Act and s 67(4) of the Close Corporations Act.

⁴³ S 356(2) of the Companies Act. Note, however, that a copy of the resolution will already be in the possession of the Master, since the Registrar of Companies has to transmit a copy of the resolution to him in terms of s 352(2).

⁴⁴ S 356(2)(b) of the Companies Act.

⁴⁵ Kunst (gen ed) *Henochsberg on the Companies Act* (1994) 754 (hereinafter referred to as Henochsberg) is of the opinion that this must be done by the company, although no authority is cited in support of this view.

special resolution is lodged with the office of the Master, it must be accompanied by a further resolution in which a person is nominated for the appointment as liquidator.⁴⁶

For the protection of creditors, security may be required to be lodged (with the Master) by the company for any debts of the company within a period not exceeding twelve months from the commencement of the winding-up.⁴⁷ Such security must be lodged with the Master *prior* to the registration of the resolution.⁴⁸ However, the Master may dispense with the furnishing of security referred to above if:

- (a) An affidavit is submitted to the Master by the directors of the company that, to the best of their knowledge and belief, and according to the records of the company, it has no debts; and
- (b) The affidavit by the directors is supported by a statement to the same effect by the auditor of the company.⁴⁹

These documents must also be provided to the Master prior to the resolution being registered by the Registrar of Companies. Only once these requirements have been met, will the Registrar be in a position to register the resolution.

⁴⁶ S 356(2)(a)(i) of the Companies Act. For the position regarding close corporations see s 74(3) of the Close Corporations Act.

⁴⁷ S 350(1)(b) of the Companies Act.

⁴⁸ S 350(1)(b) of the Companies Act.

⁴⁹ S 350(1)(b)(ii) of the Companies Act.

Once the resolution has been registered, the Master will normally appoint the person nominated as liquidator in the resolution,⁵⁰ although he may refuse to appoint a specific person if such person is disqualified from being appointed.⁵¹ The liquidator's remuneration is normally set out in the same resolution in which a liquidator has been nominated, although this is not necessarily the case. If this has not been done in the resolution nominating a liquidator, an additional resolution may be passed in which such remuneration is determined.⁵²

Once appointed, the liquidator must give notice of his or her appointment in the *Government Gazette*.⁵³ The liquidator does not convene meetings of creditors,⁵⁴ no claims by creditors are proved against the company,⁵⁵ there is no need to submit a report to creditors⁵⁶ and no statement of the affairs⁵⁷ of the company needs to be completed.⁵⁸ Subject to the consent of the members, the liquidator realises the assets of the company or corporation and lodges the account of his administration with the Master in the prescribed form.⁵⁹ It is not necessary for the liquidator to

⁵⁰ S 369 of the Companies Act. However, see s 74(3) of the Close Corporations Act for the position regarding appointments in close corporations.

⁵¹ See the provisions of s 370 of the Companies Act.

⁵² See s 384(1) of the Companies Act.

⁵³ S 375(5)(b) of the Companies Act.

⁵⁴ See Cilliers *ea Corporate Law* par 27.15 fn 30 498 where s 364(1) of the Companies Act is cited as authority "by implication".

⁵⁵ See Cilliers *ea Corporate Law* par 27.15 fn 31 498 where s 366 of the Companies Act is cited as authority "by implication".

⁵⁶ S 402 of the Companies Act and s 79 of the Close Corporations Act.

⁵⁷ Form CM 100 of the Winding-up Regulations promulgated in terms of s 15 of the Companies Act. These regulations were promulgated in terms of GN R2490 dated 28 December 1973 (hereinafter referred to as the Winding-up Regulations).

⁵⁸ S 363 of the Companies Act and s 78(1) (by implication) of the Close Corporations Act.

⁵⁹ The prescribed form is CM 101.

realise all the assets if it is possible for him or her to distribute the assets to the members *in specie*, as long as the distribution of the assets is strictly in proportion to the shareholding of every member of the company.⁶⁰

3.2 Current position in respect of the voluntary winding-up of *insolvent* companies and close corporations in South Africa⁶¹

When a company or corporation is insolvent, or no longer in a position to meet its financial obligations for whatever reason, one of the options available to the members is to wind up the company or close corporation voluntarily as a voluntary winding-up by creditors. The term “voluntary winding-up by creditors” is somewhat confusing,⁶² as the resolution to place the company or corporation into liquidation is passed by the *members*. The reference to creditors in this mode of winding-up is actually an indication that the *administration process* is creditor-driven. Unlike the situation in a voluntary winding-up by members, in a creditors’ winding-up meetings of creditors are held because the company or corporation is insolvent, or unable to meet its financial obligations.

In fact, in the case of a creditors’ voluntary winding-up, the administration process is very similar to a winding-up by the court.⁶³ Meetings of creditors (and members) are held, creditors are

⁶⁰ See Cilliers *ea Corporate Law* 498 par 27.16 fn 34.

⁶¹ In the case of companies see generally Cilliers *ea Corporate Law* paras 27.07 and 27.18-27.21; De la Rey “Creditors Voluntary Liquidation”; Shrand 293-306. In the case of close corporations see generally Cilliers *ea Close Corporations Law* 130 par 11.05.

⁶² See Cilliers *ea Corporate Law* 495-496 par 27.07 and Cilliers *ea Close Corporations Law* 130 par 11.05. This terminology was taken over from English law where the terms have caused just as much confusion in the past, to the extent that the Cork Report, paras 663-665, recommended that the term “liquidation of assets” be used instead.

⁶³ Cilliers *ea Corporate Law* 498-499 par 27.19.

required to prove claims,⁶⁴ the liquidator must lodge a report⁶⁵ and the directors (or in the case of a close corporation the members) must lodge a statement of the affairs of the company (or close corporation) in the prescribed form.⁶⁶ Due to the fact that the administration process is so similar to the process in a winding-up by the court, the whole of the administration process will not be discussed here as it is not the administration process as such that is under examination but the process that is used in order to bring about a voluntary winding-up.

One of the unique aspects of this mode of voluntary winding-up is that there is no application to court, and hence no court order placing the company or close corporation in liquidation. It is a much faster and economical method⁶⁷ of achieving the same result as an application to court by the company itself.⁶⁸ A voluntary winding-up by creditors also commences once the resolution is registered by the Registrar of Companies and Close Corporations in terms of section 200 of the Companies Act.⁶⁹ Other differences between a voluntary winding-up by creditors and a winding-

⁶⁴ S 366 of the Companies Act.

⁶⁵ S 402 of the Companies Act and s 79 of the Close Corporations Act.

⁶⁶ The prescribed form is CM 100 as set out in the Winding-up Regulations. In terms of s 356(2)(a)(ii) of the Companies Act this statement must be lodged with the Master within 28 days after registration of the resolution; s 78(1) of the Close Corporations Act.

⁶⁷ Cilliers *ea Corporate Law* 495-496 par 27.07 and Cilliers *ea Close Corporations Law* 130 par 11.05.

⁶⁸ However, it is important to note that the consequences are not necessarily the same: In *National Union of Leather Workers v Barnard and Perry* 2001 4 SA 1261 (LAC) it was held that the passing of a resolution by the members of a company for the voluntary winding-up of such company as a voluntary winding-up by creditors, is an “act” by the company that brings about the dismissal of the employees in terms of s 186 of the Labour Relations Act 66 of 1995. The winding-up of a company causes the employment contracts of the employees to be terminated immediately upon the liquidation of the employer - s 38 of the Insolvency Act, read with s 339 of the Companies Act. In his judgment Davis AJA distinguished between a winding-up by the court and a voluntary winding-up, stating that the two procedures differed in that the court had to decide, in the case where the winding-up is ordered by the court, whether the company should be wound up. He stated that since there is no court involvement in a voluntary winding-up by creditors, it amounts to an act by the company that brings about the demise of the employees’ contracts of employment. The decision has serious implications in regard to the amounts that employees may be able to claim from the company in terms of s 98A of the Insolvency Act, read with s 339 of the Companies Act (s 98A provides for the payment of preferent claims by employees against the estate of the employer).

⁶⁹ S 352(1) of the Companies Act and s 67(4) of the Close Corporations Act.

up by the court is the fact that the directors of the company (members of a close corporation) have full voting powers when it comes to the appointment of a liquidator,⁷⁰ and they are also less exposed to prosecution than in a case where the company is wound up by the court.⁷¹

Another unique aspect of a voluntary winding-up by creditors (as opposed to a winding-up by the court) is that the members remain involved in the administration process. For example, meetings of creditors *and* members are held⁷² and the members may appoint their own liquidator.⁷³ This retained interest by the members in the administration process is one of the aspects that will be examined in the proposals made under paragraph 6 below.

4 VOLUNTARY LIQUIDATIONS AND WINDING-UP IN OTHER JURISDICTIONS

4.1 Voluntary liquidation in the United States of America

Having a truly unified system of insolvency or bankruptcy law, United States bankruptcy legislation does not distinguish between corporate and consumer debtors in the case of voluntary liquidation.⁷⁴ Unlike South African insolvency legislation where a benefit for creditors is a legislative requirement before the court may grant a sequestration order in the case of insolvent individuals or partnerships, the United States bankruptcy system is a debtor-friendly system which

⁷⁰ S 365(2)(a) of the Companies Act and s 74(4) of the Close Corporations Act.

⁷¹ Eg, s 425 of the Companies Act only applies to a company being wound up by the court.

⁷² S 386(3) of the Companies Act and s 78 of the Close Corporations Act. The fact that these meetings are rarely, if ever, held was severely criticised by the court in the unreported judgment of the Cape High Court in *Die Trustees van die M M Kirsten Trust v Rousseau*, case no 5748/94 (C).

⁷³ S 364(1)(a) of the Companies Act and s 74(4) of the Close Corporations Act.

⁷⁴ For a general discussion of bankruptcy proceedings in the United States, see Herbert *Understanding Bankruptcy* (1995) ch 4-6 (hereinafter referred to as Herbert).

can basically be used in the same manner by individuals and corporations alike.⁷⁵ Chapter 3 of the United States Bankruptcy Code⁷⁶ deals with Case Administration, and section 301 of the Code reads as follows:

“§ 301. Voluntary cases. A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.”

According to the legislative history as set out in the House Report⁷⁷ and the Senate Report,⁷⁸ voluntary bankruptcy is commenced by merely filing a petition under the particular operative chapter of the Bankruptcy Code in terms of which the debtor wishes to proceed. All petitions are filed with the clerk of the bankruptcy court. Section 342 of the Bankruptcy Code requires notice to be given of an order for relief (in other words where the petition is granted) and Bankruptcy Rule 2002(f) requires the clerk of the bankruptcy court to give notice to various people, including the creditors, the debtor and the United States trustee. From the decision in *Central Mortgage & Trust, Inc v State of Texas (In re Central Mortgage & Trust, Inc)*⁷⁹ and the definition of “person”⁸⁰ and “entity”⁸¹ in the Bankruptcy Code, it is certain that these provisions apply also to companies, provided the company is eligible to become a debtor.

⁷⁵ This is what is meant by a “single gateway” approach to insolvency, as all debtors use the same procedure in order to obtain relief.

⁷⁶ 11 USC.

⁷⁷ House Report No. 95-595, 95th Congress, 1st session, 321 (1977).

⁷⁸ Senate Report 95-989, 95th Congress, 2nd session 31 (1978).

⁷⁹ 13 CBC2d 617 50 BR 1010 (SD Tex 1985).

⁸⁰ 11 USC s 101(41).

⁸¹ 11 USC s 101(15).

Due to the unique nature of the bankruptcy laws that apply in the United States of America, the procedures that lead to bankruptcy will not be of much assistance in South Africa. The great advantage of the United States' system of bankruptcy is the presence of bankruptcy courts, and the fact that the whole system of insolvency is court-driven. For example, it is impossible for a company to be liquidated without a court order having been granted, while in South Africa there is the option of passing a special resolution which does not contain any court involvement. Having a bankruptcy court obviates the need to pass resolutions for registration by the Registrar of Companies as is the case in South Africa, in fact their system of bankruptcy does not even acknowledge this possibility. South African procedures are incomparable with United States procedures due to the system of supervision that is followed here.

4 2 Voluntary winding-up in England

Considering that both Australia and South Africa inherited their company law legislation from England,⁸² the laws of the latter relating to winding-up are probably the most suited to study on a comparative basis. It has already been stated above that although England has a single statute in which its insolvency laws are embodied, it does not have a genuine unified system of insolvency law.⁸³ Rather it has a single statute into which a number of statutes have been consolidated.⁸⁴

⁸² See ch 3 and ch 4 above.

⁸³ See Fletcher *The Law of Insolvency* 2nd ed (1996) 18-20 (hereinafter referred to as Fletcher). He points out that although personal and corporate insolvencies have been consolidated into one Act, the Act itself retains the traditional distinction between the two. He also points out the apparent paradox in that the Insolvency Act now also regulates the administration of solvent companies, eg where a company is wound up as a voluntary winding-up by its members. This aspect is of extreme importance for the research undertaken in this study, since the English Insolvency Act cannot be said to be a truly unified Act. See also Keay "To Unify or Not to Unify Insolvency Legislation: International Experience and the Latest South African Proposals" 1999 *DJ* 65-68; Dalhuisen *Dalhuisen on International Insolvency and Bankruptcy* (1986) par 3.08[4] 1-93; Milman and Durrant *Corporate Insolvency Law and Practice* 3rd ed (1999) 2 (hereinafter referred to as Milman and Durrant).

⁸⁴ Fletcher 20; Milman and Durrant 2.

4 2 1 *Voluntary winding-up in England generally*⁸⁵

Despite the recommendations regarding voluntary winding-up in the Cork Report,⁸⁶ England still distinguishes between a voluntary winding-up by members and a voluntary winding-up by creditors.⁸⁷ Due to the similarities between South African, Australian and English law regarding winding-up, only a brief exposition of voluntary winding-up will be given here.

Only companies that can make a declaration of solvency⁸⁸ in terms of section 89 of the Insolvency Act 1986 may make use of a members' voluntary winding up.⁸⁹ If a company is unable to provide such a declaration within the specified time frame, the winding-up is a voluntary winding-up by creditors.⁹⁰

4 2 2 *Voluntary winding-up by members*

It has already been stated that one of the great paradoxes of the English Insolvency Act 1986, is that it also provides for the winding-up of solvent companies. The importance of this is highlighted because one of the questions being asked in this chapter is whether or not South Africa should include the provisions relating to the liquidation of solvent companies in a unified Insolvency Act. Although the inclusion of the provisions relating to the winding-up of solvent companies in the Insolvency Act 1986 does not seem to lead to great difficulty, it is nonetheless

⁸⁵ For a historical overview of the developments regarding voluntary winding-up in England, see the Cork Report paras 176-181 and ch 13 paras 661-683. See generally also Bailey *et al Corporate Insolvency – Law and Practice* (1992) ch 9.

⁸⁶ Cork Report paras 663-665.

⁸⁷ Fletcher 493-494; Milman and Durrant 77.

⁸⁸ For a discussion of the requirements for this declaration of solvency, see Fletcher 494-495; Milman and Durrant 77.

⁸⁹ Fletcher 494.

⁹⁰ Fletcher 494. For a discussion of the conversion from a voluntary winding-up by members to a voluntary winding-up by creditors, see Fletcher 495-496; Milman and Durrant 77-78 and ss 90 and 95 of the Insolvency Act 1986 - see also *De Courcy v Clements* [1971] Ch 693. For a discussion of the conversion from a voluntary winding-up to a compulsory winding-up, see Fletcher 496-498.

submitted that a statute designed for the purposes of insolvency should not include provisions of this nature.

The only two aspects of the voluntary winding-up of companies under English law that need mentioning, are the fact that if a company passes a resolution to wind up the company as a voluntary winding-up by members, and the members are unable to provide a declaration of solvency within the stated time-frame, the voluntary winding-up is automatically converted into a creditors' voluntary winding-up.⁹¹ The second aspect relates to the fact that a members' voluntary winding-up can be converted to a creditors' voluntary winding-up if it later transpires that the company is in fact insolvent, despite the declaration of solvency that was made.⁹²

4 2 3 *Voluntary winding-up by creditors in England*⁹³

Where the company itself becomes aware that it is insolvent, or is likely to be insolvent in the near future, it may take steps to bring about its voluntary liquidation.⁹⁴ This is done by passing a special

⁹¹ Fletcher 494; Milman and Durrant 77-78; *De Courcy v Clements* [1971] Ch 693.

⁹² Fletcher 494; Milman and Durrant 77-78.

⁹³ See generally Fletcher ch 19 499-515; Milman and Durrant 78-80; Goode *Principles of Corporate Insolvency Law* 101-105. Of special interest in this regard are the steps taken in England to curtail the abuse of process that can necessarily flow from a voluntary winding-up. In England these abuses became known as "Centrebinding operations", with reference to the decision in *Re Centrebind Ltd* [1967] 1 WLR 377; [1966] 3 All ER 899. The provisions now in place prevent the abuses that can take place between the time that the resolution is passed to the time a liquidator is appointed, and basically prevent the dissipation of the companies assets during this period. For a complete discussion of this aspect, see Fletcher 501-504; Milman and Durrant 78-79; Goode 102. It is submitted that the position in this regard in South Africa is even more open to abuse, since the commencement of liquidation in the case of a voluntary winding-up is only the date of the *registration* of the resolution to liquidate. In the period between the passing of the resolution and the registration thereof and the subsequent appointment of a liquidator, there is more than enough opportunity for abuse by the company.

⁹⁴ Fletcher 493.

resolution⁹⁵ in terms of section 84 of the Insolvency Act 1986.⁹⁶ In terms of section 84 a company may be wound up voluntarily in the following circumstances:

- (a) When the period fixed for the duration of the company by the articles expires;⁹⁷
- (b) When the company by special resolution resolves that it be wound up voluntarily;⁹⁸
- (c) When the company resolves by extraordinary resolution that it cannot, by reason of its liabilities, continue its business and that it would be advisable to wind up.⁹⁹

In all three of the above cases the notice of the meeting to members must also contain details of the resolution it proposes, otherwise the resolution is invalid.¹⁰⁰ Once the resolution has been passed, a copy thereof must be lodged with the Registrar of Companies within 15 days.¹⁰¹ The resolution must also be advertised in the *London Gazette* within 14 days of having been passed.¹⁰² In terms of section 86 of the Insolvency Act 1986 a voluntary winding-up is deemed to

⁹⁵ A special resolution, in terms of s 378 of the Companies Act, is one which is passed by a majority of not less than three-quarters of the members entitled to vote.

⁹⁶ Fletcher 504.

⁹⁷ In this case a resolution by the company in general meeting is required - see Fletcher 504.

⁹⁸ In this case the resolution does not need to refer to the company's state of solvency, and this procedure may therefore be instituted in order to achieve either a solvent or insolvent liquidation - see Fletcher 504; Milman and Durrant 78.

⁹⁹ As regards the requirements of an extraordinary resolution under English company law, see Fletcher 504-505. See also Milman and Durrant 78.

¹⁰⁰ According to Fletcher 505 sufficient details will be given if the section in terms of which the resolution will be passed, is indicated in the notice.

¹⁰¹ S 84(3) of the Insolvency Act 1986 and s 380(1) and (4) of the Companies Act 198; Fletcher 505.

¹⁰² S 85(1) of the Insolvency Act 1986; Fletcher 505; Milman and Durrant 78.

have commenced at the time of the passing of the resolution for voluntary winding-up.¹⁰³ Even if the voluntary liquidation is at a later date converted to a compulsory winding-up, the date of the commencement of liquidation remains the date on which the resolution was passed.¹⁰⁴

In terms of section 98(1)(a) of the Insolvency Act 1986 the company must convene a meeting of creditors no later than the 14th day after having held the meeting at which the resolution to wind up voluntarily, was taken.¹⁰⁵ The creditors are informed of the meeting by means of postal notices and must receive a minimum of seven days' notice.¹⁰⁶ In addition the meeting must be advertised in the *London Gazette* as well as in two newspapers circulating in the district of Great Britain where the main place of business was situated in the six months immediately preceding the date upon which the meeting at which the resolution to wind up, was passed.¹⁰⁷ The company must prepare a statement of the company's affairs in the prescribed form for submission to the creditors at the creditors' meeting.¹⁰⁸ The directors appoint one of their number to preside at the meeting of creditors, and the nominee is obliged to attend the meeting and perform this function.¹⁰⁹ If the appointed director fails to perform his or her functions in this regard, the creditors present at the meeting may appoint their own chairman and continue with a validly held meeting.¹¹⁰ The main business that takes place at this meeting is the appointment of a liquidator and the appointment

¹⁰³ Fletcher 505; Milman and Durrant 78.

¹⁰⁴ S 129(1) of the Insolvency Act 1986; Fletcher 505-506.

¹⁰⁵ Fletcher 507; Milman and Durrant 79.

¹⁰⁶ S 98 of the Insolvency Act 1986; Fletcher 507; Milman and Durrant 79.

¹⁰⁷ S 98 of the Insolvency Act 1986; Fletcher 507; Milman and Durrant 79.

¹⁰⁸ S 99 of the Insolvency Act 1986 and r 4.34 of the Insolvency Rules 1986; Fletcher 508; Milman and Durrant 79.

¹⁰⁹ S 99 of the Insolvency Act 1986; Fletcher 508; Milman and Durrant 79.

¹¹⁰ S 166(5) of the Insolvency Act 1986; Fletcher 508-509; Milman and Durrant 79; *Re Salcombe Hotel Development Co Ltd* (1989) 5 BCC 807; [1991] BCLC 44..

of a liquidation committee.¹¹¹ Creditors are entitled to vote at the meeting based on the value of their claims, and it is therefore the first business of the meeting to determine the value, and to prove, such claims.¹¹² Creditors are only entitled to vote on the unsecured (concurrent) portion of their claims.¹¹³

If a liquidator is appointed by the meeting in terms of section 100 of the Insolvency Act 1986, he must consent to act as such at the meeting. If this does take place, the appointment takes effect at the time the resolution for that appointment is passed.¹¹⁴ The liquidator is obliged to publish a notice of his appointment in the *Gazette* and must also deliver a formal notice of his appointment to the Registrar of Companies.¹¹⁵

Once the liquidator has been appointed, the administration process of the company in winding-up is the same as the process employed for the winding-up of a company under compulsory liquidation. Where the creditors at their meeting deem it necessary, they may appoint a “liquidation committee” that has various powers, mainly in regard to the sanctioning of the conduct of the directors and certain aspects of the liquidator’s powers and duties.¹¹⁶

¹¹¹ Fletcher 509. For a detailed discussion of the procedures and provisions relating to the appointment of a liquidator, see s 100 of the Insolvency Act 1986; Fletcher 509-510; Milman and Durrant 80.

¹¹² Fletcher 510.

¹¹³ Insolvency Rules 1986 r 4.67(4); Fletcher 510.

¹¹⁴ Insolvency Rules 1986 r 4.101; Fletcher 510.

¹¹⁵ S 109(1) of the Insolvency Act 1986; Fletcher 510-511; Milman and Durrant 81.

¹¹⁶ S 101 of the Insolvency Act 1986; Fletcher 514-515; Milman and Durrant 86. For a discussion of the powers of the liquidation committee, see Fletcher 515; Milman and Durrant 86-87.

4 2 4 Conclusion

Although various changes to English law regarding the voluntary winding-up of companies have taken place since 1929,¹¹⁷ the procedures in essence remain similar to those used in South Africa. However, the supervisory function employed in South Africa with reference to the Master is exercised in England by a liquidation committee. Other than that the procedures are more or less the same, although the time-frames used in England are a lot shorter than those used in South Africa. In South Africa we have yet to address the problems of abuse by the company and insufficient notice to creditors, problems which England seem to have overcome after the publication of the Cork Report. In the proposals that will be made below, many of the current problems currently experienced in South Africa with regard to voluntary liquidation will be addressed. In addition, and contrary to the situation in England, proposals will be made for the provisions relating to solvent entities to be omitted from a unified Insolvency Act.

4 3 Voluntary winding-up in Australia¹¹⁸

The similarities between South African and Australian winding-up law are once again obvious due to the influence that English law has had on both these countries. For this reason the procedures for the winding-up of a company in Australia are nearly identical to those found in South Africa. In the Harmer Report¹¹⁹ the following description of winding-up was given, a description that could quite easily be made in regard to South African winding-up law:

¹¹⁷ Fletcher 493-494.

¹¹⁸ See generally Keay *Insolvency, Personal and Corporate Law and Practice* 3rd ed (1998) ch 9 (hereinafter referred to as Keay *Insolvency*) and Tomasic and Whitford *Australian Insolvency and Bankruptcy Law* 2nd ed (1997) ch 10 (hereinafter referred to as Tomasic and Whitford); Keay McPherson, *The Law of Company Liquidation* 4th ed (1999) 26-34 (hereinafter referred to as McPherson).

¹¹⁹ Australian Law Reform Commission Report No 45 *General Insolvency Inquiry* par 128 (hereinafter referred to as the Harmer Report).

“Winding up is the process of stopping the business of a company, realising its assets, discharging its liabilities, settling any questions of account or contribution between its members, dividing the surplus assets, if any, among the members and terminating the existence of the company by dissolution.”

In Australia the Corporations Act¹²⁰ provides for two modes of winding-up, namely voluntary and compulsory winding-up.¹²¹ A voluntary winding-up can take two forms, namely a voluntary winding-up by members and a voluntary winding-up by creditors.¹²² As is the case in South Africa, a voluntary winding-up is initiated by the members of the company while a compulsory winding-up, which is also known as a winding-up by the court, can be initiated by a variety of persons.¹²³

Despite the two possible modes of winding-up that can both apply to an insolvent company, it is only the procedure that brings about liquidation or winding-up that differs - the actual administration of such estates is practically identical.¹²⁴ This is also the case in South Africa.¹²⁵ Keye is at pains to point out that there are, however, marked differences in the provisions of the Corporations Act dealing with insolvent and solvent companies,¹²⁶ these differences are manifested in the fact that the Corporations Act has separate provisions dealing with winding-up in insolvency¹²⁷ and the winding up of a solvent company.¹²⁸

¹²⁰ Act 50 of 2001. This Act was known as the Corporations Law prior to 15 July 2001.

¹²¹ See Keye *Insolvency* 365; Tomasic and Whitford par [10.1]; McPherson 26.

¹²² Keye *Insolvency* 365; McPherson 26.

¹²³ Keye *Insolvency* 365; McPherson 26.

¹²⁴ Keye *Insolvency* 365.

¹²⁵ See par 3.2 above.

¹²⁶ Keye *Insolvency* 365.

¹²⁷ Part 5.4B of the Corporations Act.

¹²⁸ Part 5.4A of the Corporations Act.

4 3 1 *Voluntary winding-up in Australia generally*

The court is not involved in bringing about the winding-up under this mode of liquidation, although the court may be approached to decide certain issues relating to the liquidation process.¹²⁹ In Australia voluntary winding-up is a statutory procedure governed by the Corporations Act¹³⁰ that allows the members of a company to pass a resolution placing a company in liquidation. According to Keay this process “reflects a policy endemic to company law that permits the creditors and members in winding-up to deal with what is their own affairs”.¹³¹

In Australia there are two forms of voluntary winding-up. In the case where the company is solvent, the members are entitled to initiate a voluntary winding-up by members.¹³² In the case where the company is insolvent, the members have to initiate a voluntary winding-up by creditors.¹³³

4 3 2 *Voluntary winding-up by members in Australia*¹³⁴

The process of winding-up a solvent company voluntarily in Australia is very similar to the comparable process in South Africa.¹³⁵ Companies that are wound up in this fashion are solvent and the creditors of the company, if any, can be expected to be paid in full.¹³⁶ For this reason the process does not include the participation of creditors and the members supervise the liquidation

¹²⁹ Keay *Insolvency* 366.

¹³⁰ Ss 490-512 of the Corporations Act.

¹³¹ Keay *Insolvency* 366. See also McPherson 26.

¹³² Keay *Insolvency* 367.

¹³³ Keay *Insolvency* 367.

¹³⁴ See generally McPherson 26-31.

¹³⁵ See par 3 above.

¹³⁶ Keay *Insolvency* 367; McPherson 26-27.

process.¹³⁷ Since Australia has a dual statute system of insolvency,¹³⁸ they have no need to answer the question as to whether the winding-up provisions of solvent companies should be included in separate legislation; these provisions have already been included in their Corporations Act, the South African equivalent of the Companies Act. Currently South Africa has an identical system, although the Australian Corporations Act does contain its own insolvency provisions in the Corporations Act while in South Africa the substantive law of insolvency has to be obtained from the Insolvency Act and the South African common law.¹³⁹

4 3 3 *Voluntary winding-up by creditors in Australia*¹⁴⁰

Once again the situation is the same as it currently pertains in South Africa. Although termed a “creditors’ voluntary winding-up”, the members initiate the winding-up procedure.¹⁴¹ The reference to “creditors” is because of the fact that they will control the liquidation process.¹⁴² For example, the creditors:

- (a) Appoint a liquidator;¹⁴³
- (b) May determine the liquidator’s remuneration,¹⁴⁴

¹³⁷ Keay *Insolvency* 367; McPherson 26-27.

¹³⁸ See ch 4 above.

¹³⁹ See ch 4 above.

¹⁴⁰ See generally Keay *Insolvency* 370-373; Tomasic and Whitford paras [10.26]-[10.28]; McPherson 31-34.

¹⁴¹ Keay *Insolvency* 367; McPherson 32-33.

¹⁴² Keay *Insolvency* 367; McPherson 32-33.

¹⁴³ Ss 496(5) and 499(1) of the Corporations Act; Keay *Insolvency* 367; McPherson 32.

¹⁴⁴ S 499(3) of the Corporations Act; Keay *Insolvency* 367; McPherson 32.

-
- (c) Supervise the liquidator during the administration of the affairs of the company;¹⁴⁵
- (d) Establish a committee of inspection to assist and oversee the liquidator.¹⁴⁶

Basically a voluntary winding-up by creditors is initiated in one of two ways.¹⁴⁷ Firstly, where the members of a company are unable to complete a declaration of solvency at the time the decision to wind up voluntarily is taken, they have no option but to proceed with a voluntary winding-up by creditors.¹⁴⁸ Secondly, where the liquidator of a company that is being wound up as a voluntary winding-up by members is of the opinion that the company is unable to pay its debts, the winding-up can be converted from a voluntary winding-up by members to a voluntary winding-up by creditors.¹⁴⁹

The procedure for a voluntary winding-up by creditors where the members are unable to complete a declaration of solvency, is basically as follows (only the most important aspects are discussed here on a comparative basis with the position in South Africa):

¹⁴⁵ S 506(1)(a) of the Corporations Act; Keay *Insolvency* 367; McPherson 32.

¹⁴⁶ Ss 548-551 of the Corporations Act; Keay *Insolvency* 367; McPherson 32. Australia does not have a Master of the High Court, as is the case in South Africa, to supervise the conduct of the liquidator; hence the appointment of a creditors' committee.

¹⁴⁷ Keay *Insolvency* 370; McPherson 32-33.

¹⁴⁸ Keay *Insolvency* 370; McPherson 33.

¹⁴⁹ Keay *Insolvency* 373; McPherson 34.

- (a) *Convening the meeting.* The directors of the company must convene a meeting of both the members and the creditors of the company. Members are given 21 days notice of the meeting and creditors are given 7 days notice.¹⁵⁰ The meeting of creditors must be convened on the same day as the meeting of members, or the following day.¹⁵¹ In addition to the notice of the meeting, the directors must also send the creditors a summary of the affairs of the company and a list of all the names of the creditors together with an estimate of the amount of their claims.¹⁵² There are also certain provisions relating to the placing of notices informing creditors of the meeting.¹⁵³
- (b) *The meeting of members and creditors.* At the meeting of members the resolution to place the company in liquidation will be tabled. The resolution that needs to be passed is a special resolution. The members may pass a resolution appointing a liquidator.¹⁵⁴ According to section 492 of the Corporations Act the liquidation commences at the time the special resolution to wind up the company has been passed.¹⁵⁵ According to Keay¹⁵⁶ the creditors' meeting is held shortly after the members' meeting, and normally at the same place. One of the directors and the company secretary must be appointed to attend the creditors' meeting.¹⁵⁷ The director appointed to attend the creditors' meeting, or one

¹⁵⁰ S 497(2) of the Corporations Act. Keay 371 points out that in practice creditors will receive 21 days notice of the meeting since the notice to members and creditors must be sent simultaneously - s 497(1) of the Corporations Act. See also McPherson 32-33.

¹⁵¹ S 497(1) of the Corporations Act; McPherson 33.

¹⁵² S 491(2)(b) of the Corporations Act.

¹⁵³ For a brief exposition of these provisions see Keay *Insolvency* 371.

¹⁵⁴ S 532(9) of the Corporations Act. An interesting innovation under the Australian provisions is that the nominated liquidator must have given his prior written consent to such an appointment.

¹⁵⁵ At this time the powers of the directors of the company also cease - s 499(4) of the Corporations Act.

¹⁵⁶ At 371.

¹⁵⁷ Ss 498(8)(b) and 497(6) of the Corporations Act.

of the creditors, acts as chairperson of the creditors' meeting.¹⁵⁸ The creditors' meeting usually ratifies the appointment of the nominated liquidator, but the creditors are free to nominate their own (different) liquidator who has given his or her prior consent.¹⁵⁹ In such a case the liquidator nominated by the creditors will receive preference.¹⁶⁰ According to Keay the remuneration of the liquidator is usually determined on a time basis pursuant to the schedule of fees recommended by the Insolvency Practitioners' Association of Australia.¹⁶¹

- (c) *Procedures following the creditors' meeting.* The directors must lodge a copy of the affairs of the company with the Australian Securities Commission (ASC) within 7 days;¹⁶² a copy of the special resolution must be lodged with the ASC within 7 days of being passed¹⁶³ and a notice of the resolution must be published in the *Commonwealth of Australia Gazette* within 21 days of being passed.¹⁶⁴ The chairperson of the creditors' meeting must also lodge with the ASC, within one month of the meeting, a copy of the minutes of the meeting that have been certified as correct.¹⁶⁵ Once these procedures have been followed, the liquidator will commence with the actual administration of the company's affairs.¹⁶⁶

¹⁵⁸ S 497(8) of the Corporations Act.

¹⁵⁹ Keay *Insolvency* 372; McPherson 32-33.

¹⁶⁰ S 499(1) of the Corporations Act.

¹⁶¹ Keay *Insolvency* 372.

¹⁶² Keay *Insolvency* 372.

¹⁶³ S 491(2)(a) of the Corporations Act.

¹⁶⁴ S 491(2)(b) of the Corporations Act.

¹⁶⁵ Corporations Regulation 5.6.27(1).

¹⁶⁶ Keay *Insolvency* 372-373.

- (d) *Committee of inspection.* If it has been decided that a creditors' committee of inspection should be appointed, the creditors' meeting will have decided the number of persons that constitute the committee as well as who have been appointed as the members.¹⁶⁷

From this point forward, the administration procedure is almost identical to the procedure followed by a liquidator in a compulsory winding-up.¹⁶⁸

4 3 4 Conclusion

While the provisions dealing with voluntary winding-up in the Australian Corporations Act contain some interesting innovations, the procedures are substantively the same as those followed in South Africa. The participation of creditors in the voluntary winding-up process (and the appointment of a committee of inspection) where a company is insolvent, is an interesting innovation that could possibly be introduced in South Africa. However, considering the apathetic attitude of creditors in South Africa,¹⁶⁹ the introduction of such provisions could very well prove to be a dead letter.

Because Australia still follows a dual statute system of insolvency, these provisions are not very helpful in deciding where the relevant provisions should be placed in South Africa, namely in a unified statute or in the enabling legislation. It is submitted that if one wishes to introduce a truly unified insolvency statute, this can only be achieved by including the relevant provisions (dealing with insolvent companies and close corporations) in a unified insolvency statute, while retaining the provisions relating to solvent companies in the enabling legislation.

¹⁶⁷ Key *Insolvency* 373. For a full discussion of the purpose and powers of a committee of inspection, see Key *Insolvency* 408-409.

¹⁶⁸ Key *Insolvency* 372-373.

¹⁶⁹ See SA Law Commission Project 63 Commission Paper 582 (11 Feb 2000) Vol 1 11-12 paras 4.2-4.4 regarding the apparent apathy of creditors in South Africa.

4 4 Voluntary liquidation in Germany

As is the case in the United States of America,¹⁷⁰ Germany also has a truly unified system of insolvency law¹⁷¹ and, as is the case in the United States, the insolvency process is wholly controlled by the courts. For this reason no distinction is made in German insolvency law between voluntary and compulsory winding-up or liquidation. All debtors are liquidated by an order of court and liquidation without the court's intervention is not possible.

Part Two of the *Insolvenzordnung*¹⁷² provides, *inter alia*, for the commencement of an insolvency proceeding. Section One of Part Two deals with the prerequisites for, and procedure of, the commencement of the insolvency proceeding. More specifically section 11 of the Insolvency Code provides for the permissibility of the insolvency proceeding, stating in sub-section (1) that an insolvency proceeding can be commenced with regard to the assets of any natural or legal person. It is also stated in this sub-section that an association that is not a legal person shall be deemed to be a legal person for the purposes of the Insolvency Code.¹⁷³

As regards the actual commencement of insolvency proceedings, section 13 provides that an insolvency proceeding is commenced solely upon petition.¹⁷⁴ Section 13(1) further provides that creditors and the debtor have the right to petition for the commencement of an insolvency proceeding. Section 14 deals with petitions by a creditor and will not be dealt with here.

¹⁷⁰ See par 4.1 above.

¹⁷¹ For a general discussion of German insolvency laws, see ch 4 above.

¹⁷² *Insolvenzordnung vom 5 Oktober 1994 (BGBl. I, S. 2866)* - hereinafter referred to as the Insolvency Code. This Code came into operation on 1 January 1999.

¹⁷³ For a more detailed discussion of s 11 of the German Insolvency Code, see ch 8 par 4.3.

¹⁷⁴ It is here that the difference lies between the insolvency system of Germany and that of South Africa. No provision is made in the German insolvency laws for the winding-up of legal persons by resolution.

However, section 15 deals with the right to make petitions with respect to juristic persons and companies without legal personality. Sub-sections (1) and (2) of section 15 read as follows:¹⁷⁵

“§ 15 Right to Make Petitions with respect to Legal Persons and Companies without Legal Personality

(1) In addition to the creditors, any member of a representative body [of a legal person] and, in the case of a company without legal personality or a limited partnership limited by shares, any general partner, as well as any liquidator shall have the right to petition for the commencement of the insolvency proceeding with respect to the assets of a legal person or a company without legal personality, as the case may be.

(2) In the event the petition is not made by all members of a representative body, all general partners or all liquidators, it shall be permissible if a credible showing of the reason for commencement is made. The insolvency court shall hear the remaining members of the representative body, general partners or liquidators.”

Even if all the members of, for example, a company do not agree to petition the court for an insolvency proceeding, the court may still grant the petition if a proper case is made out for the commencement of the insolvency proceeding. From the above provision and the provisions that will be discussed below, it is evident that the German Insolvency Code has given the insolvency courts a very wide discretion in granting the commencement of an insolvency proceeding. This is borne out in section 16, where a reason for the commencement of an insolvency proceeding is required.

Various circumstances are then set out as being a reason for the commencement of an insolvency proceeding. These are:

- (a) *Illiquidity*. Section 17 states that illiquidity is a general reason for the commencement of an insolvency proceeding. Sub-section (2) of this section then states what illiquidity is, it being the inability to honour payment obligations when due, or generally in the event of the debtor having ceased to make payments.

¹⁷⁵ Translation by Stewart *Insolvency Code - Act Introducing the Insolvency Code* (1997) 53-55.

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- (b) *Impending illiquidity.* In terms of section 18 impending illiquidity is also stated as a reason for the commencement of an insolvency proceeding. A deeming provision regarding impending illiquidity is included under sub-section (2) of section 18.
- (c) *Overindebtedness.* In terms of section 19 overindebtedness is a reason for the commencement of an insolvency proceeding. Overindebtedness is then described as the situation that exists when the debtor's assets no longer cover existing liabilities. There is an added rider that a valuation of the debtor's assets must be based upon a going concern if it is probable under the circumstances.

In order to determine whether a petition for the commencement of an insolvency proceeding is permissible, the debtor has to provide certain information in order for the court to make a decision on the commencement.¹⁷⁶

In order to enter liquidation a company need merely petition the insolvency court. Even in cases where all the members, for example, of a company are unable to agree, the court may still allow the company to enter bankruptcy if sufficient reasons are provided to the court. While these provisions are to be admired for their simplicity and effectiveness in allowing the court the discretion to allow the commencement of an insolvency proceeding, it is doubtful whether similar provisions could be introduced in South Africa where there is no specialist insolvency or bankruptcy court, and where the courts that do have jurisdiction are already overburdened. In South Africa there is an entrenched principle that a company or close corporation may enter liquidation upon the passing of a resolution. Until such time as this practice and philosophy has been reviewed, the German Insolvency Code cannot make any significant contribution to voluntary winding-up in South Africa in its current form.

¹⁷⁶ S 20 of the German Insolvency Code. There is a cross reference in this section to ss 97, 98 and 101 of the Insolvency Code.

5 PROPOSALS FOR THE VOLUNTARY LIQUIDATION OF *SOLVENT* DEBTORS IN SOUTH AFRICA

The first question that was posed in paragraph 1 above, was whether or not a unified insolvency statute should deal exclusively with the liquidation of *insolvent* entities. This question is important since currently, as has been pointed out in paragraph 4 above, the winding-up of both solvent and insolvent entities are dealt with in the same legislation. However, it was pointed out that the only reason for this is that winding-up law has always been contained in company law legislation and not in insolvency legislation. Until now it has never been necessary to answer this question.

What, then, should happen to the provisions dealing with solvent entities if a unified Insolvency Act is to be introduced in South Africa? If the aim of a unified insolvency statute is to deal exclusively with insolvency matters, it makes no sense to include provisions relating to the liquidation of solvent entities. This question would also appear to expose a serious philosophical dilemma. Up to now the provisions dealing with corporate insolvency have, for historical reasons, been included in the legislation dealing with the creation (and therefore also the demise) of juristic persons. However, insolvency, and more specifically corporate insolvency, has developed into a very separate and distinct branch of the law. This development has advanced to the stage where the distinction between the law relating to insolvent corporate entities and the insolvency of individuals, has all but disappeared. That this is so is evident from the decision in *Woodley v Guardian Assurance Co of SA Ltd*¹⁷⁷ where Colman J stated the following:

“I ... suggest that it is socially desirable that, as far as is practicable, all the consequences of the liquidation of an insolvent company should be similar to those [of] the insolvency of an individual ... The winding-up of a company unable to pay its debts is something closely akin to the winding-up of the estate of an insolvent individual. There are some different requirements which flow from the fundamental difference between a company and an individual: those are specifically provided for in the Companies Act. In respects other than those so provided for I

¹⁷⁷ 1976 1 SA 758 (W) at 763.

cannot see why the Legislature should not have desired, not merely the procedural rules, but also the substantive rules and consequences, to be the same in both cases.”

This being the case, the question that has been posed should be relatively simple to answer. It is submitted that the liquidation or winding-up of a solvent company's affairs have no place in a statute that deals with issues relating to insolvency. The current procedures for a voluntary winding-up by the members of a company as they are contained in the Companies Act, differ quite drastically from the procedures relating to the winding-up of a company unable to pay its debts, and which could be wound up by the court or voluntarily as a voluntary winding-up by creditors. In fact, apart from the few procedural matters relating to the passing and registration of the resolution, there is very little similarity between the procedures regulating a voluntary winding-up by members and a voluntary winding-up by creditors. And of course this should be so, as in the one case the entity is solvent and in the other it is insolvent.

Although there have been some dissenting opinions¹⁷⁸ regarding the separation of the winding-up provisions relating to solvent and insolvent entities in a unified insolvency statute,¹⁷⁹ there has also been a supporting voice calling for the separation of these forms of liquidation into different Acts.¹⁸⁰

Another question that can be asked is whether the Master of the High Court's supervisory function in the winding-up of a solvent company is justified. To a large extent the Master's supervisory function in insolvent estates is to protect the interests of creditors. In the case of a

¹⁷⁸ *Final Report Containing Proposals on a Unified Insolvency Act* Vol 4 submission dated 18 Nov 1999. A copy of this report is available at the Marensky Library, University of Pretoria.

¹⁷⁹ While it is the submission of this study that the liquidation of solvent entities should not be included in a unified Insolvency Act, the need for a conversion mechanism for companies being liquidated voluntarily by members to be converted into a voluntary liquidation by creditors, is acknowledged. It is also necessary to make provision for the conversion of a voluntary liquidation to a liquidation by the court. Both these mechanisms have been built into the proposed unified Insolvency Act contained in ann E to this thesis.

¹⁸⁰ See Havenga “Voluntary Liquidations in a New Insolvency Dispensation” 2000 *DJ* 108-109 (hereinafter referred to as Havenga “Voluntary Liquidations”).

voluntary winding-up by members there are no creditors' interests to protect, as the entity is solvent. Where there are creditors' interests that need to be protected, this is done by way of the provision of security. It is submitted that the winding-up of the affairs of a solvent corporate entity should not be regulated by the Master of the High Court at all. This function should be performed by the public authority responsible for the incorporation of the corporate entity in the first place, namely the Registrar of Companies and Close Corporations. There is no justification in subjecting the affairs of a solvent company to the scrutiny of persons who have no interest in the affairs of that entity, as these affairs should remain the private and confidential domain of the company's members.

Consequently, it is one of the conclusions and recommendations of this study that the provisions relating to the winding-up of the affairs of a solvent company or close corporation should be retained in the enabling legislation, namely the Companies Act of 1973 and the Close Corporations Act of 1984. In order to achieve this, the provisions as they currently relate to a voluntary winding-up by members have been retained in the Companies Act and the Close Corporations Act. These amendments to the Companies Act and the Close Corporations Act are evident from the table dealing with Acts amended or repealed in the unified Insolvency Act as set out in Annexure E to this thesis.

6 PROPOSALS FOR THE VOLUNTARY LIQUIDATION OF *INSOLVENT* DEBTORS IN SOUTH AFRICA

Before setting out the proposed provisions relating to voluntary liquidation in a unified insolvency statute there is one important aspect that needs to be discussed, namely the current differences between the voluntary winding-up of a company and a close corporation. Although the differences are minimal, they do exist and therefore need to be addressed.¹⁸¹ While it is true that

¹⁸¹ See Havenga "Voluntary Liquidations" 106-108 where she points out the differences between the voluntary winding-up provisions of companies and close corporations.

there are subtle differences between the voluntary winding-up of these two types of corporate entities, the question may be asked whether these differences are justified in cases where the entities are insolvent. One of the main purposes of a unified insolvency statute is to remove provisions that are dissimilar to each other in order to create uniformity and certainty. While it is acknowledged that close corporations were introduced in order to provide entrepreneurs with a simplified form of business enterprise, it is submitted that in the case of insolvency all creditors should be entitled to the same protection. Consequently it is submitted that the provisions should, as far as possible, be uniform in regard to any form of business enterprise where the entity concerned is insolvent.

There is also no reason why the provisions relating not only to procedure, but also to substantive law, should not be uniform in all respects. Where there are substantial differences between close corporations and companies, these have been addressed in separate provisions in the proposed unified Insolvency Act.¹⁸² The proposals that will be made below are therefore based on the premise that the procedures and substantive law should be uniform in all respects. It is only in this way that a truly uniform insolvency statute can be introduced.¹⁸³

6 1 Proposed insertion of clause 8 into the unified Insolvency Act

Having analysed all the aspects relating to voluntary liquidation in the preceding paragraphs of this chapter, the remaining questions that were posed in paragraph 1 above now need to be answered. These questions can be answered by the proposals contained in clause 8 of the unified Insolvency Act, which reads as follows:

¹⁸² See eg cl 116 and 117 of the proposed unified Insolvency Act in ann E to this thesis.

¹⁸³ See also the recommendations made by Havenga "Voluntary Liquidations" 109-110.

“8. Voluntary liquidation by resolution. (1) A trust debtor, company debtor, close corporation debtor or association debtor which is insolvent, may be liquidated as a voluntary liquidation by creditors if the debtor has passed a liquidation resolution, as defined in section 1 of this Act, resolving that the debtor be liquidated voluntarily as a voluntary liquidation by creditors.

(2) A voluntary liquidation by creditors of a debtor as contemplated in subsection (1) shall be a creditors’ voluntary liquidation if the liquidation resolution contemplated in subsection (1) so states, but such a liquidation resolution shall be of no force and effect unless:

- (a) the liquidation resolution has been registered
 - (i) by the Master in the case of a trust debtor;
 - (ii) by the Registrar of Companies in the case of a company debtor;
 - (iii) by the Registrar of Close Corporations in the case of a close corporation debtor;
 - (iv) by the relevant authority responsible for the administration of that specific type of debtor in the case of an association debtor; and
- (b) the debtor has personally given all known creditors and the Master at least seven days notice of the meeting at which the liquidation resolution is to be considered;

(3) Upon receipt of the notice referred to in paragraph (b) of subsection (2), the Master shall, if requested to do so by creditors nominating a liquidator, appoint a liquidator or liquidators in accordance with the provisions of section 37.

(4) The notice referred to in paragraph (b) of subsection (2) shall contain the following information, failing which such resolution shall be null and void, even if passed by the requisite majority at such meeting:

- (a) the date and time of the meeting at which the liquidation resolution is to be considered;
- (b) the venue at which such meeting will take place, which venue must be accessible to the public in order that creditors who have an interest in the adoption of such resolution, may attend such meeting should they so require.

(5) The notice referred to in paragraph (b) of subsection (2) shall be accompanied by the following documents, failing which such resolution shall be null and void, even if passed by the requisite majority at such meeting:

- (a) a copy of the statement of affairs of the debtor wishing to pass the liquidation resolution, which statement of affairs shall correspond substantially to Form A contained in Schedule 1 to the Act
- (b) a copy of the liquidation resolution which is to be tabled for adoption at the meeting concerned;
- (c) a certificate of the Master, issued not more than 14 days before the date on which the meeting to pass a liquidation resolution will be held, that sufficient security has been given for the payment of all costs of the liquidation of the estate as referred to in section 83, which are not recoverable from the creditors of the estate.

(6) A creditor, or any other person who has a financial, administrative or other interest in the affairs of such debtor, whether or not such creditor or other person has been notified of the meeting referred to in paragraph (b) of subsection (1), may:

- (a) before the meeting at which the liquidation resolution is to be adopted takes place, bring an application to court preventing the debtor concerned from adopting the liquidation resolution; or
- (b) within 14 days after the liquidation resolution has been registered with the Master, Registrar of Companies or Close Corporations or other relevant authority in terms of paragraph (a) of subsection (1), bring an application to have the liquidation resolution set aside;

Provided that such creditor or other person shall give, to the court's satisfaction, the debtor sufficient notice of the fact that he or she intends bringing an application preventing or setting aside the adoption of the liquidation resolution, as the case may be, and the debtor shall be entitled to oppose such an application.

(7) In an application brought under the provisions of paragraph (a) or (b) of subsection (6), the court may, after having considered the interests of the general body of creditors, set aside or confirm such liquidation resolution, or make such order as it in the circumstances deems appropriate.

(8) The registration of the liquidation resolution as contemplated in paragraph (a) of subsection (1) shall comply with the procedures set down from time to time by the Master, Registrar of Companies or Close Corporations or relevant authority: Provided that if such liquidation resolution is not lodged with the Master, Registrar of Companies or Close Corporations or relevant authority for registration within 30 days from the date of the adoption of the resolution, the liquidation resolution shall lapse and be void.

(9) A voluntary liquidation by creditors as contemplated in this section, shall commence at the time that the liquidation resolution is passed by the persons authorised to pass such a resolution in accordance with the definition of "liquidation resolution" in section 1 of this Act: Provided that the liquidation resolution has been duly registered by the Master, Registrar of Companies or Close Corporations or relevant authority, as the case may be, in accordance with the provisions of subsection (8).

(10) Except in the case of a creditors' voluntary liquidation by a trust debtor, the Registrar of Companies or Close Corporations or other relevant authority shall forthwith after the registration by him or her of a liquidation resolution referred to in this section, transmit a copy thereof to the Master.

(11) The nomination of a liquidator or liquidators in terms of an adopted liquidation resolution as referred to in this section, shall be of no force and effect and the Master shall appoint a liquidator or liquidators in accordance with the provisions of this Act.

(12) Any debtor as contemplated in this section which has passed a liquidation resolution for its voluntary liquidation by creditors, shall within 30 days after the registration of that resolution by the Master, Registrar of Companies or Close Corporations or relevant authority, as the case may be:

- (a) except where the debtor is a trust debtor, lodge with the Master a certified copy of the liquidation resolution concerned; and
- (b) send a copy of the liquidation resolution to the persons referred to in paragraphs (a) and (b) of subsection (1) of section 13; and

- (c) give notice of the voluntary liquidation of the debtor in the *Gazette*.”

In order to completely understand the proposals that have been made in clause 8 of the unified Insolvency Act, it is also essential to include here the definition of the term “liquidation resolution”, which reads as follows (in clause 1 of the unified Insolvency Act):

“‘**liquidation resolution**’ means:

- (a) in the case of a trust debtor, a resolution passed in accordance with the provisions of the trust deed in respect of decisions to be taken by the trustees of that trust or, failing such provisions in the trust deed, a resolution passed by all the trustees of that trust;
- (b) in the case of a company debtor, a special resolution passed by the members of that company in accordance with the Companies Act 61 of 1973, but shall exclude an external company as defined in that Act;
- (c) in the case of a close corporation debtor, a written resolution passed at a meeting of the members of the corporation and which has been signed by all the members of such corporation;
- (d) in the case of an association debtor,
 - (i) if such debtor has been created by legislation, a resolution by the management of such association as provided for in the enabling legislation, if applicable;
 - (ii) if such debtor has been created by the adoption of a constitution, a resolution by the members of such association in terms of the provisions of such constitution, if applicable;
 - (iii) if such debtor has been created by agreement, a resolution by the members of such association in terms of such agreement, if applicable;

in terms of which it has been resolved to liquidate the debtor concerned, either by court or as a voluntary liquidation by creditors.”

6 2 The most important proposals contained in clause 8

6 2 1 Field of application

In answering the question as to whether voluntary liquidation should only apply to companies and close corporations, reference can be made to clause 8(1) which makes provision for the fact that a liquidation resolution may be passed or adopted by a trust debtor, company debtor, close corporation debtor or association debtor, as the case may be. There is a reference in clause 8(1) to the definition of “liquidation resolution” in clause 1 of the unified proposals. This definition

merely defines a liquidation resolution bearing in mind the type of debtor that wishes to make use of the voluntary liquidation procedure.

No sound reason could be found for not allowing the trustees of a trust, or the members of an association debtor, to place a trust or association debtor into voluntary liquidation. The only reason that these provision could not also apply to natural person debtors and partnership debtors, is that the South African Law Commission has retained the “benefit for creditors” requirement for these types of debtors in their proposals.¹⁸⁴ Allowing such a debtor the right to voluntarily liquidate themselves would be irreconcilable with this principle.

6 2 2 Requirements for validity of the resolution

Clause 8(2) lays down the requirements which must be met in order for the liquidation resolution to be valid and enforceable. These two requirements are that the resolution must in the first instance be registered before it will have any effect, and in the second place that all creditors, and the Master, must receive prior notice of the meeting at which the liquidation resolution is going to be tabled for adoption.

The purpose of the second requirement is to prevent creditors from being prejudiced by only obtaining notice of the liquidation of the debtor long after it has gone into liquidation.¹⁸⁵ This will enable creditors to take appropriate steps in order to protect their interests should it be necessary. The notice that is sent to creditors must also comply with certain other requirements. These requirements are dealt with in the other provisions that are discussed below.

¹⁸⁴ See the discussion in ch 8 above and Commission Paper 582 Vol 2 cl 7(1)(b).

¹⁸⁵ Currently the members need not notify creditors of their intention to wind up the company voluntarily. More often than not the creditors only become aware of the liquidation quite some time after the company has already entered liquidation. It goes without saying that this often works to the prejudice of the creditors in the estate.

6 2 3 *Immediate appointment of a liquidator by the Master*

Clause 8(3) allows the Master to appoint a liquidator once his office has received a copy of the notice of the meeting at which a liquidation resolution is to be passed. In terms of paragraph (a) of sub-clause (2), the Master must also be given notice of the meeting which is to be held for the passing of a liquidation resolution.¹⁸⁶ The reason why the Master must also be given notice of the meeting, is to enable him to immediately appoint a liquidator or liquidators upon receipt of such notice. It is conceivable that creditors may suffer prejudice in the seven day period provided for in the notice. The immediate appointment of a liquidator by the Master, if circumstances warrant such an appointment, can safeguard the creditors' interests in the meantime.¹⁸⁷

6 2 4 *Information to be contained in the notice to creditors*

Clause 8(4) requires the notice to creditors to contain certain information, enabling the creditors to gain access to the contemplated meeting, should it be required. This requirement really focuses on the publicity principle which is so important for third parties who have dealings with economic entities. This sub-clause also provides that the liquidation resolution shall be null and void if these requirements are not met.

6 2 5 *Documents to accompany notice*

Clause 8(5) provides for certain documents to accompany the notice which is sent to the creditor. The purpose of the documentation is to ensure that the creditor is properly informed of the

¹⁸⁶ One delegate at the conference held on 6 Oct 1999 posed the question why the Master must receive a copy of the notice, stating that it creates unnecessary paperwork for the Master. It is respectfully submitted that this is not a very good reason for not sending the notice to the Master. The Master needs to have notice of such a meeting if he is to be in a position to appoint a liquidator in appropriate circumstances. If the resolution is not adopted at the ensuing meeting, this would become apparent in due course and the Master could then destroy the notices which do not lead to a resolution being adopted. This could be done after a period of say 90 days, and can be regulated by an internal directive. (See the Conference Transcriptions, *Final Report Containing Proposals for a Unified Insolvency Act Jan 2000* Vol 4 80 in regard to the comments made by the delegate.)

¹⁸⁷ This is also the case under the English Insolvency Act. See the proposals made in the Cork Report paras 666 -670.

circumstances surrounding the adoption of the liquidation resolution. The two documents which must accompany the notice is the statement of affairs and a copy of the liquidation resolution which is to be adopted at the meeting. These documents, especially the statement of affairs, should enable the creditor to make an informed decision in respect of whether to oppose the adoption of resolution, either before or after it has been adopted. Sub-clause (6) makes provision for the opposition of such a resolution by approaching the court in appropriate circumstances. Clause 8(5)(c) is intended to address the problem of insufficient funds in the estate in order to pay for the costs of administration.¹⁸⁸ and which relates to the provision of security by the members passing a liquidation resolution. It could easily happen in a voluntary liquidation by resolution that the debtor is so insolvent that no creditors prove claims against the estate. Due to there being no applicant creditor, it is conceivable that there will be nobody to pay the contribution in the event of a shortfall in the estate. By providing security the estate will be assured of payment of the costs of liquidation. This will also ensure that members think twice before liquidating the debtor voluntarily by resolution, as they will ultimately be held liable for the costs of liquidation should there be insufficient funds.¹⁸⁹

6 2 6 *Opposing the adoption of the resolution*

In terms of this sub-clause a creditor, or some other person having an interest in the affairs of the debtor, who wishes to oppose the passing of a liquidation resolution of which he or she has received notice may approach the court in order to prevent the members of the debtor from adopting the resolution in question. Due to the fact that the creditors or other interested persons cannot prevent the members from passing the resolution merely by being present at the meeting, there has to be a safeguard for them by being able to approach the court for assistance in

¹⁸⁸ This sub-clause was inserted at the suggestion of a conference delegate at the conference held on 6 Oct 1999 - see Conference Transcriptions *Final Report Containing Proposals for a Unified Insolvency Act* Jan 2000 Vol 4 75.

¹⁸⁹ On the other hand it may be very difficult, or even impossible, for the members to obtain a security bond to cover these costs. This would then render useless the process of voluntary liquidation by resolution. An alternative would be to amend the clause dealing with contribution (cl 99) to include the members as persons liable for contribution in appropriate circumstances.

circumstances where they are of the opinion that the voluntary liquidation would not be in their best interests. This right is afforded all creditors, even if such creditor has not received notice of the meeting at which the liquidation resolution is to be adopted. This is to safeguard the interests of creditors who have perhaps not received notice of the meeting at all.

Provision has been made for the application to be brought by a creditor before or after the resolution has been adopted, since circumstances may vary before and after the adoption of the resolution, which changed circumstances could motivate a creditor to bring such an application. A creditor who wishes to bring an application opposing or setting aside the adoption of the resolution, must give notice to the debtor in order that the members may defend the action if they so wish. Sufficient notice has not been defined in this section. The circumstances in which such an application could be brought can vary, and it is suggested that the court should decide whether or not “sufficient notice” has been given to the debtor in each case.

It is admittedly difficult to envisage any circumstances that could warrant an intervention by the creditors or anyone else in the voluntary liquidation proceedings that the members of a company are free to invoke. It is trite law that the members have the right to pass a resolution placing their company in liquidation, but it is also conceivable that certain persons may suffer prejudice by the passing of the resolution. The concept behind this clause is that the members of the company should be precluded from abusing the voluntary liquidation procedure. The procedure in clause 8(6) is designed for interested parties to intervene, and the court can only prevent the resolution from being passed if the applicant making use of the clause can prove that there are grounds for preventing the company from passing the resolution. If no such grounds exist, the provision can obviously not be used.

6 2 7 Powers of the court when adoption of resolution opposed

When an application is brought by a creditor to prevent or set aside the adoption of a liquidation resolution, the court has the power in terms of this sub-clause to either set aside or confirm the

resolution. Where the court is of the opinion that a different remedy should be granted to either the creditor or the debtor, the court may make any order it deems appropriate in the circumstances. In making this order the court should take the interests of the general body of creditors into consideration.

6 2 8 *Registration of resolution*

Clause 8(8) provides for the lodgement for registration of the resolution by the relevant authority responsible for the administration of the type of debtor involved. It also provides that if the resolution is not registered within a period of thirty days¹⁹⁰ from the date of the adoption of the resolution, it lapses and becomes void.¹⁹¹ The only outstanding question on this issue is what the sanction should be if the resolution is not lodged with the relevant authority within the specified period. One option is that such failure could constitute a ground of liquidation for the liquidation of such a debtor.¹⁹²

6 2 9 *Commencement of liquidation*

Clause 8(9) provides that the liquidation shall commence on the date upon which the resolution is passed. However, the date of commencement is retrospective, and it will only apply if the resolution is in fact registered by the relevant authority, for example the Registrar of Companies.¹⁹³

¹⁹⁰ This period differs from the period currently specified in the Companies Act and Close Corporations Act, which is 90 days. Due to the serious financial implications of passing a resolution of this kind, there is no reason why this period should be 90 days. A period of 30 days should be sufficient, especially in light of modern technology and communications systems which are readily available.

¹⁹¹ Van Loggerenberg in Conference Transcriptions Vol 4 54, 55 mentions the problem of registration of the resolution by the Registrar concerned. Considering the backlog currently experienced by the Registrar of Companies and Close Corporations, it is conceivable that the resolution might not be registered within the 30 day period. For this reason provision has been made for the resolution to be *lodged for registration* within a 30 day period.

¹⁹² This has however not been included as an option in the proposals made in this thesis.

¹⁹³ This is in line with the drafting of the clause dealing with the “date of liquidation” - see ch 9 par 2.4.1 above.

6 2 10 Copy of resolution to Master

Clause 8(10) merely provides that the authority responsible for the registration of the resolution should transmit a copy thereof to the Master as soon as possible after it has been registered, and is procedural in nature.

6 2 11 Members' nomination of liquidator of no force and effect

One of the questions that was posed in paragraph 1 above was whether or not the members of a company or close corporation should retain an interest in the liquidation of the company or close corporation of which they are members.¹⁹⁴ While this question can be answered in the affirmative as regards the voluntary liquidation of a *solvent* company by its members, no reason could be found to retain this right for the members in a case where the entity is being wound up because of its insolvency or inability to pay its debts. Consequently this right has been taken away from the members and the Master will ignore any nomination by the members of a liquidator and appoint a liquidator or liquidators in accordance with the provisions of the unified Insolvency Act.

6 2 12 Copy of resolution to certain officials and notice

Clause 8(12) merely provides for a copy of the registered resolution to be lodged with the Master within a specified period by the debtor concerned, and that notice be given in the *Gazette* of the voluntary liquidation.

In concluding these proposals it must be pointed out that as viable and workable as the above provisions may be, the effect of a recent Labour Appeal Court decision may nullify the use of voluntary liquidations by resolution altogether. The decision in question is *National Union of*

¹⁹⁴ Eg, in terms of the current provisions regulating voluntary winding-up, the members who pass the winding-up resolution may also nominate a liquidator.

Leather Workers v Barnard and Perry,¹⁹⁵ in which it was held, per Davis AJA, that the passing of a resolution by the members of a company for the voluntary winding-up of such company as a voluntary winding-up by creditors, is an “act” by the company that brings about the dismissal of the employees in terms of section 186 of the Labour Relations Act 66 of 1995.¹⁹⁶ In his judgment Davis AJA distinguished between a winding-up by the court and a voluntary winding-up, stating that the two procedures differed in that the court had to decide, in the case where the winding-up is ordered by the court, whether the company should be wound up. He stated that since there is no court involvement in a voluntary winding-up by creditors, it amounts to an act by the company that brings about the demise of the employees service contracts.

The decision has serious implications in regard to the amounts that employees may be able to claim from the company in terms of section 98A of the Insolvency Act,¹⁹⁷ read with section 339 of the Companies Act. Unfortunately the decision will also apply to the new proposals as set out in this chapter, and it is for this reason that the provisions will probably seldom be used, if ever.

7 CONCLUSION

In creating a framework for corporate insolvency law reform, and as long as South Africa elects to retain a multiple gateway approach to insolvency law, voluntary liquidation by resolution remains a key concept. The continued existence and refinement of the provisions relating to voluntary liquidation are paramount in answering the question as to whether a truly unified insolvency statute is achievable and desirable. The conclusions that have been reached at the end of this important chapter can be summarised as follows:

¹⁹⁵ 2001 4 SA 1261 (LAC). See the discussion of this case in ch 5 and par 3.2 above.

¹⁹⁶ The winding-up of a company causes the employment contracts of the employees to be terminated immediately upon the liquidation of the employer - s 38 of the Insolvency Act, read with s 339 of the Companies Act.

¹⁹⁷ S 98A of the Insolvency Act provides for the payment of preferent claims by employees against the estate of the employer.

- (a) The provisions relating to voluntary liquidation in a unified insolvency statute should be limited to the liquidation of *insolvent* entities.
- (b) The provisions relating to the voluntary liquidation of solvent entities, such as companies and close corporations, should be retained in the enabling legislation, such as the Companies Act or the Close Corporations Act.
- (c) The terminology surrounding the use of voluntary liquidations should be simplified, hence the term “voluntary liquidation by resolution”.
- (d) The provisions relating to voluntary liquidation by resolution should be extended to cover also trust debtors and association debtors.
- (e) It is possible to have uniform provisions for the voluntary liquidation by resolution of any type of debtor.
- (f) It is possible to simplify and streamline the provisions relating to voluntary liquidation by resolution, at the same time building in more safeguards for creditors.
- (g) There is no justification for the continued role played by members in the administration process where the entity is insolvent or unable to meet its financial obligations - hence the removal of these provisions.

Finally, although it is submitted that the above provisions are an improvement on the current situation regarding voluntary liquidations, the Labour Appeal Court’s approach to voluntary liquidations may result in this mode of liquidation not being used very often in future.