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## **PART 2**

### **HISTORICAL OVERVIEW**

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In this part the historical development of South African insolvency law is traced back to the South African common law and the subsequent insolvency statutes that found application. Both the common law and the development of South African statutes, which can be traced back to English law, will be discussed. The parallel development of corporate insolvency law will be also be discussed with reference to especially English law.



## CHAPTER 2

### HISTORICAL OVERVIEW OF THE DEVELOPMENT OF INSOLVENCY LAW IN SOUTH AFRICA

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#### 1 INTRODUCTION

In this chapter specific attention will be given to the historical development of South African insolvency law. Although this study is aimed at creating a framework for *corporate* insolvency law reform, it is necessary to trace the historical development of individual insolvency law as well, since it currently forms the basis of the administration of all insolvent estates in South Africa.<sup>1</sup> The fact that corporate insolvency is dealt with in separate legislation in South Africa can be ascribed to the fact that the concept of a separate juristic person, complete with its own legal personality and as a creature separate from the members who own and manage it, only came into being in South Africa in the late nineteenth century.<sup>2</sup> Prior to this, South African common law (and consequently also the statutes which contained provisions in this regard) only made provision for individuals and the only known form of business enterprise at the time, namely the partnership.

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<sup>1</sup> The Insolvency Act 24 of 1936 (hereinafter referred to as the Insolvency Act) is the core legislation dealing with the insolvency process. All other legislation is ancillary to this - eg s 339 of the Companies Act 61 of 1973 (hereinafter referred to as the Companies Act) and s 66 of the Close Corporations Act 69 of 1984 (hereinafter referred to as the Close Corporations Act).

<sup>2</sup> See ch 3 below. See also Keay "The Unity of Insolvency Legislation: Time for a Re-think?" 1999 *Insolvency Law Journal* 5 (hereinafter referred to as Keay "The Unity of Insolvency Legislation") where he states this as being the same reason for the separate development of insolvency legislation in Australia.

It is exactly the fact that statutorily-created juristic persons such as companies, and much later close corporations,<sup>3</sup> only came into being quite recently that there has been a parallel development of corporate insolvency. At the time that legislation containing provisions that allow for the creation of juristic persons came into being in South Africa, there was already quite a substantial body of law which regulated the insolvency of individuals.<sup>4</sup> New legislation, such as the Companies Act and later the Close Corporations Act, also needed procedures that could cater for the winding-up of such an entity prior to its demise.

## 2 SOUTH AFRICAN COMMON LAW

### 2.1 Roman Law<sup>5</sup>

Most writers<sup>6</sup> seem to agree that the origin of South African insolvency law is to be found in Table III of the Twelve Tables, which dealt with the execution of judgments.<sup>7</sup> In terms of Table III, which applied from approximately 451 BC, a creditor could enforce his judgment with the process known as *legis actio per manus iniunctionem*.<sup>8</sup> A debtor was given a period of grace of

<sup>3</sup> The Close Corporations Act only came into operation in 1984.

<sup>4</sup> See paras 2, 3 and 4 below.

<sup>5</sup> See generally: Wessels *History of the Roman Dutch Law* (1908) 661 (hereinafter referred to as Wessels); Smith *Insolvency Law* 3rd ed (1988) 5 (hereinafter referred to as Smith); De la Rey *Mars, The Law of Insolvency in South Africa* 8th ed (1988) 1-2 (hereinafter referred to as Mars); Stander *Die Invloed van Sekwestrasie op Onuitgevoerde Kontrakte* (unpublished LLD thesis, Potchefstroom University for Christian Higher Education, 1994) 8-16 (hereinafter referred to as Stander); Dalhuisen *Dalhuisen on International Insolvency and Bankruptcy* (1986) Vol 1 1-1-1-17 (hereinafter referred to as Dalhuisen). See especially Visser "Romeinsregtelike Aanknopingspunte van die Sekwestrasieproses in die Suid-Afrikaanse Insolvensiereg" 1980 *DJ* 42 (hereinafter referred to as Visser); Stander "Geschiedenis van die Insolvensiereg" 1996 *TSAR* 371 (hereinafter referred to as Stander "Geschiedenis van die Insolvensiereg"); Levinthal "The Early History of Bankruptcy Law" 1918 66 *University of Pennsylvania Law Review* 223-250 (hereinafter referred to as Levinthal).

<sup>6</sup> See eg Mars 1, Stander 8 and Stander "Geschiedenis van die Insolvensiereg" 371. See also Dalhuisen par 1.02 [1] 1-4-1-5.

<sup>7</sup> Mars 1; Stander 8; Stander "Geschiedenis van die Insolvensiereg" 371.

<sup>8</sup> See Visser 41, Mars 1; Wenger *Institutes of Roman Law of Civil Procedure* (1940) 230; Dalhuisen par 1.02 [1] 1-4-1-5.

## Chapter 2

## Historical Overview: Insolvency Law

30 days within which to comply with a judgment.<sup>9</sup> Failure to do so resulted in the debtor being brought before the praetor.<sup>10</sup> The judicial process was commenced by the creditor placing his hand upon the creditor while reciting the prescribed *formula*.<sup>11</sup> The debt owing had to be a liquidated debt.<sup>12</sup> Although provision was made for a *vindex* to intervene in these proceedings, this was done at great risk and was not a general occurrence.<sup>13</sup> Where no successful intervention by a *vindex* was present, and where the amount owed remained unpaid, the unfortunate debtor was awarded to the creditor in terms of an *addictio*.<sup>14</sup> The creditor could now hold the creditor prisoner for sixty days.<sup>15</sup> During this time it was possible for the debtor to enter into an arrangement with the creditor.<sup>16</sup> The debtor also remained a free man and owner of his property.<sup>17</sup>

On three consecutive market days the creditor had to bring the debtor before the praetor in the *comitium*, to announce in public the amount for which the debtor was liable.<sup>18</sup> Where the debtor was unable to reach an agreement with the creditor, and the amount owing still remained unpaid,

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<sup>9</sup> See Visser 41.

<sup>10</sup> See Visser 41.

<sup>11</sup> See Visser 41.

<sup>12</sup> See Visser 41. Interestingly enough this requirement still applies in insolvent estates to this day - see s 44 of the Insolvency Act, which requires that the debt must be a liquidated one.

<sup>13</sup> Visser 43.

<sup>14</sup> Visser 43.

<sup>15</sup> Visser 43.

<sup>16</sup> Visser 43.

<sup>17</sup> Visser 43.

<sup>18</sup> Visser 43. Visser also points out that this practice had a dual purpose: firstly it was intended to persuade the debtor's friends to pay the debt in sympathy to the degradation that the debtor was suffering, and in the second place to allow the debtor's other creditors to state their claims. See also Stander "Geskiiedenis van die Insolvensiereg" 371.

the creditor could, on the third market day, either kill the debtor or sell him into slavery.<sup>19</sup> Where there was more than one creditor, they were entitled to cut the debtor into pieces, each creditor taking his rightful share.<sup>20</sup> This barbaric practice was repealed by the *lex Poetelia* of approximately 326 BC and replaced by a procedure whereby the debtor could be held prisoner for a longer period of time to work off his debt as a “debtor slave”.<sup>21</sup>

The procedure of litigation *per legis actiones* gradually found disfavour, mainly due to its rigid character which could not keep up with the needs of the rapidly developing legal traffic.<sup>22</sup> Initially the procedure *per formulas* arose alongside the procedure *per legis actiones*, until such time as the procedure *per legis actiones* was finally abolished by the *lex Aebutia*<sup>23</sup> and the two *leges Iuliae*, apart from certain exceptions where it could still be applied.<sup>24</sup>

Where the debtor had not complied with the *condemnatio* within a period of thirty days, the creditor could invoke the *actio iudicati* against the *iudicatus*.<sup>25</sup> Once again the execution of the debt could be directed at the person of the debtor.<sup>26</sup> Apparently the *iudicatus* was awarded to the

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<sup>19</sup> Visser 44; Stander “Geschiedenis van die Insolvensiereg” 371.

<sup>20</sup> Visser 44; Stander “Geschiedenis van die Insolvensiereg” 371.

<sup>21</sup> Visser 44; Mars 1; Dalhuisen par 1.02 [1] 1-5; Stander “Geschiedenis van die Insolvensiereg” 371.

<sup>22</sup> Visser 44.

<sup>23</sup> Between 149 and 126 BC.

<sup>24</sup> Visser 44.

<sup>25</sup> Visser 44.

<sup>26</sup> Visser 45.

creditor by means of an *addictio* in order to work off the debt owing to the creditor.<sup>27</sup> An important innovation here was that the execution of the judgment was also made possible against the property of the debtor by means of a process known as *missio in possessionem*.<sup>28</sup>

By means of a praetorian order, one or more of the creditors of the debtor were authorised to take possession of the debtor's property *rei servandae causa*.<sup>29</sup> By means of a public proclamation or *proscriptio* the other creditors were informed of the attachment of the property of the debtor.<sup>30</sup> After the prescribed period had lapsed all the creditors were summoned to a meeting by a second praetorian order, in order to elect a *magister bonorum* and to supervise the sale of the property.<sup>31</sup> At the sale, which was authorised by a third praetorian order, the property of the debtor was sold *en bloc* to the person offering the largest dividend to creditors.<sup>32</sup> This *venditio bonorum*<sup>33</sup> brought about the *infamia* of the debtor, without indemnifying him against further sales in execution of property which he may have obtained thereafter, or personal execution.<sup>34</sup> A different procedure was invoked where the debtor was a person of high standing or rank (*clarae personae*) and was known as *bonorum distractio*.<sup>35</sup>

The procedures discussed above were primarily aimed at protecting the creditors, and no provision was made for a debtor to avoid the strict consequences of not being able to pay his

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<sup>27</sup> Visser 45.

<sup>28</sup> Visser 45; Mars 1 and 2; Stander "Geschiedenis van die Insolvensiereg" 371-372. See also Levinthal 232-233 for a discussion of the historical development regarding execution against the debtor's person, and execution against the debtor's property.

<sup>29</sup> Visser 45.

<sup>30</sup> Visser 45.

<sup>31</sup> Visser 45; Mars 2.

<sup>32</sup> Visser 45.

<sup>33</sup> Stander "Geschiedenis van die Insolvensiereg" 372, 373.

<sup>34</sup> Visser 45; Mars 2.

<sup>35</sup> Visser 45; Mars 2; Dalhuisen par 1.02 [4] 1-10-1-12.



debt.<sup>36</sup> This apparent shortcoming was addressed by the *lex Iulia de bonis cedendis* of 17 AD, and allowed a debtor to renounce his rights to his property in favour of his creditors instead of incurring an execution against his person.<sup>37</sup> This procedure was known as *cessio bonorum* and thereafter the procedure was the same as in the case of *bonorum emptio* and later the *distractio bonorum*.<sup>38</sup> By this procedure the debtor was indemnified against personal execution and *infamia*, subject to the *beneficium competentiae*.<sup>39</sup>

## 2.2 Roman-Dutch Law<sup>40</sup>

By all accounts it appears that the Roman law procedure of *cessio bonorum* was introduced into Holland in approximately the last part of the fifteenth century and the early sixteenth century.<sup>41</sup> Prior to this, personal execution against the debtor was the only method of trying to obtain payment of the debt. Similar to the Roman law position, a debtor was not automatically allowed to make use of *cessio bonorum* if he had defrauded his creditors in any way.<sup>42</sup> It has been stated that *cessio bonorum* was in any event a privilege which was only granted by the courts after the debtor had given the full facts in respect of the application, and only after the debtor had informed all his creditors of the application.<sup>43</sup>

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<sup>36</sup> Visser 46.

<sup>37</sup> Visser 46; Mars 2; Dalhuisen par 1.03 1-13; Stander “Geschiedenis van die Insolvensiereg” 372.

<sup>38</sup> Visser 46; Mars 2. Dalhuisen par 1.03 1-13; Stander “Geschiedenis van die Insolvensiereg” 373, 374.

<sup>39</sup> Visser 46; Mars 2; Stander “Geschiedenis van die Insolvensiereg” 372.

<sup>40</sup> See generally Wessels 664; Dalhuisen par 2.02[5] 1-34–1-37; Stander “Geschiedenis van die Insolvensiereg” 374-376.

<sup>41</sup> Dalhuisen par 2.02[5] 1-35; Wessels 664; Mars 2; Stander “Geschiedenis van die Insolvensiereg” 374.

<sup>42</sup> Visser 46; Dalhuisen par 2.02[5] 1-35.

<sup>43</sup> See De Groot *Inleidinge tot de Hollandsche Rechts-geleerdheid* updated by Van Groenewegen van der Made and Schorer (1767) 3 51 3. There are still strong traces of this principle to be found in current insolvency law, eg where a debtor brings an application for voluntary surrender in terms of the provisions of the Insolvency Act. See also Stander “Geschiedenis van die Insolvensiereg” 374.

After the confirmation of *cessio bonorum* by the court, a trustee was appointed, the property of the debtor sold by public auction, and the proceeds thereof distributed amongst the creditors on a *pro rata* basis.<sup>44</sup> After the granting of a *cessio bonorum* the estate was initially administered by commissioners under the supervision of the *scouts* or *schepenen*, but during the eighteenth century the so-called *desolate boedelkamers* were established, which were *inter alia* responsible for the administration of insolvent estates.<sup>45</sup>

According to Van der Linden<sup>46</sup> sequestration upon the application of creditors was also commonplace, and he points out that many places had local ordinances which regulated the procedures and also that special *boedelkamers* were established.<sup>47</sup>

### 3 ENGLISH LAW<sup>48</sup>

English law followed more or less the same pattern as that which was followed on the continent, in the sense that individual debt collection procedures preceded the development of formal insolvency law.<sup>49</sup> One of the first recorded pieces of legislation which allowed for the attachment of a debtor's property is to be found in the Statute of Westminster II of 1285.<sup>50</sup> The first Act that introduced attachment of the person and which had civil imprisonment as a result, was the Statute

<sup>44</sup> Voet *Commentarius ad Pandectas* (1776) 42 5 2.

<sup>45</sup> Mars 3; Stander "Geschiedenis van die Insolvensiereg" 375-376.

<sup>46</sup> *Regtsgeleerd, Practicaal en Koopmans Handboek* (1806) 3 1 10 2 (hereinafter referred to as Van der Linden).

<sup>47</sup> Van der Linden 3 1 10 1.

<sup>48</sup> See generally Dalhuisen par 2.02[8] 1-39-1-44; Rose *Lewis' Australian Bankruptcy Law* 11th ed (1999) 8-19 (hereinafter referred to as Rose); Fletcher *The Law of Insolvency* 2nd ed (1996) 6-21 (hereinafter referred to as Fletcher); Goode *Principles of Corporate Insolvency Law* 2nd ed (1997) 6-9 (hereinafter referred to as Goode).

<sup>49</sup> Dalhuisen par 2.02[8] 1-39. See also Boraine *Die Leerstuk van Vernietigbare Regshandeling in die Insolvensiereg* (unpublished LLD thesis, University of Pretoria, 1994) 229 and the authority quoted in fn 4 (hereinafter referred to as Boraine).

<sup>50</sup> Dalhuisen par 2.02[8] 1-39; Boraine 229.

of Marlbridge of 1267.<sup>51</sup> Various other statutes were introduced which eventually had as a result that a creditor was entitled to imprison the debtor for nearly all cases of the non-payment of debt.<sup>52</sup> Imprisonment for the non-payment of debt was only abolished in 1869 by the Debtors Act, subject to certain exceptions contained in section 4 of that Act.<sup>53</sup> As a result, debtors designed all sorts of means to avoid civil imprisonment.<sup>54</sup>

English bankruptcy law developed with a view to preventing debtors from avoiding civil imprisonment.<sup>55</sup> It is generally accepted that the first true insolvency procedures were introduced in 1542 by Henry VIII.<sup>56</sup> This first Insolvency Act contained a form of compulsory sequestration, designed to apply to a dishonest and absconding debtor.<sup>57</sup> This Act was replaced by an Act of 1571,<sup>58</sup> which was amended in 1604 and 1623, and eventually replaced by another Act in 1732. In contrast to the 1542 Act, the application of the 1571 Act was limited to traders.<sup>59</sup> This Act also introduced the concept of the equal distribution of a debtor's assets.<sup>60</sup>

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<sup>51</sup> Boraine 230.

<sup>52</sup> See Boraine 230 where the Act of Burnell of 1283 or 1285 and the Statute of Merchants of 1285 are referred to.

<sup>53</sup> See Boraine 230.

<sup>54</sup> For a discussion of some of these methods, see Boraine 231.

<sup>55</sup> See Rose 9-12; Boraine 231 and the authority cited by him in fn 15.

<sup>56</sup> Dalhuisen par 2.02[8] 1-41–1-42; Rose 12-13; Fletcher 6; Goode 7.

<sup>57</sup> Dalhuisen par 2.02[8] 1-41–1-42; Boraine 231 and the authority cited by him in fn 18.

<sup>58</sup> This Act was known as the Act of Elizabeth (13 Eliz 1 c 7). See Rose 13-14; Fletcher 7-8.

<sup>59</sup> Rose 13.

<sup>60</sup> Dalhuisen par 2.02[8] 1-42; Rose 13; Boraine 232 and the authority quoted by him.

Supervision of sorts was also introduced by this Act, and comprised the appointment of commissioners by the Lord Chancellor once a petition by a creditor was received. It was their task to determine whether or not the debtor was a trader and whether he had performed any fraudulent acts towards creditors.

During the nineteenth century English insolvency law was subjected to a flurry of reform in that nearly fifty Acts were introduced.<sup>61</sup> In this way the 1732 Act was replaced by the Act of 1842, the latter of which forms the basis of modern English insolvency law.<sup>62</sup> An Act introduced in 1844 made provision for the voluntary surrender of a debtor's estate. In 1849 the 1824/1825 and 1844 Acts were consolidated into the Bankruptcy Law Consolidation Act.<sup>63</sup> Although the 1849 Act was only applicable to traders, it did make provision for debtors other than traders to enter into a majority arrangement with their creditors. In 1861 the Bankruptcy Act extended sequestration to persons other than traders.<sup>64</sup>

Of particular importance for the purposes of this study, is the fact that the first English Companies Act was introduced in 1844,<sup>65</sup> which also regulated corporate insolvencies. This aspect of English insolvency law remained the subject of separate legislation up to the time of the introduction of the 1986 Insolvency Act. This Act replaced a previous Act, namely The Act for Winding-up Joint Stock Companies of 1844.<sup>66</sup>

The 1861 Act was replaced by the Bankruptcy Act of 1869, the latter of which repealed the voluntary surrender of a debtor's estate, but which was re-introduced by the 1883 Bankruptcy

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<sup>61</sup> See Rose 16; Boraine 233 and the authority cited by him in fn 32.

<sup>62</sup> Dalhuisen par 2.02[8] 1-43; Rose 16.

<sup>63</sup> Dalhuisen par 2.02[8] 1-43; Fletcher 9.

<sup>64</sup> Dalhuisen par 2.02[8] 1-43; Rose 17; Goode 7.

<sup>65</sup> Fletcher 11. See ch 3 where this aspect is dealt with in more detail.

<sup>66</sup> See Fletcher 9-12.

Act.<sup>67</sup> However, as stated above, the basis of modern English insolvency law was laid by the 1842 Act.<sup>68</sup> The office of Official Receiver, insolvency inquiries and public interrogations were introduced by this Act.

The Bankruptcy Act of 1914 was an important new Act<sup>69</sup> which, together with important amendments in 1926 and 1976, applied until the enactment of the Insolvency Act of 1986.<sup>70</sup> In 1977 a commission was appointed with a view to a new Insolvency Act for England and Wales. The commission's work is contained in the so-called Cork Report,<sup>71</sup> which resulted in the enactment of the 1985 and 1986 Insolvency Acts.<sup>72</sup> An important innovation introduced by the Cork Report is the consolidation of the sequestration of individuals and the winding-up or liquidation of companies, into one Act.<sup>73</sup>

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<sup>67</sup> For a more detailed discussion of this period, see Dalhuisen par 3.08[2] 1-87–1-89.

<sup>68</sup> Fletcher 10 states that in the 1883 Bankruptcy Act, personal bankruptcy in England attained a state of development that is still recognisable today.

<sup>69</sup> Rose 18; Goode 7.

<sup>70</sup> For a more detailed discussion see Dalhuisen par 3.08[3] 1-89–1-93. See also Goode 7.

<sup>71</sup> The full reference of this committee's work is *Insolvency Law and Practice, Report of the Review Committee* (Cmnd 8558) 1982 (hereinafter referred to as the Cork Report). See also Dalhuisen par 3.08[4] 1-93.

<sup>72</sup> Not all the recommendations made by the Cork Report were implemented. See ch 4 where the Cork Report is discussed in more detail. See also Fletcher 13-20.

<sup>73</sup> Fletcher 18 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 great importance for the research undertaken in this study, since the English Insolvency Act cannot be said to be a truly unified Act. See also Key "To Unify or Not to Unify Insolvency Legislation: International Experience and the Latest South African Proposals" 1999 1 *DJ* 65-68, and the discussion of this aspect in Parts 3 and 4 below. See also Dalhuisen par 3.08[4] 1-93.

From the above it is evident that English insolvency law was, until the eighteenth century, a system which was mainly regulated by creditors. Since the nineteenth century this system of private sequestration developed into a system where the administration is mainly regulated by the State.<sup>74</sup>

## 4 SOUTH AFRICAN STATUTES

### 4 1 Pre-Union Legislation

Besides the principles of *cessio bonorum* of Roman-Dutch law, there was no generally applicable insolvency law at the Cape until 1803.<sup>75</sup> Under the leadership of Governor De Mist, the then Commissioner-General at the Cape, an ordinance largely based on the Amsterdam Ordinance of 1777 was issued in 1804.<sup>76</sup> It is generally accepted that the Amsterdam Ordinance of 1777 played an important role in the formal development of South African insolvency law.<sup>77</sup>

The main characteristic of this system was that an office called the *Desolate Boedelkamer* was established and which was responsible for the administration of insolvent estates.<sup>78</sup> The system applied in cases where the debtor had ceased the payment of his debts, or where the debtor had surrendered his estate by means of *cessio bonorum*. Although *cessio bonorum* was still recognised at that stage, and still based on the Amsterdam Ordinance of 1777, it differed from the Ordinance in that creditors could not directly sequester the estate of a debtor, and the creditors basically played no role in the administration of the insolvent estate, which fell under the sole

<sup>74</sup> Vinelott 1987 *Current Legal Problems* 5; Stander “Geschiedenis van die Insolvensiereg” 376.

<sup>75</sup> See De Villiers *Die Ou-Hollandse Insolvensiereg en die Eerste Vaste Insolvensiereg van de Kaap De Goede Hoop* (published Doctoral Thesis, Leiden, 1923) (hereinafter referred to as De Villiers); Wessels 669; Mars 4.

<sup>76</sup> The De Mist ordinance was named the *Provisioneele Instructie voor de Commissarissen van de Desolate Boedelkamer* of 1804 - see Stander “Geschiedenis van die Insolvensiereg” 376.

<sup>77</sup> See *Fairlee v Raubenheimer* 1935 AD 135 at 146 and De Villiers 19.

<sup>78</sup> Stander “Geschiedenis van die Insolvensiereg” 376.

control of the *Desolate Boedelkamer*.<sup>79</sup> In 1818 this system was amended in that a *sequestrator* would in future be appointed to perform the functions of the *Desolate Boedelkamer*.<sup>80</sup> Due to the fact that this latter system did not work well in practice,<sup>81</sup> it was replaced in 1827 and the administration of insolvent estates would in future be dealt with by a commissioner.

Ordinance 64 of 1829 was later adopted and had as its aim the regulation of bankrupt and insolvent estates.<sup>82</sup> Many of the procedural aspects of the ordinance were based on English law, although some of the Dutch principles were still contained therein.<sup>83</sup> This ordinance provided for the voluntary surrender of an estate by the debtor as well as the compulsory sequestration of the debtor's estate if the debtor had committed certain specified acts of insolvency. After the sequestration of the debtor's estate he was denied control of his estate which vested in the Master from the moment of sequestration.<sup>84</sup> The administration of the estate was dealt with by a trustee under the supervision of the Master.<sup>85</sup>

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<sup>79</sup> Stander "Geschiedenis van die Insolvensiereg" 376.

<sup>80</sup> See *Government Gazette* of 4 Dec 1818. See also De Villiers 105; Stander "Geschiedenis van die Insolvensiereg" 376.

<sup>81</sup> Stander "Geschiedenis van die Insolvensiereg" 376.

<sup>82</sup> De Villiers 107; Wessels 670 and Stander "Geschiedenis van die Insolvensiereg" 376 are of the opinion that this ordinance was the real basis of South African insolvency law.

<sup>83</sup> This was probably unavoidable after the Cape was surrendered to the English. See De Villiers 106-107; Stander "Geschiedenis van die Insolvensiereg" 376.

<sup>84</sup> Stander "Geschiedenis van die Insolvensiereg" 376. Stander is of the opinion that this was the first time that it had become clear and certain that the trustee became owner of the estate assets.

<sup>85</sup> This ordinance introduced English insolvency law principles into our legal system. See Wessels 670.

The 1829 ordinance was replaced by the Cape Ordinance of 1843.<sup>86</sup> This ordinance was only amended four times<sup>87</sup> over a period of nearly 70 years, and abolished the process of *cessio bonorum*<sup>88</sup> and *surcèance* of payment.<sup>89</sup>

## 4 2 Union Legislation

The first uniform Insolvency Act for the then Union of South Africa was the Insolvency Act 32 of 1916.<sup>90</sup> All previous insolvency ordinances were repealed by the 1916 Insolvency Act.<sup>91</sup> This Act followed the structure of the Transvaal Act 13 of 1895.<sup>92</sup> The 1843 Ordinance continued to survive in the 1916 Act because the Transvaal Act of 1895 was an adapted version of the 1843 Ordinance.<sup>93</sup> The 1916 Act was amended by Act 29 of 1926<sup>94</sup> and Act 58 of 1934. On 1 July 1936 the 1916 Act was replaced by the current Insolvency Act 24 of 1936.

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<sup>86</sup> Mars 5 regards this ordinance as the true basis of South African insolvency law. This point of view cannot be disregarded, especially in light of the fact that Natal (the Cape Ordinance was adopted as Ordinance 24 of 1846, and which was repealed in 1884), the Orange Free State (the Cape Ordinance and Amendment Act 15 of 1859 formed the basis of Ordinance 9 of 1878, which ordinance was inserted into ch 104 of the Statute Law of the Orange Free State) and the Transvaal (the Cape Ordinance as amended by the Cape Act 15 of 1859 was largely built into Transvaal Ordinance 21 of 1880. This latter ordinance was replaced by Act 13 of 1895 which was an adapted version of the Cape Ordinance of 1843. For a discussion of the position in the Transvaal before 1880, see *Zeiler v Weeber* 1878 Kotze 17) had all adopted the 1843 ordinance in some form or another. Generally see also Buchanan *Buchanan's Decisions in Insolvency* 4th ed (1906). With reference to Wessels 669, Stander "Geschiedenis van die Insolvensiereg" 377 states that this ordinance determined modern South African law.

<sup>87</sup> By Acts 15 of 1859, 38 of 1885, 17 of 1886 and 23 of 1905. See De Villiers 9 and Mars 5.

<sup>88</sup> See s 1 of the Ordinance.

<sup>89</sup> *Newcombe v O'Brien* 1906 20 EDC 292 at 296.

<sup>90</sup> Hereinafter referred to as the 1916 Insolvency Act.

<sup>91</sup> Stander "Geschiedenis van die Insolvensiereg" 377.

<sup>92</sup> See Morice "The Reform of Insolvency Proceedings" 1906 *SALJ* 345 and 1907 *SALJ* 160.

<sup>93</sup> Mars 6.

<sup>94</sup> For a useful commentary on the 1916 Act and the impact of the 1926 amendments, see Nathan *South African Insolvency Law* 3rd ed (1928).



It is important to note that however complete the Insolvency Act 24 of 1936 may be, it did not totally repeal the common law in respect of South African insolvency law, and that English law played an important role in the development of our insolvency law.<sup>95</sup> As mentioned in Part 1, the South African Law Commission has been busy with a total review of South African insolvency law since the late 1980s.

## 5 CONCLUSION

South African insolvency law is neither pure Roman-Dutch (common) law, nor pure English law. Rather it appears to be a hybrid of Roman-Dutch law and English law. On the one hand the statutory provisions contained in the Insolvency Act 24 of 1936<sup>96</sup> contain very strong elements of English law, although this statute, and the preceding statutes on which it is based, also contain many principles of Roman-Dutch law.<sup>97</sup> On the other hand there is no doubt that the South African common law, comprising Roman-Dutch law and the judgments of the courts, forms the basis of the non-statutory insolvency law that still finds application to this day.<sup>98</sup> Corporate insolvency was an unknown concept during the early period of South African insolvency law, as company law itself had only started to evolve from the mid-nineteenth century onwards.<sup>99</sup>

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<sup>95</sup> De Villiers 9. See eg *Copestake v Alexander* 1883 SC 137 and *Evans & Co v Silbert* 1911 WLD 216.

<sup>96</sup> Which, of course, was derived from this Act's predecessors, namely the Insolvency Act 32 of 1916, the Cape Ordinance of 1843, and Ordinance 64 of 1829.

<sup>97</sup> See Stander 16; De Villiers 107; Wessels 670; Stander "Gesiedenis van die Insolvensiereg" 376.

<sup>98</sup> *Fairlee v Raubenheimer* 1935 AD at 136; *Swadif (Pty) Ltd v Dyke* 1978 1 SA 928 (A) at 938; *Millman v Twiggs* 1995 3 SA 674 (A) at 679-680.

<sup>99</sup> The development of company and winding-up law in South Africa is discussed in ch 3 below.

## CHAPTER 3

### HISTORICAL OVERVIEW OF THE WINDING-UP OF COMPANIES AND CLOSE CORPORATIONS IN SOUTH AFRICA

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#### 1 INTRODUCTION

In this chapter specific attention will be given to a historical overview of South African company and winding-up law, which is largely based on English law.<sup>1</sup> It will be shown that the concept of separate juristic personality was not known under South African common law, and that the concept of the company as it is known in South Africa today, has its origins in English law as introduced in South Africa.

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<sup>1</sup> See generally Cilliers *ea Corporate Law* 3rd ed (2000) 18-28 (hereinafter referred to as Cilliers *ea Corporate Law*).

In addition to the historical overview of company and winding-up law in South Africa, attention will be given to the introduction in South Africa in 1984 of the close corporation.<sup>2</sup> Similar to the company in legal nature, close corporations are also creatures of statute that confer juristic personality.<sup>3</sup> Close corporations are unique to South Africa and consequently need to be studied within the framework of corporate insolvency law reform.

## 2 HISTORICAL OVERVIEW OF ENGLISH COMPANY LAW

Although the Joint Stock Companies Act of 1844 was the first Act to provide for incorporation under a general enabling Act,<sup>4</sup> this Act was preceded by numerous other events under English law. The most important of these events was the unincorporated “deed of settlement company”, which was in essence a hybrid of trust and partnership, and which was mainly regulated by partnership law.<sup>5</sup> This phenomenon came strongly to the fore at the end of the eighteenth and the beginning of the nineteenth century, and had an important influence on the development of English company law legislation.<sup>6</sup> According to Cilliers *et al*<sup>7</sup> this was a direct result of the Bubble Act<sup>8</sup> that had as its main aim to bring to an end the unincorporated joint stock company.

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<sup>2</sup> By means of the Close Corporations Act 69 of 1984 (hereinafter referred to as the Close Corporations Act).

<sup>3</sup> See s 2(2) of the Close Corporations Act.

<sup>4</sup> See Goode *Principles of Corporate Insolvency Law* 2nd ed (1997) 7-8 (hereinafter referred to as Goode).

<sup>5</sup> Cilliers *ea Corporate Law* 21 and the authority quoted in fn 22.

<sup>6</sup> Cilliers *ea Corporate Law* 21 and the authority quoted in fn 23.

<sup>7</sup> Par 2.06 21.

<sup>8</sup> 6 Geo 1 c 18.

Under the Joint Stock Companies Act of 1844,<sup>9</sup> only one type of company was recognised, namely the unlimited company.<sup>10</sup> In terms of this Act members were held personally responsible for the liabilities of the company.<sup>11</sup> The Limited Liability Act of 1855<sup>12</sup> recognised the unlimited liability of members as a given, but created machinery to limit the liability to the amount owed by members on shares.<sup>13</sup> The Joint Stock Companies Act of 1856<sup>14</sup> consolidated the two prior Acts and thus made provision for two company forms, namely the unlimited company and the limited company.<sup>15</sup> This Act can be regarded as the first of the modern English Companies Acts.<sup>16</sup>

The Companies Act 1948,<sup>17</sup> as supplemented by the Companies Acts of 1967, 1976, 1980, 1981 and 1983, were consolidated in the Companies Act of 1985, and which came into operation on 1 July 1985.<sup>18</sup>

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<sup>9</sup> 7 & 8 Vict c 110.

<sup>10</sup> Cilliers *ea Corporate Law* 21 par 2.07.

<sup>11</sup> Cilliers *ea Corporate Law* 21 par 2.07.

<sup>12</sup> 18 & 19 Vict c 133.

<sup>13</sup> Cilliers *ea Corporate Law* 21 par 2.08; Goode 8.

<sup>14</sup> 19 & 20 Vict 47.

<sup>15</sup> Cilliers *ea Corporate Law* 21-22 par 2.09; Goode 7-8.

<sup>16</sup> Cilliers *ea Corporate Law* 22 and the authority quoted in fn 28; Goode 7-8.

<sup>17</sup> 11 & 12 Geo 6 c 38.

<sup>18</sup> Cilliers *ea Corporate Law* 22 par 2.10.

### 3 HISTORICAL OVERVIEW OF SOUTH AFRICAN COMPANY LAW<sup>19</sup>

#### 3 1 Pre-Union Legislation<sup>20</sup>

The first company legislation in South Africa had its origins in the Cape in the form of the Joint Stock Companies Limited Liability Act 23 of 1861. This Act was in nearly all respects a re-enactment of the English Joint Stock Companies Act of 1844<sup>21</sup> and the Limited Liability Act of 1855,<sup>22</sup> which, at the time of its enactment in South Africa, had already been repealed in England. These English Acts also served as model for statutes in Natal, the Transvaal and the Orange Free State.

#### 3 2 Post-Union Legislation<sup>23</sup>

The first post-Union South African legislation relating to companies, namely the Companies Act 46 of 1926,<sup>24</sup> was based on the Transvaal Companies Act 31 of 1909,<sup>25</sup> which in turn was based on the English Companies (Consolidation) Act of 1908.<sup>26</sup>

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<sup>19</sup> See generally Cilliers *ea Corporate Law* 23-28.

<sup>20</sup> See Cilliers *ea Corporate Law* 23 par 2.13.

<sup>21</sup> 7 & 8 Vict c 110 (repealed in 1856).

<sup>22</sup> 18 & 19 Vict c 133 (repealed in 1856).

<sup>23</sup> Cilliers *ea Corporate Law* 23 paras 2.14-2.24. See also generally Cilliers and Benade *Maatskappyereg* (1968) (hereinafter referred to as Cilliers and Benade *Maatskappyereg*).

<sup>24</sup> Hereinafter referred to as the 1926 Companies Act.

<sup>25</sup> Hereinafter referred to as the 1909 Transvaal Companies Act.

<sup>26</sup> See De la Rey "Aspekte van die Vroeë Maatskappyereg" 1986 *Codicillus* 4 (hereinafter referred to as De la Rey "Aspekte van die Vroeë Maatskappyereg").

Although various company law Acts were promulgated in England after 1908, in South Africa the 1926 Companies Act was merely periodically supplemented by means of amendment Acts. After the promulgation of the Companies Act of 1929 in England, and in light of the amendments made to the English legislation, the Lansdown Commission<sup>27</sup> was appointed in South Africa to consider changes to the South African Companies Act of 1926. Following the recommendations of the Lansdown Commission, the Companies Amendment Act 23 of 1939 was promulgated. Another far-reaching amendment Act was the Companies Amendment Act 46 of 1952, which was passed as a result of the recommendations of the Millin Commission.<sup>28</sup> This Commission was appointed following a report by the Cohen Commission<sup>29</sup> in England, which resulted in the English Companies Act of 1948.

Continuing the pattern of following what the English legislators were doing with their own company law legislation, South Africa again followed suit after the appearance in England of the report of the Jenkins Commission,<sup>30</sup> by appointing a commission of enquiry under the chairmanship of Van Wyk de Vries J.<sup>31</sup>

The current Companies Act of 1973 was a direct result of the work done by the Van Wyk de Vries Commission, and did not merely bring about important changes to the 1926 Act, but also brought about a whole new division and arrangement of the Companies Act. For example, Chapter XIV of the Companies Act provides for the winding-up of a company, either voluntarily or by

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<sup>27</sup> *Report of the Companies Act Commission 1935-1936* (UG 45 of 1936) (hereinafter referred to as the Lansdown Commission).

<sup>28</sup> *Verslag van die Kommissie van Ondersoek insake die wysiging van die Maatskappywet* (UG 69 of 1948) (hereinafter referred to as the Millin Commission).

<sup>29</sup> *Report of the Committee on Company Law Amendment* (Cmnd 6659 of 1945) (hereinafter referred to as the Cohen Commission).

<sup>30</sup> *Report of the Company Law Committee* (Cmnd 1749 of 1962) (hereinafter referred to as the Jenkins Commission).

<sup>31</sup> *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 Konsepwetsontwerp* RP 31/1972) (hereinafter referred to as the Van Wyk de Vries Commission).

order of court. Due to the fact that a company is a creature of statute, it makes sense that the same enabling legislation which confers juristic personality on such an enterprise also made provision for its winding-up prior to its dissolution.

Another important aspect of the 1973 Companies Act is the fact that it provides for the appointment of a Standing Advisory Committee on Company Law by the Minister of Trade and Industry. This committee's function is to advise the minister on policy-making decisions in respect of company law.<sup>32</sup>

An important aspect of the Standing Advisory Committee's functions for the purposes of this study, is the policy statement made by this committee on 8 February 1985,<sup>33</sup> in which they set out their vision for the future development of South African company law. The committee saw fit to categorise, in order of urgency and/or importance, problem areas which they regard as important enough to receive attention in the continuous development of South African company law. In Category B it is stated that the abilities (*vermoë*) and powers (*bevoegdheid*) of a company should be brought more into line with those of natural persons.<sup>34</sup> In Category C it is stated that a logically structured Bankruptcy Act should be established in order to replace the existing system of combining the Insolvency Act of 1936 with the winding-up chapters of the current Companies Act and other legislation making provision for specialised institutions such as banks and insurance companies.<sup>35</sup>

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<sup>32</sup> See s 18 of the Companies Act where the functions and duties of this committee are regulated.

<sup>33</sup> The full text of this statement was published in the *1985/86-Noteerder* to Cilliers *et al* *Maatskappyereg*.

<sup>34</sup> "1. *Vermoë en bevoegdheid van 'n maatskappy. Dit moet meer in ooreenstemming met die van 'n natuurlike persoon gebring word (soos in die geval van beslote korporasies gebeur het);...*"

<sup>35</sup> "5. *die daarstelling van 'n logies gestruktureerde Wet op Bankrotsky ter vervanging van die huidige sisteem waarin die Insolvensiewet gekombineer word met die likwidasiohoofstukke van die Maatskappywet (en ander wette wat op bepaalde regspersone van toepassing is soos bank- en versekeringsmaatskappye).*"

The latter point is especially relevant to this study, as the purpose of this research is not only to show that this aim can be achieved, but to in fact achieve it. By combining the winding-up provisions with the new Insolvency Act (as drafted by the South African Law Commission) both the objectives set out above will have been achieved in respect of insolvency law.<sup>36</sup>

#### **4 HISTORICAL OVERVIEW OF SOUTH AFRICAN CLOSE CORPORATION LAW**

Because this study deals with “corporate” insolvency law reform, it is necessary to place the introduction and development of the close corporation in South Africa into its proper historical perspective. The close corporation was introduced in order to simplify the use of juristic personality on a more informal basis. It is submitted that this aim will be further achieved by combining the winding-up provisions contained in the Close Corporations Act and the Companies Act into a unified Insolvency Act, which will assist in simplifying procedures and administration in respect of the administration of insolvent estates.

The advent of close corporations<sup>37</sup> owes its existence to the complexities which have built up in respect of company law over the decades. The need was felt for a more simple and efficient system for the small entrepreneur, who could enjoy the benefits of limited liability but at the same

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<sup>36</sup> The combination of the winding-up provisions with the provisions of the Insolvency Act will be undertaken in the proposals made in part 4 of this study.

<sup>37</sup> In regard to the introduction and subsequent use of close corporations in South Africa, see generally Naudé “Beslote Korporasie - Die Voorgestelde Ondernemingsvorm vir Kleinsake” 1983 *MB* 62; Naudé “The South African Close Corporation” 1984 *JJS* 119; Henning “Close Corporations and Private Companies in South and Southern Africa” 1 *Perspectives on Company Law* (1995) 169; Cilliers *ea Corporate Law* 568; Cilliers *et al Close Corporations - A Comprehensive Guide* (1993) 12; Van Dorsten *South African Business Entities* (1993) 2; Katz *et al Companies 3 Butterworths Forms and Precedents* (1991) 18; Ribbens *In Quest for the Appropriate Code for the Ideal Legal Form for the Proprietary Business Enterprise* (1986) 228; Naudé “Die Toekoms van die Beslote Korporasie en die Private Maatskappy” 1986 3 *Tran CBL* 1; Henning and Bleimschein “Die Neue Unternehmensform der Close Corporation in Südafrika” 1990 *Recht der Internationalen Wirtschaft* 627; Henning “Closely Held Corporations: Perspectives on Developments in Four Jurisdictions” 1995 *THRHR* 100; Beuthin *Basic Company Law* (1992) 325; Delpont and Pretorius *Introduction to the Close Corporations Act* (1989) 1; De la Rey “Beslote Korporasies. Probleme in Verband met Likwidasië en Akkoord” 1990 3 *Tran CBL* 107; Henning “Close Corporations in South Africa: The First Decade” 1995 *Tran CBL* 130.



time avoid the many onerous obligations placed on larger corporations by the Companies Act.<sup>38</sup>

In light of the fact that the Close Corporations Act, as the enabling legislation, confers juristic personality on close corporations upon their incorporation, the same legislation needs to provide for the winding-up of such entity prior to its demise. As in the case of the Companies Act, the Close Corporations Act contains a chapter<sup>39</sup> dealing with the winding-up of the corporation, either voluntarily or on a compulsory basis. Very few provisions contained in the Close Corporations Act actually regulate the winding-up, as most of the winding-up provisions of the Companies Act apply also to close corporations which are being wound up.<sup>40</sup>

## 5 WINDING-UP GENERALLY

Since this study purports to make proposals for the amalgamation of the winding-up provisions contained in the Companies Act and Close Corporations Act, respectively, into a unified Insolvency Act, it is necessary to trace the development of winding-up generally, and more specifically that in respect of corporate insolvency. The question that can be asked is why winding-up developed separately from insolvency law, and whether this separate development is still justified considering the changes that have taken place in corporations law in South Africa.

It is submitted that the company and close corporation, as the main forms of business enterprise in South Africa, have become so prevalent that they far overshadow in value,<sup>41</sup> if not in number,

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<sup>38</sup> For a complete list of the reasons for the introduction of close corporations in South Africa, see Cilliers *ea Close Corporations Law* 3rd ed (1998) par 1.02 (hereinafter referred to as Cilliers *ea Close Corporations Law*).

<sup>39</sup> See part IX of the Close Corporations Act.

<sup>40</sup> See s 66 of the Close Corporations Act.

<sup>41</sup> See SA Law Commission Project 63 Commission Paper 582 (11 Feb 2000) Vol 1 par 5.2.3 19 (hereinafter referred to as Commission Paper 582).

the estates of natural persons that are sequestrated.<sup>42</sup> In light of this fact it does not make sense that legislation providing for the sequestration of individuals should be the main enabling legislation in respect of insolvency, but rather that the provisions should be modelled around corporate insolvency, with the estates of individuals being adapted to fit in with this legislation. What needs to be determined is why this separate development took place, to what extent it has since been amended to meet the changing needs of the corporate world, and whether these erstwhile provisions are still justifiable in the modern business world.

Considering that early South African company law was modelled exclusively on the English statutes of that time, it is necessary to examine the introduction of winding-up provisions into English legislation. The reports of the three commissions of enquiry that were appointed to examine new company law trends in South Africa may also cast some light on the development of winding-up law, identify shortcomings contained in previous and current legislation, and provide reasons for innovations and amendments that were introduced into South African law over the decades. Lastly, the introduction of the Close Corporations Act may also shed some light on the reasons for including winding-up provisions in this relatively new piece of legislation.

## **6 HISTORICAL DEVELOPMENT OF THE WINDING-UP OF COMPANIES UNDER ENGLISH LAW<sup>43</sup>**

Whereas the sequestration of an individual's estate brings about a change of status of the individual, the winding-up of a company is seen as the process which precedes its dissolution as

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<sup>42</sup> Internationally speaking there is a strong division between consumer bankruptcy (individuals) and corporate bankruptcy (companies). How this developed over the years is illustrated in ch 4 below.

<sup>43</sup> See generally Keay *McPherson*, *The Law of Company Liquidation* 4th ed (1999) 10-20 (hereinafter referred to as *McPherson*)

a juristic person.<sup>44</sup> The latter part of this statement is well stated in the so-called Cork Report,<sup>45</sup> which was the precursor to the English Insolvency Acts of 1985 and 1986:

“The winding up of a company has long been recognised as a statutory process for bringing the operations of the company to a close, realising its assets, and distributing the proceeds amongst its creditors and shareholders in accordance with their rights and interests, to be followed by a dissolution of the company.”<sup>46</sup>

Just as the development of English (and consequently also South African) company law can be traced back to the joint stock companies of the late eighteenth century, so too can the development of corporate insolvency law.<sup>47</sup> Due to the fact that the great chartered companies and joint stock companies were dealt with under the law relating to partnerships, and due to the absence of limited liability at the time, creditors could (and did) bring proceedings against any one shareholder. This left the shareholders to try and obtain some form of financial contribution from their co-shareholders.<sup>48</sup>

With the concept of the modern limited liability company growing more popular as time wore on, procedures had to be designed to deal with the liquidation of the affairs of such a company,

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<sup>44</sup> Cilliers *ea Corporate Law* par 27.01 494. This is still the position in South Africa today, and is probably the underlying reason why a distinction is still made between the sequestration of natural persons and the liquidation (or winding-up) of companies and close corporations.

<sup>45</sup> *Insolvency Law and Practice, Report of the Review Committee* (Cmnd 8558) 1982 (hereinafter referred to as the Cork Report).

<sup>46</sup> Cork Report par 74. See also O'Donovan *Mc Pherson, The Law of Company Liquidation* 3rd ed (1987) 1 where liquidation is defined as "... a process whereby the assets of a company are collected and realised, the resulting proceeds are applied in discharging all debts and liabilities, and any balance which remains after paying the costs and expenses of winding-up is distributed among the members according to their rights and interests, or otherwise dealt with as the constitution of the company directs". In the Australian case of *Re Crust 'N' Crumb Bakers (Wholesale) Pty Ltd* (1992) 5 ACSR 70 at 72, the process of winding-up was described as the process which involves "collecting of assets, realising and reducing them to money, dealing with proofs of creditors by admitting or rejecting them, and distributing the net proceeds, after providing for costs and expenses, to the persons entitled".

<sup>47</sup> McPherson 10-11.

<sup>48</sup> Cork Report par 74.

especially in cases where it became insolvent.<sup>49</sup> It appears that these procedures contained elements derived from the old Court of Chancery, and from the law relating to the insolvency of individuals and partnerships, which were adapted to meet the specific needs of these types of companies.<sup>50</sup>

According to the Cork Report the term “winding-up” can be traced as far back as 1844,<sup>51</sup> where it was used in legislation relating to the winding-up of joint stock companies.<sup>52</sup>

“The term ‘winding up’, as applied to companies, was used in an Act of 1844, which was passed ‘for Winding up the Affairs of Joint Stock Companies unable to meet their Pecuniary Engagements’. The next twenty years or so witnessed a flood of legislation dealing with companies and winding up in particular, culminating in the Companies Act 1862 which laid down the foundation upon which subsequent legislation relating to companies has been built.”<sup>53</sup>

The 1862 Act<sup>54</sup> provided three possibilities for the winding-up of a company:<sup>55</sup> firstly, a voluntary winding-up could take place in cases where the company was unable to continue trading due to its liabilities, and the members passed a resolution that the company should be wound up.<sup>56</sup> The second possibility was where the resolution to wind up voluntarily had been taken by members,

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<sup>49</sup> Cork Report par 75.

<sup>50</sup> Cork Report par 75.

<sup>51</sup> See also McPherson 11-14.

<sup>52</sup> Cork Report par 75.

<sup>53</sup> However, there was an important Act that was passed before the 1862 Act came into operation, namely the Winding-up Act of 1848 (11 & 12 Vict c 45). For a discussion of this important Act (it introduced the concept of the members being able to apply to have the company wound up), see McPherson 14-16.

<sup>54</sup> 25 & 26 Vict c 89. See also McPherson 19.

<sup>55</sup> Cork Report par 76.

<sup>56</sup> This is similar to a voluntary winding-up by creditors, which still finds application in modern South African company and close corporation law. See ss 343(2)(a) and 351 of the Companies Act and s 67(1) of the Close Corporations Act. The Cork Report points out (in par 76(a)) that a distinction was not made between a voluntary winding-up by creditors and a voluntary winding-up by members until 1929, sixty-seven years later. This latter distinction still finds application in modern South African company and close corporation law.

but where the court could order that the winding-up should continue under the supervision of the court.<sup>57</sup> This possibility gave the court wide powers, but it would appear that it would only be invoked where the creditors, contributories or other interested parties had requested it. The third possibility was for the company to be wound up by the court in particular circumstances, such as the company being unable to pay its debts.<sup>58</sup> This could only be done in three circumstances, namely:

- (a) Where notice had been served on the company and the company was unable to pay the amount within a period of three weeks;
- (b) Where an execution judgment had been returned unsatisfied (*nulla bona* return); and
- (c) Where it was proved to the satisfaction of the court that the company was unable to pay its debts.<sup>59</sup>

Until 1929 most of the amendments and developments relating to winding-up appear to have been aimed at procedural aspects, such as the appointment of an official liquidator<sup>60</sup> and the rights and duties of such a liquidator, especially as regards money and assets which fell under his control. Other important aspects which received attention were aimed at “fraudulent and dishonest company promoters and directors”.<sup>61</sup> At this time public examinations of company promoters, directors or other officers were also provided for in the legislation, in the discretion of the court and after receipt of a report by the liquidator in this regard. This was one of the measures which led to a partial harmonisation of insolvency and winding-up legislation:

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<sup>57</sup> A similar provision exists in the Companies Act to this day - see s 346(1)(e) of the Companies Act.

<sup>58</sup> This ground of liquidation still exists in both the Companies Act and the Close Corporations Act. See s 344(f) of the Companies Act and s 68(c) of the Close Corporations Act.

<sup>59</sup> Cork Report par 76(c)(i)- (iii); McPherson 20.

<sup>60</sup> The Companies (Winding-up) Act of 1890.

<sup>61</sup> Cork Report par 78; Directors' Liability Act of 1890.

“The legislature looked upon these provisions relating to the power to have a public examination of directors of failed companies as being salutary and wholesome for the public good. They must also be regarded as measures for harmonising, so far as practicable, the bankruptcy and winding up legislation respectively upon a crucial matter namely, the need for public exposure in certain circumstances of the events connected with an insolvency.”<sup>62</sup>

In 1906 the Loreburn Committee<sup>63</sup> made only a few recommendations in connection with the winding-up of companies. These recommendations related mainly to improving the position of unsecured creditors, to facilitate the bringing of insolvency proceedings by contingent creditors, and to deal with floating charges in particular circumstances.<sup>64</sup> These recommendations were brought about in the Companies (Consolidation) Act of 1908.<sup>65</sup>

In 1925 the Greene Committee<sup>66</sup> played an important role in bringing about changes to winding-up which were eventually embodied in the 1929 Act.<sup>67</sup> The Greene Committee’s main proposal related to winding-up procedures that brought about more effective control for creditors in the case of voluntary liquidations where the company was unable to pay all its debts in full.<sup>68</sup> This procedure as recommended by the Greene Committee became known as creditors’ voluntary liquidation.<sup>69</sup> This procedure was retained in subsequent legislation in England, and brought about the demise of voluntary liquidations under the supervision of the court.<sup>70</sup> The Greene Committee’s recommendations also appear to be the origin of two important aspects of corporate insolvency, namely:

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<sup>62</sup> Cork Report par 84.

<sup>63</sup> Cd 3052 1906.

<sup>64</sup> Cork Report par 86.

<sup>65</sup> Cork Report par 86.

<sup>66</sup> Cmnd 2657 1926.

<sup>67</sup> Cork Report par 88.

<sup>68</sup> Cork Report par 89.

<sup>69</sup> Cork Report par 89.

<sup>70</sup> Cork Report par 89.

- (a) The prohibition of an “undischarged” bankrupt from participating in the management of a company without the leave of the court;<sup>71</sup> and
- (b) The important concept of “fraudulent trading”.<sup>72</sup>

Subsequent to the 1929 Act, there were two commissions of enquiry before the Cork Report in 1982. These were the Cohen Commission<sup>73</sup> and the Jenkins Commission.<sup>74</sup>

An important aspect of both these latter reports was the fact that there still seemed to be a problem in respect of the successful prosecution of directors and other officers of a company which had acted in a fraudulent manner towards creditors.<sup>75</sup> Both reports sought to address the protection of creditors, but this is especially true of the Jenkins Committee which recommended that public examinations should be extended to include “all or any of the directors or other officers of an insolvent company ‘where there is some *prima facie* case of culpability, or of such impropriety, recklessness or incompetence as might lead to disqualification of the person or persons concerned’ as a director of a company in future”.<sup>76</sup> The Insolvency Act of 1976 also sought to address the problem of inappropriate conduct by directors by making provision for the disqualification of persons who had been involved in several failures.<sup>77</sup>

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<sup>71</sup> Cork Report par 91.

<sup>72</sup> Cork Report par 92.

<sup>73</sup> *Report of the Committee on Company Law Amendment* (Cmnd 6659 of 1945) (hereinafter referred to as the Cohen Commission).

<sup>74</sup> *Report of the Company Law Committee* (Cmnd 1749 of 1962) (hereinafter referred to as the Jenkins Commission).

<sup>75</sup> Cork Report paras 96-98.

<sup>76</sup> Cork Report par 98.

<sup>77</sup> Cork Report par 99.

The next important phase in the development of English winding-up law, were the recommendations made by the Cork Report in 1982. From remarks contained in the Cork Report itself, it is clear that the English insolvency system was due for a major revamp. This is stated as follows at paragraph 1975 of the Cork Report:

“1975. Our terms of reference required us to conduct, for the first time in more than a century, a comprehensive review of the law of insolvency both individual and corporate, and to make recommendations... It became clear at an early stage of our deliberations that the immense social and economic changes which have taken place since the mid-Nineteenth Century, when our present insolvency laws and procedures were formulated, have rendered them at best obsolescent and at worse positively harmful. Without radical reform they are no longer capable of meeting the requirements of a modern society and fresh legislation of a comprehensive nature is urgently required.”

Due to the fact that the recommendations in the Cork Report will be discussed more fully in Parts 3 and 4 of this study, the detail of its recommendations will not be discussed here. However, in view of the objectives of this study, it is important to state the main recommendations made by the Cork Committee in Chapter 52 of their report:

- “(1) *To simplify and modernise the present cumbersome, complex, archaic and over-technical multiplicity of insolvency procedures, with a view to the harmonisation and integration, wherever possible, of the law and practice relating to the individual and the corporate debtor alike...*
- (2) *To encourage, wherever possible, the continuation and disposal of the debtor’s business as a going concern and the preservation of jobs for at least some of the employees, and to remove obstacles which tend to prevent this...*
- (3) *In the case of the individual debtor, to reduce the emphasis on ‘selling him up’ and to increase the attention paid to the possibility of meeting the claims of creditors out of the debtors future wages or income...*
- (4) *To improve the standard of administration of insolvent estates and to prevent abuse and also to encourage the ordinary unsecured creditors to take a more active interest in the proceedings...*
- (5) *To increase the amount available in an insolvent’s estate for the ordinary creditors...*
- (6) *To ensure a fairer distribution of the assets realised in the course of insolvency proceedings and so to allay the dissatisfaction that exists on this subject...*
- (7) *To relax the excessive severity of the law towards the individual insolvent, particularly the insolvent who is incompetent rather than dishonest, but to increase the severity of the law towards the director of the failed company who has acted irresponsibly.”<sup>78</sup>*

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<sup>78</sup> Cork Report par 1980(1)-(7).



To summarise,<sup>79</sup> winding-up law in England originated as a means of bringing about the demise of large trading companies upon their inability to pay their debts. As the concept of the company as a separate legal entity grew in popularity within a highly modernised society and business climate, the winding-up procedures were adapted to meet the ever-changing needs of these artificial juristic persons. The popularity of separate juristic personality brought with it a number of problems, such as abuse by unscrupulous company promoters and directors. As the popularity of companies grew, the need to distinguish (upon insolvency) between individuals and companies diminished, to the point where England, by introducing the Insolvency Act of 1985, sought to do away, as far as possible, with these distinctions. It is unfortunate that the English legislature elected not to implement all the recommendations made by the Cork Committee, as it is evident that its recommendations envisaged a more far-reaching integration of the laws relating to individuals and corporate debtors.<sup>80</sup>

## **7 HISTORICAL DEVELOPMENT OF THE WINDING-UP OF COMPANIES UNDER SOUTH AFRICAN LAW**

There are no ready sources available that set out the historical development of South African corporate insolvency law, save for the handbooks which refer to the historical development of

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<sup>79</sup> For a useful summary of events in England leading up to and including the recommendations made by the Cork Report, see Keay "To Unify or Not to Unify Insolvency Legislation: International Experience and the Latest South African Proposals" 1999 1 *DJ* 65-68 (hereinafter referred to as Keay "To Unify or not to Unify") and Keay "The Unity of Insolvency Legislation: Time for a Re-think?" 1999 *Insolvency Law Journal* 6.

<sup>80</sup> It is possible that the Cork Report's recommendations would have been properly implemented had it not been for the sudden decision by the government to push through a new Insolvency Act on an urgent basis. Keay "To Unify or not to Unify" states it thus at 67:

"When the Cork Committee reported, it did so to a government that was different from the one that had originally commissioned it and there was not a great deal of enthusiasm about implementing the recommendations. As so often has occurred in history, given the pragmatism of government in western democracies, a bill was drafted hurriedly in 1984 following several financial scandals in which those involved were able to avoid any personal repercussions ... The resultant statute, the Insolvency Act of 1985, was not a unified statute and it failed to introduce many of the recommendations of the Cork Committee."

South African company law.<sup>81</sup> In view of this, the history pertaining to the winding-up provisions under South African corporations law has been gleaned from the applicable statutes themselves, ranging from 1836 to 1984,<sup>82</sup> and the reports of three local commissions of enquiry into company law matters. Unfortunately none of the statutes or handbooks, and very little contained in the commission reports, provide much insight into why the winding-up provisions have developed as they have over the decades. Despite this, South African company law, and therefore also the provisions relating to winding-up, followed a similar pattern to the developments that were taking place in England.

## 7 1 Legislation in the Cape Colony

### 7 1 1 *Ordinance for Incorporating and Establishing the South African Association for the Administration and Settlement of Estates, Ordinance 6 of 1836*

The South African Association for the Administration and Settlement of Estates was one of the first forms of a corporation in South Africa, and was established as a type of trust company that administered estates. The reference in the preamble to “Joint Stock or Capital” indicates that this was the first piece of legislation whereby an association of persons, granted legal personality by the ordinance, was created. The ordinance contains no winding-up provisions, but clause 40 of the ordinance did provide how this association of persons was to be dissolved. As a result it is not known what would happen if this association of persons was unable to pay its debts.

### 7 1 2 *Ordinance for Explaining and Extending the Powers of the Trustees Appointed for the Management of a Mercantile Establishment at Port Beaufort, Ordinance 7 of 1836*

The abovementioned ordinance did not contain any provisions for winding-up either, and it is evident from clause 18 that the trustees and/or shareholders could be held jointly and severally liable for any amounts owing in respect of legal actions brought against them.

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<sup>81</sup> See eg Cilliers *ea Corporate Law* ch 2.

<sup>82</sup> In this regard I have made extensive use of a volume entitled *Companies Legislation and Related Statutes Prior to 1910*, a collection of old company law statutes compiled by De la Rey and Ferreira (1987) which is available at the library of the University of South Africa.

*7 1 3 The Joint Stock Companies Limited Liability Act 23 of 1861*

The Joint Stock Companies Limited Liability Act made provision for limited liability in respect of the members of Joint Stock Companies, but was not very clear about what should happen if the company was unable to pay its debts. For example, section XI provided as follows:

“XI. The members of any joint-stock company which has obtained a certificate of registration with limited liability, after such certificate is granted shall not be liable (any law to the contrary notwithstanding) under any judgment, decree, or order which shall be obtained against such company, for any debt or engagement of such company, further or otherwise than is hereinafter provided.”

Sections XII and XIII then provided that the shareholders were to be held personally liable for the debts of the company, in as far as their shares were not paid up. The same clauses provided that a previous shareholder could also be held liable in certain circumstances.<sup>83</sup> It must be assumed that if the shareholders or previous shareholders were not in a position to pay the debts, that these were written off.

*7 1 4 The Special Partnerships' Limited Liability Act 24 of 1861*

The introduction of this Act brought about limited liability for certain types of partnerships, although it is stated in section III that such partners “shall be jointly and severally responsible as partners now are by law”. No winding-up provisions were contained in this Act, and the only reference to insolvency is contained in section XIV:

“In case of the insolvency of any limited partnership, no special partner shall under any circumstances be allowed to claim as a creditor until all the claims of all the other creditors of the partnership shall be satisfied.”

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<sup>83</sup> The contents of cl XIV is of special interest, as it appears to be an early form of liability where the directors of a joint stock company were held personally liable for all the company's debts if it was found that they had declared a dividend at the time that the company was insolvent.

Since the partners were jointly and severally liable in terms of section III, it may be safe to assume that the insolvency statute which was applicable at the time, also applied to the insolvency of limited partnerships. The insolvency statute in question was Ordinance 6 of 1843, and applied to both individuals and partnerships.<sup>84</sup>

#### 7.1.5 *Winding-up Act 12 of 1868*

Although this Act was the first legislation making specific provision for winding-up in the Cape Colony, it was preceded in Natal by the Winding-up Law of 1866.<sup>85</sup> When examining Act 12 of 1868, one is astonished to find that the current South African law relating to the winding-up of companies has not changed very much since 1868. For example, section II reads 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.
2. Whenever the company does not commence its business within one year from its incorporation, or suspends its business for the course of a year.
3. Whenever the number of members is reduced below seven.
4. Whenever three fourths of the subscribed capital have been lost or become unavailable for the business of the company.
5. Whenever the company is unable to pay its debts.
6. Whenever the court is of opinion that it is just and equitable that the company should be wound up.”

This is but one example from a total of fifty three sections,<sup>86</sup> many of which are still recognisable in some form or another in current South African legislation. One puzzling aspect of this Act is that no reference can be found to the law of insolvency applying in the case of a company being wound up. The Master of the Supreme Court was not involved in the process, as the Act consistently refers to the “Court” having control over the process. For example, section XI states the following regarding the appointment of a liquidator:

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<sup>84</sup> It is interesting to note that this Ordinance is regarded as being the foundation of insolvency law statutes in South Africa, and survived for a period of 70 years with only four amendments - see De la Rey *Mars*, *The Law of Insolvency in South Africa* 8th ed (1988) 5 (hereinafter referred to as Mars).

<sup>85</sup> See par 7.2.4 below.

<sup>86</sup> The provisions of this Act will be discussed in more detail in part 4 of this study.

“XI. For the purpose of conducting the proceedings in winding up a company, the court may appoint a person or persons to be called an official liquidator, or official liquidators...”

How the estate was actually distributed amongst the creditors is not entirely clear.<sup>87</sup> Section XV 8 stated that a liquidator, *with the sanction of the court*,<sup>88</sup> was entitled “to do and execute all such other things as may be necessary for winding up the affairs of the company and distributing its assets”, but does not state how this was to take place. This Act also made provision for the court to determine a list of contributories,<sup>89</sup> and states in section XXII:

“XXII. The court may ... make calls on, and order payment thereof by, all or any of the contributories for the time being settled on the list of contributories, to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up...”

From section XVIII it would appear that the court determined how the property of the company was to be applied in the discharge of its liabilities:

“XVIII. As soon as may be after making an order for winding-up the company, the court shall settle a list of contributories, with power to rectify the register of members in all cases where such rectification is required, and shall cause the assets of the company to be collected and applied in discharge of its liabilities.”

Most importantly, in my view, section XXIX provides some insight as to how the company’s assets were to be applied:

“XXIX. The court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the estate of the company of the costs, charges, and expenses incurred in winding up any company, in such order of priority as the court thinks just.”

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<sup>87</sup> However, for a possible answer to this question, see par 7.1.7 below and more specifically the references to *In re Dusseau and Co (in liquidation)* 1907 17 CTR at 23 and *In re The Equitable Fire Assurance and Trust Co (in liquidation)* 1907 17 CTR at 23.

<sup>88</sup> However, see s XVI where provision was made for the court to authorise the exercise of the liquidator’s powers (as provided for in s XV) without the court’s sanction.

<sup>89</sup> S XXII. The current Companies Act also provides for a list of contributories, but this list is settled by the liquidator - see s 395 of the Companies Act.

This begs the question: how did the court go about determining the order of priority? For example, would creditors who were regarded as being secured in terms of insolvency law also be secured in the case of a company being wound up, or could (and did) the court determine a different ranking of the priority of claims? In my opinion it would be fair to state that the courts would probably have applied the insolvency law rules that found application at the time, namely Ordinance 6 of 1843. It is a striking aspect of this Act is that the court supervised the whole of the winding-up process, having the inherent right to give instructions or orders relating to any aspect of the winding-up. The task of supervising the administration is of course today performed by the Master of the High Court.<sup>90</sup>

It is worth noting at this point that this Act, which was the first legislation in the Cape Colony to provide for the winding-up of joint-stock companies, was contained in separate legislation. This is important since this study will suggest that the winding-up provisions for companies and close corporations need not necessarily be contained in the respective enabling legislation, as is currently the case. Indeed, a single insolvency statute necessarily entails separating the winding-up or liquidation provisions from the respective enabling Acts.

#### *7 1 6 The Joint Stock Companies Act 13 of 1888*

The 1888 Joint Stock Companies Act enabled joint-stock companies to obtain juristic personality and to own “lands and other property”. It was of a regulatory nature and did not contain any winding-up provisions. One is to assume that the Winding-up Act of 1868 also applied to the winding-up of these types of companies and, therefore, also Ordinance 6 of 1843.

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<sup>90</sup> The Master of the High Court was previously known as the Master of the Supreme Court. These terms are used interchangeably throughout this study.

7.1.7 *The Companies Act 25 of 1892*

The Companies Act of 1892 was the first Act to incorporate the winding-up provisions in the enabling legislation which made provision for the incorporation of companies, Part V of which made provision for winding-up. There are two possible reasons for including the winding-up provisions in the Act itself, namely:

- (a) That this new piece of legislation for the first time properly regulated the incorporation of companies, and it was thought prudent to include the winding-up provisions of such a company in the same legislation, or
- (b) The fact that the Act was taken over from English law, where the winding-up provisions had also been included in the enabling legislation.

Considering the historical development of South African company law, the latter possibility is the most probable cause of this “innovation”.

The first traces of the Master of the Supreme Court’s involvement is evident in this Act, although the court was still primarily responsible for all proceedings under winding-up.<sup>91</sup> Section 145 states the following:

“145. Where the court makes an order for winding up a company under this Act, it may if it thinks fit direct all or any subsequent proceedings for winding up the same to be had before the Master of the Supreme Court or any insolvency commissioner duly appointed...”

The powers of the liquidator were similar to those provided for in the Winding-up Act of 1868,<sup>92</sup> and could still only be exercised with the sanction of the court. In fact, many of the provisions contained in this Act were very similar to those contained in the preceding Winding-up Act of 1868, and did not bring about a major change in the way these estates were wound up. As in the

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<sup>91</sup> See ss 146-148 where the court still had the power to appoint or remove liquidators.

<sup>92</sup> See par 7.1.5 above.

case of the 1868 Winding-up Act, this Act also provided that the court could determine how the assets of a company were to be applied in the case of its insolvency. Section 168 stated it thus:

“168. The court may, in the event of the assets being insufficient to satisfy the liabilities, make such order as to the priority and payment out of the estate of the company, of the costs, charges, and expenses incurred in winding up any company as it thinks just.”

However, unlike its predecessor, this Act did contain a provision that provides the first link between winding-up law and insolvency law. This provision is contained in section 201, and provides as follows:

“201. In the proof or claim of debts against any company, or in the payment of debts by the liquidator of any company in course of being wound up under this Act, the principles regulating the proof, claim, and payment of debts in case of the judicial insolvency of any individual shall, save where it is herein otherwise provided, be followed and observed, so far as may be.”

On the face of it, sections 168 and 201 appear to be contradictory, but it is submitted that section 201 would apply unless the court directed otherwise in terms of section 168. Section 201 appears to be the equivalent of the modern-day section 339 of the current Companies Act, providing for the law of insolvency to apply to companies that were being wound up at that time. The law of insolvency that applied at the time was Ordinance 6 of 1843.

Although it is unclear exactly how the affairs of a company were wound up at the time, case law from this period does shed some light on the manner in which these estates were administered. For example, in the case of *In re Dusseau and Co (in liquidation)*<sup>93</sup> it is evident that the liquidator would submit his “report” to the court. From the discussion of this case it is evident that the liquidator included in his report an account of how the assets would be applied in the payment of the creditors claims. Once the court had confirmed the liquidator’s report, the court would also issue an order for the dissolution of the company.

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<sup>93</sup> 1907 17 CTR at 23. See also *In re The Equitable Fire Assurance and Trust Co (in liquidation)* 1907 17 CTR at 23.



The first traces of the development of voluntary winding-up by debtors and creditors can also be found in this Act. Sections 178 to 194 dealt with the voluntary winding-up of companies in detail, the content of which will be discussed in part 4 of this study. One interesting aspect of voluntary winding-up that is worth mentioning here, is section 192. This section clearly states that the costs of liquidation must be paid in priority to the claims of the creditors in the estate:<sup>94</sup>

“192. All costs, charges, and expenses properly incurred in the voluntary winding-up of a company, including the remuneration of the liquidators, shall be payable out of the assets of the company in priority to all other claims.”

### *7.1.8 Other Legislation*

In addition to the above, various other statutes were also promulgated in the Cape Colony, and dealt with company law matters in one way or another.<sup>95</sup>

## **7.2 Legislation in Natal**

### *7.2.1 The Joint Stock Companies Limited Liability Law 10 of 1864*

This Act made provision for limited liability in respect of the members of Joint Stock Companies in Natal, and is, with some notable exceptions, almost word for word the same as the Joint Stock Companies Limited Liability Act 23 of 1861 that applied in the Cape Colony.<sup>96</sup> However, while the Cape statute clearly distinguished between the liability of current shareholders and previous shareholders in sections XII and XIII, the section dealing with current shareholders in the Natal statute appears to have been omitted. This, however, appears merely to have been an oversight

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<sup>94</sup> This is still the situation today - see s 97 of the Insolvency Act read with ss 342 and 339 of the Companies Act.

<sup>95</sup> These statutory provisions did not contain any references to winding-up and are merely mentioned here for the sake of completeness: Ordinance for Enabling the Board of Executors to Sue and be Sued in the Name of their Secretary, Ordinance 8 of 1839; Ordinance for Facilitating Loans on Security of Shares in Joint Stock Companies, Ordinance 13 of 1846; the Companies' and Associations' Trustees Act 3 of 1873; the Company Debenture Act 43 of 1895; and the Companies Act Amendment Act 8 of 1906.

<sup>96</sup> See par 7.1.3 above.

on the part of the drafters. While section 12 of the Natal statute refers only to the liability of the previous shareholders, reference is made to current shareholders in the section.

*7 2 2 The Special Partnerships Limited Liability Act of 1864 (Law 1 of 1865)*

As was the case with legislation of the same name in the Cape Colony,<sup>97</sup> this Act brought about limited liability for certain types of partnerships. The same section dealing with the partners being held jointly and severally liable, also appears in this Act.<sup>98</sup> It would also appear that the rules of insolvency law applied to these entities should they have become insolvent.<sup>99</sup>

*7 2 3 To amend Law No 10 of 1864 (Law 18 of 1865)*

This amendment Act brought about an amendment to the section dealing with the personal liability of shareholders in so far as their shares were not paid up.<sup>100</sup>

*7 2 4 The Winding-up Law 19 of 1866*

This Act is the equivalent of the Winding-up Act 12 of 1868 and which came into effect in the Cape Colony. An interesting fact is that while the Joint Stock Companies Limited Liability Act, Law 10 of 1864, and the Special Partnerships' Limited Liability Act, Law 1 of 1865 in Natal were only promulgated after the same legislation was passed three years before in the Cape Colony, the Winding-up Law 19 of 1866 actually preceded the Winding-up Act 12 of 1868 which was promulgated in the Cape Colony.

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<sup>97</sup> The Special Partnerships' Limited Liability Act 24 of 1861.

<sup>98</sup> See par 7.1.4 above.

<sup>99</sup> Eg s 14, where the following is stated:

“14. In case of the insolvency of any limited partnership no special partner shall under any circumstances be allowed to claim as a creditor until all the claims of all the other creditors of the partnership shall be satisfied.”

<sup>100</sup> See par 7.1.4 where this aspect is discussed with reference to the Cape Colony Act.

In Natal (and in South Africa) this was the first legislation making specific provision for the winding-up of companies. This Act differs from the Cape Colony Act, most noticeably in the fact that the Natal Act contains a lot more detail than the Cape Colony Act. One interesting aspect, which will be discussed in more detail in the proposals made in Part 4 of this study, is that section 5 (1<sup>st</sup>) made provision for the winding-up of a company if such company had committed “any act of insolvency” under the Ordinance regulating the administration of insolvent estates.<sup>101</sup>

Another interesting aspect of the Natal Act is that the person administering the estate was not called a liquidator, but an “official manager”. In addition, the assets of the company did not merely come under the custody and control of the official manager, but actually vested in him in ownership.<sup>102</sup> The Natal and Cape Colony Acts were, however, identical in many respects. For example, section 26 of the Natal Act also determined<sup>103</sup> that the court could direct how the proceeds of estate assets were to be applied. The relevant section provided as follows:

“26. The moneys and assets of the Company, or such of them as shall be got in and realised, or any part thereof, shall, with all convenient speed, be paid by the official manager, under the direction of the Court, in or towards the satisfaction of the debts, or any of the debts, of the Company in such manner (whether by dividend or otherwise), as the Court shall direct ...”

It is not clear whether the court gave its directions with reference to the Ordinance dealing with the administration of insolvent estates,<sup>104</sup> but it is assumed that this was in fact the case.<sup>105</sup> An

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<sup>101</sup> Ordinance for Regulating the Due Collection, Administration, and Distribution of Insolvent Estates Within the District of Natal, Ordinance No 24 of 1846. This is the Ordinance in terms of which insolvent estates were administered at the time. This Ordinance was repealed in 1884 by Law 47 - see Mars 5.

<sup>102</sup> See s 19. Prior to the property vesting in the official manager, the property vested in the Master of the Supreme Court in terms of s 31. This is contrary to the current situation regarding companies where the liquidator obtains *custody and control* of the assets, and not ownership - s 361(1) of the Companies Act. However, in terms of s 20(1) of the Insolvency Act, ownership of the estate assets vests in the trustee of the insolvent estate of an individual.

<sup>103</sup> See par 7.1.5 above.

<sup>104</sup> Ordinance for Regulating the Due Collection, Administration, and Distribution of Insolvent Estates Within the District of Natal, Ordinance No 24 of 1846.

<sup>105</sup> Although s 45 does not refer to the law of insolvency to apply to these estates in all respects, it does refer to the court’s power to have regard to the law of insolvency in respect of “general practice”.

interesting provision that illustrates the tremendous influence that English law had at the time, is contained in section 46. Although the provision appears to deal with the procedural aspects of winding-up and not substantive insolvency law, it clearly states that the English Companies Act of 1862 was to find application if the (Natal) Act itself did not contain a provision dealing with a specific question.

### 7.2.5 Other Legislation

In addition to the above, various statutes were also promulgated and dealt with company law matters in one way or another.<sup>106</sup>

## 7.3 Legislation in the Transvaal

### 7.3.1 *De Acte van Maatschappijen met Beperkte Verantwoordelijkheid, 1874 (Wet 5 van 1874)*

The first legislation recognising limited liability in the Transvaal, was *De Acte van Maatschappijen met Beperkte Verantwoordelijkheid* of 1874. As was the case with the Joint Stock Companies Limited Liability Acts which applied in the Cape Colony<sup>107</sup> and Natal,<sup>108</sup> it is not clear what happened if the company was unable to pay its debts.<sup>109</sup> The same provision dealing with the liability of shareholders whose shares were not paid up, appeared in the Transvaal Act.<sup>110</sup>

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<sup>106</sup> These statutory provisions did not contain any references to winding-up and are merely mentioned here for the sake of completeness: Literary and Other Societies Act, Law 35 of 1874; the Joint Stock Companies Amendment Law of 1893, Law 19 of 1893; To Amend the Joint Stock Companies Limited Liability Law of 1864, Act 3 of 1896; Licenses and Stamp Act of 1898; and the Share Pledge Act 33 of 1899.

<sup>107</sup> Act 24 of 1861. See par 7.1.4 above.

<sup>108</sup> Law 10 of 1864. See par 7.2.1 above.

<sup>109</sup> However, see *Zeiler v Weeber* (1878) Kotzé 17 for the position regarding the administration of insolvent estates prior to 1880.

<sup>110</sup> S 14.

7 3 2 *Wet op het Liquideeren van Maatschappijen, 1891 (Wet 8 van 1891)*

This was the first legislation dealing with the winding-up of companies in the Transvaal, and differs quite radically from the winding-up Acts which had already been promulgated in the Cape Colony<sup>111</sup> and Natal.<sup>112</sup> An interesting aspect of this Act is the reference to the powers and duties of the liquidator (*liquidateuren*) throughout the Act.<sup>113</sup> As with the Cape Colony and Natal winding-up Acts, the Transvaal winding-up Act was not very clear as to how the proceeds of the company's assets were to be applied where the company was unable to pay its debt. The Transvaal Act made provision for the determination of two lists, list A and B in respect of "aandeelschuldigen", similar in nature to the list of contributories that had to be determined by the court under the Cape and Natal statutes. It is stated thus in section 6:

"6. Zoo spoedig mogelijk, nadat eene order is verleend eene maatschappij onder liquidate plaatsende, zal het hof op voordracht der liquidateren eene lijst van aandeelschuldigen vaststellen met macht het register van aandeelhouders te verbeteren in alle gevallen waar zulks noodig zal blijken en zal gelasten, dat al de baten der maatschappij zullen worden ingezameld en gebruikt ter vereffening der schulden van de maatschappij.  
Zoodanige aandeelschuldigen, zullen worden gerangschikt volgens twee lijsten gemerkt A en B."

It further appears that the court decided how the funds were to be applied, although section 12 made provision for the judges of the *Hooggerechtshof* to make rules and regulations in respect of the liquidation of companies.<sup>114</sup> Although there is no available authority to support this view, it is submitted that the insolvency law applicable at the time, namely Ordinance 21 of 1880, applied also to companies that had been placed in liquidation.

7 3 3 *Wet op het Liquideeren van Maatschappijen (Wet 1 van 1894)*

This Act replaced Act 8 of 1891 and although many of the provisions are similar to the 1891 Act, there are some very substantial differences. One practical difference is a clearer demarcation of

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<sup>111</sup> Act 12 of 1868.

<sup>112</sup> Law 10 of 1864.

<sup>113</sup> Eg s 5.

<sup>114</sup> This could only be done with the approval of Government (*goedkeuring van de Regeering*) - see s 12.

the different sections by the inclusion of headings. This Act also made provision for the issuing of rules and regulations by judges relating to the liquidation of companies.<sup>115</sup>

For the purposes of this study some very important amendments were made to this Act. These relate to the reference to the Master of the Supreme Court<sup>116</sup> in section 12, and the references to the insolvency ordinance that applied at that time, namely Ordinance 21 of 1880. The Act clearly indicates that sections 12 to 18 are new additions added to the Act that were not contained in the 1891 Act. As far as can be determined, this is the first reference to the Master taking over supervision of companies which were wound up, as this task was performed by the court prior to the introduction of this Act. It is stated thus in section 12:

*“12. De meester van het Hooggerechtshof der Zuid-Afrikaanse Republiek, zal het toezicht hebben over de behoorlijke liquidate van maatschappijen.”*

The main purpose of this Act was to provide for the supervision of the winding-up of companies by the Master, as the other provisions under the 1891 Act remained substantially the same. The most important additions to this Act are contained in sections 14, 15, 16 and 17. Due to the importance of these provisions, they are reproduced here in their entirety:

*“14. En wordt vasgesteld dat de liquidateuren van eenige maatschappij, bij deze wet bedoeld, zoodra mogelijk en niet later dan zez maanden na hunne benoeming, tenzij op aanzoek bij het Hooggerechtshof op voldoende reden ten genoege van het gemelde Gerechtshof, verder tijd tot dat einde worde gegeven, zullen moeten opmaken en voor den Meester leggen een nauwkeurigen staat en balans van den boedel van zoodanige maatschappij, bevattende de opbrengst van alle verkooping en schulden toen ingevorderd en eenen inventaris van alle goederen en effecten nog onverkocht; en mede alle vorderingen door den gemelden boedel verschuldigd en zullen een plan van verdeling van de effecten des gemelden boedels opmaken, meldende eerstelijk:*

*Zoodanige crediteuren als volgens de wetten preferent zijn in de orde van hunne wettige preferentie, en ten tweede, de concurrente crediteuren en het saldo dat overblijft om onder hen te verdeelen.*

*15. De liquidateuren zijn verplicht eene behoorlijke rekeningen en plan ten Meesterskantore in te dienen en te publiceeren op dezelfde wijze als vastgesteld bij art. 109 van wet no. 21, 1880.*

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<sup>115</sup> See s 19.

<sup>116</sup> As this office was then known. The name of the Master's office has since been changed to the Master of the High Court.

16. *Aangaande objecties tegen en bekrachtiging van zulke rekeningen en plannen zullen dezelfde regelen moeten gevolgd worden als in wet 21, 1880, artt. 110, 111, 112, vastgesteld.*

17. *Verder zullen alle regelen vastgesteld bij wet 21, 1880, betreffende de verdeeling der boedels moeten worden gevolgd.*”

From these provisions it is evident that:

- (a) The liquidator had to draw up an account of his administration of the estate within six months of his appointment. This account had to set out which creditors were preferent and which were concurrent, as well as the balance that remained for distribution amongst them;<sup>117</sup>
- (b) A proper account and plan of distribution had to be lodged with the Master. This account had to be advertised for inspection in the same way as insolvent estates in terms of the provisions of Ordinance 21 of 1880;<sup>118</sup>
- (c) Objections to accounts and the confirmation of accounts were dealt with in the same way as insolvent estates being administered in terms of the provisions of Ordinance 21 of 1880;<sup>119</sup>
- (d) The distribution of estate funds had to take place in the same way as insolvent estates being administered in terms of Ordinance 21 of 1880.<sup>120</sup>

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<sup>117</sup> S 14.

<sup>118</sup> S 15.

<sup>119</sup> S 16.

<sup>120</sup> S 17.

It is to be noted that Ordinance 21 of 1880 was later repealed by Law 13 of 1895.<sup>121</sup> According to the decision in *Kirkland v Romyn*<sup>122</sup> Law 13 of 1895 was merely an adaptation of the Cape Ordinance 6 of 1843.<sup>123</sup>

#### 7.3.4 *The Companies Act 31 of 1909*

Not only was this the first consolidated Act whereby the creation of a company with limited liability and its consequent winding-up were included in the same legislation, but it was also the first Act whereby the voluntary liquidation of companies was regulated.<sup>124</sup> Up to this time the provisions for the creation of a company with limited liability and its subsequent winding-up had been provided for in separate legislation. This Act was the precursor to the 1926 Companies Act and was the last pre-union legislation dealing with company law and winding-up.

In this Act winding-up was dealt with in a separate chapter of the Act, namely Chapter IV,<sup>125</sup> and was modelled on the English Companies (Consolidation) Act of 1908.<sup>126</sup> The current 1973 Companies Act follows more or less the same division (into chapters) as the 1926 Act.

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<sup>121</sup> Mars 5.

<sup>122</sup> 1915 AD 327 at 330.

<sup>123</sup> See also par 7.1.7 above.

<sup>124</sup> See the preface to Earnshaw *Voluntary Liquidation of Companies in the Transvaal* (1912) where it is stated that “[p]rior to the passing of the Transvaal Companies Act of 1909 no provision existed in that Province for the voluntary liquidation of companies”.

<sup>125</sup> Ss 106-197.

<sup>126</sup> See De la Rey “Aspekte van die Vroeë Maatskappyereg”.



The 1909 Companies Act was a lot clearer as regards the law that applied<sup>127</sup> when winding-up companies that were insolvent. Section 180 of this Act provided as follows:

“180. In the winding-up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law relating to insolvency, with respect to the estates of persons sequestrated; and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding-up, and make such claims against the company as they respectively are entitled to do by virtue of this section.”

In addition, section 183 provided as follows:

“183. In the case of a winding-up of any insolvent company, the provisions of the law for the time being relating to insolvency shall *mutatis mutandis* be applied in respect of any matter not specially provided for in this Act.”

This particular section was the precursor to the present section 339 of the Companies Act.<sup>128</sup> The applicable insolvency law at the time was Law 13 of 1895, which had repealed Ordinance 21 of 1880.<sup>129</sup> Because Law 13 of 1895 did not provide for certain preferences, special preferences were created by section 181 in the case of a company being wound up. These applied in addition to those preferences already created by the insolvency statute.

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<sup>127</sup> Despite the provisions of ss 180 and 183, which made the law of insolvency applicable also to companies unable to pay their debts, it would appear that these provisions created some confusion as to exactly which law did in fact apply. See eg *Standard Bank v Liquidator of the B & C Syndicate Ltd* 1918 TPD 470 where the court found it unnecessary to have recourse to the provisions of ss 180 and 183. Instead the court found that s 133, which provides for the rules pertaining to the framing of liquidation and distribution accounts, found application. This case illustrates the problems that were encountered with dual provisions as far back as 1918.

<sup>128</sup> However, it is evident that the court still had the authority to confer on the liquidator certain powers - see *Provisional Liquidators of Edwards, Ltd v Goldstein and Engelstein* 1911 WLD 152. See also *Ex parte Liquidators of the De Deur Estates* (1908) TS 960; *Ex parte Grahamstown Brickmaking Co Ltd (in liquidation)* 17 EDC 75.

<sup>129</sup> See par 7.3.3 above.

## 7 4 Legislation in the Orange Free State

### 7 4 1 *Hoofdstuk C van Wetboek: De Wet over Beperkte Verantwoordelijkheid van Naamlooze Vennootschappen*

Although this Act refers to *Naamlooze Vennootschappen*, it refers throughout to *directeuren* (directors) and not partners.<sup>130</sup> In view of this the Act appears to be drafted along the same lines as the Joint Stock Companies Acts that found application in the Cape Colony<sup>131</sup> and Natal,<sup>132</sup> and was not a reference to the Special Partnership Limited Liability Acts that also found application in the Cape Colony<sup>133</sup> and Natal.<sup>134</sup> In the same way as the Cape Colony and Natal Acts provided for limited liability, but for the shareholders to be held jointly and severally liable in certain instances, so too did the Orange Free State Act make provision for this.<sup>135</sup>

### 7 4 2 *Law No 2 of 1892: To Provide for the Winding-up of Joint Stock Companies (Wet 2 van 1892, Van Naamlooze Vennootschappen om Voorziening te maken voor de Likwidatie van Naamlooze Vennootschappen)*

Although passed in 1892, this Act bore no resemblance to the Companies Act of 1892 that was passed in the Cape Colony.<sup>136</sup> In fact, it closely resembles the winding-up Act of 1868 (Cape Colony<sup>137</sup>) and the winding-up Law of 1866 (Natal<sup>138</sup>).

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<sup>130</sup> From the 1892 Act (see par 7.4.2), it is clear that the reference to *Naamlooze Vennootschappen* was indeed a reference to joint stock companies.

<sup>131</sup> See par 7.1.4 above.

<sup>132</sup> See par 7.2.1 above.

<sup>133</sup> See par 7.1.4 above.

<sup>134</sup> See par 7.2.2 above.

<sup>135</sup> See ss 12 and 13 of the Orange Free State Act.

<sup>136</sup> See par 7.1.7 above.

<sup>137</sup> See par 7.1.5 above.

<sup>138</sup> See par 7.2.4 above.

From section 29 of this Act it would appear that the court could determine the priority of claims and payments from the estate. Section 29 provided as follows:

“29. The Court may, in the event of the assets being insufficient to satisfy the liabilities, make such order as to the priority and payment out of the estate of the company of the costs, charges, and expenses incurred in winding up any company as the Court may deem just.”

Although there is no authority to support this view, it is submitted that the applicable insolvency law that applied in the Orange Free State at the time, namely Ordinance 9 of 1878,<sup>139</sup> determined the distribution of these estates. It is to be noted that Ordinance 9 of 1878 later became Chapter 104 of the Statute Law of the Orange Free State.<sup>140</sup>

#### *7 4 3 The Companies Amendment Ordinance 24 of 1904*

This statute merely amended existing legislation and was regulatory in nature. No winding-up provisions were contained in this Act.

### **7 5 Union legislation**

As stated above,<sup>141</sup> the first post-Union South African legislation relating to companies, namely the Companies Act 46 of 1926,<sup>142</sup> was based on the Transvaal Companies Act 31 of 1909, which in turn was based on the English Companies (Consolidation) Act of 1908.<sup>143</sup> As has already been stated, the winding-up provisions relating to companies were incorporated into a separate chapter in the Act, thus merging the company law provisions and winding-up provisions into the same Act, as had already been done in other legislation prior to South Africa becoming a Union.

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<sup>139</sup> Mars 5.

<sup>140</sup> Mars 5.

<sup>141</sup> See par 3.2 above.

<sup>142</sup> For a complete discussion of the 1926 Companies Act and its operation, see Cilliers and Benade *Maatskappyereg*.

<sup>143</sup> See De la Rey “Aspekte van die Vroeë Maatskappyereg”.

Section 182 of the 1926 Companies Act provided for the law of insolvency to apply to the winding-up of companies that were unable to pay their debts.<sup>144</sup> Section 182 provided as follows:

“182. Insolvency Law to be Applied Mutatis Mutandis. - In the case of every winding-up of a company unable to pay its debts the provisions of the law relating to insolvent estates shall, in so far as they are applicable, be applied *mutatis mutandis* in respect of any matter not specially provided for in this Act or the rules framed under section *two hundred and twenty*.”

Although various Companies Acts were promulgated in England after 1908, in South Africa the 1926 Companies Act was merely periodically supplemented by means of amendment Acts. After the promulgation of the Companies Act of 1929 in England, and in light of the amendments made to the English legislation, the Lansdown Commission<sup>145</sup> was appointed in South Africa to consider changes to the South African Companies Act of 1926. Following the recommendations of the Lansdown Commission, the Companies Amendment Act 23 of 1939 was promulgated. In respect of winding-up, the Lansdown Commission had only a few suggestions regarding amendments that should be made to the 1926 Companies Act.<sup>146</sup> These related mainly to voluntary winding-up, the rights of creditors to bring applications for winding-up<sup>147</sup> and provisions relating to liquidators. What is interesting to note, is that the Lansdown Commission recommended the current distinction between the voluntary winding-up of a company that is solvent (voluntary winding-up by members) and the voluntary winding-up of a company that is insolvent (voluntary winding-up by creditors).<sup>148</sup>

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<sup>144</sup> For an early decision dealing with the application of this section in practice, see *Rivoy Investments (Pty) Ltd v Wemmer Trust (Pty) Ltd* 1939 WLD 151.

<sup>145</sup> *Report of the Companies Act Commission 1935-1936* (UG 45 of 1936) (hereinafter referred to as the Lansdown Commission).

<sup>146</sup> See the Lansdown Commission Report par BB.

<sup>147</sup> See the Lansdown Commission Report paras 230 and 231.

<sup>148</sup> See the Lansdown Commission Report paras 225-229. See par 6 above in respect of the Greene Committee Report in England.

Another far-reaching amendment Act was the Companies Amendment Act 46 of 1952, which was passed as a result of the recommendations of the Millin Commission. This commission was appointed following a report by the Cohen Commission in England, which resulted in the English Companies Act of 1948. The main recommendations in the Millin Commission report related to alternative relief to winding-up that a court may grant to minority shareholders,<sup>149</sup> provisions dealing with insolvency interrogations<sup>150</sup> and provisions relating to liquidators.<sup>151</sup> It is interesting to note that the Millin Commission recommended that certain provisions in the Insolvency Act dealing with interrogations, should also be made applicable to companies.<sup>152</sup> This is clearly indicative of the problems emanating from a dual insolvency system and that will be discussed in this study. Due to shortcomings in the 1926 Companies Act, it became necessary to recommend an amendment to make certain provisions of the Insolvency Act also applicable to companies.<sup>153</sup> The proposals relating to a unified insolvency statute in Part 4 of this study strives to solve this problem of duality.

## **7 6 Post-Union legislation**

Continuing the pattern of following what the English legislators were doing with their own company law legislation, South Africa again followed suit, after the appearance in England of the report of the Jenkins Commission, by appointing a commission of enquiry under the chairmanship of Van Wyk de Vries J.

The current 1973 Companies Act was a direct result of the work done by the Van Wyk de Vries Commission, and did not merely bring about important changes to the 1926 Companies Act but

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<sup>149</sup> Millin Commission Report paras 238-239.

<sup>150</sup> Millin Commission Report paras 240-243.

<sup>151</sup> Millin Commission Report paras 246-249.

<sup>152</sup> Millin Commission Report par 243.

<sup>153</sup> This necessity fell away under the 1973 Companies Act by the insertion of ss 417 and 418.

also brought about a whole new division and arrangement of the Act itself. For example, Chapter XIV of the Companies Act made provision for the winding-up of a company, either voluntarily or by order of court. Chapter XIX of the Van Wyk de Vries Commission's main report dealt with recommendations for winding-up, and related mainly to the submission of a statement of affairs by the directors,<sup>154</sup> reports by the Master,<sup>155</sup> various provisions relating to liquidators,<sup>156</sup> provisions relating to the administration process<sup>157</sup> and provisions relating to the examination (interrogation) of directors and others.<sup>158</sup>

While the 1973 Companies Act does contain many provisions dealing with winding-up, it is important to note that section 339 provides for the law of insolvency to apply also to the administration of insolvent companies. Although section 339 was not the first section of its kind to apply insolvency law to winding-up, it is the latest provision to entrench the duality of statutes when dealing with the winding-up of a company unable to pay its debts. This duality has created so many problems in the administration of an insolvent company, and which a unified Act strives to solve.<sup>159</sup>

Section 339 of the 1973 Companies Act<sup>160</sup> brings about the following problem: before one can decide whether or not section 339 applies, one first has to determine whether the provision is capable of being applied to a winding-up. The next step would be to determine whether the matter is specifically provided for in the Companies Act. If the matter is not provided for in the

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<sup>154</sup> Van Wyk de Vries Commission Main Report par 50.05.

<sup>155</sup> Van Wyk de Vries Commission Main Report paras 50.06-50.11.

<sup>156</sup> Van Wyk de Vries Commission Main Report paras 50.12, 50.16.

<sup>157</sup> Van Wyk de Vries Commission Main Report paras 50.12-50.15.

<sup>158</sup> Van Wyk de Vries Commission Main Report par 50.21.

<sup>159</sup> For a detailed discussion of the effects of s 339 of the Companies Act, see ch 5 in part 4A.

<sup>160</sup> And the other similar provisions contained in Acts promulgated in the late nineteenth century.

Companies Act the solution is simple, in that the law relating to insolvency will be applied (whether that provision is contained in the Insolvency Act or in the common law).

However, problems do arise where there are matters that are partially provided for in the Companies Act and partially provided for in the Insolvency Act. The question then is to what extent the provisions relating to insolvency will apply, if at all.<sup>161</sup>

The 1973 Companies Act is the current legislation regulating the winding-up of companies and it is this Act which this study seeks to amend by removing the winding-up provisions for inclusion in a unified Insolvency Act. The purpose of the study undertaken in Part 4 of this thesis is to prove that the winding-up provisions can in fact be removed from the Companies Act, and merged with the provisions of a unified insolvency statute.

## **8 HISTORICAL DEVELOPMENT OF THE WINDING-UP OF CLOSE CORPORATIONS UNDER SOUTH AFRICAN LAW<sup>162</sup>**

In the early 1980s there was a need in South Africa for a form of business enterprise that made provision for juristic personality, but at the same time did away with the complexities involved in incorporating and running a company in terms of the Companies Act. The result was the close corporation, a form of business enterprise aimed at the smaller entrepreneur.<sup>163</sup>

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<sup>161</sup> See eg the decisions in *Townsend v Barlows Tractor Co (Pty) Ltd* 1995 1 SA 159 (W) at 165D and *Stone & Stewart v Master of the Supreme Court* (unreported, case no 8828/87, (T)) which dealt with the late proof of claims and an interpretation of s 366 of the Companies Act. In *Townsend* the court found that the provisions of s 104(1) of the Insolvency Act did not apply despite the provisions of s 339 of the Companies Act. In the more recent decision of *Choice Holdings Ltd v Yabeng Investment Holding Co Ltd* 2001 2 SA 768 (W), the court had to decide whether s 150(3) of the Insolvency Act, dealing with the effect of an appeal against a sequestration order, applied also to companies being wound up. In this case the Court found that s 339 does in fact find application and held that an appeal against a liquidation order does not suspend the operation of the winding-up process. See ch 5 below where the effect of s 339 is discussed in detail.

<sup>162</sup> See generally De la Rey “Beslote Korporasies. Probleme in verband met Likwidasie en Akkoord” 1990 3 *Tran CBL* 107.

<sup>163</sup> The Close Corporations Act was promulgated in 1984.

Part IX of the Close Corporations Act provides for winding-up, and amounts to a streamlined version of the provisions contained in the Companies Act that provide for the winding-up of a company. Section 66 of the Close Corporations Act provides that the provisions of the Companies Act, which relate to the winding-up of a company, also apply to the winding-up of a close corporation.<sup>164</sup> This makes the situation even more complex than in the case of a company: when winding-up a close corporation, one first has to determine whether the relevant provision is to be found in the Close Corporations Act. If there is no provision dealing with the specific problem at hand, one has to look to the Companies Act for a possible solution. If no provision is found there, one then has to apply the provisions of the law of insolvency, in accordance with the provisions of section 339 of the Companies Act. The 1984 Close Corporations Act is still the current legislation dealing with the winding-up of close corporations, although a number of minor amendments have since been made to the Act.

## **9 CONCLUSION**

This chapter has illustrated that the law regulating the winding-up of companies and close corporations has evolved from humble beginnings, necessitated by the advent of juristic personality, to more complex provisions contained in various pieces of modern-day legislation. The development of company and close corporations law in South Africa over the years has necessitated more substantial and complicated legislation. The law regulating winding-up did not always keep up with the gradual development and refinement of company law. In fact, the definite need for proper provisions only started emerging clearly in the 1890s, when the Cape Colony, Natal and the Orange Free State (with reference to the developments taking place in English law) started making clear provision for the application of the laws of insolvency also to companies being wound up as a result of inability to pay their debts. That the development took place in this fashion can probably be ascribed to the fact that insolvency law has for a long time provided for the rights and interests of creditors, and there has been no real need for this aspect

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<sup>164</sup> However, there are a number of sections of the Companies Act that will not apply - see s 66 of the Close Corporations Act.



of (especially) company law to evolve separately in the past. From the commission reports referred to in this chapter, it is evident that the only amendments ever made were in regard to specific problems that had begun to show themselves in respect of the winding-up of a company. In the absence of proper rules during the early period of winding-up law, the courts and the Master evidently played a significant role. On the other hand, the fact that none of the commission reports ever suggested a drastic overhaul of the winding-up provisions, is probably indicative of the fact that these provisions sufficiently served their purpose.

In my view the continuous amendments to the Companies Act, the separation of the winding-up provisions relating to banks, insurance companies and the like into separate pieces of legislation, the development of insolvency law as a separate legal discipline and the advent of close corporations, has resulted in a myriad of fragmented provisions providing for what should, in essence, be one system providing for the administration of insolvent estates. Despite the piecemeal development of winding-up law, it developed very much in the same way as South African insolvency law did. The parallel development of winding-up and company law with insolvency law is striking, as is the fact that, historically, these separate branches of the law developed along similar lines, following English law developments until late in the twentieth century.

While it is understandable that the winding-up provisions relating to companies and close corporations evolved together with the enabling legislation in which these provisions were contained, it does not automatically follow that these provisions need to be retained in such legislation. In fact, it will be shown in Part 4 of this study that a unified insolvency statute, which necessitates the separation of the winding-up provisions from the current Acts they are contained in, will not affect the incorporation and subsequent functioning of a company or close corporation, or for that matter a bank or insurance company. On the contrary, it will be shown that a unified insolvency statute will contribute towards the streamlining of insolvency proceedings regarding corporations and the subsequent dissolution of such entities. A unified statute will not hamper the development of company and close corporation law proper, but it will allow insolvency law to develop and reach its full potential as a separate legal discipline.