

***A FRAMEWORK FOR CORPORATE INSOLVENCY LAW  
REFORM IN SOUTH AFRICA***

by

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**PRETORIA  
JUNE 2002**

**To my mother**

**LIVIA**

**who has always been, and always will be, my inspiration.**

## **PREFACE**

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I have attempted to state the law as at the end of May 2002.

**D A BURDETTE**

**JUNE 2002**

**PRETORIA**

*“I ... suggest that it is socially desirable that, as far as is practicable, all the consequences of the liquidation of an insolvent company should be similar to those [of] the insolvency of an individual ... The winding-up of a company unable to pay its debts is something closely akin to the winding-up of the estate of an insolvent individual. There are some different requirements which flow from the fundamental difference between a company and an individual: those are specifically provided for in the Companies Act. In respects other than those so provided for I cannot see why the Legislature should not have desired, not merely the procedural rules, but also the substantive rules and consequences, to be the same in both cases.”*

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Per Colman J in *Woodley v Guardian Assurance Co of SA Ltd* 1976 1 SA 758 (W) at 763.

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## **PART 1**

### **GENERAL ORIENTATION**

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Apart from a general introduction, this part also contains the hypotheses and methodology that will be used in order to constructively discuss corporate insolvency law reform.

University of Pretoria etd - Burdette, DA

## CHAPTER 1

### INTRODUCTION

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#### SUMMARY

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#### 1 INTRODUCTION

Since the late 1980s the South African Law Commission has been busy with a reform programme which has as its aim the complete reform of South African insolvency law. Although the Law Commission's initial brief was to reform the whole of South African insolvency law, they saw fit to delegate the reform of corporate insolvency to the Standing Advisory Committee on Company Law.<sup>1</sup> The Commission's efforts were then concentrated on the reform and revision of the Insolvency Act 24 of 1936.<sup>2</sup>

In February 2000 the Law Commission finalised its proposals on the insolvency of individuals and partnerships, but not before a sustained effort was made by the Centre for Advanced Corporate and Insolvency Law at the University of Pretoria, in collaboration with the Standing Advisory Committee on Company Law, to have proposals relating to the insolvency of (mainly) companies and close corporations, included.

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<sup>1</sup> See Boraine and Van der Linde "The Draft Insolvency Bill – an Exploration (Part1)" 1998 4 *TSAR* 621 at 622 (hereinafter referred to as Boraine and Van der Linde "The Draft Insolvency Bill – an Exploration (Part 1)").

<sup>2</sup> Hereinafter referred to as the Insolvency Act.

Considering that the value of corporate insolvencies far exceeds the value of individual insolvencies in South Africa,<sup>3</sup> there is a definite need for any new proposals concerning insolvency law reform to also address the reform of corporate insolvencies. To ignore this dire need would negate all the work which has been done thus far in revising this area of our law.

The primary source of South African insolvency law is the Insolvency Act 24 of 1936, supplemented by common law as contained in Roman-Dutch sources and the judgments of the courts.<sup>4</sup> However, the Insolvency Act specifically states that it only applies to individuals and partnerships,<sup>5</sup> and not to companies or other bodies corporate that can be wound up in terms of the Companies Act. The provisions relating to the winding-up<sup>6</sup> of companies are contained in the Companies Act, and the provisions relating to the winding-up of close corporations in the Close Corporations Act. However, there are also a myriad of other Acts which also provide for the winding-up of specific types of entities.<sup>7</sup> These latter Acts are then “connected” to the Insolvency

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<sup>3</sup> See SA Law Commission Project 63 Commission Paper 582 (11 Feb 2000) Vol 1 19 par 5.2.3 (hereinafter referred to as Commission Paper 582).

<sup>4</sup> *Fairlee v Raubenheimer* 1935 AD 135 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>5</sup> See the definition of “debtor” in s 2 of the Insolvency Act. It is to be noted that the definition of “debtor” has been given an extended meaning to include trusts (see *Magnum Financial Holdings (Pty) Ltd (in liquidation) v Summerly* 1984 1 SA 160 (W)), insolvent deceased estates and estates under curatorship (see s 3(1) of the Insolvency Act) and other entities that are not capable of being wound up in terms of the Companies Act 61 of 1973 (hereinafter referred to as the Companies Act), or the Close Corporations Act 69 of 1984 (hereinafter referred to as the Close Corporations Act). Examples of the latter would be clubs and other associations of persons that do not have juristic personality.

<sup>6</sup> The terms “winding-up” and “liquidation” will be used as synonyms throughout this study. However, in order to assist the reader of this thesis the term “winding-up” will be used as nearly as possible to indicate the current provisions relating to the liquidation of companies and close corporations in South Africa. As nearly as possible the term “liquidation” will be used to indicate provisions of the proposals for a unified insolvency statute contained in this study. It is interesting to note that the SA Law Commission has used the term “liquidation” and not “sequestration” in the Draft Insolvency Bill in Commission Paper 582. This makes unification of the various statutes an even simpler task as there is no longer any need to differentiate between sequestration and liquidation. See also Boraine and Van der Linde “The Draft Insolvency Bill – an Exploration (Part 1)” at 623 where reference is made to this uniformity.

<sup>7</sup> Eg, see part VI of the Long Term Insurance Act 52 of 1998; part VI of the Short Term Insurance Act 53 of 1998; s 29 of the Pension Funds Act 24 of 1956; s 35 of the Friendly Societies Act 25 of 1956; s 18C of the Medical Schemes Act 72 of 1967; ss 27, 28 and 39 of the Unit Trusts Control Act 54 of 1981; ch X of the Co-Operatives Act 91 of 1981; s 33 of the Financial Markets Control Act 55 of 1989; s 68 of the

Act, the central piece of legislation, by means of “connecting provisions”<sup>8</sup> that make insolvency law applicable also to these types of entities.

Having so many different provisions in such a variety of statutes causes unnecessary confusion and duplication, and the question that needs to be asked is whether it is really necessary to have separate legislation dealing with the insolvency of these various entities, or whether it would be preferable to have a single statute containing provisions for the insolvency of all types of debtors. Even the South African Law Commission has admitted that a single statute would go a long way towards simplifying insolvency law in South Africa:

“5.2 The project committee holds the view that the review of corporate insolvency should be finalised simultaneously with the review of provisions for individuals for, amongst others, the following reasons:

- 5.2.1 Once a start has been made it is surprising how easy it is to unify the provisions.
- 5.2.2 A unified Act is more user friendly, especially for foreigners like prospective foreign investors.
- 5.2.3 Corporate insolvencies far exceed individual insolvencies in terms of value.
- 5.2.4 Unnecessary differences complicate matters and are mostly inexplicable.
- 5.2.5 If the opportunity is not taken to enact a unified Act now it may not arise again in the near future.
- 5.2.6 It is easier to make amendments to a single Act than to separate Acts administered by different Ministers and considered by different portfolio committees.
- 5.2.7 There will be confusion if the insolvency law relating to individuals is reformed and nothing is done in connection with corporate insolvencies.”<sup>9</sup>

In a paper presented at a symposium on Corporate Insolvency Law Reform on 23 October 1998, Keay<sup>10</sup> discussed the unification of insolvency statutes by addressing the key issues that need to

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Banks Act 94 of 1990; and ch VIII of the Mutual Banks Act 124 of 1993.

<sup>8</sup> Eg s 339 of the Companies Act and s 66 of the Close Corporations Act.

<sup>9</sup> See Commission Paper 582 Vol 1 18-19.

<sup>10</sup> This paper has since been published: Keay “To Unify or not to Unify Insolvency Legislation: International Experience and the Latest South African Proposals” 1999 *DJ* 62-79 (hereinafter referred to as Keay “To Unify or not to Unify”).



be considered when attempting to achieve such a goal.<sup>11</sup> The value of Keay's paper lies in the lessons that may be learnt from other countries which have passed along this route before and, as Keay points out, some of which have failed at their attempts to enact such unified legislation. In his paper Keay discusses the options which are available when deciding on a single or a dual statute, international experience in respect of dual and single statutes, the advantages and disadvantages of single-statute insolvency legislation and, lastly, a brief summary of his views on the South African proposals as they appeared at the time.<sup>12</sup>

Despite some valid criticisms levelled at the first attempt at unifying South African insolvency law in a single statute, Keay brands the attempt as "a bold attempt at formulating unified legislation to replace the present system".<sup>13</sup> That Keay supports a single statute is clear from the following statement:<sup>14</sup>

"As I indicated earlier in this article, I am of the view that, on balance, the enactment of a unified statute is to be preferred to a dual system."

Since this study ultimately proposes a framework within which a single insolvency statute can be developed, and despite what has already been stated above, the first question that should be asked is why South Africa needs to unify its insolvency legislation at all. After all, the current Insolvency Act has been in operation for over sixty years and the current winding-up provisions in the Companies Act and Close Corporations Act since 1973 and 1984 respectively.

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<sup>11</sup> Keay has since called for Australia to re-think the introduction of unified insolvency legislation - see Keay "The Unity of Insolvency Legislation: Time for a Re-think?" 1999 *Insolvency Law Review* 5 (hereinafter referred to as Keay "The Unity of Insolvency Legislation").

<sup>12</sup> The proposals discussed by Keay were the first in which unification was attempted. A further attempt was made in a report discussed at a conference held at Midrand on 6 Oct 1999, and a final attempt appeared in a report submitted to the SA Law Commission in Jan 2000 - *Final Report Containing Proposals on a Unified Insolvency Act* Vol 1, a copy of which is available in the Merensky library at the University of Pretoria.

<sup>13</sup> Keay "To Unify or not to Unify" 74.

<sup>14</sup> Keay "To Unify or not to Unify" 79. In light of the reform programme currently underway in South Africa, Keay has since called on Australian legislators to reconsider the option of enacting a single statute Insolvency Act in that country - see Keay "The Unity of Insolvency Legislation" 7.

It is submitted that the problem is exactly the fact that South African insolvency legislation is interspersed between a number of Acts.<sup>15</sup> The Insolvency Act forms the basis of our insolvency legislation and contains the main provisions relating to the administration process of an insolvent estate. In the case where a company or close corporation is being wound up, one has to turn to the Companies Act or Close Corporations Act in order to find the provisions relating to these entities. The problem is exacerbated by the fact that the provisions in the Companies Act haphazardly make provision for certain procedural matters and some matters of administration, such as the appointment of liquidators, certain provisions relating to meetings, and so forth. Section 339 of the Companies Act then refers one back to the Insolvency Act for the main part of the actual administration process, the rights of creditors, distribution, contribution and the like.

The scenario in the case of a close corporation is even more problematic. Provisions relating to the winding-up of a close corporation which cannot be found in the Close Corporations Act must be searched for in the Companies Act. If no provision appears in the Companies Act, one then has to refer to the Insolvency Act for the relevant provision.<sup>16</sup>

Cross-referencing between Acts and the interpretation of provisions which are contained in the Companies Act or Close Corporations Act and which are similar, if not identical, to provisions contained in the Insolvency Act, gives rise to problems in practice. It certainly seems illogical to have incomplete provisions relating to winding-up in, for example, the Companies Act if the same Act is in any event going to refer back to the principal Act for the majority of the provisions.

There is also no sound philosophical reason for divorcing the provisions relating to the winding-up of juristic persons from those relating to individuals.<sup>17</sup> Although there are certain material

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<sup>15</sup> This duality and its associated problems are discussed in detail in ch 5 below.

<sup>16</sup> See s 66 of the Close Corporations Act.

<sup>17</sup> The reasons for the separate development of insolvency law and winding-up law will be illustrated in ch 3 below.

differences between individual and juristic persons, it is submitted that these differences are not paramount to the extent that the liquidation (of what in both cases amounts to the administration of an insolvent estate<sup>18</sup>) should be governed by separate provisions.<sup>19</sup> It is submitted that it would be both practical and good administration to have one set of provisions relating to the administration of all insolvent estates, be it the estate of an individual or that of a juristic person. It is further submitted that, in the long term, unified legislation will do away with uncertainty and ambiguity in the practice of the administration of insolvent estates.<sup>20</sup>

Creating unified insolvency legislation will mean a review of part of the philosophy behind traditional South African insolvency law. South African insolvency law has traditionally been classified as a pro-creditor system,<sup>21</sup> mostly due to the fact that our insolvency law is aimed at protecting creditors and not at assisting a struggling debtor.<sup>22</sup> The requirement of “advantage to

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<sup>18</sup> This principle has already been acknowledged by our courts in the *dicta* of Colman J in *Woodley v Guardian Assurance Co of SA Ltd* 1976 1 SA 758 (W) at 763: “I ... suggest that it is socially desirable that, as far as is practicable, all the consequences of the liquidation of an insolvent company should be similar to those [of] the insolvency of an individual ... The winding-up of a company unable to pay its debts is something closely akin to the winding-up of the estate of an insolvent individual. There are some different requirements which flow from the fundamental difference between a company and an individual: those are specifically provided for in the Companies Act. In respects other than those so provided for I cannot see why the Legislature should not have desired, not merely the procedural rules, but also the substantive rules and consequences, to be the same in both cases.”

<sup>19</sup> See Key “To Unify or not to Unify” 8 for a list of the advantages and disadvantages of unification. However, see the Australian Law Reform Commission Report No 45 *General Insolvency Inquiry* (hereinafter referred as the Harmer Report) par 29, where a previous commission of inquiry had found that the differences between corporations and individuals are too great to bring about real integration.

<sup>20</sup> This study purports to prove this fact by way of the proposals made in ann E below.

<sup>21</sup> According to Wood *Principles of International Insolvency* (1995), South Africa is a pro-creditor country, leaning towards pro-debtor (Wood scores South Africa at 6 on a scale where 1 is extremely pro-creditor and 10 is extremely pro-debtor). Wood’s classification is based on certain premises (which are not important for the purposes of these proposals), but due to our provisions relating to rehabilitation and the accompanying discharge, we are seen by most as leaning toward a pro-debtor system. One cannot necessarily agree with Wood’s classification, as there is no doubt that South Africa has a pro-creditor insolvency system (eg, South Africa still has the requirement of an “advantage for creditors” that has to be proved before a court will grant a sequestration order - see ss 6(1) and 12(1)(c) of the Insolvency Act).

<sup>22</sup> A comparison between the historical development of English and American insolvency law illustrates the change of philosophy that has taken place in the United States in this regard. Although American bankruptcy laws have their origin in English law, their bankruptcy system has changed from being a pro-creditor system to a modern liberalised pro-debtor system. As long as South Africa retains its relatively

creditors” contained in section 4 of the current Insolvency Act, is proof of this. The enactment of a unified statute would necessarily reflect a shift in philosophy also in respect of the type of debtor that will be assisted since, historically, our insolvency law has been structured around the individual. The reason for the separate development of sequestration and winding-up will become clearer in the discussion contained in chapter 3 below, but is mainly because the concept of a separate legal entity, as provided for in company law legislation, only developed a considerable time after insolvency law had already become established. A unified statute means that all debtors, be they juristic, natural or other types of entities, will be dealt with in the same insolvency statute.

It is submitted that the time is right in South Africa to seize the opportunity of reforming its insolvency law at a time when it has become stagnated and out of step with developments in other important jurisdictions, such as the United States of America and most Western European countries. In fact, the opportunity now presents itself for South Africa to become a leader in this field of the law by enacting a truly unified insolvency statute, something which no other country, with the exception of the United States of America,<sup>23</sup> and more recently the Federal Republic of Germany,<sup>24</sup> has apparently been able to achieve.

In light of the fact that this study seeks to make proposals for *corporate* insolvency law reform, it is useful to state at this point what Goode<sup>25</sup> sees as the philosophical foundations of corporate insolvency law. According to Goode<sup>26</sup> corporate insolvency law has four overriding objectives, namely:

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conservative approach to insolvency law, there is little chance that we will be able to move towards a more liberalised pro-debtor system of insolvency.

<sup>23</sup> 11 USC (hereinafter, referred to as the United States Bankruptcy Code).

<sup>24</sup> *Insolvenzordnung* of 5 Oct 1994 (which came into operation on 1 Jan 1999).

<sup>25</sup> Goode *Principles of Corporate Insolvency Law* 2nd ed (1997) (hereinafter referred to as Goode).

<sup>26</sup> Goode 24.

- (a) To restore a debtor company to profitable trading where this is possible;
- (b) To maximise the return to creditors as a whole in cases where the company cannot be saved;
- (c) To establish a fair system for the ranking of claims and the equitable distribution of assets amongst creditors; and
- (d) To provide a mechanism by which the causes of the failure of the company can be identified, those guilty of mismanagement be brought to book and, in appropriate circumstances, deprived of the right to be involved in the management of other companies.

In addition to these four objectives, Goode then states what he believes to be the ten basic principles of corporate insolvency law. Briefly, the basic principles of corporate insolvency law are stated as being:<sup>27</sup>

- (i) The recognition of rights that have accrued under the general law prior to liquidation;
- (ii) Only the assets of the debtor company are available for distribution amongst its creditors;
- (iii) Secured and other real rights that were created prior to the insolvency proceedings are unaffected by liquidation;
- (iv) The liquidator takes over the assets of the debtor company subject to all limitations and defences;

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<sup>27</sup> See Goode 53-63.

- (v) The pursuit of personal rights against the debtor company is converted into a right to prove for a dividend in the liquidation;
- (vi) Once the debtor company has been liquidated it ceases to be the beneficial owner of its assets;
- (vii) No creditor has any interest *in specie* in the company's assets;
- (viii) Liquidation brings about an acceleration of the creditors' rights to payment;
- (ix) Unsecured creditors rank *pari passu*;
- (x) As a rule the members of a company are not as such liable for its debts.

These underlying philosophies and principles will be borne in mind when addressing corporate insolvency law reform and proposing the introduction of a unified insolvency statute in South Africa. Consequently the following aspects will be examined in this study:

- (a) A historical overview of the development of South African insolvency law with particular reference to insolvency statutes.<sup>28</sup> This examination is necessary in order to place the development of a unified statute into its proper historical context.
- (b) A discussion of the historical development of insolvency statutes in South Africa with reference to corporate insolvency law.<sup>29</sup> This examination will shed light on the reasons for the separate development of individual and corporate insolvency law, and will attempt to establish whether this distinction is still justified.

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<sup>28</sup> Discussed in part 2 below.

<sup>29</sup> Discussed in part 2 below.

- (c) A brief comparative study of insolvency law reform in other jurisdictions, with particular reference to corporate insolvency law reform.<sup>30</sup> In order to bring about corporate insolvency law reform in South Africa, the lessons already learnt by other jurisdictions will be of great value in determining what the content and extent of our own law reform programme should be. In addition, a comparative study will assist in determining why some jurisdictions were more successful than others in achieving a single insolvency statute.
- (d) Proposals for a framework within which corporate insolvency law can be reformed in South Africa.<sup>31</sup> In establishing a framework within which a unified insolvency statute can be developed, a four-tiered approach will be followed:
- (i) In the first place, where an insolvency system such as the one in South Africa is not contained in a single statute but is interspersed over a number of Acts with the Insolvency Act being the main source, there has to be some or other “connecting provision” contained in the ancillary legislation that “connects” them to the main source. Examples of these types of “connecting provisions” are section 339 of the Companies Act and section 66 of the Close Corporations Act, which make the law relating to insolvency applicable also to the winding-up of these types of insolvent entities. The proposals made in this part of the study will show that a unified insolvency statute will obviate the need for such connecting provisions, as the provisions relating to the insolvency of all types of debtors will be included in a single statute. However, if a unified insolvency statute is introduced that replaces a dual system of insolvency law, there are other aspects relating to such a unified insolvency statute that will also need to be addressed. Consequently, in the first tier of the four-tiered approach that will be followed, the following aspects will be examined:

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<sup>30</sup> Discussed in part 3 below.

<sup>31</sup> Discussed in part 4 below.

- (aa) The problems surrounding the “connecting provisions” in section 339 of the Companies Act and section 66 of the Close Corporations Act, as well as how these problems can be solved by the introduction of a unified insolvency statute.
  - (bb) How a “debtor” should be defined to ensure that all types of debtors are included under the ambit of a unified insolvency statute.
  - (cc) Whether specialised institutions, such as banks and insurance companies, that are currently dealt with under extraordinary provisions contained in other legislation, should be included in the field of application of a unified insolvency statute.
- (ii) In the second place, the dual statutes that currently apply contain a number of their own provisions dealing with the winding-up of these entities. These provisions are sometimes similar and sometimes dissimilar to provisions contained in the Insolvency Act. In making proposals for a unified insolvency statute, those aspects that are dissimilar need to be examined in order to determine whether their dissimilarity is justified. Where these dissimilarities are found to be unjustified, proposals will be made for the uniformity of the provisions under a unified insolvency statute. Where the dissimilarities are justified, proposals will be made for the drafting of the provisions in such a way as to accommodate their current distinction in a unified insolvency statute. Therefore, in the second tier of this examination the following selected aspects, that mainly distinguish between natural and juristic persons, will be discussed:
- (aa) Liquidation applications under a unified insolvency statute. Due to the inherent difference between natural and juristic persons, and because the grounds upon which these types of debtors can be liquidated differ, the manner in which these entities are liquidated will be examined and proposals made for the uniformity, as far as is possible, of the liquidation application procedures.
  - (bb) The vesting of the insolvent estate and the commencement of liquidation under a unified insolvency statute. Currently there is a difference between



the vesting of the insolvent estate of a natural person, and the vesting of the insolvent estate of a juristic person in liquidation. These different vesting rules will be examined and, if the distinction is found to be unjustified, proposals will be made for the uniformity of these provisions under a unified insolvency statute. There is also currently a distinction between the commencement of sequestration of an individual's estate and the commencement of liquidation in the case of a juristic person. The difference in the current rules relating to the commencement of sequestration and the commencement of liquidation will be examined, and proposals made for uniformity under a unified insolvency statute.

- (iii) In the third place, if a unified insolvency statute is to be all-encompassing, there are certain issues that need to be addressed in order to achieve a holistic approach. These aspects are not deemed to be crucial for the introduction of a unified insolvency statute, and are considered “ancillary” for the purposes of this study. Accordingly, these aspects will not be examined in detail but will be briefly discussed in order to make an all-encompassing proposal for a unified insolvency statute. Some of these aspects relate to natural persons only, some to juristic persons only, and some aspects relate to both natural persons and juristic persons. Consequently, the third tier of this study will concentrate on the following aspects and their role in the creation of a framework for a unified insolvency statute: i) alternatives to liquidation in regard to natural persons, trusts and close corporations; ii) insolvent deceased estates; iii) business rescue provisions, entailing a discussion of compromises in terms of section 311 of the Companies Act and judicial management; iv) personal liability of directors of companies and members of close corporations; and v) cross-border insolvency issues.
- (iv) In the fourth and final place there are currently provisions in statutes, such as the Companies Act and the Close Corporations Act, relating to the voluntary winding-up of these entities. These provisions are unique to the liquidation of juristic persons and, while there is no argument as to the inclusion of these provisions in a unified insolvency statute, the question can be asked as to whether these aspects

cannot be improved upon when they are introduced into such a unified Insolvency Act. For this reason the fourth tier of this study, dealing with the framework within which a unified insolvency statute can be developed, will consist of an examination of the voluntary liquidation of juristic persons, with proposals being made for the possible improvement of these provisions under a unified Insolvency Act.

## 2 HYPOTHESES

In order to examine the above aspects, use will be made of the following hypotheses:

- (a) For the purposes of this investigation it must be accepted that the introduction of a unified insolvency statute is both possible and desirable, although the latter no longer seems to be in dispute.<sup>32</sup> An examination as contemplated in Part 4, will reveal whether or not a single statute is attainable.
  
- (b) If the purpose of a single insolvency statute is to provide a vehicle for the administration of *insolvent* estates, it must be accepted that the statute will no longer contain provisions for the liquidation of *solvent* entities.<sup>33</sup> The point of departure will therefore be that the statute should only contain provisions relating to the administration of insolvent entities.<sup>34</sup> A proper examination of this aspect will reveal whether this hypothesis is justified.

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<sup>32</sup> At a symposium held on 23 Oct 1998 on the possibility of introducing a unified insolvency statute, more than 200 people participated in the debate. At a subsequent conference held on 6 Oct 1999 to discuss the content of such a proposed unified insolvency statute, a total of 230 people registered for the conference. At both the symposium and the subsequent conference there was general consensus that South Africa should introduce a single insolvency statute.

<sup>33</sup> Eg, the voluntary winding-up of a company or close corporation by its members (as a voluntary winding-up by members) in essence deals with the winding-up of a solvent company or close corporation. It is submitted that the provisions relating to these types of voluntary winding-up should remain in the enabling legislation. This aspect is dealt with in more detail in part 4D below.

<sup>34</sup> With the exception of business rescue provisions, which will not necessarily involve insolvent entities. However, it is submitted that in most instances these entities will in fact be insolvent, or insolvency will be imminent.

- (c) If the purpose of a single insolvency statute is to be all-encompassing, it must be accepted that no entity will be excluded from the ambit of the statute, not even the so-called “specialised institutions” which currently enjoy separate treatment. This will also be the point of departure in the study of the content of a unified insolvency statute in Part 4, which will reveal whether or not it is desirable that these specialised institutions deserve to retain their current status.

### 3 METHODOLOGY

In order to create a framework within which corporate insolvency law reform can take place, and the above hypotheses tested, this investigation will be conducted as follows:

- (a) Apart from the introduction set out in Part 1, the aspects that will be investigated are set out and certain hypotheses stated. These will be tested against the framework which will form the conclusion to this study.
- (b) In Part 2 the subject under discussion will be placed in its historical context, especially as far as it relates to the development of corporate insolvency law reform. This entails tracing firstly the historical development of insolvency law as a separate legal subject, and secondly the historical development of corporate insolvency or liquidation law, which will be conducted by evaluating the history of the different statutory enactments and their parallel development with insolvency law in general.
- (c) Part 3 entails a comparative study of other jurisdictions that have attained, or have in the past attempted to attain, a single insolvency statute. The study will follow the historical development in each jurisdiction, projects and programmes which were aimed at large-scale insolvency law reform and the current status of each jurisdiction’s insolvency statutes. In addition to the reform of the substantive law of each of these jurisdictions,

the underlying philosophy of each will also be examined in order to determine the single most important motivating factor which brought about the reform in question (where this did in fact take place).

- (d) Part 4 contains proposals for a framework within which corporate insolvency law reform can take place, including proposals for the introduction of a single, unified insolvency statute in South Africa. The latest developments in the revision of South African insolvency law will not only be discussed, but will also form the basis for the proposals for a single insolvency statute.
- (e) Finally, Part 5 contains a summary and conclusion where it will be indicated what the result of the research was, seen against the background of the above exposition.

University of Pretoria etd - Burdette, DA

## **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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#### SUMMARY

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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 Twigg* 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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#### SUMMARY

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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 (*bevoegdhedes*) 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 bevoegdhedes 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 Bankrotskap 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 verdeling 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.

## **PART 3**

### **CORPORATE INSOLVENCY LAW REFORM IN OTHER JURISDICTIONS**

#### **CHAPTER 4: INSOLVENCY LAW REFORM IN ENGLAND, AUSTRALIA, GERMANY AND THE UNITED STATES OF AMERICA . . . . 77**

In this part a brief comparative study will be made of insolvency law reform in certain selected jurisdictions. The jurisdictions have been selected on the basis of similarity to South African legislation (England), innovations regarding unified legislation (United States of America), the decision not to unify insolvency legislation (Australia) and the successful introduction of unified legislation (Germany). This examination is necessary as the lessons already learnt by other jurisdictions will be of great value in determining not only whether a unified insolvency statute in South Africa is achievable, but also whether it is desirable.

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## CHAPTER 4

### INSOLVENCY LAW REFORM IN ENGLAND, AUSTRALIA, GERMANY AND THE UNITED STATES OF AMERICA

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#### SUMMARY

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#### 1 INTRODUCTION

In determining whether it is attainable, or even desirable, to bring about a unified insolvency statute in South Africa, reference to other jurisdictions may be a useful benchmark. Countries such as Germany and the United States of America have by all accounts succeeded in bringing about unified insolvency legislation. In referring to these two jurisdictions one has to look especially at their codified system of legislation and the fact that they have specialist insolvency or bankruptcy courts. Reference will also be made to the insolvency systems of England and Australia, both of which have similar legislation to that employed in South Africa.<sup>1</sup>

This chapter is not intended to give a detailed exposition of German, American, English or Australian insolvency law. Rather it is intended to refer to these jurisdictions in respect of the historical development of their insolvency laws, the reform process they have followed, and the philosophy underlying their respective systems. Due to the fact that South African insolvency legislation has been modelled on English law, the law reform process in this country will be

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<sup>1</sup> This is because both South Africa and Australia “inherited” their insolvency legislation from England - see the discussion of this aspect in ch 3 above.



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discussed in more detail than the other systems referred to. It will also be important to note how Australia, who also obtained their insolvency laws from England, have since approached the subject in their own reform process.

## 2 ENGLAND

### 2 1 Introduction and historical background<sup>2</sup>

The development of English insolvency law<sup>3</sup> generally, but winding-up law more specifically, is important for the purposes of this study. This is due to the fact that, as shown in Chapter 3 above, South African insolvency and company law legislation is deeply rooted in English law. Also, the development of English insolvency and winding-up law during the twentieth century was extensive and many changes were introduced. In this regard the so-called Cork Report<sup>4</sup> is of special importance, since it brought about the single most important change to insolvency and winding-up law in England in the twentieth century.<sup>5</sup> Although one of the main aims of the Cork

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<sup>2</sup> For a detailed discussion of the history of English insolvency law, see generally Dalhuisen *Dalhuisen on International Insolvency and Bankruptcy* (1986) paras 2.02[8], 3.08 (hereinafter referred to as Dalhuisen); Fletcher *The Law of Insolvency* 2nd ed (1996) 6-21 (hereinafter referred to as Fletcher); Levinthal "The Early History of Bankruptcy Law" 1918 66 *University of Pennsylvania Law Review* 223-250. For an interesting look at the early history of bankruptcy, see also Dal Pont and Griggs "The Journey from Ear-cropping and Capital Punishment to the Bankruptcy Legislation Amendment Bill 1995" 1988 8 *Corporate and Business Law Journal* 155.

<sup>3</sup> Although the terms "insolvency" and "bankruptcy" are used interchangeably throughout this study, it is important to point out the origin of these two terms. Fletcher 4 points out that the distinction between the two terms arose as a result of the uncoordinated development of the rules relating to debt and bankruptcy. Fletcher then distinguishes between the two terms by stating that "insolvency" was used to describe a factual position (ie liabilities exceeding the assets) while "bankruptcy" was used to describe a legal condition or status. For a discussion of the distinction between these two terms, see Fletcher 4-6; Milman and Durrant *Corporate Insolvency Law and Practice* 3rd ed (1999) 2 (hereinafter referred to as Milman and Durrant).

<sup>4</sup> *Insolvency Law and Practice, Report of the Review Committee* (Cmnd 8558) 1982 (hereinafter referred to as the Cork Report).

<sup>5</sup> Fletcher 13-20.

Report was to bring about a truly unified Insolvency Act in England, this did not take place to the extent envisaged by the review committee itself.<sup>6</sup>

Fletcher<sup>7</sup> states that one of the main characteristics of English insolvency law is that it maintains a number of fundamental distinctions between the insolvency of individuals and the insolvency of juristic persons. He further states that this division “is largely the result of the accidents of legal development”, and that it remains of continuing importance in spite of the attempts made in recent years to consolidate the disparate elements of English insolvency law.<sup>8</sup>

As was the case in most other jurisdictions,<sup>9</sup> the early history of insolvency law in England<sup>10</sup> dealt only with the insolvency of individuals.<sup>11</sup> The earliest statutes dealing with the insolvency of individuals were enacted from time to time from the mid-sixteenth century onwards.<sup>12</sup> The founding statute appears to have been Statute 1542,<sup>13</sup> although reference is also made to an earlier statute, namely Statute 1376.<sup>14</sup> In England the statutes dealing with insolvency did not originally deal with insolvency, as this was regulated by the Law Merchant which was a distinct body of law

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<sup>6</sup> 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”); Fletcher 18-19.

<sup>7</sup> Fletcher 6.

<sup>8</sup> Fletcher 6.

<sup>9</sup> For a detailed discussion and exposition of the historical development of the various jurisdictions, see Dalhuisen Vol 1.

<sup>10</sup> For a more detailed exposition of early English insolvency law see Dalhuisen par 2.02[8] 1-39-1-44; Mussman and Riesenfeld “Garnishment and Bankruptcy” 1942 27 *Minnesota Law Review* 1; Riesenfeld “Collection of Money Judgments in American Law: A Historical Inventory and Prospectus” 1957 42 *Iowa Law Review* 155; Riesenfeld “Enforcement of Money Judgments in Early American History” 1973 71 *Michigan Law Review* 691.

<sup>11</sup> Fletcher 6.

<sup>12</sup> Fletcher 6.

<sup>13</sup> 34 and 35 Hen 8 c 6.

<sup>14</sup> 50 Ed 3 c 6. See also Fletcher 6.

developed by a network of courts that were spread across Europe during medieval times.<sup>15</sup> These medieval courts exercised special jurisdiction over the transactions of merchants and matters relating to commerce, even though they were based within different, sovereign territories.<sup>16</sup> Although the Law Merchant drew extensively from the customs and practices that had become established among merchants in their dealings with each other, it was principally based upon Italian mercantile law,<sup>17</sup> which was itself derived from Roman law.<sup>18</sup>

The Law Merchant procedures for cases of individual insolvency were adapted from the Roman law procedures of *cessio bonorum*, *distractio bonorum*, *remissio* and *dilatio*.<sup>19</sup> Even though these procedures were absorbed into the Law Merchant, they enjoyed only a limited influence upon the general law of England, and were mainly confined in their application to the ranks of the merchants themselves.<sup>20</sup> However, the centralised jurisdiction of the ordinary Common Law courts gradually superseded the jurisdiction of the Merchant and Maritime Courts from the fourteenth century onwards.<sup>21</sup> During this process a considerable part of the Law Merchant was absorbed into English common law, and by the end of the seventeenth century the courts regularly took judicial notice of mercantile custom.<sup>22</sup>

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<sup>15</sup> Fletcher 6.

<sup>16</sup> Fletcher 6.

<sup>17</sup> For the position in Italy at this time, see Dalhuisen par 2.02[1] 1-24–1-26.

<sup>18</sup> Fletcher 6; Dalhuisen Vol 1 part 1 ch 2.

<sup>19</sup> Fletcher 6; Dalhuisen Vol part 1 para 1.01-1.05.

<sup>20</sup> Fletcher 7.

<sup>21</sup> Fletcher 7.

<sup>22</sup> Fletcher 7.

In 1542 the first English Bankruptcy Act was promulgated and dealt mainly with absconding debtors.<sup>23</sup> Fletcher<sup>24</sup> points out that two important principles of insolvency law had already crystallised at this time, namely the collective nature of bankruptcy proceedings and the *pari passu* principle of equal distribution amongst creditors. 1571 saw the promulgation of two further statutes, the first<sup>25</sup> dealing with the setting aside of fraudulent conveyances and the second<sup>26</sup> setting out detailed provisions for dealing with insolvent debtors.<sup>27</sup> Initially these statutory enactments only applied to insolvent traders, clearly showing the historic roots of the Law Merchant.<sup>28</sup> However, in 1861 the Bankruptcy Act of that year declared its provisions to be applicable to all debtors, not only insolvent traders.<sup>29</sup>

The distinction between traders and non-traders prior to 1861 had dire consequences for insolvent non-trader debtors, as they were subjected to the common law procedures for the enforcement of the payment of debts through the seizure and imprisonment of the debtor and the seizure and sale of the person's assets.<sup>30</sup> During this period there were also no provisions relating to a discharge of the debtor from his debt, although a statute introduced in 1705<sup>31</sup> did make some provision for a discharge.<sup>32</sup> The law was also very harsh at this time, not making any distinction between an honest and a dishonest debtor.<sup>33</sup> A series of bankruptcy statutes promulgated during

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<sup>23</sup> Statute 1542 34 and 35 Hen 8 c 4; Fletcher 7; Dalhuisen par 2.02[8] 1-41-1-42.

<sup>24</sup> Fletcher 7.

<sup>25</sup> The Fraudulent Conveyances Act 1571 13 Eliz 1 c 5 - see Fletcher 7.

<sup>26</sup> The Bankrupts Act 1571 13 Eliz 1 c 7 - see Fletcher 7.

<sup>27</sup> See also Dalhuisen par 2.02[8] 1-42.

<sup>28</sup> Fletcher 8.

<sup>29</sup> Fletcher 8; Dalhuisen par 2.02[8] 1-43.

<sup>30</sup> Fletcher 8.

<sup>31</sup> 4 & 5 Anne c 4.

<sup>32</sup> Fletcher 9.

<sup>33</sup> Fletcher 9.

the nineteenth century laid the foundation of modern English bankruptcy law. The plight of non-trader debtors was first addressed by the establishment, in 1813, of a Court for the Relief of Insolvent Debtors.<sup>34</sup> Other reforms to the law of bankruptcy were brought about by the Bankruptcy Act 1824<sup>35</sup> and were consolidated in the Bankruptcy Act 1825.<sup>36</sup> The Bankruptcy Act 1883<sup>37</sup> eventually saw a stage where insolvency law took on a form that is still recognisable in English law today.<sup>38</sup>

The traditional distinction between individual and corporate insolvency under English law is still discernable today, although some development did take place which has narrowed the divide.<sup>39</sup> The reason for this separate development<sup>40</sup> is the relatively recent concept of corporate legal personality, which only started to develop properly from the mid-nineteenth century.<sup>41</sup> The possibility of limiting one's personal liability was the cause of the distinction between corporate and individual insolvency, and was authoritatively confirmed by the House of Lords in the well-known case of *Salomon v Salomon & Co.*<sup>42</sup> In essence the unsecured creditors of a company, of which Salomon was the sole shareholder, wanted to hold Salomon personally liable for the company's debts when it was placed under liquidation. It was held by the House of Lords that

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<sup>34</sup> 53 Geo 3 c 102 and c 138 (Ireland), amended by 54 Geo 3 c 23 and c 28. See Fletcher 9.

<sup>35</sup> 5 Geo 4 c 98.

<sup>36</sup> 6 Geo 4 c 16. See also Dalhuisen par 3.08[1] 1-86.

<sup>37</sup> Fletcher 10.

<sup>38</sup> Dalhuisen par 3.08[2] 1-88.

<sup>39</sup> See Fletcher 10-13.

<sup>40</sup> The development of corporate insolvency law in England is discussed in detail in ch 3 above, and will for this reason not be repeated here. In this section merely a shortened version of the historical development will be provided.

<sup>41</sup> Fletcher 10.

<sup>42</sup> [1897] AC 22.

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upon formation of a company it becomes a distinct person in law that is separate from its shareholders. Consequently the company's debts are separate and self-contained, and are not those of the individual members of the company.

From 1844 onwards,<sup>43</sup> due to the first Companies Act that had been promulgated, corporate insolvency was regulated by special statutory provisions.<sup>44</sup> These provisions were consolidated into the various versions of the Companies Act until, finally, in 1985 and 1986 they were moved out of the Companies Act and into the (English) Insolvency Act 1985 and 1986.<sup>45</sup> In early winding-up law the concept of limited liability had not yet taken proper shape, and consequently the legislation sought to treat insolvent companies as a species of bankrupt.<sup>46</sup> The concept of limited liability only became properly established under English law with the promulgation of the Limited Liability Act 1855.<sup>47</sup> Bankruptcy proceedings in England became rather confusing when the Winding Up Amending Act 1848<sup>48</sup> made provision for a procedure whereby shareholders of a company could bring about its dissolution and winding-up by presenting a petition to the Chancery Court, a procedure that was used in parallel to the procedure used by creditors in the Bankruptcy Court.<sup>49</sup> As a result of the conflicting jurisdiction of the courts, all the procedures were eventually consolidated in 1862,<sup>50</sup> giving the Chancery Court exclusive jurisdiction regarding corporate insolvency.

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<sup>43</sup> See also Dalhuisen par 3.08[2] 1-87.

<sup>44</sup> Fletcher 11.

<sup>45</sup> Fletcher 11; Dalhuisen par 3.08[2] 1-87.

<sup>46</sup> Fletcher 11.

<sup>47</sup> Fletcher 11.

<sup>48</sup> 11 & 12 Vict c 45.

<sup>49</sup> Fletcher 12.

<sup>50</sup> Companies Act 1862 (25 & 26 Vict c 89) s 81. See Fletcher 12.

This provided further impetus to the development of specialised procedures for corporate insolvency, which were initially contained within the provisions of successive Companies Acts as from 1856.<sup>51</sup> These specialised provisions resulted in company winding-up developing along its own particular lines, separate from the basic framework and substance of the law regulating the insolvency of individuals.<sup>52</sup> The net result of these developments was that by the late nineteenth century corporate and individual insolvency had developed into two distinct branches of the law, each of which were governed by different courts and different sets of procedural rules.<sup>53</sup> Although there were many similarities between the two systems, there was still a substantial divergence between these two types of insolvency.<sup>54</sup> This divergence is still evident in modern English insolvency law, even though the procedures have since been consolidated into a single Act, namely the (English) Insolvency Act 1986.<sup>55</sup>

## 2 2 Insolvency law reform and the Cork Report

In England the historical divisions between corporate and individual insolvency continued well into the twentieth century, and was reflected in the approaches taken by the review and reform of these branches of insolvency law.<sup>56</sup> Various committees<sup>57</sup> were formed over the years whose main task was to review certain aspects of law that pertained to insolvency and company law.<sup>58</sup>

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<sup>51</sup> This process was commenced in the Companies Act 1856 (19 & 20 Vict c 47) part 3, ss 59-105.

<sup>52</sup> Fletcher 12.

<sup>53</sup> Fletcher 12.

<sup>54</sup> Fletcher 12. This is also what South Africa inherited from England.

<sup>55</sup> Fletcher 12-13. See also Milman and Durrant 2 where this distinction is emphasised.

<sup>56</sup> Fletcher 13.

<sup>57</sup> The committees that were formed to look into aspects of individual insolvency law were the Muir Mackenzie Committee (1906 Cd 4068); the Hansell Committee (Cmnd 2326 1925); and the Blagden Committee (Cmnd 221 1957). Committees appointed to review company law included the Loreburn Committee (Cd 3052 1906); the Greene Committee (Cmnd 2657 1926); the Cohen Committee (Cmnd 6659 1945); and the Jenkins Committee (Cmnd 1749 1959). See also Fletcher 13 fn 39.

<sup>58</sup> Fletcher 13.

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However, the first comprehensive review of the law of insolvency was only undertaken in 1977,<sup>59</sup> under the chairmanship of Sir Kenneth Cork. The Cork Committee was given a very wide brief:<sup>60</sup>

- (a) To undertake a total review of the law of insolvency, bankruptcy, liquidation and receiverships, and to consider reforms that are necessary or desirable;
- (b) To examine the possibility of formulating a comprehensive insolvency system, including the possibility of harmonising and integrating procedures;
- (c) To investigate the possibility of formulating less formal procedures as alternatives to bankruptcy and winding-up; and
- (d) To make recommendations.

Despite the epoch-making report of the Cork Committee<sup>61</sup> in which various recommendations were made regarding all aspects of insolvency law and procedure, the Cork Report did not include a draft Bill.<sup>62</sup> The change of government in England in May 1979 had a negative impact on the work being done by the Cork Committee,<sup>63</sup> and due to a request from the government the Cork Committee had no option but to lodge an interim report in October 1979.<sup>64</sup> The final report of the Cork Committee was eventually submitted in 1982, making out a vigorous case for fundamental reforms regarding the law of insolvency.<sup>65</sup> Unfortunately not all the recommendations made in the

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<sup>59</sup> For a discussion of the events that led to the appointment of the Cork Committee, see Fletcher 14-15.

<sup>60</sup> Fletcher 15.

<sup>61</sup> See also the remarks regarding the Cork Report in Dalhuisen par 3.08[4] 1-93.

<sup>62</sup> This was in contradistinction to law reform that was taking place in Scotland at the same time - see *Report of the Scottish Law Commission* (published in 1982 as HC Paper 176, Scot Law Com No 68).

<sup>63</sup> Fletcher 16.

<sup>64</sup> *Bankruptcy: Interim Report of the Insolvency Law Review Committee* (Cmnd 7968).

<sup>65</sup> Fletcher 17.



Cork Report were implemented, a fact which has had a negative impact on the development of insolvency law in England.<sup>66</sup> Although the law relating to individual and corporate insolvency was merged into one Act, namely the (English) Insolvency Act 1986, the Act itself does not bring about a genuine unification of the law relating to these separate branches of the law.<sup>67</sup> That the aims of the Cork Report were not fully achieved is evident from the following statement made by Fletcher:<sup>68</sup>

“Thus ... the consolidation of all the statutory provisions governing the insolvency of individuals and that of companies within a single Act ... was finally brought about. However, although a high degree of harmonisation has been achieved between many parallel provisions belonging to the different branches of insolvency law, the traditional distinction survives between corporate and personal insolvency ...”

Due to the fact that the recommendations made in the Cork Report are referred to throughout this study, the detail of its recommendations will not be discussed here. However, in view of the objectives of this thesis, it is appropriate 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 debtor's 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 ...*

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<sup>66</sup> For a discussion of the events that led to only some of the Cork Report recommendations being implemented, see Fletcher 17-20.

<sup>67</sup> Fletcher 20.

<sup>68</sup> Fletcher 20. See also Keay “To Unify or Not to Unify” 65-68.

- (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>69</sup>

## 2.3 Conclusion

To summarise,<sup>70</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>71</sup>

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<sup>69</sup> Cork Report par 1980(1)-(7).

<sup>70</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" 62.

<sup>71</sup> It is possible that the Cork Report's recommendations would have 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."

However, there are many lessons to be learnt from the development of English insolvency law, especially in light of the fact that our own system is largely based on English law. The main lessons to be learnt from the development of English insolvency law are the following:

- (a) Why corporate insolvency law experienced a parallel development with individual insolvency law;
- (b) Political issues can often hamper the proper development of the law. This was illustrated by the fact that all of the recommendations of the Cork Report were not fully implemented;
- (c) That one of the workable alternatives to having a truly unified Insolvency Act is the duplication of the insolvency provisions that apply to both individual and corporate insolvency;
- (d) That incorporating individual and corporate insolvency into one statute does not necessarily bring about a unification of the insolvency laws, especially when the Act still makes a distinction between corporate and individual insolvency.

Although insolvency law in England has developed quite substantially over the centuries, they have still not perfected the unity of their insolvency legislation. Despite this, the English system of insolvency law appears to work quite well in practice.

### 3 AUSTRALIA

#### 3 1 Introduction and historical background

The history of Australian corporate insolvency law followed a very similar pattern to the development experienced in South Africa,<sup>72</sup> in that both are to a large extent based on English law.<sup>73</sup> Consequently Australian corporate insolvency law has, over the years, developed in a similar fashion to South Africa's corporate insolvency legislation. It is interesting to note that in 1988 Australia faced the same dilemma that South Africa now faces: should unified insolvency legislation be introduced or should the current system of dual statutes be retained? Despite the matter having been considered prior to its report,<sup>74</sup> the Australian Law Reform Commission,<sup>75</sup> in a report commonly known as the Harmer Report, did not consider it a "major issue" that needed to be decided and consequently a unified Act was never introduced.<sup>76</sup>

According to Keay<sup>77</sup> the first federal bankruptcy legislation in Australia was enacted in 1924. However, Australian insolvency law to this day follows a dual system of insolvency with

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<sup>72</sup> Australia experienced a "complete acceptance of English law" - see Keay "To Unify or Not to Unify" 68.

<sup>73</sup> See Keay *Insolvency, Personal and Corporate Law and Practice* 3rd ed (1998) 1 (hereinafter referred to as Keay *Insolvency*); Tomasic and Whitford *Australian Insolvency and Bankruptcy Law* 2nd ed (1997) (hereinafter referred to as Tomasic and Whitford). For a discussion of the early history of Australian insolvency law, see Kercher "An indigenous Jurisprudence? Debt Recovery and Insolvency Law in the New South Wales Court of Civil Jurisdiction, 1788 to 1814" 1990 6 *Australian Journal of Law and Society* 1; Keay McPherson, *The Law of Company Liquidation* 4th ed (1999) 20-23 (hereinafter referred to as McPherson); For an interesting look at the early history of bankruptcy, see also Dal Pont and Griggs "The Journey from Ear-cropping and Capital Punishment to the Bankruptcy Legislation Amendment Bill 1995" 1988 8 *Corporate and Business Law Journal* 155.

<sup>74</sup> See ALRC DP32, *General Insolvency Inquiry*, August 1987.

<sup>75</sup> Australian Law Reform Commission Report No 45 *General Insolvency Inquiry* (hereinafter referred as the Harmer Report).

<sup>76</sup> Paras 25-32 of the Harmer Report. However, the Commission's recommendation has since been criticised - see Keay "To Unify or Not to Unify" 68-69 and Keay "The Unity of Insolvency Legislation: Time for a Re-think?" 1999 *Insolvency Law Journal* 7-8.

<sup>77</sup> Keay *Insolvency* 1 fn 16.

individual bankruptcies being regulated by the Bankruptcy Act of 1966 (Cth) and corporate insolvencies being regulated by the Corporations Act.<sup>78</sup> Consequently, as is the case in South Africa, Australia still distinguishes between “bankruptcy” (individuals) and “liquidation” or “winding-up” (corporations).<sup>79</sup>

Because Australia’s insolvency law is partially based on legislation and partially based on common law, various amendments to insolvency legislation has been necessitated over the years.<sup>80</sup> The most recent changes to individual bankruptcy were contained in the Bankruptcy Legislation Amendment Act 1996 (Cth) which came into operation on 16 December 1996.<sup>81</sup> Regarding corporate insolvency law reform, important changes were brought about by the Corporate Law Reform Act 1992 (Cth) which came into operation on 23 June 1993.<sup>82</sup> In the meantime the Corporations Law that contains, *inter alia*, the provisions relating to corporate insolvency, has been renamed the Corporations Act.<sup>83</sup>

Due to the fact that Australia has elected to retain a dual system of insolvency law, any references to Australia insolvency law and law reform will be of limited value for the purposes of this study. However, the Harmer Report does contain some valuable information regarding the approach that can be taken when deciding whether or not to introduce a unified insolvency statute, and it is worth taking note of the advantages and disadvantages in doing so as listed by the Harmer Report.

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<sup>78</sup> Previously known as the Corporations Law. Due to an amendment that came into operation on 15 July 2001, it is now known as the Corporations Act, Act No 50 of 2001.

<sup>79</sup> Key *Insolvency* 2. See also the Harmer Report par 22, where retaining the use of the existing terminology was recommended.

<sup>80</sup> Key *Insolvency* 3.

<sup>81</sup> Key *Insolvency* 3.

<sup>82</sup> Key *Insolvency* 3-4. See also Tomasic and Whitford 2-3.

<sup>83</sup> Act No 50 of 2001. This Act came into operation on 15 July 2001.

### 3 2 The Harmer Report<sup>84</sup>

The Harmer Report was published in 1988 and according to its terms of reference, the Commission was asked to inquire into:

“the law and practice relating to the insolvency of both individuals and bodies corporate, in particular -

- (i) the provisions of the Bankruptcy Act 1966, in its application to both business and non-business debtors;
- (ii) Parts VIII, X, XII of the Companies Act 1981 so far as they are related to or concerned with the insolvency of companies;
- (iii) any related matter”.<sup>85</sup>

This reference provided the first opportunity in Australia for a comprehensive review of its insolvency laws, as the last review had been undertaken by the Clyne Committee between 1956 and 1962, dealing only with individual insolvencies.<sup>86</sup>

In the main, the Harmer Report is divided into five main parts. The first part deals with introductory aspects and a number of general issues. Part II deals exclusively with corporate insolvency, Part III exclusively with consumer bankruptcy issues and Part IV with aspects relating to both consumer and corporate insolvency. The last part of the Report, published as a separate volume or appendix, contains recommendations in the form of draft legislation.

The question of whether or not to introduce unified insolvency legislation was one of the major issues in the commission’s terms of reference.<sup>87</sup> After having referred to the United States and

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<sup>84</sup> The Harmer Report will be referred to throughout the remaining chapters of this thesis, as many issues facing the unification of the South African insolvency statutes are touched upon in the report. Although Australia elected not to introduce a unified insolvency statute, the issues that could have led to the introduction of such a statute are dealt with in the report, and it is a useful work of reference when determining whether or not a unified insolvency statute is desirable.

<sup>85</sup> Harmer Report par 2.

<sup>86</sup> Harmer Report par 3.

<sup>87</sup> Harmer Report par 25.

England as examples of overseas countries having adopted a unified system to a larger or lesser extent,<sup>88</sup> the report looked at various aspects of this issue before coming to the following conclusion:

“While the Commission accepts that there are advantages in unified insolvency legislation it does not regard the goal of unity to be one of major significance.”<sup>89</sup>

In reaching this conclusion the Commission looked at constitutional considerations in Australia,<sup>90</sup> arguments for and against unified legislation,<sup>91</sup> and the proposals made in DP 32.<sup>92</sup> The Harmer Report then lists the following as the advantages of having unified legislation:<sup>93</sup>

- (a) Many of the aspects regulating the insolvency of individuals and corporations are or should be the same;
- (b) In an Australian context a single statutory scheme would mean that only one government (that of the Commonwealth of Australia) would have effective control of insolvency policy, and changes could be made expeditiously;
- (c) Common procedures would be cost effective.

The Harmer Report also referred to a previous commission of inquiry, commonly known as DP 32, in order to point out some of the reasons for not implementing a unified insolvency statute. These are listed as follows in the Harmer Report:

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<sup>88</sup> Harmer Report par 26.

<sup>89</sup> Harmer Report par 31.

<sup>90</sup> Harmer Report par 27.

<sup>91</sup> Harmer Report par 28.

<sup>92</sup> Harmer Report par 29. The reference to DP 32 is a reference to Australian Law Reform Commission of Inquiry ALRC DP32, *General Insolvency Inquiry*, August 1987.

<sup>93</sup> Harmer Report par 28.

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- (a) “Irreconcilable differences”. According to the report in DP 32 there are too many differences between individuals and corporations to bring about complete unity;<sup>94</sup>
- (b) “Jurisdictional difficulties”. According to the report in DP 32 unified insolvency legislation would have to be federal legislation. The question arose as to which courts, federal or state courts, would have jurisdiction. The report in DP 32 saw this as possibly giving rise to constitutional and political issues.<sup>95</sup>
- (c) “Reform, not form, important”. The report in DP 32 saw the reform of both individual and corporate insolvency as being more important than the unification of the provisions.<sup>96</sup>
- (d) “National companies legislation”. The report in DP 32 stated that national legislation regulating insolvency would go a long way towards the goal of ensuring uniformity due to the centralisation of the legislation under one government. In other words the uniformity of the substantive law was seen to be more important than the merger of the provisions into one Act.<sup>97</sup>

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<sup>94</sup> As will be shown under part 4 of this study, the differences between individual and corporate insolvency are not as irreconcilable as one might expect. In fact, the SA Law Commission stated in SA Law Commission Project 63 Commission Paper 582 (11 Feb 2000) Vol 1 par 5.2.1 (hereinafter referred to as Commission Paper 582): “Once a start has been made it is surprising how easy it is to unify the provisions.”

<sup>95</sup> This problem will not be experienced in South Africa, as a separate system of state and federal courts does not exist here.

<sup>96</sup> While this statement is not entirely incorrect, it does lose sight of the fact that, in the long term, reform will be a lot easier to implement once a unified Act is in place. Having to reform the same principles contained in separate legislation will be a lot more difficult than reforming principles contained in a single insolvency statute.

<sup>97</sup> This statement is also not entirely incorrect, but loses sight of the fact that the amendment of the substantive law in a unified Act would be far easier to achieve than having the law spread over various statutes. However, the reason for the statement seems to be based more on constitutional issues than the principles of insolvency.



### 3 3 Australian insolvency legislation and philosophy

As stated above, Australian insolvency legislation is dealt with in two statutes. Individual or consumer bankruptcy is dealt with in the Bankruptcy Act of 1966 (Cth). Corporate insolvency, on the other hand, is dealt with in Part 5 of the Corporations Act. Unlike the position in South Africa,<sup>98</sup> however, the Australian corporate insolvency law is completely separate from the law regulating the insolvency of individuals. This means that there is no connecting clause or section that makes the Bankruptcy Act applicable also to corporate insolvency. Each statute regulating consumer bankruptcies and corporate insolvency contains its own, complete set of rules that can be applied to the administration of that specific type of entity or individual.<sup>99</sup>

For the purposes of this project the Australian Corporations Act is of particular importance, and will consequently be referred to throughout the remainder of this study. As regards the current philosophy of Australian insolvency law, the main principles or aims of their insolvency law was summarised as follows by the Harmer Report:<sup>100</sup>

- (a) To provide a fair and orderly process for dealing with the financial affairs of insolvent individuals and companies;
- (b) To provide mechanisms that enable both debtor and creditor to participate with the least possible delay and expense;
- (c) To provide for an insolvency administration that is impartial, efficient and expeditious;

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<sup>98</sup> Under South African law the Insolvency Act also applies to companies that are wound up under the Companies Act 61 of 1973 (hereinafter referred to as the Companies Act) and that are unable to pay their debts. S 339 of the Companies Act makes the Insolvency Act 24 of 1936 (hereinafter referred to as the Insolvency Act) applicable in such cases, a feature not found in Australian legislation. For a discussion of s 339 of the Companies Act, see ch 5 below.

<sup>99</sup> Keay *Insolvency* 361.

<sup>100</sup> Harmer Report par 33 15-17.

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- (d) To provide a convenient means of collecting or recovering property that should properly be applied toward payment of the debts and liabilities of the insolvent person;
  - (e) To retain the principle of equal sharing between creditors, and to reinforce such principle in some areas;
  - (f) To ensure that the end result of an insolvency administration is the effective relief or release from the financial liabilities and obligations of the insolvent;
  - (g) To ensure that insolvency law, so far as it is convenient and practical, supports the commercial and economic processes of the community;
  - (h) To harmonise, as far as is possible and practicable, insolvency law with the general law;
  - (i) To enable ancillary assistance in the administration of an insolvency originating in a foreign country.

### 3 4 Conclusion

Although Australian insolvency and winding-up law is very similar to its South African counterparts, the fact remains that the Harmer Report chose not to recommend a unified statute. From the Harmer Report it is evident that the Commission of Inquiry chose only to concentrate on law reform and not on introducing a unified insolvency statute.<sup>101</sup> In fact, in rejecting a uniform insolvency statute, the Report states at paragraph 31:

“It is more important to concentrate on the particular reform proposals put forward in this Report than to be overly concerned with attempting to put the two very different aspects of insolvency law into one Act. However, as far as possible and necessary, the Commission has sought in the Report to promote the uniformity of the substance of the provisions relating to individual and corporate insolvency.”

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<sup>101</sup> Harmer Report par 31.

As stated above, the fact that the Commission chose not to introduce a unified Act has since been criticised.<sup>102</sup> On the other hand, it would appear that Australian insolvency legislation has at least succeeded in avoiding the pitfalls of a “connecting clause” that makes the rules of insolvency relating to individuals applicable also to corporate insolvency. The Australian Corporations Act contains its own complete set of rules regulating insolvency, and it is not necessary to refer back to the Bankruptcy Act in order to find the law relating to a specific issue.<sup>103</sup> This is in contrast to South African statutes, where section 339 of the Companies Act refers back to the laws regulating insolvency where the Companies Act does not contain a provision dealing with the problem at hand. It is submitted that section 339 of the Companies Act is the cause of most of the problems relating to the dual insolvency system in South Africa.<sup>104</sup>

The fact that Australia has a federal system of government also played a role in the commission deciding against unified insolvency legislation,<sup>105</sup> a fact that can be attributed more to constitutional issues than insolvency law considerations. Serious policy and political issues are raised when enacting federal legislation (or Commonwealth legislation as it is sometimes referred to), a problem that South Africa will not encounter when having to decide such an issue.<sup>106</sup> From the commission’s report it is also evident that a dual system of insolvency law works quite well in Australia, otherwise the commission would surely have recommended the unification of the various statutes.

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<sup>102</sup> See Key “To Unify or Not to Unify” 68-69 and Key “The Unity of Insolvency” Legislation 7-8.

<sup>103</sup> Key *Insolvency* 361.

<sup>104</sup> This aspect is dealt with in more detail in the conclusion contained in part 5 of this thesis.

<sup>105</sup> See paras 29 and 32 of the Harmer Report.

<sup>106</sup> However, there are still some political issues that South Africa will experience. Eg, the Insolvency Act is administered by the Department of Justice and Constitutional Development while the Companies Act, to name but one example, is administered by the Department of Trade and Industry. Vested interests may yet cause the promulgation of a unified insolvency statute to fail in South Africa.

## 4 GERMANY

### 4.1 Introduction

The reason for selecting the Federal Republic of Germany as one of the jurisdictions to be discussed on a comparative basis, is the fact that Germany has recently adopted a unified insolvency statute.<sup>107</sup> Not only is the *Insolvenzordnung* of 1994 unified in the sense that it creates a “single gateway” approach to insolvency and business rescue, but it also happens to be unified in the sense that the insolvency enactments of the Federal Republic of Germany and the former German Democratic Republic (GDR) are now contained in a single statute.<sup>108</sup> It has taken a number of years for the *Insolvenzordnung* to be promulgated, and the fact that it has taken so long may cast some light on the problems experienced by Germany in obtaining a single insolvency statute.<sup>109</sup> In this chapter the historical development of German insolvency law will be traced, examining events that led to the promulgation of the *Insolvenzordnung* that currently finds application. The law reform programme that Germany followed will also be scrutinised in order to determine what the current philosophy is regarding German corporate insolvency law.

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<sup>107</sup> *Insolvenzordnung vom 5 Oktober 1994 (BGBl. I, S. 2866)* - hereinafter referred to as the Insolvency Code of 1994. This Code came into operation on 1 January 1999.

<sup>108</sup> See Stewart *Insolvency Code - Act Introducing the Insolvency Code* (1997) 6; Schäfer “Limitations on Secured Creditors’ Rights” <http://themis.wustl.edu/ibll/bank/Schaefer.htm> (accessed on 18 March 2001) (hereinafter referred to as Schäfer).

<sup>109</sup> At this point it is interesting to note that Stewart 6 states that the reason for the late implementation is the result of negotiations between the German government and the judiciary. Apparently the judiciary was afraid that it would be unable to deal with the flood of insolvency matters that would arise from the promulgation of the Code. It is assumed that the simplified insolvency application procedure contained in the Code would lead to the flood of applications. See also Schäfer, who points out that the delay was due to organisational changes in the judiciary.

## 4 2 Historical development of German insolvency law<sup>110</sup>

Dalhuisen<sup>111</sup> states that no uniform system of insolvency law existed in Germany during its early history. Only individual remedies were available for creditors until as late as the fifteenth and sixteenth centuries.<sup>112</sup> However, in some of the Hanseatic cities a bankruptcy procedure did exist from the thirteenth century onwards, although initially only in regard to dead or absconding debtors.<sup>113</sup> Italian influence resulted in more sophistication in regard to the bankruptcy laws, a fact evident from the Hamburg city laws of 1603 and 1605 and the law of Nuremberg of 1564.<sup>114</sup> The further development of these laws under Italian influence could also be seen in the laws of Freiburg (1520), Frankfurt (1578), Bavaria (1611 and 1616), Saxony (1622 and 1724), Gotha (1670), Eisenach (1702) and the later Hamburg regulations of 1753.<sup>115</sup>

The *cessio bonorum* was recognised by the laws of Bavaria and the law of Wuerttemberg of 1610 for the honest but unfortunate debtor in order to avoid going to prison.<sup>116</sup> In the seventeenth and eighteenth centuries the writings of Salgado de Samoza is said to have caused a Spanish law influence over developments in Germany.<sup>117</sup> According to Dalhuisen<sup>118</sup> the Spanish influence can

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<sup>110</sup> For a detailed discussion of the early German insolvency laws, see Wood and Totty *Butterworths International Insolvency Laws* (1994) 172-255.

<sup>111</sup> Dalhuisen par 2.02[7] 1-37.

<sup>112</sup> Dalhuisen par 2.02[7] 1-37.

<sup>113</sup> Dalhuisen par 2.02[7] 1-37. This system was also subsequently adopted by Bremen and Hamburg.

<sup>114</sup> Dalhuisen par 2.02[7] 1-37.

<sup>115</sup> Dalhuisen par 2.02[7] 1-37.

<sup>116</sup> Dalhuisen par 2.02[7] 1-37–1-38. This procedure provided for a kind of discharge by granting the *beneficium competentiae*, and this resulted in the debtor not needing to do more than he reasonably could to repay his debts - see Dalhuisen par 2.02[7] 1-38.

<sup>117</sup> Dalhuisen par 2.02[7] 1-38.

<sup>118</sup> Dalhuisen par 2.02[7] 1-38.

be detected in the laws of Bavaria of 1753,<sup>119</sup> the Prussian ordinances of 1718 and 1722, the Prussian Code of 1781, the Prussian *Gerichtsordnung* of 1793, the Codes of Lippe Detmold (1779), Hannover (1850) and Baden (1864).<sup>120</sup> Germany was not unified at the beginning of the nineteenth century and consequently state law prevailed at the time.<sup>121</sup> These laws were based on Roman law concepts that had been received and amended into Germany.<sup>122</sup> In some states, such as Bavaria and Prussia, codification took place in the eighteenth and nineteenth centuries.<sup>123</sup> In Hanover in 1850 and in Baden in 1869 new codes were promulgated, and in Bavaria a new code of civil procedure<sup>124</sup> was enacted in 1869. In 1855 separate bankruptcy legislation had been enacted in Prussia,<sup>125</sup> and while bankruptcy law also existed in other cities, in the other states insolvency law had not been codified.<sup>126</sup>

After German unification new codes were introduced on a gradual basis. This ultimately led to the all-German Codes of 1900.<sup>127</sup> The 1877 Bankruptcy Act<sup>128</sup> was eventually passed, but only came into operation in 1879.<sup>129</sup> This Act was amended in 1898 to bring it into line with the

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<sup>119</sup> *Codex Bavaricus Judiciarius*.

<sup>120</sup> For a discussion of the systems of insolvency under these laws see Dalhuisen par 2.02[7] 1-38.

<sup>121</sup> Dalhuisen par 3.07[1] 1-82.

<sup>122</sup> Dalhuisen par 3.07[1] 1-82.

<sup>123</sup> Dalhuisen par 3.07[1] 1-82.

<sup>124</sup> *Bayerische Prozessordnung*, Book V - see Dalhuisen par 3.07[1] 1-82.

<sup>125</sup> *Preussische Konkursordnung* - see Dalhuisen par 3.07[1] 1-82.

<sup>126</sup> Dalhuisen par 3.07[1] 1-82.

<sup>127</sup> Dalhuisen par 3.07[2] 1-82.

<sup>128</sup> *Reichs-Gesetzblatt* 351 of 10 February 1877. The underlying ideas contained in this Act came mainly from Prussian and Bavarian bankruptcy laws of 1855 and 1869 respectively, although it is thought that the French law of 1838 also had some influence - see Dalhuisen par 3.07[2] 1-82.

<sup>129</sup> Dalhuisen par 3.07[2] 1-82.

provisions of the new German Civil Code of 1900.<sup>130</sup> The original German Bankruptcy Code that was passed in 1877<sup>131</sup> was, according to commentators,<sup>132</sup> during the “Promoters’ Age”<sup>133</sup> which was a period of escalating industrialisation in Germany. According to Stewart<sup>134</sup> the Bankruptcy Code contained “classical liberal theories” and was seen by many as a mechanism for “separating the economic chaff from the economic wheat.” Stewart states this as one of the reasons why the Bankruptcy Code was criticised for its alien roots once the traditional socialistic, centralistic German economic thinking gained a foothold.

In 1893 a bill to amend the Bankruptcy Code was tabled, which eventually resulted in the Bankruptcy Code of 20 May 1898.<sup>135</sup> From Stewart’s comments<sup>136</sup> it is evident that the existing Bankruptcy Code was criticised due it being tailored to meet the needs of big business, and because it was based on the idea of debtor’s fault. In addition to the Bankruptcy Code, the Reorganisation Code<sup>137</sup> was introduced in 1935 to meet the need of providing relief to honest debtors without having to use the bankruptcy procedure.<sup>138</sup>

In the post-World War II era in Germany’s history, which was a an era of sustained recovery, growth and prosperity, there was little or no reason for anyone to object to the foreign roots of

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<sup>130</sup> Dalhuisen par 3.07[2] 1-82.

<sup>131</sup> Stewart 8.

<sup>132</sup> Stewart 8.

<sup>133</sup> Stewart 8 refers to it as the so-called “*Gründerzeit*”.

<sup>134</sup> Stewart 8.

<sup>135</sup> *Konkursordnung* of 20 May 1898 (RGBl p 612; BGBl III No 311-4).

<sup>136</sup> Stewart 8.

<sup>137</sup> *Vergleichsordnung* of 26 February 1935 (RGBl I p 217; BGBl I p 1185). See also Dalhuisen par 3.07[2] 1-84.

<sup>138</sup> Stewart 8. However, it is submitted that under the Reorganisation Code an agreement would only have been possible if the debtor had sufficient assets in order to make the agreement effective. It is unlikely that an agreement would have been reached if the debtor had no or negligible assets.

the Bankruptcy Code.<sup>139</sup> However, the presence of the social state and its resultant social market economy increasingly sought to bring about a form of debtor relief that would ultimately seek to protect jobs.<sup>140</sup>

In 1978 the Ministry of Justice appointed an independent committee to recommend an insolvency law that is effective, modern, business-orientated and socially relevant.<sup>141</sup> It was also necessary for the new insolvency law to include a procedure that could save a company in financial difficulty, but which would be acceptable to creditors.<sup>142</sup> This committee presented its proposals in 1985, which included a unified insolvency proceeding as well as an effective business rescue proceeding.<sup>143</sup>

In 1988 a “Discussion Draft of a Statute Reforming Insolvency Law”<sup>144</sup> was published by the Ministry of Justice, but this draft took a much harder line than the aforementioned committee’s report.<sup>145</sup> This draft was followed in 1989 by the Ministry of Justice’s final draft, the “Experts’ Draft of a Statute Reforming Insolvency Law”.<sup>146</sup>

With the fall of East Germany in the late 1980s, it became necessary to integrate East Germany’s insolvency proceedings into West Germany’s legal framework.<sup>147</sup> To this end the Aggregate

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<sup>139</sup> See Stewart 9.

<sup>140</sup> Stewart 9.

<sup>141</sup> Stewart 9.

<sup>142</sup> Stewart 9.

<sup>143</sup> Stewart 9.

<sup>144</sup> “*Diskussions-Entwurf eines Gesetzes zur Reform des Insolvenzrechts.*”

<sup>145</sup> Stewart 9.

<sup>146</sup> “*Referenten-Entwurf eines Gesetzes zur Reform des Insolvenzrechts.*”

<sup>147</sup> Stewart 9-10.



Execution Code<sup>148</sup> that applied in East Germany was amended<sup>149</sup> and adopted for application in the former German Democratic Republic.<sup>150</sup> In 1991 the government released the Government Draft of an Insolvency Code,<sup>151</sup> and in 1992 it released a draft Introductory Statute<sup>152</sup> that included a total redrafting of the Statute on Noninsolvency Avoidance of Transactions by the Debtor<sup>153</sup> and detailed provisions on international application of the insolvency statute.<sup>154</sup>

In the meantime, the interim measures that had been made applicable to insolvency proceedings in East Germany, were as a result of the wider law reform programme taking place in West Germany. The idea was that the East German law would be repealed and brought into line with West German law with the promulgation of a new insolvency statute.<sup>155</sup>

The government's draft of a new insolvency statute was debated at a committee hearing of the Legal Committee of the *Deutscher Bundestag*<sup>156</sup> with many critical voices being raised against the draft.<sup>157</sup> In response to this criticism, the committee proposed various changes to the statute which included a special proceeding in respect of consumer insolvencies.<sup>158</sup> The committee's new draft was accepted by the *Bundestag* and the Bill was passed in April 1994.<sup>159</sup>

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<sup>148</sup> “*Gesamtvollstreckungsordnung.*”

<sup>149</sup> See the version of the *Gesamtvollstreckungsordnung* promulgated on 23 May 1991 (BGBl I p 1185).

<sup>150</sup> Stewart 9-10.

<sup>151</sup> “*Regierungs-Entwurf einer Insolvenzordnung.*”

<sup>152</sup> “*Entwurf eines Einführungsgesetzes zur Insolvenzordnung.*”

<sup>153</sup> “*Anfechtungsgesetz.*”

<sup>154</sup> Stewart 10.

<sup>155</sup> See Schäfer.

<sup>156</sup> The German Lower House of Parliament.

<sup>157</sup> Stewart 10.

<sup>158</sup> Stewart 10.

<sup>159</sup> Stewart 10.

The *Bundesrat*,<sup>160</sup> however, objected to the proposals by appealing to the *Vermittlungsausschuß*<sup>161</sup> and demanded that provision be made for the increased burden on the courts that the proposals were likely to cause.<sup>162</sup> The *Bundesrat* also demanded a formally separate consumer proceeding. In response to these demands the *Vermittlungsausschuß*'s only response was to delay the effective date of the statute to 1 January 1999, and ignored all other demands by the *Bundesrat*.<sup>163</sup> The *Vermittlungsausschuß*'s proposals were approved by the *Bundestag* on 17 June 1994 and by the *Bundesrat* on 18 July 1994.<sup>164</sup> The final statutes, namely the *Insolvenzordnung* (Insolvency Code) and the *Einführungsgesetz zur Insolvenzordnung* (Introductory Statute) were published in the *Bundesgesetzblatt* (Federal Legislative Register) on 5 October 1994.<sup>165</sup>

As of 1 January 1999, the *Insolvenzordnung* (Insolvency Code) of 5 October 1994 has replaced the previous insolvency statute, the *Konkursordnung* (Bankruptcy Code) of 20 May 1898, the *Vergleichsordnung* (Reorganisation Code) of 26 February 1935 and the *Gesamptsvollstreckungsordnung* (Aggregate Execution Code) of 23 May 1991. According to Stewart<sup>166</sup> the *Einführungsgesetz zur Insolvenzordnung* (Act Introducing the Insolvency Code) of 5 October 1994 completely amends the *Anfechtungsgesetz* (Statute on Noninsolvency Avoidance of Transactions by the Debtor) of 20 May 1898. In addition, the promulgation of Germany's new insolvency statute has brought about the repeal of nine statutes and the amendment of 99 other statutes.<sup>167</sup>

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<sup>160</sup> The German Upper House of Parliament.

<sup>161</sup> Conference Committee.

<sup>162</sup> Stewart 10. See also Schäfer.

<sup>163</sup> Stewart 10.

<sup>164</sup> Stewart 10.

<sup>165</sup> Stewart 10. See also Paulus "The New German Insolvency Code" 1998 33 *Texas International Law Journal* 141-155 (hereinafter referred to as Paulus).

<sup>166</sup> Stewart 10.

<sup>167</sup> Stewart 10. For a useful summary of the mechanics of the new German Insolvency Code, see Paulus 141-155.

### 4 3 Current philosophy of German insolvency law

Although there are, according to Stewart,<sup>168</sup> still some serious shortcomings in the German framework of insolvency law, it must be said that Germany has now introduced a truly unified insolvency statute that contains many similarities with the United States Bankruptcy Code.<sup>169</sup> What makes the German Insolvency Code remarkable in the innovative sense, is that they have introduced a “single gateway” approach to insolvency, where all bankruptcies are filed through the insolvency courts.<sup>170</sup> This is similar to the United States system of bankruptcy that is operated through a well organised system of bankruptcy courts.

The current philosophy of German insolvency law is evident from the following underlying principles of the new Bankruptcy Code:<sup>171</sup>

- (a) *Unified insolvency proceedings.*<sup>172</sup> The German Insolvency Code has introduced a unified insolvency system that streamlines and consolidates all the previous legislation that existed in regard to insolvency law.<sup>173</sup> Included in this new system is a revised approach towards reorganisations which now provides for an ailing business to seek help before recovery of the business becomes impossible. This has been done by removing the insolvency requirement before a reorganisation can be entered into, replacing it with a more attainable requirement, namely “threatened illiquidity”.<sup>174</sup> In addition to this, the German

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<sup>168</sup> Stewart 10-17.

<sup>169</sup> United States Bankruptcy Code, 11 USC. See Stewart 11.

<sup>170</sup> However, this “innovation” is not really that new as the insolvency courts, as part of the local country courts, had already existed under the *Konkursordnung*.

<sup>171</sup> See generally Stewart 11-16; Paulus 143-144.

<sup>172</sup> See Paulus 143.

<sup>173</sup> Stewart 11.

<sup>174</sup> Stewart 11.

Insolvency Code also introduces a system whereby the debtor may manage the bankruptcy on its own, subject to the supervision of an administrator. These provisions are very similar to the United States' "debtor-in-possession" principles provided for in the United States Bankruptcy Code.<sup>175</sup> Finally, the German Insolvency Code is also "unified" in the sense that there is now one Insolvency Code for the entire territory that previously consisted of the Federal Republic of Germany and the German Democratic Republic.<sup>176</sup>

- (b) *Increased creditor independence.*<sup>177</sup> According to Stewart<sup>178</sup> the German Insolvency Code attempts to strike a balance between creditors running their own affairs in insolvency proceedings, and subordinating creditors' rights for the common good. This is done by giving creditors a large degree of independence, but at the same time allowing the court to overrule the conduct of creditors where it is required. These rights of the creditors are interspersed between a number of provisions, but the Insolvency Code achieves its goal by allowing creditors more rights in regard to various administrative procedures, for example the right to appoint their own administrator and the right to constitute a creditors committee.<sup>179</sup> This independence that has been given to the creditors is tempered by the court's powers to overrule them should they overstep the mark.<sup>180</sup>
- (c) *Avoidance measures.* Although not really pertinent to the scope of this study, it is worth pointing out that the German Insolvency Code has tightened the measures relating to the avoidance of antecedent transactions. One of the interesting aspects of this is the fact that

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<sup>175</sup> Stewart 11.

<sup>176</sup> Stewart 11.

<sup>177</sup> See Paulus 143.

<sup>178</sup> Stewart 11.

<sup>179</sup> This aspect of creditor independence is also not a new concept. Under the *Konkursordnung* the creditors also had the right to elect their own trustee at the first creditors meeting.

<sup>180</sup> Stewart 11-12.

they have reduced the burden of proof by removing the need to prove actual intent by the debtor. By introducing gross negligence as an objective test, and by introducing a number of presumptions in this regard, the avoidance provisions have been substantially tightened.<sup>181</sup>

- (d) *Secured creditors.* In contrast to the previous insolvency laws that applied in Germany, secured creditors are also now included in insolvency proceedings. However, their rights are limited in certain respects, especially as regards the ambit of their secured rights, although they are allowed to participate and vote in the creditors' assembly.<sup>182</sup>
- (e) *Labour issues.*<sup>183</sup> An important issue in any country's insolvency laws today, the German Insolvency Code goes a long way towards protecting employees in insolvency. According to Stewart there are sixteen provisions in the German Insolvency Code that directly address labour issues. However, the Insolvency Code does strive to strike a balance and does not try to preserve jobs at the expense of everything else. What it does do, however, is to anchor labour law principles firmly into insolvency. An example of this is the right of employees to be represented in a creditors' committee.<sup>184</sup>

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<sup>181</sup> Stewart 12.

<sup>182</sup> Although secured creditors are able to participate in the procedures, they have no "real" part in the proceeding because they are not seen as bankruptcy creditors. This is so because their claims are settled apart from the bankruptcy procedures, and not out of the other estate assets as ordinary creditors' claims would be.

<sup>183</sup> Stewart 14; Paulus 144.

<sup>184</sup> For more detail regarding labour issues in the German Insolvency Code see Stewart 14-15. This has also become a trend in South African insolvency law: eg s 38 of the Insolvency Act (dealing with the termination of employment contracts); s 197 of the Labour Relations Act 66 of 1995 (dealing with the obligation of a purchaser of a business to take over the existing employment contracts of that business); s 98A of the Insolvency Act (providing for an improved dispensation for employees arrear salary claims upon the insolvency of the employer).

- (f) *Release from remaining liabilities.*<sup>185</sup> Although a complete “fresh start” is not afforded debtors under the German Insolvency Code, sections 286-303 of the Insolvency Code do provide some relief to *bona fide* debtors who co-operate with the administrator, the court and the creditors.<sup>186</sup>
- (g) *Proceedings relating to consumer bankruptcy, and other simplified proceedings.* It is interesting to note that German insolvency law attempts, as far as possible, to keep consumer bankruptcy cases out of the courts and therefore out of the formal proceedings.<sup>187</sup> This is done by only allowing consumer debtors to enter an insolvency proceeding if all other attempts at reaching an arrangement with the creditors have failed. These “other attempts” that are referred to consist of extra-judicial agreements, debt adjustment plans and a release from remaining liabilities.<sup>188</sup> These alternatives to bankruptcy are contained in a simplified, inexpensive proceeding in Part Nine of the Insolvency Code. Briefly stated, these alternatives to consumer bankruptcy are designed to make it more attractive to creditors to enter into agreements with the debtor for the re-scheduling and repayment of debt. Failing an agreement within these extra-judicial guidelines, the debtor can petition the court to enter insolvency proceedings, resulting in bigger losses for the creditors and, more importantly, bringing about a discharge for the

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<sup>185</sup> See Paulus 143.

<sup>186</sup> Stewart 16. It must be pointed out that only consumer debtors qualify for a fresh start. It is also worth pointing out that some of the regulations of the old *Vergleichsordnung* were incorporated into ss 286-303 of the *Insolvenzordnung*.

<sup>187</sup> See part nine of the German Insolvency Code.

<sup>188</sup> These innovations in the German Insolvency Code appear to be similar to common-law compositions, administration orders and statutory compositions under South African law.

debtor.<sup>189</sup> The provisions are therefore designed to make it clear to both the debtor and the creditor that it is advisable to enter into an extra-judicial settlement.<sup>190</sup>

#### 4 4 Conclusion

Although the Federal Republic of Germany has adopted what can be described as one of the most modern (unified) insolvency systems at present, the underlying principles of their Code is only of limited use in a South African context. It is worth expanding on this view:

- (a) In the first place German insolvency law makes use of specialist insolvency courts, something that will not become a feature of South African insolvency law for a long time to come, if ever.<sup>191</sup> By having a system of insolvency courts it is possible to have a “single gateway” approach to bankruptcy where all debtors are able to use the same procedure to obtain relief. This system also presupposes a reasonably debtor-friendly system whereby relief will be given to those seeking it.<sup>192</sup> In South Africa there is not only an absence of insolvency courts, but the use of a creditor-friendly system requires that there must be some pecuniary benefit to creditors by the use of insolvency proceedings.<sup>193</sup>

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<sup>189</sup> Stewart 16.

<sup>190</sup> Stewart 16. Once again, however, it must be pointed out that an agreement with the creditors can only work if the debtor has substantial assets. If there are no or negligible assets the commencement of insolvency proceedings against the debtor will be a relief to the consumer, because the compulsory execution by single creditors ends and is replaced by orderly insolvency proceedings.

<sup>191</sup> See *Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court* Third and Final Report Vol 1 Book 1 (also known as the Hoexter Commission Report).

<sup>192</sup> In the case of consumer bankruptcy, however, this is subject to the extra-judicial alternatives having been exhausted.

<sup>193</sup> An anomalous situation arises in South Africa in that consumer insolvency requires a benefit to creditors and also forms the basis of South African insolvency law. In the case of corporate insolvency, no benefit to creditors needs to be proved and a company, eg, may even be liquidated by means of a special resolution.

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- (b) Secondly, it is evident from the German Insolvency Code that creditors actively participate in insolvency proceedings. This is unfortunately not the case in South Africa, where creditors tend to be rather apathetic when it comes to actively participating in insolvency proceedings. By involving creditors in what is essentially their own affairs, the need for supervision and intervention in German insolvency law is limited to those instances where this becomes necessary to protect the rights of creditors as a whole.<sup>194</sup>

Despite what has been stated above, the German Insolvency Code is in my view a bold, modern piece of insolvency legislation that strikes a sound balance between a simplified insolvency procedure and the protection of debtor and creditor rights. The Germans have evidently taken a leaf out of the very liberal bankruptcy laws of the United States, and have successfully adapted these principles to their own unique situation. South Africa can learn from the German experience by introducing a uniform insolvency statute, despite the fact that the initial promulgation of such an Act may turn out to be defective in certain areas in practice. Defects in the system will eventually show themselves and can be rectified by means of amendments, an approach which is employed to good effect in, for example, the United States.<sup>195</sup>

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<sup>194</sup> In South Africa creditors do not act independently or without supervision. The Master of the High Court is a government institution that supervises the administration of all estates. However, South African insolvency does allow for a high degree of participation by the creditors.

<sup>195</sup> See par 5 below.



## 5 UNITED STATES OF AMERICA<sup>196</sup>

### 5.1 Introduction

As explained earlier in this study, the United States as an insolvency jurisdiction has been selected because it has a completely unified system of insolvency law. As such it could possibly serve as a template for insolvency law reform worldwide, and not only in South Africa. An additional reason for including this insolvency jurisdiction is the fact its bankruptcy system also has its roots in English law.<sup>197</sup> What makes the American system of bankruptcy so fascinating is the fact that it has developed tremendously, especially in the last century or so. In fact, the American system of insolvency has developed to such an extent that it is barely recognisable from the insolvency system from which it obtained its roots, namely English insolvency law.

In this brief review of American bankruptcy law, the focus will be on the development of its insolvency system from its English roots to its current form. Of special interest will be the wholesale reform that took place in 1978, the reasons behind the reforms and the current philosophy underlying insolvency law in the United States. Of special importance will be determining how the United States was able to introduce such a liberal system of insolvency, while other countries to a large extent still rely on relatively conservative historical rules in this field of the law.

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<sup>196</sup> See generally Tabb “The History of the Bankruptcy Laws in the United States” 1995 (June) *ABI Law Review* 5-51 (hereinafter referred to as Tabb); Skeel “The Genius of the 1898 Bankruptcy Act” 1999 15(2) *Bankruptcy Developments Journal* 321-341 (hereinafter referred to as Skeel); Tabb “A Century of Regress or Progress? A Political History of Bankruptcy” 1999 15(2) *Bankruptcy Developments Journal* 343-381 (hereinafter referred to as Tabb “Regress or Progress?”); Klee “Legislative History of the New Bankruptcy Code” 1980 54(3) *American Bankruptcy Law Journal* 275-297 (hereinafter referred to as Klee); Kennedy and Clift “An Historical Analysis of Insolvency Laws and Their Impact on the Role, Power, and Jurisdiction of Today’s United States Bankruptcy Court and Its Judicial Officers” 9 *Journal of Bankruptcy Law and Practice* 165-200 (hereinafter referred to as Kennedy and Clift); Dalhuisen par 3.09 1-94–1-117; Herbert *Understanding Bankruptcy* (1995) ch 3 and ch 4 (hereinafter referred to as Herbert); Jackson *The Logic and Limits of Bankruptcy* (1986) 1-19 (hereinafter referred to as Jackson); Albergotti *Understanding Bankruptcy in the US: A Handbook of Law and Practice* (1992) 1-3 (hereinafter referred to as Albergotti). For detailed treatises on the history of United States bankruptcy laws, see Coleman *Debtors and Creditors in America* (1974); Warren *Bankruptcy in United States History* (1935).

<sup>197</sup> Tabb 6.

## 5 2 American bankruptcy laws prior to 1978

The United States Constitution includes the power to enact uniform laws on the subject of bankruptcies.<sup>198</sup> It is evident that the drafters of the Constitution had the English insolvency system in mind when including this power in the Constitution, as the first United States bankruptcy law which was passed in 1800, virtually copied the English law of that time.<sup>199</sup> It can therefore be stated that the United States bankruptcy laws have their conceptual origins in the English bankruptcy laws that existed prior to 1800.<sup>200</sup> Consequently United States bankruptcy laws were initially of a pro-creditor nature, something which has changed over the years as the United States now has a pro-debtor system.

As regards the early insolvency laws that applied in the United States, reference is made to the first bankruptcy laws passed in England, namely the 1542 Act<sup>201</sup> that was passed during the reign of Henry VIII.<sup>202</sup> Reference is also made to the Act that was passed in 1570<sup>203</sup> during the reign of Queen Elizabeth I, an Act which remained in force until the time of the American Revolution.<sup>204</sup> At this time the bankruptcy laws were strictly creditor-driven procedures, and a discharge for the debtor was not provided for.<sup>205</sup> In addition, the bankruptcy laws only applied to merchant debtors or traders.<sup>206</sup> If the debtor had committed an act of bankruptcy the creditors could petition the

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<sup>198</sup> United States Constitution, art 1 s 8 cl 4. See Dalhuisen par 3.09[1] 1-94; Herbert 49.

<sup>199</sup> Tabb 6-7; Dalhuisen par 3.09[1] 1-94.

<sup>200</sup> Tabb 7.

<sup>201</sup> 34 & 35 Hen 8 c 4 (1542-1543)

<sup>202</sup> Tabb 7.

<sup>203</sup> 13 Eliz c 7 (1570).

<sup>204</sup> Tabb 8.

<sup>205</sup> Tabb 8.

<sup>206</sup> Tabb 9.

Lord Chancellor in order to convene a bankruptcy proceeding.<sup>207</sup> The Chancellor would in turn appoint bankruptcy commissioners to supervise the process of seizing and selling the debtor's assets.<sup>208</sup> If the debtor was a non-merchant, there were separate insolvency laws that applied and that made provision for release from prison and a relief from debt in certain circumstances.<sup>209</sup>

The next two centuries saw sporadic amendments<sup>210</sup> to the bankruptcy laws, the amendments in many cases seeking to strengthen the powers of commissioners to make the bankruptcy laws more effective.<sup>211</sup> In 1705 the Statute of Anne<sup>212</sup> was passed, marking the completion of English bankruptcy law of this era.<sup>213</sup> The 1705 statute was noteworthy as it introduced a discharge of debts for co-operative debtors.<sup>214</sup> Although the statute remained of a semi-criminal nature, the foundation was laid for a more humane approach to honest debtors who had suffered misfortune.<sup>215</sup> At this time the bankruptcy laws were still very much creditor-orientated, and the discharge that was provided for was introduced more as a measure to assist creditors than as a measure to assist defaulting debtors.<sup>216</sup> Also, a discharge was not an automatic entitlement as the commissioners had to certify that the debtor had in fact been co-operative.<sup>217</sup> In 1706 creditor

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<sup>207</sup> Tabb 8.

<sup>208</sup> Tabb 8.

<sup>209</sup> Tabb 9.

<sup>210</sup> For a list of these amendments, see Tabb 10 fn 30.

<sup>211</sup> Tabb 10.

<sup>212</sup> 4 Anne c 17 (1705).

<sup>213</sup> Tabb 10.

<sup>214</sup> Tabb 10.

<sup>215</sup> Tabb 10.

<sup>216</sup> Tabb 11.

<sup>217</sup> Tabb 11 points out that there is a similar proviso to a discharge in s 727 of the United States Bankruptcy Code (11 USC) (hereinafter referred to as the Bankruptcy Code), in that a discharge can be denied to a debtor who has not been co-operative in the collection and distribution of the estate.

consent became a prerequisite for the granting of a discharge.<sup>218</sup> Despite the fact that the bankruptcy laws remained pro-creditor for a number of years, by the middle of the eighteenth century a more liberal approach to bankruptcy had established itself, largely due to the changing attitudes regarding credit and commerce that were brought about by the industrial revolution.<sup>219</sup> At the time of the ratification of the United States Constitution and the promulgation of the first American bankruptcy law in 1800, the 1732 Statute of George II<sup>220</sup> was the English bankruptcy law that applied.<sup>221</sup> The 1732 Statute of George II served as the model for the United States 1800 Act,<sup>222</sup> retaining many of its attributes such as a discharge for co-operative debtors.<sup>223</sup>

During the colonial era of American history many of the states had passed comprehensive laws regulating debtor and creditor relations.<sup>224</sup> However, these laws were varied in their ambit and application and because the Articles of Confederation made no provision for federal bankruptcy legislation, state regulation of these issues continued.<sup>225</sup> Due to the problems that could be experienced in the field of commerce and by non-resident creditors, it was felt that bankruptcy legislation should be a subject of federal legislation.<sup>226</sup> Consequently a bankruptcy clause was added to the proceedings of the Constitutional Convention, although very little debate accompanied its inclusion.<sup>227</sup> However, for more than a century the bankruptcy clause in the

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<sup>218</sup> Tabb 11.

<sup>219</sup> Tabb 11.

<sup>220</sup> 5 Geo 2 c 30 (1732).

<sup>221</sup> Tabb 12.

<sup>222</sup> Dalhuisen par 3.09[1] 1-94.

<sup>223</sup> Tabb 12.

<sup>224</sup> Tabb 12.

<sup>225</sup> Tabb 12-13.

<sup>226</sup> Tabb 13.

<sup>227</sup> Tabb 13.

Constitution remained largely unexercised by the United States Congress. Tabb<sup>228</sup> points out that federal bankruptcy laws were only in existence between 1800 to 1803,<sup>229</sup> from 1841 to 1843<sup>230</sup> and from 1867 to 1878,<sup>231</sup> the first permanent federal bankruptcy legislation only coming into effect in 1898.<sup>232</sup>

On 4 April 1800 the first permanent federal bankruptcy law was passed,<sup>233</sup> and was to a large extent modelled on the 1732 Statute of George II.<sup>234</sup> The statute also had many of the features of the Pennsylvania bankruptcy statute that applied at the time.<sup>235</sup> The statute could still only be used by creditors and it only applied to merchants, but a discharge for co-operative debtors was permitted under the Act.<sup>236</sup> Although the Act was only intended to operate for five years, it was repealed after only three,<sup>237</sup> the main reason being small dividends and abuse of the system by unscrupulous debtors.<sup>238</sup> After the repeal of the Bankruptcy Act of 1800, the states themselves regulated relations between debtors and creditors, although two decisions of the United States Supreme Court did make life difficult for debtors. The first case, namely *Sturges v*

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<sup>228</sup> Tabb 13.

<sup>229</sup> Bankruptcy Act of 1800 c 19 2 Stat 19 (repealed by Act of Dec 19 1803 c 6 2 Stat 248).

<sup>230</sup> Bankruptcy Act of 1841 c 9 5 Stat 440 (repealed by Act of Mar 3 1843 c 82 5 Stat 614).

<sup>231</sup> Bankruptcy Act of 1867 c 176 14 Stat 517 (repealed by Act of June 7 1878 c 160 20 Stat).

<sup>232</sup> Tabb 14 points out that each federal law was passed as a result of some or other major financial disaster, following the Panic of 1797, the Panic of 1837 and the Panic of 1857 and the Civil War respectively. The 1898 Act was passed after the Panic of 1893. See also Kennedy and Clift 170-171; Skeel 323; Herbert 49.

<sup>233</sup> Bankruptcy Act of 1800 (c 19 2 Stat 19).

<sup>234</sup> Tabb 14; Kennedy and Clift 171.

<sup>235</sup> Tabb 14; Kennedy and Clift 171.

<sup>236</sup> Tabb 14-15.

<sup>237</sup> Tabb 14; Kennedy and Clift 171.

<sup>238</sup> Tabb 15; Kennedy and Clift 171.

*Crowninshield*,<sup>239</sup> held that states could not constitutionally discharge pre-existing debts. In the second case, namely *Ogden v Saunders*,<sup>240</sup> the court held that states could discharge future debts against citizens of the same state, but not against citizens of another state.<sup>241</sup>

The Bankruptcy Act of 1841<sup>242</sup> was eventually passed as a result of numerous factors, not least due to the Panic of 1837.<sup>243</sup> This Act also followed numerous attempts to introduce bankruptcy legislation that provided for both voluntary and involuntary bankruptcy.<sup>244</sup> This was eventually achieved in the Bankruptcy Act of 1841, but the Act did not apply to corporations.<sup>245</sup> However, this Act too was not successful from the viewpoint of creditors as they received small dividends and faced high administration expenses.<sup>246</sup> Consequently the Act was repealed a little more than a year after it had come into operation.<sup>247</sup> Despite its repeal, the Act had entrenched some important principles that would never again be questioned, namely the use of voluntary proceedings by debtors and the marriage of the concepts of insolvency and bankruptcy.<sup>248</sup>

The Panic of 1857 and the financial crisis caused by the American Civil War, led to the enactment of the Bankruptcy Act of 1867.<sup>249</sup> The only major differences between the 1841 Act and the 1867

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<sup>239</sup> 17 US (4 Wheat) 122 (1819).

<sup>240</sup> 25 US (12 Wheat) 213 (1827).

<sup>241</sup> Tabb 15.

<sup>242</sup> C 9 5 Stat 440.

<sup>243</sup> Tabb 16; Kennedy and Clift 171; Dalhuisen par 3.09[1] 1-94.

<sup>244</sup> Tabb 16; Kennedy and Clift 171. For other important features of this Act see Kennedy and Clift 171-172.

<sup>245</sup> Tabb 16-17.

<sup>246</sup> Tabb 18.

<sup>247</sup> Tabb 18; Dalhuisen par 3.09[1] 1-94.

<sup>248</sup> Tabb 18. Tabb refers to the 1841 Act as “the first modern bankruptcy law”. See also Kennedy and Clift 171-172; Dalhuisen par 3.09[1] 1-94.

<sup>249</sup> C 176 14 Stat 517. See also Dalhuisen par 3.09[1] 1-94–1-95.

Act was the fact that it now also applied to corporations, the restriction of involuntary bankruptcy to merchants was dropped and the list of the acts of bankruptcy was extended.<sup>250</sup> This Act also started to shape the current system used by the United States in regard to the judicial mechanisms that were used for dealing with bankruptcy cases.<sup>251</sup> The criticisms against this Act were the same as against the previous Acts, and consequently the Act was repealed in 1878.<sup>252</sup> At the time the 1867 Act found application, a new innovation in the form of a composition agreement had been introduced into bankruptcy legislation in 1874.<sup>253</sup> This was the forerunner of modern re-organisation provisions and was quite advanced in its application.<sup>254</sup>

An important turn of events in American bankruptcy history was the introduction of equity receiverships that emanated from the financial woes of the railroad companies.<sup>255</sup> Due to the repeal of federal bankruptcy law (and consequently also the compositions that were introduced in 1874), there were no mechanisms in place to assist the ailing railroad companies which were of strategic economic importance at the time.<sup>256</sup> State remedies were of no assistance due to the interstate nature of the railroads.<sup>257</sup> In order to assist the railroads, the power of the federal courts was used to supervise their restructuring, thereby ensuring their continued important role in the

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<sup>250</sup> Tabb 19; Kennedy and Clift 172; Dalhuisen par 3.09[1] 1-94.

<sup>251</sup> Tabb 19.

<sup>252</sup> Tabb 19. However, there were some positive aspects to flow from this Act. See Tabb 20-21 for a discussion of especially the state exemption laws that applied at the time. See also Dalhuisen par 3.09[1] 1-95.

<sup>253</sup> This innovation was introduced by the Act of June 22 1874 c 390 ss 17 18 Stat 178 182-184 and was repealed in 1878. See Kennedy and Clift 173; Dalhuisen par 3.09[1] 1-95.

<sup>254</sup> Tabb 21. For a brief discussion of how the composition worked and what it provided for, see Tabb 21. Of special note here is the fact that the composition was held to fall under the subject of bankruptcy. See also Kennedy and Clift 173 for a discussion of these compositions.

<sup>255</sup> Tabb 21.

<sup>256</sup> Tabb 21; see also Dalhuisen par 3.09[4] 1-99–1-100.

<sup>257</sup> Tabb 21-22.

economy.<sup>258</sup> These court-supervised receiverships remained in place until federal reorganisation laws were enacted nearly half a century later.<sup>259</sup>

The next important phase in American bankruptcy history was the enactment of the Bankruptcy Act of 1898<sup>260</sup> and its subsequent amendments.<sup>261</sup> This Act remained in force for eighty years, being repealed by America's current bankruptcy legislation, namely the Bankruptcy Reform Act of 1978.<sup>262</sup> The 1898 Act also signalled the beginning of the era of permanent federal bankruptcy legislation.<sup>263</sup> In passing the legislation through Congress there were many important aspects that needed to be considered, *inter alia* whether the legislation should be of a permanent or temporary nature and whether it should be used by creditors and debtors or only by debtors.<sup>264</sup> Ultimately the 1898 Act ushered in the modern area of liberal debtor treatment in the United States,<sup>265</sup> although much of the Act was aimed at ensuring an equitable division of the debtor's assets amongst the creditors and not at debtor relief.<sup>266</sup> The Act itself regulated some very important aspects: the Supreme Court was vested with the power to prescribe rules, forms and orders for

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<sup>258</sup> Tabb 22.

<sup>259</sup> Tabb 22. Many of the features of these receiverships are still identifiable in modern reorganisation legislation, including that of the United States. A receiver would take over the assets and run the railroad while looking for a buyer of the assets. The creditors were eventually paid out of the proceeds of a foreclosure of the assets and, since the business could be sold as a going concern, a higher price was realised and jobs were preserved (see Tabb 22). This is still one of the most important aspects of a business rescue culture - see ch 10 below and Tabb 23. In regard to receiverships during this time, see also Dalhuisen par 3.09[4] 1-99-1-100.

<sup>260</sup> C 541 30 Stat 544.

<sup>261</sup> Tabb 23-32; Kennedy and Clift 174-178. For a detailed discussion of the 1898 Bankruptcy Act, see Skeel 321-341; Tabb "Regress or Progress?" 353-381.

<sup>262</sup> Tabb 23; Herbert 49-50.

<sup>263</sup> Tabb 23. For a discussion of the most important aspects of this Act, see Kennedy and Clift 175. See also Skeel 322; Dalhuisen par 3.09[2] 1-951-98; Jackson 1.

<sup>264</sup> Tabb 23.

<sup>265</sup> For a discussion of these aspects see Tabb 24-25; Kennedy and Clift 175; Skeel 322-323.

<sup>266</sup> Tabb 25.



procedure;<sup>267</sup> creditors exercised increased control over the bankruptcy process by being allowed to elect a trustee; and federal district courts sat as courts of bankruptcy, although most of the work was done by referees who were appointed by the district courts.<sup>268</sup> These referees were eventually appointed bankruptcy judges in 1973.<sup>269</sup>

Another important aspect of the 1898 Act was that corporations were unable to make use of the voluntary bankruptcy procedure, although certain types of business corporations were subject to involuntary bankruptcy procedures.<sup>270</sup> The Act did however make provision for the bankruptcy of partnerships.<sup>271</sup> Compositions as an alternative to liquidation was re-introduced in the 1898 Act, although the procedures in order to approve the composition did differ.<sup>272</sup> Once a composition was accepted by the requisite majority, the bankruptcy case was dismissed.<sup>273</sup> Despite numerous attempts to have the 1898 Bankruptcy Act repealed, the Act survived and was subjected to numerous amendments, especially during the years of the Depression and during the presidency of Hoover.<sup>274</sup> The Depression era brought about numerous pro-debtor amendments that assisted the rehabilitation of debtors through bankruptcy.<sup>275</sup> Compositions and reorganisations became more readily available from 1933,<sup>276</sup> and corporate reorganisations were sanctioned a year

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<sup>267</sup> See also Dalhuisen par 3.09[2] 1-97–1-98.

<sup>268</sup> Tabb 25; Kennedy and Clift 175-176.

<sup>269</sup> Tabb 25.

<sup>270</sup> S 4b 30 Stat 547; Tabb 26; Kennedy and Clift 175.

<sup>271</sup> S 5 30 Stat 547; Tabb 26.

<sup>272</sup> Tabb 26; Kennedy and Clift 175; Dalhuisen par 3.09[2] 1-97.

<sup>273</sup> S 12e 30 Stat 550; Tabb 26.

<sup>274</sup> For a brief discussion of these amendments and their content, see Tabb 26-30.

<sup>275</sup> Tabb 28.

<sup>276</sup> See Dalhuisen par 3.09[5] 1-100–1-105.

later in 1934.<sup>277</sup> The next important event in the history of the United States bankruptcy laws was the so-called Chandler Act, which was passed in 1938.<sup>278</sup> The effect of the Chandler Act was to substantially review almost all of the provisions of the 1898 Act and to update the whole of the process of bankruptcy law.<sup>279</sup> The most important amendments brought about by the Chandler Act were the provisions relating to reorganisations, which were now incorporated into the Act itself.<sup>280</sup> Although many amendments were made to the 1898 Bankruptcy Act between 1938 and 1978, most were passed to address specific issues and were not of a general nature.<sup>281</sup> In 1970 the United States Congress created the Commission on the Bankruptcy Laws of the United States.<sup>282</sup> The purpose of the Commission was to study and report on the existing bankruptcy laws and when it did lodge its report in 1973, the Bankruptcy Reform Act followed five years later in 1978, replacing the 1898 Act with the current Bankruptcy Code of 1978.<sup>283</sup>

### 5.3 American bankruptcy legislation after 1978

The Bankruptcy Reform Act of 1978 represented the first major overhaul of the federal bankruptcy laws for forty years, and repealed the law that had been in operation for eighty

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<sup>277</sup> This was done by means of Act of June 7 1934 c 424 48 Stat 911, 912-925, which created s 77B of the 1898 Bankruptcy Act. See also Tabb 28; Herbert 50.

<sup>278</sup> C 575 52 Stat 840 (1938). See also Kennedy and Clift 176-177 for a discussion of the Chandler Act.

<sup>279</sup> Tabb 29; Kennedy and Clift 176; Herbert 50.

<sup>280</sup> Tabb 30; Kennedy and Clift 176. The reorganisation provisions were contained in ch X (corporate reorganisations); ch XI (arrangements); ch XII (real property arrangements); and ch XIII (wage earner plans). Kennedy and Clift, with reference to *Wright v Union Cent Life Ins Co* 311 US 273 61 S Ct 196 85 L Ed 184 (1940), point out that since 1938 there has been a Congressional policy favouring reorganisation over liquidation whenever possible. See also Dalhuisen par 3.09[5] 1-101-1-105.

<sup>281</sup> See Tabb 30-32 for a discussion of these amendments and their relevance at the time.

<sup>282</sup> Act of July 24 1970 84 Stat 468.

<sup>283</sup> Tabb 32.

years.<sup>284</sup> What made the enactment of the Bankruptcy Reform Act so significant was that it was not preceded by any of the financial calamities that had underscored previous bankruptcy legislation.<sup>285</sup> It is not intended to deal with all the reforms<sup>286</sup> brought about by the Bankruptcy Code when it came into operation on 1 October 1979.<sup>287</sup> However, the main issues that were addressed can be summarised as follows:

- (a) The status of bankruptcy judges;<sup>288</sup>
- (b) Improvement of the administration process;<sup>289</sup>
- (c) Merging of all the provisions relating to reorganisation into one chapter of the Bankruptcy Code (Chapter 11);<sup>290</sup>
- (d) Encouraged greater use of the Chapter 13 procedure relating to the adjustment of debts of individuals;<sup>291</sup> and

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<sup>284</sup> Tabb 32. For a detailed discussion of the legislative history of the Bankruptcy Reform Act, see Klee 275-297. For a discussion of the main features of the Bankruptcy Reform Act see Kennedy and Clift 178-180; Dalhuisen par 3.09[7] 1-106-1-117.

<sup>285</sup> Tabb 32; Klee 277.

<sup>286</sup> See *Report of the Commission on the Bankruptcy Laws of the United States* (1973) which preceded the Bankruptcy Reform Act of 1978.

<sup>287</sup> See also Klee 275; Herbert 51.

<sup>288</sup> Tabb 34; Klee 280; Kennedy and Clift 178-179. See also *Report of the Commission on the Bankruptcy Laws of the United States* (1973) ch 4.

<sup>289</sup> Tabb 35. See also *Report of the Commission on the Bankruptcy Laws of the United States* (1973) ch 5.

<sup>290</sup> Tabb 35. For a detailed discussion see *Report of the Commission on the Bankruptcy Laws of the United States* (1973) ch 9.

<sup>291</sup> Tabb 35-36. For a detailed discussion see *Report of the Commission on the Bankruptcy Laws of the United States* (1973) ch 6.

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- (e) A better balance was achieved between the rights of debtors and creditors in bankruptcy proceedings.<sup>292</sup>

There have been various amendments to the Bankruptcy Code since its inception in 1979.<sup>293</sup> These amendments were sparked by various occurrences, for example responses by Congress to decisions of the United States Supreme Court and the lower courts, initiatives by the credit industry to tighten the laws relating to debtors, and the farm crisis of the early 1980s. The most important of these post-1978 reforms was undoubtedly the Bankruptcy Reform Act of 1994.<sup>294</sup> Tabb<sup>295</sup> summarises the most important aspects of this reform Act as follows:

- (a) The creation of a second National Bankruptcy Review Commission;<sup>296</sup>
- (b) The unprecedented number of amendments to the Bankruptcy Code by Congress; and
- (c) The failure to introduce the Chapter 10 procedure for the reorganisation of small business debtors.<sup>297</sup>

#### 5 4 Is United States bankruptcy law truly unified?

Having discussed the legislative history of the United States' bankruptcy laws, the question that may now be asked is whether the Bankruptcy Code is a truly unified insolvency statute. This

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<sup>292</sup> Tabb 36.

<sup>293</sup> For a brief discussion of these amendments and the reasons therefore, see Tab 37-43; Kennedy and Clift 180-182.

<sup>294</sup> 108 Stat 4106. See also *Reforming the Bankruptcy Code* The National Bankruptcy Conference's Code Review Project Final Report (1 May 1994).

<sup>295</sup> Tabb 42-43.

<sup>296</sup> See also Kennedy and Clift 181; Herbert 53.

<sup>297</sup> See also Kennedy and Clift 182.

question may appear to be superfluous in the context of what has already been said about the all-encompassing ambit of the Bankruptcy Code. However, this question is addressed by Tabb who states:<sup>298</sup>

“‘Uniformity’ is problematic in the bankruptcy context because: (i) most laws governing the substance of relationships between debtor and creditors are *state* laws; (ii) these state laws are incorporated into and applied in the federal Bankruptcy Code; and (iii) these state laws are not necessarily uniform. Since debtors and creditors in similar factual situations will often receive different treatment in bankruptcy from state to state, one might conclude that constitutional uniformity is not achieved by the bankruptcy law.”<sup>299</sup>

Tabb reaches the conclusion that the varying state laws do not destroy the uniformity of bankruptcy law in the United States. In doing so he refers to the United States Supreme Court decision in *Hanover National Bank v Moyses*<sup>300</sup> where it was held that the United States Constitution requires geographical uniformity as opposed to personal uniformity.<sup>301</sup> Although Tabb refers to “uniformity” in the constitutional sense of the word in the United States, he nevertheless states the following regarding such uniformity:

“Thus, a bankruptcy law is ‘uniform’ when (i) the substantive law applied in a bankruptcy case conforms to that applied outside of bankruptcy under state law; (ii) the same law is applied to all debtors within a state and to their creditors; and (iii) Congress uniformly delegates to the states the power to fix those laws.”

Consequently the United States’ bankruptcy laws are seen to be “uniform”, especially when reference is made to the federal system of government that is employed in America. South Africa does not have a similar problem as we do not have a federal system of government.

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<sup>298</sup> Tabb 46.

<sup>299</sup> As is the case in Australia (see par 3 above), this is also a constitutional issue and not one based on insolvency considerations.

<sup>300</sup> 186 US 181 (1902).

<sup>301</sup> See Tabb 46-47. The uniformity or not of state laws is referred to as personal uniformity - see Tabb 46. For a detailed discussion of the United States exemption laws (which are regulated by the states themselves) see Dalhuisen par 3.09[6] 1-105-1-106.

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## 5 5 Conclusion

From what has been stated above it is evident that early American bankruptcy laws were based on the English statutes of the time. As the American economic, social and political system progressed, legislation was designed around the specific needs of the population.<sup>302</sup> This saw a divergence from English law as early as the mid-nineteenth century.<sup>303</sup> Although the first federal bankruptcy legislation that was passed under the United States Constitution was to a large extent modelled on English law, this was the beginning of an even bigger divergence from the conservative pro-creditor bankruptcy laws that still applied in England.<sup>304</sup>

As is the case in many countries, the United States' bankruptcy laws were usually only amended or enforced at federal level when some or other financial calamity had struck the American nation. It was only in the late nineteenth century that bankruptcy law became entrenched at federal level. But from that point onward, and it is submitted to a large extent due to the success of the reorganisation provisions contained in the 1898 Act, federal bankruptcy laws have remained permanent. At the present time the Bankruptcy Code has become entrenched, reflecting the importance that Americans attach to this dynamic field of the law.

Dalhuisen,<sup>305</sup> with reference to Riesenfeld, states that “[a] ‘progressing liberalization’ has given the United States bankruptcy policy three primary purposes”. These three primary purposes are stated as being:

- (a) To avoid the pitfalls (“evils”) of liquidation;

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<sup>302</sup> For an insightful discussion of the events that led to the enactment of the 1898 Bankruptcy Act and its divergence from English Law, see Skeel 321-341, especially at 340-341.

<sup>303</sup> See Tabb 16; Skeel 340-341.

<sup>304</sup> See Skeel 327-328.

<sup>305</sup> Dalhuisen par 3.09[7] 1-106–1-107.

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- (b) To relieve the honest debtor from the indebtedness and to provide a fresh start unhampered by pre-existing debt; and
- (c) To ensure an effective and speedy administration of bankrupt estates.

Although this “progressive liberalization” has caused America to move from being a pro-creditor insolvency jurisdiction to becoming a liberal pro-debtor system, nothing ever seems to be cast in stone in the United States. American bankruptcy law can best be described as a dynamic field of the law, ever-changing to meet the needs of the society it serves. This is again reflected in the recent call by credit card companies to tighten the laws relating to a discharge of the debtors that abuse the easy flow of credit from these organisations.<sup>306</sup> Although the United States Bankruptcy Code is a uniform insolvency statute in the true sense of the word, it is submitted that its precise mechanics cannot easily be imported into a country that does not make use of a federal system of government and a federal court system.<sup>307</sup> The Americans have designed their bankruptcy laws around the uniqueness of their socio-economic and political system, and while the effectiveness of their system is to be lauded, it cannot be implemented in its precise form by a country which has only a developing economy.<sup>308</sup> It is for this reason that the content and precise mechanics of the American system is of limited use to South Africa in designing a uniform insolvency Act.<sup>309</sup>

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<sup>306</sup> Tabb “Regress or Progress?” 345.

<sup>307</sup> Skeel 341.

<sup>308</sup> In this regard see Braucher “Harmonizing the Business Bankruptcy Systems of Developed and Developing Nations: Some Issues” 1997 17 *New York Law School Journal of International and Comparative Law* 473-480. Braucher states that a country’s bankruptcy reorganisation system should be viewed as part of its law and policy of economic development, but that this does not necessarily mean that a country’s stage of development is or should be the predominant concern when designing a business bankruptcy system.

<sup>309</sup> It must also be borne in mind that South Africa has elected to retain a relatively conservative pro-creditor system (see part 4 below), which is in conflict with the liberal pro-debtor bankruptcy laws of the United States. Until such time as South Africa has a more liberal system, the bankruptcy laws of the United States will be of limited value in this regard.

Apart from exposing the South African insolvency system's weaknesses as a pro-creditor system, there are also some other lessons to be learnt from the American experience, namely:

- (a) It is in fact possible to bring about an insolvency statute that applies to all debtors. The United States Bankruptcy Code has succeeded in bringing about a single statute dealing with all aspects of insolvency.<sup>310</sup>
- (b) The United States Bankruptcy Code is a fine example of assembling all the relevant aspects of insolvency law under one statute. Not only does the code deal with straight liquidation, but it also has numerous chapters dealing with business rescue and the reorganisation of consumer debt.
- (c) The United States Bankruptcy Code is also an example of how insolvency as a separate legal discipline can evolve. From its humble origins in English law, it has developed into federal legislation that is both liberal and pro-debtor; quite a turn-around from the pro-creditor system it originated from.
- (d) Finally, the United States Bankruptcy Code is a good example of how insolvency can be arranged within a single statute in order to promote the harmonisation of the bankruptcy laws. The arrangement within the Code itself into different chapters, while at the same time leaving spaces open for the introduction of new concepts, can serve as a useful template on which other jurisdictions can model their own insolvency laws.

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<sup>310</sup> Eg, not only does the Bankruptcy Code deal with straight liquidation, but it also deals with business rescue and the reorganisation of consumer debt.





## **PART 4**

### **PROPOSALS FOR A UNIFIED INSOLVENCY ACT**

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In this part proposals will be made for the framework within which a unified insolvency statute can be developed.

University of Pretoria etd - Burdette, DA

**PART 4A**

**THE CONCEPT OF A UNIFIED INSOLVENCY ACT**

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In this part current winding-up law in South Africa will be discussed with particular reference to the problems contained in the “connecting provisions” in section 339 of the Companies Act and section 66 of the Close Corporations Act. Having reached the conclusion that a unified Insolvency Act is the solution to this problem, two further aspects relating to a unified insolvency statute are discussed, namely the definition of “debtor” and the treatment of specialised institutions in a unified Insolvency Act. A discussion of these aspects proves that the implementation of a unified Insolvency Act is both desirable and attainable.



## CHAPTER 5

### THE APPLICATION OF THE LAW OF INSOLVENCY TO THE WINDING-UP OF INSOLVENT COMPANIES AND CLOSE CORPORATIONS

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#### SUMMARY

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#### 1 INTRODUCTION

It has already been stated in this study<sup>1</sup> that the main Act that regulates insolvency law in South Africa is the Insolvency Act 24 of 1936.<sup>2</sup> It has also been shown how this came about, mainly because of the separate development of insolvency law as opposed to winding-up law, the latter always having been contained in separate legislation.<sup>3</sup> Insolvency law has shown immense growth

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<sup>1</sup> See ch 1.

<sup>2</sup> Hereinafter referred to as the Insolvency Act.

<sup>3</sup> It is interesting to note that although a hybrid of Roman-Dutch law and English law forms the basis of the South African insolvency law, and English law forms the basis of winding-up law, the “marriage” of the two systems has not yielded insurmountable problems in practice. This can also be attributed to the fact that English common law has a strong Roman law flavour.

over the past century, mirroring the growth in trade in industrialised nations. This has especially been the case in respect of international commerce, a community which South Africa recently rejoined. This growth has exposed South African insolvency law to be out of step with the rest of the industrialised world, and it has now become necessary to modernise our legislation.

The purpose of this chapter is to provide an exposition of the manner in which companies and close corporations are currently wound up under South African law. This is necessary in order to determine the need for a single insolvency statute in South Africa. In light of the fragmented nature of South African insolvency law, particular attention will be paid to:

- (a) The “connecting provisions” in section 339 of the Companies Act 61 of 1973<sup>4</sup> and section 66 of the Close Corporations Act 69 of 1984.<sup>5</sup> These provisions make the law of insolvency applicable to companies and close corporations that are unable to pay their debts, and require the law of insolvency to be applied where the Companies Act or Close Corporations Act does not contain a provision dealing with a specific matter. It will be shown that the root of the problems experienced with dual insolvency statutes in South Africa can, in the main, be attributed to these connecting provisions.<sup>6</sup>
- (b) Provisions contained in the Companies Act and Close Corporations Act that are similar to those contained in the Insolvency Act, and cross-referencing between Acts. Although section 339 of the Companies Act makes the law of insolvency applicable to companies that are being wound up and that are unable to pay their debts, the legislature thought it prudent to include in the Companies Act:

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<sup>4</sup> Hereinafter referred to as the Companies Act.

<sup>5</sup> Hereinafter referred to as the Close Corporations Act.

<sup>6</sup> However, it must be pointed out that these connecting provisions are necessary in light of the fact that the provisions relating to insolvency have not been duplicated in the Companies Act and the Close Corporations Act. England and Australia do not require these connecting provisions as the insolvency rules have been duplicated in the relevant legislation.

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- (i) Specific provisions relating to specific aspects, for example the appointment, powers and duties of liquidators<sup>7</sup> and provisions relating to interrogations;<sup>8</sup>
  - (ii) Specific references to sections of the Insolvency Act, in addition to the general connecting provision contained in section 339 of the Companies Act. Examples of these are the provisions relating to meetings<sup>9</sup> and the provisions relating to contribution by creditors;<sup>10</sup> and
  - (iii) Specific provisions that only apply to companies or close corporations. An example of this is to be found in section 419 of the Companies Act which provides for the dissolution of a company once it has been completely wound up.<sup>11</sup>

In regard to the problem identified in paragraph (a), it will be shown that the introduction of a unified insolvency statute will remove the current problems being experienced with the use of the connecting provisions in section 339 of the Companies Act and section 66 of the Close Corporations Act.

Likewise, the problems encountered in paragraph (b) will be analysed and it will be shown that the introduction of a unified statute will obviate the need for cross-referencing between Acts in addition to the general connecting provisions contained in section 339 of the Companies Act and section 66 of the Close Corporations Act. The possible manner in which the problems in paragraphs (a) and (b) can be addressed, will be discussed in the conclusion to this chapter.<sup>12</sup>

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<sup>7</sup> Ss 367 to 411 of the Companies Act.

<sup>8</sup> Ss 415 to 418 of the Companies Act.

<sup>9</sup> S 412 of the Companies Act.

<sup>10</sup> S 342(2) of the Companies Act.

<sup>11</sup> These unique provisions that relate only to corporate entities with legal personality will not be discussed here. However, these existing provisions that are found in the Companies Act and the Close Corporations Act have been included in the unified insolvency statute included as Annexure E to this study.

<sup>12</sup> In par 6 below.



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## 2 THE APPLICATION OF INSOLVENCY LAW TO THE WINDING-UP OF COMPANIES

Chapter XIV of the Companies Act, consisting of sections 337 to 426, provides for the winding-up of a company. Nearly all the provisions dealing with winding-up in the Companies Act relate to procedural aspects, with the substantive law of insolvency being regulated by the law of insolvency as contained in the Insolvency Act and the common law. Many of the provisions of the Companies Act deal with the alignment of the provisions of the Companies Act with those of the Insolvency Act,<sup>13</sup> some relate to the fundamental differences between natural and juristic persons, for example the dissolution of a company once the winding-up process has been completed<sup>14</sup> and others with the personal liability of directors in respect of fraudulent trading.<sup>15</sup>

However, the winding-up provisions of the Companies Act cannot on their own be applied in the total administration of an insolvent company. Instead of including the provisions of substantive insolvency law in the Companies Act,<sup>16</sup> the legislature saw fit to make the “law relating to insolvency” applicable also to the winding-up of companies. This was achieved by a general connecting provision that is contained in section 339 of the Companies Act. In addition to this general connecting provision, certain sections in the Companies Act make specific provisions of the Insolvency Act applicable also to companies that are being wound up and are unable to pay their debts.

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<sup>13</sup> Eg s 340 provides for the application of the Insolvency Act’s provisions dealing with impeachable transactions, and sets out the events in respect of the winding-up of a company that will correspond to the sequestration order in the case of individuals or partnerships.

<sup>14</sup> See s 419 of the Companies Act.

<sup>15</sup> See s 424 of the Companies Act.

<sup>16</sup> This is the position in Australia and England - see ch 4 above.

### 3 THE APPLICATION OF INSOLVENCY LAW TO THE WINDING-UP OF CLOSE CORPORATIONS

As in the case of the Companies Act, the Close Corporations Act also contains provisions relating to winding-up.<sup>17</sup> The Close Corporations Act contains considerably less provisions for winding-up than the Companies Act does, but there are nonetheless provisions which, again, are nearly identical to those contained in the Companies Act. Being a more recent Act, however, the Close Corporations Act does contain some innovations which are not to be found in either the Insolvency Act or the Companies Act.<sup>18</sup> The winding-up provisions in the Close Corporations Act are mainly procedural in nature, and make provision for the unique situation that a close corporation finds itself in under South African law.

In the same way that section 339 of the Companies Act makes the law of insolvency applicable to companies that are being wound up and that are unable to pay their debts, so too does section 66 of the Close Corporations Act apply in the case of a close corporation that is unable to pay its debts. Section 66 makes the Companies Act applicable to close corporations, which in turn makes section 339 of the Companies Act applicable. In other words, the law relating to insolvency will apply to a close corporation (that is unable to pay its debts) by virtue of section 339 of the Companies Act read with section 66 of the Close Corporations Act.

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<sup>17</sup> See part IX, ss 66 to 81 of the Close Corporations Act.

<sup>18</sup> Eg the Master may immediately upon the granting of a provisional winding-up order appoint a final liquidator (s 74 of the Close Corporations Act). This is not possible under the provisions of the Insolvency Act or the Companies Act.

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#### 4 THE APPLICATION OF INSOLVENCY LAW TO THE WINDING-UP OF SPECIALISED INSTITUTIONS

It has already been stated that there are various other pieces of specialised legislation that contain their own provisions in respect of winding-up.<sup>19</sup> The provisions contained in these Acts are mainly procedural in nature, and relate to the powers conferred on the governing bodies to intervene in winding-up proceedings, or to initiate such proceedings. The winding-up of these specialised institutions is dealt with in more detail in chapter 7 below.

#### 5 THE CONNECTING PROVISIONS IN SECTION 339 OF THE COMPANIES ACT AND SECTION 66 OF THE CLOSE CORPORATIONS ACT, DUPLICATION AND CROSS-REFERENCING

##### 5.1 Introduction

It is a well-accepted fact that the Insolvency Act is the central insolvency legislation in South Africa.<sup>20</sup> All other Acts which provide for winding-up, liquidation and the like, are ancillary to the Insolvency Act. In effect this means that the administration of insolvent estates takes place

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<sup>19</sup> See part VI of the Long Term Insurance Act 52 of 1998; part VI of the Short Term Insurance Act 53 of 1998; s 29 of the Pension Funds Act 24 of 1956; s 35 of the Friendly Societies Act 25 of 1956; s 18C of the Medical Schemes Act 72 of 1967; ss 27, 28 and 39 of the Unit Trusts Control Act 54 of 1981; ch X of the Co-Operatives Act 91 of 1981; s 33 of the Financial Markets Control Act 55 of 1989; s 68 of the Banks Act 94 of 1990; and ch VIII of the Mutual Banks Act 124 of 1993.

<sup>20</sup> See *Woodley v Guardian Assurance Co of SA Ltd* 1976 1 SA 758 (W). The Van Wyk de Vries Commission (*Kommissie van Ondersoek na die Maatskappywet (Hoofverslag RP 45/1970)* and (*Aanvullende Verslag en Konsepwetsontwerp RP 31/1972*) - hereinafter referred to as the Van Wyk de Vries Commission) stated it thus at ch XIX par 50.02(b): “Ons beskou die Insolvensiewet as die heersende Wet.”

under the provisions contained in the Insolvency Act, and that all other Acts which make provision for corporate insolvency are designed to slot into this process. However, the Insolvency Act only applies once winding-up has been effected under the separate legislation which governs such a corporation, for example the Companies Act or the Close Corporations Act.

In terms of the definition of “debtor” in the Insolvency Act,<sup>21</sup> only the estates of natural persons and partnerships may be sequestrated.<sup>22</sup> The liquidation of corporations, such as companies or other bodies corporate, is specifically excluded by the definition. This means that the procedure for bringing about a winding-up order is contained in separate legislation, such as the Companies Act or Close Corporations Act. Only once this procedure has been successfully implemented can the provisions of the Insolvency Act apply, and then not in all cases, as the enabling legislation often contains its own provisions in respect of certain procedures.<sup>23</sup>

## 5 2 Connecting provisions under earlier legislation

Section 339 has a brief but interesting history, and the provision itself has often been the subject of scrutiny by our courts. It is an interesting fact that section 339 has recently been considered judicially in a number of decisions.<sup>24</sup>

The Transvaal Companies Act 31 of 1909<sup>25</sup> was the first consolidated Act whereby the creation of a company with limited liability and its consequent winding-up were included in the same

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<sup>21</sup> See the definition of “debtor” in s 2 of the Insolvency Act.

<sup>22</sup> However, trusts, clubs and other associations of persons may also be sequestrated under the Insolvency Act - see *Magnum Financial Holdings (Pty) Ltd (in liquidation) v Summerly* 1984 1 SA 160 (W).

<sup>23</sup> Eg the Companies Act contains its own provisions for the appointment of liquidators, which are nearly identical to the provisions for the appointment of trustees in the Insolvency Act - see ss 367 to 385 of the Companies Act.

<sup>24</sup> These decisions are discussed in detail below.

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

Act.<sup>26</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.<sup>27</sup> This Act was the precursor to the Companies Act 46 of 1926,<sup>28</sup> 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, namely Chapter IV.<sup>29</sup> This Act was modelled on the English Companies (Consolidation) Act of 1908.<sup>30</sup> The current Companies Act follows more or less the same division (into chapters) as the 1926 Companies Act.

In distinction to previous legislation, the 1909 Transvaal Companies Act was a lot clearer as regards the law that applied 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.”

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<sup>26</sup> See ch 3 above.

<sup>27</sup> See ch 3 above.

<sup>28</sup> Hereinafter referred to as the 1926 Companies Act.

<sup>29</sup> Ss 106-197.

<sup>30</sup> See De la Rey “Aspekte van die Vroeë Maatskappyereg: ‘n Vergelykende Oorsig (Slot)” 1986 *Codicillus* Vol 27 No 2 24.

This section was the precursor to the present section 339 of the Companies Act.<sup>31</sup> The applicable insolvency law at the time was Law 13 of 1895, which had repealed Ordinance 21 of 1880.<sup>32</sup> From court decisions at the time, it is evident that these connecting provisions created problems of interpretation. For example, in *Standard Bank v Liquidator of the B & C Syndicate Ltd*<sup>33</sup> the court had to decide whether the rules pertaining to liquidation and distribution accounts in insolvent estates, and especially the rules pertaining to contribution by creditors, also applied to a company in liquidation. In this case the court found it unnecessary to refer to the provisions of sections 180 and 183 of the 1909 Companies Act, finding its solution instead in the provisions of section 133 of that Act. Section 133 provided that a liquidator was obliged to draft the liquidation and distribution account in the same manner as a trustee in an insolvent estate. This case illustrates the fact that, despite the general provisions of sections 180 and 183, there were also other provisions dealing with specific issues; in this case the rules pertaining to the drafting of liquidation and distribution accounts.

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>34</sup>

“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*.”

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<sup>31</sup> However, 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>32</sup> See ch 3 above.

<sup>33</sup> 1918 TPD 470.

<sup>34</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.

In *R v Schreuder*<sup>35</sup> and *R v RSI (Pty) Ltd*<sup>36</sup> the court found that a company could not be found guilty of contravening the provisions of the Insolvency Act by virtue of the connecting provision found in section 182 of the 1926 Companies Act. This problematic situation was well illustrated by the comments of Wynne J in the *RSI (Pty) Ltd* case at 416C-D:

“So far, however, as insolvency is concerned, the ‘nexus’ between the Companies Act and the Insolvency Act is to be found in two sections only of the Companies Act, viz sec 182 and sec 185 ... Sec 182 is an administrative section which applied the provisions of the law relating to insolvent estates *mutatis mutandis* to the winding-up of a company unable to pay its debts in respect of all matters not specially provided for in the Companies Act ... Nowhere in the Companies Act ... is any section to be found which renders the company itself liable for the commission of offences provided for in the Insolvency Act.”

The comment made at 29E of the *Schreuder* case is also apt:

“It seems to me, however, that sec 182 of the Companies Act, 1926, is merely administrative and does not incorporate into that Act the penal provisions of the Insolvency Act, 1936.”<sup>37</sup>

In both the above decisions the court found that section 182 was purely administrative.<sup>38</sup> However, in *S v Yousuf*<sup>39</sup> the court found that the directors of a company had been properly

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<sup>35</sup> 1957 4 SA 27 (O).

<sup>36</sup> 1959 1 SA 414 (E).

<sup>37</sup> See also *Cooper and Cooper v Ebrahim* 1959 4 SA 27 (T) where the court confirmed the approach taken by the court in the *Schreuder* case *supra*. Cf the decision of the court in *S v Gani* 1965 1 SA 222 (T) at 223D where the court reached the same conclusion that was reached in the *Schreuder*, *RSI (Pty) Ltd* and *Ebrahim* cases above, but did not refer to either. However, the court did refer to the Griqualand West decision of *R v City Silk Emporium (Pty) Ltd and Meer* 1950 1 SA 825 (GW), in deciding that s 182 of the 1926 Companies Act was merely administrative in nature. For other decisions dealing with the possible application and interpretation of s 182 of the 1926 Companies Act, see also *F & C Building Construction Co (Pty) Ltd v Macsheil Investments (Pty) Ltd* 1959 3 SA 841 (D) at 845F-G and *Parity Insurance Co Ltd (in liquidation) v Hill* 1967 2 SA 551 (A).

<sup>38</sup> In regard to s 182 only being administrative in nature, see also *Ex parte Mallac: In re de Marigny (Pty) Ltd (in liquidation): de Charmoy Estates (Pty) Ltd Intervening* 1960 2 SA 187 (N). However, the part of the *Mallac* case that dealt with the application of s 182 to leases and s 37 of the Insolvency Act, was overruled by the Appellate Division in *Durban City Council v Liquidator, Durban Icedromes Ltd* 1965 1 SA600 (A).

<sup>39</sup> 1965 3 SA 259 (T).

charged under section 134(1) of the Insolvency Act, but referred to the provisions of section 185<sup>40</sup> of the 1926 Companies Act and not section 182. This illustrates the difficulties encountered where there are additional connecting provisions in the Companies Act, such as section 185 that was found to be applicable in this case, other than the general connecting provision such as the one found in section 182.

However, the most important decision regarding section 182 of the 1926 Companies Act is undoubtedly to be found in *Woodley v Guardian Assurance Co of SA Ltd*<sup>41</sup> where Colman J made the following remark regarding this connection provision:

“I ... suggest that it is socially desirable that, as far as is practicable, all the consequences of the liquidation of an insolvent company should be similar to those [of] the insolvency of an individual ... The winding-up of a company unable to pay its debts is something closely akin to the winding-up of the estate of an insolvent individual. There are some different requirements which flow from the fundamental difference between a company and an individual: those are specifically provided for in the Companies Act. In respects other than those so provided for I cannot see why the Legislature should not have desired, not merely the procedural rules, but also the substantive rules and consequences, to be the same in both cases.”

From the above decisions it is evident that the court had in the past grappled with the connecting provisions contained in both the 1909 Transvaal Companies Act as well as similar provisions contained in the 1926 Companies Act.

### **5 3 The fragmentation of current South African insolvency law and the resultant connecting provisions**

#### *5 3 1 Introduction*

The fragmentation, or duality, of current South African insolvency law creates a number of interesting interpretational and practical problems. There are many facets to this fragmentation, ranging from the commencement of the insolvency proceeding to the duplication of provisions

<sup>40</sup> S 185 of the 1926 Companies Act made the criminal provisions relating to insolvency law also applicable to certain officers of a company.

<sup>41</sup> 1976 1 SA 758 (W).



in various Acts. Under this heading the problems caused by the current fragmentation of South African insolvency law will be discussed. Because many of these aspects overlap each other, it is necessary to first outline the various identifiable facets of the problems caused by the fragmentation of our insolvency law.

- (a) In the first place, there are currently different statutes that govern the commencement of the insolvency proceeding itself.
- (b) In the second place, there are numerous difficulties involved in determining which provisions that are contained in a variety of statutes, actually govern the winding-up process.
- (c) Thirdly, there may be different winding-up rules that apply to the same type of debtor due to the mode of winding-up that has been followed.
- (d) Fourthly, the fragmentation of our insolvency law may lead to different conclusions being reached in respect of similar disputes.<sup>42</sup>
- (e) Lastly, there are other statutes that are interpreted to override the provisions of the Insolvency Act.<sup>43</sup>

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<sup>42</sup> Reference can be made here to two decisions, namely *Klerk v SA Metal and Machinery Company (Pty) Ltd* [2001] 2 All SA 276 (E) and *Waste-Tech (Pty) Ltd v Van Zyl and Glanville* 2002 1 SA 841 (E). In both these cases the liquidators were compelled to provide security for litigation costs in terms of the provisions of the Companies Act and the Close Corporations Act. The point that needs to be made here is that these rules (regarding the provision of security) do not apply to trustees in estates that have been sequestered in terms of the Insolvency Act, which results in different rules being applied to the same situation.

<sup>43</sup> An example of this is to be found in the provisions of the Sectional Titles Act 95 of 1986, where the arrear levies have to be paid before a sectional title unit can be transferred. In *Nel v Body Corporate of the Seaways Building* 1996 1 SA 131 (A) and *Barnard v Regspersoon van Aminie* 2001 3 SA 973 (SCA) the Appellate Division of the Supreme Court, as it was then known, and the Supreme Court of Appeal respectively found that the provisions of the Sectional Titles Act override the provisions of s 89 of the Insolvency Act, which provide for a limitation of two years in respect of the payment of arrear taxes out of the proceeds of the property. Consequently arrear levies have to be paid in full from the proceeds before

The ensuing discussion will concentrate on paragraphs (b) and (c) above, with only a brief reference to paragraph (a). However, the proposals made in this study must be seen against the background of the sum total of all these issues, as they are all symptomatic of the same thing, namely the fragmentation or duality of South African insolvency law.

### 5.3.2 *Different statutes governing the commencement of the insolvency proceeding*

Due to the fact that liquidation applications are dealt with separately under chapter 8 below, only a brief reference to this problem will be made here, and then only with reference to two specific cases that presented themselves recently.

The first case is *In re: Body Corporate of Caroline Court*<sup>44</sup> where the Supreme Court of Appeal had to decide whether the body corporate of a sectional title scheme could be wound up in terms of the provisions of the Sectional Titles Act 95 of 1986.<sup>45</sup> Without going into any detail,<sup>46</sup> the court dismissed the application brought in terms of section 48 of the Sectional Titles Act, but without really providing any answers to the questions that the court itself had raised. One of the problems in this case was the fact that section 36(5) of the Sectional Titles Act expressly excludes the application of the provisions of the Companies Act, meaning that the application could not be brought in terms of the provisions of the Companies Act. As a result of this decision one is left wondering how one should in fact go about winding-up the body corporate of a sectional title scheme, or if it is in fact possible.<sup>47</sup>

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a sectional title unit will issue a levy clearance certificate, effectively allowing the property to be transferred out of the insolvent estate.

<sup>44</sup> [2002] 1 All SA 49 (SCA).

<sup>45</sup> Hereinafter referred to as the Sectional Titles Act.

<sup>46</sup> The *Caroline Court* decision is discussed in detail in ch 6 below.

<sup>47</sup> It is submitted that this can in fact be done in a similar fashion as the method used by the premier of the Eastern Cape in *Sunny South Cannery (Pty) Ltd v Mbangxa* 2001 2 SA 49 (SCA), namely by listing the powers of the liquidators with specific reference to the provisions of the Companies Act.

The second case that is relevant here is the decision in *Fairleigh v Whitehead*<sup>48</sup> which dealt with the administration of an insolvent deceased estate in terms of section 34 of the Administration of Estates Act 66 of 1965.<sup>49</sup> Section 34 of the Administration of Estates Act provides for two possible alternative procedures, one being in terms of the Administration of Estates Act and the other in terms of the Insolvency Act.<sup>50</sup> The question that the court had to answer, was whether or not the informal procedure created in terms of section 34 of the Administration of Estates Act was one in terms of which the executor deals with an estate that has been sequestrated. Although the court answered this question in the affirmative, litigation could probably have been avoided if it were not for the fragmentation of our insolvency law.<sup>51</sup>

### 5.3.3 *The connecting provisions in current legislation, the duplication of provisions and cross-referencing between Acts*

With the promulgation of the current Companies Act, the wording of section 182 of the 1926 Companies Act was amended to the wording currently contained in section 339 of the Companies Act, which reads as follows:

“339. In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied *mutatis mutandis* in respect of any matter not specifically provided for by this Act.”

The Van Wyk de Vries Commission of Enquiry into the Companies Act was directly responsible for the promulgation of the 1973 Companies Act in its revised form, but the Commission’s report itself does not shed much light on the reasons for the Commission changing the wording of this

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<sup>48</sup> 2001 2 SA 1197 (SCA).

<sup>49</sup> Hereinafter referred to as the Administration of Estates Act.

<sup>50</sup> See ch 10 below where this aspect is dealt with in detail.

<sup>51</sup> Despite the *Fairleigh* decision, this study proposes that the administration of insolvent deceased estates should remain in the provisions of the Administration of Estates Act - see ch 10 below.

section from its previous form in section 182 of the 1926 Act.<sup>52</sup> The only reference in the report that has any relevance, is the following statement made at paragraph 50.02 of the Main Report (*Hoofverslag*):

“50.02 Wat die algemene benadering van die Kommissie tot hierdie onderwerp betref, was ons gelei deur -

(a) ...

(b) die wenslikheid daarvan om die Maatskappywet met betrekking tot likwidasië te laat strook met die Insolvensiewet ten aansien van sowel beginsels as prosedure. Ons beskou die Insolvensiewet as die heersende Wet ...”

From this statement by the commission it is evident that the new wording contained in section 339 was designed to improve upon the previous connection provision contained in section 182 of the 1926 Companies Act, by making it clearer that both the principles and procedures relating to the law of insolvency should apply also to companies in winding-up. That the modification of the section was not entirely successful, is evident from the decisions that will be discussed below.

A matter that complicates the application of the “the law relating to insolvency” when applied to winding-up, is that in addition to the general connecting provision there are also specific provisions in the Companies Act that make specific provisions of the Insolvency Act applicable to companies being wound up. An example of this can be found in *Dally v Galaxie Melodies (Pty) Ltd*<sup>53</sup> where the court found that section 340(1)<sup>54</sup> renders the provisions of section 34 of the Insolvency Act applicable to the alienation by a company of its business.<sup>55</sup> Because section 340(1) makes specific provision for certain sections of the Insolvency Act to apply, it of course becomes

<sup>52</sup> See also De la Rey “Creditors’ Voluntary Liquidation: Theoretical Analysis and Practical Guide” 1980 *DJ* 47, where she agrees with the view that the Van Wyk de Vries Commission did not always provide explanations for the changes that they proposed.

<sup>53</sup> 1975 2 SA 337 (C).

<sup>54</sup> S 181(1) of the 1926 Companies Act.

<sup>55</sup> Cf *Scott-Hayward v Habibworths (Pty) Ltd* 1959 1 SA 202 (T); *Castleden v Volks Furniture Stores (Pty) Ltd* 1967 3 SA 733 (D); *Garzonis v Tokwe Ranches (Pvt) Ltd* 1969 1 SA 349 (R) dealing with similar cases under s 182 of the 1926 Companies Act.

unnecessary to apply section 339. However, such specific references to the provisions of the Insolvency Act create confusion as to why there are, in addition to section 339, sections of the Companies Act that find it necessary to make reference to specific sections of the Insolvency Act. The question that could be asked is why there is a general connecting provision *in addition to* the specific references to sections in the Insolvency Act.

One of the earliest problems encountered with the applicability of the provisions of the Insolvency Act to a company in liquidation by virtue of the provisions of section 339, can be found in *Herrigel v Bon Roads Construction Co (Pty) Ltd*.<sup>56</sup> In this case Lichtenberg J found that section 339 of the Companies Act did not envisage that the procedure and orders provided for in section 32 of the Insolvency Act<sup>57</sup> applied to a claim based on section 341 of the Companies Act.<sup>58</sup>

On the other hand, the court in *Hubert Davies Water Engineering (Pty) Ltd v The Body Corporate of "The Village"*<sup>59</sup> found that section 84(1)<sup>60</sup> of the Insolvency Act applied to companies in liquidation by virtue of the provisions of section 339 of the Companies Act. In *Venter v Avfin (Pty) Ltd*<sup>61</sup> the Supreme Court of Appeal had to determine whether sections 84 and 83 of the Insolvency Act also applied to close corporations in liquidation, by virtue of the provision of sections 66 of the Close Corporations Act read with section 339 of the Companies Act. In finding that the provisions do apply, the court referred to the *Hubert Davies* decision with

<sup>56</sup> 1980 4 SA 669 (SWA). See also *Trakman v Livschitz: In re Livschitz v Trakman* 1996 2 SA 384 (W) which dealt with security for costs where a liquidator commences proceedings to set aside impeachable dispositions in terms of the Insolvency Act.

<sup>57</sup> S 32 of the Insolvency Act deals with proceedings to set aside improper dispositions.

<sup>58</sup> S 341 of the Companies Act deals with dispositions and share transfers that are void if made after winding-up.

<sup>59</sup> 1981 3 SA 97 (D).

<sup>60</sup> S 84(1) deals with the effect of insolvency on instalment sale transactions.

<sup>61</sup> 1996 1 SA 826 (A) (also reported under [1996] 1 All SA 173 (A)).

approval.<sup>62</sup> However, in another case dealing with section 84(1) of the Insolvency Act and its application to the winding-up of a close corporation by virtue of the provisions of section 66 of the Close Corporations Act read with section 339 of the Companies Act, there is an interesting twist when applying the provisions of section 339. In *ABSA Bank Ltd v Cooper*<sup>63</sup> it was contended that before section 339 of the Companies Act could be applied, the inability of the corporation to pay its debts had to be determined. It was further contended that the relevant stage for determining such inability was the time at which the section was invoked. It was also contended that the inability to pay debts did not only involve a consideration of commercial insolvency, but reference to all the corporation's assets and liabilities. In its decision the court found, *inter alia*, that the time to determine whether the corporation was unable to pay its debts, and therefore to answer the question as to whether section 339 did in fact find application, was at the time the section was invoked. The court also found that mere commercial insolvency was not sufficient, holding that the inability of a corporation to pay its debts had to be measured in the context of its winding-up, that is in a weighing-up of its assets and liabilities. Without considering the correctness of the *ABSA Bank* case, or for that matter any of the cases dealing with the connecting provisions, it is evident that section 339 of the Companies Act and section 66 of the Close Corporations Act<sup>64</sup> cause various interpretational difficulties.

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<sup>62</sup> Cf *Morgan v Wessels* 1990 3 SA 57 (O); *Van Zyl v Bolton* 1994 4 SA 648 (C); *UDC Bank Ltd v Seacat Leasing and Finance Co (Pty) Ltd* 1979 4 SA 682 (T), the latter of which was not followed in the *Venter* case. See also *Avfin Industrial Finance (Pty) Ltd v Interjet Maintenance (Pty) Ltd* 1997 1 SA 807 (T) which was decided before the *Venter* case.

<sup>63</sup> 2001 4 SA 876 (T). It should be noted that the court in *Taylor and Steyn v Koekemoer* 1982 1 SA 374 (T) had already pointed out that the time to determine whether or not the company or corporation was unable to pay its debts, is the time at which the section is invoked.

<sup>64</sup> There are many examples of where s 66 of the Close Corporations Act has been applied, often creating huge interpretational problems: *Spendiff v JAJ Distributors (Pty) Ltd* 1989 4 SA 126 (C) 135; *Du Plessis v Oosthuizen* 1995 3 SA 604 (O); *Syfrets Bank Ltd v Sheriff of the Supreme Court, Durban Central; Schoerie v Syfrets Bank Ltd* 1997 1 SA 764 (D); *Nathaniël & Efthymakis Properties v Hartebeestspuit Landgoed CC* [1996] 2 All SA 317 (T); *Townsend v Barlows Tractor Co (Pty) Ltd* 1995 1 SA 159 (W) and *Barlows Tractor Co (Pty) Ltd v Townsend* 1996 2 SA 869 (A) 881.

The words *mutatis mutandis* that appear in section 339 of the Companies Act came to be interpreted by the court in *Smith v Mann*.<sup>65</sup> Although the case dealt with a section 311 compromise in terms of the Companies Act, the question that had to be answered was whether the provisions of sections 130<sup>66</sup> and 141<sup>67</sup> of the Insolvency Act found application by virtue of section 339 of the Companies Act. Flemming J (as he then was) discussed the meaning of *mutatis mutandis* in section 339 as follows:<sup>68</sup>

“Section 339 does not create a power on the part of the court to apply a law passed for certain circumstances to other circumstances. It purports to carry the limits of the applicability which it prescribes in itself. Concededly, the applicability ‘*mutatis mutandis*’ is not capable of firm delineation. The provisions which become applicable may range over a wide field or a narrow one. The ‘changes’ in wording to adjust to the exotic circumstances may be minor or major. What remains constant is that no leeway is created to decide rather than to conclude that a statute which according to its own terms is not applicable to the present situation, should apply to a different situation. It can only follow if the Legislature, even be it in general terms, has so decreed.”

In *Bryant & Flanagan (Pty) Ltd v Muller*<sup>69</sup> the Appellate Division found that a liquidator, as in the case of a trustee, was vested with a discretion to abide by or terminate an executory contract not specifically provided for in the Insolvency Act. The common law being applicable in such a case, the court found that the liquidator was vested with the same rights as a trustee under the common law by virtue of section 339 of the Companies Act.

One of the most important cases dealing with the applicability of insolvency law to the winding-up of a company by virtue of section 339 of the Companies Act, is *Kalil v Decotex (Pty) Ltd*.<sup>70</sup>

<sup>65</sup> 1984 1 SA 719 (W).

<sup>66</sup> S 130 of the Insolvency Act deals with illegal inducements to vote for a composition, or not to oppose the rehabilitation of a debtor.

<sup>67</sup> S 141 of the Insolvency Act deals with the consequences of the acceptance of consideration for certain illegal acts or omissions.

<sup>68</sup> At 722C-E. See also *SA Fabrics v Millman* 1972 4 SA 592 (A) 600 where the Appellate Division held that *mutatis mutandis* means with the *necessary* alterations.

<sup>69</sup> 1978 2 SA 807 (A).

<sup>70</sup> 1988 1 SA 943 (A).

In this decision of the Appellate Division<sup>71</sup> the words “in the winding-up of a company” that are used in section 339, were interpreted by the court to refer to the *process of liquidation* that commences *once an order of winding-up has been granted*. The court found that the provisions of section 339 do not apply to proceedings giving rise to a liquidation order or the refusal thereof. In this specific case the provisions of section 150 of the Insolvency Act<sup>72</sup> were found not to apply to a company where the court had refused to grant a provisional winding-up order. The court referred with approval to the decision in *Lawclaims (Pty) Ltd v Rea Shipping Co SA: Schiffcommerz Aussenhandelsbetrieb Der VVB Schiffsbau Intervening*<sup>73</sup> where it was stated that section 339 only applies in the winding-up of a company, that stage only being reached when an order to wind up a company has been made in terms of the Companies Act.<sup>74</sup>

In *Choice Holdings Ltd v Yabeng Investment Holding Co Ltd*<sup>75</sup> the court also had to decide whether or not section 150 of the Insolvency Act would apply to a company by virtue of section 339 of the Companies Act, where the directors of a company had appealed against the granting of a liquidation order by the court. The court found that section 150(3) of the Insolvency Act did in fact apply, allowing the winding-up process of the company to continue despite the pending appeal.<sup>76</sup> This case can be distinguished from the *Kalil* decision in that the *Choice Holdings* case dealt with a liquidation order that had in fact been granted, allowing the provisions of section 339 of the Companies Act to apply. In the *Kalil* case the court had refused to grant a liquidation order and, due to the fact that the company was not in liquidation, section 339, and consequently

<sup>71</sup> As it was then known. The name of this court has since been changed to the Supreme Court of Appeal.

<sup>72</sup> S 150 of the Insolvency Act deals with appeals.

<sup>73</sup> 1979 4 SA 745 (N).

<sup>74</sup> 750B-C of the *Lawclaims* case, *supra*.

<sup>75</sup> 2001 2 SA 768 (W).

<sup>76</sup> It was contended by the applicants that r 49(11) of the Uniform Rules of Court applied, having as a result that the appeal stayed all proceedings, including the winding-up process, relating to the company. S 150(3) of the Insolvency Act, on the other hand, provides that the administration process of an insolvent estate is not stayed, but continues subject to certain provisos relating to the sale of property.



section 150(3) of the Insolvency Act, could not be applied.<sup>77</sup>

There are three cases that highlight the difficulties encountered where the Companies Act does in fact contain a provision relating to the problem at hand, begging the question as to whether or not the Insolvency Act's provisions should apply by virtue of the provisions of section 339 of the Companies Act. The first case is *Townsend v Barlows Tractor Co (Pty) Ltd*,<sup>78</sup> where the court held that the proviso to section 104(1)<sup>79</sup> of the Insolvency Act could find no application to a company in liquidation, despite the provisions of section 339 of the Companies Act. In arriving at his conclusion Cloete J expressed himself as follows:<sup>80</sup>

“I find no room for the operation of the proviso in s 104(1) of the Insolvency Act to liquidations of companies or close corporations. The omission of such a proviso from s 366(2) of the Companies Act of 1973 ... is in my view inconsistent with an intention on the part of the Legislature that such a proviso would be applicable in the case of liquidations. The Companies Act having in s 366(2) dealt with the consequences of late proof of claims, there is no room for the proviso in s 104 of the Insolvency Act to be incorporated under the general provisions of s 339 of the Companies Act.”

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<sup>77</sup> However, an appeal against a liquidation order must be distinguished from an application to have the proceedings relating to the winding-up of a company set aside completely. In this regard see the decision of the court in *Storti v Nugent* 2001 3 SA 783 (W), where the court gave a detailed historical account of s 354 of the Companies Act. S 339 is also referred to in this case, although no direct decision regarding its operation was made. See also *Ward v Smit: In re Gurr v Zambia Airways Corporation Ltd* 1998 3 SA 175 (SCA).

<sup>78</sup> 1995 1 SA 159 (W).

<sup>79</sup> This provision deals with the late proof of claims. In *Swaanswyk Investments (Pty) Ltd v The Master* 1978 2 SA 267 (C) it was held that the proof of creditors' claims must be both procedurally and substantively the same as in the case of insolvency. However, in regard to the possible application of s 45 of the Insolvency Act to a company being wound up under the provisions of the 1926 Companies Act, and the application of s 182 of that Act, see *Wynn and Godlonton v Mitchell* 1973 1 SA 283 (E).

<sup>80</sup> At 165C-D.

The other two cases are *Syffrets Bank Ltd v Sheriff of the Supreme Court, Durban Central* and *Schoerie v Syffrets Bank Ltd*,<sup>81</sup> where the court held that section 20 of the Insolvency Act<sup>82</sup> was not one of the provisions that applied to a company or close corporation in liquidation by virtue of the provisions of section 339 of the Companies Act.<sup>83</sup> The court arrived at this conclusion because of the fact that section 361(1) of the Companies Act specifically provides for the assets of a company to be deemed to be under the custody and control of first the Master and then the liquidator.

In *National Union of Leather Workers v Barnard and Perry*<sup>84</sup> the Labour Appeal Court, per Davis AJA, found that section 38 of the Insolvency Act<sup>85</sup> applied to a company that was wound up voluntarily as a voluntary winding-up by creditors, by virtue of the provisions of section 339 of the Companies Act. This in turn led the court to rule that the decision to wind up the company by passing a special resolution amounted to an act by the employer in bringing the contract of employment to an end in a manner recognised by law, and therefore amounting to a dismissal in terms of section 186(a) of the Labour Relations Act 66 of 1995. Once again this case illustrates the tremendous impact that section 339 can have when applying the principles of insolvency to companies that are being wound up.

In addition to the sections and case law that have been discussed above, the Companies Act also contains an interesting hybrid of provisions from the Insolvency Act and additional provisions

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<sup>81</sup> 1997 1 SA 764 (D). These cases were decided simultaneously.

<sup>82</sup> S 20 deals with the vesting of estate property in the Master and the trustee in the case of sequestration.

<sup>83</sup> Cf *Pols v R Pols - Bouers en Ingenieurs (Edms) Bpk* 1953 3 SA 107 (T) at 111G-H and *Secretary for Customs and Excise v Millman* 1975 3 SA 544 (A) at 552F-H.

<sup>84</sup> 2001 4 SA 1261 (LAC).

<sup>85</sup> S 38 of the Insolvency Act deals with the termination of service contracts upon the sequestration (or liquidation) of the employer.

contained in the Companies Act. Although many of these provisions do not create many problems in practice, they nevertheless unnecessarily complicate the administration of companies that are being wound up.

Section 340 of the Companies Act makes the provisions relating to impeachable dispositions in the Insolvency Act applicable also to companies that are being wound up and that are unable to pay their debts. Many of the problems associated with this section, especially in regard to the application of section 34 of the Insolvency Act, have already been discussed above.

Despite the connecting provision contained in section 339 of the Companies Act, section 342 provides that the rules relating to the application of a company's assets and the costs of winding-up must be applied in the same way as they would be in the case of a sequestrated estate. Section 342 reads as follows:

“342. Application of assets and costs of winding-up. - (1) In every winding-up of a company the assets shall be applied in payment of the costs, charges and expenses incurred in the winding-up and, subject to the provisions of sections 435(1)(b), the claims of creditors as nearly as possible as they would be applied in payment of the costs of sequestration and the claims of creditors under the law relating to insolvency and, unless the memorandum or articles otherwise provide, shall be distributed among the members according to their rights and interests in the company.

(2) The provisions of the law relating to insolvency in respect of contributions by creditors towards any costs shall apply to every winding-up of a company.”

The practical effect of this section is that the rules pertaining to the sale of assets and the subsequent application of the proceeds in the payment of administration expenses and claims, are the same as would be the case in the estate of an individual. This necessarily entails the application of various sections of the Insolvency Act. For example, if the asset is subject to the

rights of a secured creditor then sections 2,<sup>86</sup> 83,<sup>87</sup> 89<sup>88</sup> and 95<sup>89</sup> of the Insolvency Act will find application to the proceeds of such an asset.

However, the greatest irony contained in the application of section 342 of the Companies Act, lies in the application of the proceeds of free residue assets to the claims of statutory preferent creditors.<sup>90</sup> Although the preferences for which provision is made in sections 96 to 102 of the Insolvency Act do find application in the case of a partnership, and may in fact apply to the estate of an individual, they more often find application in the case of companies and partnerships. For example, section 98A of the Insolvency Act provides for the payment of arrear salaries and other employee claims to be paid as a preference out of the free residue assets. These claims will of course arise in the case of partnerships, hardly ever in the estate of an individual, but most often in the case of a company or close corporation. It is submitted that it would have been more sensible for provisions of this nature to be included in the winding-up provisions of the Companies Act and Close Corporations Act. In addition to section 98A, section 38 of the Insolvency Act provides for the termination of contracts of employment where the employer's estate is sequestrated. These provisions would also be better suited to companies and corporations that are being wound up, even though the provisions would find application in the case of a partnership being sequestrated in terms of the provisions of the Insolvency Act. The same principle applies to claims by the South African Revenue Service for value-added tax in terms of section 99 of the Insolvency Act.

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<sup>86</sup> Definition of "security" and "preference".

<sup>87</sup> This section deals with the sale of an asset that is subject to the secured rights of creditors.

<sup>88</sup> This section deals with the costs that must be paid from the proceeds of a security before the creditor becomes entitled to the balance of the proceeds.

<sup>89</sup> This section deals with the distribution of the balance of the proceeds of a security once the costs referred to in s 89 have been paid.

<sup>90</sup> For a comprehensive discussion of statutory preferences in corporate insolvency in South Africa and the United Kingdom, see Keay, Borraine and Burdette "Statutory Preferences in Corporate Insolvency: A Comparative Analysis" 2001 *International Insolvency Review* 1.

The Companies Act also contains some specific references to the Insolvency Act relating to the convening of meetings,<sup>91</sup> voting at meetings<sup>92</sup> and interrogations.<sup>93</sup> Although the provisions in the Insolvency Act relating to the convening of meetings and voting at meetings do not appear to create any practical problems, the application of section 65, and other sections relating to interrogations held under the provisions of the Insolvency Act, do appear to have raised some questions. The problem with section 416 of the Companies Act referring to the provisions of section 65 of the Insolvency Act, is the question whether all the provisions of this section must be applied or only aspects thereof. Henochsberg<sup>94</sup> states the following in regard to the scope of application of section 65 of the Insolvency Act to section 415 interrogations under the Companies Act:

“As to the provisions of s 65 of the Insolvency Act, which apply in relation to the interrogation of a witness under s 415, see the General Note on s 415. Apart from these provisions, it is submitted that, in view of the fact that effectively all the matters for which s 65 of the Insolvency Act provides are *mutatis mutandis* already provided for by s 415, there is in fact no scope for the application of s 65 in the winding-up (s 339).”

However, in *Vize v Wilmans*<sup>95</sup> the court did in fact find that the provisions of sections 64 and 65 of the Insolvency Act are applicable to a company in liquidation by virtue of section 339 of the Companies Act. It is submitted that this decision is clearly incorrect as the provisions find application by virtue of section 416 of the Companies Act.<sup>96</sup> From this it is evident that the extent

<sup>91</sup> Ss 364(2) and 412(1)(a) of the Companies Act refers to the manner in which meetings must be convened. It is not clear why it was considered necessary to make provision for the convening of meetings in both these sections.

<sup>92</sup> S 365(2)(a) of the Companies Act.

<sup>93</sup> S 416 of the Companies Act.

<sup>94</sup> Kunst (gen ed) *Meskin, Henochsberg on the Companies Act* (1994) 883 (hereinafter referred to as Henochsberg).

<sup>95</sup> 2001 4 SA 1114 (NC).

<sup>96</sup> One may pose the question as to whether it makes any difference whether the provisions of ss 64 and 65 of the Insolvency Act are made applicable by virtue of s 339 or s 416. However, the wording of ss 339 and 416 are not identical: in s 339 the words used are “in the winding-up of a company unable to pay its debts”, while the wording used in s 416 refers to a company “which is being wound up and is unable to

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of application of these fragmented provisions is not always clear. This creates confusion and uncertainty, something that could be prevented by having uniform provisions in a unified insolvency statute.

Other sections of the Companies Act that refer to the provisions or application of the Insolvency Act are sections 386(1)(e),<sup>97</sup> 386(4)(g)<sup>98</sup> and 425.<sup>99</sup> Since no real practical problems have been experienced with these provisions in the past, they will not be discussed here.

The final aspect that needs to be discussed here is the term that effectively makes the law of insolvency applicable to winding-up, namely the term “unable to pay debts”. If one looks at the various provisions of the Insolvency Act that apply to companies and close corporations in liquidation, it is evident that the legislature only wanted the provisions to apply in cases where the company was insolvent and, consequently, wanted to protect the interests of creditors. Because the winding-up provisions in the Companies and Close Corporations Act also regulate the winding-up process of solvent companies, it was necessary to make a distinction that could determine to which companies and corporations the law of insolvency must be applied. The term “unable to pay debts” has been problematic in a number of respects, but especially in regard to

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pay its debts”. In the *Vize* case the court found that the difference in wording between ss 339 and 416 did not amount to anything substantial. Although these phrases seem to imply the same thing, it was argued in *Hudson v The Master* 2002 1 SA 862 (T), that they do not have the same meaning. Although the court rejected this argument, another court may well have come to a different conclusion.

<sup>97</sup> This section deals with general powers and duties of liquidators.

<sup>98</sup> This section deals with the liquidator’s powers in regard to contracts for the purchase of immovable property (s 35 of the Insolvency Act) and a liquidator’s powers in regard to contracts of lease (s 37 of the Insolvency Act).

<sup>99</sup> This section provides for the application of the criminal provisions relating to the law of insolvency. Parts of this aspect have been discussed above under the discussion of s 339 of the Companies Act.

the time at which this inability must be determined.<sup>100</sup> Whether this inability to pay debts is based on factual or commercial insolvency has also become a bone of contention.<sup>101</sup>

Then there are also provisions that do not refer to an inability to pay debts, but instead refer to a court order, in circumstances where it is clear that the legislature intended that the provisions should also apply to the winding-up of such a company. One such provision is contained in section 417 of the Companies Act which deals with interrogations. Section 417 states that “[i]n any winding-up of a company unable to pay its debts, the Master or the Court may, at any time after a *winding-up order* has been made ...” summon any director or other officer in order that they may provide information. In *Janse van Rensburg v Master of the High Court*<sup>102</sup> the court held that the provisions of section 417 of the Companies Act do not apply to a company that has been wound up as a voluntary winding-up by creditors. The court arrived at this conclusion due to the wording of the section requiring a court order to have been issued before the provisions will apply. This was decided despite the words “in any winding-up of a company unable to pay its debts”. It is submitted that it was the intention of the legislature for these provisions to apply to insolvent companies irrespective of the mode of winding-up, as one of the main aims of an interrogation is to recover assets for the benefit of the creditors. Due to the manner in which the provision has been drafted, the court found that it does not apply to a voluntary winding-up. With respect, it is illogical to conclude that an interrogation cannot apply merely because the section refers to a “winding-up order”. However, the *Janse van Rensburg* and *South African Phillips* cases do illustrate the difficulties that are involved when the court has to interpret the content of sections in order to determine their applicability in the case of insolvency.

<sup>100</sup> See eg *Taylor and Steyn v Koekemoer* 1982 1 SA 374 (T) where it was held that the time by reference to which it must be determined whether the company is in fact unable to pay its debts, is the time when it is sought to invoke such section. See also *ABSA Bank Ltd v Cooper* 2001 4 SA 876 (T), *Vize v Wilmans* 2001 4 SA 1114 (NC) and *Hudson v The Master* 2002 1 SA 862 (T), where this approach was also followed.

<sup>101</sup> *ABSA Bank Ltd v Cooper* 2001 4 SA 876 (T). See also *Hudson v The Master* 2002 1 SA 862 (T), where the court indicated that the liquidator must have regard to both liquidated and unliquidated claims.

<sup>102</sup> 2001 3 SA 519 (W) (also reported under [2001] 2 All SA 551 (W)). See also *South African Phillips (Pty) Ltd v The Master* 2000 2 SA 841 (W) where the court gave the same interpretation to s 417 as was the case in the *Janse van Rensburg* case.

## 6 CONCLUSION

From the above exposition of the cases dealing with the interpretation of section 339 of the Companies Act and section 66 of the Close Corporations Act, it is clear that the connecting provisions contained in these sections are, to say the least, problematic. While there is no doubt that the current system of winding-up companies and close corporations is workable, it is obvious that the dual system of insolvency employed in South Africa creates substantial problems. It is submitted that the problems underlying the shortcomings of the present system are twofold:

- (a) In the first place section 339 of the Companies Act and section 66 of the Close Corporations Act create unnecessary problems of interpretation when trying to apply the law of insolvency to the winding up of companies and close corporations. This was illustrated with reference to the court judgments in the preceding paragraph.
- (b) In the second place, and this aspect is related to the first, the fact that both the Companies Act and the Close Corporations Act contain provisions relating to winding-up in addition to the connecting provisions contained in section 339 of the Companies Act and section 66 of the Close Corporations Act, creates confusion. In other words, one cannot merely refer to the law relating to insolvency by virtue of the provisions of sections 339 and 66 - one first has to consult the provisions of the Companies Act or Close Corporations Act in order to determine whether or not there is not already a provision dealing with the subject. If there is a provision in the Companies Act or Close Corporations Act, the further question arises as to what extent, if any, similar or any provisions of the Insolvency Act will also find application.<sup>103</sup>

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<sup>103</sup> Other specific aspects of this problem are dealt with in part 4B below.



While the winding-up provisions of the Companies Act and the Close Corporations Act are admittedly not flawed to the extent that it has become impossible to wind up companies and close corporations with expedience and effectiveness, it is submitted that some very important aspects deserve consideration:

- (a) If one looks at the number of decisions that have been discussed in this chapter that deal with the interpretational problems encountered with sections 339 and 66,<sup>104</sup> it is apparent that these connecting provisions have caused a plethora of expensive litigation, a fact that can only be to the detriment of creditors who have in any event suffered financial loss due to the financial failure of the company or corporation.
- (b) In addition to the expense involved in litigation, one of the main aims of insolvency law is to ensure the speedy administration of insolvent estates, thereby allowing the creditors that have suffered losses to be paid expediently. Litigation involving the interpretation of these provisions is a lengthy and time-consuming process, which is in direct conflict with one of the most important and entrenched principles of our insolvency law.
- (c) The last aspect that plays a role here, is the confusion that is created by the use of a dual system. The fact that there has been so much litigation regarding the abovementioned provisions clearly illustrates the uncertainty surrounding the application of the various Acts, something one would assume sections 339 and 66 was intended to avoid.

Having identified what is believed to be the underlying problems surrounding the application of a dual system of insolvency, the question now is how one could possibly effectively address this shortcoming. It is submitted that there are two possible manners in which this problem can be addressed:

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<sup>104</sup> This was merely a selection of cases and does not include all the reported and unreported decisions.

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- (a) The first (and, it is submitted, the best) manner in which this problem can be addressed is by the introduction of a unified insolvency statute. If all the provisions relating to insolvency were contained in one Act none of the interpretational problems that have been discussed above would have arisen. One Act implies one set of rules applicable to all (insolvent) debtors, with exceptions to some rules being clearly spelt out in the relevant provisions.<sup>105</sup>
- (b) The second manner in which this problem can be addressed is by repeating all the provisions relating to insolvency in the relevant Acts dealing with winding-up. For example, all the provisions relating to insolvency that apply to companies can be included in the relevant chapter of the Companies Act. In this way it becomes unnecessary to refer to other Acts in order to achieve the desired effect. This is the *modus operandi* in England and Australia<sup>106</sup> and, while not the most desirable solution, seems to work reasonably well.<sup>107</sup>

For the following reasons the option set out in paragraph (b) above is, in my opinion, not a viable one:

- (a) In the first place, amendments will be complicated if the relevant provisions are scattered amongst a number of Acts. For example, an amendment to a relevant provision of the Insolvency Act will necessitate an amendment to the same or similar provision of the Companies Act and the Close Corporations Act. Since the relevant legislation does not

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<sup>105</sup> This study proposes one Insolvency Act that can apply to all debtors - see ann E.

<sup>106</sup> See ch 4 above.

<sup>107</sup> However well this system may appear to work in practice, there are some problems that can be associated with this system as well. For example, duplicating the provisions in various Acts, or even in the same Act but under separate chapters, can cause problems when amending the such legislation. Another possible problem that can arise is where the courts give differing interpretations to the same principles that are contained in different Acts. For this reason it would be preferable to have only one Act with one set of principles that apply to all debtors; consequently the introduction a unified Insolvency Act is preferable to duplicating all the insolvency provisions in the various Acts.

fall under the auspices of a single ministry,<sup>108</sup> it will require the co-operation of a number of government departments in order to bring about the amendments in question.

- (b) In the second place the duplication of clauses in various Acts opens up the possibility that the courts may attach differing interpretations to what is in essence the same provision. Although one would assume that the courts would be consistent, the mere fact that the provision on the one hand refers to an individual, and on the other to a company or corporation, may contribute towards the court interpreting the provision in a different manner.

Consequently it is submitted that the creation of a single insolvency statute would be the better option. In addition to removing unnecessary duplication and the need to interpret identical provisions in different Acts, a single statute is also relatively simple to amend should the need arise. It is also good administration to have a single statute, since it can be used to promote the uniformity and harmonisation of insolvency as a legal discipline, and does not create confusion for the persons that are required to apply it in practice.

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<sup>108</sup> The Insolvency Act falls under the auspices of the Department of Justice and Constitutional Development, while the Companies Act and the Close Corporations Act fall under the auspices of the Department of Trade and Industry.

## CHAPTER 6

### DEFINING “DEBTOR” FOR THE PURPOSES OF A UNIFIED INSOLVENCY ACT<sup>1</sup>

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#### SUMMARY

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#### 1 INTRODUCTION

Having determined in the previous chapter that a unified or a single insolvency statute should address the problems experienced with a dual system of insolvency law, the first aspect that will have to be addressed is the drafting of the unified statute in such a way as to make it applicable to all types of debtors. In doing so the definition of “debtor” plays a crucial role. Boraine and Van der Linde<sup>2</sup> point out that a correct and exact definition of “debtor” is one of the key issues

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<sup>1</sup> In this Chapter frequent reference is made to the transcriptions of a symposium held on 23 Oct 1998, transcriptions of workshops held from 7 to 10 Dec 1998 and transcriptions of a conference held on 6 Oct 1999. The symposium, workshops and conference were used in order to obtain input from the insolvency profession as to the content and technical workings of a unified insolvency statute. In this study the transcriptions will be referred to as the Symposium Transcriptions (*Final Report Containing Proposals on a Unified Insolvency Act Vol 2*), Workshop Transcriptions (*Final Report Containing Proposals on a Unified Insolvency Act Vol 2*) and Conference Transcriptions (*Final Report Containing Proposals on a Unified Insolvency Act Vol 4*) respectively. A copy of the above documents are available for perusal in the Merensky Library, University of Pretoria.

<sup>2</sup> “The Draft Insolvency Bill - an Exploration (Part 1)” 1998 4 *TSAR* 621 at 626 (hereinafter referred to as Boraine and Van der Linde (Part 1)).

in the review of our insolvency law. Keay<sup>3</sup> confirms this viewpoint and states that the key here is to find a way of defining “debtor” without being clumsy and long-winded in the drafting of the provisions.<sup>4</sup>

Formulating a definition of “debtor” for the purposes of a unified insolvency statute requires a dual approach. In the first place the definition of “debtor” will be examined in relation to individuals and partnerships regarding the concept of “sequestration”. This also entails a deliberation of the definition of “debtor” after the introduction of company law in South Africa, and the resultant exclusion of companies from such a definition in the various Insolvency Acts. It will be pointed out that the current definition of “debtor” in the Insolvency Act 24 of 1936<sup>5</sup> evolved due to the separate treatment of natural persons and juristic persons under South African insolvency law. In the second place the definition of “debtor” will be examined with a view to a unified insolvency statute, which by its very definition requires an all-encompassing approach that will include both natural and juristic persons.

## 2 HISTORICAL DEVELOPMENT

Prior to the concept of separate legal personality being introduced into South Africa in the late nineteenth century, the law of insolvency only applied to the estates of individuals and partnerships. For this reason it is unnecessary to research the old ordinances in order to determine how a debtor was defined prior to this time. What is important, however, is the definition of “debtor” at the time legal personality had already become entrenched in our law.

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<sup>3</sup> “To Unify or not to Unify Insolvency Legislation: International Experience and the Latest South African Proposals” 1999 *DJ* 62-79 (hereinafter referred to as Keay “To Unify or not to Unify”).

<sup>4</sup> The first attempt at defining “debtor” for the purposes of unified legislation, was submitted at the symposium held on 23 Oct 1998. It was, to say the least, clumsy and awkward. In response to the suggestion made by Keay in his paper, the definition was substantially amended and proved to be simple to use in the proposals contained in the Final Report. In consequence of further suggestions made at the conference on 6 Oct 1999, the definition was refined even further.

<sup>5</sup> Hereinafter referred to as the Insolvency Act.

For example, the Transvaal Law 13 of 1895 did not contain any definitions, and therefore no definition of “debtor” as it applied at the time can be found in this Act. Although Law 13 of 1895 did not expressly exclude companies from its operation, it is evident from sections 1 and 2 that it only applied to individuals and partnerships. The relevant sections provided as follows:

- “1. Any person who shall be desirous of voluntarily surrendering his estate as insolvent for the benefit of his creditors may apply by written petition to that effect to the High Court or a Circuit Court.<sup>6</sup>
2. Such petition may be made:-
  - (a) On behalf of the estate of any person who is absent from the Republic, by any one who is duly authorised by power of attorney to administer such estate.
  - (b) On behalf of the estate of a deceased person, or of a person who is legally or actually incapable of managing his own estate, by any one who is lawfully charged with the management thereof.
  - (c) On behalf of the estate of any partnership, by the majority of the partners present or represented in the Republic.”

It is apparent from the decision in *Cassere v United Party Club*<sup>7</sup> that the definition of “debtor” was only introduced into South African insolvency legislation in the Insolvency Act 32 of 1916.<sup>8</sup> The definition of “debtor” in section 2 of the 1916 Insolvency Act provided as follows:

“‘Debtor’ shall, when used in connection with an estate which is about to be sequestrated or assigned, include any person who, or any estate of a person which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law for the time being in force in any Province, relating to the winding up of companies;”

This definition does not differ substantially from the current definition of “debtor” in section 2 of the Insolvency Act, thereby illustrating that the same principles that apply today applied under the 1916 Insolvency Act. Section 3(c) of this Act also provided for the sequestration of partnerships.

The current definition of “debtor” in the Insolvency Act is contained in section 2, and reads as

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<sup>6</sup> S 7 made provision for a creditor to petition the court for compulsory sequestration.

<sup>7</sup> 1930 WLD 39 at 41.

<sup>8</sup> Hereinafter referred to as the 1916 Insolvency Act.

follows:

“‘debtor’, in connection with the sequestration of the debtor’s estate, means a person or a partnership or the estate of a person or a partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to Companies;”

The use of the term “person” in the above provision is indicative of the fact that it applies to *natural* (as opposed to juristic) persons, and the provision also expressly excludes juristic persons from its operation. Although it was implied under previous insolvency statutes that they only applied to the estates of natural persons and partnerships, our legislation has since moved away from using implied provisions to the use of an express provision. Consequently the provisions of the Insolvency Act currently only apply to the estate of natural persons or partnerships.<sup>9</sup>

### 3 DEFINITION OF “DEBTOR” IN OTHER JURISDICTIONS

#### 3 1 Definition of “debtor” in the United States

The United States, being the one insolvency jurisdiction that does have a genuinely unified insolvency statute, has a very detailed provision that determines who may be a debtor under the United States Bankruptcy Code.<sup>10</sup> This detailed provision can be ascribed to the fact that the United States bankruptcy laws have been codified. Although the provision contains various exclusions, many of these have been justified elsewhere in this study.<sup>11</sup> Section 109 of the Code determines who may be a debtor for the purposes of bankruptcy proceedings, and reads as follows:

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<sup>9</sup> There are, however, exceptions to this rule. These exceptions are discussed in par 6 below.

<sup>10</sup> 11 USC s 109 (hereinafter referred to as the United States Bankruptcy Code).

<sup>11</sup> See ch 7 below.

“Sec. 109. Who may be a debtor

- (a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.
- (b) A person may be a debtor under chapter 7<sup>12</sup> of this title only if such person is not -
- (1) a railroad;
  - (2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, a small business investment company licensed by the Small Business Administration under subsection (c) or (d) of section 301 of the Small Business Investment Act of 1958, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act; or
  - (3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States.
- (c) An entity may be a debtor under chapter 9<sup>13</sup> of this title if and only if such entity -
- (1) is a municipality;
  - (2) is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter;
  - (3) is insolvent;
  - (4) desires to effect a plan to adjust such debts; and
  - (5)
    - (A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;
    - (B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;
    - (C) is unable to negotiate with creditors because such negotiation is impracticable; or
    - (D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title.
- (d) Only a person that may be a debtor under chapter 7 of this title, except a stockbroker or a commodity broker, and a railroad may be a debtor under chapter 11 of this title.
- (e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than \$250,000 and noncontingent, liquidated, secured debts of less than \$750,000, or an individual with regular income and such individual’s spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than \$250,000 and noncontingent, liquidated, secured debts of less than \$750,000 may be a debtor under chapter 13 of this title.
- (f) Only a family farmer with regular annual income may be a debtor under chapter 12 of this title.
- (g) Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if -

<sup>12</sup> Ch 7 of the United States Bankruptcy Code deals with straight liquidations.

<sup>13</sup> Ch 9 of the United States Bankruptcy Code deals with the adjustment of debts of a municipality.



- (1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or
- (2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.”

Section 101(15) and 101(41) of the United States Bankruptcy Code contain the definitions of “entity” and “person” that have been used in the above provision respectively. These definitions read as follows:

“(15) ‘entity’ includes person, estate, trust, governmental unit, and United States trustee;”

“(41) ‘person’ includes individual, partnership, and corporation, but does not include governmental unit, except ...”

Consequently the United States Bankruptcy Code applies equally to all types of debtors, with specific exclusions being built into the provisions where necessary. One may argue that these definitions have been drafted too exhaustively, but this is one of the consequences of the codification of their bankruptcy laws. What is striking about these provisions is that they are all-encompassing in their nature, leaving no doubt as to the ambit of their application.

### 3 2 Definition of “debtor” in England

Traditionally much of South African insolvency law, but especially company law<sup>14</sup> and the resultant provisions dealing with winding-up, have a strong English law basis.<sup>15</sup> However, the United Kingdom’s insolvency law has undergone a great deal of change since the publication of

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<sup>14</sup> See De la Rey “Aspekte van die Vroeë Maatskappyereg: ‘n Vergelykende oorsig (Deel 1)” 1986 *Codicillus* Vol 27 No 1 4-15 (hereinafter referred to as De la Rey “Aspekte van die Vroeë Maatskappyereg (Deel 1)”) and De la Rey “Aspekte van die Vroeë Maatskappyereg: ‘n Vergelykende Oorsig (Slot)” 1986 *Codicillus* Vol 27 No 2 18-24 (hereinafter referred to as De la Rey “Aspekte van die Vroeë Maatskappyereg (Slot)”).

<sup>15</sup> See ch 3 above.

the Cork Report<sup>16</sup> and the resultant (English) Insolvency Act of 1986. Although the English Insolvency Act of 1986 purports to be a “unified Act” in the sense that it covers both personal and corporate insolvency, it still retains a definite distinction between the two.<sup>17</sup>

As is currently the case in South Africa, England at one time had legislation that provided, on the one hand, for the bankruptcy of individuals and partnerships<sup>18</sup> and, on the other hand, for the winding-up of companies and other corporations. However, in England the need was felt for special provisions relating to the insolvency of partnerships. Consequently, section 420 of the 1986 Insolvency Act makes specific statutory provision for the insolvency of partnerships. These provisions have since been further refined by the Insolvent Partnerships Order of 1994,<sup>19</sup> and basically allow for a partnership to be wound up as an unregistered company.<sup>20</sup>

Currently the Insolvency Act of 1986, despite being promulgated as one Act, makes separate provision for the insolvency of individuals, partnerships and companies and other corporations. Section 73<sup>21</sup> of the Insolvency Act of 1986 contains the provisions relating to the modes of winding-up a company, while section 264<sup>22</sup> of the same Act deals with the question as to who may present a bankruptcy petition. No specific definition of “debtor” is contained in the Act itself.

<sup>16</sup> *Insolvency Law and Practice, Report of the Review Committee* (Cmnd 8558) 1982 (hereinafter referred to as the Cork Report).

<sup>17</sup> See Fletcher *The Law of Insolvency* 2nd ed (1996) 18-20 (hereinafter referred to as Fletcher). He points out that although personal and corporate insolvencies have been consolidated into one Act, the Act itself retains the traditional distinction between the two. He also points out the apparent paradox in that the Insolvency Act now also regulates the administration of solvent companies, eg where a company is wound up as a voluntary winding-up by its members. This aspect is of extreme importance for the research undertaken in this study, since the English Insolvency Act cannot be said to be a truly unified Act. See also Keay “To Unify or Not to Unify” 65-68 and Dalhuisen *Dalhuisen on International Insolvency and Bankruptcy* (1986) par 3.08[4] 1-93 (hereinafter referred to as Dalhuisen).

<sup>18</sup> Partnerships do not have legal personality under English law - see Fletcher 77-78.

<sup>19</sup> SI 1994 No 2421.

<sup>20</sup> In terms of part V of the Insolvency Act 1986. See also Fletcher 78-80.

<sup>21</sup> Contained in part IV, ch 1.

<sup>22</sup> Contained in part IX, ch 1.

### 3 3 Definition of “debtor” in Australia

Australia follows a dual system of insolvency law similar to that used in South Africa. The Australian Bankruptcy Act of 1966 (Cth) deals with individuals and partnerships, while the Corporations Act of 2001 provides for the winding-up of corporations.<sup>23</sup>

Section 7 of the Australian Bankruptcy Act provides as follows:

“7. Application of Act

- (1) This Act extends to debtors being persons who are not Australian citizens and persons who have privilege of Parliament.
- (1A) This Act applies to debtors whether or not they have attained the age of 18 years.
- (2) A sequestration order shall not be made against, nor a debtor’s petition presented by:
  - (a) a corporation; or
  - (b) a partnership or association registered under a law of the Commonwealth, of a State, or of a Territory of the Commonwealth, that provides for the winding up of a partnership or association registered under that law.
- (3) This Act applies, with any modifications prescribed by the regulations, in relation to limited partnerships as if they were ordinary partnerships and, upon all the general partners of a limited partnership becoming bankrupt, the assets of the limited partnership shall vest in the trustee.”

From these provisions it is can be seen that only entities that are not able to be wound up in terms of the Corporations Act, are dealt with in terms of the Australian Bankruptcy Act of 1966. This is the same as the situation that currently prevails in South Africa.

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<sup>23</sup> At one stage Australia did consider adopting a unified insolvency statute. However, after consideration of this issue by the Law Reform Commission, it was seen not to be a “major issue” and no recommendation to do so was made. See Australian Law Reform Commission Report No 45 *General Insolvency Inquiry* (hereinafter referred as the Harmer Report) paras 20-32. See also Keay “To Unify or not to Unify” 65-68.

### 3 4 Definition of “debtor” in the Federal Republic of Germany

Although the *Insolvenzordnung*<sup>24</sup> does not specifically define “debtor” in the Code, section 11 does indicate to whom the Code is applicable. Section 11 provides as follows:<sup>25</sup>

#### “§ 11 Permissibility of the Insolvency Proceeding

- (1) An insolvency proceeding may be commenced with respect to the assets of any natural or legal person. An association that is not a legal person shall be deemed, to such an extent, to be a legal person.
- (2) An insolvency proceeding may also be commenced with respect to:
  1. the assets of a company without legal personality (commercial partnership, limited partnership, civil law partnership, shipyard partnership, European business association);
  2. pursuant to the provisions of §§ 315 through 334, a decedent’s estate, the community property of an extended community of marital property or the community property of a community of marital property that it is administered jointly by the spouses.
- (3) The commencement of an insolvency proceeding is also permissible following the dissolution of a legal person or a company without legal personality, as long as the distribution of the assets has not been completed.”

Clearly the German *Insolvenzordnung* is intended to be all-encompassing in its ambit, although it does not cover insolvency proceedings in regard to the assets of the Federal or State Government.<sup>26</sup> Other than these specific exclusions, the *Insolvenzordnung* covers all types of debtors.<sup>27</sup> Although Germany’s insolvency laws have also now been codified, there is a striking difference between these provisions and those contained in the United States Bankruptcy Code referred to in paragraph 3.1 above. The German provisions are simple and clear, and have not been obfuscated by detailed legalese.

<sup>24</sup> *Insolvenzordnung vom 5 Oktober 1994 (BGBl. I, S. 2866)* - hereinafter referred to as the Insolvency Code of 1994. This Code came into operation on 1 January 1999.

<sup>25</sup> A translation of the *Insolvenzordnung* by Stewart has been used - see *Insolvency Code - Act Introducing the Insolvency Code* (1997) 6.

<sup>26</sup> See s 12 of the *Insolvenzordnung*, which provides that legal persons under public law are not subject to its provisions (this section refers to federal government or state government assets).

<sup>27</sup> From these provisions it is also important to note that Germany has what may be termed a “single gateway” approach to insolvency, in other words there is only one manner in which all debtors can be placed under insolvency. This is also the case in the United States of America, while countries such as England, Australia and South Africa all have a “dual gateway” approach to insolvency.

#### 4 CURRENT DEFINITION OF “DEBTOR”

The current definition of “debtor” is contained in section 2 of the Insolvency Act, and reads as follows:

“debtor’, in connection with the sequestration of the debtor’s estate, means a person or a partnership or the estate of a person or a partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to Companies;”

By couching the definition in these terms, the legislature had as its aim the exclusion of companies and other corporate entities from the ambit of the Insolvency Act.<sup>28</sup> The obvious reason for this is the dual system of insolvency law that is applied in South Africa, and which has already been discussed above.<sup>29</sup> The challenge in formulating a definition of “debtor” for the purposes of a unified Insolvency Act, lies in couching the definition in terms that embrace not only individuals and partnerships, but also the entities which the original definition sought to exclude in the first place.

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<sup>28</sup> This definition has caused numerous problems in the past. Eg, a trust is not a natural person or a partnership, but it is also not a body corporate, company or other association of persons that can be wound up in terms of the Companies Act. In *Magnum Financial Holdings (Pty) Ltd (in liquidation) v Summerly* 1984 1 SA 160 (W), the court found that since a trust could not be wound up in terms of the provisions of the Companies Act, it was an entity that could be sequestrated under the Insolvency Act. Problems have also been experienced with external companies that cannot be wound up in terms of the provisions of the Companies Act, thereby necessitating the use of sequestration proceedings under the Insolvency Act - see *Lawclaims (Pty) Ltd v Rea Shipping Co SA: Schiffcommerz Aussenhandelsbetrieb Der VVB Schiffsbau Intervening* 1979 4 SA 745 (N). See also par 6 below where these and other problems are discussed in more detail.

<sup>29</sup> See ch 3 and ch 5 above.

## 5 DEFINITION OF “DEBTOR” IN THE DRAFT INSOLVENCY BILL<sup>30</sup>

The following definition of “debtor” appears in clause 1 of the Draft Insolvency Bill.<sup>31</sup>

“‘debtor’, in connection with the liquidation of a debtor’s estate, means a person or entity which is a debtor in the usual sense of the word, except a debtor which can be wound up under the Companies Act, 1973 (Act No. 61 of 1973) or any other Act and, unless inconsistent with the context or clearly inappropriate, includes such a debtor before the date of liquidation of his or her estate;”

Initial drafts of the Law Commission’s Draft Insolvency Bill omitted the definition of “debtor”.

The reason for this is stated as follows at paragraph 1.17 to 1.18 of Commission Paper 582:<sup>32</sup>

“1.17 Paragraph 1.22 of the Explanatory Memorandum in Discussion Paper 66 notes that a definition of ‘debtor’ will be considered once it has been decided how to deal with provisions for the liquidation of legal persons.

1.18 There is strong support for the view that the same provisions should apply to companies and individuals, at least as regards the administration of the liquidation process, with nuances for banks, insurance companies and others where such differences are justified by structural requirements. The Bill is drafted in such a way that it would not be too difficult to adapt the provisions in question for legal persons. Uniform provisions for individuals and companies have not been finalised and substantive corporate law issues like rescue procedures must also receive attention. For the time being the essence of the definitions of ‘debtor’ and ‘insolvent’ in the Insolvency Act has been retained.”

## 6 PROPOSED DEFINITION OF “DEBTOR” UNDER A UNIFIED INSOLVENCY ACT

Considering that the idea is to bring about a unified Insolvency Act, the following definitions of “debtor” are proposed for the purposes of such an Act:

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<sup>30</sup> See SA Law Commission Project 63 Commission Paper 582 (11 Feb 2000) Vol 1 (hereinafter referred to as Commission Paper 582).

<sup>31</sup> Commission Paper 582 Vol 2 cl 1 9. See also the discussion of the definition in Commission Paper 582 Vol 1 cl 1 31-32.

<sup>32</sup> Vol 1 31-32.

“debtor”, when referring to who may be liquidated in terms of this Act, means:

- (a) a natural person or the estate of such natural person (hereinafter referred to as a “natural person debtor”);
- (b) a partnership or the estate of a partnership (hereinafter referred to as a “partnership debtor”);
- (c) a trust as defined in section 1 of the Trust Property Control Act 57 of 1988 (hereinafter referred to as a “trust debtor”);
- (d) a company incorporated in terms of the Companies Act 61 of 1973, or in terms of any Act or Acts which preceded the Companies Act 61 of 1973, including an external company (hereinafter referred to as a “company debtor”);
- (e) a corporation incorporated in terms of the Close Corporations Act 69 of 1984 hereinafter referred to as a “close corporation debtor”);
- (f) any other person or entity which is a debtor in the usual sense of the word (hereinafter referred to as an “association debtor”).”

“debtor”, when used as a noun in the context of this Act, means a debtor as defined in the previous paragraph which has been liquidated in terms of the provisions of this Act and, unless inconsistent with the context or clearly inappropriate, includes such a debtor before the liquidation of the debtor’s estate.”

Up to the present time South African insolvency law has been centred around the individual and the partnership, with the liquidation of companies, close corporations and the like being dealt with in separate provisions in the Companies Act and the Close Corporations Act respectively. The proposals contained in this study envisage one Act that will regulate the administration of the estates of all types of insolvent debtors, and not only that of the individual or partnership.

The definition of “debtor” is therefore the fulcrum around which the whole Act will turn. In defining a debtor in such a way as to include all types of natural, juristic and other types of debtors, one has to have regard to the specific types of problems that may occur in this regard. For example, although a church<sup>33</sup> is an association of persons that has not been created by legislation or law of general application, it does qualify as a debtor in the normal sense of the word. A church would consequently be subject to the provisions of a unified Insolvency Act. The definition as it appears above is an attempt at being all-encompassing in respect of the type of debtor that can be liquidated under a unified Insolvency Act.

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<sup>33</sup> In regard to whether churches are sequestrated or liquidated under the current laws of insolvency, it was held in *Wilson v American Methodist Episcopal Church* 15 CTR 413 that churches are in fact sequestrated (this decision was followed in *Van der Byl v Trustees, Jewish Foreign Society* 20 CTR 774).

### 6 1 Individuals (natural persons)

Paragraph (a) of the definition of “debtor” refers to natural persons, as is the case under the present Insolvency Act. For ease of reference this type of debtor is referred to as a “natural person debtor” in the unified Insolvency Act,<sup>34</sup> as there are certain provisions of the unified statute that can only be applied to natural persons.

### 6 2 Partnerships

Paragraph (b) of the definition of “debtor” refers to partnerships, as is the case under the present Insolvency Act. For ease of reference this type of debtor is referred to as a “partnership debtor” throughout the unified Insolvency Act.<sup>35</sup>

### 6 3 Trusts

Paragraph (c) of the definition refers to trusts as defined in section 1 of the Trust Property Control Act 57 of 1988. This is a new addition to the traditional definition of debtor in section 2 of the Insolvency Act, although trust debtors are presently sequestrated in terms of the provisions of the Insolvency Act.<sup>36</sup> The reason for this is that a trust does not have juristic personality and cannot therefore be wound up under the provisions of the Companies Act or Close Corporations Act.

The definition of “trust” in section 1 of the Trust Property Control Act draws a distinction between an ownership trust and the so-called *bewind* trust. Essentially the difference lies in the fact that in the former ownership of the trust assets vest in the trustee of the trust, and in the latter

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<sup>34</sup> The proposed unified Insolvency Act is contained in ann E below.

<sup>35</sup> The proposed unified Insolvency Act is contained in ann E below.

<sup>36</sup> *Magnum Financial Holdings (Pty) Ltd (in liquidation) v Summerly* 1984 1 SA 160 (W).



the ownership vests in the beneficiaries of the trust, with the trustee merely administering the trust assets on behalf of the trust beneficiaries. For the purposes of insolvency the distinction is not an important one.<sup>37</sup>

The specific inclusion of trusts in the definition of “debtor” is important, not because trusts were previously omitted from the definition, but because certain new proposals contained in a unified Insolvency Act can also then apply to trusts generally. For example, there is no reason why a trust cannot be subjected to a business rescue regime.<sup>38</sup> Just as companies and close corporations suffer financially due to mismanagement, so too do trusts. By replacing the trustees with persons having the proper skills, many trusts could be turned around to show a profit or real growth, thereby protecting the trust beneficiaries, who are in many cases below the age of majority.

#### 6 4 Companies

Paragraph (d) of the definition refers to companies incorporated under the provisions of the Companies Act. The inclusion of companies in the definition of debtor is a major shift away from present South African legislation, as companies are presently wound up in terms of the provisions

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<sup>37</sup> The distinction is important in order to determine whether vesting has taken place in a certain instance, but in both cases the trust would be one which could be liquidated.

<sup>38</sup> It often happens in practice that trustees maladminister trusts. With proper management such a trust could conceivably be turned around to profitability. Considering that many trusts have minors as beneficiaries, subjecting a trust to possible business rescue regimes may be the best protection of their interests. There are, however, some aspects that may make the application of a business rescue regime to trusts inappropriate: Eg, the costs involved in placing the trust under a business rescue regime may be too high to warrant this remedy. It may also be difficult to subject a discretionary trust to the rigours of a business rescue regime, as no vesting of rights has taken place.

## Chapter 6

## Defining “Debtor” in a Unified Insolvency Act

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of the Companies Act. This part of the definition is one of the major changes which has to be made in order to have truly unified insolvency legislation.<sup>39</sup> The definition includes external companies that have been incorporated under the Companies Act. For ease of reference this type of debtor is referred to as a “company debtor” in the proposed unified Insolvency Act.<sup>40</sup>

### 6 5 Close corporations

Paragraph (e) of the definition refers to close corporations established under the provisions of the Close Corporations Act. As is the case with companies, this is a major shift away from current South African insolvency law, where close corporations are wound up in terms of the winding-up provisions of the Close Corporations Act and the Companies Act.<sup>41</sup> For ease of reference this type of debtor is referred to as a “close corporation debtor” in the proposed unified Insolvency Act.<sup>42</sup>

### 6 6 Other debtors

Paragraph (f) of the definition has proved to be the most problematic to formulate. The idea with this paragraph is to include any possible type of debtor which is not included under the previous paragraphs. For example, a university which is created by statute would not be covered by one of the paragraphs above, but is an entity which takes part in commercial intercourse and which should, ideally, be able to be liquidated should the circumstances warrant this.

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<sup>39</sup> Something which the Cork Report could not achieve. Although the English Insolvency Act is a single statute, the liquidation of each type of debtor is dealt with separately, in the main repeating the provisions relating to each type of debtor. See Fletcher 18 and Keay “To Unify or not to Unify” 65-68.

<sup>40</sup> The proposed unified Insolvency Act is contained in ann E below.

<sup>41</sup> The provisions of the Companies Act apply by virtue of the provisions of s 66 of the Close Corporations Act.

<sup>42</sup> The proposed unified Insolvency Act is contained in ann E below.

A club is an example of a debtor that does not fall under any of the previous paragraphs in the definition of debtor, but which is an economic entity which should be capable of being subjected to a liquidation. There are various examples in our case law dealing with the sequestration or liquidation of clubs. In one of the earliest decisions in this regard, the court in *In re Panmure Club*<sup>43</sup> decided that it could not accept the surrender of the Panmure Club’s estate. The court found that the club was not a partnership that could be sequestrated in terms of the third section of Ordinance 6 of 1843, the insolvency ordinance that found application at the time. In *Re The Cape Town Club*<sup>44</sup> the question had already been asked whether or not a club could be liquidated in terms of the provisions of the Companies Act 25 of 1892. In *Cassere v United Party Club*<sup>45</sup> the court considered the possibility of sequestrating a club in some detail, arriving at the conclusion that an unincorporated body of persons capable under its constitution of holding property apart from its members, was a “debtor” in terms of section 2 of the 1916 Insolvency Act.<sup>46</sup> In *Silverman v Silver Slipper Club*<sup>47</sup> the full bench of the Transvaal Provincial Division of the Supreme Court referred with approval to the *Cassere* decision before granting a final order placing the Silver Slipper Club under sequestration.<sup>48</sup>

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<sup>43</sup> 5 EDC 170 (15 June 1886).

<sup>44</sup> 1902 19 SC 420.

<sup>45</sup> 1930 WLD 39.

<sup>46</sup> In the *Cassere* case the court did not follow the *Panmure Club* decision, but instead followed the decisions in *The Committee of the Johannesburg Public Library v Spence* 5 OR 84 and *Khunou & Pettele v Minister for Native Affairs and Mokhatle* 1908 TS 260. In the course of its judgment the court also referred to *Van der Byl v Trustees, Jewish Foreign Society* 20 CTR 774, *Reid v South African Party Club* 1922 TPD 36 and *Graham v Milnerton Turf Club* 1921 CPD 688.

<sup>47</sup> 1932 TPD 355.

<sup>48</sup> The only recent decision that could be traced in regard to the sequestration of clubs, is the Southern Rhodesia (as it was then known) decision in *Ex parte Matabeleland Club* 1962 2 SA 647 (SR). In this case it was found that a club could be sequestrated under the provisions of Rhodesian insolvency legislation.

A more recent example of the problems that arise where specific types of debtors cannot be categorised according to the more traditional definition of debtor, can be found in the case of *In re: Body Corporate of Caroline Court*.<sup>49</sup> Although the body corporate of a sectional title scheme is a “body corporate ... or other association of persons”,<sup>50</sup> it is not one that can be liquidated or wound up in terms of the Companies Act.<sup>51</sup> In the *Caroline Court* decision the Supreme Court of Appeal had to deal with an application for the winding-up of the affairs of a body corporate where the body corporate contended that the court was empowered to wind up its affairs due to its inability to pay its debts. In bringing the application the body corporate relied on section 48(6),<sup>52</sup> alternatively on section 48(1)(c) read with section 48(6), of the Sectional Titles Act. Although the Supreme Court of Appeal decided the issue on procedural law grounds and not on the substantive law, the court did raise some interesting questions regarding the unique nature of sectional title schemes.<sup>53</sup> This case serves as an example of how the definition of “debtor” in a unified Insolvency Act should be drafted if problems of this nature are to be avoided in the future. It is submitted that the proposed definition of “debtor” under a unified insolvency statute, more specifically paragraph (f), is wide enough to include the body corporate of a sectional title scheme. Under a unified insolvency statute it is doubtful whether the problems that were experienced in

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<sup>49</sup> [2002] 1 All SA 49 (SCA).

<sup>50</sup> Cf the definition of “debtor” in s 2 of the Insolvency Act.

<sup>51</sup> See s 36(5) of the Sectional Titles Act 95 of 1986 (hereinafter referred to as the Sectional Titles Act). S 36(5) states that the provisions of the Companies Act do not apply to bodies corporate established in terms of the Sectional Titles Act.

<sup>52</sup> S 48(6) provides that the affairs of a body corporate may be wound up when the building to which it is attached is damaged or destroyed. The court found that since this was not the case in the matter under consideration, the said provision could find no application.

<sup>53</sup> It is submitted that if the body corporate is not an entity that can be wound up in terms of the Companies Act, then it falls under the current definition of “debtor” in s 2 of the Insolvency Act. Consequently the body corporate should be capable of being sequestrated in terms of the provisions of the Insolvency Act. It is further submitted that, upon closer scrutiny of the legal nature of a body corporate, it shows characteristics akin to a partnership and could very well be seen as a type of statutory partnership. Since partnerships are capable of being sequestrated, a categorisation of this nature would also have brought the body corporate under the ambit of the provisions of the Insolvency Act.

the *Caroline Court* decision would have been experienced.<sup>54</sup> For ease of reference this type of debtor has been referred to as an “association debtor” in the proposed unified Insolvency Act.<sup>55</sup>

It is important to note that one of the main purposes of these proposals is to include all possible types of juristic and non-juristic entities in the definition of debtor.<sup>56</sup> Probably the most controversial debate which was held regarding these proposals<sup>57</sup> was whether or not to include certain types of institutions which have traditionally been dealt with in separate legislation, for example banks and insurance companies.<sup>58</sup>

## 7 CONCLUSION

A discussion of the many reported cases dealing with the sequestration or liquidation of certain types of entities, has illustrated the importance of including an all-encompassing definition of “debtor” in a unified insolvency statute. It is submitted that the above definition of “debtor”, although more cumbersome than the current one which excludes corporations with juristic

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<sup>54</sup> Provided of course s 36(5) of the Sectional Titles Act, which currently states that the Companies Act does not apply to bodies corporate, is not amended to provide that the unified Insolvency Act will not apply to bodies corporate created by the provisions of the Sectional Titles Act.

<sup>55</sup> The proposed unified Insolvency Act is contained in ann E below.

<sup>56</sup> By doing so this will also mean that the problem that was experienced in *Lawclaims (Pty) Ltd v Rea Shipping Co SA: Schiffcommerz Aussenhandelsbetrieb Der VVB Schiffsbau Intervening* 1979 4 SA 745 (N) will not be experienced again. In this case a company could not be liquidated under the provisions of the Companies Act because it was an external company. Consequently the court held that the company could be sequestrated in terms of the Insolvency Act (see the definition of “debtor” in s 2 of the Insolvency Act). With more and more cross-border insolvency cases coming to the fore of late, having a unified Insolvency Act will not only solve the problems experienced in the *Lawclaims* case, but will also prevent other potential problems from arising in cross-border insolvency matters - see Smith and Boraine “Crossing Borders Into South African Insolvency Law: From the Roman-Dutch Jurists to the Uncitral Model Law” 2002 10 *ABI Law Review* 135 (hereinafter referred to as Smith and Boraine).

<sup>57</sup> See eg the Workshop Transcriptions 18.

<sup>58</sup> Currently the provisions relating to these types of institutions are dealt with in s 68 of the Banks Act 94 of 1990, part VI of the Long Term Insurance Act 52 of 1998 and part VI of the Short Term Insurance Act 53 of 1998 respectively. This aspect is dealt with separately under ch 7 below.

personality, succeeds in being all-encompassing by including every conceivable form of debtor, be it corporate or otherwise.

The mere existence of a unified insolvency statute will obviate the need to try and determine, as is currently the case, whether a specific debtor should be sequestrated or liquidated under the provisions of different Acts. Under a unified Insolvency Act all debtors will be subject to liquidation in terms of the same statute, thereby creating certainty and uniformity, and will also negate the effect of the many reported cases in this regard.



**CHAPTER 7**

**SPECIALISED INSTITUTIONS UNDER A UNIFIED INSOLVENCY ACT**

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**SUMMARY**

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**1 INTRODUCTION<sup>1</sup>**

As in the case of most other countries,<sup>2</sup> there are certain types of specialised institutions which enjoy preferential treatment due to the nature of these business concerns. The main reason for their preferential treatment appears to be the protection of the public interest. The question that has to be decided within the framework of this study, is whether or not these institutions deserve their specialised status - not generally, but in the event of insolvency. This chapter seeks to answer this question and then proceeds to make proposals giving effect to the conclusions that have been reached.

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<sup>1</sup> In this chapter frequent reference will be made to the *Final Report Containing Proposals on a Unified Insolvency Act Jan 2000 Vol 1 to 5*. This report was drafted under the auspices of the Centre for Advanced Corporate and Insolvency Law at the University of Pretoria, and a copy thereof is available at the Merensky Library, University of Pretoria. This report is referred to in this chapter as the Final Report.

<sup>2</sup> See Giovanoli and Heinrich (eds) *International Bank Insolvencies: A Central Bank Perspective* (1999) where a useful summary of the handling of insolvent banks in various jurisdictions is provided.



Apart from the treatment of specialised institutions, there are also other (ancillary) matters that need to be discussed if a truly unified insolvency statute is to be introduced. These matters include alternatives to the liquidation (sequestration) of individuals,<sup>3</sup> the treatment of insolvent deceased estates,<sup>4</sup> business rescue provisions<sup>5</sup> and personal liability of directors and others,<sup>6</sup> to name but a few. While the treatment of specialised institutions will be dealt with in this chapter, the other ancillary matters mentioned above will be dealt with in Part 4C of this study. The treatment of solvent companies and close corporations will be dealt with in Part 4D below.

## 2 SPECIALISED INSTITUTIONS<sup>7</sup>

Since the key issue to be decided here is whether or not there should be one Act which deals with the liquidation of all legal entities, it is necessary to briefly look at the entities which receive specialised treatment under South African law. Besides the Companies Act 61 of 1973<sup>8</sup> and the Close Corporations Act 69 of 1984,<sup>9</sup> there are a number of other legislative provisions dealing with the liquidation of specific types of institutions, or the placing under curatorship of such

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<sup>3</sup> Eg the question arises as to whether s 74 of the Magistrates' Courts Act 32 of 1944 should be included in a unified insolvency statute.

<sup>4</sup> Currently regulated by s 34 of the Administration of Estates Act 66 of 1965.

<sup>5</sup> South Africa has a very limited array of business rescue provisions, namely s 311 of the Companies Act dealing with compromises, and judicial management which is dealt with in s 427 *et seq* of the Companies Act.

<sup>6</sup> Currently dealt with in s 424 of the Companies Act.

<sup>7</sup> In this chapter reference is made to the transcriptions of a symposium held on 23 Oct 1998, transcriptions of workshops held from 7 to 10 Dec 1998 and transcriptions of a conference held on 6 Oct 1999. The symposium, workshops and conference were used in order to obtain input from the insolvency profession as to the content and technical workings of a unified insolvency statute. In this study the transcriptions will be referred to as the Symposium Transcriptions (Final Report, Vol 2), Workshop Transcriptions (Final Report, Vol 2) and Conference Transcriptions (Final Report, Vol 4) respectively. A copy of these documents are available for perusal in the Merensky Library, University of Pretoria.

<sup>8</sup> Hereinafter referred to as the Companies Act. The provisions of the Companies Act do not have unlimited application - see s 3 of the Companies Act.

<sup>9</sup> Hereinafter referred to as the Close Corporations Act.

institutions. These are Part VI of the Long-Term Insurance Act 52 of 1988;<sup>10</sup> Part VI of the Short-Term Insurance Act 53 of 1988;<sup>11</sup> section 29 of the Pension Funds Act 24 of 1956; section 35 of the Friendly Societies Act 25 of 1956; section 18C of the Medical Schemes Act 72 of 1967; sections 27, 28 and 39 of the Unit Trusts Control Act 54 of 1981; Chapter X of the Co-Operatives Act 91 of 1981; section 33 of the Financial Markets Control Act 55 of 1989; section 68 of the Banks Act 94 of 1990;<sup>12</sup> and Chapter VIII of the Mutual Banks Act 124 of 1993.<sup>13</sup> For the sake of brevity only the liquidation of banks, and to a more limited extent insurance companies, will be referred to in this chapter. However, what is stated here in respect of banks and insurance companies will apply equally to the other institutions mentioned in this paragraph.

It seems illogical to speak of a unified Insolvency Act if such a unified Act is not going to be complete in every sense. The problem here is that these specialised institutions, such as banks and insurance companies,<sup>14</sup> are not directly governed by the provisions contained in the Insolvency Act, Companies Act or Close Corporations Act, even though such institution is, for example, a company. These specific types of institutions have provisions in their enabling legislation that regulate their winding-up or judicial management.<sup>15</sup>

While it is understandable that the authorities which are responsible for the administration of these institutions would prefer to retain control over the manner in which they are wound up or placed

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<sup>10</sup> Hereinafter referred to as the Long-Term Insurance Act.

<sup>11</sup> Hereinafter referred to as the Short-Term Insurance Act.

<sup>12</sup> Hereinafter referred to as the 1990 Banks Act.

<sup>13</sup> See par 5.1.2 of the Introduction and Summary of Recommended Changes, Discussion Paper 66, Project 63 by the South African Law Commission.

<sup>14</sup> See the Symposium Transcriptions 1-31 and the Workshop Transcriptions 1-74 for a discussion of these issues at the symposium and workshops respectively.

<sup>15</sup> Generally speaking the provisions of the Insolvency Act 24 of 1936 (hereinafter referred to as the Insolvency Act) are applied, but subject to special provisions applying in the case of the winding-up of such a specialised institution. One exception to this is the provisions of the Co-Operatives Act 91 of 1981. This Act comes close to reproducing all the provisions of the Insolvency Act.

under judicial management, it is submitted that there is no real reason why this can only be achieved by including such provisions in the enabling legislation. Stated differently, there appears to be no overwhelming reason why these provisions should not be included in a unified insolvency statute.<sup>16</sup>

In most cases the protection of the public interest is the basis for the current provisions in the Acts referred to.<sup>17</sup> To this end the authority governing such institutions has an important role to play. For example, when an application is brought in order to place a bank in liquidation, the Registrar of Banks has the right to oppose such application.<sup>18</sup> In the same vein the registrar has the right to apply to court to have a bank wound up.<sup>19</sup> The Master of the High Court may also not appoint any person as liquidator or judicial manager of a bank other than a person recommended by the Registrar of Banks.<sup>20</sup> These are laudable provisions that are aimed not only at protecting the interests of the bank's clients, the public, but also for the protection of financial markets and the national payments system. The principle of protecting the public interest also applies to the interests of policy holders in the case of insurance companies.<sup>21</sup>

Laudable as these provisions are, there is no reason why the same provisions, which currently protect the public interest, cannot be included in proposals for a unified insolvency statute. These provisions are aimed at preventing any person from simply bringing an application to wind up, for

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<sup>16</sup> It is evident that the Reserve Bank is opposed to this idea - see the Conference Transcriptions 16-67, and especially the comments made by Grobler (commencing at 28).

<sup>17</sup> In the case of banks there is an additional reason, namely the so-called "systemic risk" that is peculiar to the banking industry. Stated simply, systemic risk is the risk that a disturbance in financial markets may seriously harm the financial position of financial firms which could in turn disrupt the payments system of a country - see Patrikis "Role and Functions of Authorities: Supervision, Insolvency Prevention and Liquidation" in Giovanoli and Heinrich (eds) *International Bank Insolvencies, A Central Bank Perspective* (1999) 283. This aspect is dealt with in greater detail in par 4.1 below.

<sup>18</sup> S 68(1)(a) of the 1990 Banks Act.

<sup>19</sup> S 68(1)(a) of the 1990 Banks Act.

<sup>20</sup> S 68(1)(b) of the 1990 Banks Act.

<sup>21</sup> See eg part VI of the Long-Term Insurance Act.

example, a bank or insurance company that would, obviously, result in potential chaos. However, once the checks and balances have been complied with and the Registrar has been consulted and notified of the winding-up, it does not mean that the Registrar cannot still exercise his powers just because the provisions are contained in a unified piece of insolvency legislation.

The unification of insolvency legislation is not intended to take away the powers of any governing authority over its charge, but merely to provide for uniform procedures once the institution in question has in fact been placed in liquidation. After all, an insolvent bank is still insolvent and the provisions relating to insolvency must be applied to it.<sup>22</sup>

In brief, it can be stated that the powers that have currently been conferred on the governing authorities in respect of specialised institutions, will have to be retained in proposals for unified insolvency legislation. This is not only necessary in order to protect the public interest, but also for the purposes of good administration. However, the same objectives can be achieved by including these provisions in one consolidated piece of legislation.<sup>23</sup>

### **3 HISTORICAL DEVELOPMENT**

In order to determine whether or not the liquidation provisions relating to the banking and other specialised industries should be kept separate or included in a unified Act, it is necessary to briefly

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<sup>22</sup> It is conceded that the provisions relating to the appointment as co-liquidator of someone who is knowledgeable about the banking industry (s 68(1)(c) of the 1990 Banks Act) are important, and this has been addressed in the proposals contained in this report.

<sup>23</sup> The problem of amendment to the unified piece of insolvency legislation has also been addressed. Eg, unified insolvency legislation will probably fall under the control of the Ministry of Justice and Constitutional Development while the Banks Act, eg, falls under the auspices of the Ministry of Finance. The Finance Ministry would no doubt disapprove of the idea of the legislation being amended without first being consulted. This can effectively be addressed by building in a peremptory consultation clause before certain sections can be amended. This has been done very effectively in the new s 98A of the Insolvency Act, that makes provision for peremptory consultation in the case of amendment to provisions relating to preferences payable to employees in an insolvent estate.

set out the historical development of these specialised provisions. As stated above,<sup>24</sup> only the banking industry and, where necessary, insurance companies will be discussed in this chapter. In respect of banks a complete history has been provided. In the case of insurance companies only Union and current legislation will be discussed.

### **3 1 Pre-Union banking legislation**

#### *3 1 1 Cape Colony*

The earliest legislation dealing with banks in the Cape Colony that can be traced, is an ordinance in terms of which the Cape of Good Hope Savings Bank was established.<sup>25</sup> This ordinance did not contain any provisions as to the banks's liquidation or dissolution, and does not shed any light on the manner in which banks were wound up, if at all, during this period.

The first reference to banks in any legislation is to be found in the Joint-Stock Companies' Limited Liability Act 23 of 1861. Section I of this Act provided:

"I. The term 'joint-stock company' in this Act shall mean every partnership whereof the capital is divided, or agreed to be divided into shares, and so as to be transferable without the express consent of all the partners; and also every partnership which at its formation or by subsequent admission shall consist of more than twenty-five members: Provided, however, that nothing in this Act contained shall apply to any joint-stock company formed for the purpose of banking."

However, in the fourth proviso to section XIII, which dealt with proceedings against shareholders where the company had insufficient goods to satisfy an execution judgment, it was stated that this section did in fact apply to every joint-stock company established for the purpose of banking, notwithstanding anything to the contrary contained in the Act. From this it would appear that separate legislation did in fact regulate the incorporation of joint-stock companies for the purpose

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<sup>24</sup> See par 1 above.

<sup>25</sup> Ordinance 86 of 1831.

of banking, but that the rules regulating the liability of shareholders, also applied to shareholders of a joint-stock company established for banking.<sup>26</sup>

The Winding-up Act 12 of 1868 was the first legislation in the Cape Colony to make specific provision for the winding-up of joint-stock companies. Nowhere in this Act could any reference be found to a provision stating that it did not apply to joint-stock companies operating as a bank. In fact, in *The Wellington Bank, In Liquidation*<sup>27</sup> Smith J asked the question as to why the bank had not been placed “under the Winding-up Act at once” where the shareholders had first attempted a voluntary winding-up. The court immediately placed the bank under liquidation and appointed liquidators to deal with the administration.

The picture in regard to banks becomes even clearer in the Companies Act 25 of 1892. Section 222 of this Act provided as follows:

“222. In the case of any company subject to this Act and formed for the purpose of carrying on the business of banking or the business of life assurance, the provisions of this Act shall not apply in any case in which they would be inconsistent with the provisions of ‘The Banks Act, 1891,’ or ‘The Life Assurance Act, 1891,’ as the case may be.”

From this it is evident that the winding-up provisions contained in this Act applied also to banks, except in so far as they were inconsistent with the provisions of the enabling legislation.<sup>28</sup> However, the Banks Act 6 of 1891 did not contain any provisions pertaining to the liquidation

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<sup>26</sup> There was much litigation concerning this aspect at the time. See eg *Union Bank (in liquidation) v Watson’s Heirs* (1891) 1 CTR 72; *The Cape of Good Hope Bank (in liquidation) v East, Runciman and Others* (1891) 1 CTR 75 (also reported at (1891) 8 SC 157); *Liquidators Paarl Bank v Executrix and Heirs of GJ Roux* (1891) 1 CTR 136 (also reported under *The Liquidators of the Paarl Bank v Roux and Others* (1891) 8 SC 205); *The Union Bank, In Liquidation v Uys* (1891) 1 CTR 119; *The Cape of Good Hope Bank, In Liquidation v Belson* (1891) 1 CTR 183.

<sup>27</sup> (1891) 1 CTR 181. See also *Liquidators of Union Bank v King’s Trustee* (1893) 3 CTR 89 (also reported at (1893) 10 SC 101) where it is evident that the bank was being wound up in terms of the provisions of the Winding-up Act of 1868.

<sup>28</sup> See *The Cape of Good Hope Bank (in liquidation) v East, Runciman and Others* (1891) 1 CTR 75 (also reported at (1891) 8 SC 157) from which it is evident that the winding-up provisions of the Winding-up Act 23 of 1861 applied also to the winding-up of banks.

or winding-up of a bank. In fact, the Banks Act 6 of 1891 did not refer in any way to what would happen if a bank was to be wound up, which merely confirms the view that banks were wound up in the same way as any other company would be at that time. The Banks Act 6 of 1891 was later repealed by the Banking Act 38 of 1942.<sup>29</sup> However, the Life Assurance Act 13 of 1891 did contain provisions relating to the winding-up of a life assurance company. Section 24 of the Life Assurance Act 13 of 1891 provided as follows:

“24. The Court may order the winding-up of any company, in accordance with the “Winding-up Act, 1868,”<sup>30</sup> upon the petition of twenty or more policy-holders or shareholders, upon its being proved to the satisfaction of the Court that the company is insolvent; and in determining whether or not the company is insolvent, the Court shall take into account its contingent or prospective liability under policies or annuity, or other existing contracts.”

An interesting innovation, however, is to be found in section 25 of the same Act, granting the court a discretion to allow a procedure in lieu of winding-up:

“25 The Court may in the case of the company which has been proved to be insolvent, reduce the amount of the contracts of such company upon such terms and subject to such conditions as to the Court may seem fit, instead of granting a winding-up order.”

Section 26 also contained references to winding-up, but does not have any direct bearing on the present discussion.

### *3.1.2 Natal*

The Joint-Stock Companies' Limited Liability Law 10 of 1864 was the equivalent of the Cape Colony's Joint-Stock Companies' Limited Liability Act of 1861.<sup>31</sup> However, while the Natal statute contained the same provision stating that the Act did not apply to joint-stock companies established for the purpose of banking, it did not contain the fourth proviso that the Cape Colony

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<sup>29</sup> See par 3.2 below.

<sup>30</sup> This Act was repealed by Act 25 of 1892.

<sup>31</sup> See par 3.1.1 above.

statute contained in section XIII. Section 12 of the Natal statute was the equivalent of the Cape Colony's section XIII, and contained no provision referring to the liability of shareholders in a joint-stock company established for the purpose of banking. From this it is assumed that none of the provisions of the Natal statute applied to banks.

The Special Partnerships Limited Liability Act of 1864<sup>32</sup> specifically excluded "partnerships being Joint-Stock Companies, or being formed for the purpose of banking". From this one would assume that there was special legislation governing the winding-up of banks at the time, but no such legislation could be traced. In the Natal Winding-up Law 19 of 1866, no reference at all was made to banks or their exclusion from the ambit of the Act. From this must be deduced that the Act and all its provisions did in fact apply to banks and other specialised institutions, especially since the Natal Bank Act of 1888<sup>33</sup> contained no provision stating otherwise. The only provision that related to the winding-up of a bank in the 1888 statute was section 97, and provided as follows:

"97. If at any time during the continuance of this Law The Natal Bank (Limited) shall have sustained actual damages and incurred losses to such an amount that the whole amount of the Reserve Fund then accumulated, and one-fourth part of the subscribed Capital of the Bank (as by this Law defined, and from time to time increased), shall be exhausted in paying off and satisfying said damages and losses, then the Board of Directors for the time being shall forthwith call a special general meeting of the shareholders, in manner hereinbefore provided, and shall submit to such meeting a full and general statement of the affairs and concerns of the said Bank, and thereupon the affairs of the said Bank shall be wound up, and the Bank, as soon as may be, dissolved."

Unfortunately the Act did not state how, or in terms of which legislation, the bank was to be wound up. One can only assume that the winding-up laws at the time applied to the winding-up of the bank.

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<sup>32</sup> Law No 1 of 1865.

<sup>33</sup> Law No 43 of 1888.



### 3 1 3 Transvaal

In section 1 of *De Acte van Maatschappijen met Beperkte Verantwoordelijkheid*<sup>34</sup> it is evident that this legislation did not apply to banks. It is stated thus in the Act itself:

“ ..., met bepaling echter dat niets in deze wet vervat, betrekking zal hebben op eenige bankmaatschappij.”

The 1891 *Wet op het Liquideeren van Maatschappijen*<sup>35</sup> contained no reference to companies established for the purpose of banking. Also the *Wet met betrekking tot de Banken in de Zuid-Afrikaansche Republiek*<sup>36</sup> of 1892 contained no references to winding-up, and one must therefore assume that the *Wet op het Liquideeren van Maatschappijen* of 1891 did indeed apply to the liquidation of, *inter alia*, banks. The 1892 *Wet met betrekking tot de Banken in de Zuid-Afrikaansche Republiek* was replaced in 1893 by the *Wet met betrekking tot de Banken in de Zuid-Afrikaansche Republiek*<sup>37</sup> and likewise contained no reference to the winding-up of a bank. The latter Act was later repealed by the Banking Act 38 of 1942.<sup>38</sup> The 1894 *Wet op het Liquideeren van Maatschappijen*,<sup>39</sup> which replaced the winding-up statute of 1891, also contained no reference to the position of banks under this Act.

The Companies Act 31 of 1909 contained very precise provisions relating to not only the winding-up of banks and insurance companies,<sup>40</sup> but also co-operatives, building societies, friendly societies and trade unions.<sup>41</sup> Section 201 of this Act provided as follows:

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<sup>34</sup> *Wet No 5 van 1874.*

<sup>35</sup> *Wet No 8 van 1891.*

<sup>36</sup> *Wet No 22 van 1892.*

<sup>37</sup> *Wet No 2 van 1893.*

<sup>38</sup> See par 3.2 below.

<sup>39</sup> *Wet No 1 van 1894.*

<sup>40</sup> See s 201.

<sup>41</sup> See s 202.

“201. Where a company or a foreign company is subject to the provisions of-

- (a) Law No. 2 of 1893 or any law which for the time being is specially applicable to banking companies; or
- (b) Law No. 8 of 1898 or any law which for the time being is specially applicable to life, fire, or accident insurance companies or societies,

the provisions of this Act which would otherwise apply in respect of such company shall not apply wherever these provisions would be inconsistent with any such law.”

From this section it is evident that the provisions of the Companies Act would also apply to banks and insurance companies, but only in so far as the provisions were not inconsistent with the provisions of the banking legislation that applied at the time and the legislation dealing with insurance companies. As pointed out in the previous paragraph, Law 2 of 1893 contained no reference to winding-up, and it is to be assumed that the reference to this Act was to the provisions relating to the functioning of the bank as such. Likewise, Law No 8 of 1898<sup>42</sup> contained no references to winding-up.

### 3 1 4 Orange Free State

Section 13 of the *Wet over Beperkte Verantwoordelijkheid van Naamlooze Vennootschappen* contained in *Hoofdstuk C van Wetboek*, dealt with the liability of shareholders. In section 13(4) provision was made for the liability of shareholders of banking companies, despite any provisions to the contrary that may have been provided for elsewhere. Clearly there was other legislation at the time that regulated companies established for the banking industry.

Chapter CI of the Statute Law (*Wetboek*) of the Orange River Colony contained The Articles of Association of the National Bank. Part XVII of this Act made provision for the “Winding up of the National Bank of the Orange Free State, Limited” which were dealt with in sections 105 to 109. However, from the provisions themselves it would appear that the bank was not necessarily insolvent to the extent that it could not pay its debts. What happened if the bank was in fact hopelessly insolvent, is not certain from the provisions in question. Due to their importance, sections 106 and 107 are reproduced here in their entirety:

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<sup>42</sup> *Wet tot Regeling van de Besigheid van Assurantie-Maatschappijen in de Zuid-Afrikaansche Republiek, Wet No 8 van 1898.*



curatorship. Section 43 of the 1942 Banking Act made provision for a bank to be placed under curatorship by applying the provisions of sections 196 to 198 (inclusive) of the Companies Act 46 of 1926,<sup>44</sup> which provided for judicial management.

Section 44 of the 1942 Banking Act made provision for a bank to be wound up under the provisions of the 1926 Companies Act, subject to certain provisos. These provisos amounted to the following: The provisions did not apply if the bank was registered under the Co-operative Societies Act of 1939; the Registrar of Banks was added as one of the parties that needed to be informed and upon whom documents had to be served; the Registrar of Banks replaced the Master or was added as an additional party in some of the provisions; and the Registrar of Banks was given the power to oppose or bring winding-up applications in respect of banks. Section 45 of the 1942 Banking Act made provision for the cancellation of the bank's registration or provisional registration once the Master or court had confirmed the final account in regard to the winding-up of the financial institution.

### 3 2 2 *Banks Act 23 of 1965*<sup>45</sup>

The 1942 Banking Act was repealed by the 1965 Banks Act. Although very similar to the provisions contained in the 1942 Act, the provisions contained in sections 40, 41 and 42 of this new legislation were a little more refined than the provisions contained in the previous Act. However, the provisions did not really provide for anything new and were basically a re-enactment of the existing provisions dealing with the curatorship<sup>46</sup> and winding-up of a bank.

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<sup>44</sup> Hereinafter referred to as the 1926 Companies Act.

<sup>45</sup> Hereinafter referred to as the 1965 Banks Act. For a brief discussion of the winding-up provisions of this Act, see Willis *Banking in South African Law* (1981) 93-94 (hereinafter referred to as Willis). For an example of the difficulties experienced in applying the various provisions of both the 1965 Banks Act and the 1990 Banks Act, see *Alpha Bank Bpk v Registrateur van Banke* 1996 1 SA 330.

<sup>46</sup> For a brief discussion of the curatorship of a bank under these provisions, see Willis 94-96.

One major innovation, however, was section 41(6), which provided that only a person recommended by the Registrar of Banks could be appointed by the Master as a liquidator or judicial manager in the case where a bank was being wound up or had been placed under curatorship.<sup>47</sup>

### 3 3 Union legislation relating to the insurance industry<sup>48</sup>

#### 3 3 1 Insurance Act 37 of 1923<sup>49</sup>

Section 35 of the 1923 Insurance Act made provision for the petition by policy-holders for the winding-up of an insurance company.<sup>50</sup> Section 35(1) provided as follows:

“35. (1) On the petition of twenty or more policy-holders owning life policies for an aggregate sum of not less than ten thousand pounds and upon its being proved to the satisfaction of the court that the company is insolvent, the court may order the winding up of any company whose head office is in the Union and may apply, as far as may be deemed necessary, the provisions of the law governing the winding up of companies: Provided that such petition shall not be presented except with the leave of the court and leave shall not be granted until a *prima facie* case has been established to the satisfaction of the court and until security for costs such as an amount as the court may think reasonable has been given.”

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<sup>47</sup> See Willis 93-96.

<sup>48</sup> Although only Union legislation in regard to insurance companies will be discussed here, it is to be noted that there were several Acts and Ordinances that regulated the insurance industry in the various colonies prior to these Acts. Due to the fact that the historical development of winding-up provisions in respect of insurance companies is very much the same as that relating to banks, the detail of these statutes will not be discussed here. However, for the sake of completeness the statutes in question are mentioned here: *Cape Colony*: Act for Incorporating the Union Fire and Marine Insurance and Trust Company, Act 32 of 1861; the Life Assurance Act, Act 13 of 1891. *Natal*: Assurance & Insurance Companies Act, Act 47 of 1904. *Transvaal*: *Wet tot Regeling van de Bezigheid van Assurantie-Maatschappijen in de Zuid-Afrikaanse Republiek, Wet No 12 van 1892*; *Wet tot Regeling van de Bezigheid van Assurantie-Maatschappijen in de Zuid-Afrikaanse Republiek, Wet No 8 van 1898*. *Orange Free State*: ch CIII of the Statute Law, Regulating the Admission of Insurance Companies; Law to Regulate Rights under Policies of Life Assurance, Law 12 of 1894.

<sup>49</sup> Hereinafter referred to as the 1923 Insurance Act.

<sup>50</sup> As to when a policy-holder had *locus standi* to bring such an application, see *L J Sheffield & Co Ltd v The United Provident and Assurance Association of South Africa, Limited*; *Barrow v Idem*; *Butterworth v Idem* 1932 WLD 200.

The following points are of interest here:

- (a) It had to be proved that the insurance company was insolvent;
- (b) The law applying to the winding-up of companies was applicable;<sup>51</sup>
- (c) The petition could not be presented to the court without its (the court's) permission; and
- (d) The court could not grant leave until such time as a *prima facie* case had been made.

The requirement that a *prima facie* case first had to be made before the court would grant leave to petition the court for winding-up was probably designed to prevent frivolous applications for the winding-up of insurance companies, thereby causing a panic amongst the public.

Section 35(2) conferred on the court the power to reduce the contracts of the insurance company instead of issuing a winding-up order. This would probably occur in cases where the court was of the opinion that the insurance company was still viable, and that it was not in the interests of the policy holders to place the insurance company in liquidation. Section 35(3) merely provided for the manner in which the value of policies had to be determined for the purposes of winding-up or the bringing of an application for the winding-up of an insurance company.

### 3 3 2 *Insurance Act 27 of 1943*<sup>52</sup>

The 1943 Insurance Act contained far more refined provisions in respect of winding-up than the provisions contained in the 1923 Insurance Act.<sup>53</sup> In addition to these extended provisions, the Act also made provision for the possibility of an insurance company being placed under judicial

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<sup>51</sup> In this regard see also the comments made in Davis *Gordon and Getz on the South African Law of Insurance* 4th ed (1993) 54 (hereinafter referred to as Davis).

<sup>52</sup> Hereinafter referred to as the 1943 Insurance Act. As regards the winding-up and judicial management of insurance companies under the 1943 Insurance Act generally, see Davis ch 3.

<sup>53</sup> See ss 30 and 32.

management.<sup>54</sup> It is also important to note that section 3(1) of the Companies Act expressly excludes the operation of the Companies Act in cases where its provisions are inconsistent with the provisions of the Insurance Act.<sup>55</sup>

In terms of section 30 of the 1943 Insurance Act the following persons or institutions could bring an application for the winding-up of an insurance company:<sup>56</sup>

- (a) The Registrar of Insurance Companies<sup>57</sup> (with the permission of the relevant Minister);<sup>58</sup>

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<sup>54</sup> See s 31. See also Davis 68-72.

<sup>55</sup> See also Davis 54. The reasons for the exclusion of the operation of the provisions of the Companies Act were explained by Vieyra J in *Ex parte Liquidators of Parity Insurance Co Ltd* 1966 1 SA 463 (W). According to Vieyra J (at 466) the reasons are that the liquidation of insurance companies introduce complexities of a nature not found in the liquidation of ordinary commercial companies. Vieyra J also criticised (at 476) the provisions in the 1943 Insurance Act as being inadequate, and the language as being obscure. However, see *Lindsay Keller & Partners v AA Mutual Insurance Association Ltd* 1988 2 SA 519 (W) where the court held that the winding-up provisions of the Companies Act were not inconsistent with the provisions of the Insurance Act of 1943. In this case the court distinguished between the winding-up of the “insurance business” of an insurance company and the winding-up of the company itself, holding that the provisions of the Insurance Act only applied to the winding-up of the “insurance business” (see also the discussion of the *Lindsay Keller* decision in Davis 57-58). However, see *Connolly v AA Mutual Insurance Association Ltd* 1991 1 SA 423 (W) where the plaintiff (the liquidators of an insurance company) contended that one part of an insurance business could be wound up, allowing the liquidators to sue the remaining part. Schabert J (at 428) regarded the contention as “utterly imaginable”. In *Ex parte Wells: In re African Horizon Insurance Co Ltd (in liquidation)* 1963 2 SA 419 (C) the court had already expressed its view that the provisions of s 32(4) of the 1943 Insurance Act did not allow the court to “issue legislation” superseding the provisions of the (1926) Companies Act.

<sup>56</sup> It is interesting to note that no grounds for the winding-up of an insurance company were provided for in the 1943 Insurance Act, save one instance where the Registrar was the applicant - see Davis 56. Since the provisions of the Companies Act applied *mutatis mutandis* (see ss 31(6) and 32(5)) except in so far as the provisions were inconsistent with the provisions of the 1943 Insurance Act, the grounds for liquidation set out in the Companies Act could be relied upon in appropriate circumstances - see Davis 56-57. In *Registrar of Insurance v Johannesburg Insurance Co Ltd (2)* 1962 4 SA 548 (W) at 551 Hiemstra J stated that the grounds for winding-up insurance companies are wider than in the case of other companies.

<sup>57</sup> For an example of this, see *Registrar of Insurance v Provident Assurance Corporation of Africa Ltd* 1963 4 SA 83 (W). See also Davis 54-55.

<sup>58</sup> S 30(1).

- (b) A registered insurer;<sup>59</sup>
- (c) A creditor of the insurance company “who was unable to obtain payment of his claim after recourse to the ordinary process of law”.<sup>60</sup>

However, none of the above could bring an application unless they had satisfied the court of the desirability of bringing such an application.<sup>61</sup> Section 30(3) made provision for the powers of the court where an application was brought. The court could:

- (a) Refuse the application;<sup>62</sup>
- (b) Order the Registrar to appoint an inspector to investigate the affairs of the insurance company;<sup>63</sup>
- (c) Order that the whole or part of the business of such an insurer be placed under judicial management;<sup>64</sup> or
- (d) Order that the whole or part of the business of such an insurer be wound up.<sup>65</sup>

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<sup>59</sup> S 30(1). See also Davis 55.

<sup>60</sup> S 30(2). See also Davis 55-56.

<sup>61</sup> Proviso to s 30(1) and proviso to s 30(2).

<sup>62</sup> S 30(3)(a); Davis 62.

<sup>63</sup> S 30(3)(b); Davis 62.

<sup>64</sup> S 30(3)(c); Davis 62. In terms of s 31(3) the court had to appoint the judicial manager and determine his or her remuneration. From the decision in *Ex parte Registrar of Insurance* 1963 3 SA 411 (W) it would appear that the court would only determine the remuneration after the judicial manager had reported to the court in terms of s 31(9).

<sup>65</sup> S 30(3)(d); Davis 63.



Section 30 of the Act also clearly stated that when exercising its discretion, the court had to act primarily in the interests of the policy owners.<sup>66</sup> Although the Registrar of Insurance played a critical role in the winding-up of an insurance company, he did not usurp the Master's powers in such a case.<sup>67</sup> In fact, the Master retained all his usual rights and powers in cases where insurance companies were being wound up.<sup>68</sup>

Section 31 made provision for the judicial management of an insurance company, and contained detailed provisions in respect of how the judicial management of the company was to be conducted.<sup>69</sup> The whole process was controlled by the court.<sup>70</sup> Section 32 made provision for winding-up and, interestingly enough, this whole process was also driven by the court. For example:

- (a) The court appointed a liquidator;<sup>71</sup>
- (b) The court could issue directions to the liquidator as it saw fit;<sup>72</sup>

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<sup>66</sup> It is for this reason that an alternative to the winding-up of an insurance company must be found, if at all possible - see in this regard the comments by Marais J in *Financial Mail (Pty) Ltd v Registrar of Insurance* 1966 2 SA 219 (W).

<sup>67</sup> See *Ex parte Liquidators of Parity Insurance Co Ltd* 1966 1 SA 463 (W).

<sup>68</sup> See *Registrar of Financial Institutions v Parity Insurance Co Ltd* 1965 2 SA 461 (W).

<sup>69</sup> For a more detailed discussion of the judicial management provisions, see Davis 68-72.

<sup>70</sup> See *Parity Insurance Co Ltd (in liquidation) v Hill* 1967 2 SA 551 (A); Davis 72-76.

<sup>71</sup> S 32(3). As regards the remuneration that the liquidator was entitled to, the court normally determined this on the return day of the rule *nisi* (see Davis 63). In cases where the remuneration determined by the court turned out to be insufficient, it was held that the liquidator was entitled to approach the court for a variation of the original order - see in this regard *Ex parte Wells: In re Auto Protection Insurance Co Ltd* 1968 2 SA 631(W).

<sup>72</sup> S 32(4). This subsection was amended in 1969 to state that the instructions given by the court would "prevail over the provisions of any law other than this Act". However, the word "law" as it was applied in this section did not mean the common law - see *Schuurman v Motor Insurers' Association of SA* 1960 4 SA 316 (T). For an example of the court issuing instructions to the liquidator, see *Foord v Lake* 1968 4 SA 395 (W) where the court gave the liquidator the power to accept or reject claims without proof before a magistrate, and to compromise claims without any directions from the creditors.

- (c) The liquidator acted under the control of the court at all times and could apply to the court for instruction.<sup>73</sup>

Although the law relating to the winding-up of companies applied *mutatis mutandis* to an insurance company being wound up, they only applied in so far as they were not inconsistent with the (detailed) provisions contained in the Insurance Act.<sup>74</sup>

### 3 4 Current position in regard to the banking industry

Before the current Banks Act 94 of 1990<sup>75</sup> could be promulgated, the current (1973) Companies Act had in the meantime been passed by Parliament. The 1990 Banks Act was therefore drafted with references to the 1973 Companies Act.<sup>76</sup> When it comes to the supervision of the banking industry in South Africa, there are basically three main role-players, namely the Registrar of Banks, the Reserve Bank and the Financial Services Board. The Financial Services Board, for example, plays an important role in the case of a bank or insurance company being placed under curatorship.

The provisions in the 1990 Banks Act dealing with winding-up and curatorship are far more refined than the previous provisions that appeared in the 1942 and 1965 banking legislation and, due to their relevance to the current discussion, will be dealt with here in detail. It is also interesting to note that these provisions (dealing with winding-up and curatorship) were recently

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<sup>73</sup> S 32(6).

<sup>74</sup> S 32(5) and (8). For examples of how this was applied in practice, see *Lindsay Keller & Partners v AA Mutual Insurance Association Ltd* 1988 2 SA 519 (W) and *Ex parte Wells: In re African Horizon Insurance Co Ltd (in liquidation)* 1963 2 SA 419 (C).

<sup>75</sup> Hereinafter referred to as the 1990 Banks Act.

<sup>76</sup> For an example of the difficulties involved in applying the various provisions of the 1965 Banks Act, the 1990 Banks Act and the Companies Act, see *Alpha Bank Bpk v Registrateur van Banke* 1996 1 SA 330.

amended,<sup>77</sup> providing the relevant authorities with even more say in the manner that banks are wound up.

Section 68 of the 1990 Banks Act deals with winding-up,<sup>78</sup> and basically provides for the following:

- (a) The Registrar (of Banks) has the right to apply for the winding-up of any bank;<sup>79</sup>
- (b) The Registrar has the right to oppose the application for the winding-up of any bank by any other person;<sup>80</sup>
- (c) No person other than a person recommended by the Registrar may be appointed by the Master as provisional or final liquidator of a bank;<sup>81</sup>
- (d) The Master must appoint a person designated by the Registrar to assist the provisional or final liquidator, and such person must be someone who, in the opinion of the Registrar, has experience and knowledge of the banking industry;<sup>82</sup>
- (e) The appointment of a person to assist the liquidator must be done by way of a letter in which is set out the name of the bank in respect of which the appointment has been made,

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<sup>77</sup> See ss 9 and 10 of the Banks Amendment Act 36 of 2000.

<sup>78</sup> In terms of s 3 of the Companies Act, its provisions do not apply to a bank.

<sup>79</sup> S 68(1)(a) of the 1990 Banks Act.

<sup>80</sup> S 68(1)(a) of the 1990 Banks Act.

<sup>81</sup> S 68(1)(b) of the 1990 Banks Act.

<sup>82</sup> S 68(1)(c) of the 1990 Banks Act.

any directions in regard to such person's remuneration and any other directions as the Master or Registrar may have seen fit to issue. The Master must send a copy of such a letter of appointment to the provisional or final liquidator concerned;<sup>83</sup>

- (f) If a bank is being wound up voluntarily, the liquidator has to furnish the Registrar with any returns or statements which the bank would have been obliged to furnish if it was not being wound up;<sup>84</sup>
- (g) In any application for the winding-up of a bank by the court,<sup>85</sup> the Registrar, in addition to the Master, must be served with the necessary application and of every affidavit submitted in support thereof;<sup>86</sup>
- (h) In any application for the winding-up of a bank by the court, the Registrar, in addition to the Master, may report to the court any facts ascertained by him which appear to him to justify the court in postponing the hearing or dismissing the application;<sup>87</sup>
- (i) In the case where a company which is a bank is being wound up voluntarily, a copy of the special resolution and of every order of court amending or setting aside any proceedings in relation to a winding-up, must be furnished to the Registrar;<sup>88</sup>

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<sup>83</sup> S 68(1A)(a)-(c) of the 1990 Banks Act.

<sup>84</sup> S 68(2) of the 1990 Banks Act.

<sup>85</sup> In terms of s 346 of the Companies Act.

<sup>86</sup> S 68(3)(a) of the 1990 Banks Act.

<sup>87</sup> S 68(3)(a) of the 1990 Banks Act.

<sup>88</sup> S 68(3)(b) of the 1990 Banks Act.

- (j) Provisions relating to the effect of the suspension, cancellation or termination of the registration of a bank as a result of an application brought by the Registrar.<sup>89</sup>

From these provisions it is quite evident that the liquidation or winding-up of a bank still takes place in terms of the rules relating to insolvency. All that the provisions in the Banks Act seek to achieve is the addition of the Registrar of Banks as a party to the proceedings, and the addition of a few administrative regulatory matters. In other words, the winding-up provisions contained in the Banks Act are merely procedural in nature, and do not detract from the substantive law that regulates winding-up generally. It is for this reason that I am of the opinion that these provisions should be included in a unified insolvency statute.<sup>90</sup>

However, a unified insolvency statute cannot, and should not, regulate any attempt at rescuing a bank or insurance company experiencing financial difficulties. For example, the section<sup>91</sup> dealing with the placing of a bank under curatorship should not be included in a unified insolvency statute, and it is submitted that these provisions should remain in the Banks Act.<sup>92</sup>

### **3 5 Current position in regard to the insurance industry**

Insurance legislation in South Africa was recently overhauled to the extent that two new pieces of insurance legislation, namely the Long-Term Insurance Act and the Short-Term Insurance Act, were promulgated in 1998.<sup>93</sup> These Acts contain identical provisions in regard to winding-up and

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<sup>89</sup> S 68(5) of the 1990 Banks Act.

<sup>90</sup> The aspects mentioned in paras (a) to (j) above can quite easily be addressed in a unified insolvency statute, as will be illustrated in par 4.4 below.

<sup>91</sup> Ss 69 and 69A of the 1990 Banks Act.

<sup>92</sup> Although a unified insolvency statute will also provide for business rescue, it is submitted that due to the specialised nature of banks and insurance companies, these provisions should remain in the enabling legislation. Another factor that influences such a submission, is that the Financial Services Board (FSB) has jurisdiction in the case of a bank being placed under curatorship. In order to effectively exercise its authority, the provisions will probably be better utilised in the Banks Act.

<sup>93</sup> Although promulgated in 1998, both these Acts only came into operation on 1 January 1999.

judicial management, and consequently only the provisions of the Long-Term Insurance Act will be referred to here.

After the gradual intensification of the winding-up provisions contained in first the 1923 Insurance Act,<sup>94</sup> and then the 1943 Insurance Act,<sup>95</sup> it is rather surprising to see how the provisions in the 1998 Act have been toned down to just a few basic principles that have to be applied in the case of an insurance company being wound up.

Part VI of the Long-Term Insurance Act provides for the “Judicial Management and Winding-up of Long-Term Insurers”. Section 41 deals with judicial management, section 42 with the winding-up of an insurer by the court and section 43 with voluntary winding-up. In regard to the winding-up of an insurance company by the court, the following principles apply:

- (a) The Registrar (of Insurance Companies) is deemed to be a person authorised by section 346 of the Companies Act to bring an application for the winding-up of an insurance company;<sup>96</sup>
- (b) The Registrar may bring such an application only with the permission of the relevant Minister, and then only when he is satisfied that it would be in the best interests of the policy-holders to do so;<sup>97</sup>

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<sup>94</sup> See par 3.3.1 above.

<sup>95</sup> See par 3.3.2 above.

<sup>96</sup> S 42(1) of the Long-Term Insurance Act.

<sup>97</sup> S 42(2) of the Long-Term Insurance Act.

- (c) When deciding whether it is just and equitable that an insurance company be wound up, the additional question that has to be asked by the court is whether it will be in the interests of the policy-holders to do so;<sup>98</sup>
- (d) Certain references to the provisions of the Companies Act dealing with winding-up must include a reference to the Registrar of Insurance Companies;<sup>99</sup>
- (e) Where application is made for the winding-up of a company by someone other than the Registrar,
  - (i) the application cannot be heard unless the application and all documents are also served on the Registrar at least 15 days before the application is set down for hearing;<sup>100</sup> and
  - (ii) the Registrar may oppose the application if he is convinced that the application is not in the interests of the policy-holders.<sup>101</sup>

Although this aspect falls beyond the scope of this study, it would appear that section 43, which provides for the voluntary winding-up of an insurance company, only makes provision for an insurance company to be wound up voluntarily as a voluntary winding-up by members.<sup>102</sup>

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<sup>98</sup> S 42(3)(b) of the Long-Term Insurance Act.

<sup>99</sup> S 42(3)(d) of the Long-Term Insurance Act.

<sup>100</sup> S 42(4)(a) of the Long-Term Insurance Act.

<sup>101</sup> S 42(4)(b) of the Long-Term Insurance Act.

<sup>102</sup> S 43(a) of the Long-Term Insurance Act states that the company must make satisfactory arrangements to meet all the liabilities of the long-term insurer under long-term policies entered into it prior to the winding-up. This is hardly likely to be possible in the case of a voluntary winding-up by creditors, which may be used where the company is insolvent.

## **4 PROPOSALS FOR THE INCLUSION OF SPECIALISED INSTITUTIONS UNDER A UNIFIED INSOLVENCY STATUTE**

### **4 1 Introduction**

As mentioned above,<sup>103</sup> the protection of specialised institutions is necessary for the protection of the public interest and, in some cases, for the protection and stability of financial markets. However, it is submitted that the same protection which is currently enjoyed by these institutions can be built into a unified insolvency statute. As pointed out above, there was one symposium and one conference which preceded a report on a unified Insolvency Act held at the University of Pretoria. Not only did the subject of including banks, insurance companies and the like in the unified proposals spark a heated debate at these events, but it was also one of the most problematic aspects of the report on a unified Insolvency Act.<sup>104</sup> Not only does this problem strike at the very core of the philosophy relating to the liquidation of these types of entities, but it is also a political issue that needs to be approached with the utmost caution and sensitivity.

At the heart of the debate lies the question as to whether certain institutions, the winding-up and judicial management of which currently take place under separate governing legislation, should be included under proposals for a unified Insolvency Act. The decision to exclude or include such provisions would appear to be one of policy. Many objections were made in respect of including the provisions currently contained in separate legislation, for example in the Banks Act or the Long-Term Insurance Act, in a unified statute.<sup>105</sup> It has been argued that the institutions which currently enjoy protection in terms of special legislation require this protection in the public interest and, in certain cases, for the protection and stability of the financial markets. From this one can only adduce that the protagonists for the retention of the special provisions in the

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<sup>103</sup> See par 2 above.

<sup>104</sup> See paras 3.1-3.18 Final Report Vol 1.

<sup>105</sup> This was the case at the conference held on 6 Oct 1999. See eg the submissions made by Grobler of the Reserve Bank, Conference Transcriptions 28-32.



governing legislation believe that this is the only way in which the public interest can be protected.

After having studied the provisions concerned in the relevant Acts, it is submitted that there can be no danger that the protection of the public interest will be compromised by including the liquidation of these institutions in a unified insolvency statute. Most of the provisions in question relate to preventing simply any person from bringing an application to liquidate a bank or insurance company which would, quite obviously, result in potential chaos. In addition, these provisions require a person with the requisite expertise to act as liquidator. However, the powers of the registrars concerned need not be compromised by including the (currently separate) provisions in a unified piece of legislation. In a nutshell, the unification process is not intended to take away the powers of any governing authority over its charge, but merely to provide for uniform procedures *once the institution in question has in fact been placed in liquidation*.

The powers that have currently been conferred on the governing authorities in respect of these specialised institutions will clearly have to be retained, in whatever form, in proposals for unified insolvency legislation. This would be necessary not only in order to protect the public interest, but also for the purpose of good administration. It is, however, submitted that the same objectives can be attained by including these provisions in unified insolvency legislation. Separate provisions create uncertainty and suspicion, especially at a time when transparency is of paramount importance. The inclusion of these provisions in the unified proposals would create legal certainty for all concerned, and would facilitate the effective administration of (all) insolvent estates. An additional advantage of including these provisions in a unified statute, would be the fact that the liquidation of banks and other institutions would be far less complicated to administer than they currently are.

As pointed out above, the intention here is only to include the provisions relating to liquidation and does not influence any other provisions contained in the governing legislation, for example

where an institution is placed under curatorship.<sup>106</sup> With this as background, it is submitted that an attempt should be made to include all types of institutions in a unified insolvency statute. An initial attempt at incorporating the separate provisions as they currently appear in the governing legislation, was a dismal failure.<sup>107</sup> The provisions are simply just too long, and drafting separate provisions for each type of institution based on the current legislation resulted in a clumsy and awkward chapter dealing with these special provisions. The proposals reflected below therefore reflect an attempt at drafting a blanket-clause which could apply in the case of all specialised institutions.

However, before this is attempted, the treatment of specialised institutions in other jurisdictions first needs to be examined. From an international<sup>108</sup> perspective Patrikis,<sup>109</sup> the First Vice President of the Federal Reserve Bank of New York, is of the opinion that the problem surrounding the liquidation of banks, is what he defines as “systemic risk”. He states it thus at 283:

“Banks are a pivotal part of the domestic and international payments system. Bank insolvencies entail systemic risks which are absent in the bankruptcy of most commercial concerns.”

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<sup>106</sup> See ss 69 and 69A of the 1990 Banks Act.

<sup>107</sup> See paras 3.1-3.18 Final Report Vol 1.

<sup>108</sup> For a more detailed exposition of international trends regarding the liquidation and regulation of banks, see Giovanoli and Heinrich (eds) *International Bank Insolvencies: A Central Bank Perspective* (1999) and Walker *International Banking Regulation: Law, Policy and Practice* (2001).

<sup>109</sup> Patrikis “Role and Functions of Authorities: Supervision, Insolvency Prevention and Liquidation” in Giovanoli and Heinrich (eds) *International Bank Insolvencies: A Central Bank Perspective* (1999) 283 (hereinafter referred to as Patrikis). This paper was delivered at a workshop on international bank insolvencies held in 1998.

“Systemic risk” is then defined as

“the risk that a disturbance in financial markets might seriously harm the financial position of financial firms, which could in turn threaten to disrupt the payments system and the capacity of the international financial system to allocate capital”.<sup>110</sup>

Patrikis therefore sees the function of the commercial law of banks as ensuring the integrity of the payments system.<sup>111</sup> He further points out that while non-bank insolvency is dominated by two main goals, namely the fair treatment of all creditors and the maximisation of the value of the estate, bank insolvency contains a third goal, namely the reduction of systemic risk.<sup>112</sup> Patrikis further points out that most countries treat the insolvency of banks differently than ordinary commercial insolvencies. As an example he points out that in the United States insolvency proceedings under the Bankruptcy Code differ from proceedings under the bank liquidation schemes in the following critical areas:<sup>113</sup>

- (a) Initiation of proceedings.
- (b) Administration of the estate.
- (c) Reorganisation.
- (d) Liquidity.

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<sup>110</sup> Patrikis 283.

<sup>111</sup> Patrikis 283.

<sup>112</sup> Patrikis 283-284.

<sup>113</sup> This is also the case under South African law. See par 3.4 above.

There are also important differences in the treatment of impeachable transactions where, in the case of banks, banking insolvency law would be less willing to reverse non-fraudulent transfers.<sup>114</sup>

While there is no doubt that the effect of the liquidation of a bank differs from the liquidation of other commercial concerns, Patrikis unfortunately does not state whether these institutions can *only* be protected by including the provisions in separate legislation. As pointed out above, it is *only* the liquidation process itself which is sought to be included in a unified insolvency statute, not other preceding proceedings such as the placing of a bank under curatorship in order to ensure its continued existence, or the protection of the financial markets. Patrikis himself recognises that there can be various stages in the gradual demise of a financial institution, ending in its possible liquidation:

“If insolvency authorities are morticians, supervisory authorities are the doctors. And often supervisory and insolvency authorities are one and the same. This suggests that bank insolvency is the end-stage of a continuous process, which begins with bank supervision, proceeds to workouts of distressed institutions, and terminates with insolvency.”<sup>115</sup>

By including banks and other institutions in a unified insolvency statute, it is the latter part of the process which one is seeking to address, not the initial or intermediate stages of supervision which would, in terms of the enabling legislation, be supervised by the governing body of the institution concerned.

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<sup>114</sup> Patrikis 285. The point is made that financial contracts are much more difficult to avoid than ordinary transfers. Under South African insolvency law special provision has been made for the avoidance of financial transactions: s 35A of the Insolvency Act deals with transactions on an exchange and s 35B deals with agreements on informal markets. The provisions in question basically provide that a trustee cannot avoid certain transactions, and may be bound to certain transactions that result in netting or set-off.

<sup>115</sup> At 285.

With this as background, it is interesting to note how banks (and other specialised institutions<sup>116</sup>) are treated in the United States and England.

#### **4 2 The liquidation of banks (and other specialised institutions) in the United States of America<sup>117</sup>**

The definition of “debtor” under the United States Bankruptcy Code<sup>118</sup> expressly excludes banks, savings banks, co-operative banks, savings and loan associations, building and loan associations, homestead associations, credit unions, industrial banks or similar institutions which are insured banks as defined in section 3(h) of the Federal Deposit Insurance Act.<sup>119</sup> Consequently, the insolvency law applicable to commercial banks in the United States is “an entirely different body of law from that applicable to other commercial enterprises”.<sup>120</sup> The reason for this is that domestic banks in the United States are subject to the liquidation provisions of the applicable federal and state banking laws.<sup>121</sup>

When it comes to the supervision of banks in the United States, there are various regulatory authorities which exercise control. These are: the Federal Reserve Board (FRB), the Treasury Department’s Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance

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<sup>116</sup> For a detailed discussion of the liquidation of insurance companies in other jurisdictions, see Moss (ed in chief) *et al Cross-Frontier Insolvency of Insurance Companies* (2001) especially par 1 (United Kingdom), par 2 (USA), par 4 (Australia) and par 14 (Germany).

<sup>117</sup> See generally Mattingly, Misback, Milenkovich, Hansen and Sommer “International Bank Insolvencies: A Central Bank Perspective” 1998 12 *International Banking, Finance and Economic Law* 259 (hereinafter referred to as Mattingly *ea*).

<sup>118</sup> 11 USC s 109(b)(2) and (d). See also Herbert *Understanding Bankruptcy* (1995) 78-79.

<sup>119</sup> 12 USC (1989).

<sup>120</sup> Mattingly *ea* 259. However, if the bank is a foreign bank that does not have a branch or agency in the United States, it may be liquidated in terms of the United States Bankruptcy Code - Mattingly *ea* 259.

<sup>121</sup> Mattingly *ea* 259.

Corporation (FDIC) and the Office of Thrift Supervision (OTS).<sup>122</sup> All the aforementioned are at federal level, and work in co-operation with state banking agencies at state level. The purpose of these federal and state supervisory and regulatory authorities is to ensure the continuous safety and soundness of banking institutions and stability in the financial markets.<sup>123</sup>

The reason that the liquidation of banks is treated separately from other commercial enterprises becomes clear when one looks at the framework for the liquidation of banks generally in the United States.<sup>124</sup> The liquidation of a bank depends largely on such bank's charter and license.<sup>125</sup> Where a bank has been licensed by a state, liquidation is subject to that state's law. However, where a bank has been licensed by the OCC, federal liquidation law is applicable to the liquidation of such a bank.<sup>126</sup>

In the case of a national bank, the OCC has the authority to determine whether such bank is insolvent.<sup>127</sup> The OCC also has the right to appoint a receiver to wind up the bank, and in the case of an insured national bank, the OCC must appoint the FDIC as receiver.<sup>128</sup> In the case of banks that have been licensed by a particular state, the state banking laws generally find application to the liquidation of such banks.<sup>129</sup> Examples are the New York banking law and the laws that find application in the state of California.<sup>130</sup>

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<sup>122</sup> Mattingly *ea* 260.

<sup>123</sup> Mattingly *ea* 260.

<sup>124</sup> Mattingly *ea* 262.

<sup>125</sup> Mattingly *ea* 262.

<sup>126</sup> Mattingly *ea* 262-263.

<sup>127</sup> Mattingly *ea* 262-263.

<sup>128</sup> Mattingly *ea* 262-263.

<sup>129</sup> Mattingly *ea* 264-265.

<sup>130</sup> Mattingly *ea* 264-265.

In South Africa, as opposed to the United States, banking law is governed centrally and not by provincial legislation. Consequently all legislation applicable to banks is governed by central government, allowing the provisions that apply to all banks to be the same throughout the Republic. By allowing states to govern their own (state) banking, the United States is unable to regulate the liquidation of all banks by means of central (federal) government laws. This inherent difference distinguishes the liquidation of banks in South Africa from the liquidation of banks in the United States.

#### **4 3 The liquidation of banks (and other specialised institutions) in England<sup>131</sup>**

Contrary to the position in the United States, under English law “banks are subject to insolvency and liquidation provisions that are essentially the same as for all other commercial companies”.<sup>132</sup> However, English law does contain special provisions<sup>133</sup> dealing with the liquidation of a bank which are very similar to the provisions that currently prevail in South Africa.<sup>134</sup>

The supervision of the banking industry in England recently passed from the Bank of England to the Financial Services Authority (FSA).<sup>135</sup> However, in terms of a Memorandum of Understanding (MOA) between the UK Treasury, the Bank of England<sup>136</sup> and the FSA entered into on 28 October 1997, a framework was created for co-operation between these bodies in

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<sup>131</sup> See generally Beaves “International Bank Insolvencies: A Central Bank Perspective” 1998 12 *International Banking, Finance and Economic Law* 237 (hereinafter referred to as Beaves).

<sup>132</sup> Beaves 237. However, while this is the case in respect of banks, the winding-up of an insurance company is effected by means of provisions contained in separate legislation - Beaves 237.

<sup>133</sup> Beaves 237-238.

<sup>134</sup> See par 3.4 above.

<sup>135</sup> Beaves 238.

<sup>136</sup> For an example of an application for the winding-up of a bank by the Bank of England, see *Re Bank of Credit and Commerce International SA* [1992] BCC 83.

order to ensure financial stability.<sup>137</sup> This is similar to the situation in South Africa where the Reserve Bank and the Financial Services Board function in tandem.

Where a bank is liquidated or wound up in terms of English law, it would appear that the FSA is limited to presenting a petition to the High Court for the winding-up of an “authorized institution” on the ground that it is unable to pay its debts within the meaning of section 123 of the English Insolvency Act 1986, or on the ground that it is just and equitable that the institution in question be wound up.<sup>138</sup> In addition to this, the FSA must also be notified of any petition for the winding-up of an authorised institution by any other person, or be provided with notice of any meeting at which a resolution for its winding-up will be considered.<sup>139</sup>

Subject to certain limitations regarding ongoing monitoring powers, the FSA has no authority over the liquidator once he or she has been appointed.<sup>140</sup> After the appointment of a liquidator, such a person is subject to the control of the court, and not the FSA.<sup>141</sup> It is not clear whether the FSA has the right to insist on a liquidator (or co-liquidator) with the requisite knowledge of the banking industry, but in light of the United Kingdom’s system of licensed practitioners, it is unlikely that this will ever be problematic in England.

To summarise, in England banks and other specialised institutions (except for insurance companies) are not dealt with any differently than other commercial entities. The only protection that is granted to the banking industry is certain procedural requirements similar to, but not as stringent as, those currently applicable in South Africa.

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<sup>137</sup> Beaves 238-239.

<sup>138</sup> Beaves 240. See s 92 of the Banking Act 1987.

<sup>139</sup> Beaves 237.

<sup>140</sup> Beaves 240.

<sup>141</sup> Beaves 240.



#### 4 4 Proposed new provisions dealing with specialised institutions in South Africa

In order to achieve an insolvency statute that is truly unified, it is proposed that a separate chapter dealing with the insolvency of these institutions can be built into a unified Insolvency Act. The proposed chapter and sections dealing with the insolvency of these institutions could be framed as follows:

##### “CHAPTER 3 - SPECIAL PROVISIONS APPLICABLE TO SPECIFIC DEBTORS

**9. Special provisions relating to the liquidation of certain debtors.** (1) If a debtor which has been, or is in the process of being liquidated in terms of the provisions of this Act is:

- (a) a long-term insurer as defined in section 1 of the Long-Term Insurance Act 52 of 1998, or a short-term insurer as defined in section 1 of the Short-Term Insurance Act 53 of 1998, or
- (b) a bank as defined in section 1 of the Banks Act 94 of 1990; or
- (c) a mutual bank as defined in section 1 of the Mutual Banks Act 124 of 1993; or
- (d) a pension fund as defined in section 1 of the Pension Funds Act 24 of 1956; or
- (e) a financial exchange as defined in section 1 of the Financial Markets Control Act 55 of 1989; or
- (f) a medical scheme as defined in section 1 of the Medical Schemes Act 72 of 1967; or
- (g) a management company as defined in section 1 of the Unit Trusts Control Act 54 of 1981; or
- (h) a co-operative as defined in section 1 of the Co-operatives Act 91 of 1981; or
- (i) a friendly society as defined in section 1 of the Friendly Societies Act 25 of 1956,

the provisions of this section must be applied when applying this Act to such a debtor.

(2) In the application for the liquidation of a debtor as referred to in paragraphs (a) to (i) of subsection (1), the registrar of such debtor shall be deemed to be a person authorised by section 4 to make an application to the court for the liquidation thereof.

(3) The registrar of any debtor as referred to in paragraphs (a) to (i) of subsection (1), may with the written consent of the Minister responsible for the administration of such debtor, make an application under section 4 for the liquidation of such a debtor if he or she is satisfied that it is in the interests of the beneficiaries or creditors of such debtor to do so.

(4) In any sections of this Act-

- (a) any reference to the Master in respect of notice being given, shall be construed as a reference also to the registrar of the debtor concerned;
- (b) any reference to the Registrar of Companies shall be construed as a reference also to the registrar of the debtor concerned.

(5) If an application to the court for or in respect of the liquidation of a debtor as referred to in paragraphs (a) to (i) of subsection (1) is made by any other person than the registrar of the debtor concerned-

- (a) it shall not be heard unless copies of the notice of motion and of all accompanying affidavits and other documents filed in support of the application are lodged with the registrar of such debtor at least 15 days, or such shorter period as the court may allow on good cause shown, before the application is set down for hearing; and
- (b) the applicant concerned shall not, at any time before the application is set down for hearing, make public or cause to be made known to any person other than the registrar concerned, his or her intention to bring such an application, failing which the applicant shall be guilty of an offence and, on conviction, shall be sentenced to imprisonment for a period not exceeding X years, or a fine; and
- (c) if, for any reason, the registrar of the debtor concerned is satisfied that the application is contrary to the interests of such debtor or its beneficiaries, such registrar may join the application as a party and file affidavits and other documents in opposition to the application; and
- (d) in addition to any question whether it is just and equitable that the debtor should be wound up, there shall be considered also the question whether it is in the interest of the beneficiaries or other stakeholders of that debtor that it should be wound up.

(6) No liquidation resolution relating to the liquidation of a debtor referred to in paragraphs (a) to (i) of subsection (1), as contemplated in section 8<sup>142</sup> or paragraph (d) of subsection (1) of section 4<sup>143</sup> of this Act, shall be registered by the Registrar of Companies in terms of section 200 of the Companies Act 61 of 1973, and no liquidation resolution to that effect in terms of the constitution of such a debtor which is not a company shall have legal force

- (a) unless a copy of the notice referred to in paragraph (b) in subsection (2) of section 8 has been lodged also with the registrar of the debtor concerned; or
  - (b) if the registrar of such debtor, by notice to the debtor, declares that the resolution is contrary to an appropriate legislative provision which prohibits the adoption of such resolution.
- (7)
- (a) Notwithstanding the provisions of the Companies Act 61 of 1973 or any other law under which a debtor as referred to in paragraphs (a) to (i) of subsection (1) has been incorporated, Chapter 24 of this Act shall, subject to this subsection and with the necessary changes, apply in relation to the judicial management of such a debtor, whether or not it is a company, and in such application the registrar of the debtor concerned shall be deemed to be a person authorised by section 4 of this Act to make an application to court for the liquidation thereof.
  - (b) The registrar of the debtor concerned may make an application under Chapter 24 of this Act for a judicial management order, in respect of such a debtor if he or she is satisfied that it is in the interests of the debtor or the beneficiaries of such debtor to do so.
  - (c) If an application to the court for the judicial management of a debtor as referred to in paragraphs (a) to (i) of subsection (1), is made by any other person than the registrar of the debtor concerned-
    - (i) it shall not be heard unless copies of the notice of motion and of all accompanying affidavits and other documents

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<sup>142</sup> Cl 8 refers to voluntary liquidations by resolution.

<sup>143</sup> Cl 4 refers to applications for liquidation by corporate debtors.

- filed in support of the application are lodged with the registrar of the debtor concerned at least 15 days, or such shorter period as the court may allow on good cause shown, before the application is set down for hearing; and
- (ii) the registrar of the debtor concerned may, if satisfied that the application is contrary to the interests of the debtor or its beneficiaries, join the application as a party and file affidavits and other documents in opposition to the application.
- (d) As from the date on which a provisional or final judicial management order is granted in respect of a debtor as referred to in paragraphs (a) to (i) of subsection (1), any reference to such debtor shall, unless clearly inappropriate, be construed as a reference to the provisional or final judicial manager, as the case may be;
- (8) (a) Notwithstanding the provisions of this Act,
- (i) no person other than a person recommended by the registrar of a debtor as referred to in paragraphs (a) to (i) of subsection (1), shall be appointed by the Master as provisional liquidator, liquidator, provisional judicial manager or judicial manager, as the case may be, of any such institution; and
  - (ii) the Master shall appoint a person designated by the registrar of the debtor concerned, who shall be a person who in the opinion of the registrar concerned has wide experience of, and is knowledgeable about the latest developments in, the industry concerned, to assist a provisional liquidator, liquidator, provisional judicial manager or judicial manager referred to in paragraph (a) in the performance of his or her functions in respect of the institution in question.
- (b) The appointment by the Master of a person in terms of subsection (a)(ii) shall be by means of a letter of appointment addressed by the Master to the person appointed and in which is set out-
- (i) the name of the institution in respect of which such person is appointed;
  - (ii) directions in regard to the remuneration of the person appointed; and
  - (iii) such other directions incidental to the matter as the Master or the registrar of such debtor may deem necessary,
- and a copy of such letter of appointment shall be furnished by the Master to the provisional liquidator, liquidator, provisional judicial manager or judicial manager concerned.
- (9) During the voluntary liquidation by resolution in terms of section 8 of any debtor as referred to in paragraphs (a) to (i) of subsection (1) of this section, the liquidator shall furnish, if applicable, the registrar of the debtor concerned with such return or statement which the debtor concerned would have been obliged to furnish to such registrar in terms of any Act, were such debtor not being wound up, as such registrar may require.
- (10) The provisions of this section may not in any way be amended or changed without prior consultation with, and written approval of such changes by, the Minister responsible for the administration of a debtor as referred to in paragraphs (a) to (i) of subsection (1).”

## **4 5 Explanation of provisions**

### *4 5 1 To whom do the provisions apply?*

Clause 9(1) merely identifies the institutions which are affected by the provisions contained in this chapter, with reference to the relevant governing legislation.<sup>144</sup>

### *4 5 2 Registrar may bring application*

Clause 9(2) includes the registrar of the institution concerned as one of the persons who may bring an application for the liquidation of a debtor in terms of clause 4, which is basically a retention of the *status quo*.

### *4 5 3 Registrar may only bring application if authorised to do so*

Clause 9(3) is linked to clause 9(2), in that the relevant registrar may only bring such an application (in terms of clause 4) if he or she has been authorised to do so by the Minister responsible for the administration of the relevant institution.

### *4 5 4 Notice to registrar*

Clause 9(4) has been included to ensure that the registrar of the relevant institution also receives notice of information which has to be supplied to the Master. This is necessary to ensure that the registrar concerned can also exercise other important powers which have been conferred upon him or her elsewhere in the clause.

### *4 5 5 Protection of the public interest*

Clause 9(5) is of paramount importance in the protection of the public interest. One of the greatest fears of the governing bodies of the institutions already referred to, is that someone other than the registrar would be able to bring an application for the liquidation of the debtor, without the registrar being aware of the application, or being powerless to do anything about preventing the application from being made, and subsequently granted.

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<sup>144</sup> These are the same as those that currently enjoy special treatment - see par 2 above.

Paragraph (a) ensures that the registrar concerned has in fact been notified, without which prior notification the court may not grant the order. Paragraph (b) is intended to prevent an applicant who is bringing an application from making public the fact that an application is to be brought. Failure to comply with this requirement results in the commission of an offence. Paragraph (c) allows the registrar to join the application as a party and to file opposing affidavits in respect of the application. The governing bodies therefore retain control over the process leading up to the application being heard by the court. Paragraph (d) ensures that the court will also consider the interests of the various stakeholders<sup>145</sup> of the debtor before granting a liquidation order.

#### *4 5 6 Voluntary liquidation*

Clause 9(6) prevents a relevant institution from entering into a voluntary liquidation by resolution without the prior knowledge of the registrar concerned. This is achieved by preventing the registration of the resolution unless notice of the resolution has also been given to the registrar, or if the registrar has informed such institution that the adoption of the resolution is prohibited.

#### *4 5 7 Judicial management*

Clause 9(7) makes judicial management applicable also to the institutions listed in clause 9(1). Paragraph (b) entitles the registrar of the relevant institution to make an application for the judicial management of the relevant institution.

Paragraph (c) provides for sufficient notice to be given to the relevant registrar in cases where the application for judicial management is brought by someone other than the registrar concerned. In this case also the registrar is entitled to join the application as a party and to file opposing affidavits.

#### *4 5 8 Appointment of specialist as liquidator or judicial manager*

Clause 9(8) has been inserted to ensure that a person with the necessary expertise will be appointed to liquidate or judicially manage the relevant specialised institution. This subsection

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<sup>145</sup> Eg the policy-holders of an insurance company.

also provides for the appointment of a person to assist the liquidator or judicial manager with the liquidation of a specialised institution.<sup>146</sup> The Master must therefore appoint as liquidator or judicial manager a person recommended by the relevant registrar.<sup>147</sup> In addition, the Master must also appoint someone designated or nominated by the registrar of the debtor concerned, to assist the liquidator in the performance of his or her functions.

#### *4 5 9 Submission of returns and information*

Clause 9(9) has been inserted to ensure that the relevant returns and statements which may be required to be furnished by law,<sup>148</sup> are still furnished to the relevant registrar at a time when the debtor concerned is being wound up voluntarily.

#### *4 5 10 Amendment*

Clause 9(10) is intended to address the problem of amendment to the provisions contained in a unified Insolvency Act. The unified insolvency legislation will probably fall under the control of the Ministry of Justice and Constitutional Development, while the administration of the specialised institutions will probably fall under the auspices of a different ministry.<sup>149</sup> By inserting a peremptory consultation clause, the Ministry of Justice and Constitutional Development is prevented from amending the legislation without prior consultation with other ministries. Of course this provision only applies to the amendment of section 9, and does not effect amendment to the remainder of the legislation.

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<sup>146</sup> This is in accordance with s 68(1A) of the 1990 Banks Act.

<sup>147</sup> At the conference held on 6 Oct 1999, Calitz of the Master of the High Court (Pretoria) requested that this sub-clause be extensively formulated to exclude the possibility of misinterpretation in the appointment of liquidators (see the Conference Transcriptions 20). The clause has been drafted accordingly.

<sup>148</sup> Eg in terms of the 1990 Banks Act.

<sup>149</sup> Eg banks fall under the Ministry of Finance and not under the Ministry of Justice and Constitutional Development.

## 5 CONCLUSION

From the above discussion and the subsequent proposed insertion of a clause dealing with the liquidation of specialised institutions, it is evident that specialised institutions can quite effectively be accommodated within the framework of a unified insolvency statute. Instead of duplicating an excessive number of clauses in each specialised Act which provide for essentially the same circumstances, it appears far more sensible to provide for the relatively few key aspects that provide for the protection of the public interest.<sup>150</sup>

As suggested, however, it is submitted that in order to achieve effective supervision over distressed banks and other specialised institutions, it is necessary to retain, in the enabling legislation, provisions that provide for the possible recovery of such institutions under the auspices of the necessary authorities.

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<sup>150</sup> Stated differently, all legislation that requires the participation of the Master of the High Court as supervisor of the administration process, should be included under one Act.

University of Pretoria etd - Burdette, DA



**PART 4B**

**PROPOSALS FOR UNIFORM PROVISIONS RELATING TO  
INDIVIDUAL AND CORPORATE INSOLVENCY**

**CHAPTER 8: LIQUIDATION APPLICATIONS UNDER A UNIFIED  
INSOLVENCY ACT ..... 223**

**CHAPTER 9: THE COMMENCEMENT OF LIQUIDATION AND THE  
VESTING OF THE INSOLVENT ESTATE UNDER A UNIFIED  
INSOLVENCY ACT ..... 277**

In this part various provisions of the Insolvency Act and the Companies and Close Corporation Acts that are dissimilar to each other will be discussed with a view to introducing uniform provisions, where possible, in a unified Insolvency Act. These dissimilar provisions relate to liquidation applications, the vesting of the insolvent estate upon insolvency, and the commencement of liquidation. The reasons for the distinction between the provisions that apply dissimilarly to natural and juristic persons will be discussed, and proposals made for their uniform inclusion in a unified Insolvency Act.

University of Pretoria etd - Burdette, DA

## CHAPTER 8

### LIQUIDATION APPLICATIONS UNDER A UNIFIED INSOLVENCY ACT

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#### SUMMARY

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#### 1 INTRODUCTION

Due to the very real differences between natural and juristic persons, the acts of insolvency and grounds upon which a company or close corporation may be wound up obviously differ quite drastically.<sup>1</sup> This chapter deals with this aspect of insolvency law as well as with another closely related issue, namely the form of the application itself.<sup>2</sup> Historically the acts of insolvency have

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<sup>1</sup> One could debate whether South Africa wants or needs to retain a “multiple gateway” approach to insolvency. Currently there are two manners in terms of which, eg. a company can be placed in liquidation. By having a “single gateway” approach, many of the problems enumerated in this chapter would not exist. The point of departure in this chapter is that South Africa will retain a “multiple gateway” approach to insolvency, being liquidation by the court and liquidation by the adoption of a liquidation resolution. Only liquidation by the court will be discussed here, as the aim of this chapter is to bring about uniform procedures for liquidation applications in respect of individuals and corporate entities. Voluntary liquidation by resolution is discussed separately in ch 11 below.

<sup>2</sup> Although this chapter will mainly address the acts of insolvency and the grounds for liquidation, a unified insolvency statute should also address the uniformity of insolvency applications which, due to the differing nature of these types of applications, currently differ from each other.

always related to the insolvency of individuals.<sup>3</sup> On the other hand, and due to the inherent differences between individuals and companies, the grounds for liquidation upon which a company may be liquidated, do not generally apply to the sequestration of individuals.<sup>4</sup> However, in this chapter it will be shown that the acts of insolvency and grounds for liquidation are not that mutually exclusive. Many of the acts of insolvency could apply to companies and, it is submitted, some of the grounds for liquidation could even apply to individuals. Unfortunately the South African Law Commission has elected to retain the somewhat archaic acts of insolvency,<sup>5</sup> contrary to other countries such as England,<sup>6</sup> which have scrapped them as being outdated. Another factor that will influence the application of the grounds for insolvency also to individuals, is the fact that the South African Law Commission has elected to retain<sup>7</sup> the “advantage to creditors” test in the case of voluntary liquidations<sup>8</sup> by individuals.<sup>9</sup>

In attempting to draft a unified insolvency statute, one of the main issues that has to be addressed is the question of uniformity in respect of the application to bring about insolvency. Bringing such

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<sup>3</sup> However, see par 3.1.2 below where reference is made to a Natal statute where it was possible for a company to be wound up if it had committed an “act of insolvency”.

<sup>4</sup> Many of these grounds are unique to a company or a close corporation, eg where a company has not commenced trading within one year from its incorporation - see s 344(c) of the Companies Act 61 of 1973 (hereinafter referred to as the Companies Act).

<sup>5</sup> See SA Law Commission Project 63 Commission Paper 582 (11 Feb 2000) Vol 1 (hereinafter referred to as Commission Paper 582 Vol 1) paras 2.1-2.6 40-42. The SA Law Commission states in par 2.1 that “[i]n light of the support for the retention of the acts of insolvency and the lack of compelling reasons for departing from the existing position, the acts of insolvency have been retained in essence”.

<sup>6</sup> See Fletcher *The Law of Insolvency* 2nd ed (1996) 69 (hereinafter referred to as Fletcher). See also the original recommendations made by the Cork Report paras 529-530 (*Insolvency Law and Practice, Report of the Review Committee* (Cmnd 8558) 1982 (hereinafter referred to as the Cork Report)). See also Boraine and Van der Linde “The Draft Insolvency Bill - An Exploration (Part 1)” 1998 *TSAR* 621 at 633 and the authority cited in fn 76 (hereinafter referred to as Boraine and Van der Linde (Part 1)).

<sup>7</sup> See Commission Paper 582 Vol 1 par 3.6 43-44.

<sup>8</sup> This is known as “voluntary surrender” under the current Insolvency Act.

<sup>9</sup> For this reason an individual would not be able to “pass a resolution” in order to bring about his own liquidation without further ado. He would still have to prove to the court that there would be a substantial advantage to creditors should it grant the liquidation order.

an application would, of course, have to rest on some or other legal basis. In addition there are different forms of insolvency applications. For example, should a *debtor* bring an application for his, her or its voluntary liquidation, there would have to be a legal basis upon which such an application could be brought.<sup>10</sup> On the other hand, if a *creditor* wanted to bring an application for the liquidation of the debtor, there would have to be other, differing grounds upon which such an application could be brought. In this chapter both these aspects will be addressed in determining whether or not common grounds can be found for the liquidation of individuals and juristic persons alike. This chapter will also investigate to what extent the procedures for obtaining a liquidation order can be made uniform in regard to individuals and corporate entities.

## 2 ACTS OF INSOLVENCY AND THE APPLICATION FOR SEQUESTRATION<sup>11</sup>

### 2.1 Current position regarding acts of insolvency in South Africa<sup>12</sup>

It must be borne in mind that under current South African insolvency law a debtor<sup>13</sup> may be sequestrated in two possible ways, namely by means of a voluntary surrender<sup>14</sup> and compulsorily.<sup>15</sup> In the case of a voluntary surrender the debtor him- or herself brings the application and a unique

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<sup>10</sup> Eg that the individual is insolvent and that it would be to the creditors benefit if such an estate were to be liquidated.

<sup>11</sup> In order to avoid any confusion, the current term “sequestration” will be used in this chapter. However, it is to be noted that the SA Law Commission has proposed that the term “liquidation” should be used in a new Insolvency Act to alleviate the problems that are currently experienced by the difference in terminology regarding the sequestration of individuals and partnerships, and the liquidation of companies and close corporations - see Commission Paper 582 Vol 2. See also Boraine and Van der Linde (Part 1) 623 fn 12.

<sup>12</sup> See generally Kunst (gen ed) *Meskin, Insolvency Law* (1990, updated to 30 April 1999) ch 2 and ch 3 (hereinafter referred to as Meskin); De la Rey *Mars, The Law of Insolvency in South Africa* 8th ed (1988) (hereinafter referred to as Mars) ch 5.

<sup>13</sup> The word “debtor” when used in this context means a natural person or a partnership - see s 2 of the Insolvency Act 24 of 1936 (hereinafter referred to as the Insolvency Act).

<sup>14</sup> For a detailed exposition of these types of applications, see Meskin ch 3 and Mars ch 3.

<sup>15</sup> For a detailed exposition of these types of applications, see Meskin ch 2 and Mars ch 5.

set of rules apply when the court considers it. Where a debtor is sequestrated compulsorily by a creditor, a different set of rules apply. The main difference between these two forms of sequestration lies in the burden of proof. In the case of a voluntary surrender the debtor has to prove that the granting of a sequestration order will in fact be to the benefit of the creditors,<sup>16</sup> while in the case of a compulsory sequestration the applicant creditor need merely prove that there is reason to believe that the sequestration will be to the benefit of the creditors.<sup>17</sup> Since it is only compulsory sequestration that is similar to proceedings in order to have a company wound up by the court, only compulsory sequestration proceedings will be discussed under this chapter.<sup>18</sup>

In order to assist creditors that apply for the sequestration of a debtor's estate certain presumptions, that are indicative of insolvency, have been provided in the form of "acts of insolvency".<sup>19</sup> In terms of current South African insolvency law, a debtor commits an act of insolvency if:

- (a) He leaves the Republic or otherwise absents himself with the intention of evading or delaying the payment of his debts;<sup>20</sup>

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<sup>16</sup> S 6(1) of the Insolvency Act. As to when an application will be to the advantage of creditors in the case of a voluntary surrender, see Meskin par 3.2 3-3 – 3-4 and Mars par 3.31 53-54. It must be noted that a debtor, when bringing an application for voluntary surrender, cannot rely on any of the acts of insolvency in order to obtain a sequestration order, as this privilege is only accorded creditors that apply for compulsory sequestration.

<sup>17</sup> S 10(c) of the Insolvency Act. As to when an application will be to the advantage of creditors in the case of a compulsory sequestration, see Meskin par 2.1.4 2-18–2-20 and Mars par 5.35 108-111.

<sup>18</sup> The voluntary surrender of an individual debtor's estate will not be discussed here, although it is worth pointing out that the SA Law Commission has retained this form of liquidation, albeit in simplified form, in its Draft Insolvency Bill. Voluntary liquidation by resolution in the case of corporate entities is discussed separately in ch 11 below.

<sup>19</sup> See Commission Paper 582 Vol 1 41 par 2.4.

<sup>20</sup> S 8(a) of the Insolvency Act.

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- (b) He fails to satisfy a judgment by the court, or fails to point out sufficient disposable property to satisfy it, or where a *nulla bona* return has been made by the officer responsible for the execution of the judgment;<sup>21</sup>
  - (c) The debtor makes or attempts to make a disposition of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another;<sup>22</sup>
  - (d) He removes or attempts to remove any of his property with the intent of prejudicing his creditors or of preferring one creditor above another;<sup>23</sup>
  - (e) He makes or offers to make an arrangement with any of his creditors for releasing him wholly or in part from his debts;<sup>24</sup>
  - (f) After having published a notice of his intent to bring an application for voluntary surrender, he fails to comply with the formal requirements or to bring such application, or where he lodges an incorrect statement of affairs;<sup>25</sup>
  - (g) He gives notice in writing to any one of his creditors that he is unable to pay any of his debts;<sup>26</sup>

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<sup>21</sup> S 8(b) of the Insolvency Act. This is similar to a company's inability to pay its debts, which is provided for in s 344(f) of the Companies Act, and which basically provides for sequestration where a debtor is commercially insolvent.

<sup>22</sup> S 8(c) of the Insolvency Act.

<sup>23</sup> S 8(d) of the Insolvency Act.

<sup>24</sup> S 8(e) of the Insolvency Act.

<sup>25</sup> S 8(f) of the Insolvency Act.

<sup>26</sup> S 8(g) of the Insolvency Act.

- (h) Being a trader, he places a notice in the *Government Gazette* in terms of section 34 of the Insolvency Act (alienation of business) and is thereafter unable to pay his debts.<sup>27</sup>

## 2.2 The application for sequestration<sup>28</sup>

It is not intended to deal with the application for the compulsory sequestration of a debtor's estate in any detail. Only the general procedures regarding these applications will be dealt with here in order to illustrate the similarities and dissimilarities between applications for the sequestration of an individual's estate as opposed to those for the winding-up of a company,<sup>29</sup> and in order to determine whether a single process is feasible.

A creditor may bring sequestration proceedings against a debtor if such creditor has a liquidated claim, sounding in money, for not less than R100.<sup>30</sup> The creditor's application for the sequestration of the debtor's estate can only be brought on two grounds, namely that the debtor has committed an act of insolvency as set out in section 8 of the Insolvency Act or that such debtor is insolvent.<sup>31</sup> The acts of insolvency have been referred to in the previous paragraph, but actual insolvency means that the debtor's liabilities actually exceed his assets on a balance sheet test.<sup>32</sup> Sequestration proceedings are motion proceedings in the High Court. These proceedings are subject to the provisions of the Insolvency Act and the practice in these matters as developed

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<sup>27</sup> S 8(h) of the Insolvency Act. Due to the omission of s 34 of the Insolvency Act from the Law Commission's Draft Insolvency Bill, s 8(h) as an act of insolvency has also been omitted from the Draft Insolvency Act contained in Commission Paper 582 Vol 2 - see Commission Paper 582 Vol 1 41 par 2.6.

<sup>28</sup> See generally Meskin paras 2.1.6-2.1.13 and Mars paras 5.13-5.36. As regards new provisions for the liquidation of an individual debtor's estate, see par 4 below and Commission Paper 582, Vol 1 paras 3.1-3.14 and paras 4.1-4.12.

<sup>29</sup> As regards applications for the winding-up of a company by the court, see par 3.3 below.

<sup>30</sup> S 9(1) of the Insolvency Act. See *Freidberg v Van Niekerk* 1962 2 SA 413 (C) regarding claims sounding in money.

<sup>31</sup> S 9(1) of the Insolvency Act. See also Meskin par 2.1.1 2-4.

<sup>32</sup> *Ohlsson's Cape Breweries Ltd v Totten* 1911 TPD 48 at 50; *De Villiers v Bateman* 1946 TPD 126 at 130. See also Meskin par 2.1.3 2-17-2-18.



through the decisions of our courts.<sup>33</sup> The court's decision to grant a provisional sequestration order will be made on the strength of the applicant creditor's founding affidavit(s), which should contain at least the following allegations:

- (a) The identify of the debtor and his or her marital status.<sup>34</sup> Identification of the debtor includes the full names and date of birth of such debtor as well as an identity number if one has been assigned to such person.<sup>35</sup> If the applicant creditor is unable to provide all this information the application will not fail, as long as the applicant states the reason for such inability to provide the information.<sup>36</sup>
- (b) If the debtor is married, identification also of the spouse.<sup>37</sup> Meskin<sup>38</sup> submits that disclosure must be made as to how the debtor is married, since in the case of a marriage in community of property the application must be brought against both spouses in terms of the Matrimonial Property Act.<sup>39</sup>
- (c) *Prima facie* proof that the applicant creditor has *locus standi* to bring the application.<sup>40</sup> This includes proving that the creditor has a liquidated claim of not less than R100 that sounds in money. In regard to the claim itself, the application should disclose the amount,

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<sup>33</sup> See eg *Kleynhans v Van der Westhuizen* 1970 1 SA 565 (O) and *Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd* 1984 3 SA 202 (T). See also Meskin par 2.1.6 2-23.

<sup>34</sup> S 9(3)(a)(i) and (ii) of the Insolvency Act. These provisions must be read with s 18A of the Insolvency Act.

<sup>35</sup> S 9(3)(a)(i) and (ii) and s 9(3)(c) of the Insolvency Act.

<sup>36</sup> S 9(3)(c) of the Insolvency Act; Meskin par 2.1.6 2-24.

<sup>37</sup> S 9(3)(a)(i) and (ii) of the Insolvency Act.

<sup>38</sup> Meskin 2-24.

<sup>39</sup> S 17(4)(b) read with s 11 of the Matrimonial Property Act 88 of 1984.

<sup>40</sup> S 9(1) of the Insolvency Act.

cause and nature of the claim.<sup>41</sup> The applicant must indicate whether the claim is secured and, if so, the nature and value of the security.<sup>42</sup>

- (d) That the court has jurisdiction to entertain the application and to grant the order of sequestration.<sup>43</sup>
- (e) The grounds upon which the application is being brought (that is, actual insolvency or that the debtor has committed an act of insolvency).<sup>44</sup>

The application itself must be accompanied by a certificate by the Master stating that sufficient security has been provided for the payment of all fees and charges relating to the application and subsequent administration of the estate up to the time that a trustee has been appointed.<sup>45</sup> The Master's certificate relating to security must be issued by him not more than ten days before the date of the application.<sup>46</sup>

The Insolvency Act itself does not make provision for notice of the application to be given to the debtor prior to the hearing of the application by the court. In this regard the practice of each particular court must be followed, as such practice differs from jurisdiction to jurisdiction.<sup>47</sup> In terms of section 10 of the Insolvency Act and the decision in *Moch v Nedtravel (Pty) Ltd t/a*

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<sup>41</sup> S 9(3)(a)(iii) of the Insolvency Act.

<sup>42</sup> S 9(3)(a)(iv) of the Insolvency Act. Meskin 2-24 is of the opinion that the "security" mentioned in this section is "security" as defined in s 2 of the Insolvency Act, meaning real as opposed to personal security.

<sup>43</sup> See eg *Hoffman v Hoffman* 1959 2 SA 511 (E) 511-512. As regards which court will have jurisdiction, see the provisions of s 149 of the Insolvency Act.

<sup>44</sup> Meskin par 2.1.6 2-23, 2-24–2-26.

<sup>45</sup> S 9(3)(b) of the Insolvency Act.

<sup>46</sup> S 9(3)(b) of the Insolvency Act. As regards the requirements relating to the Master's certificate see Meskin 2-29.

<sup>47</sup> See *Gouws v Scholtz* 1989 4 SA 315 (NC) where the leading authorities in this regard are conveniently set out.

*American Express Travel Service*<sup>48</sup> the court has no authority to grant a final order of sequestration immediately, but is obliged to issue a provisional order of sequestration.<sup>49</sup> The applicant carries the burden of proof to establish that the requisites for the granting of a sequestration order have been proved.<sup>50</sup> This is so irrespective of whether or not the granting of the application is opposed.<sup>51</sup> Where the court grants an order of provisional sequestration, it must simultaneously issue a rule *nisi* in terms of which the debtor is called upon to show cause on the return date why his or her estate should not be placed under final sequestration.<sup>52</sup>

Section 11 of the Insolvency Act requires that the provisional sequestration order must be served upon the debtor. The debtor, on good cause shown, may anticipate the return date of the rule *nisi*, but must give at least twenty-four hours notice of such application to the applicant.<sup>53</sup> If upon the return date of the rule *nisi* the court is satisfied that the applicant has proved the three essential elements<sup>54</sup> of his or her case, the court has a discretion to finally sequestrate the debtor's estate.<sup>55</sup>

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<sup>48</sup> 1996 3 SA 1 (A) 9-10.

<sup>49</sup> See also *Meskin* par 2.1.8 2-34–2-35.

<sup>50</sup> *Meskin* 2-34(1). See also *London Estates (Pty) Ltd v Nair* 1957 3 SA 591 (D).

<sup>51</sup> *Meskin* 2-34(1).

<sup>52</sup> S 11(1) of the Insolvency Act.

<sup>53</sup> S 11(3) of the Insolvency Act.

<sup>54</sup> In terms of s 12 of the Insolvency Act these “essential elements” are: i) the applicant creditor has established a claim against the debtor; ii) the debtor has committed an act of insolvency or is insolvent; and iii) there is reason to believe that the sequestration of the debtor's estate will be to the advantage of the creditors.

<sup>55</sup> See *Visser v Coetzer* 1982 4 SA 805 (W) at 807-811.

### 3 GROUNDS FOR LIQUIDATION AND THE APPLICATION FOR WINDING-UP

#### 3.1 Historical development of the grounds for liquidation

##### 3.1.1 Cape Colony

In the Winding-up Act 12 of 1868<sup>56</sup> the first reference to the grounds for liquidation can be found in the Cape Colony. The relevant section read 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.”

It is interesting to note that the grounds did not refer to the circumstances having to be present where the company was to be wound up by the court, although this did in fact happen. Section III of the same Act described, in detail, when a company was deemed unable to pay its debts, the provisions being very similar to the current provisions contained in the Companies Act.

The Companies Act 25 of 1892<sup>57</sup> replaced the Winding-up Act, the winding-up provisions being contained in Part V of the 1892 Companies Act. Section 135 of the 1892 Companies Act described the circumstances in which a company could be wound up by the court, and lists only five grounds instead of the previous Act's six grounds for liquidation. The relevant section read as follows:

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<sup>56</sup> Hereinafter referred to as the 1868 Winding-up Act.

<sup>57</sup> Hereinafter referred to as the 1892 Companies Act.

“135. A company may be wound up by the court under this part of the Act under the following circumstances:

- (1) Whenever the company has passed a special resolution requiring the company to be wound up by the court.
- (2) Whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year.
- (3) Whenever the members are reduced in number to less than seven.
- (4) Whenever the company is unable to pay its debts.
- (5) Whenever the court is of opinion that it is just and equitable that the company should be wound up.”

Section 136 of the 1892 Companies Act set out the circumstances in which a company was deemed unable to pay its debts, and the provisions were far more condensed than was the case in the 1868 Winding-up Act.

### 3 1 2 *Natal*

The Winding-up Law 19 of 1866,<sup>58</sup> which was promulgated prior to the Cape Colony 1868 Winding-up Act, contained eleven grounds for liquidation upon which an application for the winding-up of a joint-stock company could take place. Due the importance of these provisions, they are repeated here in their entirety:

“5. Any person who shall be a creditor of any Joint-stock or other Company, and whose debt shall amount to fifty pounds and upwards, or who shall claim to be a contributory of a Company, may present a petition to the Supreme Court in a summary way for the winding-up of the affairs of such Company in any of the following cases, that is to say:

- 1<sup>st</sup>. If any Company shall have committed any act of insolvency under the Ordinance No. 24, of 1846, entitled “Ordinance for regulating the due collection, administration and distribution of Insolvent Estates within the District of Natal.”
- 2<sup>nd</sup>. If any Company shall, by virtue of a resolution passed in that behalf at a meeting of the shareholders of such Company or of the directors of such Company, have filed, or have caused to be filed, in the office of the Registrar of the Supreme Court of this Colony, a declaration in writing that such Company is unable to meet its engagements.
- 3<sup>rd</sup>. If any person shall have recovered judgment for any debt or demand in any Court of this Colony against such Company, or against any person authorised to be sued as the nominal defendant on behalf of such Company, or against any one or more of the members of such Company, acting in that behalf, and such judgment debt shall remain unpaid or unsecured or uncompounded for the space of sixty days from the date of such judgment.
- 4<sup>th</sup>. If any decree or order shall have been pronounced in any cause pending in any such Court, or any order made therein in any matter of insolvency or lunacy or minority against any such Company or person authorised to be sued, or against any one or more

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<sup>58</sup> Hereinafter referred to as the 1866 Winding-up Law.

- of the members or contributories of such Company on that behalf, or acting on the behalf of other members or contributories thereof, ordering any sum of money to be paid by such Company, and such Company shall not have paid the same at the time when the same ought, according to the exigency of such decree or order, to be paid.
- 5<sup>th</sup>. If any action shall have been brought against any contributory of a Company for any debt or demand which shall be due or claimed to be due from or by such Company, and such Company shall not, within ten days after notice in writing by such contributory of such action, have paid, secured, or compounded for such debt or demand, or have otherwise procured such action to be stayed, or shall not have indemnified the defendant to his satisfaction against such action, and all costs, damages, and expenses to be incurred by him by reason of the same.
- 6<sup>th</sup>. If any creditor of a Company, whose debt shall amount to fifty pounds and upwards, shall have filed an affidavit with the Registrar of the Supreme Court that such debt is justly due to him from such Company, and shall have sued out the process of the said Court for the recovery thereof, and such Company shall not within three weeks after the service of notice thereof, have paid, secured, or compounded for such debt to the satisfaction of such creditor, or have made it appear, to the satisfaction of a Judge of the Supreme Court, that it is the intention of such Company to defend such action on the merits, and shall not, within three weeks after service of such notice, have caused appearance to be entered to such action.
- 7<sup>th</sup>. If any Company shall have dissolved, or shall have ceased to carry on business, or shall be carrying on business only for the purpose of winding-up its affairs, and the same shall not have been completely wound up.
- 8<sup>th</sup>. Whenever the Company in general meeting has passed a special resolution requiring the Company to be wound up by the Court.
- 9<sup>th</sup>. Whenever the Company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year.
- 10<sup>th</sup>. Whenever the shareholders are reduced in number to less than seven.
- 11<sup>th</sup>. Whenever three-fourths of the paid-up capital of the Company have been lost or become unavailable.”

The first ground of liquidation is noteworthy in that it referred to the acts of insolvency that applied to individuals. This has also been done in the new proposals set out below,<sup>59</sup> and it would appear that the wheel has turned full circle. Another interesting aspect is that the section does not refer to the ground of just and equitable, as is to be found in the Cape Colony statute of a few years later.<sup>60</sup>

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<sup>59</sup> See par 5 below.

<sup>60</sup> See par 3.1.1 above.

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### 3 1 3 Transvaal

Section 2 of the *Wet op het Liquideeren van Maatschappijen van 1891*<sup>61</sup> dealt with the grounds upon which a company could be liquidated by the court:

“2. Iedere maatschappij zal kunnen geliquideerd worden door orde van het Hooggerechtshof, Rondgaand Hof of een der rechters in kamers.

- a. Wanneer bewezen wordt, dat onware opgaven hebben plaats gehad, zooals uiteengezet in 1a tot 1f van wet no. 1 van 1891.
- b. Wanneer de maatschappij tot een speciaal besluit gekomen is dezelve te liquideeren.
- c. Wanneer de maatschappij hare werkzaamheden niet heeft begonnen binnen een jaar na hare inlijving of hare werkzaamheden voor een geheel jaar heeft gestaakt.
- d. Wanneer het aantal leden verminderd is tot minder dan vijf-en-twintig.
- e. Wanneer 75 percent van het werkelijk gestorte kapitaal verloren is of nutteloos geworden is voor de bezigheid van de maatschappij.
- f. Wanneer de maatschappij hare schulden niet kan betalen.
- g. Wanneer het Hooggerechtshof van oordeel is, dat het raadzaam, rechtmatig en billijk is, dat de maatschappij geliquideerd zal worden.”

A peculiar aspect of this Act is that it required the number of members to remain above twenty five and not seven as was the case in all the other provinces, and also added a ground of liquidation relating to the submission of incorrect returns. This Act was repealed by the *Wet op het Liquideeren van Maatschappijen van 1894*,<sup>62</sup> but the grounds for liquidation in this new Act were identical to those contained in the 1891 Act. However, the Companies Act 31 of 1909<sup>63</sup> brought the provisions relating to winding-up by the court into line with what the position had been in other provinces. Section 112 of the 1909 Companies Act dealt with the grounds upon which a company could be wound up by the court, and read as follows:

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<sup>61</sup> Act 8 of 1891.

<sup>62</sup> Act No 1 of 1894.

<sup>63</sup> Hereinafter referred to as the 1909 Companies Act.

- “112. A company may be wound up by the Court -
- (i) if the company has by special resolution resolved that the company be wound up by the Court;
  - (ii) if default is made in lodging the statutory report or in holding the statutory meeting;
  - (iii) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;
  - (iv) if the number of members is reduced, in the case of a private company below two, or, in the case of any other company, below seven;
  - (v) if seventy-five per cent. of the paid up share capital of the company has been lost, or has become useless for the business of the company;
  - (vi) if the company is unable to pay its debts;
  - (vii) if the court is of the opinion that it is just and equitable that the company should be wound up.”

### 3 1 4 Orange Free State

Section 2 of the Law to Provide for the Winding Up of Joint Stock Companies of 1892<sup>64</sup> contained the grounds for liquidation of a company (it is not certain from all the subsections whether the court had to grant the order or not):

- “2. The winding up shall take place under the following circumstances, and in the following cases, to wit:-
- (a) If the company has taken a special resolution to enter into liquidation.
  - (b) If the company has not commenced its operations within one year after its incorporation, or has suspended its operations for a whole year, without being able to satisfy such Court that it has valid excuses for such omission or suspension.
  - (c) If the number of shareholders has diminished to less than seven.
  - (d) If the company is unable to pay its debts.
  - (e) If the Court is of the opinion that it would be just and equitable to wind up the company.

As can be seen from all the above provisions, the grounds for liquidation of a company were very similar in all the provinces, bar a few provisions in Natal in the late nineteenth century. These grounds for liquidation were carried over into Union and Republic legislation, as will be illustrated below.

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<sup>64</sup> Law No 2 of 1892.



### 3.1.5 Legislation in the Union and thereafter

Section 111 of the Companies Act 46 of 1926<sup>65</sup> is identical to section 112 of the 1909 Companies Act<sup>66</sup> that applied in the Transvaal Republic. This latter Act was, in fact, used as the basis for the 1926 Companies Act. The provisions of the current Companies Act, which repealed the 1926 Companies Act, are dealt with in detail below.<sup>67</sup>

### 3.2 Current position in South African law regarding the grounds for liquidation<sup>68</sup>

In terms of the Companies Act and the Close Corporations Act, a company or close corporation may be wound up by the court<sup>69</sup> on the grounds that:

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<sup>65</sup> Hereinafter referred to as the 1926 Companies Act. For a detailed discussion of the grounds for liquidation under the 1926 Companies Act, see Cilliers and Benade *Maatskappyereg* (1968) 326-329.

<sup>66</sup> See par 3.1.3 above.

<sup>67</sup> See par 3.2.

<sup>68</sup> See generally Cilliers *et al Corporate Law* 3rd ed (2000) 502-509; Shrand *The Law and Practice of Insolvency, Winding-up of Companies and Judicial Management* 3rd ed (1977) ch 7 (hereinafter referred to as Shrand) in regard to companies and Cilliers *et al Close Corporations Law* 3rd ed (1998) 131-132 in regard to close corporations.

<sup>69</sup> An important remark that needs to be made here is that the grounds for liquidation, unlike the acts of insolvency, are not necessarily indicative of insolvency. In fact, it is important in the context of this study to note that a company may be wound up by the court in circumstances other than insolvency. This aspect relates to the fact that a company is incorporated by statute, and the same entity can therefore also be terminated by the use of the various grounds for liquidation. These grounds for liquidation relate to the unique position that a company finds itself in and can for obvious reasons not be applied in the case of the insolvency of an individual.

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- (a) The company has by special resolution resolved that it be wound up by the court<sup>70</sup> or, in the case of a close corporation, the members having more than one half of the total number of votes of members, have resolved at a meeting of members called for the purpose of considering the winding-up of the corporation that the corporation be wound up, and sign a written resolution to that effect;<sup>71</sup>
- (b) The company has commenced business before a certificate to commence business has been issued by the Registrar;<sup>72</sup>
- (c) The company or close corporation has not commenced business within a year of incorporation (or registration in the case of a close corporation), or has suspended its business for a whole year;<sup>73</sup>
- (d) In the case of a public company, the number of members has been reduced below seven;<sup>74</sup>

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<sup>70</sup> S 344(a) of the Companies Act. See also *Ex parte East London Café (Pty) Ltd* 1931 EDL 111 and *Ex parte Maison P Beelen (Pty) Ltd* 1940 WLD 159.

<sup>71</sup> S 68(a) of the Close Corporations Act.

<sup>72</sup> S 344(b) of the Companies Act. This ground of liquidation only applies to Companies with a share capital - see s 172(1) of the Companies Act.

<sup>73</sup> S 344(c) of the Companies Act and s 68(b) of the Close Corporations Act. However, when exercising its discretion to wind up the company the court will have regard to the prospects of the company commencing (or resuming) its business in the foreseeable future - see Cilliers *ea Corporate Law* par 27.33 503; *Hull v Turf Mines Ltd* 1906 TS 68 at 74; *Taylor v Machavie Claims Syndicate* 1912 WLD 187; *Cluver v Robertson Portland Cement & Lime Co Ltd* 1925 CPD 45 at 51; *Nakhooda v Northern Industries Ltd* 1950 1 SA 808 (N). In the *Taylor* case, where the company suspended business for more than a year with the approval of the shareholders, the court did not consider itself bound to issue a winding-up order. However, where the directors have suspended business because it was to their and others' benefit but not to the benefit of the shareholders, the court granted a winding-up order - see *East Rand Deep Ltd v Joel* 1903 TS 616.

<sup>74</sup> S 344(d) of the Companies Act.

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- (e) In the case of a company, seventy-five per cent of the share capital has been lost or become useless for the business of the company;<sup>75</sup>
- (f) The company or corporation is unable to pay its debts;<sup>76</sup>
- (g) An external company that has been dissolved in the country of its incorporation, or has ceased to carry on business or is carrying on business only for the purposes of winding-up its affairs, may be wound up by the court in South Africa;<sup>77</sup>
- (h) It appears to the court that it is just and equitable that the company be wound up.<sup>78</sup>

The grounds for liquidation have, with a few exceptions, remained constant since the advent of company liquidations in 1866. The question that has to be asked is whether all these grounds need to be retained in modern South African insolvency law, especially in light of the single statute approach that is being mooted in this study. This question will be answered in paragraph 5 below.

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<sup>75</sup> S 344(e) of the Companies Act. See also *Alpha Bank Bpk v Registrateur van Banke* 1996 1 SA 330 (A). If, despite the loss of the share capital, the majority of the members of the company wish the company to continue trading, the court will not easily order the winding-up unless fraud in regard to the minority shareholders is proved - see Cilliers *ea Corporate Law* par 27.35 503; *Fox v SA Trade Protection and Trust Co Ltd* 1903 TH 412; *Burkhardt v Black Sands Reduction Co of SA Ltd* 1910 WLD 244.

<sup>76</sup> Ss 344(f) and 345 of the Companies Act and s 68(c) of the Close Corporations Act. For a full discussion of this ground of liquidation see Cilliers *ea Corporate Law* 503-505 in regard to companies and Cilliers *ea Close Corporations Law* 131 in regard to close corporations. For an interesting discussion of the concept "inability to pay debts" under English Law, see Goode *The Principles of Corporate Insolvency Law* 2nd ed (1997) ch 4 64-100 (hereinafter referred to as Goode).

<sup>77</sup> S 344(g) of the Companies Act (and s 68(d) of the Close Corporations Act). See also *Ward v Smit: In re Gurr v Zambia Airways Corporation Ltd* 1998 3 SA 175 (SCA).

<sup>78</sup> S 344(h) of the Companies Act and s 68(d) of the Close Corporations Act. Since it not the purpose of this chapter to provide an exhaustive discussion of all the grounds for liquidation, the many cases reported regarding the ground of "just and equitable" will not be discussed here. However, for a complete discussion of this aspect, see Cilliers *ea Corporate Law* paras 27.41-27.49. For a discussion of the ground "just and equitable" under the 1926 Companies Act, see Cilliers and Benade *Maatskappyereg* (1968) 328-329 (hereinafter referred to as Cilliers and Benade *Maatskappyereg*).

### 3.3 The application for winding-up<sup>79</sup>

The application for the winding-up of a company consists of a notice of motion and supporting affidavits.<sup>80</sup> The application must be accompanied by a certificate by the Master, which has been issued not more than ten days before the date of the application, and which states that sufficient security has been provided for the payment of all fees and charges relating to the winding-up of the company until the appointment of a provisional liquidator or the discharge of the company from liquidation. A copy of the application and all supporting affidavits must be lodged with the Master,<sup>81</sup> and he may report to the court any facts that would justify the court in postponing the hearing of the application, or dismissing it. Any such report by the Master must be furnished to the applicant and the company itself.<sup>82</sup>

The application itself must mention the main business and nature of the company, as well as the company's registered office.<sup>83</sup> The *locus standi*<sup>84</sup> of the applicant and the ground of liquidation relied upon for the application,<sup>85</sup> must also be specified. At the hearing the court can either grant the application, dismiss it, or adjourn proceedings conditionally or unconditionally.<sup>86</sup> If the

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<sup>79</sup> See generally Cilliers *ea Corporate Law* paras 27.52-27.53 509-510; Shrand ch 7. For a discussion of the liquidation application under the 1926 Companies Act, see Cilliers and Benade *Maatskappyereg* 329-334.

<sup>80</sup> Cilliers *ea Corporate Law* par 27.52 509.

<sup>81</sup> S 346(4)(a) of the Companies Act; *Confrees (Pty) Ltd v Oneanate Investments (Pty) Ltd (Snoek Wholesalers (Pty) Ltd Intervening)* 1996 1 SA 759 (C); *First National Bank Ltd v EU Civils (Pty) Ltd: First National Bank Ltd v EU Plant (Pty) Ltd; Bassets v EU Civils (Pty) Ltd; EU Holdings (Pty) Ltd v EU Plant (Pty) Ltd* 1996 1 SA 924 (C).

<sup>82</sup> S 346(4)(b) of the Companies Act. Where the liquidator is the applicant reg 17 of the Winding-up Regulations finds application.

<sup>83</sup> *Klass v Zwarenstein en Odendaal (Pty) Ltd* 1961 2 SA 552 (W). This information is required in order to determine whether the relevant court has jurisdiction.

<sup>84</sup> *Fraser v Warmbaths Cotton Estates Ltd* 1926 WLD 110.

<sup>85</sup> *Bam v Robertson Portland Cement and Lime Co Ltd* 1927 CPD 137; *McLeod v Gesade Holdings (Pty) Ltd* 1958 3 SA 672 (W); *Breetveldt v Van Zyl* 1972 1 SA 304 (T).

<sup>86</sup> Cilliers *ea Corporate Law* par 27.54 510; *Bagus Allie v Meer-Onia (Pty) Ltd* 1948 4 SA 550 (C); *London Ranch (Pty) Ltd (in liquidation) v Hyreb Estate (Pty) Ltd* 1963 2 SA 570 (E).

applicant has shown a *prima facie*<sup>87</sup> case the court will normally issue a provisional winding-up order with a rule *nisi*.<sup>88</sup> On the return date the company can advance reasons why it should not be placed under final liquidation. Although a provisional order is normally issued by the court, there are instances where this requirement can be dispensed with.<sup>89</sup> The court may not refuse to grant the winding-up merely on the grounds that the company has no assets, or that the assets have been mortgaged to an amount equal to or in excess of the value of such assets.<sup>90</sup> On the return date of the rule *nisi* the court will normally confirm the provisional winding-up order by making it final.<sup>91</sup> In terms of section 348 of the Companies Act the winding-up of the company is deemed to have commenced at the time of the presentation of the application to court, that is at the time the application is filed with the Registrar of the High Court.<sup>92</sup>

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<sup>87</sup> As to what constitutes a *prima facie* case, see *Timmers v Spansteel (Pty) Ltd* 1979 3 SA 242 (T) at 249 and *Kalil v Decotex (Pty) Ltd* 1988 1 SA 943 (A) at 976.

<sup>88</sup> *Cilliers ea Corporate Law* par 27.56 511; *Nowak v Rosano International Restaurant (Pty) Ltd* 1968 1 SA 93 (O); *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd* 1976 2 SA 856 (W) at 867; *Wolhuter Steel (Welkom) (Pty) Ltd v Jatu Construction (Pty) Ltd* 1983 3 SA 815 (O); *Reynolds v Mecklenberg (Pty) Ltd* 1996 1 SA 75 (W).

<sup>89</sup> *Ex parte Beach Hotel Amanzimtoti (Pty) Ltd* 1988 3 SA 435 (W); *Ex parte Clifford Homes Construction (Pty) Ltd* 1989 4 SA 610 (W).

<sup>90</sup> S 347(1) of the Companies Act; *F & C Building Construction Co (Pty) Ltd v MacSheil Investments (Pty) Ltd* 1959 3 SA 841 (D). This provision in the Companies Act raises a problem when trying to achieve uniform application procedures for both individuals and companies. The reason for this is that the liquidation of an individual's estate requires an advantage to creditors to be proved before the court will grant the order. This means that there must be some pecuniary benefit to the creditors. Since the "advantage to creditors" requirement has been retained in the Draft Insolvency Bill by the SA Law Commission, a distinction will still need to be made between applications for liquidation by individuals and corporate entities, where no advantage to creditors needs to be proved. However, even in the case of an application for the winding-up of a company or close corporation, there must be some or other benefit for the *applicant* - see eg *Payslip Investment Holdings CC v Y2K Tec Ltd* 2001 4 SA 781 (C) at 789 where the court refused to grant an application for liquidation because the applicant could not prove that the granting of the order would be in his interest.

<sup>91</sup> As to how and by whom the granting of a final order may be opposed, see *Cilliers ea Corporate Law* par 27.57 511 and the authority cited in fn 146.

<sup>92</sup> *Venter v Farley* 1991 1 SA 316 (W). See also *Cilliers ea Corporate Law* par 27.58 512 and the authority cited in fn 152.

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## 4 INSOLVENCY AND BANKRUPTCY APPLICATIONS IN OTHER JURISDICTIONS

### 4.1 Introduction

In order to ascertain whether or not it is possible to unify the procedures for South African insolvency applications under a unified Insolvency Act, it is necessary to briefly look at the position in other jurisdictions. While countries such as the United States of America and Germany have a “single gateway” approach to insolvency, other jurisdictions such as England and Australia have a “multiple gateway” approach similar to the one currently operative in South Africa. A brief analysis of how insolvency applications are dealt with in these jurisdictions will assist in placing our own current system, and the new system that is being proposed in this study, in the proper perspective.

### 4.2 Bankruptcy applications in the United States of America

The American bankruptcy system is a codified one where use is made of specialised bankruptcy courts.<sup>93</sup> Due to the fact that the United States has a truly unified system of insolvency law, using a single gateway approach to bankruptcy, insolvency proceedings in this jurisdiction will briefly be examined below.

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<sup>93</sup> As to how these courts function, and for an explanation of the status of bankruptcy judges, see Herbert *Understanding Bankruptcy* (1995) 55-56 (hereinafter referred to as Herbert). As regards a discussion of bankruptcy jurisdiction and venues, see Herbert ch 5; Albergotti *Understanding Bankruptcy in the US: A Handbook of Law and Practice* (1992) 3-8, 13 (hereinafter referred to as Albergotti).

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Title 11 of the United States Code<sup>94</sup> deals with bankruptcy issues, and contains all the substantive provisions of bankruptcy law governing cases filed on or after 1 October 1979.<sup>95</sup> The Bankruptcy Code is divided into eight chapters:<sup>96</sup>

- (a) Chapter 1 contains general provisions such as definitions;<sup>97</sup>
- (b) Chapter 3 is entitled “Case Administrations” and deals with the commencement of a bankruptcy case under the code;<sup>98</sup>
- (c) Chapter 5 is entitled “Creditors, the Debtor and the Estate” and deals with creditors, their claims, duties and benefits of the debtor and what the estate consists of;<sup>99</sup>
- (d) Chapter 7 is entitled “Liquidation” and deals with liquidation cases under the Bankruptcy Code. In the main this chapter deals with the administration of chapter 7 cases, the collection of assets and the liquidation and distribution of the estate;<sup>100</sup>
- (e) Chapter 9 is entitled “Adjustment of Debts of a Municipality”;<sup>101</sup>

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<sup>94</sup> 11 USC. This title is generally known as the United States Bankruptcy Code and was enacted as part of the Bankruptcy Reform Act of 1978. Hereinafter Title 11 of the United States Code will be referred to as the Bankruptcy Code.

<sup>95</sup> Sulmeyer *et al* 1998 *Collier Handbook for Trustees and Debtors in Possession* (1998) 2-1 (hereinafter referred to as Sulmeyer *ea*).

<sup>96</sup> See generally Albergetti 8-13.

<sup>97</sup> 11 USC ss 101-110; Sulmeyer *ea* 2-4.

<sup>98</sup> 11 USC ss 301-366; Sulmeyer *ea* 2-4.

<sup>99</sup> 11 USC ss 501-560; Sulmeyer *ea* 2-4.

<sup>100</sup> 11 USC ss 701-766; Sulmeyer *ea* 2-4.

<sup>101</sup> 11 USC ss 901-946; Sulmeyer *ea* 2-4.

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- (f) Chapter 11 is entitled “Reorganisation” and deals with business rescue measures;<sup>102</sup>
- (g) Chapter 12 deals with the adjustment of debts of a family farmer with regular income;<sup>103</sup>
- (h) Chapter 13 is entitled “Adjustment of Debts of an Individual With Regular Income.” As the name suggests, this chapter deals with individuals with regular incomes who seek relief from their debts by way of a plan of composition, an extension for the payment of debt, or both these issues.<sup>104</sup>

It is important to note that the provisions of chapters 1, 3 and 5 only apply to chapters 7, 11, 12 and 13.<sup>105</sup> The provisions of chapters 11, 12 and 13 only apply to chapter 11, 12 and 13 cases respectively.<sup>106</sup> Sub-chapter 1 of Chapter 3 of the Bankruptcy Code deals with the “Commencement of a Case.”<sup>107</sup> Section 301 of the Bankruptcy Code deals with voluntary cases<sup>108</sup> and section 303 deals with involuntary cases.<sup>109</sup>

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<sup>102</sup> 11 USC ss 1101-1174; Sulmeyer *ea* 2-5.

<sup>103</sup> 11 USC ss 1201- 1231; Sulmeyer *ea* 2-5.

<sup>104</sup> 11 USC ss 1301-1330; Sulmeyer *ea* 2-5.

<sup>105</sup> Sulmeyer *ea* 2-9.

<sup>106</sup> Sulmeyer *ea* 2-9.

<sup>107</sup> King 1998 *Collier Pamphlet Edition, Part 1, Bankruptcy Code* (1998) 110 (hereinafter referred to as King).

<sup>108</sup> “Voluntary cases” is used in this context to indicate that the debtor applies for relief under the Bankruptcy Code. Where the debtor and his or her spouse file for relief under the Bankruptcy Code, s 302, dealing with “joint cases”, finds application - see King 113-116.

<sup>109</sup> See King 116-132.



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#### 4 2 1 Voluntary bankruptcy proceedings<sup>110</sup>

A voluntary bankruptcy proceeding is commenced merely by filing a petition with the bankruptcy court<sup>111</sup> under the relevant chapter of the code that the debtor<sup>112</sup> wishes to utilise. For example, if the debtor wishes his or her estate to be liquidated in a manner similar to insolvency proceedings in South Africa, then a petition would be filed with the bankruptcy court under Chapter 7, dealing with liquidations. However, if the debtor wishes to obtain relief in the form of a composition or the rescheduling of debts, such a debtor would lodge a petition for relief under Chapter 13 of the Bankruptcy Code. Section 301 of the Bankruptcy Code also provides that “[t]he commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter”.

That section 301 also applies to companies is evident from the definition of “entity” in section 101(15) of the Bankruptcy Code and the decision in *Central Mortgage & Trust Inc v State of Texas (In re Central Mortgage & Trust Inc)*,<sup>113</sup> where it was held that a director of a company that has been closed under state insolvency laws may not be precluded from commencing a case under the Bankruptcy Code on behalf of the company, provided the company is eligible to become a “debtor”.

From the provisions of section 305 of the Bankruptcy Code it is evident that the bankruptcy court, after notice and a hearing, may dismiss or suspend an insolvency proceeding at any time if the court is of the opinion that the interests of the creditors and the debtor would be better

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<sup>110</sup> See also Ayers “Commencing a Case Under the Bankruptcy Reform Act of 1978: A Primer” 1981 51 *Mississippi Law Journal* 639; Kennedy “The Commencement of a Case Under the New Bankruptcy Code” 1979 36 *Washington and Lee Law Review* 977; Herbert ch 6; Albergotti 31-32.

<sup>111</sup> S 301. Bankruptcy Rule 1002 requires the petition commencing the proceeding to be filed with the clerk of the bankruptcy court - see King 111. See also Herbert 78-83 where a discussion of the commencement under each chapter of the Bankruptcy Code is discussed.

<sup>112</sup> The Bankruptcy Code uses the term “entity” in s 301 and the term “person” in s 303. In terms of the definition of “entity” in s 101(15), it includes a person, estate, trust, governmental unit and the United States Trustee. The definition of “person” in s 101(41) includes an individual, partnership and corporation, but excludes certain governmental organisations.

<sup>113</sup> 13 CBC2d 617 50 BR 1010 (SD Tex 1985).

served by doing so, or there are circumstances present as specified in section 305(a)(2)(A) and (B).<sup>114</sup>

#### 4 2 2 *Involuntary bankruptcy proceedings*<sup>115</sup>

Section 303 of the Bankruptcy Code deals with involuntary<sup>116</sup> bankruptcy proceedings. Section 303 clearly states that involuntary bankruptcy proceedings can only be commenced against a “person” under Chapters 7 (liquidation) and 11 (reorganisation) of the Bankruptcy Code.<sup>117</sup> A “person” is defined in section 101(41) as being an individual, partnership or corporation. The insolvency proceeding is commenced by the filing of a petition with the clerk of the bankruptcy court under chapters 7 or 11 of the Bankruptcy Code.<sup>118</sup> Section 303(b)(1)-(4) states who may file a bankruptcy petition under this section. In terms of section 303(h) the court must grant an order for the relief requested if the petition is not timeously opposed.<sup>119</sup> However, after a trial the court may only grant the order when certain circumstances are present, namely:

- (a) If the debtor is generally not paying his, her or its debts as they become due,<sup>120</sup> or

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<sup>114</sup> S 305(a)(2)(A) refers to a pending foreign proceeding and s 305(a)(2)(B) refers to the provisions of s 304(c), which deals with factors that the court must bear in mind when dealing with a case ancillary to foreign proceedings.

<sup>115</sup> See generally McCoid “The Occasion for Involuntary Bankruptcy” 1987 61 *American Bankruptcy Law Journal* 195; Herbert 83-94; Albergotti 32-40.

<sup>116</sup> The South African equivalent would be compulsory sequestration or winding-up by the court.

<sup>117</sup> See also Herbert 85-86.

<sup>118</sup> S 303(b) of the Bankruptcy Code. See also Herbert 86.

<sup>119</sup> This section uses the words “timely controverted.”

<sup>120</sup> S 303(h)(1) of the Bankruptcy Code. See also Comment “Involuntary Bankruptcy: The Generally Not Paying Standard” 1982 33 *Mercer Law Review* 903. For a discussion of the abolition of the acts of bankruptcy in the United States, see Herbert 83-84.

- (b) Specified persons have taken possession “of less than substantially all of the property of the debtor” within 120 days before the date of the filing of the petition.<sup>121</sup>

Section 303(j) of the Code provides that the court may only dismiss a petition filed under this section after notice to all creditors and a hearing. The petition may be dismissed by the court on the motion of the petitioner,<sup>122</sup> on consent of all the petitioners and the debtor,<sup>123</sup> or “for want of prosecution”.<sup>124</sup>

The procedures for bringing about an insolvency proceeding in the United States of America are relatively straight forward, and the fact that America has a pro-debtor system of insolvency allows for speedy and efficient relief for debtors under this system.<sup>125</sup> The Bankruptcy Code is truly unified in that most of its provisions deal with all forms of debtors, even if some of these provisions do appear under different chapter headings.

### 4 3 Insolvency applications in the Federal Republic of Germany<sup>126</sup>

The new German Insolvency Code<sup>127</sup> provides for a single gateway approach to bankruptcy, a system that is facilitated by the existence of insolvency courts. Section 2 of the Insolvency Code provides as follows:

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<sup>121</sup> S 303(h)(2) of the Bankruptcy Code.

<sup>122</sup> S 303(j)(1) of the Bankruptcy Code.

<sup>123</sup> S 303(j)(2) of the Bankruptcy Code.

<sup>124</sup> S 303(j)(3) of the Bankruptcy Code.

<sup>125</sup> For a discussion of the procedures, see Herbert ch 6.

<sup>126</sup> A translated text of the German Insolvency Code, or *Insolvenzordnung*, has been used as the basis for this discussion. See Stewart *Insolvency Code, Act Introducing the Insolvency Code* (1997).

<sup>127</sup> For a full discussion of the events that led to a new Insolvency Code being introduced in Germany, see ch 4 above.

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“ 2 Lower Court as Insolvency Court

(1) For the insolvency proceeding, the Lower Court in the district of which a State Court is located shall have exclusive jurisdiction as the insolvency court for the district of such State Court.

(2) The State governments shall be empowered, for the purpose of expedient administration or more rapid completion of the proceeding, to establish, by regulation, other, or additional, Lower Courts as insolvency courts and to establish other districts of the insolvency courts in derogation from the foregoing. The State Governments may transfer such power to the State justice authorities.”

To the extent that the Insolvency Code does not make provision for procedural rules, section 4 of the Insolvency Code makes the Code of Civil Procedure applicable to insolvency proceedings. Section 11 of the Insolvency Code determines the “permissibility of the insolvency proceeding” and provides that an insolvency proceeding may be commenced in regard to the assets of any natural or legal person. Sections 13 , 14 and 15 deal with the actual petition for commencement, these sections dealing generally with petitions, petitions by creditors and the right to make petitions in regard to legal persons. Section 16 merely states that there must be a reason for the commencement of an insolvency proceeding. Sections 17, 18 and 19 state the acceptable reasons for the commencement of an insolvency proceeding, these being “illiquidity”,<sup>128</sup> “impending illiquidity”<sup>129</sup> and “overindebtedness”.<sup>130</sup> From these provisions it is apparent that any debtor or creditor may approach the insolvency courts by way of petition for the declaration of insolvency of that particular debtor. The closest the German Insolvency Code comes to providing for grounds for liquidation or acts of insolvency, are the rules pertaining to illiquidity, pending illiquidity and overindebtedness.<sup>131</sup> The provisions relating to insolvency proceedings in the German Insolvency Code are simple and direct, with no complicated procedures that need to be followed.

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<sup>128</sup> S 17 of the Insolvency Code.

<sup>129</sup> S 18 of the Insolvency Code.

<sup>130</sup> S 19 of the Insolvency Code.

<sup>131</sup> Eg, s 17(1) states that “[i]lliquidity is a general reason for commencement”. S 17(2) takes this step further by stating that “[t]he debtor is illiquid, if it is unable to honor payment obligations when due”.

#### 4 4 Bankruptcy and winding-up applications in England<sup>132</sup>

Although England has one Insolvency Act<sup>133</sup> regulating the insolvency of both individuals and legal persons, it still has a dual gateway approach to insolvency law.<sup>134</sup> The Cork Report went a long way in recommending wide-sweeping changes to especially insolvency proceedings under English insolvency law.<sup>135</sup> The abolition of the acts of bankruptcy relating to natural persons under English law was recommended by the Cork Report,<sup>136</sup> together with the recommendation that the sole ground upon which a court may make an insolvency order, ought to be the inability to pay debts.<sup>137</sup> However, this only applies to natural person debtors and a whole different set of rules finds application in the case of companies.<sup>138</sup>

##### 4 4 1 *Insolvency proceedings in regard to individuals*

The first stage of insolvency proceedings under English law is the presentation of a petition for a bankruptcy order to the court having jurisdiction in that specific matter.<sup>139</sup> A petition can only

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<sup>132</sup> See generally Fletcher ch 5 and ch 6.

<sup>133</sup> Insolvency Act 1986.

<sup>134</sup> England has a dual gateway in the sense that a company, eg, may be wound up by the court as well as by the passing of a resolution - see eg Milman and Durrant *Corporate Insolvency Law and Practice* 3rd ed (1999) 2 (hereinafter referred to as Milman and Durrant).

<sup>135</sup> See eg ch 10 of the Cork Report.

<sup>136</sup> Cork Report paras 529-530.

<sup>137</sup> Cork Report paras 535-537.

<sup>138</sup> Eg, s 264(1) of the Insolvency Act 1986 provides for the bankruptcy petition relating to the estate of an individual, while s 122(1) of the same Act provides for the grounds for liquidation in the case of a company.

<sup>139</sup> In terms of s 373(1) of the Insolvency Act 1986, the High Court and the County Courts have jurisdiction. See Fletcher 81.

be presented by a person who has the requisite *locus standi*, and could be the debtor him- or herself, or a creditor.<sup>140</sup> Section 264(1) of the (English) Insolvency Act 1986 provides that a petition for bankruptcy may be presented to the court by:

- (a) A single creditor, or more than one creditor jointly;
- (b) By the debtor him- or herself; or
- (c) By certain specified persons relating to voluntary arrangements.

A creditor who petitions the court for the bankruptcy order, has to meet the further requirement that the debt must be one which the debtor is unable to pay, or one which the debtor has no reasonable prospect of being able to pay.<sup>141</sup> This provision must be read with the definition of “inability to pay” as defined in the Insolvency Act 1986.<sup>142</sup>

Where the debtor him- or herself petitions the court for a bankruptcy order, the Insolvency Rules provide for certain information to be furnished to the court when presenting the petition.<sup>143</sup> One of the requirements is that it must contain a statement that the petitioner (debtor) is unable to pay his or her debts, and must include a request that the bankruptcy order be made against him or her.<sup>144</sup> From these provisions it is apparent that under English law the procedures for bringing about the bankruptcy of a natural person debtor are relatively simple, in that the court is petitioned for the bankruptcy of the debtor based on such debtor’s inability to pay his or her debts.

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<sup>140</sup> S 264(1) of the Insolvency Act 1986; Fletcher 81.

<sup>141</sup> S 267(2)(c) of the Insolvency Act 1986; Fletcher 110.

<sup>142</sup> S 268 of the Insolvency Act 1986; Fletcher 110. As regards the hearing of a creditor’s petition, see Fletcher 130-138.

<sup>143</sup> Insolvency Rules 1986, r 6.38; Form 6.27; Fletcher 129.

<sup>144</sup> Fletcher 129. As regards the hearing of a debtor’s petition, see Fletcher 138-141.

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#### 4 4 2 *Insolvency proceedings in regard to companies*<sup>145</sup>

Under English law there is a definite distinction between the bankruptcy of an individual and the winding-up of a company, a distinction that is entrenched by the structure of the (English) Insolvency Act 1986.<sup>146</sup> Like the South African Companies Act,<sup>147</sup> the (English) Insolvency Act 1986 provides for certain grounds for liquidation in terms of which a company may be wound up by the court.<sup>148</sup> The grounds for liquidation under English law are very similar to those found in the South African Companies Act and are contained in section 122(1) of the Insolvency Act 1986.<sup>149</sup> Due to the similarities with the South African grounds for liquidation, the English grounds will not be repeated here.<sup>150</sup>

As stated earlier, the winding-up of a company does not necessarily take place due to insolvency, although the majority of companies are wound up because of the fact that the company is unable to pay its debts. This also appears to be the case in England.<sup>151</sup>

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<sup>145</sup> See generally Fletcher ch 20-23; Goode ch 5; Bailey *et al Corporate Insolvency – Law and Practice* (1992) 175-183, 195-206. Regarding the specific procedure and hearing of winding-up petitions, see Fletcher ch 21 533-552; Goode ch 5.

<sup>146</sup> Fletcher 519; Milman and Durrant 2. This is so despite the fact that England has a single insolvency statute. See also Keay “To Unify or Not to Unify Insolvency Legislation: International Experience and the Latest South African Proposals” 1999 *DJ* 62 at 65-68 (hereinafter referred to as Keay “To Unify or not to Unify”).

<sup>147</sup> See par 3.2 above.

<sup>148</sup> S 122(1) of the Insolvency Act 1986. It is to be noted that under English law a company may also be wound up voluntarily. This aspect is covered in ch 11 below.

<sup>149</sup> See also Goode 106-114.

<sup>150</sup> For a list of the relevant grounds for liquidation under English law see Fletcher 522; Milman and Durrant 96-101. One interesting aspect of the ground “inability to pay debts” under English law is the use of a statutory demand. In the proposals made under par 5.1 below, it is suggested that a similar form of statutory demand should be introduced into a unified South African Insolvency Act. As regards the English statutory demand, see Fletcher 524-526; Milman and Durrant 97-98.

<sup>151</sup> Fletcher 533.

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Briefly, the following persons or organisations may present a petition,<sup>152</sup> in terms of section 124 of the Insolvency Act 1986, for the winding-up of a company on one of the recognised grounds set out in section 122(1):

- (a) The company itself;<sup>153</sup>
- (b) The directors of the company;<sup>154</sup>
- (c) One or more creditors;<sup>155</sup>
- (d) One or more contributories;<sup>156</sup>
- (e) The official receiver;<sup>157</sup>
- (f) The Secretary of State;<sup>158</sup>
- (g) The Bank of England;<sup>159</sup>

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<sup>152</sup> See also Milman and Durrant 98; Goode 110-111.

<sup>153</sup> S 124(1) of the Insolvency Act 1986. If a company has already been placed under voluntary winding-up the liquidator is competent to present the petition - see Fletcher 533.

<sup>154</sup> S 124(1) of the Insolvency Act 1986; Milman and Durrant 100.

<sup>155</sup> S 124(1) of the Insolvency Act 1986.

<sup>156</sup> S 124(1) of the Insolvency Act 1986. See also Milman and Durrant 101.

<sup>157</sup> In terms of s 124(5) of the Insolvency Act 1986. See also Milman and Durrant 100-101.

<sup>158</sup> In terms of s 124(4) and 124A of the Insolvency Act 1986, or under s 72 of the Financial Services Act 1986, or under ss 53 and 54 of the Insurance Companies Act 1982.

<sup>159</sup> In terms of s 92 of the Banking Act 1987.



- (h) The Attorney-General,<sup>160</sup>
- (i) The Building Societies Commission,<sup>161</sup>
- (j) The clerk of the Magistrates' Court.<sup>162</sup>

As opposed to the United States and Germany, England makes use of a dual gateway approach to insolvency. As regards consumer bankruptcy England has discarded the archaic acts of bankruptcy and replaced them with a single ground of bankruptcy, namely the inability to pay debts.<sup>163</sup> As far as the winding-up of companies is concerned, England still acknowledge various grounds for liquidation, some of which have no relevance to insolvency. In addition, England still distinguishes between individual and corporate insolvency, providing for separate procedures to be applied in each case.<sup>164</sup>

#### 4 5 Bankruptcy and winding-up applications in Australia<sup>165</sup>

As is the case in England and South Africa, Australia also has a dual gateway approach to insolvency law. In addition, and as is the case in South Africa, Australia also has a fragmented

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<sup>160</sup> In the case of charitable companies - see s 63 of the Charities Act 1993.

<sup>161</sup> S 37 of the Building Societies Act 1986.

<sup>162</sup> S 87A of the Magistrates' Court Act.

<sup>163</sup> For a discussion of the distinction between commercial and factual insolvency under English law, see Fletcher 110-112.

<sup>164</sup> For a discussion of the procedures to be followed in order to place a company into compulsory winding-up under English Law, see Milman and Durrant ch 6 94-115; Goode ch 5.

<sup>165</sup> See generally Keay *Insolvency, Personal and Corporate Law and Practice* 3rd ed (1998) ch 2 (bankruptcy) and ch 9 (liquidation) (hereinafter referred to as Keay *Insolvency*); Tomasic and Whitford *Australian Insolvency and Bankruptcy Law* 2nd ed (1997) ch 7-9 (liquidation) and ch 14-15 (bankruptcy) (hereinafter referred to as Tomasic and Whitford). As regards bankruptcy petitions in respect of individuals, see also Rose *Lewis' Australian Bankruptcy Law* 11th ed (1999) ch 4-8 (hereinafter referred to as Rose).

system of insolvency legislation.<sup>166</sup> The bankruptcy of individuals is dealt with in the Bankruptcy Act<sup>167</sup> while the winding-up of companies is regulated by the Corporations Act.<sup>168</sup>

#### 4 5 1 *Bankruptcy procedures in regard to individuals*<sup>169</sup>

In Australia a person can be declared bankrupt in one of two ways, namely by a debtor's petition or by a creditor who applies to the court for the sequestration of the debtor's estate.<sup>170</sup> In the case where the debtor himself applies for bankruptcy, the petition is presented to the Official Receiver and, if there is no other pending application to bankrupt the debtor, and provided the petition is accepted by the court, the debtor is bankrupt.<sup>171</sup> According to Keay<sup>172</sup> the procedure leading to bankruptcy by way of a debtor's petition is "very simple".<sup>173</sup>

In the case of compulsory bankruptcy where a creditor applies to have the estate of the debtor sequestrated, the creditor will have to establish that an act of bankruptcy has been committed.<sup>174</sup>

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<sup>166</sup> See Keay "To Unify or not to Unify" 68 where he states that this is because bankruptcy law has been regulated by federal statutes and company law by state Acts.

<sup>167</sup> 1966 (Cth).

<sup>168</sup> See Duns and Mason "Consumer Insolvency in Australia: Current Regulation and Proposed Reforms" 7, a paper presented at the Academics' Meeting of the INSOL Sixth World Congress in London on 17 July 2001 (hereinafter referred to as Duns and Mason), where they point out that Australia distinguishes between consumer and corporate insolvency.

<sup>169</sup> See generally Duns and Mason 1-46; Rose ch 4-8.

<sup>170</sup> Keay *Insolvency* 17. It is of interest that Keay states here that bankruptcy only applies to a debtor who is not a corporation, partnership, association or company that has been registered under a law that provides for the winding-up of such partnership or association. This is very similar to the situation in South Africa, although partnerships are sequestrated under the Insolvency Act in South Africa - see the definition of "debtor" in s 2 of the Insolvency Act and ch 5 above. See also Rose 90-91.

<sup>171</sup> Keay *Insolvency* 17; Tomasic and Whitford par [14.34] 467-468; Duns and Mason 10; Rose 91-94.

<sup>172</sup> Keay *Insolvency* 17.

<sup>173</sup> For a full discussion of the procedure that must be followed in order to succeed with a debtor's petition, see Keay *Insolvency* 28-36; Tomasic and Whitford par [14.34] 467-468.

<sup>174</sup> Keay *Insolvency* 17; Tomasic and Whitford par [14.11] 456. For a discussion of the acts of bankruptcy and their use in practice, see Keay *Insolvency* 38-50; Tomasic and Whitford paras [14.13]-[14.29] 458-465; Duns and Mason 10; Rose 41-42, 48-60.

In order to obtain the order the creditor will have to present a creditor's petition to the court within six months of the commission of the act of bankruptcy.<sup>175</sup> A judge or the registrar, acting as officials of the court, will then decide whether the debtor's estate should be made subject to a sequestration order.<sup>176</sup> Personal bankruptcy procedures in Australia are evidently very similar, procedurally, to those in South Africa.<sup>177</sup> Both countries make provision for:

- (a) The voluntary surrender of a debtor's estate;
- (b) The compulsory sequestration of a debtor's estate by a creditor; and
- (c) Acts of insolvency (or bankruptcy).

#### 4 5 2 *Winding-up procedures in regard to companies*<sup>178</sup>

In terms of the Australian Corporations Act there are basically two modes of winding-up, namely voluntary winding-up and compulsory winding-up.<sup>179</sup> Voluntary winding-up by resolution is dealt with as a separate chapter in this study and consequently only winding-up by the court will be discussed here.

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<sup>175</sup> Keay *Insolvency* 17; Tomasic and Whitford par [14.11] 456.

<sup>176</sup> Keay *Insolvency* 17; Tomasic and Whitford par [14.11] 456. For a discussion of the procedures that have to be followed in order to succeed with a creditor's petition in practice, see Keay *Insolvency* 50-57; Tomasic and Whitford paras [14.11]-[14.33] 455-467.

<sup>177</sup> However, it must be borne in mind that although South Africa also has a system of voluntary surrender (the Australian equivalent is the debtor's petition), our courts require a clear benefit for creditors before the sequestration order can be granted. In addition, in light of the many formalities that have to be complied with before the court will grant a sequestration order based on an application for voluntary surrender, the procedure here can hardly be said to be a simple one.

<sup>178</sup> See generally Keay McPherson, *The Law of Company Liquidation* 4th ed (1999) ch 2-6 (hereinafter referred to as McPherson).

<sup>179</sup> Keay *Insolvency* 365; Tomasic and Whitford paras [7.1], [10.1]; McPherson 25-26. This mode of winding-up is also referred to as "court winding-up". This is similar to South African winding-up law where a dual gateway approach is taken in that a company may be wound up by the court or voluntarily by its members.

In Australia, as in South Africa and England, compulsory liquidation, or liquidation by the court, is a statutory procedure that enables a certain defined person or institution to bring about the winding-up of a company.<sup>180</sup> Although section 462(2) of the Corporations Act allows for a broad range of persons to bring an application for the winding-up of a company, Keay<sup>181</sup> states that it is probable that well over 90% of all liquidations by the court are initiated by creditors. The grounds upon which a company may be wound up are contained in sections 459A and 461 of the Corporations Act. Basically five broad grounds for liquidation<sup>182</sup> are identified in the Corporations Act:<sup>183</sup>

- (a) The company is proved to be insolvent<sup>184</sup> after an application made to court in terms of section 459P of the Corporations Act;<sup>185</sup>
- (b) The court finds that the company is insolvent after an application made in terms of sections 260, 462 or 464 of the Corporations Act;<sup>186</sup>

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<sup>180</sup> Keay *Insolvency* 373; McPherson 35.

<sup>181</sup> Keay *Insolvency* 373.

<sup>182</sup> The Australian Law Reform Commission, in its report DP32 *General Insolvency Inquiry* of Aug 1987, proposed major changes to the grounds upon which a company can be liquidated by the court. The Australian Law Reform Commission, in its Report No 45 *General Insolvency Inquiry* Vol 1 paras 133-134 (hereinafter referred to as the Harmer Report), refers to the recommendations made in the DP32 report. In fact, the Harmer report really only made one recommendation relating to the grounds for liquidation, namely “that there should be a single provision setting out all the circumstances in which a company may be wound up in insolvency”.

<sup>183</sup> See Keay *Insolvency* 374; McPherson 53-54.

<sup>184</sup> Australian winding-up law has also struggled in the past with the concept of “insolvency” or the inability of a company to pay its debts. In the Harmer Report substantial attention is given to this aspect in paras 135-155, the Commission recommending that the “deeming” provision relating to insolvency be replaced by presumptions relating to the insolvency of a company. See also Keay *Insolvency* 375-376, where these presumptions are discussed, and 391-392 where the test for insolvency is discussed. See also McPherson 54-58.

<sup>185</sup> S 459A of the Corporations Act.

<sup>186</sup> S 459B of the Corporations Act.

- (c) Where a company is under voluntary administration and the creditors resolve that the company be wound up;<sup>187</sup>
- (d) Where a company fails to give effect to the instrument providing for a deed of company arrangement within 21 days of the meeting of creditors after the creditors resolved to accept the deed;<sup>188</sup>
- (e) Where the creditors of a company resolve that a deed of company arrangement be terminated.<sup>189</sup>

Basically the procedure for obtaining a winding-up order for the liquidation of a company is as follows: the winding-up procedure is initiated by an application to the court with the necessary jurisdiction.<sup>190</sup> In terms of section 459P any one of the following persons or institutions will have *locus standi* to bring an application:<sup>191</sup>

- (a) The company itself;<sup>192</sup>
- (b) A creditor of the company;<sup>193</sup>

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<sup>187</sup> S 446A(1)(a) and 446A(6) of the Corporations Act.

<sup>188</sup> Ss 446A(1)(b), 444B(2)(a) and 446A(6) of the Corporations Act.

<sup>189</sup> Ss 446A(1)(c), 445E and 446A(6) of the Corporations Act.

<sup>190</sup> Key *Insolvency* 394. For a discussion of the jurisdictional rules, see Key *Insolvency* 393; McPherson 38-45.

<sup>191</sup> Key *Insolvency* 393; Tomasic and Whitford paras [7.44]-[7.56] 241-252; McPherson 35-37.

<sup>192</sup> S 459P(1)(a) of the Corporations Act. See also Tomasic and Whitford par [7.45] 242-244.

<sup>193</sup> S 459P(1)(b) of the Corporations Act. See also Tomasic and Whitford par [7.46] 244-245.

- (c) A contributory of the company;<sup>194</sup>
- (d) A director of the company;<sup>195</sup>
- (e) A liquidator or provisional liquidator of the company;<sup>196</sup>
- (f) The Australian Securities Commission (ASC);<sup>197</sup>
- (g) A prescribed agency.<sup>198</sup>

An application for the winding-up<sup>199</sup> of a company must comply with the prescribed form of such application, state the nature of the relief sought, namely a winding-up order, and the ground or grounds upon which such application relies.<sup>200</sup> The application is supported by an affidavit confirming the allegations made in the application.<sup>201</sup> Once the application has been filed with the court, it must be served on the company and there are certain requirements relating to the publication of the application.<sup>202</sup> At the hearing the court may grant the order, dismiss the

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<sup>194</sup> S 459P(1)(c) of the Corporations Act. See also Tomasic and Whitford par [7.54] 250-251.

<sup>195</sup> S 459P(1)(d) of the Corporations Act. See also Tomasic and Whitford par [7.45] 242-244.

<sup>196</sup> S 459P(1)(e) of the Corporations Act. See also Tomasic and Whitford par [7.55] 251.

<sup>197</sup> S 459P(1)(f) of the Corporations Act. See also Tomasic and Whitford par [7.56] 251-252.

<sup>198</sup> The Corporations Regulations prescribe these agencies - see Keay *Insolvency* 393.

<sup>199</sup> See generally Tomasic and Whitford paras [7.57]-[7.60] 252-255 and ch 8; McPherson 117-142.

<sup>200</sup> Keay *Insolvency* 394. It is interesting to note that the filing of the application with the court registry (Registrar of the High Court in South Africa) is the date upon which antecedent transactions will be determined. This is similar to s 348 of the Companies Act which provides that a winding-up under South African law is deemed to commence at the time the application is filed with the Registrar of the High Court. In this regard see also Tomasic and Whitford par [7.62] 257.

<sup>201</sup> Keay *Insolvency* 394.

<sup>202</sup> For a discussion of the service of the application on the company and publication, see Keay *Insolvency* 394-395.

application, adjourn proceedings or make an interim or other order it deems fit in the circumstances.<sup>203</sup>

From the brief review of Australian insolvency procedures set out above, it is clear that:

- (a) Australia too has a dual gateway approach to the winding-up of companies;
- (b) The procedures in order to bring about the insolvency of an individual differs from the procedures in order to bring about a winding-up order;
- (c) Australia has separate legislation governing the bankruptcy of individuals and the winding-up of companies;
- (d) Australia has scrapped many of the traditional grounds for liquidation that still apply in England and South Africa and that were introduced into Australia via English law;
- (e) The inability of a company to pay its debts is also the most common ground for the winding-up of a company in Australia.

Although Australia has succeeded in reducing the number of grounds for liquidation for the winding-up of a company, the procedures and grounds for bringing about the sequestration of an individual, as opposed to the procedures and grounds for the liquidation of a company, appear to be worlds apart. While the procedures for bringing about the sequestration of a debtor appear to be relatively simple, the procedures for placing a company in liquidation appear to be cumbersome, especially in regard to the presumptions relating to the insolvency of a company.<sup>204</sup>

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<sup>203</sup> For a detailed discussion of the various orders that can be made by the court, see Keay *Insolvency* 397-404.

<sup>204</sup> It is a pity that the Harmer Report did not recommend a unified insolvency procedure for individuals and companies alike. Considering the difference in procedures and grounds, it would have been interesting to see how they would in fact have gone about structuring the relevant provisions.

## 5 PROPOSALS FOR THE BASIS OF LIQUIDATION APPLICATIONS UNDER A UNIFIED INSOLVENCY ACT

### 5.1 The acts of insolvency and grounds for liquidation under a unified Insolvency Act<sup>205</sup>

Despite the very obvious difference in insolvency procedures relating to individuals and companies in England, Australia and South Africa,<sup>206</sup> it is submitted that it is in fact possible to bring about a large measure of uniformity in the application procedures if a unified insolvency statute were to be introduced in South Africa. In the main, the ground of insolvency or liquidation which is most often encountered is an inability to pay debts. Subtle nuances that exist due to the inherent differences between individuals and companies can quite easily be accommodated within the unified provisions themselves, as will be shown below.

Because the definition of “debtor” now also includes debtors other than natural persons and partnerships, it is necessary to substantially amend the clauses that deal with this aspect in a unified Insolvency Act. At the workshops held at the University of Pretoria during December 1998, it was agreed by all present that if the archaic acts of insolvency are to be retained, then they should also be made applicable to other debtors such as companies and close corporations.<sup>207</sup>

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<sup>205</sup> For a discussion of the clauses of the Draft Insolvency Bill prepared by the SA Law Commission, see Boraine and Van der Linde (Part 1) 1998 *TSAR* 626-633.

<sup>206</sup> Due to the fact that the United States of America and the Federal Republic of Germany have single gateway insolvency proceedings, it is difficult to glean any assistance from the principles applied in these jurisdictions. In any event, both the United States and Germany have codified systems of bankruptcy, a fact which makes it difficult to implement their approach in a hybrid system of insolvency such as the one used in South Africa.

<sup>207</sup> *Final Report Containing Proposals on a Unified Insolvency Act Vol 2 Workshop Transcriptions 109 et seq* (hereinafter referred to as Workshop Transcriptions (Final Report Vol 2)). This suggestion was initially made by Cronje (SA Law Commission) in his written submissions received after the symposium held on 23 Oct 1998.



In addition, it is submitted that the grounds for liquidation which are currently contained in the Companies Act and the Close Corporations Act, should be reduced to those that are most commonly experienced in practice and which deal directly or indirectly with insolvency,<sup>208</sup> and also be made applicable to other types of debtors which are not companies or close corporations. It was submitted that the remaining grounds for liquidation currently contained in the Companies Act, if they are to be retained at all, should remain in the Companies Act.<sup>209</sup> As a result of these proposals, the proposed clause 2 of a unified Insolvency Act provides as follows:

- “2. Acts of insolvency and circumstances in which certain debtors may be liquidated by the court.<sup>210</sup> -
- (1) A debtor commits an act of insolvency -
    - (a) in the case of a natural person debtor, if such debtor leaves the Republic or, being out of the Republic remains absent therefrom, or absents himself or herself from his or her dwelling, or regular place of business, with intent thereby to evade or delay the payment of his or her debts;<sup>211</sup>
    - (b) if it appears from the return of the officer charged with the execution of a judgment of a court against the debtor that the judgment has not been satisfied after a valid execution thereof;<sup>212</sup>
    - (c) if a debtor disposes or attempts to dispose of his or her or its property or any part thereof in a manner which appears to the court to be likely to prejudice creditors or to prefer one or more creditors above another, unless the debtor satisfies the court that he or she or it was able to pay his or her debts after the disposition;<sup>213</sup>
    - (d) if a debtor removes or attempts to remove any of his or her property in a manner which appears to the court to be likely to prejudice

<sup>208</sup> The grounds for liquidation that have been omitted are the following: i) commencement of business without certification from the Registrar (s 344(b) of the Companies Act); ii) non-commencement of business within a year of incorporation (s 344(c) of the Companies Act and s 68(b) of the Close Corporations Act); iii) in the case of a public company where the number of members has been reduced below seven (s 344(d) of the Companies Act); iv) in the case of a company where seventy-five per cent of the share capital has been lost or become useless for the business of the company (s 344(e) of the Companies Act); v) where an external company has been dissolved in the country of its incorporation, or has ceased to carry on business or is carrying on business only for the purposes of winding-up its affairs (s 344(g) of the Companies Act).

<sup>209</sup> Workshop Transcriptions (Final Report Vol 2) 109 *et seq* and 445-508.

<sup>210</sup> See cl 2 of the SA Law Commission’s Draft Insolvency Bill in Commission Paper 582 Vol 2 Project 63.

<sup>211</sup> Currently s 8(a) of the Insolvency Act.

<sup>212</sup> Currently s 8(b) of the Insolvency Act.

<sup>213</sup> Currently s 8(c) of the Insolvency Act.

- creditors or to prefer one or more creditors above another, unless the debtor satisfies the court that he or she was able to pay his or her debts after the removal or attempted removal;<sup>214</sup>
- (e) if a debtor makes or offers to make any arrangement with any of his or her creditors for releasing him or her wholly or partially from his or her debts;<sup>215</sup>
  - (f) if, having applied in terms of section 3 for the liquidation of the estate, a debtor fails to comply with the requirements of that section or submits a statement of affairs contemplated in that section which is substantially incorrect or incomplete;<sup>216</sup>
  - (g) if a debtor gives notice in writing to any one of his or her creditors that he or she is unable to pay any of his or her debts.<sup>217</sup>
- (2) A debtor may be liquidated by the court if:
- (a) in the case of a trust debtor, company debtor, close corporation debtor or association debtor, the debtor concerned has resolved that it be liquidated by the court in terms of a liquidation resolution as defined in section 1 of this Act; provided that such debtor is not prevented by law, agreement or any other legally enforceable reason, from passing such resolution;
  - (b) the debtor is unable to pay its debts as described in subsection (3) of this section;<sup>218</sup>
  - (c) in the case of a company debtor, close corporation debtor or association debtor in appropriate circumstances, it appears to the court that it is just and equitable that the debtor should be liquidated.<sup>219</sup>
- (3) A debtor shall be unable to pay its debts if:
- (a) a creditor, by cession or otherwise, to whom the debtor is indebted in an amount of not less than R2000 then due-
    - (i) has served on a company debtor or close corporation debtor, by leaving the same at its registered office or main place of business, a statutory demand for payment of such an amount to pay an amount which is due and payable, or to give security to the reasonable satisfaction of the creditor for such amount, or to enter into a compromise therefor. The statutory demand shall correspond substantially with Form F in Schedule 1 and shall be served on the debtor by the sheriff of the magistrate's court within whose jurisdiction the debtor resides or by the creditor's attorney or the attorney's clerk by delivering it to the debtor; or

<sup>214</sup> Currently s 8(d) of the Insolvency Act.

<sup>215</sup> Currently s 8(e) of the Insolvency Act.

<sup>216</sup> Currently s 8(f) of the Insolvency Act.

<sup>217</sup> Currently s 8(g) of the Insolvency Act.

<sup>218</sup> Currently s 344(f) of the Companies Act and s 68(c) of the Close Corporations Act.

<sup>219</sup> Currently s 344(h) of the Companies Act and s 68(d) of the Close Corporations Act.

- (ii) in the case of a debtor other than a company debtor or close corporation debtor, has served such demand by handing it to the debtor or leaving it at its main office or place of residence, or delivering it to the secretary or some director, manager or principal officer of such association of persons or body corporate or in such other manner as the court may direct, and the debtor has for twenty-one days thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or
  - (b) if it appears from the return of the officer charged with the execution of a judgment of a court against the debtor that the judgment has not been satisfied after a valid execution thereof; or
  - (c) it is proved to the satisfaction of the court that the debtor is unable to pay its debts.
- (4) In determining for the purpose of subsection (3) whether a debtor is unable to pay its debts, the court shall also take into account the contingent and prospective liabilities of the debtor.”<sup>220</sup>

## 5 2 Explanation of the provisions of clause 2

The main changes and / or proposals made in clause 2 of the proposed unified Insolvency Act can be summarised as follows:

- (a) Due to the contents of clause 2(1)(a), this clause has only been made applicable to natural person debtors and partnership debtors.
- (b) Clauses 2(1)(b) to (g) have been amended to make provision for all types of debtors, not only natural person and partnership debtors.
- (c) Clause 2(2) has been inserted into the proposals in order to make provision for the current provisions, contained in the Companies Act and Close Corporations Act, relating to the grounds for liquidation:<sup>221</sup>

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<sup>220</sup> Currently s 345 of the Companies Act and s 69 of the Close Corporations Act.

<sup>221</sup> Most of the delegates that were present at the workshops held at the University of Pretoria in Dec 1998 felt that these provisions should be made applicable to all types of debtors - see Workshop Transcriptions (Vol 2 Final Report) 109 *et seq.* Obviously not all the acts of insolvency can be applicable to corporate debtors and, conversely, not all the grounds for liquidation can be made applicable to natural persons.

- (i) Clause 2(2)(a) replaces the current provisions in the Companies Act and Close Corporations Act which provides for a company or close corporation to be wound up by the court after a resolution to this effect has been passed by the members of the company or close corporation concerned.<sup>222</sup> In order to bring about uniform provisions relating to all types of debtors, provision has been made for a special type of resolution, namely a “liquidation resolution”,<sup>223</sup> whereby a debtor may resolve to be liquidated by the court. This special “liquidation resolution” has been included due to the current provisions of the Companies Act, which makes provision for a *special* resolution, and the Close Corporations Act, which makes provision for a *written* resolution, in cases where a company or close corporation wishes to pass a resolution to be liquidated by the court. In order to avoid cross-references to the Companies Act and Close Corporations Act, it was decided to include a definition of “liquidation resolution”, which has a special meaning in the context of these unified proposals.<sup>224</sup> In addition, this “liquidation resolution” can also be utilised by other types of debtors.<sup>225</sup>

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Only the applicable acts of insolvency or grounds for liquidation have been included. It is of course debatable whether the other grounds should be omitted from a unified Insolvency Act, but from a practical point of view it is submitted that only the grounds for liquidation relating to insolvency should be included under the unified Insolvency Act. As stated, the other grounds for liquidation can be retained in the Companies Act if they are to be retained.

<sup>222</sup> This also amounts to a voluntary liquidation by resolution, but should not be confused with a voluntary liquidation by creditors as provided for in cl 8 (cl 8 of the unified Insolvency Act is discussed in ch 11 below). In the circumstances enumerated above, the members resolve to approach the court in order to be liquidated. Consequently there will be a court order liquidating the debtor, which would not be the case when cl 8 is applied.

<sup>223</sup> See also the definition of “liquidation resolution” in the proposed unified Insolvency Act in ann E below.

<sup>224</sup> By including a definition of “liquidation resolution” it has been a far easier task to draft the relevant clauses of the unified statute. Its use obviates the need to refer back to the provisions of the Companies Act or Close Corporations Act each time reference is made to the specific types of resolution. These references (to the Companies Act and the Close Corporations Act) have therefore only been included once, sc in the definition of “liquidation resolution” in cl 1 of the proposed unified Insolvency Act (see ann E below).

<sup>225</sup> After considering submissions made at the workshops referred to above, it was decided to make this paragraph applicable to all types of debtors except natural person debtors and partnership debtors - see Workshop Transcriptions (Vol 2 Final Report) 445-509. The requirement that the liquidation of an

Natural person debtors and partnership debtors have been omitted from this paragraph, as their inclusion would nullify the requirement of advantage to creditors contained in clause 10(1)(b) of the unified Insolvency Act.<sup>226</sup> By extending the provisions of this paragraph also to trusts and other entities, where control over the assets or business of the debtor is exercised by some person or persons in a representative capacity, it now becomes possible for these entities to approach the court for liquidation based on a resolution passed by the persons authorised to pass such resolution. For example, the trustees of a trust may, in terms of this provision, pass a resolution in terms of which the trust may be liquidated by the court should the circumstances warrant such application. The proviso to this clause is intended to prevent a resolution for liquidation being passed in circumstances where the persons involved are prohibited from doing so, for example as a result of a prohibitive provision in the trust deed of a trust.

- (ii) Clauses 2(2)(b) and (c) represent the two grounds for liquidation that have been retained from the current grounds for liquidation set out in the Companies Act and the Close Corporations Act.<sup>227</sup>

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individual must be to the advantage of creditors must not be lost sight of here. By allowing an individual to liquidate by means of a resolution, one would negate this requirement.

<sup>226</sup> Despite a suggestion to the contrary, it was felt by the majority of delegates present at the workshops that these provisions should find no application in the case of natural person debtors and partnership debtors - see Workshop Transcriptions (Vol 2 Final Report) 445-509. It is submitted that if it was not for the fact that South Africa still has a conservative pro-creditor approach to insolvency law, it would have been possible to allow a natural person debtor or a partnership debtor to utilise these provisions, effectively allowing these types of debtors automatic access to the liquidation process.

<sup>227</sup> It was felt by delegates at the workshops that the other grounds for liquidation are rarely, if ever, utilised in practice - Workshop Transcriptions (Volume 2 Final Report) 109 *et seq.* The suggestion was made that these grounds can be retained in the Companies Act or Close Corporations Act for use by the Registrar of Companies and Close Corporations, should he or she wish to make use of them - see Workshop Transcriptions (Volume 2 Final Report) 109 *et seq.* In addition, the suggestion was made that these two grounds should also be made applicable to natural person debtors and partnership debtors, in other words to all debtors as defined in a unified Insolvency Act - Workshop Transcriptions (Volume 2 Final Report) 109 *et seq.*

- (d) Clause 2(3) is a re-enactment of the current provisions of section 345 of the Companies Act and section 69 of the Close Corporations Act.<sup>228</sup> The clause has, however, been adapted to make provision for entities other than companies and close corporations. Clause 2(3)(a)(i) has been adapted to make provision for a statutory demand in a prescribed form, which prescribed form has been included as a form in one of the schedules to the unified Insolvency Act.<sup>229</sup> The demand is based on the statutory demand<sup>230</sup> used in the (English) Insolvency Act 1986, and takes the following form:

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<sup>228</sup> It would appear that this is a duplication of the provisions contained in cl 1(b), relating to an act of insolvency. However, no apparent problem seems to arise from this duplication as cl 2(b) has a more detailed provision regarding when a debtor is deemed unable to pay his debts.

<sup>229</sup> The proposed unified Insolvency Act is contained in ann E below.

<sup>230</sup> Australia also uses a statutory demand in order to assist creditors in bringing about the winding-up of a company. See Key *Insolvency* 376-391; Key "Statutory Demands in Light of the Corporate Law Reform Act 1992" 1994 12 *Companies & Securities Law Journal* 407.

**STATUTORY DEMAND IN TERMS OF SECTION 2(3)(a)(i) OF THE INSOLVENCY AND  
BUSINESS RECOVERY ACT**

**WARNING**

*This is an important document. If you should fail to respond to the document within twenty-one days after service thereof your estate may be liquidated and your assets taken away from you.*

**DEMAND**

To: \_\_\_\_\_

Address: \_\_\_\_\_

*The creditor claims that you are indebted to him or her for the following amount which is now due and payable and that he holds no security for the amount claimed.*

| <i>When incurred</i> | <i>Type of debt<br/>(cause of action)</i> | <i>Amount due as at the date of the<br/>demand</i> |
|----------------------|---|--|
|                      |   |  |

*The creditor demands that you pay the amount due within three weeks after the service of this demand or give security to the reasonable satisfaction of the creditor therefor, or enter into a compromise in respect thereof.*

*Should you fail to comply with this demand, this does not preclude you from opposing an application for the liquidation of your estate. If you deny indebtedness wholly or in part, you should contact the creditor without delay.*

SIGNATURE: \_\_\_\_\_

NAME OF CREDITOR: \_\_\_\_\_  
(PRINT)

DATE: \_\_\_\_\_

CAPACITY: \_\_\_\_\_  
(IF NOT CREDITOR PERSONALLY)

ADDRESS: \_\_\_\_\_

TEL NO: \_\_\_\_\_

PERSON YOU MAY CONTACT IF NOT CREDITOR PERSONALLY:

NAME: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

If debt obtained by cession or otherwise:

|                          | <i>Name</i> | <i>Date of cession or other act</i> |
|--------------------------|-------------|-------------------------------------|
| <b>Original creditor</b> |             |                                     |

### 5.3 Liquidation applications by a debtor under a unified Insolvency Act

Due to the inherent differences between natural persons and juristic persons, as well as the difference in procedure for the voluntary liquidation of individuals and corporate entities,<sup>231</sup> I have elected to keep separate the voluntary application provisions for these types of entities. Consequently clauses 3 and 4 of the proposed unified Insolvency Act read as follows:

**“3. Application by debtor for liquidation of estate.”**<sup>232</sup> - (1) A natural person debtor or a partnership debtor who is insolvent or a person who lawfully acts on behalf of an insolvent natural person debtor who is incompetent to manage his or her own affairs or the executor or liquidator of the insolvent estate of a deceased person may apply to a court for the liquidation of the estate of the debtor.<sup>233</sup>

(2) The application shall contain the following information, which shall also appear in the heading of the application:

- (a) The full name and date of birth of the debtor and, if an identity number has been assigned to him or her, that identity number; and
- (b) the marital status of the debtor and, if he or she is married in community of property, the full name and date of birth of his or her spouse and, if an identity number has been assigned to the spouse, that identity number.<sup>234</sup>

(3) An application referred to in subsection (1) shall be accompanied by -

- (a) a statement of affairs of the debtor corresponding substantially with Form A of Schedule 1 and which shall contain the particulars provided for in the said Form, which particulars shall be sworn to or confirmed as required by the said Form;<sup>235</sup>
- (b) a certificate of the Master, issued not more than 14 days before the date on which the application is to be heard by the court, that sufficient security has been given for the payment of all costs in respect of the application that might be awarded against the applicant and all costs of the liquidation of the estate referred to in section 83, which are not recoverable from other creditors of the estate.<sup>236</sup>

(4) Before noon on the fifth court day before the day on which the application is to be heard by the court, the applicant shall lodge the application with the registrar of the court

<sup>231</sup> The voluntary liquidation (by resolution) of corporate debtors is dealt with separately in ch 11 below.

<sup>232</sup> See cl 3 of the SA Law Commission’s Draft Insolvency Bill in Commission Paper 582 Vol 2 Project 63.

<sup>233</sup> Currently s 3(1) of the Insolvency Act.

<sup>234</sup> Currently s 9(3)(a) of the Insolvency Act.

<sup>235</sup> Currently s 4(3) of the Insolvency Act.

<sup>236</sup> Currently s 9(3)(b) of the Insolvency Act.



for enrolment and send a copy of the application and two copies of the statement of affairs referred to in subsection 3(a) as well as a copy of the affidavit in support of the application, to the Master.<sup>237</sup>

(5) If an applicant is unable to comply with any of the requirements of subsection (4), the court may dispense with such requirement and dispose of the application in the manner that it finds just.

(6) The affidavit in support of the application for liquidation referred to in subsection (1) shall confirm that the requirements of subsection (4) have been complied with.

(7) The Master may require the applicant to cause the property enumerated in the statement of affairs to be valued by an appraiser appointed in terms of section 6 of the Administration of Estates Act 1965 (Act No. 66 of 1965), or a valuer or associated valuer registered in terms of the Valuer's Act, 1982 (Act No. 23 of 1982), or some other person approved by the Master.<sup>238</sup>

(8) Having considered the application, the court may make an order as contemplated in section 10 or may dismiss the application or postpone its hearing or make any other order that it deems just.<sup>239</sup>

**4. Application for liquidation by certain debtors.** (1) An application to the Court for the liquidation of a trust debtor, a company debtor, close corporation debtor or association debtor may, subject to the provisions of this section, be made-

- (a) by the debtor itself<sup>240</sup> or, notwithstanding any contrary provisions contained in the articles, memorandum, association agreement or constitution of the debtor concerned, by the management<sup>241</sup> of such a debtor;
- (b) by one or more of its members, or any person referred to in section 103(3) of the Companies Act 61 of 1973, irrespective of whether his name has been entered in the register of members or not;<sup>242</sup>
- (c) jointly by any or all of the parties mentioned in paragraphs (a) and (b);<sup>243</sup>

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<sup>237</sup> Currently s 4(1) of the Insolvency Act.

<sup>238</sup> Currently s 4(4) of the Insolvency Act.

<sup>239</sup> Currently s 9(4) and (5) of the Insolvency Act.

<sup>240</sup> Currently s 346(1)(a) of the Companies Act.

<sup>241</sup> The "management of a debtor" is defined in cl 1 of the proposed unified Insolvency Act (see ann E). This definition was included in order to simplify the drafting of the provisions in the unified Insolvency Act itself. Instead of referring in every relevant clause to every type of person who may be responsible for the management of a company, close corporation, trust or association of persons, it was decided instead to extensively define the management of each type of debtor in cl 1. This has made the drafting of the proposed unified Insolvency Act a lot easier.

<sup>242</sup> Currently s 346(1)(c) of the Companies Act.

<sup>243</sup> Currently s 346(1)(d) of the Companies Act.

- (d) in the case of any debtor being liquidated voluntarily by the Court in terms of a liquidation resolution, by the Master or any creditor or member of that debtor;<sup>244</sup> or
- (e) in the case of a judicial management order in terms of Chapter 24, by the judicial manager of the debtor.<sup>245</sup>
- (2) A member of a debtor shall not be entitled to present an application for the liquidation of that debtor unless he or she has been a member for a period of at least six months immediately prior to the date of the application or the shares or interest he or she holds have devolved upon him or her through the death of a former holder, and unless the application is on the ground referred to in section 2(2)(c).<sup>246</sup>
- (3) Every application to the Court referred to in subsection (1), except an application by the Master in terms of paragraph (d) of that subsection, shall be accompanied by a certificate of the Master, issued not more than 14 days before the date on which the application is to be heard by the court, that sufficient security has been given for the payment of all costs in respect of the application that might be awarded against the applicant and all costs of the liquidation of the estate referred to in section 83, which are not recoverable from other creditors of the estate.<sup>247</sup>
- (4) Before noon on the fifth day before the day on which the application is to be heard by the court, the applicant shall lodge the application with the registrar of the court for enrolment and send a copy of the application and two copies of the statement of affairs as well as a copy of the affidavit in support of the application to the Master.
- (5) If the applicant is unable to comply with any of the requirements of subsection (4), the court may dispense with such requirement and dispose of the application in the manner that it finds just.
- (6) (a) After having considered any application referred to in subsections (1) to (3), the court may grant any order in terms of the provisions of section 7, 10 or 11 of this Act, but the court shall not refuse to grant a liquidation order on the ground only that the assets of the debtor have been mortgaged to an amount equal to or in excess of those assets or that the debtor has no assets.<sup>248</sup>
- (b) Where the application is presented by members of the debtor and it appears to the court that the applicants are entitled to relief, the court shall grant a liquidation order, unless it is satisfied that some other remedy is available to the applicants and that they are acting unreasonably in seeking to have the debtor liquidated instead of pursuing that other remedy.<sup>249</sup>

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<sup>244</sup> Currently s 346(1)(e) of the Companies Act.

<sup>245</sup> Currently s 346(1)(f) of the Companies Act.

<sup>246</sup> Currently s 346(2) of the Companies Act.

<sup>247</sup> Currently s 346(3) of the Companies Act.

<sup>248</sup> Currently s 347(1) of the Companies Act.

<sup>249</sup> Currently s 347(2) of the Companies Act.

- (c) Where the application is presented to the court by-
- (i) any applicant under section 2(2)(d), the court may in the liquidation order or by any subsequent order confirm all or any of the proceedings in the voluntary liquidation; or
  - (ii) any member under that section, the court shall satisfy itself that the rights of the member will be prejudiced by the continuation of a voluntary liquidation.<sup>250</sup>
- (d) The court shall not grant a final liquidation order in the case of a debtor which is already being liquidated by order of court within the Republic.<sup>251</sup>

Due to the fundamental differences between natural persons and other debtors such as companies and close corporations, the applications for voluntary liquidation by the court in respect of natural persons need to be kept separate from the applications for voluntary liquidation by the court in respect of other types of debtors. The application procedures for voluntary liquidation by the court in respect of a natural person debtor have therefore been dealt with in clause 3, and the application procedures for the liquidation by the court in respect of other debtors in clause 4.

Generally clause 4 is a re-enactment of sections 346 and 347 of the Companies Act, making an in-depth discussion of the provisions unnecessary. However, one very important amendment has been made to clause 4(1)(a), which deals with the power of a debtor to bring an application. There has been some controversy under South African law as to whether a director, or the directors of a company by means of a directors' resolution, may bring an application for the winding-up of a company under section 344 of the Companies Act.<sup>252</sup> Section 346(1)(a) of the

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<sup>250</sup> Currently s 347(4) of the Companies Act.

<sup>251</sup> Currently s 347(5) of the Companies Act.

<sup>252</sup> The conflicting decisions in this regard are *Ex parte Voorligter Drukkery Beperkt* 1922 EDL 315; *Ex parte Edenvale Wholesalers and General Suppliers (Pty) Ltd* 1959 2 SA 477 (W); *Ex parte Umtentweni Motels (Pty) Ltd* 1968 1 SA 144 (D); *Ex parte Tangent Sheeting (Pty) Ltd* 1993 3 SA 488 (W) - in each of these aforementioned cases the applicants were successful in obtaining a winding-up order on the basis of a resolution by the directors) - and *Ex parte Russlyn Construction (Pty) Ltd* 1987 1 SA 33 (D); *Ex parte Screen Media Ltd* 1991 3 SA 462 (W), where the application for a winding-up based on a resolution by the directors did not succeed. See also McLennan "Powers of Directors to Wind up Insolvent Companies" 1987 *SALJ* 232, which the court referred to in *Ex parte Tangent Sheeting (Pty) Ltd*, and Larkin "A Question of Management: Does it Include Ceasing to Manage?" 1987 *BML* 165. It would appear that England experienced a similar problem before rectifying the situation under the Insolvency Act 1986 - see *Re Emmadart Ltd* [1979] ch 540 and Fletcher *The Law of Insolvency* (1996) 533 fn 2.

Companies Act merely states that a company may bring such an application. In order to avoid problems of this nature from occurring in future, it was submitted that the directors as an organ of the company should be able to bring an application.<sup>253</sup> However, in terms of the provisions included here, the directors may only bring such an application if there is no prohibition contained, for example, in the articles or memorandum of a company.

#### 5 4 Liquidation applications by creditors for the liquidation of a debtor's estate

Clause 5 deals with applications for liquidation by creditors, as opposed to clauses 3 and 4, which deal with applications for liquidation by the debtor him-, her- or itself. The amendments made to this clause, which is an adaptation of the clause inserted by the South African Law Commission into their proposed Draft Insolvency Bill,<sup>254</sup> relate mainly to the inclusion in the clause of other types of debtors and the insertion of new grounds for liquidation. It also brings about uniformity in the liquidation applications, by creditors, for all types of debtors. The relevant clause reads as follows:

**“5. Application by creditor for liquidation of debtor's estate.** (1) A creditor who has a liquidated claim of not less than the amount of R2000 against a debtor who has committed an act of insolvency, who is insolvent or which is unable to pay its debts as determined in section 2(3), or two or more creditors who in the aggregate have liquidated claims against such debtor for not less than the amount of R2000 may apply to a court for the liquidation of the debtor's estate.

(2) The Minister may amend the amounts in subsection (1) by notice in the Gazette in order to take account of subsequent fluctuations in the value of money.

(3) A claim in respect of a liquidated debt which is payable at some determined time in the future may be taken into account for purposes of subsection (1).

(4) (a) An application contemplated in subsection (1) shall be made with notice to the debtor and, in the case of a natural person debtor, also to the debtor's spouse with whom he or she is married in community of property, unless the court orders that such notice may be dispensed with.

(b) Such an application shall, subject to subparagraph (d), contain the following information, namely -

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<sup>253</sup> This was also suggested at the workshops held at the University of Pretoria in Dec 1998 - see Workshop Transcriptions (Vol 2 Final Report) 104 *et seq.*, where Van der Linde and Edeling discussed this issue.

<sup>254</sup> See cl 4 of the Law Commission's Draft Insolvency Bill in Commission Paper 582 Vol 2 Project 63.

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- (i) in the case of a natural person debtor, the full name and date of birth of the debtor and, if an identity number has been assigned to him or her, that identity number and, in the case of any other debtor, the registration number or other reference number which has been assigned to such debtor and, if no such registration number or reference number exists, this fact shall be stated;
  - (ii) in the case of a natural person debtor, the marital status of the debtor and if he or she is married in community of property, the full name and date of birth of his or her spouse and if an identity number has been assigned to the spouse, such identity number;
  - (iii) the amount, cause and nature of such claim;
  - (iv) whether or not security has been given for the claim and if so, the nature and value of the security; and
  - (v) the act of insolvency or ground of liquidation on which the application is founded or otherwise an allegation that the debtor is in fact insolvent.
- (c) The allegations in the application shall be supported by an affidavit and the application shall be accompanied by a certificate of the Master, issued not more than 14 days before the date on which the application is to be heard by the court, that sufficient security has been given for the payment of all costs in respect of the application that might be awarded against the applicant and all costs of the liquidation of the estate referred to in section 83, which are not recoverable from creditors of the estate.
- (d) The particulars in paragraph (b)(i) and (ii) shall appear also in the heading of the application and if the applicant is unable to furnish all such particulars he or she shall mention the reason why he or she is unable to do so.
- (e) Before noon on the fifth court day before the day on which the application is to be heard by the court, the applicant shall lodge the application with the registrar of the court for enrolment and, unless notice to the debtor has been dispensed with, a copy of the application and copies of all annexures thereto shall be served on the debtor or handed to him or her by the applicant or his or her attorney or the attorney's clerk.
- (f) If the debtor wishes to oppose the application he or she shall lodge a notice and replying affidavit with the registrar and serve on or hand a copy thereof to the applicant, before noon on the second court day before the day on which the application is to be heard by the court.
- (g) A copy of the application and of every affidavit in support of the allegations in the application shall be sent to the Master when the application is lodged with the registrar.
- (5) If an applicant is unable to comply with any of the requirements of subsection (4), the court may dispense with such requirement and dispose of the application in the manner that it finds just.
- (6) Having considered the application, the court may make an order as contemplated in section 10 or may dismiss the application or postpone its hearing or make any other order that it deems just.”

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The main changes to the Law Commission's Draft Insolvency Bill can be summarised as follows:

- (a) Clause 5(1) has been adapted to include a reference to a debtor who is unable to pay his, her or its debts in accordance with clause 2(3).<sup>255</sup>
- (b) Clause 5(3) has been amended in two respects, namely:
  - (i) To distinguish between the type of information required by natural persons as opposed to the information required in regard to juristic persons or other types of debtors, and
  - (ii) To include, in addition to the acts of insolvency, also the other grounds for liquidation.

## 6 CONCLUSION

Although the clauses reflected above do bring about the uniformity of liquidation applications to a certain degree, it is submitted that it is impossible to entirely unify these provisions under a unified insolvency statute in South Africa. This is borne out by the fact that separate provisions still have to be made for the liquidation of individuals and corporate entities. The reasons for this, it is submitted, are the following:

- (a) While a benefit for creditors is required for the granting of a liquidation order in regard to natural person and partnership debtors, the same requirement is not a prerequisite for the liquidation of a company or close corporation.

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<sup>255</sup> Cl 2(3) is reflected above.

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- (b) While a natural person debtor can only be placed in liquidation by the court (due to the benefit for creditors requirement and the change of status that it brings about), this is not the case in regard to companies and close corporations which can also be liquidated on a voluntary basis.
- (c) A natural person and partnership debtor can only be liquidated if he, she or it is insolvent, while companies and close corporations can be liquidated on grounds other than insolvency.
- (d) While an individual has the ability to earn income subsequent to his or her liquidation, this is not the case when dealing with a company, close corporation or partnership.<sup>256</sup> This factor further contributes towards the “benefit for creditors” requirement in the case of individuals.<sup>257</sup>

For the reasons enumerated above, it is impossible to bring about the total uniformity of liquidation applications that can be found in jurisdictions such as the United States of America or Germany. In order to bring about a unified system of insolvency as applied in the aforementioned countries, it would require a total shift in the philosophy underlying South African insolvency law. From the tenor of the South African Law Commission’s Draft Insolvency Bill and its explanatory memorandum,<sup>258</sup> the government is evidently not yet ready to make the paradigm shift that will bring about a change to the underlying philosophy of the “benefit for creditors” requirement that is applied in the case of individual insolvency. It is submitted that the failure to be able to totally unify South African insolvency and winding-up law is not to be found in the structures of the insolvency legislation, but rather in the philosophy underlying insolvency law as a whole.

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<sup>256</sup> Although it does happen that the liquidator of a company or a close corporation continues trading after liquidation, this is normally only done in order to sell the business as a going concern, thereby obtaining a better return for the creditors.

<sup>257</sup> See eg *Ressel v Levin* 1964 1 SA 128 (C) and *Ex parte Veitch* 1965 1 SA 667 (W).

<sup>258</sup> See Commission Paper 582 Vol 1 and Vol 2.

Despite these shortcomings, it is submitted that the clauses as enumerated above will go a long way to streamlining and simplifying liquidation applications under the unified insolvency statute proposed in this study. The unified provisions will rid the current system of insistent interpretational problems and bring about much more clarity in regard to the procedures that have to be followed, no matter what type of debtor is being dealt with.



## CHAPTER 9

### THE COMMENCEMENT OF LIQUIDATION AND THE VESTING OF THE INSOLVENT ESTATE UNDER A UNIFIED INSOLVENCY ACT

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#### SUMMARY

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#### **1 INTRODUCTION**

In this chapter two aspects regarding individual and corporate insolvency that are dissimilar to each other, will be discussed. Unlike the previous chapter, where it was pointed out that bringing about uniformity in liquidation applications is not entirely possible, this chapter concentrates on two aspects where, it is submitted, the introduction of uniform provisions is in fact possible. The two aspects that will be discussed in this chapter are closely related in that one arises from the other. In the first place the commencement of liquidation will be discussed with reference to the fact that, under current South African law, the provisions relating to the commencement of liquidation and sequestration differ. In the second place the vesting rules that apply once a liquidation order has been granted, will be discussed. Currently the rules relating to vesting differ in the case of individual and corporate insolvency.

In approaching these dissimilar aspects of individual and corporate insolvency, a brief summary of the current position will be provided. After a brief comparison with other jurisdictions, proposals will be made for uniform provisions that apply to both individual and corporate insolvency.

## 2 THE COMMENCEMENT OF LIQUIDATION

### 2.1 The current position regarding the commencement of sequestration and liquidation<sup>1</sup>

Due to the fact that sequestration and / or winding-up has the effect of bringing about a *concursum creditorum*,<sup>2</sup> the date upon which the sequestration or liquidation commences is of paramount importance. The date of commencement of sequestration and/or liquidation also has an important impact on the execution of judgments<sup>3</sup> and the rights of the parties to transactions entered into prior to sequestration or liquidation.<sup>4</sup>

Under current South African insolvency law the date of commencement of *sequestration* and the date of commencement of *liquidation*, are determined in different ways. In the case of the sequestration of an individual's estate, the date of sequestration is as follows:<sup>5</sup>

- (a) Where the application is for voluntary surrender, the date of sequestration is the date upon which the court grants the sequestration order.

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<sup>1</sup> See generally Kunst (gen ed) *Meskin, Henochsberg on the Companies Act* Vol 1 (1994) 738-739 (hereinafter referred to as Henochsberg); Cilliers *et al Corporate Law* 3rd ed (2000) 510-512 (hereinafter referred to as Cilliers *ea Corporate Law*).

<sup>2</sup> See *Walker v Syfret* 1911 AD 141 at 166. See also *Nel v The Master* 2002 1 SA 354 (SCA), where the court had to decide what the effect is on the *concursum creditorum* when a provisional order for the winding-up of a company that was obtained at the instance of a creditor is discharged and immediately replaced by a final order for the winding-up of the company granted at the instance of another creditor. The court found that since there was no interruption in the proceedings bringing about the liquidation, the *concursum creditorum* that was created by the provisional order remained operative.

<sup>3</sup> See s 359 of the Companies Act 61 of 1973 (hereinafter referred to as the Companies Act).

<sup>4</sup> See ss 26-34 of the Insolvency Act 24 of 1936 (hereinafter referred to as the Insolvency Act) and s 340 of the Companies Act.

<sup>5</sup> See the definition of "sequestration order" in s 2 of the Insolvency Act, where it is provided that a "sequestration order" means any order of court whereby an estate is sequestered and includes a provisional order which has not been set aside. S 1 of the Companies Act contains a similar definition for "winding-up order", but see the provisions of s 348 of the Companies Act which provides for the commencement of liquidation. The Insolvency Act does not contain a similar provision to s 348 of the Companies Act.

- (b) Where the application is an application for compulsory sequestration, the date of sequestration is the date on which the provisional sequestration order (rule *nisi*) is granted by the court, provided the provisional order has not been set aside or, stated differently, provided the provisional order has been made final.

In the case of a company<sup>6</sup> the commencement of liquidation is determined as follows:

- (a) In the case of a company being wound up by the court, section 348 of the Companies Act finds application. In terms of section 348 the winding-up of a company is deemed to commence at the time of the presentation to the court<sup>7</sup> of the application for the winding-up. The commencement of liquidation is therefore not determined by reference to the date on which the order is granted, or even the date on which the application is heard by the court,<sup>8</sup> although there can be no commencement of liquidation without a winding-up order having been granted.<sup>9</sup> It must also be noted that the mere presentation of an application to court does not have the effect of creating a moratorium in respect of the payment of a company's debts.<sup>10</sup>

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<sup>6</sup> The same rules apply *mutatis mutandis* to a close corporation in liquidation - s 66 of the Close Corporations Act 69 of 1984 (hereinafter referred to as the Close Corporations Act).

<sup>7</sup> This means that the application must have been duly lodged with the Registrar of the High Court - see *Wolhuter Steel (Welkom) (Pty) Ltd v Jatu Construction (Pty) Ltd* 1983 3 SA 815 (O) at 816; *Venter v Farley* 1991 1 SA 316 (W) at 320; *The MV Nantai Princess: Nantai Line Co Ltd v Cargo Laden on the MV Nantai Princess* 1997 2 SA 580 (D) at 584-586. See also *Rennie v South African Sea Products Ltd* 1986 2 SA 138 (C) at 141-142 and *Meaker v Campbell's New Quarries (Pvt) Ltd* 1973 3 SA 157 (R) at 159-160 regarding the position under the Companies Act 46 of 1926.

<sup>8</sup> See *Venter v Farley* 1991 1 SA 316 (W) 319H-320F; *The MV Nantai Princess: Nantai Line Co Ltd v Cargo Laden on the MV Nantai Princess* 1997 2 SA 580 (D); *Kalil v Decotex (Pty) Ltd* 1988 1 SA 943 (A). See also Kunst (gen ed) *Meskin, Insolvency Law and its Operation in Winding-up* (1990, updated to 30 April 1999) par 5.20 fn 16 (hereinafter referred to as Meskin).

<sup>9</sup> *Vermeulen v CC Bauermeister (Edms) Bpk* 1982 4 SA 159 (T); *Kalil v Decotex (Pty) Ltd* 1988 1 SA 943 (A).

<sup>10</sup> *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd* 1976 4 SA 75 (W).

- (b) In the case of a company being wound up voluntarily, the date of the commencement of the liquidation is the date upon which the resolution placing the company in liquidation is registered by the Registrar of Companies.<sup>11</sup>

There is therefore a difference between determining the date of the commencement of sequestration in the case of an individual, and determining the date of the commencement of the winding-up of a company or close corporation. Whether or not this discrepancy is justified, will be discussed below.

Not one of the commentators on insolvency law discusses the date of sequestration in any detail, and one has to deduce from the provisions of the Insolvency Act itself, and the definition of “sequestration order” in section 2, that sequestration commences on the day any sequestration order is granted, and includes a provisional sequestration order.<sup>12</sup> However, in the case of the commencement of winding-up or liquidation of a company, specific provision has been made for the commencement of winding-up, even in early legislation dealing with the winding-up of joint stock companies.<sup>13</sup>

#### 2.1.1 Comments regarding the winding-up of a company by the court

The reason for the deeming provision contained in section 348 of the Companies Act is, according to the decision in *Lief v Western Credit (Africa) (Pty) Ltd*,<sup>14</sup> to negate any attempt by a dishonest company, or directors, or creditors or others, to gain an unfair advantage during the period

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<sup>11</sup> S 352 of the Companies Act. See also Henochsberg 744; Cilliers *ea Corporate Law* 496. This was not always the case. Under earlier company law legislation the date of the commencement of liquidation was the date under on which the resolution was passed - see par 2.2 below.

<sup>12</sup> This is also the deduction that can be made from the court’s decision in *Walker v Syfret* 1911 AD 141 at 166. Generally this deduction can be made because the property of the estate vests in the Master upon the granting of a provisional order (in the case of a compulsory sequestration). The property can only vest if the sequestration has commenced. See also De la Rey *Mars, The Law of Insolvency in South Africa* 8th ed (1988) 174 (hereinafter referred to as Mars) and the cases cited in fn 3.

<sup>13</sup> See par 2.2 below.

<sup>14</sup> 1966 3 SA 344 (W).

between then presentation of the application for a winding-up order and the granting of an order by the court.<sup>15</sup> However, a similar provision does not exist in the Insolvency Act in the case of a compulsory sequestration, although it is conceivable that the same prejudice may occur where there exists an unscrupulous debtor or creditors in the insolvent estate of an individual.<sup>16</sup>

The South African Law Commission did consider the effects of section 348 in its final report regarding individual insolvency, coming to the conclusion that a provision such as section 348 may operate unfairly in practice.<sup>17</sup> The fact that there is no similar provision in the Insolvency Act regarding compulsory sequestration does not seem to create any problems in the insolvent estates of individuals, and in any event there are other provisions in the Insolvency Act that could possibly be utilised to protect the interests of creditors, for example the provisions dealing with impeachable transactions.

As stated above, the date of commencement of liquidation is important since it brings about a *concursum creditorum* that affects the rights of especially creditors who have perhaps obtained execution judgments prior to the winding-up being applied for.<sup>18</sup> In regard to the execution of judgments and other legal proceedings,<sup>19</sup> section 359(1)(b) of the Companies Act finds application in the winding-up of a company or close corporation, and reads as follows:

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<sup>15</sup> Per Snyman J at 347 of the *Lief* case. Although this decision was based on the predecessor to s 348 of the Companies Act, namely s 115 of the Companies Act 46 of 1926, it nevertheless still finds application today.

<sup>16</sup> This is only the case where one is dealing with a compulsory sequestration as different rules apply in the case of a voluntary surrender. Eg, although the date of sequestration is the date of the granting of the order for a voluntary surrender, s 5(1) of the Insolvency Act determines that all sales in execution are stayed by the publication of a notice to surrender.

<sup>17</sup> See the comments made by the SA Law Commission in Project 63 Commission Paper 582 (11 Feb 2000) 31 paras 1.15-1.16 (hereinafter referred to as Commission Paper 582).

<sup>18</sup> See *Walker v Syfret* 1911 AD 141 and *Nel v The Master* 2002 1 SA 354 (SCA).

<sup>19</sup> See also Henochsberg 757-762; Cilliers *ea Corporate Law* 513-514.

“359. Legal proceedings suspended and attachments void.- (1) When the Court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered in terms of section 200-

- (a) ...
- (b) any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void.”

This provision was clearly designed to protect the creditors in the estate, preventing other (judgment) creditors from obtaining an unfair advantage where liquidation of the company is eminent. The term “put in force” used in section 359(1)(b) has been judicially considered in a number of cases.<sup>20</sup> According to Henochsberg<sup>21</sup> the correct approach is that an execution is put into force when, in pursuance of a warrant of execution, the sheriff enters into *possession* of the property. The commencement of liquidation precludes the delivery of property sold in execution prior to such commencement, and delivery can only be proceeded with where the liquidator elects to continue with the sale.<sup>22</sup> However, in *Shurrie v Sheriff for the Supreme Court, Wynberg*<sup>23</sup> the court found that the purchaser was entitled to such delivery where the hammer had fallen on the sale of property at an auction after the application had been lodged, but before the liquidation order had been granted. The fact that the deeming provision in section 348 came into operation upon the granting of the liquidation order, did not sway the court in holding that the sale had taken place before the company had been placed in liquidation.<sup>24</sup>

<sup>20</sup> *Pols v R Pols-Bouers & Ingenieurs (Edms) Bpk* 1953 3 SA 107 (T) at 110; *Rennie v Registrar of Deeds* 1977 2 SA 513 (C) at 515; *Strydom v MGN Construction (Pty) Ltd* 1983 1 SA 799 (D) at 802-806; *Rennie v South African Sea Products Ltd* 1986 2 SA 138 (C); *Shalala v Bowman* 1989 4 SA 900 (W); *Shurrie v Sheriff for the Supreme Court, Wynberg* 1995 4 SA 709 (C); *Syffrets Bank Ltd v Sheriff of the Supreme Court, Durban Central*; *Schoerie v Syffrets Bank Ltd* 1997 1 SA 764 (D); *King Pie Holdings (Pty) Ltd v King Pie (Pinetown)(Pty) Ltd*; *King Pie Holdings (Pty) Ltd v King Pie (Durban)(Pty) Ltd* 1998 4 SA 1240 (D); *The MV Nantai Princess: Nantai Line Co Ltd v Cargo Laden on the MV Nantai Princess* 1997 2 SA 580 (D). For the contrary view that to sell the property in execution means to put into force the execution, see *Ex parte Flynn: In re United Investment & Development Corporation Ltd* 1953 3 SA 443 (E) at 445; *Meaker v Campbell's New Quarries (Pvt) Ltd* 1973 3 SA 157 (R) at 162.

<sup>21</sup> Henochsberg 759. See also Cilliers *ea Corporate Law* 514 fn 166.

<sup>22</sup> See *Shalala v Bowman* 1989 4 SA 900 (W); *Schoerie v Syffrets Bank Ltd* 1997 1 SA 764 (D).

<sup>23</sup> 1995 4 SA 709 (C).

<sup>24</sup> It is respectfully submitted that this case was incorrectly decided - a view shared by Henochsberg Vol 1 760 - as ss 348 and 359 were designed exactly for this purpose. This case also illustrates that the courts do not interpret the provisions of ss 348 and 359 of the Companies Act consistently. The problem is

Another section of the Companies Act that refers to the commencement of liquidation and also seeks to protect the interests of creditors, is section 341(2).<sup>25</sup> This section declares the disposition of its property by a company after the commencement of winding-up to be void. This section only applies to companies that are being wound up and that are unable to pay their debts. From the case law<sup>26</sup> on the subject it is evident that the section has regularly been invoked in practice and needs to be addressed when determining the date for the commencement of liquidation.

### 2.1.2 Comments regarding voluntary winding-up<sup>27</sup>

It has already been stated that section 352 of the Companies Act provides that a voluntary winding-up commences on the day that the resolution placing the company in liquidation is registered by the Registrar of Companies. This provision differs from earlier legislation<sup>28</sup> although it is impossible to determine why this provision was changed. Under earlier legislation the date of commencement of a voluntary winding-up was the date on which the resolution was passed. This was changed in the current 1973 Companies Act, although no explanation<sup>29</sup> for the changes

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created by the deeming provision in s 348, which states that the winding-up of the company is *deemed* to have commenced at the time the application is lodged with the Registrar. The judge in the *Shurrie* case failed to recognise that liquidation was deemed to have commenced prior to the hammer falling at the auction, when the sale of the property at the auction had taken place before the *liquidation order* had been granted. What the judge failed to appreciate, is that once an order for the winding-up of the company had been granted, the company went into liquidation with retrospective effect from the date that the application was lodged. It is for this very reason that the deeming provision contained in s 348 has been included in the Companies Act, another fact that the court in the *Shurrie* decision failed to appreciate.

<sup>25</sup> See generally Henochsberg 675-681; Cilliers *ea Corporate Law* 514.

<sup>26</sup> See *Administrator, Natal v Magill Grant and Nell (Pty) Ltd* 1969 1 SA 660 (A); *Rousseau v Malan* 1989 2 SA 451(C); *First National Bank Ltd v EU Civils (Pty) Ltd: First National Bank Ltd v EU Plant (Pty) Ltd; Bassett v EU Civils (Pty) Ltd; EU Holdings (Pty) Ltd v EU Plant (Pty) Ltd* 1996 1 SA 924 (C).

<sup>27</sup> See generally De la Rey "Creditors' Voluntary Liquidation: Theoretical Analysis and Practical Guide" 1980 *DJ* 47 (hereinafter referred to as De la Rey "Creditors' Voluntary Liquidation"); Cilliers *ea Corporate Law* 496-499.

<sup>28</sup> See par 2.2 below.

<sup>29</sup> See also De la Rey "Creditors' Voluntary Liquidation" 47 and 52, where she states that the Van Wyk de Vries Commission (*Kommissie van Ondersoek na die Maatskappywet* (there were two reports, the main report (*Hoofverslag* RP 45/1970) and a supplementary report with a draft Bill (*Aanvullende Verslag en Konsepwetsontwerp* RP 31/1972) (hereinafter referred to as the Van Wyk de Vries Commission)) did not always provide explanations for the changes that they proposed.

to the provision could be found in the Van Wyk De Vries Commission of Inquiry into the Companies Act.<sup>30</sup> The fact that a Registrar of Companies was created under the 1973 Companies Act may be one of the reasons why this provision changed, although this could not be determined with any certainty.

One difference between a winding-up by the court and a voluntary winding-up by resolution that is worth noting, is the fact that the provisions of section 359 also apply to companies that are being wound up voluntarily. However, there is no deeming provision in the Companies Act that states that the winding-up is deemed to have commenced at an earlier date, for example the date upon which the resolution has been passed.<sup>31</sup> It is conceivable, in the words of Snyman J in the *Lief* case, that a dishonest company, or directors, or creditors or others, may try to gain an unfair advantage between the time the resolution to liquidate the company has been passed and the actual registration of that resolution by the Registrar of Companies. Does the fact that there is no deeming provision in the case of a voluntary winding-up imply that the legislature did not wish to protect creditors in such an instance? The current provisions relating to the commencement of sequestration and liquidation are unsatisfactory in that there is not only a difference between the commencement of sequestration and the commencement of liquidation, but also between the provisions relating to compulsory and voluntary winding-up. It is submitted that the new proposed date for the commencement of liquidation as set out in paragraph 2.4 below, will do away with the uncertainties and inconsistencies that are currently experienced in this regard.

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<sup>30</sup> The report of this Commission led to the promulgation of the current 1973 Companies Act. One reason that may be advanced, is that in terms of s 203 of the Companies Act a special resolution only becomes operative once it has been registered. In terms of the same section any other resolution comes into operation on the date which it is passed.

<sup>31</sup> While there is no deeming provision regarding the commencement of voluntary winding-up, it should be noted that in the case of the voluntary surrender of an individual's estate in terms of the Insolvency Act, s 5(1) determines that all sales in execution are stayed by the publication of a notice to surrender. This date will in practice usually be some time before the actual sequestration order is granted.



## 2 2 Historical development regarding the commencement of liquidation

No reason for the difference in approach between companies and individuals could be found, although it is interesting to note that even in the earliest company law legislation the current provision, albeit in different form, relating to the commencement of liquidation was present in most of the provinces.

### 2 2 1 Cape Colony

In the Cape Colony's Winding-up Act 12 of 1868 section V provided as follows:

“The winding-up shall have relation to the date of the presenting of the petition for winding-up on which any order for winding-up shall be made.”

From this it is evident that the position at that time was the same as it currently is, in that the liquidation commenced at the time the petition (application) was presented to the court. At this time voluntary liquidation was not a known concept, and therefore no provision was made for this eventuality.

As regards winding-up by the court, the position was the same under the Cape Colony's Companies Act 25 of 1892<sup>32</sup> where section 138 provided as follows:

“138. A winding-up of a company by the court shall be deemed to commence at the time of the presentation of the petition for winding-up on which any order for winding-up shall be made.”

However, for the first time in the Cape Colony the 1892 Companies Act made provision for the voluntary winding-up of companies, and section 179 of this Act provided as follows:

“179. A voluntary winding-up shall be deemed to commence at the time of the passing of the resolution authorizing such winding-up.”

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<sup>32</sup> Hereinafter referred to as the 1892 Companies Act.

This was also the position in the Transvaal,<sup>33</sup> but the date of commencement of liquidation in regard to voluntary winding-up was changed in later legislation.<sup>34</sup>

### 2.2.2 Natal

The Natal Winding-up Law 19 of 1866<sup>35</sup> did not specifically provide for a date upon which the winding-up would commence. It is also not clear from some of the provisions as to whether the winding-up commenced on the date the order was granted, or on the day the petition was filed with the court. For example, section 13 of the 1866 Winding-up Law provided as follows:

“From the date of any order, as aforesaid, or from any date to be therein fixed for that purpose, the Company therein specified shall be absolutely interdicted and prevented from acting as a Company, and every director or manager shall cease to have or to perform any act, matter, or thing in relation to the affairs of such Company.”

On the other hand, section 28 provided as follows:

“The filing of any such petition with the Registrar of the Court shall have the effect of suspending and staying all and every action and actions, or other proceedings at law ... except in so far as is in this section hereinafter provided for; and such suspensive effect shall continue until such petition shall be dismissed, or such suspensive effect be removed by the said Court ...”

It is submitted that section 28 had the same effect as the current section 348 of the Companies Act,<sup>36</sup> in that the effective date of liquidation was the date upon which the petition (application) was lodged with the Registrar of the court.

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<sup>33</sup> See par 2.2.3 below.

<sup>34</sup> See par 2.1.2 above.

<sup>35</sup> Hereinafter referred to as the 1866 Winding-up Law.

<sup>36</sup> In fact, the provision appears to be a hybrid of the current ss 348 and 359 of the Companies Act.

### 2 2 3 Transvaal

Section 4 of the *Wet op het Liquideeren van Maatschappijen* of 1891<sup>37</sup> provided that liquidation only commenced on the date on which a winding-up order was granted:

“*De luiquidatie zal van kracht zijn van af den dag waarop de order verleend wordt.*”

The position in the Transvaal differed from the position in the other provinces, and this position was continued in the 1894 Act.<sup>38</sup> However, this position changed under the provisions of section 116 the Transvaal Companies Act 31 of 1909:<sup>39</sup>

“116. A winding-up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding-up.”

It was under this Act that the voluntary winding-up of a company was provided for for the first time, but the provisions were different under this Act than they are under current South African winding-up law. Section 157 of the 1909 Companies Act provided as follows:

“157. A voluntary winding-up shall be deemed to commence at the time of the passing of the resolution authorizing the winding-up.”

This aspect is important when dealing with voluntary liquidation, and will be referred to again under the chapter dealing with voluntary liquidation by resolution.<sup>40</sup>

### 2 2 4 Orange Free State

Section 5 of the Law for the Winding-up of Joint Stock Companies of 1892 provided as follows:

“If an order for the winding-up of a company be obtained, the company shall be deemed to have been in a state of liquidation as and from the day on which the application was made.”

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<sup>37</sup> Act 8 of 1891.

<sup>38</sup> See s 4 of the *Wet op het Liquideeren van Maatschappijen*, Act 1 of 1894.

<sup>39</sup> Hereinafter referred to as the 1909 Companies Act.

<sup>40</sup> See ch 11 below.

The commencement of liquidation in the Orange Free State was thus the same as in most of the other provinces.

### 2.2.5 *Union legislation*

Section 115 of the Companies Act 46 of 1926<sup>41</sup> provided for the commencement of winding-up in the case of a company being wound up by the court:

“115. A winding-up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding-up.”

This position is the same as it was in the 1909 Transvaal Companies Act,<sup>42</sup> and was in all probability taken over from this statute. As regards the commencement of winding-up in the case of a voluntary liquidation, section 161 of the 1926 Companies Act provided that:

“161. A voluntary winding-up shall be deemed to commence at the time of the passing of the resolution authorizing the winding-up.”

This was the same as the provision contained in the Transvaal Companies Act of 1909.

To summarise, the date for the commencement for *winding-up by the court* was, in most cases, the date on which the application was lodged with, or presented to, the court. Once the possibility of *voluntary winding-up* had been included in South African company law, all the legislation made provision for the commencement of such winding-up to be the day on which the resolution to place the company in voluntary liquidation, had been passed.

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<sup>41</sup> Hereinafter referred to as the 1926 Companies Act.

<sup>42</sup> See par 2.2.3 above.

## 2 3 Commencement of liquidation or bankruptcy in other jurisdictions

### 2 3 1 *Commencement of bankruptcy in the United States of America*

As mentioned in the previous chapter,<sup>43</sup> section 301 of the United States Bankruptcy Code<sup>44</sup> provides for the voluntary commencement of a bankruptcy proceeding, while section 303 provides for the commencement of an involuntary bankruptcy proceeding. It is not entirely clear what the date of commencement of bankruptcy is in the United States as the word “commencement” used in sections 301 and 303 appears to refer to “commencement” as the manner in which bankruptcy proceedings can be instituted, and does not necessarily indicate the actual moment when the bankruptcy itself commences. The relevant sections read as follows:

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

§ 303. **Involuntary cases.**

(a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person ... that may be a debtor under the chapter under which such case is commenced.

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title- ...”

From the second part of section 301 it would appear that although a bankruptcy *proceeding* is commenced by the filing of a bankruptcy petition, the actual commencement of the bankruptcy itself takes place as soon as the court grants the bankruptcy order. However, in section 303 the date of commencement of the bankruptcy is not as clear. This section does not state that an order for relief brings about the commencement of the bankruptcy, although it would appear from a different sub-section that it would only commence once a court has granted an order for involuntary bankruptcy. The relevant sub-section is paragraph (f) of section 303, and reads as follows:

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<sup>43</sup> Ch 8.

<sup>44</sup> 11 USC.

“(f) Notwithstanding section 363 of this title, except to the extent that the court orders otherwise, *and until an order for relief in the case*, any business of the debtor may continue to operate, and the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced” (my emphasis).

From this sub-section it would appear that the commencement of an involuntary bankruptcy proceeding under United States bankruptcy law only commences once an order for relief has in fact been granted. In terms of the provisions of section 546, which deals with the limitation on avoiding powers where antecedent transactions are being attacked, an action for the setting aside of impeachable transactions cannot be commenced after “2 years after the entry of *the order for relief*” (my emphasis). However, when it comes to the proof of claims<sup>45</sup> or the application of the rules regarding impeachable transactions,<sup>46</sup> the determining date is the date on which *the petition was filed*.<sup>47</sup> Whatever the date of the commencement of bankruptcy in the United States may be, one thing at least is certain, and that is that the date is the same for all types of debtors.

### 2 3 2 Commencement of insolvency in the Federal Republic of Germany

In terms of section 27 of the German *Insolvenzordnung*<sup>48</sup> the time of the commencement of the insolvency proceeding must be indicated in the order commencing it. Section 27 reads as follows:

#### “§ 27 Order of Commencement

(1) If the insolvency proceeding is commenced, the court shall appoint an insolvency administrator. Sections 270 and 313(1) shall be unaffected.

(2) The order of commencement shall include:

1. Company name or family name and first name, business or occupation, commercial domicile or home address of the debtor;

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<sup>45</sup> See eg 11 USC s 502(b)(5).

<sup>46</sup> See eg 11 USC s 547(b).

<sup>47</sup> This situation would appear to be similar to the position regarding the winding-up of companies in South Africa. Under South African law the deeming provision contained in s 348, where it is provided that the liquidation commences on the date on which the application was lodged with the Registrar, can only apply once a winding-up order has in fact been granted. However, once the order has been granted, the date of the commencement of the winding-up is determined with reference to s 348 of the Companies Act.

<sup>48</sup> *Insolvenzordnung vom 5 Oktober 1994 (BGBl. I, S. 2866)* - hereinafter referred to as the *Insolvenzordnung*. This Code came into operation on 1 Jan 1999.

2. name and address of the insolvency administrator;
  3. the hour of commencement.
- (3) If the hour of commencement is not provided, the time of commencement shall be deemed to be noon on the day of the order.”

From this section it is clear that the commencement of insolvency is the time and day on which the court granted a bankruptcy order. If the court order omitted to state the time at which the order was granted, then the insolvency is deemed to have commenced at noon on the day of the order. Due to the fact that Germany has a unified insolvency statute, the commencement of insolvency is the same for both individual and corporate debtors.<sup>49</sup>

### 2 3 3 *Commencement of bankruptcy and winding-up in England*

In light of the fact that England does not have a truly unified system of insolvency law,<sup>50</sup> a distinction must be made between the commencement of bankruptcy in the case of individuals and the commencement of winding-up in the case of companies.

In the case of individuals, section 278(a) of the (English) Insolvency Act 1986 provides that the technical date of the commencement of bankruptcy is the date on which the court granted the bankruptcy order.<sup>51</sup> According to Fletcher<sup>52</sup> a bankruptcy order takes effect immediately on the day it is made, and “[b]eing a judicial act it is deemed to be operative from the earliest moment of that day”.

As far as the commencement of the winding-up of a company is concerned, a further distinction

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<sup>49</sup> See also s 35 (concept of insolvency assets), s 38 (concept of insolvency creditors) and ss 80-102 (all dealing with the effects of the commencement of an insolvency proceeding) where the date of commencement is stated as being the determining date. However, in the case of impeachable transactions, the determining date is clearly the date on which the petition was lodged - see eg s 130.

<sup>50</sup> See ch 4 above.

<sup>51</sup> See Fletcher *The Law of Insolvency* (1996) 145, 189 (hereinafter referred to as Fletcher).

<sup>52</sup> Fletcher 145.

has to be made between a voluntary winding-up and a winding-up by the court.<sup>53</sup> In the case of a voluntary winding up the date of commencement of the winding-up is deemed to be the day on which the resolution to wind up the company is passed.<sup>54</sup> In the case of a winding-up by the court, the winding-up is deemed to commence at the time of the presentation of the petition to court.<sup>55</sup> From all these provisions it is evident that the situation in England regarding commencement is the same as the position that currently finds application in South Africa.

#### 2 3 4 *Commencement of bankruptcy and winding-up in Australia*<sup>56</sup>

Under the Australian insolvency regime a distinction once again has to be made between individual bankruptcy and corporate liquidation. The rules regarding the commencement of bankruptcy and the commencement of liquidation differ under these provisions, which are also contained in separate Acts.<sup>57</sup>

The Australian Bankruptcy Act contains an interesting provision regarding the commencement of bankruptcy, which is not to be found in any of the jurisdictions looked at so far. In terms of section 115 of the Bankruptcy Act a distinction is made between the commencement of bankruptcy by a debtor's petition (voluntary surrender of a debtor's estate) and the

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<sup>53</sup> See also *Insolvency Law and Practice, Report of the Review Committee* (Cmnd 8558) 1982 (hereinafter referred to as the Cork Report) paras 666-673 where the commencement of winding-up was discussed in detail.

<sup>54</sup> S 86 of the Insolvency Act 1986; Fletcher 505. See also s 84 of the Insolvency Act 1986 and Fletcher 487.

<sup>55</sup> S 129(2) of the Insolvency Act 1986; Fletcher 554. There is, however, an exception to this rule - in the case where a company has passed a resolution to wind up voluntarily prior to a petition being lodged with the court, then s 129(1) of the Act provides that the date of commencement will be backdated to the day on which the resolution to place the company in voluntary winding-up, was passed (see also Fletcher 554).

<sup>56</sup> In regard to the commencement of insolvency (individuals) see generally Rose *Lewis' Australian Bankruptcy Law* 11th ed (1999) 138-141 (hereinafter referred to as Rose). In regard to the commencement of liquidation, see Keay *McPherson, The Law of Company Liquidation* 4th ed (1999) 216-221 (hereinafter referred to as McPherson).

<sup>57</sup> The provisions relating to individuals are contained in the Bankruptcy Act of 1966 (Cth) and the provisions relating to companies in the Corporations Act of 2001.



commencement of bankruptcy where a creditor has filed a petition (compulsory bankruptcy).<sup>58</sup>

In the case of a debtor's petition, the date of commencement of bankruptcy is either:

- (a) The date of the presentation of the petition to court;<sup>59</sup> or
- (b) At the time of the commission of the earliest act of bankruptcy committed within the six months immediately preceding the presentation of the debtor's petition to court.<sup>60</sup>

In the case of a creditor's petition for the bankruptcy of a debtor, the date of commencement of bankruptcy is the commission of the earliest act of bankruptcy within the six month period immediately preceding the presentation of the creditor's petition.<sup>61</sup> The reference in these provisions to a date prior to the date that the actual order is granted, is known as the "doctrine of relation back".<sup>62</sup> It is interesting to note that the Harmer Report, and the report that preceded it, actually recommended the abolition of this doctrine (along with the acts of bankruptcy), stating that it should be replaced by a simple provision that provides for bankruptcy to commence on the day that the order is actually granted.<sup>63</sup> That these proposals were not implemented is evident from the current provisions still contained in the Bankruptcy Act.

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<sup>58</sup> Keay *Insolvency, Personal and Corporate Law and Practice* 3rd ed (1998) 31-32, 68 (hereinafter referred to as Keay *Insolvency*); Rose 139-140. Regarding bankruptcy generally in Australia, see Tomasic and Whitford *Australian Insolvency and Bankruptcy Law* 2nd ed (1997) ch 14 (hereinafter referred to as Tomasic and Whitford).

<sup>59</sup> S 115 of the Bankruptcy Act; Keay *Insolvency* 31-32, 68.

<sup>60</sup> S 115 of the Bankruptcy Act; Keay *Insolvency* 31-32, 68.

<sup>61</sup> S 115 of the Bankruptcy Act; Keay *Insolvency* 31-32, 68; Rose 139-140.

<sup>62</sup> Australian Law Reform Commission Report No 45 *General Insolvency Inquiry* (hereinafter referred as the Harmer Report) Vol 1 par 398.

<sup>63</sup> Harmer Report par 398. In the context of this study it is important to point out that the Harmer Report was of the opinion that the abolition of the relation back provision would not be prejudicial to creditors, provided the provisions relating to antecedent transactions were strengthened. It is submitted that the same approach should be taken when drafting provisions under a unified Insolvency Act in South Africa. This aspect is dealt with in par 2.4 below.

In the case of the liquidation of companies under the Australian Corporations Act of 2001, a distinction has to be made, yet again, between a winding-up under the supervision of the court and the voluntary winding-up of a company.<sup>64</sup> In the case of a compulsory winding-up (by the court), the date of commencement of liquidation is determined by section 513A(e) of the Corporations Act as being the day on which the liquidation order is granted.<sup>65</sup> In the case of a voluntary winding-up, the date of commencement of the liquidation is the day on which the special resolution to wind up is passed.<sup>66</sup> The position regarding the commencement of liquidation of companies in Australia is therefore the same as England as far as voluntary liquidation is concerned, but different regarding compulsory liquidation. Australia do not regard the commencement of liquidation in the case of compulsory liquidation to be detrimental to the creditors of the company. All that they have done in order to protect the creditors in regard to any prejudice that may be suffered between the filing of the petition and the actual granting of the order, is to tighten up the provisions relating to antecedent transactions.<sup>67</sup>

## 2 4 Proposals for the commencement of liquidation under a unified Insolvency Act

### 2 4 1 *Uniform date of liquidation*

Contrary to the current Insolvency Act which does not clearly define what the date of sequestration is, the Draft Insolvency Bill<sup>68</sup> of the South African Law Commission has included in it a definition of the “date of liquidation”. This is extremely helpful in that for the first time, regarding the insolvency of individuals and partnerships, the Insolvency Act will clearly define when liquidation commences. Due to the fact that a unified Insolvency Act will include debtors

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<sup>64</sup> Keay *Insolvency* 432, 439; McPherson 216-218.

<sup>65</sup> Keay *Insolvency* 404; Tomasic and Whitford par [5.19]; McPherson 216-217.

<sup>66</sup> S 513B(e) of the Corporations Act; Keay *Insolvency* 439; McPherson 217.

<sup>67</sup> Keay *Insolvency* 432-433.

<sup>68</sup> Contained in Commission Paper 582 Vol 2.

such as companies and close corporations, it is therefore only necessary to redraft the definition to also include voluntary liquidations by resolution.<sup>69</sup>

While there is generally agreement as regards the date of liquidation in cases where a debtor is wound up by the court, there was some debate at the conference held on 6 October 1999 as to what the date of commencement of liquidation should be in the case of a voluntary liquidation by resolution. The initial draft of the relevant clauses of the unified Insolvency Act provided that the date of liquidation in the case of a voluntary liquidation by resolution, should be the date upon which the resolution to place the company or corporation into liquidation, is passed (and not the subsequent registration of the resolution by the Registrar of Companies and Close Corporations). This was done in the initial draft mainly for the purposes of determining an equitable date upon which impeachable transactions could be attacked.

Due to the possibility of the liquidation resolution not being registered by the Registrar of Companies and Close Corporations subsequent to it being passed,<sup>70</sup> this can create unnecessary problems and confusion as to the status of the company. In order to solve this potential problem, it is submitted that the resolution can be made to operate retrospectively once the resolution has in fact been registered. In other words, the date of liquidation will be the date on which the resolution is passed, but only once it has been duly registered.<sup>71</sup> However, in order to further protect creditors against unscrupulous directors of companies and members of close corporations

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<sup>69</sup> The definition as drafted by the Law Commission is sufficiently wide to include the liquidation of a company or close corporation by the court, and therefore no amendment is necessary in order to cater for companies or close corporations. This is also one of the advantages of having uniform application procedures for the liquidation of all types of entities. See ch 11 below for a discussion of voluntary liquidation by resolution.

<sup>70</sup> If the resolution is not registered within a specified period, it lapses and the company or close corporation retains its status as it was prior to the passing of the resolution - see the discussion of this aspect under par 2 above.

<sup>71</sup> It is worth mentioning that by determining the date of commencement of liquidation as the date upon which the resolution had been passed, as was suggested in the initial draft, this would have been in line with the situation as it was prior to 1909. This is also similar to the current provisions of s 348, which provides that a winding-up order is deemed to operate from the date on which it was filed with the Registrar of the High Court.

who may dissipate the estate assets prior to the registration of the resolution, clause 22 of the unified Insolvency Act<sup>72</sup> has been drafted in such a way as to make the definitive date for the setting aside of impeachable transactions, the date on which the notice was despatched to creditors informing them of the meeting at which a resolution to place the company into voluntary liquidation will be taken.

Prior to the amalgamation of the liquidation provisions as contained in the Unified Act, the South African Law Commission's Draft Insolvency Bill<sup>73</sup> included the following definition of "date of liquidation" under clause 1:

**"date of liquidation"** means the date of the first liquidation order;"

The date of the first liquidation order could of course be the date upon which the court grants a provisional *or* a final liquidation order, depending on the circumstances in each individual case. In order to include under this definition also voluntary liquidations by resolution, it will be necessary to amend the definition of "date of liquidation" to read as follows:

**"date of liquidation"** means-

- (a) in the case of a liquidation by the court, the date of the first liquidation order;  
or
- (b) in the case of a voluntary liquidation by resolution, the date on which a voluntary liquidation commences as provided for in subsection (9) of section 8;"<sup>74</sup>

It is to be noted that the definition does not state by whom the liquidation resolution has to be registered. This is because there are various possibilities as to who will register the resolution.<sup>75</sup> For example, in the case of a company or close corporation the resolution would be registered by

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<sup>72</sup> See ann E.

<sup>73</sup> Commission Paper 582 Vol 2.

<sup>74</sup> Cl 8(9) of the proposed unified Insolvency Act provides for the commencement of a voluntary liquidation by resolution - see ch 11 par 6.1 below.

<sup>75</sup> For a detailed discussion of this aspect, see ch 11 below.

the Registrar of Companies and Close Corporations. However, in the case of a trust the liquidation resolution would have to be lodged with, and registered by, the Master.<sup>76</sup>

#### *2 4 2 Effect of liquidation order*

As pointed out above, section 359 of the Companies Act, dealing with the effect of a winding-up order on legal proceedings and attachments, was designed to protect creditors and refers to the deeming provision relating to the commencement of liquidation contained in section 348 of the Companies Act. By merging the provisions of section 359 of the Companies Act with clause 11 of the Draft Insolvency Bill of the South African Law Commission, some difficulties may be experienced in aligning the dates of commencement of liquidation under a unified Insolvency Act. In the first place it was decided by the South African Law Commission, in their Draft Insolvency Bill, to retain the current vesting rules pertaining to individuals.<sup>77</sup> In the second place, clause 11 of the Draft Insolvency Bill also provides for a stay of execution proceedings similar to the provisions contained in section 359 of the Companies Act, but uses the date of the first liquidation order in order to do so. This is contrary to the position in section 359 of the Companies Act, where provision is made for the date of lodgment of the application for liquidation with the Registrar to be the deciding date.

In order to bring about uniform provisions relating to the commencement of liquidation, it is submitted that clause 11 of the Draft Insolvency Bill (clause 14 of the unified Insolvency Act) should also apply to juristic persons such as companies and close corporations that are liquidated in terms of a unified Insolvency Act. Although this will have as a result that the law relating to companies and close corporations as it currently stands and as discussed in paragraph 2 1 above, will change, it is submitted that creditors can be suitably protected with the use of provisions relating to impeachable transactions.<sup>78</sup> Clause 14 of the Unified Act (clause 11 of the Law

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<sup>76</sup> For a detailed discussion of this aspect, see ch 11 below.

<sup>77</sup> Commission Paper 582 Vol 1 55-56 cl 11.

<sup>78</sup> See the conclusion in par 2.5 below.

Commission's Draft Insolvency Bill<sup>79</sup>) which deals with the effect of liquidation on a debtor and his, her or its property, reads as follows (only the relevant portion dealing with execution judgments has been included here):

**“14. Effect of liquidation on debtor and his or her property.** - (1) The issuing of a first liquidation order, or the registration of a liquidation resolution in terms of section 8, in respect of a debtor shall have the effect that all the property of the debtor concerned shall be deemed to be in the custody and under the control of the Master until a liquidator has been appointed, whereupon the insolvent estate shall be deemed to be in the custody and control of the liquidator ...

- (6) (a) The execution of a judgment in respect of property of the debtor shall be stayed as soon as the sheriff becomes aware of the issuing of a first liquidation order against the debtor, unless the court orders otherwise.
- (b) The execution of a judgment in respect of property of the debtor shall be stayed as soon as the sheriff becomes aware of the adoption of a liquidation resolution by the debtor in terms of section 8; Provided that the sheriff shall hold over such execution of a judgment until such time as he is satisfied that the resolution in question has been registered with the necessary authority in terms of section 8(2)(a), failing which he shall continue with the execution of the judgment as if the liquidation resolution in question had not been adopted.
- (c) If costs in connection with the sale in execution of assets of the debtor have already been incurred when the execution of a judgment is stayed as contemplated in paragraph (a), the Master may on the application of the liquidator, on the conditions he or she finds just and subject to confirmation of the sale price by the Master or by resolution of a meeting of creditors of the estate, approve the continuation of the sale for the benefit of the insolvent estate, in which case the costs of the sale before or after liquidation shall be deducted from the proceeds.
- (d) The liquidator of an insolvent estate is entitled to recover from a creditor of the debtor the net amount of any payment in pursuance of the execution of any judgement made to such creditor after the granting of the first liquidation order or after the adoption of a liquidation resolution in pursuance of section 8”.

From the contents of this clause, it is evident that execution judgments will only be stayed once a first liquidation order is granted, and not at the time the application for liquidation is lodged with the Registrar as is currently the case under section 359(1)(b) of the Companies Act. It is also evident that a provision of this nature will not provide the maximum protection for creditors in the period between the lodging of the application for liquidation and the actual granting of the

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<sup>79</sup> For a discussion of the amendments to cl 11, currently s 20 of the Insolvency Act, by the SA Law Commission, see Commission Paper 582 Vol 1 55-58 paras 11.1-11.7.

order, but it must be pointed out that the current provisions do not provide adequate protection either, despite the clear wording of section 359(1). An example of a case where the provisions of section 359 did not provide the creditors with any protection, can be found in *Shurrie v Sheriff for the Supreme Court, Wynberg*.<sup>80</sup>

## 2 5 Conclusion regarding the commencement of liquidation

### 2 5 1 Uniform date of liquidation

From what has been stated above, the following problems exist regarding the varying dates of sequestration and winding-up:

- (a) The date of sequestration has up to now differed from the date of winding up of a company by the court, the former being the date of the granting of the order to sequester, the latter being the date upon which the application to wind up the company is lodged with the Registrar of the High Court.
- (b) The commencement of liquidation in the case of a voluntary winding-up differs from the commencement of liquidation in the case of a winding-up by the court, the former being the date upon which the resolution is passed, and subject to it being duly registered by the Registrar of Companies or other relevant authority.

It is submitted that the uniform provision for the commencement of liquidation as contained in a unified Insolvency Act will remove the uncertainty that has been created in the past by the differing provisions currently found in the Insolvency Act and the Companies Act. Uniformity promotes certainty, and for this reason alone the new clause will bring about a welcome change

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<sup>80</sup> 1995 4 SA 709 (C). In this case the hammer fell at an auction after the application to wind up the company had been lodged with the Registrar, but before the court had granted the winding-up order. The court found that there was no winding-up until the court had in fact granted an order, and directed that the property was to be transferred to the purchaser. This was the finding of the court despite the deeming provision regarding the commencement of liquidation in s 348 of the Companies Act. See the earlier discussion of this case under par 2.1.1 above.

in regard to liquidation orders granted by the court. However, due to the unique nature of the voluntary liquidation of corporate entities by means of a resolution, the date of liquidation in such cases must necessarily differ from the date of liquidation in the case of a liquidation order granted by the court. This difference is brought about by procedural necessities, but the effects thereof can easily be provided for in the legislative provisions of a unified Insolvency Act.

#### *2.5.2 Effect of liquidation order*

The differing dates of the commencement of sequestration and the commencement of winding-up have as a result that the effect of a sequestration order differs from the effect of a winding-up order. In addition, the fact that the date of commencement of a winding-up by the court and a voluntary winding-up by resolution are not the same, also has an effect on the consequences of a winding-up order. In the main, the problems are as follows:

- (a) Execution judgments in the case of compulsory sequestration are only void if the disposition took place after the granting of a sequestration order, and not after the date when the application was lodged.
- (b) Execution judgments in the case of the voluntary surrender of a debtor's estate are only void if the disposition took place after the publication of a notice of surrender in terms of section 5(1) of the Insolvency Act.
- (c) In the case of the winding-up of a company or close corporation being wound up by the court, execution judgments are void if proceeded with after the commencement of liquidation, being the date upon which the application was lodged with the Registrar of the High Court.
- (d) In the case of the voluntary winding-up of a company or close corporation by resolution, execution judgments are void if proceeded with after the commencement of liquidation, being the date upon which the resolution is passed and has subsequently been duly registered by the Registrar of Companies or other relevant authority.



While creditors' interests are protected in the case of paragraphs (b) and (c) above, the creditors in cases set out in paragraphs (a) and (d) clearly are not. These types of inconsistencies should have no place in modern insolvency legislation, and it is submitted that the effect of liquidation should be the same for all types of debtors. It is further submitted that, in determining a date for the protection of the creditors' interests, this should not necessarily be done with reference to the date upon which the liquidation commenced.

Where there is a need to use a date that differs from the (uniform) date of liquidation proposed in a unified insolvency statute, for example in determining the date for the setting aside of impeachable transactions, or when determining the personal liability of the directors of the company for insolvent trading, those particular provisions should include the determination of a date which differs from the date of liquidation. That this can in fact be achieved is evident from clause 19 of the unified Insolvency Act<sup>81</sup> contained in Annexure E to this thesis, which reads as follows (the clause deals with dispositions without value, but only sub-clause (1) is included here):

**“19. Disposition without value.-** (1) Every disposition of property not made for value may be set aside by the court if such disposition was made by the debtor *within two years before the presentation of the application for liquidation of his or her estate to the Registrar* or within three years before the presentation of the application for liquidation to the Registrar if the disposition was made in favour of an associate: Provided that if it is proved by someone opposing the setting aside of the disposition that the liabilities of the debtor at any time after the making of the disposition exceeded his or her assets by less than the value of the property disposed of, the disposition may be set aside only to the extent of such excess” (my emphasis).

As can be seen from the italicised portion of the clause, the date of the presentation of the application is the determining date, and not the date of the commencement of liquidation. When the provisions relating to impeachable transactions (clauses 19, 21 and 22) are applied to companies and close corporations being wound up by resolution, clause 23 finds application. Clause 23 has as its purpose to align the dates and events relating to voluntary liquidations by

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<sup>81</sup> Cl 18 of the SA Law Commission's Draft Insolvency Bill - see Commission Paper 582 Vol 2.

resolution, with the dates and events provided for in clauses 19, 21 and 22. Clause 23 reads as follows:

- “23. Application of sections 19, 21 and 22 to certain debtors.** (1) The provisions of section 19, 21 and 22 shall apply to a trust debtor, company debtor, close corporation debtor and association debtor if such debtor has been liquidated in terms of the provisions of this Act.
- (2) For the purposes of applying sections 19, 21 and 22 to a trust debtor, company debtor, close corporation debtor or association debtor, the event which shall be deemed to correspond with the presentation of the application for liquidation of a debtor shall be-
- (a) where the liquidation order has superseded a voluntary liquidation by members, the date of registration of the special resolution or resolution, as the case may be, to liquidate the debtor; and
  - (b) where the liquidation order has superseded a voluntary liquidation by creditors in terms of section 8, the date on which notice was given to creditors of the liquidation resolution to liquidate the debtor; and
  - (c) in the case of a voluntary liquidation by resolution in terms of section 8, the date upon which notice was given to creditors to liquidate the debtor by resolution.
- (3) Any cession or assignment by a trust debtor, company debtor, close corporation debtor or association debtor of all of its property to trustees for the benefit of all its creditors shall be void.”

From clause 23 it is evident that the date upon which the Registrar of Companies and Close Corporations registers the resolution for the voluntary liquidation does not play a role, as it is the date upon which notice of the meeting to pass such a resolution was given that will find application. This is merely one example of how the interests of creditors can be protected within the relevant clauses, and without a general reference to the date of the commencement of liquidation.<sup>82</sup>

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<sup>82</sup> Another example can be found in cl 172(2) of the unified Insolvency Act in ann E to this thesis. In par 2.1.1 above it was pointed out that the current s 341(2), dealing with a disposition by a company of its property after the commencement of sequestration, was designed to protect the interests of creditors. Having proposed that a uniform date of liquidation should apply to all debtors under a unified Insolvency Act, creditors will still need to be protected against the possible prejudice that could take place if a company was to dispose of its assets after the commencement of proceedings for liquidation, but before the actual order for liquidation is granted. For this reason cl 172(2) has been drafted to make the applicable date after which a company may no longer dispose of its assets, the date upon which an application to liquidate is lodged with the Registrar (in the case of a voluntary liquidation by resolution, the date is the day on which notice was given to creditors that the company is intent on passing a resolution to place the company in liquidation).

It is submitted that the potential prejudice that can be experienced by creditors, as pointed out by the court in *Lief v Western Credit (Africa) (Pty) Ltd*,<sup>83</sup> will be countered by provisions such as those relating to the setting aside of dispositions that have been discussed above, and that these potential problems should not prevent uniform provisions for the commencement of liquidation from being introduced. This is currently the situation regarding winding-up in Australia,<sup>84</sup> and it does not seem to lead to unfair results *vis-à-vis* the creditors.

### 3 VESTING OF THE INSOLVENT ESTATE<sup>85</sup>

#### 3 1 Introduction

One of the interesting aspects of having dual insolvency legislation in South Africa is the fact that the various provisions in the Insolvency Act and other legislation, such as the Companies Act, contain differing provisions for what should essentially be the same thing. One of these aspects, namely the commencement of liquidation, has already been discussed in paragraph 2 above. Another of these aspects is the vesting of the debtor's assets once the estate has entered insolvency (or winding-up) proceedings. In the case of a debtor who is a natural person, the debtor is divested of his or her estate and the assets *vest* in the Master and then in the trustee once appointed.<sup>86</sup> However, in the case of a company being wound up by the court,<sup>87</sup> the assets fall under the *custody and control* of the Master and then the liquidator, once appointed.<sup>88</sup>

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<sup>83</sup> 1966 3 SA 344 (W). See the earlier discussion of this case under par 2.1.1 above.

<sup>84</sup> See par 2.3.4 above.

<sup>85</sup> See generally Meskin par 5.2; Mars 174-175 for the position regarding sequestration and Henochsberg Vol 1 764-765; Cilliers *ea Corporate Law* par 27.62 513; and Meskin par 5.9.6 in regard to winding-up.

<sup>86</sup> See s 20(1)(a) of the Insolvency Act.

<sup>87</sup> It is not clear what transpires should the company be wound up in a different manner, eg as a voluntary winding-up by creditors.

<sup>88</sup> See s 361(1) of the Companies Act.

According to our case law,<sup>89</sup> the assets of a company never vest in the liquidator, subject of course to cases where the court has made an order in terms of section 361(3).<sup>90</sup> This chapter seeks to determine why this difference exists, where it originated, whether such a difference is justified and whether or not the vesting rule can be uniform in regard to all types of debtors.

### 3 2 Historical development regarding vesting<sup>91</sup>

#### 3 2 1 Cape Colony

Section XI of the Cape Colony's Winding-up Act 12 of 1868 stated the following in regard to the custody of the company's assets:

“XI. If no official liquidator is appointed, or during any vacancy in such appointment, all the property of the company shall be deemed in the custody of the court; and in any indictment for theft thereof, or any part thereof, under such circumstances, or for any similar purpose, the property may be laid in the Master of the Supreme Court.”

Although it was not specifically stated by the Act, from this excerpt it must be assumed that where a liquidator had been appointed, the assets were in the custody of such a liquidator. Nothing further is stated in this Act in respect of the vesting of the assets. Section 146 of the Cape Colony's Companies Act 25 of 1892 contained exactly the same provision as the Winding-up Act of 1868 (reproduced above) and consequently the same assumption regarding the custody of the assets by the liquidator must be made.

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<sup>89</sup> See *Secretary for Customs and Excise v Millman* 1975 3 SA 544 (A) at 552; *Soane v Lyle* 1980 3 SA 183 (D) at 186; *Letsitele Stores (Pty) Ltd v Roets* 1958 2 SA 224 (T) at 226-227.

<sup>90</sup> S 361(3) provides that the court may grant an order vesting part or all of the property of a company in the liquidator, albeit in his official capacity. See Henochsberg 764-765 and *Milman and Steub v Koetter* 1993 2 SA 749 (C) as to reasons why this may be necessary.

<sup>91</sup> As regards the common law roots of the vesting rule in the case of sequestration, see Stander “Die Eienaar van die Bates van die Insolvente Boedel” 1996 *THRHR* 388 (hereinafter referred to as Stander).

### 3 2 2 *Natal*

Early legislation in Natal was a lot different in many respects to the legislation that applied at the Cape. This is again evident in section 19 of the Natal Winding-up Law 19 of 1866, which provided that the assets of the company vested in the official manager responsible for the winding-up of the company. Section 19 provided as follows:

“19. On every such appointment of official manager, all the estate, effects, and credits, and rights of action of the Company, shall, except in so far as the Court shall direct to the contrary, become absolutely vested in the official manager so appointed; and such official manager shall be deemed as entitled to possess and possessing the like powers in all respects in regard to the winding-up of any Company’s estate, as any trustee of an insolvent estate possesses under the provisions of the aforesaid Insolvent Ordinance.”

Clearly the legislature wanted to place the liquidator (official manager) in the same position as a trustee administering an insolvent estate, hence the reference to the “Insolvent Ordinance”.

### 3 2 3 *Transvaal*

In the Transvaal the *Wet op het Liquideeren van Maatschappijen*, Act 8 of 1891, did not make any provision for the custody and control or the vesting of the assets in the liquidator. From this one has to assume that the company’s assets remained vested in the company, and that the liquidator merely dealt with the assets with the court’s permission as provided for in section 5(a) to (h).<sup>92</sup> The *Wet op het Liquideeren van Maatschappijen*, Act 1 of 1894, which replaced the 1891 Act, did not make provision for the vesting or otherwise of the company’s assets either.

The first reference to the custody and control of a company’s assets in liquidation in the Transvaal, can be found in the Companies Act 31 of 1909. Section 126 of this Act provided as follows:

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<sup>92</sup> Eg, s 5(d) provided that the liquidator could sell the property belonging to the company (with the court’s permission) and pass transfer thereof where necessary.

“126. In a winding-up by the Court the liquidator shall take into his custody, or under his control, all the property, movable and immovable, to which the company is or appears to be entitled.”

This provision is very similar to section 361(1) of the current Companies Act of 1973, and was probably the origin of the current provision, considering that the 1909 Companies Act formed the basis of the 1926 Companies Act.

#### 3 2 4 *Orange Free State*

Section 11 of Law No 2 of 1892, To Provide for the Winding Up of Joint Stock Companies, provided that the assets of a company under liquidation fell under the custody of the court, or the Master, where no liquidator had been appointed or where the position became vacant. These provisions are identical to the provisions contained in early Cape Colony legislation which have already been referred to above.<sup>93</sup>

#### 3 2 5 *Union legislation*

Section 124(3)(b) of the 1926 Companies Act provided for the custody and control of the company's assets upon liquidation, and read as follows:

“(b) On a winding-up order being made all the property of the company shall be deemed to be in the custody or control of the Master until a liquidator or provisional liquidator is appointed and is capable of acting as such.”

Section 124(5) of the 1926 Companies Act also provided that in the event of no liquidator having been appointed, or in cases where there was a vacancy, the assets fell under the custody and control of the Master.

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<sup>93</sup> See par 3.2.1 above.

### 3 2 6 Post-Union legislation (current position)

Under current company legislation dealing with the winding-up of companies, section 361(1) of the Companies Act provides that, in the case of a company being wound up by the court,<sup>94</sup> the assets fall under the custody and control of the Master and then the liquidator, once appointed. According to case law,<sup>95</sup> the assets of a company never vest in the liquidator, subject of course to cases where the court has made an order in terms of section 361(3).<sup>96</sup>

## 3 3 Vesting of the estate in other jurisdictions

### 3 3 1 Vesting of the estate in the United States of America

The United States Bankruptcy Code does not appear to make specific provision for the vesting of estate assets in a trustee where a debtor has been declared bankrupt. Sulmeyer *et al*<sup>97</sup> state the following as regards the possession that is exercised by the trustee:

“The possession of the property by the trustee must be an exclusive possession since the trustee alone is accountable for property taken into possession. Therefore, the trustee must exclude all others, except agents and employees of the trustee, from such possession.”<sup>98</sup>

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<sup>94</sup> It is not clear what transpires should the company be wound up in a different manner, eg as a voluntary winding-up by creditors. However, it is submitted that the assets also in these cases remain vested in the company itself until such time as the company has been divested of its assets prior to its dissolution.

<sup>95</sup> See *Secretary for Customs and Excise v Millman* 1975 3 SA 544 (A) at 552; *Soane v Lyle* 1980 3 SA 183 (D) at 186; *Letsitele Stores (Pty) Ltd v Roets* 1958 2 SA 224 (T) at 226-227. See also *Syffrets Bank Ltd v Sheriff of the Supreme Court, Durban Central*; *Schoerie v Syffrets Bank Ltd* 1997 1 SA 764 (D) where the court discussed the difference between s 20 of the Insolvency Act and s 361 of the Companies Act. In this case it was also held that s 20 of the Insolvency Act does not find application to companies or close corporations by virtue of the provisions of s 66 of the Close Corporations Act read with s 339 of the Companies Act.

<sup>96</sup> S 361(3) provides that the court may grant an order vesting part or all of the property of a company in the liquidator, albeit in his official capacity. See also *Henochsberg* 764-765; *Milman and Steub v Koetter* 1993 2 SA 749 (C).

<sup>97</sup> *1998 Collier Handbook for Trustees and Debtors in Possession* (1998) 10-7 (hereinafter referred to as *Sulmeyer ea*).

<sup>98</sup> *Sulmeyer ea* 10-7.

Even though the possession that is exercised by the trustee is to the exclusion of all others, it cannot be said that the property of the insolvent actually vests in the trustee, as the term “vest” is not used expressly in the Bankruptcy Code itself. It is submitted that “possession” itself is not sufficient to include actual ownership of the estate assets, and the conclusion that must necessarily be drawn is that ownership of the estate assets does not vest in the trustee under United States bankruptcy law. The reason why actual vesting of the property in the trustee does not take place in the United States may be attributed to the fact that, upon filing a petition for relief under the Bankruptcy Code, a separate “estate” is created. Section 541 of the Bankruptcy Code then specifies what becomes property of the debtor’s “estate”.<sup>99</sup>

### 3 3 2 *Vesting of the estate in England*

The position in England is regulated by the Insolvency Act 1986. As is the current position in South Africa, a distinction is made between individual and corporate insolvency. In the case of personal (or individual) insolvency, section 306 of the (English) Insolvency Act provides that the property of the insolvent estate vests in the trustee. Section 306 reads as follows:

**“306. Vesting of bankrupt's estate in trustee**

(1) The bankrupt's estate shall vest in the trustee immediately on his appointment taking effect or, in the case of the official receiver, on his becoming trustee.

(2) Where any property which is, or is to be, comprised in the bankrupt's estate vests in the trustee (whether under this section or under any other provision of this Part), it shall so vest without any conveyance, assignment or transfer.”

In the case of corporate liquidations a further distinction is made between voluntary and compulsory winding-up. In the case of *voluntary winding-up* it would appear that the assets remain vested in the company,<sup>100</sup> as no reference is made to vesting or custody and control of the company’s assets in such a case. It would, however, appear that the court may grant an order

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<sup>99</sup> For a discussion of this concept, see Albergotti *Understanding Bankruptcy in the US: A Handbook of Law and Practice* (1992) 45-50. Herbert *Understanding Bankruptcy* (1995) 95 goes further by stating that “A bankruptcy petition creates an ‘estate’; that is, a new legal entity separate and apart from the debtor who filed the petition ...”

<sup>100</sup> See Fletcher 506 where he states: “Property in the company’s assets remains with the company unless a vesting order is made under section 112.”



vesting the assets in the liquidator if the need should arise.<sup>101</sup> Section 112 of the Insolvency Act deals with the court's powers to make orders in the case of a voluntary winding-up, so it is conceivable that the court may confer powers on a liquidator that are the same as those conferred on a liquidator in a winding-up by the court.

In the case of a *company being wound up by an order of court*, it is evident from section 144 of the Insolvency Act that the custody or control of the assets pass to the provisional or final liquidator. In cases where it is necessary, the court may order (in terms of section 145) that all or some of the assets actually vest in the liquidator. From the wording of the section South Africa apparently adopted England's approach to the custody and control of estate assets upon insolvency. For the sake of completeness, the relevant sections of the (English) Insolvency Act read as follows:

**“144. Custody of company's property**

- (1) When a winding-up order has been made, or where a provisional liquidator has been appointed, the liquidator or the provisional liquidator (as the case may be) shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled.
- (2) In a winding up by the court in Scotland, if and so long as there is no liquidator, all the property of the company is deemed to be in the custody of the court.

**145. Vesting of company property in liquidator**

- (1) When a company is being wound up by the court, the court may on the application of the liquidator by order direct that all or any property of whatsoever description belonging to the company or held by trustees on its behalf shall vest in the liquidator by his official name; and thereupon the property to which the order relates vests accordingly.
- (2) The liquidator may, after giving such indemnity (if any) as the court may direct, bring or defend in his official name any action or other legal proceedings which relates to that property or which it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property.”

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<sup>101</sup> Fletcher 506.

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### 3.3.3 *Vesting of the estate in Australia*<sup>102</sup>

The position in Australia is similar, if not identical, to the situation in England. In terms of section 58 of the Bankruptcy Act of 1966 (Cth), the property of the insolvent estate, in the case of individual insolvency, vests in the trustee. Section 58 reads as follows:

**“58 Vesting of property upon bankruptcy**

- (1) Subject to this Act, where a debtor becomes a bankrupt:
- (a) the property of the bankrupt, not being after-acquired property, vests forthwith in the Official Trustee or, if, at the time when the debtor becomes a bankrupt, a registered trustee becomes the trustee of the estate of the bankrupt by virtue of section 156A, in that registered trustee; and
  - (b) after-acquired property of the bankrupt vests, as soon as it is acquired by, or devolves on, the bankrupt, in the Official Trustee or, if a registered trustee is the trustee of the estate of the bankrupt, in that registered trustee.
- (2) Where a law of the Commonwealth or of a State or Territory of the Commonwealth requires the transmission of property to be registered and enables the trustee of the estate of a bankrupt to be registered as the owner of any such property that is part of the property of the bankrupt, that property, notwithstanding that it vests in equity in the trustee by virtue of this section, does not so vest at law until the requirements of that law have been complied with.
- (3) Except as provided by this Act, after a debtor has become a bankrupt, it is not competent for a creditor:
- (a) to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt; or
  - (b) except with the leave of the Court and on such terms as the Court thinks fit, to commence any legal proceeding in respect of a provable debt or take any fresh step in such a proceeding.
- (4) After a debtor has become a bankrupt, distress for rent shall not be levied or proceeded with against the property of the bankrupt, whether or not the bankrupt is a tenant of the landlord by whom the distress is sought to be levied.
- (5) Nothing in this section affects the right of a secured creditor to realize or otherwise deal with his or her security.
- (5A) Nothing in this section shall be taken to prevent a creditor from enforcing any remedy against a bankrupt, or against any property of a bankrupt that is not vested in the trustee of the bankrupt, in respect of any liability of the bankrupt under:
- (a) a maintenance agreement or maintenance order (whether entered into or made, as the case may be, before or after the commencement of this subsection); or
  - (b) a pecuniary penalty order or interstate pecuniary penalty order.

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<sup>102</sup> As regards the vesting of the estate in the case of individual insolvency, see generally Rose 138-139. As regards the position regarding corporate insolvency, see McPherson 219-221.

(6) In this section, *after-acquired property*, in relation to a bankrupt, means property that is acquired by, or devolves on, the bankrupt on or after the date of the bankruptcy, being property that is divisible amongst the creditors of the bankrupt.”

In terms of section 474 of the Corporations Act, the assets of a company in liquidation fall under the custody or control of the provisional or final liquidator.<sup>103</sup> Section 474 reads as follows:

**“474. Custody and vesting of company's property**

(1) If a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company has been appointed, the liquidator or provisional liquidator shall take into his or her custody or under his or her control all the property to which the company is or appears to be entitled, and, if there is no liquidator, all the property of the company shall be in the custody of the Court.

(2) The Court may, on the application of the liquidator, by order direct that all or any part of the property of the company shall vest in the liquidator and thereupon the property to which the order relates shall vest accordingly and the liquidator may, after giving such indemnity (if any) as the Court directs, bring, or may defend, any action or other legal proceeding that relates to that property or that it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property.

(3) Where an order is made under this section, the liquidator of the company to which the order relates shall, within 14 days after the making of the order, lodge with the Commission an office copy of the order.”

### 3 3 4 *Vesting of the estate in Germany*

The German *Insolvenzordnung* does not refer to vesting or custody and control, but uses the terms “manage and transfer”. There are basically only two sections where reference is made to the control of the assets upon insolvency, namely sections 22 and 80. These sections read as follows:<sup>104</sup>

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<sup>103</sup> See also McPherson 219.

<sup>104</sup> See the translation of the *Insolvenzordnung* by Stewart *Insolvency Code; Act Introducing the Insolvency Code* (1997) 59 and 93.

**“§ 22 Legal Position of the Interim Insolvency Administrator**

(1) If a interim insolvency administrator is appointed and the debtor generally enjoined from transferring assets, the debtor’s right to manage and transfer its assets shall be transferred to the interim insolvency administrator. In such event, the interim insolvency administrator shall: ...”

**§ 80 Transfer of the Rights of Management and Disposition**

(1) As a result of the commencement of the insolvency proceeding, the right of the debtor to manage and transfer assets that constitute part of the insolvency estate shall pass to the insolvency administrator.”

From these provisions it would appear that the “insolvency administrator” does not become owner of the property, but merely obtains the right to “manage and transfer” assets that form part of the estate. It is submitted that this does not amount to ownership of the estate assets that is brought about by vesting, but amounts to custody and control of the estate assets for the purposes of administering the estate in question.

*3 3 5 Conclusion regarding vesting in other jurisdictions*

To summarise, countries that have a unified system of insolvency legislation (the United States and Germany) do not find it necessary to make provision for the vesting of the estate assets in the trustee of the insolvent estate. On the other hand, countries that do not have a (totally) unified system of insolvency law (England, Australia and South Africa) make a distinction between individual and corporate insolvency. In the case of individual insolvency the assets vest in the trustee in ownership, while in the case of corporate insolvency the assets merely fall under the custody and control of the liquidator.

The underlying reason. it is submitted, appears to be that in England, Australia and South Africa the liquidation of a company is a step that necessarily needs to be taken before a company can be dissolved. Because the company has not yet been dissolved during the period of administration, the company retains its juristic personality and therefore also ownership of its assets.<sup>105</sup> For this

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<sup>105</sup> See also Commission Paper 582 Vol 1 55 par 11.1.

reason the estate assets merely fall under the custody and control of the liquidator, with a specific provision allowing the court to order that ownership does indeed vest in the liquidator should the circumstances require this.

Because the American and German insolvency systems do not distinguish between corporate and individual insolvency, their legislation has found it unnecessary to make a distinction. What is interesting, however, is that both these unified systems of insolvency have found it unnecessary to have the estate assets vest in the person administering the insolvent estate.

### 3 4 Proposals for the vesting of the insolvent estate under a unified Insolvency Act

Clause 14(1) of the unified Insolvency Act<sup>106</sup> deals, *inter alia*, with the vesting of the insolvent estate. The Law Commission, in its draft Insolvency Bill,<sup>107</sup> has elected to retain the current rule for individuals, which is that the estate vests first in the Master and then in the trustee (liquidator under the Law Commission's proposals) upon appointment.<sup>108</sup> The Law Commission's final recommendation<sup>109</sup> in this regard is in contrast to its earlier viewpoint<sup>110</sup> that the rule regarding vesting in the case of individuals should be the same as it is in the case of companies, namely that the assets should merely be under the custody and control of the liquidator. In paragraph 11.1 of the Law Commission's final recommendations,<sup>111</sup> the following statement is made:

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<sup>106</sup> See ann E to this thesis.

<sup>107</sup> See Commission Paper 582 Vol 2 cl 11(1).

<sup>108</sup> See Commission Paper 582 Vol 1 55 par 11.1.

<sup>109</sup> Commission Paper 582 Vol 1 55 par 11.1.

<sup>110</sup> Recommendation 3 in Working Paper 33 Project 63.

<sup>111</sup> Commission Paper 582 Vol 1 55.

“11.1 On the assumption that uniform provisions should apply to companies and persons, consideration was given to the rule at present applicable to companies or a similar rule - only the custody and control of assets pass and as a rule the assets vest in the company. The difference in the rule in respect of companies and persons is, however, based on the substantial difference between companies and individuals. After liquidation the company continues to exist and the liquidator merely acts on behalf of the company. An individual can accumulate assets that do not form part of his insolvent estate. Notwithstanding views to the contrary ... the existing rule does not give rise to any problems, except perhaps problems related to section 21. *Clause 11(1) has retained the present position that assets vest in the liquidator.*”

As pointed out above, the position relating to juristic persons under the Companies Act differs from individual insolvency. Section 361(1) of the Companies Act provides that the assets of a company that is being wound up by the court remain vested in the company after liquidation.<sup>112</sup> The liquidator only obtains control over such assets, and not ownership.<sup>113</sup>

The fundamental difference between the vesting rule for individuals and corporations is not easy to explain, although the Law Commission has pointed out that this rule exists due to the fundamental difference between a corporation and an individual.<sup>114</sup> So the argument seems to be that in the case of the sequestration of an individual’s estate, the person undergoes a change of status and he or she no longer has the right to participate freely in commercial intercourse. Liquidation, on the other hand, is a process which precedes the dissolution of a company or close corporation, and the company or corporation does not lose its juristic personality as a result of the liquidation. Consequently, in the latter instance the company remains vested with its assets.<sup>115</sup>

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<sup>112</sup> This is also the position in the case of close corporations.

<sup>113</sup> However, see s 361 (3) of the Companies Act, which provides that the court may order that such property vests in the liquidator in his official capacity.

<sup>114</sup> But that does not explain why the rules regarding custody and control only apply to companies and corporations being wound up by the court, and not to companies that are being wound up voluntarily.

<sup>115</sup> It is interesting to note that s 361(1) only applies to companies that are liquidated by the court. It is not clear what transpires in cases where a company is wound up in some other manner, eg as a voluntary winding-up by creditors, in which case the company is also insolvent. This is also the situation in England - see par 3.3.2 above.

In *Letsitele Stores (Pty) Ltd v Roets*<sup>116</sup> the court held that the assets fall under the liquidator's control for a specific purpose, namely in order to wind up its affairs, for the distribution of its assets in satisfaction of claims proved against it, and the division of the surplus amongst its members.<sup>117</sup>

Since the decision in *De Villiers v Delta Cables*,<sup>118</sup> it has been largely accepted that ownership of the assets in the insolvent estate of an individual vest in the trustee. There is, however, a body of opinion which believe that such vesting is unnecessary, and that criticise the *Delta Cables* decision.<sup>119</sup> According to Stander,<sup>120</sup> the vesting rule in the case of individuals cannot be supported by Roman or Roman-Dutch law, and she states that the transfer of ownership to the trustee is superfluous and can remain vested in the debtor.

After having analysed the various viewpoints and possible effects of changing the current rule regarding sequestration, it is submitted that the current rule that the assets vest in the trustee is an unnecessary one. It is not necessary for the trustee to have actual ownership of the assets in order to effectively sell or alienate them in practice, although a change in the rule may necessitate

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<sup>116</sup> 1958 2 SA 224 (T) at 227. This case was followed with approval in *Sarwill Agencies (Pty) Ltd v Jordaan* 1975 1 SA 938 (T) at 942 and *De Villiers v Electronic Media Network (Pty) Ltd* 1991 2 SA 180 (W) at 184C.

<sup>117</sup> While delegates at the workshops held at the University of Pretoria in December 1998 indicated no real preference in respect of whether ownership or control and custody should pass to the Master and then the liquidator under a unified Insolvency Act, all delegates were unanimous in stating that the provisions, whatever they may be, should be the same in respect of individuals and juristic persons alike. This view is shared by Boraine and Van der Linde (Part 1) 621 fn 104.

<sup>118</sup> 1992 1 SA 9 (A).

<sup>119</sup> See eg Joubert "Artikel 21 van die Insolvensiewet: Tyd Vir 'n Nuwe Benadering" 1992 *TSAR* 699; Evans "Who Owns the Insolvent Estate?" 1996 *TSAR* 719 and Stander 388. See also recommendation 3 in Working Paper 33 of the South African Law Commission, Project 63, which proposed that the property should only be under the control and custody of the trustee also in the case of individuals.

<sup>120</sup> Stander 388.

minor changes to other legislation, for example to the Deeds Registries Act.<sup>121</sup> Since the vesting rule in regard to individuals cannot be justified on common law grounds, and in the quest for uniform provisions to apply to both individual and corporate debtors, it is proposed that a unified Insolvency Act should contain a provision allowing for the estate assets of all debtors to merely fall under the custody and control of the liquidator.

Consequently clause 14 of the unified Insolvency Act<sup>122</sup> has been drafted to read as follows (only sub-clauses (1) and (2) have been reproduced here):

**“14. Effect of liquidation on debtor and his or her property.** - (1) The issuing of a first liquidation order, or the registration of a liquidation resolution in terms of section 8,<sup>123</sup> in respect of a debtor shall have the effect that all the property of the debtor concerned shall be deemed to be in the custody and under the control of the Master until a liquidator has been appointed, whereupon the insolvent estate shall be deemed to be in the custody and control of the liquidator: Provided that, if for any reason it appears expedient, the court may direct that all or part of any property belonging to the debtor, or to anyone on the debtor’s behalf, shall vest in the liquidator in his official capacity, and thereupon the property or the part thereof specified in the order shall vest accordingly, and the liquidator may, after giving such indemnity, if any, as the court may direct, bring or defend in his official capacity any action or other legal proceeding relating to that property, or necessary to be brought or defended for the purpose of effectually administering the estate of the debtor and recovering its property.<sup>124</sup>

(2) The estate of the debtor remains in the custody and under the control of the liquidator until it reverts to the debtor in terms of a composition or compromise contemplated in Chapters 22 or 23 of this Act, or until the property is re-vested in the debtor or the debtor’s estate in terms of section 104(1)(d) or any other provision in this Act that makes provision for the setting aside of a liquidation order or a liquidation resolution adopted in terms of section 8.”

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<sup>121</sup> Act 47 of 1937. Eg, s 58 of the Deeds Registries Act 47 of 1937 regards the trustee as being the owner of property that forms part of an insolvent estate. However, a minor amendment such as this should not prevent uniform rules regarding individual and corporate debtors from being introduced. In addition there is some legislation, eg the Deeds Registries Act, that regards both the trustee and the liquidator as being an “owner” in terms of the provisions of the Act. A change to the vesting rule will not have any effect on these provisions.

<sup>122</sup> Cl 11 of the Law Commission’s Draft Insolvency Bill - see Commission Paper 582 Vol 2.

<sup>123</sup> Cl 8 makes provision for voluntary liquidation by resolution.

<sup>124</sup> The proviso to this clause is currently contained in s 361(3) of the Companies Act.



From this clause it is apparent that the property of a debtor is deemed to be in the custody and under the control of the Master upon liquidation, and passes to the liquidator upon his or her appointment. Sub-clause (1) also provides for the voluntary liquidation of a debtor by means of a resolution,<sup>125</sup> while sub-clause (2), which is currently embodied in section 361(3) of the Companies Act, has been inserted to allow the court to order the vesting of estate property in the liquidator should the circumstances require it.

### 3 5 Conclusion regarding vesting

From what has been stated above it is clearly still customary, in England, Australia and South Africa, to allow the estate assets to vest in the trustee in the case of individual insolvency. In the case of corporate debtors the various countries' provisions merely allow custody and control of the assets to pass to a liquidator upon liquidation. However, in the United States and Germany, the latter's code being the most recent of all the insolvency legislation referred to, the insolvency administrator only obtains the right to deal with the assets to the exclusion of others without actual vesting taking place. America and Germany have obviously decided that vesting ownership of the estate assets in the insolvency administrator is unnecessary for the exercise of a trustee or liquidator's rights, and applies the rule uniformly to all entities.

It is submitted that actual vesting, or ownership, of the estate assets is not necessary upon insolvency and the clause dealing with this aspect in a unified Insolvency Act has been drafted accordingly. Should the need arise, the courts are in a position to order ownership to vest in the liquidator in terms of the proviso to sub-clause (1) of the proposed clause dealing with this aspect.<sup>126</sup>

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<sup>125</sup> This is not currently the rule that applies to companies and close corporations that are being wound up voluntarily, as s 361(3) only applies to companies being wound up by the court. Voluntary liquidation by means of a resolution is dealt with in ch 11 below.

<sup>126</sup> See par 3.4 above.



**PART 4C**

**THE INTRODUCTION OF A TRULY UNIFIED INSOLVENCY ACT:  
ANCILLARY MATTERS**

**CHAPTER 10: THE INTRODUCTION OF A TRULY UNIFIED ACT:  
ANCILLARY MATTERS ..... 321**

In this part various ancillary matters relating to insolvency in general will be discussed with a view to determining whether or not they should be included in a unified Insolvency Act. These ancillary matters relate to debt relief measures, insolvent deceased estates, business rescue provisions, personal liability of directors and other officers and cross-border insolvencies. Each of these aspects will be briefly dealt with and recommendations made in regard to their inclusion or exclusion from a unified insolvency statute.



## CHAPTER 10

### THE INTRODUCTION OF A TRULY UNIFIED INSOLVENCY ACT: ANCILLARY MATTERS

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#### SUMMARY

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#### 1 INTRODUCTION

If a unified insolvency statute is to be introduced, then it cannot be said to be truly unified if substantially all aspects relating to insolvency are not included in such legislation. One of these aspects, namely the treatment of specialised institutions such as banks and insurance companies, has already been dealt with in chapter 7. However, there are a number of other issues that need to be addressed if this study is to claim that a framework has been created for a truly unified Insolvency Act.

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Although the matters covered in this chapter are referred to as “ancillary”, this has been done only for the purposes of this study. Due to the wide ambit of the issues covered in this chapter it is impossible to discuss them in any detail. For this reason the discussion of the ancillary matters will be limited to a discussion of where they should slot into the bigger insolvency picture. Consequently a discussion of the merits and / or principles of these ancillary matters will not be included here. Stated differently, should these issues be included in a unified insolvency statute or should they be contained in separate legislation? In answering this question it will be necessary to briefly determine the philosophy behind their inclusion in their current Acts, and to determine whether it is possible to include them in a unified insolvency statute.

## **2 ALTERNATIVES TO LIQUIDATION (SEQUESTRATION) FOR NATURAL PERSON DEBTORS<sup>1</sup>**

### **2 1 Introduction**

It has often been stated that the abuse of the current system of consumer insolvency in South Africa is due to the fact that there are insufficient alternatives available to a debtor experiencing

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<sup>1</sup> To a large extent this discussion is based on a paper by Boraine and Roestoff entitled “Fresh Start Procedures for Consumer Debtors in South African Bankruptcy Law” presented at the Academics’ Meeting of the INSOL Sixth World Congress held in London on 17 and 18 July 2001. This paper has since been published: Boraine and Roestoff “Fresh Start Procedures for Consumer Debtors in South African Bankruptcy Law” 2002 *International Insolvency Review* Vol 11 1 (hereinafter referred as Boraine and Roestoff “Fresh Start Procedures”).

financial difficulties.<sup>2</sup> One of the only statutory alternatives,<sup>3</sup> namely administration orders,<sup>4</sup> are limited in their scope and are only available for use by debtors with liabilities totalling less than R50 000. The other alternative, namely a common-law composition offered by a debtor to his creditors, can be a dangerous option to be used by a debtor since the mere offer of composition amounts to an act of insolvency in terms of which the debtor may be sequestrated.<sup>5</sup> In addition, the offer of composition is ineffective unless it has been accepted by all the creditors of the debtor. If there are dissenting creditors, the composition cannot be forced on them and this leaves the agreement flawed in regard to the debtor.<sup>6</sup>

Statutory compositions, on the other hand, are of no real assistance to the struggling debtor as the procedure can only be invoked once the debtor has been sequestrated.<sup>7</sup> Although not the prime aim of South African insolvency law, the sequestration of an individual's estate does bring about

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<sup>2</sup> See Boraine and Roestoff "Vriendskaplike Sekwestrasies - 'n Produk van Verouderde Beginsels" 1993 *DJ* 229; Roestoff and Jacobs "Statutêre Akkoord voor Likwidasië: 'n Toereikende Skuldenaar Remedie" 1997 *DJ* 189; Loubser "Ensuring Advantage to Everyone in a Modern South African Insolvency Law" 1997 *SA Merc LJ* 325; Boraine and Roestoff "Developments in American Consumer Bankruptcy Law: Lessons for South Africa" 2000 *Obiter* (Part 1 Vol 1) 33 and (Part 2 Vol 2) 241; Evans "Friendly Sequestrations, the Abuse of the Process of Court, and Possible Solutions for Overburdened Debtors" 2001 *SA Merc LJ* 485 (hereinafter referred to as Evans).

<sup>3</sup> For a discussion of the alternatives, see Boraine and Roestoff "Fresh Start Procedures" par 2.1. See also Evans 485.

<sup>4</sup> Administration orders are regulated by s 74 of the Magistrates' Courts Act 32 of 1944 (hereinafter referred to as the Magistrates' Courts Act), falling under the jurisdiction of the magistrates' courts and conducted in terms of civil procedure.

<sup>5</sup> See s 8(e) of the Insolvency Act 24 of 1936 (hereinafter referred to as the Insolvency Act). However, it must be pointed out that a notice by a debtor of his or her intention to apply for an administration order in terms of s 74 of the Magistrates' Courts Act can also constitute an act of insolvency under s 8(g) of the Insolvency Act - see *Barlow's (Eastern Province) Ltd v Bouwer* 1950 4 SA 385 (E); *Volkskas ('n Divisie van Absa Bank Bpk) v Pietersen* 1993 1 SA 312 (C) (Cf *Rodrew (Pty) Ltd v Rossouw* 1975 3 SA 137 (O)).

<sup>6</sup> See SA Law Commission Project 63 Commission Paper 582 (11 Feb 2000) Vol 1 par 124.1 (hereinafter referred to as Commission Paper 582).

<sup>7</sup> Statutory compositions are implemented in terms of s 119 of the Insolvency Act. See Boraine and Roestoff "Fresh Start Procedures" par 2.3.2 for a brief discussion of this procedure.

a discharge of the debt once the debtor has been rehabilitated,<sup>8</sup> and is for this reason that so many debtors make use of sequestration proceedings in practice.<sup>9</sup> In view of these shortcomings in the consumer laws of South Africa, the South African Law Commission has proposed a new form of composition in its review of the law of insolvency.<sup>10</sup> The proposal amounts to a common-law composition that has been given statutory recognition by the use of a clause providing for the binding of dissenting creditors. For the purposes of the discussion that follows, the new form of composition proposed by the Law Commission will be referred to as a “pre-liquidation composition”, while the existing statutory composition in terms of section 119 of the Insolvency Act will be referred to as a “post-liquidation composition”.

In the ensuing discussion the possible inclusion of administration orders in a unified insolvency statute will be discussed first, followed by a discussion of statutory compositions. The question that needs to be answered here is not whether the existing or proposed alternatives are workable, but whether or not they should be included in a unified insolvency statute.

## 2 2 Administration orders<sup>11</sup>

Administration orders are currently regulated by section 74 of the Magistrates’ Courts Act. The procedure is quite obviously aimed at debtors in the lower income groups, since the procedure

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<sup>8</sup> S 129(1)(b) of the Insolvency Act.

<sup>9</sup> See also Evans 485.

<sup>10</sup> Commission Paper 582 Vol 1 par 124.

<sup>11</sup> For a general discussion of administration orders its procedure, see Harms *Civil Procedure in the Magistrates’ Courts* (1997) paras 37.1-37.10. See also Boraine and Roestoff “Fresh Start Procedures” par 2.2. See also *Interim Research Report on the Review of Administration Orders in terms of Section 74 of the Magistrates’ Courts Act 32 of 1944*, Centre for Advanced Corporate Insolvency Law, University of Pretoria, May 2002 par 1 (unpublished) for a brief history of administration orders (hereinafter referred to as *Interim Research Report on Administration Orders*); Shrand *The Law and Practice of Insolvency, Winding-up of Companies and Judicial Management* 3rd ed (1977) ch 16 (hereinafter referred to as Shrand).



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cannot be used by a debtor whose liabilities exceed an amount of R50 000. The granting of an administration order in the magistrate's court does not amount to a discharge, and the debtor is required to repay all his or her debts in full. However, the granting of an administration order does bring about a stay for the debtor, in that the creditors that are affected by the order cannot take execution proceedings against such a debtor in respect of debts covered by the administration order. For this reason administration orders can be said to be a collective debt-collecting mechanism and forms part of South African debt relief measures.

However well this system of debt-collecting may appear to work in theory, it is fraught with problems in practice, a situation that has been exacerbated by the recent explosion of growth experienced in the micro-lending industry in South Africa. Research currently being carried out on this topic<sup>12</sup> shows that the following serious problems exist in regard to administration orders:<sup>13</sup>

- (a) The payments made by debtors are in most cases too small to realistically pay off the debt within the required time frames;
- (b) The procedures that need to be followed are onerous;
- (c) The staff of the magistrates' courts that supervise this procedure are often ill-equipped to perform their tasks;
- (d) The magistrates' courts are experiencing a massive work overload that leads to delays and eventual prejudice for both debtor and creditor;

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<sup>12</sup> Interim Research Report on Administration Orders par 1.

<sup>13</sup> For a detailed discussion of the problems relating to administration orders, see Interim Research Report on Administration Orders paras 3, 7.

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- (e) There are insufficient safeguards built into the procedure in that the administrators are not required to belong to any professional body. This leads to abuse by administrators by charging exorbitant fees and expenses;
- (f) There is very little, if any, proper supervision over administrators which in turn leads to abuse.

These are but a few of the problems currently being experienced in this field of the law, and the question being addressed in the research currently underway is whether these provisions can be improved upon to make the system of administration orders more effective.<sup>14</sup> One of the questions that has been posed by the research team conducting the research on administration orders, is whether or not this procedure should not be included in a unified insolvency statute, enabling the procedure of administration orders to be linked to a possible pre-liquidation composition or, ultimately, a liquidation (sequestration) order.<sup>15</sup> In addition to this, one of the options being considered by the research team is the likelihood that administration orders will be more effectively administered if insolvency practitioners were to take responsibility for the general administration process.

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<sup>14</sup> For a full discussion of how the current system of administration orders functions in practice, see Research Report on Administration Orders par 6.

<sup>15</sup> It is interesting that in England the Cork Report (*Insolvency Law and Practice, Report of the Review Committee* (Cmnd 8558) 1982 (hereinafter referred to as the Cork Report)) ch 6 included a recommendation that administration orders be abolished and replaced with a Debts Arrangement Order as part of their insolvency law reform process. However, this recommendation was never implemented and currently the provisions relating to administration order are still contained in separate legislation. See also Fletcher *The Law of Insolvency* (1996) 60.

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By increasing the threshold of those able to use administration orders, inserting the provisions into a unified insolvency statute and linking it to pre-liquidation compositions and insolvency, it is the view of the research committee that the administration order procedure will become more effectively regulated.<sup>16</sup>

### 2.3 Statutory pre-liquidation compositions<sup>17</sup>

As stated above, the South African Law Commission has proposed that common-law compositions be fortified by giving them statutory recognition in the form of a composition outside insolvency.<sup>18</sup> The Law Commission states that the statutory recognition of these types of compositions is necessary due to the requirement in the Draft Insolvency Bill that the liquidation of the estate of the debtor must be to the advantage of the creditors.<sup>19</sup> According to the Law Commission “provision must be made for debtors with little or no assets who through no fault of their own are unable to pay their debts”.<sup>20</sup> In order to achieve this, the Law Commission proposes the insertion of a new sub-section into section 74 of the Magistrates’ Courts Act, the provision dealing with administration orders. The new section provides for a composition between a debtor and his or her creditors *prior* to liquidation (sequestration) and which is binding on dissenting creditors. This procedure, too, is in essence a collective debt-collecting procedure aimed at alleviating the predicament of both debtor and creditor.

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<sup>16</sup> For a discussion of the proposals being made in regard to administration orders and its role within the insolvency system, see Interim Research Report on Administration Orders par 10.

<sup>17</sup> For a more detailed discussion of this new innovation, see Boraine and Roestoff “Fresh Start Procedures” par 3. See also Research Report on Administration Orders par 5.

<sup>18</sup> As opposed to within the insolvency process, which is possible by means of the post-liquidation composition provided for in s 119 of the current Insolvency Act (cl 71 of the Draft Insolvency Bill and cl 119 of the unified Insolvency Act in ann E to this thesis).

<sup>19</sup> Commission Paper 582 Vol 1 par 124.1.

<sup>20</sup> Commission Paper 582 Vol 1 par 124.1.

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For the purposes of this study it is not necessary to discuss the mechanics of the proposed new provision, but this does bring one to the point where the question needs to be posed as to where the provisions dealing with administration orders and pre-liquidation compositions should be included. It is submitted that both these procedures should be included in a unified insolvency statute. The reason for this statement can be found in the fact that the inability of a debtor to pay his or her debts resorts under the wide ambit of insolvency law. From a creditor's point of view South African insolvency law is a collective debt-collecting procedure,<sup>21</sup> while it is seen as a debt relief measure from a debtor's point of view. Consequently, any procedure aimed at alleviating a debtor's financial situation should, in my opinion, be included in insolvency legislation if it amounts to relief for both the debtor and the creditors in a collective fashion.

## 2 4 Conclusion

The information required to be placed before the magistrate's court in terms of the proposed new provision providing for pre-liquidation compositions, is very similar to the information required to be placed before the magistrate's court in the case of administration orders.<sup>22</sup> For this reason the two provisions should be linked in some way. In addition, the magistrate presiding over either of these procedures should have a discretion to decide which of them will be most suited to the prevailing circumstances in each case.

Although the conclusion has been reached that administration orders and pre-liquidation compositions should be included in a unified insolvency statute, for the purposes of the unified Insolvency Act included in this thesis, this has not in fact been done. The reason for this is that the decision to move administration orders out of the Magistrates' Courts Act and into a unified insolvency statute is one of policy that will have to be made by the relevant government

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<sup>21</sup> As opposed to individual debt-collecting procedures initiated, eg, by the issuing of a summons for the recovery of debt.

<sup>22</sup> Research Report on Administration Orders paras 5, 6.

authorities and the political powers that be. On the other hand, the proposed pre-liquidation composition provision has not yet been inserted into the Magistrates' Courts Act and can easily be slotted into a unified statute.<sup>23</sup>

The insertion of the provision dealing with pre-liquidation compositions is evident from clause 118 of the unified Insolvency Act that forms Annexure E to this thesis. However, some minor amendments have been made to this clause in consequence of what has been determined in this study. These amendments are the following:

- (a) In terms of the proposals made by the South African Law Commission, pre-liquidation compositions have only been made applicable to individuals (natural persons). However, there is no reason why these same provisions cannot be made applicable also to the other debtors as defined<sup>24</sup> in the unified Insolvency Act.<sup>25</sup> For this reason the clause has been amended to make provision for all types of debtors.
- (b) The second major amendment relates to the provision in the Law Commission's proposal that, in the event of the creditors rejecting the offer of composition, the presiding officer can request the debtor if he or she wishes for his or her assets to be divided in terms of the Insolvency Act. It is submitted that such a provision would lead to an abuse of this process by debtors, as they would be able to escape the rigorous test of advantage to creditors that is applied in applications for liquidation (sequestration). Consequently the

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<sup>23</sup> If this cannot be achieved then pre-liquidation compositions should be inserted into the Magistrates' Courts Act, together with the provisions dealing with administration orders. However, such a step will lead to the further fragmentation of our insolvency law.

<sup>24</sup> See ch 6 above in regard to the definition of "debtor" under a unified Insolvency Act.

<sup>25</sup> Although there are other provisions that have been included in the unified Insolvency Act that have historically been used by companies, these provisions have also been made applicable to all types of debtors. See par 4 below and cl 120 and 120A in ch 23 of the unified Insolvency Act in ann E to this thesis.

clause has been amended to make provision for two possibilities. If the composition is rejected:

- (i) The presiding magistrate can declare that the proceedings relating to a pre-liquidation composition have ceased and that the debtor is once again in the position he was prior to the offer of composition being made; or
- (ii) The presiding magistrate can determine whether or not an administration order can be granted in terms of section 74 of the Magistrates' Courts Act<sup>26</sup> and, if so, grant the relevant order.<sup>27</sup>

By including administration orders and pre-liquidation compositions in a unified insolvency statute, South African insolvency legislation would be in line with the approach taken by many other countries.<sup>28</sup> For example, in Australia the Harmer Report<sup>29</sup> refers to a previous scheme, entitled the Regular Payment of Debt scheme, that was recommended by a previous commission of inquiry,<sup>30</sup> but was never tabled in Parliament. However, the Harmer Report recommended that a new scheme, entitled Debts Payment Plans, should be incorporated into the Australian Bankruptcy Act.<sup>31</sup> From the content of the recommendation it appears to be a hybrid between the South African administration order and the proposed pre-liquidation composition already referred to above.

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<sup>26</sup> Ideally, s 74 of the Magistrates' Courts Act would be inserted into the unified Insolvency Act, in close proximity to cl 118, where reference would then be made to the relevant clause of the unified Act.

<sup>27</sup> However, this will only apply to natural person debtors and not to other types of debtors who may also make use of the provisions.

<sup>28</sup> Eg, in the United States of America compositions were held to fall under the bankruptcy laws as far back as 1874. See Tabb "The History of Bankruptcy Laws in the United States" 1995 3 *ABI Law Review* 5-51 at 21.

<sup>29</sup> Australian Law Reform Commission Report No 45 *General Insolvency Inquiry* (hereinafter referred as the Harmer Report) Vol 1 paras 432-440.

<sup>30</sup> Harmer Report par 433.

<sup>31</sup> Harmer Report par 432.

Currently in Australia there are a number of options available to a debtor which serve as alternatives to formal bankruptcy.<sup>32</sup> In the first place it is possible for a debtor to enter into a private informal agreement with the individual creditors by restructuring loans or obtaining a moratorium for the payment of debt.<sup>33</sup> In the second place a debtor may enter into a private arrangement with his or her creditors under Part X of the Bankruptcy Act 1966 (Cth).<sup>34</sup> This arrangement has the avoidance of bankruptcy as a result.<sup>35</sup> In the third place a debtor may propose a debt agreement which is subject to Part IX of the Bankruptcy Act.<sup>36</sup> These provisions will not be discussed here, but it is important to point out that these debt relief measures are contained in the Australian Bankruptcy Act.

However, in England<sup>37</sup> there are both formal and informal procedures<sup>38</sup> that serve as alternatives to formal bankruptcy. The formal procedures consist of individual voluntary arrangements, deeds of arrangement<sup>39</sup> and administration orders,<sup>40</sup> although only individual voluntary arrangements are regulated by the Insolvency Act 1986.<sup>41</sup>

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<sup>32</sup> See generally Duns and Mason "Consumer Insolvency in Australia: Current Regulation and Proposed Reforms" 7, a paper presented at the Academics' Meeting of the INSOL Sixth World Congress in London on 17 July 2001.

<sup>33</sup> Key *Insolvency* 18. For a discussion of this form of debt relief, see Key and Kennedy "To Bankrupt, or Not to Bankrupt? The Question Faced by All Insolvency Advisers" 1993 *Insolvency Law Journal* 187.

<sup>34</sup> Key *Insolvency* 18.

<sup>35</sup> Key *Insolvency* 18; ch 3.

<sup>36</sup> Key *Insolvency* 18; ch 4.

<sup>37</sup> See generally Fletcher ch 4; Cork Report ch 7.

<sup>38</sup> For a discussion of the informal procedures, see Fletcher 66-67.

<sup>39</sup> Deeds of Arrangement Act 1914. See also Fletcher 59-60.

<sup>40</sup> For a discussion of administration order under English law, see Fletcher 60-66.

<sup>41</sup> See part VIII, ss 252-263. See also Fletcher 41.

In Germany, Part Nine of the *Insolvenzordnung* (Insolvency Code) regulates consumer insolvency proceedings. Sections 305 to 310 of the Insolvency Code deal with a debt adjustment plan. In terms of these provisions a debtor may in the first place not commence an insolvency proceeding him- or herself unless it can be proved to the court that an extrajudicial agreement with creditors was attempted, but failed.<sup>42</sup> In addition, when filing the petition to commence an insolvency proceeding, the petition must be accompanied by a debt adjustment plan.<sup>43</sup> If the creditors accept the debt adjustment plan, the court makes an order to that effect and the insolvency petition is deemed to have been withdrawn.<sup>44</sup> If the debt adjustment plan is not accepted by all the creditors, the provisions make provision for a “cram-down” by the court, provided at least more than half the creditors of the estate have accepted it.<sup>45</sup> In the event the creditors do not accept the debt adjustment plan and the court has not substituted its consent for dissenting creditors, then the insolvency proceeding is reinstated.<sup>46</sup> What is important about the German debt adjustment plan is not only that it forms part of the Insolvency Code, but also that it is a compulsory requirement before a debtor may approach the court for relief in the form of formal insolvency.

In the United States<sup>47</sup> the alternatives to bankruptcy are also contained in their bankruptcy legislation, namely the United States Bankruptcy Code.<sup>48</sup> In terms of the Code a debtor may file

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<sup>42</sup> Insolvency Code s 305(1)1.

<sup>43</sup> Insolvency Code s 305(1)4.

<sup>44</sup> Insolvency Code s 308.

<sup>45</sup> Insolvency Code s 309.

<sup>46</sup> Insolvency Code s 311.

<sup>47</sup> For a comprehensive discussion of alternatives to bankruptcy in the United States, see Research Project on Administration Orders par 9. See also Herbert *Understanding Bankruptcy* (1995) ch 18 (hereinafter referred to as Herbert).

<sup>48</sup> 11 USC.



for bankruptcy under Chapter 7, and a reorganisation process under either Chapters 13<sup>49</sup> or 11.<sup>50</sup> In terms of the Chapter 7 procedure the debtor's non-exempt property will be liquidated and distributed amongst the creditors.<sup>51</sup> The Chapter 11 procedure is complicated, and is generally only used by businesses, although nothing prevents an individual from making use of the process.<sup>52</sup> Chapter 13 procedures for reorganisation are usually utilised by individual or consumer debtors, and make provision for the debtor to remain in possession of his or her property by drawing up a plan to repay some or all of the debt out of future income.<sup>53</sup> What is important about alternatives to bankruptcy under the American system, is that the measures are contained in the same enactment, namely the United States Bankruptcy Code.

It is therefore important that South Africa takes note of international trends when considering a unified Insolvency Act, as it is evident that all debt relief measures should be included in the same legislation regulating insolvency.

### 3 INSOLVENT DECEASED ESTATES<sup>54</sup>

It is quite possible that the estate of a deceased person is found to be insolvent at the time of the deceased's death, or at a stage sometime thereafter. In terms of section 34 of the Administration

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<sup>49</sup> For a discussion of this aspect that gave rise to the ch 13 procedure, see *Report of the Commission on the Bankruptcy Laws of the United States* (1973) ch 6.

<sup>50</sup> For a discussion of this aspect that gave rise to the ch 11 procedure, see *Report of the Commission on the Bankruptcy Laws of the United States* (1973) ch 9.

<sup>51</sup> 11 USC s 726.

<sup>52</sup> See Herbert 304.

<sup>53</sup> 11 USC s 1322.

<sup>54</sup> Regarding the administration of insolvent deceased estates generally, see Burdette "Selected Aspects of the Administration of Insolvent Deceased Estates" 2001 2 *SA Merc LJ* 211-225 (hereinafter referred to as Burdette); Shrand ch 15.

of Estates Act<sup>55</sup> there are two possible manners in which these estates may be administered. In the first place it is possible that the estate may be administered in terms of a procedure set out in section 34 of the Administration of Estates Act. The second possibility is that the estate may be declared formally insolvent after an application to court,<sup>56</sup> and the estate is then administered in terms of the Insolvency Act.<sup>57</sup>

The choice as to which of these procedures will be implemented, is left to the creditors. This is done by way of a notice to creditors in terms of section 34(1) of the Administration of Estates Act, whereby they must make an election as to which procedure is favoured. Creditors are not actually given a choice as such - what happens is that the executor must inform the creditors and the Master that the estate in question is insolvent.<sup>58</sup> In the notice to creditors the executor must inform them that if the majority of creditors in number and value do not instruct him (the executor) to formally sequester the estate in terms of the Insolvency Act, he will proceed to administer the estate in terms of section 34 of the Administration of Estates Act. What this section does is to tell creditors that the estate will be wound up in terms of the Administration of Estates Act unless they instruct the executor to formally sequester the estate.<sup>59</sup> Obviously an executor should inform the creditors what the appropriate course of action should be considering the circumstances of each case.<sup>60</sup>

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<sup>55</sup> Act 66 of 1965 (hereinafter referred to as the Administration of Estates Act).

<sup>56</sup> It is interesting to note that s 3 of the current Insolvency Act states that “[a]n insolvent debtor or his agent or a person entrusted with the administration of the estate of a deceased insolvent debtor ... may petition the court for the acceptance of the surrender of the debtor’s estate for the benefit of his creditors”, this being an application for voluntary surrender. However, take note that a creditor of the deceased may still formally apply for the compulsory sequestration of the decedent’s estate - s 34(13) of the Administration of Estates Act.

<sup>57</sup> See s 34(1) of the Administration of Estates Act and Burdette 216-219.

<sup>58</sup> S 34(1) of the Administration of Estates Act and Burdette 212-215.

<sup>59</sup> S 34(1) of the Administration of Estates Act and Burdette 212-215.

<sup>60</sup> S 34(1) of the Administration of Estates Act and Burdette 212-215.

For example,<sup>61</sup> it may be that the deceased donated most of his assets to his beneficiaries shortly before his death and as a result his estate is insolvent. The sections dealing with the setting aside of impeachable transaction in the Insolvency Act<sup>62</sup> cannot be implemented by an executor, only by a trustee of an insolvent estate. In circumstances such as these, the executor should inform the creditors that the appropriate course of action would be to formally sequestrate the estate in order that a trustee may be appointed. The trustee, once appointed, may then apply to court to have the transactions set aside.

In light of the proposals for the enactment of a unified insolvency statute in this study, the question has to be asked whether or not the provisions of section 34 of the Administration of Estates Act should also be included in such a unified statute. Considering the unique procedures that regulate the administration of deceased estates, it is submitted that the procedures regarding insolvent deceased estates should not be included under a unified statute. The reasons for reaching this conclusion are the following:

- (a) Although the current procedure set out in section 34 of the Administration of Estates Act regulates the administration of insolvent deceased estates, the estate in question is still wound up as a deceased estate and not as an insolvent estate.<sup>63</sup> This is important in regard to a number of administrative measures:
  - (i) In the first place, an insolvent deceased estate is administered by an executor and not a trustee. Moving the section 34 procedure will create unnecessary confusion as to whether the person appointed is an executor or a trustee.
  - (ii) Secondly, insolvent deceased estates that are administered in terms of section 34 follow the same procedures as a normal deceased estate, for example the

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<sup>61</sup> For more examples of where the deceased estate should be formally sequestered, see Burdette 213-214.

<sup>62</sup> Ss 26-34 of the Insolvency Act.

<sup>63</sup> Burdette 211, 219-225.

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appointment of an executor, the inspection periods, the considerations of objections by the Master, etcetera. Moving section 34 of the Administration of Estates Act will mean that the estate is subject to administration by a trustee, inspection periods differ and different rules regarding the consideration of objections by the Master will apply.

- (iii) Thirdly, the fee structure<sup>64</sup> of an executor administering an insolvent deceased estate in terms of section 34 of the Administration of Estates Act differs from the fee structure of a trustee in an insolvent deceased estate being administered in terms of the Insolvency Act.
- (b) An insolvent deceased estate that is administered in terms of section 34 of the Administration of Estates Act, is in any event wound up in accordance with the principles of insolvency law.<sup>65</sup> There is a curious hybrid of provisions that apply: the actual administration process takes place in accordance with the procedures set out in the Administration of Estates Act, while the division of assets among the creditors takes place in accordance with the principles of insolvency.<sup>66</sup>
- (c) The consequences of a deceased estate being wound up in terms of section 34 are not the same as the consequences of a deceased estate being wound up in terms of the provisions of the Insolvency Act. An example would be where one of the spouses in a marriage in community of property passes away and the joint (deceased) estate is found to be insolvent. If the estate is administered in terms of section 34 of the Administration of Estates Act, the surviving spouse is not considered to be an insolvent and will

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<sup>64</sup> Executors are generally entitled to 3,5% on the gross value of the assets in the estate, while the fees of a trustee are based on a percentage on the type of asset found in the estate.

<sup>65</sup> S 34(7)(b) of the Administration of Estates Act and Burdette 211, 219-225.

<sup>66</sup> However, not all the principles of insolvency apply. Eg. contribution will not be levied on the creditors where there is a shortfall - see Burdette 215 fn 8.

consequently not suffer any of the limitations on his or her capacity to act that are currently imposed by the Insolvency Act. On the other hand, the surviving spouse will also not enjoy any of the benefits of sequestration, such as the discharge of debts upon rehabilitation.<sup>67</sup> However, if the joint deceased estate is declared formally insolvent, this will have a completely different effect on the status of the surviving spouse.

For the above reasons it is important to maintain a distinction between an insolvent deceased estate that is being wound up in terms of section 34 of the Administration of Estates Act, and an insolvent deceased estate that is being formally wound up as an insolvent estate in terms of the Insolvency Act. An insolvent deceased estate is still a deceased estate that should, as far as possible, be administered together with other deceased estates. No prejudice is suffered by creditors by the use of section 34 of the Administration of Estates Act, as the principles of insolvency still apply to the actual distribution of the assets. By merging these very different provisions into the same Act, the advantage of having a simple and inexpensive procedure for the administration of insolvent deceased estates will be lost.

Part Ten of the German Insolvency Code provides for “Inheritance Insolvency Proceedings”. These provisions are contained in sections 315 to 331, and allow various persons, including the executor, the heirs and creditors the right to approach the court in order to commence the insolvency proceeding.

Special rules pertaining to the administration of insolvent deceased estates also apply in England, although the insolvency provisions and rules are adapted to meet the needs of these special cases.<sup>68</sup> However, in Australia the situation is similar to the administration of insolvent deceased estates in South Africa, as the estate of the decedent may either be dealt with under the provisions

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<sup>67</sup> There can be no rehabilitation in such a case, as there has been no formal sequestration.

<sup>68</sup> See Fletcher 330-333.

of the Bankruptcy Act 1966 (Cth) or under the provisions of the State legislation governing the administration of deceased estates.<sup>69</sup> The reasons for making use of the Bankruptcy Act instead of the laws governing the administration of deceased estates seem to be the same as those relied upon in South Africa.<sup>70</sup>

Finally, it must be borne in mind that South Africa uses unique procedures when dealing with deceased estates. The Master of the High Court has a supervisory role in the administration of all estates, unlike the probate system that is used in countries such as England. Due to the uniqueness of the procedures used in both insolvency and deceased estates in South Africa, it is submitted that the administration of insolvent deceased estates should remain as it is.

## 4 BUSINESS RESCUE PROVISIONS<sup>71</sup>

### 4.1 Introduction and the legal nature and underlying philosophy of business rescue

Although South Africa currently lags behind the rest of the world when it comes to business rescue regimes, it is ironic that South Africa was one of the first countries to actually introduce a business rescue regime in the form of judicial management.<sup>72</sup> Unfortunately, since the

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<sup>69</sup> Keay *Insolvency* 155. For a brief discussion of this aspect see also Rose *Lewis' Australian Bankruptcy Law* 11th ed (1999) 4.

<sup>70</sup> Eg, to make use of the provisions dealing with impeachable transactions - see Keay *Insolvency* 155.

<sup>71</sup> See generally: Hunter "The Nature and Functions of a Rescue Culture" 1999 *Journal of Business Law* 491 (hereinafter referred to as Hunter); Rochelle "Lowering the Penalties for Failure: Using the Insolvency Law as a Tool for Spurring Economic Growth; the American Experience, and Possible Uses for South Africa" 1996 2 *TSAR* 315 (hereinafter referred to as Rochelle); Harmer "Comparison of Trends in National Law: The Pacific Rim" 1997 13 *Brookings Journal of International Law* 139-165 (hereinafter referred to as Harmer); Goode *Principles of Corporate Insolvency Law* 2nd ed (1997) 267-270 (hereinafter referred to as Goode); Herbert ch 17. For a useful discussion of the underlying philosophy of reorganisations under United States law, see Jackson *The Logic and Limits of Bankruptcy Law* (1986) ch 9 209-224.

<sup>72</sup> See Rajak and Henning "Business Rescue for South Africa" 1999 *SALJ* 262 (hereinafter referred to as Rajak and Henning).

introduction of judicial management in 1926, South Africa has not really developed its business rescue provisions any further and consequently finds itself out of step with the rest of the world regarding this important aspect of modern insolvency law.

While it is not the intention in this part of the chapter to discuss business rescue in any detail, a brief exposition of the current business rescue regimes will be given, and proposals made for their inclusion under a unified Insolvency Act.<sup>73</sup> It must also be borne in mind that the purpose of a business rescue regime is *not necessarily* to save the business and return it to its former profitable status. One of the spin-offs of a business rescue regime is that even if the business cannot be restored to a solvent and profitable status, the return to creditors in the long-run will be much higher.<sup>74</sup> It is stated thus by Smits:<sup>75</sup>

“Modern ‘corporate rescue’ and reorganisation seeks to take advantage of the reality that in many cases an enterprise not only has substantial value as a going concern, but its going concern value exceeds its liquidation value. Through judicial bankruptcy procedures, reorganisation seeks to maximise, preserve and possibly even enhance the value of a debtor’s business enterprise, in order to maximise payment to the creditors of the distressed debtor.”

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<sup>73</sup> It is interesting that Milman and Durrant *Corporate Insolvency Law and Practice* 3rd ed (1999) 1 (hereinafter referred to as Milman and Durrant) state that one of the aims of corporate insolvency is in fact to promote business rescue. See also Goode 267-270.

<sup>74</sup> S 427(1) of the Companies Act requires that there must be a reasonable probability that the company will be able to pay its debts and meet its obligations if the judicial management order is granted. In *Noordkaap Lewende Hawe Ko-op Bpk v Schreuder* 1974 3 SA 102 (A) the court confirmed the requirement that there must be a reasonable probability and not merely a reasonable possibility. The court also stated that the intention of the legislature in using the term “probability” was to restrict as little as possible the rights of creditors. This requirement is stated as being unrealistic, and sometimes even against the wishes of creditors, by Rajak and Henning 268. Smits 86 is of the opinion that the success of judicial management should not be measured by this requirement, as this is not the only goal of a business rescue regime. See also Harmer 144 where he attempts to provide an internationally acceptable definition of the term “rescue”.

<sup>75</sup> Smits “Corporate Administration: A Proposed Model” 1999 32 *DJ* 80 at 83 (hereinafter referred to as Smits). See also Trebilcock and Katz “The Law and Economics of Corporate Insolvency: A North American Perspective” in Rickett (ed) *Essays on Corporate Restructuring and Insolvency* (1996), where the following is stated at 7:

“The collective interest of all creditors requires the maximisation of the aggregate value of the assets of the debtor. In many cases, an insolvent firm is worth more as a going concern than the sum value of its discrete assets sold on a piecemeal basis. In these situations, it is in the collective interests of all creditors that the business be preserved as a going concern.”

An important point made by Harmer,<sup>76</sup> is that a business rescue regime has a far better chance of succeeding if the insolvency system in which it is applied is debtor-friendly, as opposed to a creditor-friendly system of insolvency where business rescue regimes are not applied as successfully.<sup>77</sup> This is certainly true of South Africa. As has already been pointed out in this study South Africa has a creditor-friendly insolvency system, and it is submitted that the fact that the courts take a very conservative approach to insolvency and judicial management is a contributing factor in the failure of judicial management as a business rescue regime in South Africa. This aspect is discussed in more detail below.

While judicial management, as an example of a business rescue mechanism in South Africa, is seen to be an extraordinary measure, in other jurisdictions business rescue procedures are seen as a necessary and natural precursor to insolvency itself.<sup>78</sup> In this regard it is important to note the legal nature and philosophy behind a business rescue culture. In the Cork Report, the following two aims “of a good modern insolvency law” were identified in regard to English law:<sup>79</sup>

- “(i) to recognise that the effects of insolvency are not limited to the private interests of the insolvent and his creditors, but that other interests of society or other groups in society are vitally affected by the insolvency and its outcome, and to ensure that these public interests are recognised and safeguarded;
- (j) to provide means for the preservation of viable commercial enterprises capable of making a useful contribution to the economic life of the country;”

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<sup>76</sup> Harmer 147.

<sup>77</sup> Harmer 147 refers to the United States as an example of a debtor-friendly insolvency system where business rescue has a very high success rate, as opposed to Australia with a low rate of success due to its creditor-friendly insolvency system.

<sup>78</sup> See eg Herbert 303-314 who discusses the role of business rescue in the United States.

<sup>79</sup> At par 198 of the Cork Report.



In addition to these statements on the general aims of English insolvency law, the Cork Report stated the following in regard to the appointment of administrators as a form of business rescue.<sup>80</sup>

“498. Under our proposals, an Administrator may be appointed for all or any of the following reasons:

- (a) to consider the reorganisation of the company and its management with a view to restoring profitability or maintaining employment;
- (b) to ascertain whether a company of doubtful solvency can be restored to profitability;
- (c) to make proposals for the most profitable realisation of assets for the benefit of creditors and shareholders;
- (d) to carry on the business where this is in the public interest but is unlikely that the business can be continued under the existing management.”

In determining what the actual meaning of a “rescue culture” is,<sup>81</sup> Hunter provides the following explanation:<sup>82</sup>

“What then [is meant] by the term ‘rescue culture’? It is a multi-aspect concept, having both a positive and protective role, and a corrective and a punitive role. On one level, it manifests itself by legislative and judicial policies, directed to the more benevolent treatment of insolvent persons, whether they be individuals or corporations, and at the same time to a more draconian treatment of true economic delinquents. On another level, it entails the adoption of a general rule for the construction of statutes, which is deliberately inclined towards the giving of a positive and socially profitable meaning (rather than a negative or socially destructive meaning), to statutes of socio-economic import. Of such statutes, insolvency legislation may justly be regarded as the paramount example.”

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<sup>80</sup> Cork Report par 498. See also Goode 267-323 for a useful discussion of administration orders under English law. The Harmer Report followed similar principles when recommending the introduction of voluntary administration as a form of business rescue in Australia - see the Harmer Report ch 3.

<sup>81</sup> See also Harmer 143-148 where he gives an exposition of the general principles that a business rescue culture should ascribe to.

<sup>82</sup> Hunter 498.

Having regard to what has been stated above, it is evident that business rescue procedures are closely linked to, or intertwined with, insolvency law.<sup>83</sup> This means that in order to be effective, the business rescue provisions must be contained in the same legislation as the insolvency laws so that the link between insolvency and business rescue can be maintained. In the United States,<sup>84</sup> Germany<sup>85</sup> and England,<sup>86</sup> their respective business rescue procedures are contained in their insolvency legislation. In Australia<sup>87</sup> the business rescue procedures (for companies) are contained in the Corporations Act, but that same Act also provides for the winding-up of insolvent companies, so the *nexus* between insolvency and business rescue is maintained there as well.

It is therefore submitted that in South Africa a unified Insolvency Act should also contain all provisions that relate to business rescue. Stated conversely, the machinery relating to business rescues should be included in the same legislation making provision for the liquidation of companies and close corporations. While acknowledging that a new business rescue culture needs to be developed for use in South Africa, it is submitted that any such new (or existing) scheme of business rescue must be included in a unified Insolvency Act. Since the development of a new business rescue regime seems to be some time away, the existing forms of business rescue, namely judicial management and the (current) section 311 compromises in terms of the Companies Act,

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<sup>83</sup> See eg Harmer 143.

<sup>84</sup> In the United States the business rescue provisions, also known as chapter 11 cases, are contained in the United States Bankruptcy Code (11 USC). See also the discussion of chapter 11 cases in Herbert ch 17. For a discussion of the rationale behind the advent of the ch 11 procedure, see *Report of the Commission on the Bankruptcy Laws of the United States* (1973) ch 9.

<sup>85</sup> In Germany the rescue provisions are contained in parts six, seven and eight of the *Insolvenzordnung vom 5 Oktober 1994 (BGBl. I, S. 2866)* - hereinafter referred to as the Insolvency Code. This Code came into operation on 1 January 1999.

<sup>86</sup> The English business rescue provisions are contained in the Insolvency Act 1986 (s 29 deals with administrative receivers, part I deals with voluntary arrangements and part II deals with company administration orders). For a useful discussion of business rescue in England, see Goode ch 10.

<sup>87</sup> The Australian business rescue procedures are contained in the Corporations Act of 2001 (corporate receivership is dealt with in part 5.2, voluntary administration and deeds of company arrangement are dealt with in part 5.3A, and part 5.1 deals with formal schemes of arrangement). See also Harmer 148-155.

should be included until such time as a new system is installed. The two forms of business rescue that are discussed under this part of the chapter are judicial management and section 311 compromises.<sup>88</sup>

## 4 2 Judicial management<sup>89</sup>

### 4 2 1 Introduction

Judicial management is provided for in sections 427 to 440 of the Companies Act. It is a process that can be used by a company that is experiencing a temporary financial setback as a result of mismanagement or other special circumstances, and that will lead to it once again becoming a successful business concern.<sup>90</sup> This is achieved by replacing the existing management of the company with a judicial manager who takes over the company's business with the purpose of restoring it to profitability.<sup>91</sup>

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<sup>88</sup> S 311 of the Companies Act 61 of 1973 (hereinafter referred to as the Companies Act).

<sup>89</sup> See generally: Smits 80; Cilliers *et al Corporate Law* 3rd ed (2000) ch 26 (hereinafter referred to as Cilliers *ea Corporate Law*); Kunst (gen ed) *Henochsberg on the Companies Act* (1994) Vol 1 923-959 (hereinafter referred to as Henochsberg); Kloppers "Judicial Management Reform - Steps to Initiate a Business Rescue" 2001 13 *SA Merc LJ* 359 (hereinafter referred to as Kloppers "Judicial Management Reform"); Kloppers "Judicial Management - A Corporate Rescue Mechanism in Need of Reform?" 1999 *Stell LR* 417 (hereinafter referred to as Kloppers "Judicial Management"); Rajak and Henning 262; Burdette "Unified Insolvency Legislation in South Africa: Obstacles in the Path of the Unification Process" 1999 *DJ* 44; Olver "Judicial Management: A Case for Law Reform" 1986 *THRHR* 84 (hereinafter referred to as Olver). For a useful discussion of the history of judicial management and its application by the courts, see Olver *Judicial Management in South Africa* (unpublished doctoral thesis 1980 UCT) (hereinafter referred to as Olver Thesis) and *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* 2001 2 SA 727 (C), [2001] 1 All SA 223 (C). For a useful summary of the *Le Roux Hotel Management* case, see O'Brien and Boraine "Review of Case Law and Publications" 2001 *SAILR* 25; Shrand ch 14.

<sup>90</sup> S 427(1) of the Companies Act; Cilliers *ea Corporate Law* par 26.01 478; *Silverman v Doornhoek Mines Ltd* 1935 TPD 349.

<sup>91</sup> Cilliers *ea Corporate Law* 478.

Judicial management was introduced into South African law by the Companies Act 46 of 1926, South Africa at the time being one of the first countries to introduce a business rescue regime.<sup>92</sup> Judicial management has not changed very much over the years, although a few amendments have been made as a result of a number of commissions of inquiry. The most important of these amendments was introduced in 1932,<sup>93</sup> and made provision for a moratorium on claims by creditors and introduced the principles of impeachable transactions to apply also to judicial management.<sup>94</sup> Further minor amendments were made in 1939, as a result of the report by the Lansdown Commission,<sup>95</sup> and 1952, following the report of the Millin Commission.<sup>96</sup> When the Van Wyk de Vries Commission<sup>97</sup> was deliberating the consolidation of the Companies Act in the early 1970s, the Masters of the Supreme Court called for the abolition of judicial management due to its low success rate.<sup>98</sup> However, the commission did not recommend the abolition of judicial management and retained it under the new Companies Act of 1973.

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<sup>92</sup> Rajak and Henning 262. In the 1960s Australia imported judicial management into their legal system as a business rescue procedure, but used the term “official management” instead of “judicial management”. However, as is the case currently in South Africa, official management in Australia was a “remarkable failure” - see Harmer 149. Harmer is of the opinion that the reason for official management’s dismal failure as a business rescue regime, is that it requires all the debts of the ailing company to be repaid in full.

<sup>93</sup> Companies Act Amendment Act 11 of 1932.

<sup>94</sup> Rajak and Henning 265.

<sup>95</sup> *Report of the Companies Act Commission 1935-1936* (UG 45 of 1936) (hereinafter referred to as the Lansdown Commission).

<sup>96</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>97</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).

<sup>98</sup> Par 51.02 147 of the main report; Rajak and Henning 266.

The popularity of modern business rescue regimes worldwide,<sup>99</sup> and the fact that judicial management has not been very successful in South Africa, has of late resulted in a number of commentators calling for a review of South African business rescue procedures.<sup>100</sup> However, at a conference held on 6 October 1999 where three different models for a new business rescue regime were submitted for consideration, the delegates could not reach unanimity on the principles of such a new regime. The result was a rejection of all three models, with a call for proper research on the subject and proposals to be made sometime in the future.

#### 4 2 2 *The main problems experienced with judicial management*

It is difficult to give a brief exposition of a subject-area as wide as judicial management. Consequently only the most problematic aspects of judicial management will be discussed here. The main problem, it is submitted, lies in the fact that the courts in South Africa see judicial management as an extraordinary procedure, and not as a viable alternative to liquidation.<sup>101</sup> Kloppers submits that this should not be the case and states that there is nothing in the provisions themselves that indicate that this should be so.<sup>102</sup>

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<sup>99</sup> It is indisputable that business rescues have become the international buzzword. See Flessner "Philosophies of Business Bankruptcy Law: An International Overview" in Ziegel (ed) *Current Developments in International and Comparative Corporate Insolvency Law* (1994) 20 where he states: "Over time, and in all developed economies, the view came to prevail that bankruptcy law should offer not only straight liquidation but also reorganization, including a restructuring of debt and equity, as a solution to insolvency. The American Bankruptcy Act of 1938, with its chapters X and XI, was the first piece of legislation in a capitalist and free-market economy fully to incorporate this idea. Since then it has become commonplace in modern business bankruptcy legislation to provide for alternatives to piecemeal liquidation of insolvent enterprises."

<sup>100</sup> See Rajak and Henning 264-265, 287; Rochelle 328, 329; Smits 107; Kloppers "Judicial Management Reform" 371-379. While most authors call for a whole new system of business rescue to be developed, Kloppers in both his articles points out that there is nothing wrong with judicial management - he is of the opinion that the current shortcomings in the system can be rectified by means of a few legislative amendments.

<sup>101</sup> Kloppers "Judicial Management Reform" 378; *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* 2001 2 SA 727 (C), [2001] 1 All SA 223 (C).

<sup>102</sup> Kloppers "Judicial Management Reform" 378.

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In terms of section 427(1) of the Companies Act the granting of a judicial management order by the court rests on various requirements. These requirements are:<sup>103</sup>

- (a) If, by reason of mismanagement or any other cause
  - (i) the company is unable to pay its debts or is probably unable to meet its commitments; and
  - (ii) has not become, or is prevented from becoming, a successful business concern; and
  
- (b) there is a reasonable probability that, if the company is placed under judicial management, it will be in a position to:
  - (i) pay its debts or meet its obligations; and
  - (ii) become a successful business concern,

then a court may, if it appears just and equitable, grant a judicial management order.

The first part of the requirements relate to the state that a company finds itself in, and must be proved before an applicant will have *locus standi* to obtain a judicial management order. The second part of the requirements relate to what can be achieved by obtaining a judicial management order, and what needs to be proved before the court will grant the order. Even if the above requirements have been met, the court will not grant an order for judicial management if it does not appear to the court that it is just and equitable<sup>104</sup> to do so.

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<sup>103</sup> With acknowledgement to Cilliers *ea Corporate Law* 480.

<sup>104</sup> According to *De Jager v Karoo Koeldranke & Roomys (Edms) Bpk* 1956 3 SA 594 (C), the court will consider the interests of both the creditors and the shareholders before deciding whether or not it is just and equitable to grant the judicial management order. See also Blackman *Lawsa* (1996) Vol 4.3 460-461 (hereinafter referred to as Blackman). It has been held by our courts on more than one occasion that it is not just and equitable to grant a judicial management order where the parties seek to use the remedy in order to settle internal disputes - see *Makhuva v Lukoto Bus Service (Pty) Ltd* 1987 3 SA 376 (V) and *Ben-Tovim v Ben-Tovim* 2000 3 SA 325 (C).

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From our case law and the numerous articles that have been written on the subject of judicial management, it is submitted that the following main problems with judicial management as a viable business rescue regime can be identified:

- (a) Judicial management is seen as an extraordinary measure. The courts<sup>105</sup> see judicial management as an extraordinary measure due to the fact that a creditor of a company that is unable to pay its debts is entitled to make use of liquidation in order to recover payment of his or her claims.<sup>106</sup>
- (b) The requirement that there must be a “reasonable probability” that the company will become a successful concern.<sup>107</sup> There has been some debate as to whether this test is the same at the time the provisional and final orders are considered, or whether the test should be more stringent upon the return date of the order: in other words, should the test be more stringent once the provisional judicial manager has had time to investigate the affairs

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<sup>105</sup> See eg *Silverman v Doornhoek Mines Ltd* 1935 TPD 349 at 353; *Sammel v President Brand Gold Mining Co Ltd* 1969 3 SA 629 (A) at 663 and *Tenowitz v Tenny Investments (Pty) Ltd* 1979 2 SA 680 (E) at 683. This conservative approach of the courts was recently criticised in *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* 2001 2 SA 727 (C), [2001] 1 All SA 223 (C). Before the introduction of voluntary administration, Australia too experienced a conservatism by the courts regarding business rescue. The Harmer Report Vol 1 stated it thus at par 52:

“The Commission is also concerned that ... the legislative approach to corporate insolvency in Australia is most conservative. There is very little emphasis upon or encouragement of a constructive approach to corporate insolvency by ... focussing on the possibility of saving a business (as distinct from the company itself) and preserving employment prospects.”

<sup>106</sup> This right of creditors was described in *Tenowitz v Tenny Investments (Pty) Ltd* 1979 2 SA 680 (E) at 683 as a right *ex debito justitiae* to liquidate the company.

<sup>107</sup> See Kloppers “Judicial Management Reform” 362-363. This requirement is in my opinion also one of the reasons why judicial management cannot be successfully implemented in South Africa, and has been criticised as being outdated and unrealistic (Rajak and Henning 267 and Smits 82-84). It is submitted that the burden of proof is too onerous, and that the test should rather be one of a “reasonable possibility”. This aspect is discussed in par 4.2.3 below.

of the company and report back to the court.<sup>108</sup> In *Tenowitz v Tenny Investments (Pty) Ltd*<sup>109</sup> the court found that something more than a “reasonable probability” is required before the court can grant a final judicial management order. However, from cases such as *Ex parte Onus (Edms) Bpk: Du Plooy v Onus (Edms) Bpk*,<sup>110</sup> *Kotzé v Tulryk Bpk*<sup>111</sup> and *Ladybrand Hotel (Pty) Ltd v Segal*<sup>112</sup> it is evident that the courts felt that the test upon the granting of a final order should be the same as in the case of a provisional order. This latter view is supported by Kloppers<sup>113</sup> and Meskin,<sup>114</sup> although Olver<sup>115</sup> is of the opinion that a stricter test should be employed.<sup>116</sup>

- (c) Reliance on court proceedings.<sup>117</sup> Kloppers is of the opinion that this is one of the most important drawbacks of the current judicial management system, stating that the costs of running a judicial management is hardly a financially sound one. The costs incurred in

<sup>108</sup> See *Tenowitz v Tenny Investments (Pty) Ltd* 1979 2 SA 680 (E) at 683; Henochsberg 926; Blackman 459; Cilliers *ea Corporate Law* 481 where it is stated that upon the return day the court will be in a better position to assess whether or not the company has a chance of becoming a successful concern.

<sup>109</sup> 1979 2 SA 680 (E).

<sup>110</sup> 1980 4 SA 63 (O).

<sup>111</sup> 1977 3 SA 118 (T).

<sup>112</sup> 1975 2 SA 357 (O).

<sup>113</sup> Kloppers “Judicial Management Reform” 363.

<sup>114</sup> Henochsberg 926.

<sup>115</sup> Olver Thesis, with reference to an unreported decision in ann IV, *sc In re Olver: Intafine Leasing & Finance (Pty) Ltd*, case no M1830/76 (C), judgment delivered on 16 Feb 1977.

<sup>116</sup> Kloppers “Judicial Management Reform” 363 is of the opinion that since Cilliers *ea Corporate Law* do not refer to the *Ex parte Onus* decision, their view will not carry much weight in future. This statement by Kloppers is incorrect as Cillers *ea Corporate Law* does in fact refer to *Ex parte Onus* in fn 12 at 481. Kloppers also points out that Olver wrote his thesis before *Ex parte Onus*, and might have come to a different conclusion had he had the benefit of the decision. Although the court in *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* 2001 2 SA 727 (C), [2001] 1 All SA 223 (C) referred to this difference in opinion, it did not express its views thereon.

<sup>117</sup> See Kloppers “Judicial Management Reform” 371.



running the process are so high that it does not make the process attractive for the creditors, as all the available funds are spent on the process itself.<sup>118</sup>

- (d) The insolvency requirement.<sup>119</sup> Section 427(1)(a) of the Companies Act contains a strict requirement that the company must be unable to pay its debts before a judicial management order may be granted. Kloppers is of the opinion that insolvency or pending insolvency should not be a requirement as it not only acts as a bar for its more general use, but it also defeats the object of the exercise, namely staving off insolvency and making the company profitable again.<sup>120</sup> He submits further that the earlier a company enters judicial management for assistance, the better chance there is that it will be successful.<sup>121</sup>
- (e) The use of liquidators as judicial managers.<sup>122</sup> Olver states that it is ludicrous to appoint liquidators as judicial managers, as they have been trained to liquidate companies and not save them.<sup>123</sup> Besides the conflict of interests that liquidators might often have in such a case, the structure of the fees is also seen by Olver as a problem.<sup>124</sup> Rajak and Henning<sup>125</sup>

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<sup>118</sup> Rajak and Henning 268 are of the opinion that this factor makes judicial management unsuitable for small to medium business enterprises, as the process is unaffordable. See also Kloppers “Judicial Management Reform” 425.

<sup>119</sup> See generally Kloppers “Judicial Management Reform” 375-377.

<sup>120</sup> Kloppers “Judicial Management Reform” 375-377.

<sup>121</sup> Kloppers “Judicial Management Reform” 375-377.

<sup>122</sup> See generally Olver 84.

<sup>123</sup> Olver 87.

<sup>124</sup> Olver 84.

<sup>125</sup> Rajak and Henning 282-285.

share the view that the wrong people are being used as judicial managers and suggest that a panel of retired or semi-retired businesspeople should be employed in order to oversee the rescue procedure, whatever form it takes.

- (f) The fact that judicial management procedures only apply to companies. Currently the provisions relating to judicial management only apply to companies, and not to close corporations, partnerships or business trusts. Some doubt has been expressed by our courts as to whether or not the provisions relating to judicial management should be applied to small companies, for example private companies with only a few members.<sup>126</sup> However, in *Tobacco Auctions Ltd v AW Hamilton (Pvt) Ltd*<sup>127</sup> the court stated that there is no reason why the provisions cannot be held to apply also to small companies. The court further stated that one should not look at the size of the company, but rather at the extent and scope of its business activities, its assets and liabilities and the nature of its difficulties.<sup>128</sup>

While the above exposition does not cover all the aspects relating to judicial management, it does shed some light on the problems that make judicial management an unattractive option as an effective business rescue regime. These problems will serve as a point of departure for proposals that will be made in paragraph 4.4 for the retention of and inclusion under a unified Insolvency Act, of judicial management as an interim<sup>129</sup> business rescue mechanism.

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<sup>126</sup> See eg *Rustomjee v Rustomjee (Pty) Ltd* 1960 2 SA 753 (D) at 758 where the court stated that it is doubtful whether judicial management proceedings are appropriate to small private companies.

<sup>127</sup> 1966 2 SA 451 (R) at 453.

<sup>128</sup> At 453. It is submitted that what the court was saying, is that one should look to see whether it would be just and equitable to place the company under judicial management. This is a separate requirement under judicial management and has already been discussed above.

<sup>129</sup> The word “interim” is used here because South Africa needs to address its lack of a proper business rescue regime. As stated above, delegates at a technical conference held on a unified Insolvency Act on 6 Oct 1999 rejected all three proposals for a new business rescue regime. No unanimity could be obtained even in regard to the principles that such a regime should subscribe to. For this reason it was decided that business rescue should be properly researched and a viable regime found for application in the South African context. Until such time as a proper regime can be formulated, it is submitted that judicial

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### 4 2 3 Proposals regarding judicial management

The preceding discussion of the problems experienced with judicial management as a business rescue regime shows that South Africa is in dire need of a revised system that can effectively regulate this important aspect of insolvency law. The conservative approach of the courts and the unrealistic requirements that are laid down by especially section 427 of the Companies Act, have not allowed judicial management to develop as an effective means of saving financially distressed companies in South Africa.<sup>130</sup> Kloppers is of the opinion that judicial management does not need to be scrapped, but merely modernised by means of a few legislative amendments.<sup>131</sup> However, considering the considerable volume of case law restricting the use of judicial management in practice and the negative connotation<sup>132</sup> that can be attached to it, it may be more sensible to introduce an entirely revised form of business rescue into South Africa, a system that can be devised specifically with the South African economy and labour dispensation<sup>133</sup> in mind.

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management must be retained as the only viable alternative, together with s 311 compromises in terms of the Companies Act. One of the main purposes of including the judicial management provisions in a unified Insolvency Act, is to reserve a place for a new business rescue regime in such a unified statute. Once a new business rescue regime has been formulated and accepted, it can be imported into the unified Insolvency Act and the judicial management provisions can be repealed.

<sup>130</sup> Harmer 149 is of the opinion that judicial management (or official management as it was known in Australia) does not work because it is used in a conservative creditor-friendly environment, and secondly because it requires the company's debts to be paid in full.

<sup>131</sup> Kloppers "Judicial Management Reform" 378-379 actually makes proposals for the amendment of judicial management.

<sup>132</sup> See Cilliers *ea Corporate Law* par 26.03 480 who state that the disadvantage of judicial management is that it affects the creditworthiness of the company, even if the order is later set aside. This negative connotation is not something that can be remedied by legislative amendments, but requires a change of attitude by all the stakeholders, a view shared by Kloppers "Judicial Management Reform" 377-378.

<sup>133</sup> The impact of labour law on insolvency law cannot be underestimated. It is submitted that in light of s 197 of the Labour Relations Act 66 of 1995 (which makes provision of the employment contracts of employees to be taken over by the purchaser of a business, whether such business has been taken over as a going concern or sold piecemeal), and decisions such as *National Union of Leather Workers v Barnard and Perry* 2001 4 SA 1261 (LAC) , any new business rescue regime will have to be developed in conjunction and co-operation with the labour sector of the South African economy. For a discussion of the *National Union of Leather Workers* case, see ch 5 above and ch 11 below.

Consequently, judicial management has been included in the unified Insolvency Act, reflected in Annexure E to this thesis, in the form of Chapter 24, clauses 121 to 135. In addition to including these provisions in a unified Insolvency Act, it is submitted that two of the problems enumerated above regarding judicial management, can in fact be addressed even at this early stage. The two amendments relate to the strict test of “reasonable probability” and the entities to whom judicial management applies. Consequently, it is proposed that clause 121(1) - currently section 427(1) of the Companies Act - should be drafted to read as follows:

**“121. Circumstances in which certain debtors may be placed under judicial management.** - (1) When a company debtor, close corporation debtor, trust debtor or association debtor by reason of mismanagement or for any other cause-

- (a) is unable to pay its debts or is probably unable to meet its obligations; and
- (b) has not become or is prevented from becoming a successful concern, and there is a reasonable possibility that, if it is placed under judicial management, it will be enabled to pay its debts or to meet its obligations and become a successful concern, the Court may, if it appears just and equitable, grant a judicial management order in respect of that debtor.”

In terms of this revised clause judicial management will no longer only apply to companies, but also to close corporations, trusts and other associations that can be resurrected by the use of the relevant provisions. In paragraph (b) the current requirement of “reasonable probability” has been replaced by “reasonable possibility”. It is submitted that these two minor changes will go a long way towards making judicial management a more attractive option for distressed businesses, and may even contribute towards removing the conservative approach taken by the courts up to now. However, these minor changes will not be sufficient to rectify the many problems associated with judicial management, and there is an urgent need for a complete overhaul of South African business rescue mechanisms.

### 4 3 Compromises in terms of section 311 of the Companies Act<sup>134</sup>

#### 4 3 1 Introduction

A variety of circumstances may make it desirable for a company to reorganise its capital structure by, for example, reducing or increasing it according to its needs.<sup>135</sup> It is in meeting these needs that one speaks of the “reorganisation” of a company. According to Cilliers *et al*<sup>136</sup> the procedures that are provided for within the framework of the Companies Act in order to effect a reorganisation “range from resolutions for alteration of share capital, including increases, reductions and other changes of capital, and for variation of shareholder rights, to arrangements and compromises”.

Since the purpose of this study is to propose a unified Insolvency Act that also contains mechanisms for the implementation of a successful business rescue plan, this part of the chapter will concentrate on compromises and arrangements in terms of section 311 of the Companies Act as a business rescue mechanism.

#### 4 3 2 Proposals regarding compromises

It is submitted that the current provisions of section 311 of the Companies Act, in so far as they relate to a compromise between a company and its creditors, should be included as a separate provision under a unified Insolvency Act. The existing provisions of section 311 relating to an arrangement between a company and its members can then be retained in the Companies Act. This proposal would not appear to cause a great deal of confusion or difficulty, and even the large

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<sup>134</sup> See generally Cilliers *ea Corporate Law* ch 25; Henochsberg 601-637.

<sup>135</sup> Cilliers *ea Corporate Law* 449.

<sup>136</sup> Cilliers *ea Corporate Law* 449.

body of case law regarding section 311 compromises and arrangements would not appear to be affected thereby as there is a clear distinction between a compromise and an arrangement.<sup>137</sup>

Considering that section 66 of the Close Corporations Act currently specifically excludes the possibility of section 311 compromises applying to close corporations,<sup>138</sup> the question that needs to be asked is whether or not this limitation is justified. In fact, the question can be asked as to whether there ought to be a limitation on its use in regard to any form of business enterprise. The mere fact that a close corporation, for example, has been incorporated under the provisions of the more informal provisions of the Close Corporations Act, does not necessarily mean that the business that is operated is not a complex or large undertaking. Conversely, just because a small private company has been incorporated under the more complex provisions of the Companies Act, does not mean that the undertaking is a large or complex one. In reality the question that needs to be asked is whether the provisions of section 311 of the Companies Act need to be reserved for use by companies only. Should other forms of business enterprise such as the close corporation, partnership, business trust and other associations of persons not also be in a position to use the mechanisms provided for by section 311 of the Companies Act?

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<sup>137</sup> It is submitted that it would perhaps have been preferable to omit s 311 compromises from a unified Insolvency Act altogether, since there are other statutory forms of composition (see par 2 above) that could be utilised instead. In practice s 311 compromises are mainly used in order to obtain an assessed loss under s 20(1)(a)(i) of the Income Tax Act 58 of 1962, or where members of a company wish to retain ownership of the business, so the scope of application of these “rescue provisions” is very limited. However, considering the large volume of case law on the subject, and the fact that they are indeed used in practice, it has been decided to retain the provisions under a unified Insolvency Act. Although the mechanics and procedures of s 311 compromises will not be discussed here, see *Ex parte Kaplan: In re Robin Consolidated Industries Ltd* 1987 3 SA 413 (W) where these procedures are conveniently set out by the court.

<sup>138</sup> Due to the uncertainty that prevailed in this regard (see De la Rey “Beslote Korporasies. Probleme in verband met Likwidasië en Akkoord” 1990 3 *Tran CBL* 107; Henning “Akkoord, Skikking en Reëling en die Beslote Korporasie in Likwidasië” 1987 2 *JJS* 218; Henning and Bonnet “Likwidasië van Beslote Korporasies en Reëlinskemas ingevolge Artikels 311 en 389 van die Maatskappywet” 1991 *THRHR* 274; Henning “Judicial Management and Corporate Rescues in South Africa” 1992 1 *JJS* 90), the Close Corporations Act was amended in 1997 to exclude the possibility of s 311 compromises and arrangements applying also to close corporations - see Cilliers *ea Corporate Law* 681. See also Fourie ‘n *Kritiese Evalueer van Enkele Probleme Rondom die Likwidasië van Beslote Korporasies* (unpublished LLM dissertation, University of Pretoria, 1991) 48-61.

In addition to this, the question that has already been asked, and addressed, in par 2 above, is why pre- and post-liquidation compositions cannot be utilised by companies as well. It is quite conceivable that a small private company may want to make use of the relatively simple and informal procedures relating to compositions. On the other hand, it is also conceivable that a close corporation with a large and complex business may wish to make use of the more complex and expensive procedure set out in section 311 of the Companies Act. Consequently it is proposed that:

- (a) The provisions dealing with compromises in section 311 of the Companies Act be removed from that Act and inserted into a unified Insolvency Act;
- (b) The provisions relating to an arrangement between a company and its members be retained in the Companies Act;
- (c) The provisions dealing with compromises in a unified Insolvency Act be made applicable to all debtors.

To this end the provisions of sections 311, 312 and 313 have been reproduced and inserted into the unified Insolvency Act that appears in Annexure E to this thesis. These provisions have been included under clauses 120, 120A and 120B of the unified Insolvency Act, and read as follows:

**“120. Compromise between a debtor and its creditors.** - (1) Where any compromise is proposed between a debtor, as defined in sub-section (8), and its creditors or any class of them, the court may, on the application of the debtor or any creditor or member of the debtor or, in the case of a debtor being liquidated, of the liquidator, or if the debtor is subject to a judicial management, of the judicial manager, order a meeting of the creditors or class of creditors, to be summoned in such manner as the court may direct.

(2) If the compromise is agreed to by a majority in number representing three-fourths in value of the creditors or class of creditors present and voting either in person or by proxy at the meeting, such compromise shall, if sanctioned by the court, be binding on all the creditors or the class of creditors, and also on the debtor or on the liquidator if the debtor is being liquidated or on the judicial manager if the debtor is subject to a judicial management order.

(3) No such compromise shall effect the liability of any person who is a surety for the debtor.

(4) If the compromise is in respect of a debtor being liquidated and provides for the discharge of the liquidation order or for the dissolution, where applicable, of the debtor without liquidation, the liquidator of the debtor shall lodge with the Master a report in terms of section 42<sup>139</sup> and a report as to whether or not any person who forms part of the management of the debtor is or appears to be personally liable for damages or compensation to the debtor or for any debts or liabilities of the debtor under any provision of this Act, and the Master shall report thereon to the Court.

(5) The Court, in determining whether the compromise should be sanctioned or not, shall have regard to the number of creditors or creditors of a class present or represented at the meeting referred to in subsection (2) voting in favour of the compromise and to the report of the Master referred to in subsection (4).

(6) (a) An order by the Court sanctioning a compromise shall have no effect until a certified copy thereof has been lodged with the Registrar under cover of the prescribed form and registered by him.

(b) A copy of such order of court shall be annexed to every copy of the memorandum or similar document, if applicable, of the debtor issued after the date of the order.

(7) If a debtor fails to comply with the provisions of subsection (6)(b), the debtor and every person who forms part of the management of such debtor who is a party to the failure, shall be guilty of an offence.

(8) For the purposes of this section, a “debtor” means an association of persons that has been accorded legal personality in terms of the common law or in terms of a statutory provision.

**120A. Information as to compromises.** - (1) Where a meeting of creditors or any class of creditors or of members or any class of members is summoned under section 120 for the purpose of agreeing to a compromise, there shall -

(a) with every notice summoning the meeting which is sent to a creditor or member, be sent also a statement -

- (i) explaining the effect of and alternatives to the compromise; and
- (ii) in particular stating any material interests of the management of the debtor, whether as directors or as members or as creditors of the debtor or otherwise, and the effect thereon of the compromise, in so far as it is different from the effect on the like interests of other persons; and

<sup>139</sup>

This report is currently lodged with the Master in terms of s 400(2) of the Companies Act. Since a unified Insolvency Act makes provision for all debtors to be liquidated under the same Act, this report is now provided for in cl 42 of the unified Act (see ann E).



- (b) in every notice summoning the meeting which is given by advertisement, be included either such a statement as aforesaid or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement.
- (2) Where the compromise affects the rights of debenture-holders of a company, the said statement shall give the like explanation and statement as respects the trustee of any deed for securing the issue of the debentures as it is required to give as respects the company's directors.
- (3) Where a notice given by advertisement includes a notification that copies of the said statement can be obtained by creditors or members entitled to attend the meeting, every such creditor or member shall, on making application in the manner indicated by the notice, be furnished by the debtor free of charge with a copy of the statement.
- (4) Where a debtor makes default in complying with any requirement of this section, the debtor and every person who is part of the management of the debtor who is a party to the default, shall be guilty of an offence, and for the purpose of this subsection any liquidator of the debtor and any trustee of a deed for securing the issue of debentures of a company shall be deemed to be an officer of the debtor: Provided that a person shall not be liable under this subsection if he shows that the default was due to the refusal of any other person, being a director or trustee for debenture-holders, to supply the necessary particulars as to his interests and that fact has been stated in the statement.
- (5) It shall be the duty of every person who forms part of the management of a debtor and of every trustee for debenture-holders, where applicable, to give notice to the debtor of such matters relating to himself as may be necessary for the purposes of this section, and if he makes default in complying with such duty, he shall be guilty of an offence.

**120B. Provisions facilitating reconstruction or amalgamation.** (1) If an application is made to the Court under this section for the sanctioning of a compromise proposed between a company and any such persons as are referred to in this section, and it is shown to the Court that the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as the "transferor company") is to be transferred to another company (in this section referred to as the "transferee company") the Court may, either by the order sanctioning the compromise or by any subsequent order, make provision for all or any of the following matters:

- (a) The transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;
- (b) the allotment or appropriation by the transferee company of any shares, debentures or other like interests in that company which under the compromise are to be allotted or appropriated by that company to or for any person;
- (c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;
- (d) the dissolution, without liquidation, of any transferor company;
- (e) the provision to be made for any persons who, within such time and in such manner as the Court may direct, dissent from the compromise;
- (f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out:

Provided that no order for the dissolution, without liquidation, of any transferor company shall be made under this subsection prior to the transfer in due form of all the property and liabilities of the said company.

(2) Where an order under this section provides for the transfer of property or liabilities, that property shall by virtue of the order vest in, subject to transfer in due form, and those liabilities shall become the liabilities of, the transferee company.

(3) If an order is made under this section, every company in relation to which the order is made shall, within thirty days after the making of the order, cause a copy thereof to be lodged with the Registrar, under cover of the prescribed form, for registration, and if default is made in complying with this subsection, the company shall be guilty of an offence.

(4) In this section the expression "property" includes property, rights and powers of every description, and the expression "liabilities" includes duties.

(5) The expression "company" in this section does not include any company other than a company within the meaning of the Companies Act 61 of 1973."

The effect of these provisions, and the provisions of pre- and post-liquidation compositions that have been discussed in paragraph 2 above, is that a debtor now has a number of alternatives when considering the best manner in which to attempt a settlement of some kind with his, her or its creditors. Depending on what the person invoking the provisions wishes to achieve, a compromise or pre- or post-liquidation composition can be entered into with the creditors of the estate in question.

## 5 PERSONAL LIABILITY OF DIRECTORS OF COMPANIES AND MEMBERS OF CLOSE CORPORATIONS<sup>140</sup>

### 5 1 Introduction

While the use of a company or close corporation as a vehicle for conducting business has its attraction in the form of limited liability, this attractiveness is offset to an extent by the balance that the law attempts to strike between encouraging business operations and providing protection to creditors.<sup>141</sup> The attractiveness of the use of a company or close corporation for business operations lies in the fact that the company or corporation is a separate legal entity, with its own assets, liabilities, rights and duties. It acquires legal personality upon its incorporation and exists apart from its members.<sup>142</sup> Should the business fail, the individual estates of the members will not be affected thereby; the company or corporation will be liquidated and the losses incurred will be incurred by the company or corporation only.<sup>143</sup> While the principle of limited liability is necessary to encourage the spirit of entrepreneurship in business ventures, the other side of the coin is that

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<sup>140</sup> The discussion of the personal liability of directors in terms of company law is largely based on a paper by Lombard entitled "Directors' Liability from a South African Perspective" presented at the Academics' Meeting of the INSOL Sixth World Congress held in London on 17 and 18 July 2001 (hereinafter referred to as Lombard). Generally, see also De Koker *Die Roekelose en Bedrieglike Dryf van Besigheid in die Suid-Afrikaanse Maatskappyereg* (LLD thesis 1996 UOFS) (hereinafter referred to as De Koker Thesis); Cilliers *ea Corporate Law* 160-163; Henochsberg 911-920. See also Luiz and Van der Linde "Trading in Insolvent Circumstances - Its Relevance to Sections 311 and 424 of the Companies Act" 1993 *SA Merc LJ* 230.

<sup>141</sup> Lombard 1.

<sup>142</sup> This principle became entrenched in our law via the important English case of *Salomon v Salomon & Co Ltd* [1897] AC 22. That this principle has become entrenched in our law is evident from *Dadoo v Krugersdorp Municipal Council* 1920 AD 530; *Gumede v Bandhla Vukani Bakithi Ltd* 1950 4 SA 560 (N); *Lategan v Boyes* 1980 4 SA 191 (T) and *J Louw & Co (Pty) Ltd v Richter* 1987 2 SA 237 (N).

<sup>143</sup> Of course the members of the company may also suffer loss in that the contributions they have made towards the business may be lost, but their personal estates will, eg. not be sequestrated because of the failure of the company or corporation (however, if the members have bound themselves as surety for the debts of the company or corporation, they may suffer further losses).

the principle of protecting creditors has also become entrenched in our law.<sup>144</sup> One of the provisions that was introduced into company law, and which is aimed at the protection of creditors, is the principle that the persons who conduct the business must do so in an honest and responsible manner, and not fraudulently or recklessly. This principle is entrenched in company law in the form of section 424 of the Companies Act. Similar principles have been designed to protect creditors who have dealings with close corporations.<sup>145</sup>

Ultimately this portion of the study is intended to determine whether a modified version of section 424 of the Companies Act should be included under a unified Insolvency Act, and also whether or not a provision relating to insolvent trading should be introduced.<sup>146</sup> In regard to close corporations the question is whether or not the current provisions contained in the Close Corporations Act should be included in a unified Insolvency Act, or whether they should remain where they are.

Another aspect that will affect the personal liability of directors and others, and which is not dealt with in detail here, is the possibility of making use of other remedies in order to bring delinquent businesspeople to book, the first traces of which have already made their presence felt. For example, in *McLelland v Hulett*<sup>147</sup> it was held that the shareholders may sue the directors, after

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<sup>144</sup> See Lombard 1 for some examples of the protection that is afforded to creditors who conduct business with companies.

<sup>145</sup> See eg ss 63, 64 and 65 of the Close Corporations Act.

<sup>146</sup> In the *King Report on Corporate Governance for South Africa 2002* (King Committee on Corporate Governance, Main Report, March 2002) (hereinafter referred to as the King Report) s 424 of the Companies Act is cited in ch 2 par 2 143-144 as one of the examples of provisions contained in the Companies Act that seeks to hold directors accountable. However, with reference to the Nel Commission 127-131 (*The First Report of the Commission of Inquiry into the Affairs of the Masterbond Group and Investor Protection in South Africa*) it is stated that “[u]nfortunately, [section 424] has been criticised for being both difficult and expensive to implement”. In par 6 of the Executive Summary of the King Report it is stated that s 424 “is a very effective sanction for the punishment of delinquent directors and officers”, but that “[c]onsideration should be given to the means by which section 424 can be more effectively implemented”.

<sup>147</sup> 1992 1 SA 456 (D).

the dissolution of the company, for an omission that caused them pure economic loss.<sup>148</sup> The question as to whether the directors may be held personally liable in consequence of a class action by those that have suffered a loss, is a question that is about to become more pertinent in South African law. The King Report refers to this possibility as one which will make litigation against delinquent directors a financially viable one for litigants, and recommends that rules should be introduced to regulate this new form of civil litigation in South Africa.<sup>149</sup> The Constitution of the Republic of South Africa<sup>150</sup> makes provision for class actions,<sup>151</sup> although it would appear that at this time no rules have been formulated that regulate them.<sup>152</sup> The lack of properly formulated rules has not prevented class actions from being brought, however, as is evident from the decision in *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape*.<sup>153</sup> In this decision the High Court allowed a class action to be instituted by a group of persons relating to the payment of pensions. Although the decision was appealed against, the Supreme Court of Appeal<sup>154</sup> confirmed the decision of the court *a quo*, allowing the class action to continue. It is quite conceivable that creditors may in future consider a class action against the directors and other officers of a company as a viable alternative to, or a remedy in addition to, liquidation.

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<sup>148</sup> This decision was brought as a delictual action, and the decision was one based on policy considerations - see Cilliers *ea Corporate Law* 163 par 10.64.

<sup>149</sup> King Report (Main Report) 145-146 par 5.

<sup>150</sup> Act 108 of 1996 (hereinafter referred to as the Constitution).

<sup>151</sup> See eg ss 38(c), 39(1)(a) and 39(2) of the Constitution.

<sup>152</sup> In this regard see the recommendations in the King Report (Main Report) 146 par 5.4.

<sup>153</sup> 2001 2 SA 609 (E).

<sup>154</sup> In *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 4 SA 1184 (SCA). *Inter alia* the decision was appealed against on the grounds of jurisdiction. The appellants contended that due to the fact that members of the class action fell outside the jurisdiction of the High Court in the Eastern Cape, the class action had to fail. The Supreme Court of Appeal rejected this contention and confirmed the decision of the court *a quo*.

## 5 2 Proposals for personal liability under a unified Insolvency Act

Although it is not the purpose of this chapter to discuss personal liability in any detail, it is necessary to arrive at some or other conclusion regarding the placement of the provisions relating to personal liability in so far as it plays a role in the liquidation of companies and close corporations in a unified Insolvency Act. For this reason the proposed clauses that deal with personal liability and which, it is submitted, should be inserted into a unified insolvency statute, are reflected below. Each insertion is accompanied by a brief explanation.

### 5 2 1 *Fraudulent trading and insolvent trading provisions*

At a symposium on corporate insolvency law reform held on 23 October 1998, De Koker<sup>155</sup> made various proposals in regard to the reform that should take place regarding personal liability. In sum his proposals amount to the following:

- (a) The retention of a criminal fraudulent trading provision in the Companies Act,<sup>156</sup> without reference to personal liability for fraudulent trading, which he feels should be included in the unified Insolvency Act;
- (b) The excision of reckless trading from the personal liability provisions. Instead of the reckless trading provision, De Koker would rather see the introduction of a new provision that provides for personal liability in respect of insolvent trading.

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<sup>155</sup> De Koker "Personal Liability and Disqualification - Sanctioning Insolvent Trading by Companies" 2 (hereinafter referred to as De Koker "Personal Liability and Disqualification"). This unpublished paper was delivered at a symposium on corporate insolvency law reform held in Pretoria on 23 Oct 1998. De Koker points out in his paper that the amplification of the fraudulent trading provision was introduced as a result of a proposal made by the Jenkins Commission (*Report of the Company Law Committee* (Cmnd 1749 of 1962)), a proposal that was never introduced in England.

<sup>156</sup> This is also the position in England where s 458 of the Companies Act 1985 embodies a provision of general application which is not confined to situations where the company concerned is in liquidation.. See also Fletcher 657.

In regard to an insolvent trading provision, De Koker states that “[i]nternationally it is a generally accepted principle that directors should have the permission of the creditors or of the court if they want to allow their company to continue incurring debts when the company is commercially insolvent and there is no reasonable prospect of the debts being repaid”. In addition to giving a helpful rendition of insolvent trading provisions internationally, De Koker included proposals for new provisions relating to personal liability in his paper. To a large extent the proposals included here are based on the proposals made by De Koker.

Consequently it is proposed that the following two clauses should be included under a unified Insolvency Act (clause 114 deals with the fraudulent or reckless conduct of a business and clause 115 is the insolvent trading provision proposed by De Koker):

**“114. Liability for fraudulent or reckless conduct of business.** (1) When a debtor<sup>157</sup> is liquidated in terms of the provisions of this Act, or is placed under judicial management in terms of Chapter 24 of this Act, and it appears that any business of the debtor was or is being carried on recklessly or with intent to defraud creditors of the debtor or creditors of any other person or for any fraudulent purpose, the court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the debtor, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be responsible, without any limitation of liability, for all or any of the debts or other liabilities of the debtor as the court may direct.

(2) The provisions of this section shall have effect notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is made.

**115. Insolvent trading.** (1) If a debtor is liquidated in terms of the provisions of this Act, or is placed under judicial management in terms of the provisions of Chapter 24 of this Act, the court may, upon application, declare that any person responsible for the management of the debtor who caused or allowed the debtor to incur a debt at a time when he or she knew or had reasonable grounds to suspect that the debtor would not be able to pay such debt as well as its other debts as they fell due, shall be liable to pay such amount as awarded under this section.

(a) For the purposes of this section the facts which a person referred to in subsection (1) ought to know or ascertain, the conclusions which he or she ought to reach and the steps which he or she ought to take

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<sup>157</sup> “Debtor” will include, eg, a close corporation. The reckless and fraudulent trading provision contained in s 64 of the Close Corporations Act closely resembles s 424 of the Companies Act, and for this reason there should be no problem making the provision applicable also to close corporations. See eg Cilliers *ea Corporate Law* 641; De Koker Thesis 152-264; *TJ Jonck BK t/a Bothaville Vleismark v Du Plessis* 1998 1 SA 971 (O).

are those which would be known or ascertained or reached or taken by a reasonable diligent person having both-

- (i) the general knowledge, skill and experience that may reasonably be expected of a person carrying out similar functions as are entrusted to and carried out by that person in relation to the debtor; and
- (ii) the general knowledge, skill and experience that such person has.

(b) Proof that-

- (i) the liabilities (including prospective and contingent liabilities) of the debtor exceeded its assets, fairly valued, when the debt was incurred; or
- (ii) that the particular person committed an offence in respect of the accounting records of the debtor in respect of the period during which the debt was incurred; or
- (iii) that the particular person failed to take all reasonable steps to ensure that the accounting records in respect of the period during which the debt was incurred are surrendered or transferred to the liquidator,

shall be prima facie evidence that the particular person, at the time the debt was incurred, had reasonable grounds to believe that the debtor would not be able to pay its debts as they fell due.

(2) Without prejudice to the defences which may be raised against an application under this section, a person, if he or she establishes one or more of the following defences, will not be held liable in terms of subsection (1) where, at the time the debt was incurred-

- (a) he or she had no knowledge of the transaction and could not reasonably be expected to have had knowledge of such a transaction; or
- (b) he or she believed that the debtor would be able to repay the debt because a competent and reliable person was responsible for monitoring the solvency of the debtor and for reporting to him or her and was fulfilling that responsibility satisfactorily; or
- (c) he or she did not take part in the management of the debtor on account of illness or for some other good reason; or
- (d) he or she took all reasonable steps to prevent the debtor from incurring such debt; or
- (e) he or she took all reasonable steps to ensure that the creditor is informed that the debtor had reasonable grounds to believe that it would not be able to repay that debt when it fell due.

(3) The court shall determine the amount payable with reference to the loss that was or will be suffered by the creditors on account of the insolvent trading and-

- (a) the amount so determined will be payable to the applicant or applicants for distribution among the creditors represented in the



application, or for distribution in such a way as the court may be requested to order, and the court may make any such order as it deems just and equitable in the circumstances;

- (b) in determining the amount and its fair distribution among the creditors, the court shall have regard to the extent to which a particular creditor negligently or intentionally contributed to his or own loss.

(4) The provisions of this section shall apply notwithstanding that the person or persons concerned may be criminally liable in respect of the matters on which the declaration by the court is based.”

### 5 2 2 *Personal liability provisions relating to close corporations only*

The liability of members and other persons for the debts of a close corporation are contained in various provisions of the Close Corporations Act. Some of these provisions, such as section 63, make the members liable for certain specific contraventions of the provisions of the Close Corporations Act, and will not be discussed here.<sup>158</sup>

Section 64 of the Close Corporations Act provides for the personal liability of the members in cases where there has been reckless or fraudulent trading. The provision is very similar to the personal liability of directors under section 424 of the Companies Act,<sup>159</sup> although section 64 of the Close Corporations Act provides for liability in the case of grossly negligent trading and not recklessness as in the case of section 424 of the Companies Act. Cilliers *et al*<sup>160</sup> correctly point out that the difference is not material, as the Supreme Court of Appeal<sup>161</sup> has already held that “recklessness” under section 424 amounts to gross negligence. Because the provisions of section 64 of the Close Corporations Act and section 424 of the Companies Act are so similar, it is submitted that separate provisions for reckless and fraudulent trading are not required for close

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<sup>158</sup> Although not dealt with here, it is worth mentioning that a contravention of these provisions also results in civil liability. In such a case the members are held jointly and severally liable with the corporation for specified debts - see Cilliers *ea Corporate Law* 638-641.

<sup>159</sup> Cilliers *ea Corporate Law* 641.

<sup>160</sup> Cilliers *ea Corporate Law* 641.

<sup>161</sup> In *Philotex (Pty) Ltd v Snyman; Braitex (Pty) Ltd v Snyman* 1998 2 SA 138 (SCA) at 143C-F.

corporations under a unified Insolvency Act.<sup>162</sup> Consequently it has already been proposed that clause 114 of the proposed unified Insolvency Act should also be made applicable to close corporations.<sup>163</sup>

In addition to the provisions relating to personal liability by members as set out above, the Close Corporations Act also provides for repayments that may need to be made by the members of a close corporation within a specific period before liquidation.<sup>164</sup> These provisions are contained in sections 70 and 71 of the Close Corporations Act, and it is submitted that these two sections should be included in a unified Insolvency Act. This can be justified by the fact that the provisions are already contained in the winding-up provisions of the Close Corporations Act.

Consequently the following proposals are made regarding the personal liability of members of close corporations:

- (a) In regard to reckless and fraudulent trading, it is proposed that clause 114 will also apply to close corporations.<sup>165</sup>
- (b) As regards the personal liability of members currently regulated in terms of section 63 of the Close Corporations Act, it is proposed that these provisions remain in the Close Corporations Act.

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<sup>162</sup> Cilliers *ea Corporate Law* 641 state: “[Section 424 of the Companies Act and section 64 of the Close Corporations Act] have the same ambit. Consequently the case law in respect of section 424 is instructive and can serve as authority in respect of the analysis of section 64.” See also De Koker Thesis 152-264 and *TJ Jonck BK t/a Bothaville Vleismark v Du Plessis* 1998 1 SA 971 (O).

<sup>163</sup> See par 5.2.1 above.

<sup>164</sup> See Cilliers *ea Corporate Law* 679-681.

<sup>165</sup> See par 5.2.1 above.

- (c) As regards the provisions relating to repayments by members in specified circumstances, currently regulated by sections 70 and 71 of the Close Corporations Act, it is proposed that these provisions should be included under a unified Insolvency Act as clauses 116 and 117. For the sake of completeness the relevant clauses are reflected below:

**“116. Repayments by members of close corporations.** (1) Where a close corporation debtor is being liquidated in terms of this Act, any payment made to a member by reason only of his membership within a period of two years before the commencement of the liquidation of the corporation, shall be repaid to the corporation by the member, unless such member can prove that

- (a) after such payment was made, the corporation’s assets, fairly valued, exceeded all its liabilities; and
- (b) such payment was made while the corporation was able to pay its debts as they became due in the ordinary course of its business; and
- (c) such payment, in the particular circumstances, did not in fact render the corporation unable to pay its debts as they became due in the ordinary course of business.

(2) A person who has ceased to be a member of the corporation concerned within the said period of two years, shall also be liable for any repayment provided for in subsection (1) if, and to the extent that, repayments by present members, together with all other available assets, are insufficient for paying all the debts of the corporation.

(3) A certificate given by the Master as to the amount payable by any member or former member in terms of subsection (1) or (2) to the corporation, may be forwarded by the liquidator to the clerk of the magistrate’s court in whose area of jurisdiction the registered office of the corporation is situated, who shall record it, and thereupon such notice shall have the effect of a civil judgment of that magistrate’s court against the member or former member concerned.

(4) The court in question may, on application by a member or former member referred to in subsection (2), make any order that it deems fit in regard to any certificate referred to in subsection (3).

**117. Repayment of salary or remuneration by members of a close corporation debtor.**

(1) If a close corporation debtor is being liquidated in terms of this Act, and-

- (a) any direct or indirect payment of a salary or other remuneration was made by the corporation within a period of two years before the commencement of its liquidation to a member in his capacity as an officer or employee of the corporation; and
- (b) such payment was, in the opinion of the Master, not *bona fide* or reasonable in the circumstances,

the Master shall direct that such payment, or such part thereof as he may determine, may be repaid by such member to the corporation.

(2) A person who has within a period of two years referred to in subsection (1)(a) ceased to be a member of a corporation referred to in that subsection may, under the circumstances referred to therein, be directed by the Master to make a repayment provided for in subsection (1), if, and to the extent that, any such repayments by present members are, together with all other available assets, insufficient for paying all the debts of the corporation.

(3) The provisions of subsections (3) and (4) of section 116 shall *mutatis mutandis* apply in respect of any repayment to a corporation in terms of subsection (1) or (2).”

### 5 3 Conclusion

While it is necessary to promote entrepreneurship in the South African economy, at the same time investors and creditors must be sufficiently and efficiently protected from delinquent directors and other officers of companies and close corporations. It is submitted that while most of the existing provisions regulating personal liability have been retained in the proposals under a unified Insolvency Act, they have been supplemented by a proper provision regulating insolvent trading. This provision should go a long way towards not only bringing delinquent directors and others to book, but also clearly demarcating the parameters within which such businesspeople may conduct their corporate affairs.

## 6 CROSS-BORDER INSOLVENCIES

Despite the promulgation<sup>166</sup> of the Cross-Border Insolvency Act<sup>167</sup> in South Africa, cross-border insolvencies are currently still dealt with in terms of South African private international law.<sup>168</sup> The

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<sup>166</sup> Although promulgated by Parliament, the Act has not yet come into operation.

<sup>167</sup> Act 42 of 2000 (hereinafter referred to as the Cross-Border Insolvency Act). For a detailed discussion of this new Act and the possible problems that may be encountered as a result of its promulgation, see Smith and Boraine “Crossing Borders Into South African Insolvency Law: From the Roman-Dutch Jurists to the Uncitral Model Law” 2002 10 *ABI Law Review* 135 (hereinafter referred to as Smith and Boraine).

<sup>168</sup> See eg: *Viljoen v Venter* 1981 2 SA 152 (W) dealing with South African legislation and its extra-territorial operation (cf *Ex parte Steyn* 1979 2 SA 309 (O)); *Ex parte Palmer: In re Hahn* 1993 3 SA 359 (C) dealing with the “domicile” of corporations; *Deutsche Bank AG v Moser* 1999 4 SA 216 (C) dealing

Cross-Border Insolvency Act is based almost entirely<sup>169</sup> upon the UNCITRAL Model Law drafted by the United Nations Commission on International Trade Law, and South Africa is one of the first countries in the world that has elected to adopt the model law.

Considering the fact that cross-border insolvencies will for the first time be regulated by legislation, the obvious question that needs to be posed in the context of this study, is where such legislation should be incorporated. The Cross-Border Insolvency Act has been promulgated as an independent Act, and has not been incorporated, for example, into the Insolvency Act. However, it is submitted that it would make sense for cross-border issues to be incorporated into a unified insolvency statute should such a statute eventually be promulgated. There are various reasons for this:

- (a) According to Smith and Boraine<sup>170</sup> a foreign representative may use either the cross-border insolvency rules, or make use of domestic (South African) insolvency rules, depending on the circumstances and whether or not the country from which the representative comes has been recognised as a designated country for the purposes of the

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with immovable property situated in South Africa; *Bekker v Kotzé* 1996 4 SA 1287 (Nm) dealing with the recognition of foreign judgments; *Ward v Smit: In re Gurr v Zambia Airways Corporation Ltd* 1998 3 SA 175 (SCA) dealing with movable property; *Ex parte Wessels & Venter: In re Pyke-Nott's Insolvent Estate* 1996 2 SA 677 (O) dealing with requests for assistance from overseas courts; *Nahrungsmittel GmbH v Otto* 1991 4 SA 414 (C) and *Re Estate Morris* 1907 TS 657 dealing with jurisdictional matters; *Donaldson v British South African Asphalt and Manufacturing Co Ltd* 1905 TS 753 and *In re Leydsdorp & Pietersburg Estates Ltd (in liquidation)* 1903 TS 254 dealing with the refusal of a winding-up order where an order has already been granted in another jurisdiction; *Herman v Tebb* 1929 CPD 65 and *Chaplin v Gregory* 1950 3 SA 555 (C) dealing with the status of persons in South Africa where they have been sequestered in a foreign jurisdiction; *Ex parte Robinson's Trustee* 1910 TPD 25 dealing with the qualifications of liquidators; *Moolman v Builders & Developers (Pty) Ltd (in provisional liquidation): Jooste Intervening* 1990 1 SA 954 (A) for an example of the type of order that the court may grant when a foreign representative applies for recognition; *Cape of Good Hope Bank (in liquidation) v Mellé* 10 SC (1893) 280 and *Dyer v Carlis* 4 Official Reports (1897) 67 dealing with the effect of rehabilitation; *North American Bank Ltd (in liquidation) v Grant* 1998 3 SA 557 (W) dealing with the discharge of foreign debt after rehabilitation in South Africa.

<sup>169</sup> In addition to the few minor amendments that were made in order to make the statute applicable to South Africa, the Justice and Constitutional Development Portfolio Committee of Parliament decided to introduce the principle of reciprocity into the Cross-Border Insolvency Act.

<sup>170</sup> Smith and Boraine par H.

Cross-Border Insolvency Act. It makes sense for all the legal principles applicable in both cases to be incorporated into one Act. This will avoid confusion for foreign representatives as they will not have to consult a multitude of Acts in order to determine the legal position that may or may not apply.

- (b) The Cross-Border Insolvency Act contains a number of provisions that refer to the South African insolvency statutes. It will be far more convenient if the references were made to sections of the same Act.
- (c) Considering the possible complications that can arise regarding jurisdiction,<sup>171</sup> it would be far more sensible to include the provisions relating to cross-border insolvency in a unified insolvency statute. This will alleviate the problems relating to jurisdiction in that the rules will be incorporated into one Act, and will not require cross-referencing to other pieces of legislation.

For this reason the provisions of the Cross-Border Insolvency Act have been incorporated into the unified Insolvency Act as a separate chapter dealing with cross-border issues. No amendments have been made to the Act, and it has merely been incorporated into the unified Act under Chapter 26, clauses 137 to 169.<sup>172</sup>

## 7 CONCLUSION

As explained above, the purpose of this chapter was not to discuss in any detail the ancillary matters that have been identified under this heading. This chapter was designed to provide a

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<sup>171</sup> Smith and Boraine paras I(8), K(1).

<sup>172</sup> See ann E to this thesis.

holistic approach to the introduction of a unified insolvency statute. Many of the aspects dealt with under this chapter are policy issues that need to be decided by the powers that be, a task that will probably fall in the hands of the Justice and Constitutional Development Portfolio Committee, a committee falling under the auspices of Parliament.

However, the discussion of all these ancillary provisions and the inclusion of most of them in a unified insolvency statute has shown that it is indeed possible to include all insolvency related matters in one Act. To summarise:

- (a) As regards alternatives to liquidation, it is submitted that the provisions relating to administration orders and pre- and post-liquidation compositions should be included in a unified insolvency statute. As far as pre- and post-liquidation compositions are concerned, these have been included in the proposals in this study for a unified Insolvency Act. However, the provisions relating to administration orders have been left out of the unified insolvency statute because they are currently included under the Magistrates' Courts Act.
- (b) As regards insolvent deceased estates it is submitted that the procedures as they currently stand should remain in the Administration of Estates Act. These provisions contain special procedures, and there is no sound motivation for their removal from the current legislation. One of the most compelling reasons for leaving these provisions intact is the cost factor; the section 34 procedure under the Administration of Estates Act is a simple and inexpensive procedure that can be used by an executor. The inclusion of these provisions in a unified insolvency statute may lead to delays in the administration process, especially since it may lead to a liquidator having been appointed. Under the current provisions an executor that has been appointed under the Administration of Estates Act may administer the insolvent deceased estate.

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- (c) As regards business rescue provisions, it is submitted that South Africa needs to introduce a revised system of business rescue that can replace the current system of judicial management. However, in order to reserve a place in the unified Insolvency Act for a new business rescue procedure, and because judicial management is an existing form of business rescue with an accompanying body of case law, the provisions have been retained in the proposed unified insolvency statute. In addition to retaining the provisions relating to judicial management, two minor amendments have been made to the provisions in order to make it more accessible as a business rescue mechanism. The first of these two amendments relates to the burden of proof in order to obtain a judicial management order; instead of requiring proof that there is a “reasonable probability” that the business will be saved if placed under judicial management, the provision has been changed to require a “reasonable possibility”. The second of the proposed amendments relates to whom the provisions may apply. Consequently the provisions will no longer apply only to companies, but have been extended to cover also close corporations and trusts. In addition to judicial management the provisions of section 311 of the Companies Act relating to compromises have been included in the proposed unified Insolvency Act. The provisions that are proposed to be included in the unified insolvency statute relate only to a compromise between a debtor and its creditors, the provisions relating to an arrangement having been removed. These provisions have also been made applicable to all types of debtors that have legal personality.
- (d) As regards personal liability, it has been proposed in this chapter that all the provisions relating to personal liability be consolidated in order that they may apply to other juristic persons as well. In addition, an insolvent trading provision has been included under the proposed unified Insolvency Act. Special provisions relating to the personal liability of members of close corporations have also been included in the proposals for a unified Insolvency Act.



- (e) As far as cross-border insolvencies are concerned, it has been proposed in this chapter that the Cross-Border Insolvency Act 42 of 2000 be inserted as a separate chapter in a unified insolvency statute.

In this way all the ancillary matters that have been discussed in this chapter, with the exclusion of insolvent deceased estates, will be dealt with and included in a the unified Insolvency Act that appears in annexure E to this thesis.



**PART 4D**

**VOLUNTARY LIQUIDATION UNDER A UNIFIED INSOLVENCY ACT**

**CHAPTER 11: VOLUNTARY LIQUIDATION UNDER A UNIFIED INSOLVENCY ACT ..... 377**

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



## CHAPTER 11

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

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#### SUMMARY

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#### 1 INTRODUCTION

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

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

<sup>2</sup> See Cilliers *ea Corporate Law* par 27.02.

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

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

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

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

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<sup>3</sup> Cilliers *ea Corporate Law* par 27.01.

<sup>4</sup> See par 2 below.

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

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

In addressing these questions the historical development<sup>7</sup> of voluntary liquidation will be a valuable assessment tool, as will a comparative study of other jurisdictions.<sup>8</sup> Finally, proposals to improve upon the current situation in South Africa will be made in the form of draft legislative provisions.<sup>9</sup>

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

<sup>7</sup> See par 2 below.

<sup>8</sup> See par 4 below.

<sup>9</sup> See paras 5 and 6 below.

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## 2 HISTORICAL DEVELOPMENT

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

### 2.1 Voluntary winding-up in the Cape Colony

The earliest form of voluntary winding-up in the Cape Colony took place under the supervision of the court. Section II(1) of the Winding-up Act of 1868<sup>12</sup> provided as follows:

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

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

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<sup>10</sup> See ch 4 above.

<sup>11</sup> See ch 4 above.

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

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



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

Voluntary winding-up proper was first introduced into the Cape Colony in the Companies Act of 1892.<sup>14</sup> In this Act, for the first time, a separate chapter (or part) had been included that made provision for winding-up.<sup>15</sup> The company could still be wound up by the court where the company had passed a special resolution to that effect, so the provision as it appeared in the 1868 Act was duplicated here.

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

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

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

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<sup>14</sup> Act 25 of 1892.

<sup>15</sup> See part V of Act 25 of 1892.

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

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

## 2.2 Voluntary winding-up in Natal

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

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

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

### 2 3 Voluntary winding-up in the Transvaal

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

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

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

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

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<sup>17</sup> See ch 3 above.

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

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

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

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

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

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

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

## 2 4 Voluntary winding-up in the Orange Free State

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

## 2 5 Voluntary winding-up under Union legislation

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

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

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

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

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

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

“GENERAL

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

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

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

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

<sup>26</sup> See 258-260 of the commission's supplementary report.

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

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

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

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

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<sup>27</sup> Lansdown Commission Report par 225 37.

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

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

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we find in our law between a members' and a creditors' voluntary winding-up. Apart from the proposal that extraordinary resolutions as provided for by the 1926 Companies Act be scrapped, the Millin Commission's report<sup>30</sup> did not add much to the development of voluntary winding-up under South African law.<sup>31</sup>

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

#### **3 1 Current position in respect of the voluntary winding-up of *solvent* companies and close corporations in South Africa<sup>32</sup>**

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

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

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

<sup>31</sup> Millin Commission Report par 254 99.

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



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

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

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

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

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

<sup>35</sup> Cilliers *ea Corporate Law* par 27.12 and Cilliers *ea Close Corporations Law* par 11.04..

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

<sup>37</sup> Cilliers *ea Corporate Law* par 27.06 and Cilliers *ea Close Corporations Law* par 11.05.

A voluntary winding-up by members is initiated by a resolution passed by the members of the company or corporation.<sup>38</sup> Such a resolution must state whether or not the winding-up is a voluntary winding-up by members or by creditors.<sup>39</sup> In the case of a company, the power of the members to pass such a resolution cannot be excluded by the company's articles.<sup>40</sup> Once the resolution has been passed, it must be lodged with the Registrar of Companies (or Close Corporations) who will then register the resolution in terms of section 200 of the Companies Act.<sup>41</sup> The winding-up only commences after the resolution has been registered by the Registrar in terms of section 200.<sup>42</sup> Within 28 days of the resolution having been registered by the Registrar, the company must lodge a certified copy of the resolution with the Master.<sup>43</sup>

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

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

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

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

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

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

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

<sup>44</sup> S 356(2)(b) of the Companies Act.

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

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

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

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

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

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

<sup>47</sup> S 350(1)(b) of the Companies Act.

<sup>48</sup> S 350(1)(b) of the Companies Act.

<sup>49</sup> S 350(1)(b)(ii) of the Companies Act.

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

Once appointed, the liquidator must give notice of his or her appointment in the *Government Gazette*.<sup>53</sup> The liquidator does not convene meetings of creditors,<sup>54</sup> no claims by creditors are proved against the company,<sup>55</sup> there is no need to submit a report to creditors<sup>56</sup> and no statement of the affairs<sup>57</sup> of the company needs to be completed.<sup>58</sup> Subject to the consent of the members, the liquidator realises the assets of the company or corporation and lodges the account of his administration with the Master in the prescribed form.<sup>59</sup> It is not necessary for the liquidator to

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

<sup>51</sup> See the provisions of s 370 of the Companies Act.

<sup>52</sup> See s 384(1) of the Companies Act.

<sup>53</sup> S 375(5)(b) of the Companies Act.

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

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

<sup>56</sup> S 402 of the Companies Act and s 79 of the Close Corporations Act.

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

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

<sup>59</sup> The prescribed form is CM 101.

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

### 3.2 Current position in respect of the voluntary winding-up of *insolvent* companies and close corporations in South Africa<sup>61</sup>

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

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

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<sup>60</sup> See Cilliers *ea Corporate Law* 498 par 27.16 fn 34.

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

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

<sup>63</sup> Cilliers *ea Corporate Law* 498-499 par 27.19.

required to prove claims,<sup>64</sup> the liquidator must lodge a report<sup>65</sup> and the directors (or in the case of a close corporation the members) must lodge a statement of the affairs of the company (or close corporation) in the prescribed form.<sup>66</sup> Due to the fact that the administration process is so similar to the process in a winding-up by the court, the whole of the administration process will not be discussed here as it is not the administration process as such that is under examination but the process that is used in order to bring about a voluntary winding-up.

One of the unique aspects of this mode of voluntary winding-up is that there is no application to court, and hence no court order placing the company or close corporation in liquidation. It is a much faster and economical method<sup>67</sup> of achieving the same result as an application to court by the company itself.<sup>68</sup> A voluntary winding-up by creditors also commences once the resolution is registered by the Registrar of Companies and Close Corporations in terms of section 200 of the Companies Act.<sup>69</sup> Other differences between a voluntary winding-up by creditors and a winding-

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<sup>64</sup> S 366 of the Companies Act.

<sup>65</sup> S 402 of the Companies Act and s 79 of the Close Corporations Act.

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

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

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

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

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

Another unique aspect of a voluntary winding-up by creditors (as opposed to a winding-up by the court) is that the members remain involved in the administration process. For example, meetings of creditors *and* members are held<sup>72</sup> and the members may appoint their own liquidator.<sup>73</sup> This retained interest by the members in the administration process is one of the aspects that will be examined in the proposals made under paragraph 6 below.

## 4 VOLUNTARY LIQUIDATIONS AND WINDING-UP IN OTHER JURISDICTIONS

### 4.1 Voluntary liquidation in the United States of America

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

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

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

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

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

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

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can basically be used in the same manner by individuals and corporations alike.<sup>75</sup> Chapter 3 of the United States Bankruptcy Code<sup>76</sup> deals with Case Administration, and section 301 of the Code reads as follows:

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

According to the legislative history as set out in the House Report<sup>77</sup> and the Senate Report,<sup>78</sup> voluntary bankruptcy is commenced by merely filing a petition under the particular operative chapter of the Bankruptcy Code in terms of which the debtor wishes to proceed. All petitions are filed with the clerk of the bankruptcy court. Section 342 of the Bankruptcy Code requires notice to be given of an order for relief (in other words where the petition is granted) and Bankruptcy Rule 2002(f) requires the clerk of the bankruptcy court to give notice to various people, including the creditors, the debtor and the United States trustee. From the decision in *Central Mortgage & Trust, Inc v State of Texas (In re Central Mortgage & Trust, Inc)*<sup>79</sup> and the definition of “person”<sup>80</sup> and “entity”<sup>81</sup> in the Bankruptcy Code, it is certain that these provisions apply also to companies, provided the company is eligible to become a debtor.

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

<sup>76</sup> 11 USC.

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

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

<sup>79</sup> 13 CBC2d 617 50 BR 1010 (SD Tex 1985).

<sup>80</sup> 11 USC s 101(41).

<sup>81</sup> 11 USC s 101(15).



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

#### 4 2 Voluntary winding-up in England

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

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<sup>82</sup> See ch 3 and ch 4 above.

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

<sup>84</sup> Fletcher 20; Milman and Durrant 2.

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#### 4 2 1 *Voluntary winding-up in England generally*<sup>85</sup>

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

Only companies that can make a declaration of solvency<sup>88</sup> in terms of section 89 of the Insolvency Act 1986 may make use of a members' voluntary winding up.<sup>89</sup> If a company is unable to provide such a declaration within the specified time frame, the winding-up is a voluntary winding-up by creditors.<sup>90</sup>

#### 4 2 2 *Voluntary winding-up by members*

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

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

<sup>86</sup> Cork Report paras 663-665.

<sup>87</sup> Fletcher 493-494; Milman and Durrant 77.

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

<sup>89</sup> Fletcher 494.

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

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

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

#### 4 2 3 *Voluntary winding-up by creditors in England*<sup>93</sup>

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

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

<sup>92</sup> Fletcher 494; Milman and Durrant 77-78.

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

<sup>94</sup> Fletcher 493.

resolution<sup>95</sup> in terms of section 84 of the Insolvency Act 1986.<sup>96</sup> In terms of section 84 a company may be wound up voluntarily in the following circumstances:

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

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

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

<sup>96</sup> Fletcher 504.

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

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

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

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

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

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

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

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

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<sup>103</sup> Fletcher 505; Milman and Durrant 78.

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

<sup>105</sup> Fletcher 507; Milman and Durrant 79.

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

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

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

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

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

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

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

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

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

<sup>112</sup> Fletcher 510.

<sup>113</sup> Insolvency Rules 1986 r 4.67(4); Fletcher 510.

<sup>114</sup> Insolvency Rules 1986 r 4.101; Fletcher 510.

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

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

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#### 4 2 4 Conclusion

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

#### 4 3 Voluntary winding-up in Australia<sup>118</sup>

The similarities between South African and Australian winding-up law are once again obvious due to the influence that English law has had on both these countries. For this reason the procedures for the winding-up of a company in Australia are nearly identical to those found in South Africa. In the Harmer Report<sup>119</sup> the following description of winding-up was given, a description that could quite easily be made in regard to South African winding-up law:

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<sup>117</sup> Fletcher 493-494.

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

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

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

In Australia the Corporations Act<sup>120</sup> provides for two modes of winding-up, namely voluntary and compulsory winding-up.<sup>121</sup> A voluntary winding-up can take two forms, namely a voluntary winding-up by members and a voluntary winding-up by creditors.<sup>122</sup> As is the case in South Africa, a voluntary winding-up is initiated by the members of the company while a compulsory winding-up, which is also known as a winding-up by the court, can be initiated by a variety of persons.<sup>123</sup>

Despite the two possible modes of winding-up that can both apply to an insolvent company, it is only the procedure that brings about liquidation or winding-up that differs - the actual administration of such estates is practically identical.<sup>124</sup> This is also the case in South Africa.<sup>125</sup> Keye is at pains to point out that there are, however, marked differences in the provisions of the Corporations Act dealing with insolvent and solvent companies,<sup>126</sup> these differences are manifested in the fact that the Corporations Act has separate provisions dealing with winding-up in insolvency<sup>127</sup> and the winding up of a solvent company.<sup>128</sup>

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

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

<sup>122</sup> Keye *Insolvency* 365; McPherson 26.

<sup>123</sup> Keye *Insolvency* 365; McPherson 26.

<sup>124</sup> Keye *Insolvency* 365.

<sup>125</sup> See par 3.2 above.

<sup>126</sup> Keye *Insolvency* 365.

<sup>127</sup> Part 5.4B of the Corporations Act.

<sup>128</sup> Part 5.4A of the Corporations Act.



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

The court is not involved in bringing about the winding-up under this mode of liquidation, although the court may be approached to decide certain issues relating to the liquidation process.<sup>129</sup> In Australia voluntary winding-up is a statutory procedure governed by the Corporations Act<sup>130</sup> that allows the members of a company to pass a resolution placing a company in liquidation. According to Keay this process “reflects a policy endemic to company law that permits the creditors and members in winding-up to deal with what is their own affairs”.<sup>131</sup>

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

#### 4 3 2 *Voluntary winding-up by members in Australia*<sup>134</sup>

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

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<sup>129</sup> Keay *Insolvency* 366.

<sup>130</sup> Ss 490-512 of the Corporations Act.

<sup>131</sup> Keay *Insolvency* 366. See also McPherson 26.

<sup>132</sup> Keay *Insolvency* 367.

<sup>133</sup> Keay *Insolvency* 367.

<sup>134</sup> See generally McPherson 26-31.

<sup>135</sup> See par 3 above.

<sup>136</sup> Keay *Insolvency* 367; McPherson 26-27.

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

#### 4 3 3 *Voluntary winding-up by creditors in Australia*<sup>140</sup>

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

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

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<sup>137</sup> Keay *Insolvency* 367; McPherson 26-27.

<sup>138</sup> See ch 4 above.

<sup>139</sup> See ch 4 above.

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

<sup>141</sup> Keay *Insolvency* 367; McPherson 32-33.

<sup>142</sup> Keay *Insolvency* 367; McPherson 32-33.

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

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

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

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

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

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

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

<sup>147</sup> Keay *Insolvency* 370; McPherson 32-33.

<sup>148</sup> Keay *Insolvency* 370; McPherson 33.

<sup>149</sup> Keay *Insolvency* 373; McPherson 34.

- (a) *Convening the meeting.* The directors of the company must convene a meeting of both the members and the creditors of the company. Members are given 21 days notice of the meeting and creditors are given 7 days notice.<sup>150</sup> The meeting of creditors must be convened on the same day as the meeting of members, or the following day.<sup>151</sup> In addition to the notice of the meeting, the directors must also send the creditors a summary of the affairs of the company and a list of all the names of the creditors together with an estimate of the amount of their claims.<sup>152</sup> There are also certain provisions relating to the placing of notices informing creditors of the meeting.<sup>153</sup>
- (b) *The meeting of members and creditors.* At the meeting of members the resolution to place the company in liquidation will be tabled. The resolution that needs to be passed is a special resolution. The members may pass a resolution appointing a liquidator.<sup>154</sup> According to section 492 of the Corporations Act the liquidation commences at the time the special resolution to wind up the company has been passed.<sup>155</sup> According to Keay<sup>156</sup> the creditors' meeting is held shortly after the members' meeting, and normally at the same place. One of the directors and the company secretary must be appointed to attend the creditors' meeting.<sup>157</sup> The director appointed to attend the creditors' meeting, or one

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

<sup>151</sup> S 497(1) of the Corporations Act; McPherson 33.

<sup>152</sup> S 491(2)(b) of the Corporations Act.

<sup>153</sup> For a brief exposition of these provisions see Keay *Insolvency* 371.

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

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

<sup>156</sup> At 371.

<sup>157</sup> Ss 498(8)(b) and 497(6) of the Corporations Act.

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

- (c) *Procedures following the creditors' meeting.* The directors must lodge a copy of the affairs of the company with the Australian Securities Commission (ASC) within 7 days;<sup>162</sup> a copy of the special resolution must be lodged with the ASC within 7 days of being passed<sup>163</sup> and a notice of the resolution must be published in the *Commonwealth of Australia Gazette* within 21 days of being passed.<sup>164</sup> The chairperson of the creditors' meeting must also lodge with the ASC, within one month of the meeting, a copy of the minutes of the meeting that have been certified as correct.<sup>165</sup> Once these procedures have been followed, the liquidator will commence with the actual administration of the company's affairs.<sup>166</sup>

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<sup>158</sup> S 497(8) of the Corporations Act.

<sup>159</sup> Keay *Insolvency* 372; McPherson 32-33.

<sup>160</sup> S 499(1) of the Corporations Act.

<sup>161</sup> Keay *Insolvency* 372.

<sup>162</sup> Keay *Insolvency* 372.

<sup>163</sup> S 491(2)(a) of the Corporations Act.

<sup>164</sup> S 491(2)(b) of the Corporations Act.

<sup>165</sup> Corporations Regulation 5.6.27(1).

<sup>166</sup> Keay *Insolvency* 372-373.

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

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

#### 4 3 4 Conclusion

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

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

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

<sup>168</sup> Key *Insolvency* 372-373.

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

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#### 4 4 Voluntary liquidation in Germany

As is the case in the United States of America,<sup>170</sup> Germany also has a truly unified system of insolvency law<sup>171</sup> and, as is the case in the United States, the insolvency process is wholly controlled by the courts. For this reason no distinction is made in German insolvency law between voluntary and compulsory winding-up or liquidation. All debtors are liquidated by an order of court and liquidation without the court's intervention is not possible.

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

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

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<sup>170</sup> See par 4.1 above.

<sup>171</sup> For a general discussion of German insolvency laws, see ch 4 above.

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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<sup>177</sup> 1976 1 SA 758 (W) at 763.

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

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

Although there have been some dissenting opinions<sup>178</sup> regarding the separation of the winding-up provisions relating to solvent and insolvent entities in a unified insolvency statute,<sup>179</sup> there has also been a supporting voice calling for the separation of these forms of liquidation into different Acts.<sup>180</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>183</sup> See also the recommendations made by Havenga "Voluntary Liquidations" 109-110.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“‘**liquidation resolution**’ means:

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

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

## 6 2 The most important proposals contained in clause 8

### 6 2 1 *Field of application*

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



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

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

#### *6 2 2 Requirements for validity of the resolution*

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

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

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

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

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

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

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

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

### 6 2 5 *Documents to accompany notice*

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

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

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

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

#### 6 2 6 *Opposing the adoption of the resolution*

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

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

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

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

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

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

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

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

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

#### 6 2 8 *Registration of resolution*

Clause 8(8) provides for the lodgement for registration of the resolution by the relevant authority responsible for the administration of the type of debtor involved. It also provides that if the resolution is not registered within a period of thirty days<sup>190</sup> from the date of the adoption of the resolution, it lapses and becomes void.<sup>191</sup> The only outstanding question on this issue is what the sanction should be if the resolution is not lodged with the relevant authority within the specified period. One option is that such failure could constitute a ground of liquidation for the liquidation of such a debtor.<sup>192</sup>

#### 6 2 9 *Commencement of liquidation*

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

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

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

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

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

*6 2 10 Copy of resolution to Master*

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

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

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

*6 2 12 Copy of resolution to certain officials and notice*

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

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

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

*Leather Workers v Barnard and Perry*,<sup>195</sup> in which it was held, per Davis AJA, that the passing of a resolution by the members of a company for the voluntary winding-up of such company as a voluntary winding-up by creditors, is an “act” by the company that brings about the dismissal of the employees in terms of section 186 of the Labour Relations Act 66 of 1995.<sup>196</sup> In his judgment Davis AJA distinguished between a winding-up by the court and a voluntary winding-up, stating that the two procedures differed in that the court had to decide, in the case where the winding-up is ordered by the court, whether the company should be wound up. He stated that since there is no court involvement in a voluntary winding-up by creditors, it amounts to an act by the company that brings about the demise of the employees service contracts.

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

## 7 CONCLUSION

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

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

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

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

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

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





## **PART 5**

### **CONCLUSION AND RECOMMENDATIONS**

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In this part a conclusion will be drawn from the preceding chapters, in order to determine whether the introduction of a unified insolvency statute is possible, desirable and capable of implementation.



## CHAPTER 12

### CONCLUSION AND RECOMMENDATIONS

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#### SUMMARY

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#### **1 INTRODUCTION**

In chapter 1 it was stated that the objective of this study is to make recommendations regarding a framework within which corporate insolvency law reform can be conducted. It was also stated that, in doing so, a unified Insolvency Act would be proposed as part of the conclusion. From the above study it has become evident that the introduction of a substantially unified Insolvency Act is indeed attainable. In this chapter the most important recommendations resulting from the research conducted in this study will be briefly summarised.

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## 2 HISTORICAL DEVELOPMENT OF INSOLVENCY LAW AND THE LAW RELATING TO WINDING-UP

Although the research in this study is aimed at creating a framework for *corporate* insolvency law reform, it was necessary to trace the historical development of individual insolvency law since it 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 a creature separate from the members who own and manage it, only came into being in South Africa in the late nineteenth century. 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.

The creation of the concept of juristic personality in the form of companies, and later close corporations, resulted in the parallel development of corporate insolvency with that of individual or consumer insolvency. By the time legislation regulating companies and close corporations came into being in South Africa, there was already quite a substantial body of law which regulated the insolvency of individuals. In adapting to these new forms of legal personality, legislation regulating the winding-up of these creatures of statute developed in a piecemeal fashion, mostly in tandem with the developments taking place in regard to individual insolvency law.

The conclusion that has been drawn from this part of the research is that 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 contain very strong elements of English law, although this statute, and the preceding statutes on which it is based, also contain many principles of

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<sup>1</sup> See ch 2 above.

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Roman-Dutch law. 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 today. Corporate insolvency was an unknown concept during the early period of South African insolvency law, as company law itself only started to evolve from the mid-nineteenth century onwards.

In tracing the parallel development of South African winding-up law with that of individual insolvency law, specific attention was given to a historical overview of South African company and winding-up law, which is for the most part based on English law.<sup>2</sup> The conclusion that has been reached is 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 into South Africa. In addition to the historical overview of company and winding-up law in South Africa, research was also conducted into the introduction of the close corporation as a juristic person.

The conclusion that has been reached as a result of this part of the research is that the law regulating the winding-up of companies and close corporations has evolved from humble beginnings, necessitated by the advent of legal personality, to more complex provisions contained in various pieces of modern-day legislation. It has also been concluded that the continuous amendments to the Companies Act, the separation of the winding-up provisions relating to banks, insurance companies and the like into separate legislation, the development of insolvency law as a separate legal discipline and the advent of close corporations, have resulted in a myriad of fragmented provisions providing for corporate insolvency. Despite the piecemeal development of winding-up law, it developed in very much the same way as South African insolvency law. The parallel development of winding-up and 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 the late twentieth century. The consolidation of the law relating to corporate

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<sup>2</sup> See ch 3 above.

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and individual insolvency seems to be the next logical step in this process, and will allow insolvency law to develop and reach its full potential as a separate legal discipline.

### **3 OTHER JURISDICTIONS**

In determining whether a unified insolvency statute is attainable, or even desirable, a brief reference to the insolvency systems of other jurisdictions served as a useful benchmark.<sup>3</sup> Countries such as Germany and the United States of America have by all accounts succeeded in bringing about unified insolvency legislation. In referring to these two jurisdictions reference is made to their codified systems of legislation, and the fact that they have specialist insolvency or bankruptcy courts. Reference to the insolvency systems of England and Australia, both of which have similar legislation to that employed in South Africa, also proved to be beneficial.

The research pertaining to other jurisdictions was intended to reflect the historical development of their insolvency laws, the reform process they have followed, and the philosophy underlying their respective systems. Due to the fact that South African insolvency legislation has been modelled on English law, the law reform process in this country is of particular importance. It is also important to note how Australia, who also obtained its insolvency laws from England, has since approached the subject in its own reform process.

#### **3 1 England**

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.

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<sup>3</sup> See ch 4 above.

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The popularity of separate legal 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. Unfortunately the English legislature elected not to implement all the recommendations made by the Cork Committee, and it is evident that its recommendations envisaged a more far-reaching integration of the laws relating to individuals and corporate debtors. The main lessons that can be learnt by South Africa from the development of English insolvency law are the following:

- (a) Why corporate insolvency law experienced a parallel development with individual insolvency law;
- (b) Political issues can often hamper the proper development of the law. This was illustrated by the fact that all of the recommendations of the Cork Report were not fully implemented;
- (c) That one of the workable alternatives to having a truly unified Insolvency Act is the duplication of the insolvency provisions that apply to both individual and corporate insolvency;
- (d) That incorporating individual and corporate insolvency into one statute does not necessarily bring about a unification of the insolvency laws, especially when the Act itself still makes a distinction between corporate and individual insolvency.



Although insolvency law in England has developed quite substantially over the centuries, they have still not perfected the unity of their insolvency legislation. Despite this, the English system of insolvency law appears to work quite well in practice.

### **3 2 Australia**

Although Australian insolvency and winding-up law is very similar to its South African counterparts, the fact remains that the Harmer Report chose not to recommend a unified statute. From the Harmer Report it is evident that the Commission of Inquiry chose only to concentrate on law reform and not on introducing a unified insolvency statute. However, it would appear that Australian insolvency legislation has at least succeeded in avoiding the pitfalls of a “connecting clause” that makes the rules of insolvency relating to individuals applicable also to corporate insolvency. The Australian Corporations Act contains its own complete set of rules regulating insolvency, and it is not necessary to refer back to the Bankruptcy Act in order to find the law relating to a specific issue.

The fact that Australia has a federal system of government also played a role in the Harmer Commission deciding against unified insolvency legislation, a fact that can be attributed more to constitutional issues than insolvency law considerations. Serious policy and political issues are raised when enacting federal legislation, a problem that South Africa will not encounter when having to decide such an issue. Research on the Australian insolvency system has revealed that a dual system of insolvency law can work quite well where the provisions relating to insolvency have been duplicated in the various statutes that regulate insolvency. The Australian insolvency system differs from that in England, in that Australia still employs separate legislation for individual and corporate insolvency, not having consolidated their legislation into a single statute as was done in England.

### 3 3 Germany

Research on the insolvency system of the Federal Republic of Germany, revealed that this country has one of the most modern (unified) insolvency systems in the world. The German Insolvency Code is a bold, modern piece of insolvency legislation that strikes a sound balance between a simplified insolvency procedure and the protection of debtor and creditor rights. The research also revealed that Germany has evidently taken a leaf out of the very liberal bankruptcy laws of the United States, and has successfully adapted these principles to their own unique situation. Despite misgivings about the introduction of a unified Insolvency Code in Germany, they nevertheless went ahead with its promulgation. The Insolvency Code is relatively new and only time will tell whether or not its introduction has been successful. South Africa can learn from the German experience by introducing a uniform insolvency statute, despite the fact that the initial promulgation of such an Act may turn out to be defective in certain areas in practice. Defects in the system will eventually reveal themselves and can be rectified by means of amendments, a technique that is applied to good effect in, for example, the United States.

### 3 4 The United States of America

Research on the American system of bankruptcy revealed that their early statutes too were based on the English statutes of the time. However, as the American economic, social and political systems progressed, legislation was designed around the specific needs of the country. This saw a divergence from English law as early as the mid-nineteenth century. Although the first federal bankruptcy legislation that was passed under the United States Constitution was to a large extent modelled on English law, it was the beginning of an even bigger divergence from the conservative pro-creditor bankruptcy laws that still applied in England.

Bankruptcy laws in the United States were usually only amended or enforced at federal level after some or other financial calamity had struck the nation. It was only in the late nineteenth century

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that bankruptcy law became entrenched at federal level. But from that point onward, and to a large extent due to the success of the reorganisation provisions contained in the 1898 Act, federal bankruptcy laws have remained a permanent feature. At present the Bankruptcy Code has become entrenched, reflecting the importance that Americans attach to this dynamic field of the law.

The research in this part revealed that progressive liberalisation has caused America to move from being a pro-creditor insolvency jurisdiction to becoming a liberal pro-debtor system. American bankruptcy law can best be described as a dynamic field of the law, ever-changing to meet the needs of the society it serves. Although the United States Bankruptcy Code is a uniform insolvency statute in the true sense of the word, the research conducted in this study revealed that its precise mechanics cannot easily be imported into a country that does not make use of a federal system of government and a federal court system. The Americans have designed their bankruptcy laws around the uniqueness of their socio-economic and political system, and while the effectiveness of their system is to be lauded, it cannot be implemented in its precise form by a country that only has a developing economy. However, apart from exposing the South African insolvency system's weaknesses as a pro-creditor system, there are also some other lessons to be learnt from the American experience, namely:

- (a) It is in fact possible to bring about an insolvency statute that applies to all debtors;
- (b) The United States Bankruptcy Code is a fine example of incorporating all the relevant aspects of insolvency law into one statute. Not only does the code deal with straight liquidation, but it also has numerous chapters dealing with business rescue and the reorganisation of consumer debt.
- (c) The United States Bankruptcy Code is also an example of how insolvency as a separate legal discipline can evolve. From its humble origins in English law, it has developed into

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a federally controlled legal system that is both liberal and pro-debtor; which is quite a turn-around from the pro-creditor system it originated from.

- (d) Finally, the United States Bankruptcy Code is a good example of how insolvency legislation can be arranged within a single statute in order to promote the harmonisation of the bankruptcy laws. The arrangement of the Code itself in different chapters can serve as a useful template on which other jurisdictions can model their own insolvency laws.

#### **4 THE CONCEPT OF A UNIFIED INSOLVENCY ACT<sup>4</sup>**

##### **4 1 The application of the law of insolvency to the winding-up of companies and close corporations**

Before determining the need for a single insolvency statute in South Africa, research was first conducted in order to determine how the current system of dual legislation functions.<sup>5</sup> The research revealed many of the problems that are experienced with the duality of our insolvency legislation, and illustrated exactly how fragmented the legislative provisions dealing with corporate insolvency really are.

In finding a solution to the problems caused by the fragmented provisions dealing with corporate insolvency, proposals have been made in order to rectify the problem. In terms of the research conducted in this part of the thesis, two possible solutions to this problem presented themselves, namely:

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<sup>4</sup> See part 4A above.

<sup>5</sup> See ch 5 above.

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- (a) The introduction of a unified insolvency statute. This solution is regarded as being the best solution to the problem, and entails the introduction of a single insolvency statute that will remove the fragmented nature of current insolvency law, replacing it with a cohesive single statute that will obviate the need for connecting provisions and cross-referencing between Acts. The introduction of a unified insolvency statute is the recommendation made in terms of this study, the result of which is contained in annexure E.
- (b) Duplication of all the provisions relating to insolvency in the relevant Acts dealing with winding-up. This solution is offered as the second-best option, and entails a duplication of the procedural and substantive insolvency law provisions in the current legislation dealing with winding-up, for example in the Companies Act and the Close Corporations Act. Although not the best option, it would effectively remove the need for a connecting provision and cross-referencing between Acts. This option is currently the *modus operandi* in England and Australia and, while not the most desirable solution, seems to work reasonably well.

#### 4 2 Defining “debtor” for the purposes of a unified insolvency statute

Having determined that a unified or a single insolvency statute can effectively address the problems experienced with a dual system of insolvency law, the drafting of the unified statute in such a way as to make it applicable to all types of debtors was examined.<sup>6</sup> Formulating a definition of “debtor” for the purposes of a unified insolvency statute was the next step in this

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<sup>6</sup> See ch 6 above.

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process. Research on this aspect revealed the importance of including an all-encompassing definition of “debtor” in a unified insolvency statute. The result of this research is the proposal for an extensive definition of “debtor” that can be used in a unified Insolvency Act.<sup>7</sup>

### 4 3 Specialised institutions under a unified Insolvency Act<sup>8</sup>

In this part of the study the rules applicable to the winding-up of specialised institutions which enjoy preferential treatment due to the nature of these business concerns, were examined. The conclusion reached is that the reason for their preferential treatment is based on the protection of the public interest. The question that had to be decided within the framework of this study, is whether or not these institutions deserve their specialised status - not generally, but in the event of insolvency.

The conclusion that has been reached in this regard is that specialised institutions can quite effectively be accommodated within the framework of a unified insolvency statute, and it has consequently been recommended that instead of duplicating an excessive number of clauses in each specialised Act which provide for essentially the same circumstances, it would be far more sensible to provide for the relatively few key aspects that provide for the protection of the public interest. It is therefore recommended that a single clause regulating the liquidation of these specialised institutions be included in a unified Insolvency Act.<sup>9</sup>

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<sup>7</sup> See ch 6 above and the definition of “debtor” in cl 1 of the proposed unified Insolvency Act in ann E.

<sup>8</sup> See ch 7 above.

<sup>9</sup> See cl 9 of the unified Insolvency Act in ann E.

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## 5 PROPOSALS FOR UNIFORM PROVISIONS RELATING TO INDIVIDUAL AND CORPORATE INSOLVENCY<sup>10</sup>

### 5.1 Liquidation applications

The research conducted in this part of the thesis exposed the very real differences between natural and juristic persons regarding the acts of insolvency and grounds upon which a company or close corporation may currently be wound up.<sup>11</sup> However, this research also revealed that:

- (a) The acts of insolvency and grounds for liquidation are not necessarily mutually exclusive;
- (b) The South African Law Commission has elected to retain the somewhat archaic acts of insolvency, contrary to other countries such as England which have scrapped them as being outdated;
- (c) The South African Law Commission has elected to retain the “advantage to creditors” test in the case of voluntary liquidations by individuals.

Consequently the conclusion has been made that the above factors hamper the introduction of uniform liquidation applications in that the grounds upon which liquidation can be sought differ in the case of individuals and juristic persons. In attempting to bring about a unified insolvency statute, common ground was sought for the basis upon which the liquidation of individuals and juristic persons could be regulated. The possibility of introducing uniform liquidation application procedures for individuals and corporate entities was also investigated.

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<sup>10</sup> See part 4B above.

<sup>11</sup> See ch 8 above.

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The conclusion reached in this part of the research is that although it is possible to bring about the uniformity of liquidation applications to a certain degree, it is impossible to entirely unify these provisions under a unified insolvency statute. This is borne out by the fact that separate provisions still have to be made for the liquidation of individuals and corporate entities. The reasons for this conclusion are as follows:

- (a) While a benefit for creditors is required for the granting of a liquidation order in regard to natural person and partnership debtors, the same requirement is not a prerequisite for the liquidation of a company or close corporation.
- (b) While a natural person debtor can only be placed in liquidation by the court (due to the benefit for creditors requirement and the change of status that it brings about), this is not the case in regard to companies and close corporations which can also be liquidated on a voluntary basis.
- (c) A natural person and partnership debtor can only be liquidated if he, she or it is insolvent, while companies and close corporations can be liquidated on grounds other than insolvency.
- (d) While an individual has the ability to earn income subsequent to his or her liquidation, this is not the case when dealing with a company, close corporation or partnership.

For these reasons it was impossible to recommend the total uniformity of liquidation applications such as those found in the jurisdictions of the United States of America or Germany. It has further been concluded that to bring about a unified system of insolvency law as it is applied in these countries, would require a total shift in the philosophy underlying South African insolvency law. From the tenor of the South African Law Commission's Draft Insolvency Bill and its



explanatory memorandum, the government is evidently not yet ready to make the paradigm shift that will bring about a change to the underlying philosophy of the “benefit for creditors” requirement that is applied in the case of individual insolvency. It is therefore concluded in this part of the study that the failure to be able to totally unify South African insolvency and winding-up law is not to be found in the structures of existing insolvency legislation, but rather in the philosophy underlying insolvency law as a whole.

Despite these shortcomings, the proposals made in this part of the study go a long way towards streamlining and simplifying liquidation applications. It is further submitted that the proposed unified provisions relating to liquidation applications will rid the current system of insistent interpretational problems, and bring about far more clarity in regard to the procedures that have to be followed, no matter what type of debtor is being dealt with.<sup>12</sup>

## **5 2 Commencement of liquidation and the vesting of the insolvent estate**

In this part of the thesis research was conducted on two aspects regarding individual and corporate insolvency that are dissimilar to each other, namely the date of commencement of liquidation and the vesting of the insolvent estate.<sup>13</sup> The research revealed that under current South African law, the provisions relating to the commencement of liquidation and the rules relating to the vesting of the insolvent estate, differ in the case of individual and corporate insolvency. In approaching these dissimilar aspects of individual and corporate insolvency, the current situation under South African law was investigated and a brief comparison made with other jurisdictions.

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<sup>12</sup> See the proposals made in ch 8.

<sup>13</sup> See ch 9 above.

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In regard to the commencement of liquidation and sequestration, the research revealed that the date of sequestration currently differs from the date of winding up of a company by the court, the former being the date of the granting of the order to sequester, the latter being the date upon which the application to wind up the company is lodged with the Registrar of the High Court. It also revealed that the commencement of liquidation in the case of a voluntary winding-up differs from the commencement of liquidation in the case of a winding-up by the court, the former being the date upon which the resolution is registered by the Registrar of Companies.

In order to bring about uniformity in the case of liquidation by the court, a uniform date for the commencement of liquidation is proposed, which will apply equally to individuals and corporations alike. However, due to the unique nature of the voluntary liquidation of corporate entities by means of a resolution, the date of liquidation in such cases must necessarily differ from the date of liquidation in the case of a liquidation order granted by the court. This difference is brought about by procedural necessities, and has easily been provided for in the proposals made under this part of the study.<sup>14</sup> As regards the effect of the commencement of liquidation, proposals have also been made in order to bring about uniformity in this regard.<sup>15</sup>

In regard to the vesting of the insolvent estate upon sequestration and liquidation, different rules apply. In the case of a debtor who is a natural person the debtor is divested of his or her estate and the assets *vest* in the Master and then in the trustee once appointed. However, in the case of a company being wound up by the court, the assets fall under the *custody and control* of the Master and then the liquidator, once appointed. It is, however, possible for the court to make an order vesting the property of a company in the liquidator. The research in this part of the study

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<sup>14</sup> See ch 9 above and the definition of “date of liquidation” in cl 1 of the proposed unified Insolvency Act in ann E below.

<sup>15</sup> See ch 9 above and cl 14(1) of the unified Insolvency Act in ann E below.

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sought to determine why this difference exists, where it originated from, whether such a difference is justified and whether or not the vesting rule can be made uniform in regard to all types of debtors.

The research revealed that it is still customary, in England, Australia and South Africa, to allow the estate assets to vest in the trustee in the case of individual insolvency. In the case of corporate debtors the various countries' provisions merely allow custody and control of the assets to pass to a liquidator upon liquidation. However, in the United States and Germany, the latter of the two countries having the most recent of all the insolvency legislation referred to, the insolvency administrator only obtains the right to deal with the assets to the exclusion of others without actual vesting taking place.

The conclusion that is reached is that actual vesting, or ownership, of the estate assets is not a necessary requirement upon insolvency, and the recommended clause dealing with this aspect in a unified Insolvency Act has been drafted with uniformity in mind. After investigating the origin of the vesting rule in insolvency, the conclusion is reached is that there is no justification in South African common law for its existence. Consequently the recommendation is made that only custody and control should pass to the liquidator in both individual and corporate insolvency.

## **6 PROPOSALS FOR THE INCLUSION OF ANCILLARY MATTERS UNDER A UNIFIED INSOLVENCY ACT<sup>16</sup>**

If the conclusion to this study is that a unified insolvency statute should be introduced in South Africa, this cannot be achieved unless substantially all aspects relating to insolvency are included in such an Act. In this regard a number of issues were researched in order to determine whether

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<sup>16</sup> See ch 10 above.

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or not they could also be included under the unified Insolvency Act proposed in annexure E to this study. Due to the wide ambit of the issues researched under this part of the thesis, it was impossible to discuss them in any detail; consequently a discussion of the merits and principles of these ancillary matters were not included in the research that was conducted. The purpose of this part of the study was designed to provide a holistic approach to the introduction of a unified insolvency statute, and the conclusions that were reached are the following:

- (a) As regards alternatives to liquidation (debt relief measures), it is recommended that the provisions relating to administration orders and pre- and post-liquidation compositions should be included in a unified insolvency statute. As far as pre- and post-liquidation compositions are concerned, these proposals have been included in the provisions of a unified Insolvency Act.<sup>17</sup> However, because administration orders are currently included under the Magistrates' Courts Act, these provisions have been omitted from the proposals for a unified insolvency statute.
- (b) As regards insolvent deceased estates it is submitted that the procedures as they currently stand should remain in the Administration of Estates Act. These provisions contain special procedures, and there is no sound motivation for their removal from the current legislation.
- (c) As regards business rescue provisions, it has been concluded that South Africa needs to introduce a revised system of business rescue that can replace the current system of judicial management. However, in order to reserve a place in the unified Insolvency Act for a new business rescue procedure, and because judicial management is an existing form of business rescue with an accompanying body of case law, it is recommended that the provisions be retained in the proposed unified insolvency statute. In addition to retaining the provisions relating to judicial management for the time being, two minor amendments

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<sup>17</sup> See cl 118 and cl 119 of the proposed unified Insolvency Act in ann E below.

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to the provisions have been recommended in order to make it more accessible as a business rescue mechanism. The first of these two recommended amendments relates to the burden of proof in order to obtain a judicial management order, and the second relates to making the provisions accessible to other types of debtors in addition to companies. In addition to judicial management the provisions of section 311 of the Companies Act, relating to compromises, have been included in the proposed unified Insolvency Act. The provisions that are proposed to be included in the unified insolvency statute relate only to a compromise between a debtor and its creditors, the provisions relating to an arrangement having been removed. It is also recommended that these provisions be made applicable to all types of debtors that have legal personality.

- (d) As regards personal liability, it has been proposed that all the provisions relating to personal liability be consolidated in order that they may apply to other juristic persons as well. In addition, an insolvent trading provision has been recommended for inclusion under the unified Insolvency Act proposed by this study. Recommendations for special provisions relating to the personal liability of members of close corporations have also been included in the proposals.
- (e) As far as cross-border insolvencies are concerned, it has been proposed in this chapter that the Cross-Border Insolvency Act 42 of 2000 be inserted as a separate chapter in a unified insolvency statute.

## **7 VOLUNTARY LIQUIDATION UNDER A UNIFIED INSOLVENCY ACT<sup>18</sup>**

Research in this part of the study revealed that liquidation or winding-up is a process that precedes the dissolution of a company. This is one of the most important differences between

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<sup>18</sup> See ch 11 above.

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

The research in this regard caused the following questions to be posed:

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

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In addressing these questions the historical development of voluntary liquidation was used as a valuable assessment tool, as was a comparative study of other jurisdictions. The conclusion that is reached in this part of the study is that in creating a framework for corporate insolvency law reform, and as long as South Africa elects to retain a multiple gateway approach to insolvency law, voluntary liquidation by resolution remains a key concept. The continued existence and refinement of the provisions relating to voluntary liquidation are paramount in answering the question as to whether a truly unified insolvency statute is achievable or not. The conclusions that have been reached as a result of the research conducted in this regard can be summarised as follows:

- (a) The provisions relating to voluntary liquidation in a unified insolvency statute should be limited to the liquidation of *insolvent* entities.
- (b) The provisions relating to the voluntary liquidation of solvent entities, such as companies and close corporations, should be retained in the enabling legislation, such as the Companies Act or the Close Corporations Act.
- (c) The terminology surrounding the use of voluntary liquidations should be simplified, and the term “voluntary liquidation by resolution” should be employed.
- (d) The provisions relating to voluntary liquidation by resolution should be extended to cover also trust debtors and association debtors.
- (e) It is possible to have uniform provisions for the voluntary liquidation by resolution of any type of debtor.

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- (f) It is possible to simplify and streamline the provisions relating to voluntary liquidation by resolution, at the same time building in more safeguards for creditors.
  - (g) There is no justification for the continued role played by members in the administration process where the entity is insolvent or unable to meet its financial obligations, hence the removal of these provisions.

## 8 CONCLUDING REMARKS

Although corporate insolvency only started developing during the second half of the nineteenth century, it has shown tremendous growth in a relatively short period of time. The growth in this area has been profound during the second half of the twentieth century, to the point where it now overshadows consumer insolvency in both the number and the value of estates that enter insolvency. Despite the piecemeal development of corporate insolvency law, it experienced a parallel development with consumer insolvency and has since evolved into a separate and identifiable branch of the law.

During the past thirty years or so, most countries have experienced a plethora of reforms dealing with insolvency in general, but especially in regard to corporate insolvency. These reforms have concentrated on consolidating consumer and corporate insolvency in an attempt to harmonise their insolvency laws. This has brought about a shift in philosophy, namely the move away from a liquidation culture to one of business rescue, which is now seen as being part and parcel of insolvency law. In bringing about these reforms the focus has been on not only unifying the insolvency procedures, but also in simplifying them. It is for this reason that many jurisdictions have elected to introduce a single gateway approach to insolvency, a sort of “one-stop” service in order to obtain relief. However, a single gateway approach clearly calls for the existence or introduction of a debtor-friendly system of insolvency.



There is no doubt that South Africa has a pro-creditor system of insolvency. This is borne out by the South African Law Commission's Draft Insolvency Bill which elected to retain not only the archaic acts of insolvency relating to consumer insolvency, but also the retention of the "benefit for creditors" requirement in regard to liquidation applications. In addition, South Africa has a dual gateway approach to corporate insolvency in that a company or close corporation may be liquidated by the court or voluntarily.

Although the above factors have hampered the recommendations made in this thesis for the introduction of a unified insolvency statute, it has not made the drafting of such a statute an impossible task. Consequently it is the recommendation of this thesis that a unified Insolvency Act can, and should, be introduced. The recommendations made by this thesis have been included in the form of a draft Insolvency and Business Recovery Bill, which can be found in annexure E below.

## **ANNEXURE A**

### **SUMMARY**

South Africa has a dualistic system of insolvency law, which means that individual and corporate insolvency are dealt with in separate statutes. The purpose of this study is propose a framework for corporate insolvency law reform, with a view to introducing a single insolvency statute in South Africa.

In determining why individual and corporate insolvency experienced separate development in South Africa, research was conducted into the historical development of both individual and corporate insolvency law. The research revealed that while South African individual insolvency law is based on a hybrid between Roman-Dutch law and English law, corporate insolvency law originated from the English statutes that were introduced into South Africa from the mid-nineteenth century. Although corporate insolvency is supplemented by the substantive rules of individual insolvency, the existence of separate statutes regulating individual and corporate insolvency has resulted in the separate development, and resultant fragmentation, of South African insolvency law.

In determining why some countries have been more successful than others in introducing a unified insolvency statute, a brief comparative study was undertaken in respect of the insolvency regimes that apply in England, Australia, Germany and the United States. The research revealed that two main factors were responsible for Germany and the United States having succeeded in unifying their insolvency laws, namely a debtor-friendly insolvency regime and a federal court system with specialist bankruptcy courts. Although England introduced a single insolvency statute in 1986, the statute still distinguishes between individual and corporate insolvency and cannot be said to be genuinely unified. Australia also follows a dualistic insolvency regime and, despite having had the opportunity of unifying of their insolvency laws, elected not to do so.

With the benefit of lessons learnt by other jurisdictions, research was conducted into the possibility of introducing a unified insolvency statute in South Africa. In doing so, the current problems experienced with a dualistic system of insolvency law were explored. Having determined that the underlying problem of a dualistic system is the fragmentation of the regulatory statutes, the remainder of the thesis was devoted to making proposals for the introduction of a unified statute.

In proposing a unified insolvency statute the following critical issues were addressed: the definition of “debtor” for the purposes of a unified statute; whether a unified statute should also address the liquidation of specialised institutions such as banks; liquidation applications; the commencement of liquidation; the vesting of the insolvent estate; whether ancillary matters such as alternatives to liquidation, insolvent deceased estates, business rescue provisions, compromises, personal liability provisions and cross-border insolvencies should be included in a unified statute; and revised provisions regarding voluntary liquidations by resolution.

The conclusion reached was that it is possible to substantially unify all the provisions relating to individual and corporate insolvency law in South Africa, in a single statute. This conclusion is reflected in a draft Insolvency and Business Recovery Bill, and is included as part of the conclusion to this thesis.

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## ANNEXURE E

### DRAFT INSOLVENCY AND BUSINESS RECOVERY BILL

The draft Insolvency and Business Recovery Bill in this annexure contains the proposals for a unified insolvency statute, which was the main aim of this thesis. It represents the merging of the winding-up provisions contained in the Companies Act 61 of 1973 and the Close Corporations Act 69 of 1984,<sup>1</sup> into the draft Insolvency Bill drawn up by the South African Law Commission.

Please note that:

1. Insertions into the Law Commission's Draft Insolvency Bill have been indicated by underlined words and sentences, for example: insertion.
2. Omissions from the Law Commission's Draft Insolvency Bill having been indicated by striking out the words or sentences concerned, for example: ~~deletion~~.

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<sup>1</sup> It also includes a blanket provision, in cl 9, dealing with the winding-up provision contained in various other legislation such as the Banks Act.



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**BILL**

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**To consolidate, unify and amend the law relating to the insolvency of natural persons, companies, close corporations, trusts, partnerships and other legal entities, with or without legal personality**

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BE IT ENACTED by Parliament and the President of the Republic of South Africa, as follows:

**CHAPTER 1 - DEFINITIONS**

1. **Definitions.** - In this Act, unless the context otherwise indicates - [2]

**“account”**, in relation to a liquidator, means a liquidation account and plan of distribution or of contribution, or any supplementary liquidation account and plan of distribution or of contribution;

**"associate"** (a) in relation to a natural person means-

- (i) the spouse of such person; or
- (ii) any person who is by consanguinity related to such first-mentioned person or to his or her spouse, in the first, second or third degree of relationship as determined in accordance with section 1(3)(d) or (e) of the Intestate Succession Act, 1987 (Act No. 81 of 1987); or
- (iii) the partner of such person or the spouse of such partner or any person who is related to such partner or spouse as is contemplated in subparagraph (ii); or
- (iv) the beneficiaries of a trust, or a trust of which such person or associate of such person is the a trustee or beneficiary; or



- (v) a company of which such person is a director or a close corporation of which such person is a member or any juristic person of whom such person is a manager or of which he or she has control;
- (b) in relation to a juristic person means -
  - (i) any natural person who is a director of that juristic person or a member of a close corporation or who has control of that juristic person or close corporation, either alone or together with his or her associate as contemplated in sub paragraph (a); or
  - (ii) any other juristic person which is controlled by the same person who controls the first-mentioned juristic person;
- (c) of another person means a person who has control of an undertaking of the other person, and that person also has control of an undertaking if the person who manages the undertaking is or the persons who manage it are accustomed to act in accordance with that person's directions or instructions, unless that person gives advice in a professional capacity only;
- (d) means a natural person or juristic person who was an associate of another natural person or juristic person at the time of the disposition in question or at the date of the liquidation of the estate or liquidation of one of the parties; and
- (e) means that two entities are associates of each other if the one is an associate of the other; [New definition]

**“bank”** means a bank registered in terms of the Banks Act, 1990 (Act No. 94 of 1990) or a mutual bank finally registered in terms of the Mutual Banks Act, 1993 (Act No. 124 of 1993); [banking institution]

**"book or books"** in relation to bookkeeping or the recording or storage of information, includes any electronic or mechanical device by means of which the information concerned is recorded or stored, and in relation to the production, the handing over or the attachment of any book or books, means the production, the handing over or the attachment of a print-out or other written version of the said information produced by means of such device; [New definition]

"**concurrent creditor**" means a creditor who in whole or in part has a claim other than as a secured creditor or a preferent creditor; [New definition]

"**contribution**" in respect of a fund or annuity means a contribution made to such fund or annuity by ~~the insolvent debtor~~ in respect of the insolvent debtor, less that part of the contribution which represents commission or a premium in respect of death or disability benefits and benefits paid to the insolvent debtor before the date of liquidation; [New definition]

"contributory" as applied in Chapter 20 of this Act in relation to a company limited by guarantee, means any person who has undertaken to contribute to the assets of the company in terms of section 52(3)(b) of the Companies Act 61 of 1973. [Section 337 of the Companies Act]

"**court**" means the provincial or local division of the High Court which has jurisdiction in the matter or a judge of that division, and in section ~~2(b); 12(1); 18, 20, 21, 101 and 102 2(b); 16(1); 20, 22, 23, 136 and 175~~ and also a magistrate's court which has jurisdiction in respect of the matter or offence concerned;

"**date of liquidation**" means-

(a) the date of the first liquidation order; or

(b) in the case of a voluntary liquidation by resolution, the date on which a voluntary liquidation commences as provided for in subsection (9) of section 8;

~~"debtor", in connection with the liquidation of the debtor's estate, means a person or entity which is a debtor in the usual sense of the word, except a debtor which can be wound up under the Companies Act, 1973 (Act No. 61 of 1973) or any other Act and; unless inconsistent with the context or clearly inappropriate, includes such a debtor before the date of liquidation of his or her estate;~~

“debtor”, when referring to who may be liquidated in terms of this Act, means:

- (a) a natural person or the estate of such natural person (hereinafter referred to as a “natural person debtor”);
- (b) a partnership or the estate of a partnership (hereinafter referred to as a “partnership debtor”);
- (c) a trust as defined in section 1 of the Trust Property Control Act 57 of 1988 (hereinafter referred to as a “trust debtor”);
- (d) a company incorporated in terms of the Companies Act 61 of 1973, or in terms of any Act or Acts which preceded the Companies Act 61 of 1973, including an external company (hereinafter referred to as a “company debtor”);
- (e) a corporation incorporated in terms of the Close Corporations Act 69 of 1984 hereinafter referred to as a “close corporation debtor”;
- (f) any other person or entity which is a debtor in the usual sense of the word (hereinafter referred to as an “association debtor”). [New definition]

“debtor”, when used as a noun in the context of this Act, means a debtor as defined in the previous paragraph which has been liquidated in terms of the provisions of this Act and, unless inconsistent with the context or clearly inappropriate, includes such a debtor before the liquidation of the debtor’s estate. [New definition]

**"disposition"** means any transfer or abandonment of rights to property and includes a sale, mortgage, pledge, delivery, payment, release, compromise, donation, suretyship or any contract therefor,

“estate affairs” for the purposes of Chapter 7 of this Act, means the affairs of the debtor or any associate of the debtor, whether before or after the liquidation of the debtor’s estate, and includes any matter which may affect a liquidation and distribution account;

**"exchange"** in relation to transactions on an exchange, means a stock exchange as defined in section 1 of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985), or a financial exchange or clearing house as defined in section 1 of the Financial Markets Control Act, 1989 (Act No. 55 of 1989); [35A(1)]

**“financial lease”** means a contract whereby a lessor leases specified movable property to a lessee at a specified rent over a specified period subject to a term of the contract that-

- (a) at the expiry of the contract the lessee may acquire ownership of the leased property by paying an agreed or determinable sum of money to the lessor; or
- (b) the rent paid in terms of the contract shall at the expiry of the contract be applied in reduction of an agreed or determinable price at which the lessee may purchase the leased property from the lessor; or
- (c) the proceeds of the realization of the leased property at the expiry of the lease shall accrue wholly or partly to the lessee; [New definition]

**“first liquidation order”** means a provisional order for the liquidation of the estate of a debtor or an order for the final liquidation of the estate of the debtor if a provisional liquidation order has not been granted. [New definition]

**“free residue”** in relation to an insolvent estate, means that portion of the estate which is not subject to any claim by a secured creditor;

**“fund”** means any pension fund, provident fund or pension scheme which is instituted in terms of any law or regulation or a fund which is registered or provisionally registered in terms of section 4 of the Pension Funds Act, 1956, (Act No. 24 of 1956); [New definition]

**“Gazette”** means the **Government Gazette**;

**“good faith”** in relation to the disposition of property, means the absence of any intention to prejudice creditors in obtaining payment of their claims or to prefer one creditor above the other;

**“immovable property”** means land and every right, title and interest in and to land or minerals which is registerable in any office in the Republic intended for the registration of title to land or the right to mine;

"**insolvent**" means a debtor whose estate is under liquidation, and in relation to a debtor who at the date of the liquidation of his or her estate is married in community of property, includes the spouse of such debtor;

"**insolvent estate**" means an estate which is under liquidation and where the joint estate of spouses married in community of property is under liquidation it includes the separate property of the spouses;

"**liquidation order**" means an order of a court whereby the estate of a debtor is placed under liquidation and includes a provisional liquidation order when it has not been set aside; [sequestration order]

**"liquidation resolution" means:**

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

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

"magistrate" includes an additional magistrate and an assistant magistrate;

**“management of a debtor” means**

- (a) in the case of a trust debtor, the trustees of such trust which have been granted letters of authority to act as such by the Master of the High Court in terms of the provisions of the Trust Property Control Act 57 of 1988 or, if a trust came into existence before the coming into operation of the Trust Property Control Act 57 of 1988, the trustees or administrators who act on behalf of such trust, or former trustees or administrators of the trust who acted under such authority or on behalf of such a trust for a period of twelve months prior to the liquidation of the trust concerned;
- (b) in the case of a company debtor, the directors, secretary or other officers of such company who at the time of the liquidation of the company debtor were directors, the secretary or other officers of such company debtor, and shall include former directors, secretaries or officers of such company debtor who were involved with the management or affairs of such company for the period of twelve months prior to the liquidation of the company concerned;
- (c) in the case of a close corporation debtor, the members of such close corporation who at the time of the liquidation of the corporation were members of the corporation concerned, and shall include former members of such corporation who were members for the period of twelve months prior to the liquidation of the corporation concerned;
- (d) in the case of an association debtor
  - (i) where such association has been created by legislation, the persons who at the time of its liquidation were responsible for the management of such association in terms of the enabling legislation, and shall include any person who was involved in the management of such association for the period of twelve months prior to the liquidation of the association concerned;

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(ii) where such association has been created by the adoption of a constitution, the persons who at the time of its liquidation were responsible for the management of such association in terms of the constitution, and shall include any person who was responsible for the management of the association for the period of twelve months prior to the liquidation of the association concerned;

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(iii) where such association has been created by agreement, the persons who at the time of its liquidation were in fact responsible for the management of such association in terms of the agreement or otherwise, and shall include any person who was responsible for the management of such association for the period of twelve months prior to the liquidation of the association concerned;

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(e) any other person who, to the satisfaction of the court, is effectively a part of the management of the debtor.[New definition]

"**market participant**" in relation to transactions on an exchange, means a stock broker or a member as defined in section 1 of the Stock Exchanges Control Act, 1985, or a financial instrument principal or a financial instrument trader as defined in section 1 of the Financial Markets Control Act, 1989, or a client of such a stock broker, member, or financial instrument trader or any other party to a transaction; [35A(1)]

"**Master**" means the Master of the High Court within whose area of jurisdiction the matter concerned is to be dealt with and includes a Deputy Master and an Assistant Master;

"**Minister**" means the Minister of Justice;

"**movable property**" means every kind of property and every right or interest which is not immovable property;

"**personal notice**" means a notice or delivery by mail, telefax, electronic mail, or personal delivery supported by an affidavit by the liquidator with a list of the persons given notice and the method of delivery used by the liquidator: Provided that the

liquidator may substitute for personal notice another form of notice approved by the Master;

"**preferent creditor**" means a creditor whose claim enjoys preference in terms of section 80 ~~84~~ or a provision in terms of any other Act to pay a creditor who has no preference in respect of particular assets before concurrent creditors; [New definition]

"**property**" means movable or immovable property wherever situated and includes contingent interests in property;

"**Republic**" means the Republic of South Africa;

"**reservation of ownership contract**" means a contract in terms of which corporeal or incorporeal movable property is sold to a purchaser, the purchase price is payable wholly or partly in the future, the property is delivered to or placed at the disposal of the purchaser and the ownership in the property does not pass to the purchaser upon delivery of the property, but remains vested in the seller until the purchase price is fully paid or until the occurrence of some other specified event; [Instalment sale transaction section 1 of the Credit Agreements Act 75 of 1980]

"**rules of an exchange**" means rules made pursuant to either section 12 of the Stock Exchanges Control Act, 1985 or section 17 of the Financial Markets Control Act, 1989; [35A(1)]

"**secured creditor**" means a creditor of an insolvent estate ~~who~~ to the extent that such person holds security for his or her claim, or a portion of a claim, against the estate; [New definition]

"**security**" in relation to the claim of a creditor of an insolvent estate, means property of the insolvent estate over which the creditor has a preferent right by virtue of any special bond, landlord's legal hypothec, pledge, including a cession of rights to secure a debt, right of retention, reservation of ownership, financial lease, or ~~a preferent~~ any such right over property in terms of any other Act;



"**sheriff**" includes a deputy sheriff;

"**social benefit**" means the pension, allowance or benefits payable to a person in terms of the Occupational Diseases in Mines and Works Act 1973 (Act No. 78 of 1973), section 9 of the Civil Protection Act 1977 (Act No. 67 of 1977), the Social Assistance Act, 1992 (Act No. 59 of 1992) and the Compensation for Occupational Injuries and Diseases Act 1993 (Act No. 130 of 1993); [New definition]

"**special bond**" means a mortgage bond hypothecating any immovable property or a notarial bond hypothecating specially described movable property in terms of section 1 of the Security by Means of Movable Property Act, 1993 (Act 57 of 1993), or such a notarial bond registered before 7 May 1993 in terms of section 1 of the Notarial Bonds (Natal) Act, 1932 (Act No. 18 of 1932);

"**spouse**" means a spouse in the legal sense, and even if there is such a spouse, also a spouse according to any law or custom or a person of any sex living with another as if married; [21(13)]

"**transaction**" in relation to transactions on an exchange, means any transaction to which the rules of an exchange apply. [35A(1)]

| **CHAPTER 2 - ACTS OF INSOLVENCY AND MANNERS IN WHICH DEBTOR MAY**  
| **BE LIQUIDATED**

| **2. Acts of insolvency and circumstances in which certain debtors may be**  
| **liquidated by the court.** -

| (1) A debtor commits an act of insolvency -

- | (a) in the case of a natural person debtor, if such debtor ~~he or she~~ leaves the Republic or, being out of the Republic remains absent therefrom, or absents himself or herself from his or her dwelling, or regular place of business, with intent thereby to evade or delay the payment of his or her debts; [8(a)]

## Annexure E

## Draft Insolvency and Business Recovery Bill

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- (b) if it appears from the return of the officer charged with the execution of a judgment of a court against the debtor that the judgment has not been satisfied after a valid execution thereof; [8(b)]
  - (c) if a debtor ~~he or she~~ disposes or attempts to dispose of his or her or its property or any part thereof in a manner which appears to the court to be likely to prejudice creditors or to prefer one or more creditors above another, unless the debtor satisfies the court that he or she or it was able to pay his or her debts after the disposition; [8(c)]
  - (d) if a debtor ~~he or she~~ removes or attempts to remove any of his or her property in a manner which appears to the court to be likely to prejudice creditors or to prefer one or more creditors above another, unless the debtor satisfies the court that he or she was able to pay his or her debts after the removal or attempted removal; [8(d)]
  - (e) if a debtor ~~he or she~~ makes or offers to make any arrangement with any of his or her creditors for releasing him or her wholly or partially from his or her debts; [8(e)]
  - (f) if, having applied in terms of section 3 for the liquidation of the estate ~~his or her estate~~, a debtor ~~he or she~~ fails to comply with the requirements of that section or submits a statement of affairs contemplated in that section which is substantially incorrect or incomplete; [8(f)]
  - (g) if a debtor ~~he or she~~ gives notice in writing to any one of his or her creditors that he or she is unable to pay any of his or her debts. [8(g)]

(2) A debtor may be liquidated by the court if:

- (a) in the case of a trust debtor, company debtor, close corporation debtor or association debtor, the debtor concerned has resolved that it be liquidated by the court in terms of a liquidation resolution as defined in section 1 of this Act; provided that such debtor is not prevented by law, agreement or any other legally enforceable reason, from passing such resolution;  
[New provision]
- (b) the debtor is unable to pay its debts as described in subsection (3) of this section; [Section 344(f) of the Companies Act and section 68(c) of the Close Corporations Act]

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(c) in the case of a company debtor, close corporation debtor or association debtor in appropriate circumstances, it appears to the court that it is just and equitable that the debtor should be liquidated.[Section 344(h) of the Companies Act and section 68(d) of the Close Corporations Act]

(3) A debtor shall be unable to pay its debts if:

(a) a creditor, by cession or otherwise, to whom the debtor is indebted in an amount of not less than R2000 then due-

(i) has served on a company debtor or close corporation debtor, by leaving the same at its registered office or main place of business, a statutory demand for payment of such an amount to pay an amount which is due and payable, or to give security to the reasonable satisfaction of the creditor for such amount, or to enter into a compromise therefor. The statutory demand shall correspond substantially with Form F in Schedule 1 and shall be served on the debtor by the sheriff of the magistrate's court within whose jurisdiction the debtor resides or by the creditor's attorney or the attorney's clerk by delivering it to the debtor; or

(ii) in the case of a debtor other than a company debtor or close corporation debtor, has served such demand by handing it to the debtor or leaving it at its main office or place of residence, or delivering it to the secretary or some director, manager or principal officer of such association of persons or body corporate or in such other manner as the court may direct,

and the debtor has for twenty one days thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) if it appears from the return of the officer charged with the execution of a judgment of a court against the debtor that the judgment has not been satisfied after a valid execution thereof; or

(c) it is proved to the satisfaction of the court that the debtor is unable to pay its debts.

(4) In determining for the purpose of subsection (3) whether a debtor is unable to pay its debts, the court shall also take into account the contingent and prospective liabilities of the debtor. [Section 345 of the Companies Act and section 69 of the Close Corporations Act]

**3. Application by debtor for liquidation of estate.** - (1) A natural person debtor or a partnership debtor who is insolvent or a person who lawfully acts on behalf of an insolvent natural person debtor who is incompetent to manage his or her own affairs or the executor or liquidator of the insolvent estate of a deceased person may apply to a court for the liquidation of the estate of the debtor. [3(1)]

(2) The application shall contain the following information, which shall also appear in the heading of the application:

- (a) The full name and date of birth of the debtor and, if an identity number has been assigned to him or her, that identity number; and
- (b) the marital status of the debtor and, if he or she is married in community of property, the full name and date of birth of his or her spouse and, if an identity number has been assigned to the spouse, that identity number. [9(3)(a)]

(3) An application referred to in subsection (1) shall be accompanied by -

- (a) a statement of affairs of the debtor corresponding substantially with Form A of Schedule 1 and which shall contain the particulars provided for in the said Form, which particulars shall be sworn to or confirmed as required by the said Form; [4(3)]
- (b) a certificate of the Master, issued not more than 14 days before the date on which the application is to be heard by the court, that sufficient security has been given for the payment of all costs in respect of the application that might be awarded against the applicant and all costs of the liquidation of the estate referred to in section ~~79~~ 83, which are not recoverable from other creditors of the estate. [9(3)(b)]

(4) Before noon on the fifth court day before the day on which the application is to be heard by the court, the applicant shall lodge the application with the registrar of the court for enrolment and send a copy of the application and two copies of the statement of affairs referred to in subsection 3(a) as well as a copy of the affidavit in support of the application, to the Master. [4(1)]

(5) If an applicant is unable to comply with any of the requirements of subsection (4), the court may dispense with such requirement and dispose of the application in the manner that it finds just. [New provision]

(6) The affidavit in support of the application for liquidation referred to in subsection (1) shall confirm that the requirements of subsection (4) have been complied with. [New provision]

(7) The Master may require the applicant to cause the property enumerated in the statement of affairs to be valued by an appraiser appointed in terms of the Administration of Estates Act 1965 (Act 66 of 1965), or by a person designated by the Master. [4(4)]

(8) Having considered the application, the court may make an order as contemplated in section 7 10 or may dismiss the application or postpone its hearing or make any other order that it deems just. [9(4), (5)]

**4. Application for liquidation by certain debtors.** (1) An application to the Court for the liquidation of a trust debtor, a company debtor, close corporation debtor or association debtor may, subject to the provisions of this section, be made-

(a) by the debtor itself or, notwithstanding any contrary provisions contained in the articles, memorandum, association agreement or constitution of the debtor concerned, by the management of such a debtor;

(b) by one or more of its members, or any person referred to in section 103(3) of the Companies Act 61 of 1973, irrespective of whether his name has been entered in the register of members or not;

(c) jointly by any or all of the parties mentioned in paragraphs (a) and (b);

(d) in the case of any debtor being liquidated voluntarily by the Court in terms of a liquidation resolution, by the Master or any creditor or member of that debtor; or

(e) in the case of a judicial management order in terms of Chapter 24, by the judicial manager of the debtor.

[Section 346(1) of the Companies Act]

(2) A member of a debtor shall not be entitled to present an application for the liquidation of that debtor unless he or she has been a member for a period of at least six months immediately prior to the date of the application or the shares or interest he or she holds have devolved upon him or her through the death of a former holder, and unless the application is on the grounds referred to in section 2(2)(c).

[Section 346(2) of the Companies Act]

(3) Every application to the Court referred to in subsection (1), except an application by the Master in terms of paragraph (d) of that subsection, shall be accompanied by a certificate of the Master, issued not more than 14 days before the date on which the application is to be heard by the court, that sufficient security has been given for the payment of all costs in respect of the application that might be awarded against the applicant and all costs of the liquidation of the estate referred to in section 83, which are not recoverable from other creditors of the estate.

[Section 346(3) of the Companies Act]

(4) Before noon on the fifth day before the day on which the application is to be heard by the court, the applicant shall lodge the application with the registrar of the court for enrolment and send a copy of the application and two copies of the statement of affairs as well as a copy of the affidavit in support of the application to the Master.

(5) If the applicant is unable to comply with any of the requirements of subsection (4), the court may dispense with such requirement and dispose of the application in the manner that it finds just.

(6) (a) After having considered any application referred to in subsections (1) to (3), the court may grant any order in terms of the provisions of section 7, 10 or 11 of this Act, but the court shall not refuse to grant a liquidation order on the ground only that the assets of the debtor have been mortgaged to an amount equal to or in excess of those assets or that the debtor has no assets. [Section 347(1) of the Companies Act]

(b) Where the application is presented by members of the debtor and it appears to the court that the applicants are entitled to relief, the court shall grant a liquidation order, unless it is satisfied that some other remedy is available to the applicants and that they are acting unreasonably in seeking

to have the debtor liquidated instead of pursuing that other remedy.

[Section 347(2) of the Companies Act]

(c) Where the application is presented to the court by-

(i) any applicant under section 2(2)(d), the court may in the liquidation order or by any subsequent order confirm all or any of the proceedings in the voluntary liquidation; or

(ii) any member under that section, the court shall satisfy itself that the rights of the member will be prejudiced by the continuation of a voluntary liquidation.

[Section 347(4) of the Companies Act]

(d) The court shall not grant a final liquidation order in the case of a debtor which is already being liquidated by order of court within the Republic.

[Section 347(5) of the Companies Act]

**5. Application by creditor for liquidation of debtor's estate.** (1) A creditor who has a liquidated claim of not less than the amount of R2000 against a debtor who has committed an act of insolvency, or who is insolvent or which is unable to pay its debts as determined in section 2(3), or two or more creditors who in the aggregate have liquidated claims against such debtor for not less than the amount of R2000 may apply to a court for the liquidation of the debtor's estate. [9(1)]

(2) The Minister may amend the amounts in subsection (1) by notice in the Gazette in order to take account of subsequent fluctuations in the value of money.

(3) A claim in respect of a liquidated debt which is payable at some determined time in the future may be taken into account for purposes of subsection (1). [9(2)]

(4) (a) An application contemplated in subsection (1) shall be made with notice to the debtor and, in the case of a natural person debtor, also to the debtor's spouse with whom he or she is married in community of property, unless the court orders that such notice may be dispensed with.

- 
- (b) Such an application shall, subject to subparagraph (d), contain the following information, namely -
- (i) in the case of a natural person debtor, the full name and date of birth of the debtor and, if an identity number has been assigned to him or her, that identity number and, in the case of any other debtor, the registration number or other reference number which has been assigned to such debtor and, if no such registration number or reference number exists, this fact shall be stated;
  - (ii) in the case of a natural person debtor, the marital status of the debtor and if he or she is married in community of property, the full name and date of birth of his or her spouse and if an identity number has been assigned to the spouse, such identity number; [9(3)]
  - (iii) the amount, cause and nature of such claim;
  - (iv) whether or not security has been given for the claim and if so, the nature and value of the security; and
  - (v) the act of insolvency or ground of liquidation on which the application is founded or otherwise an allegation that the debtor is in fact insolvent. [9(3)]
- (c) The allegations in the application shall be supported by an affidavit and the application shall be accompanied by a certificate of the Master, issued not more than 14 days before the date on which the application is to be heard by the court, that sufficient security has been given for the payment of all costs in respect of the application that might be awarded against the applicant and all costs of the liquidation of the estate referred to in section 83, which are not recoverable from creditors of the estate. [9(4)(b)]
- (d) The particulars in paragraph (b)(i) and (ii) shall appear also in the heading of the application and if the applicant is unable to furnish all such particulars he or she shall mention the reason why he or she is unable to do so. [9(4)(c)]
- (e) Before noon on the fifth court day before the day on which the application is to be heard by the court, the applicant shall lodge the application with the registrar of the court for enrolment and, unless notice to the debtor has been dispensed with, a copy of the application and copies of all annexures



thereto shall be served on the debtor or handed to him or her by the applicant or his or her attorney or the attorney's clerk. [New provision]

- (f) If the debtor wishes to oppose the application he or she shall lodge a notice and replying affidavit with the registrar and serve on or hand a copy thereof to the applicant, before noon on the second court day before the day on which the application is to be heard by the court. [New provision]
- (g) A copy of the application and of every affidavit in support of the allegations in the application shall be sent to the Master when the application is lodged with the registrar. [9(3)(a)]

(5) If an applicant is unable to comply with any of the requirements of subsection (4), the court may dispense with such requirement and dispose of the application in the manner that it finds just. [New provision]

(6) Having considered the application, the court may make an order as contemplated in section 7 10 or may dismiss the application or postpone its hearing or make any other order that it deems just. [9(4), (5)]

**6. Liquidation of partnership estate.** (1) When application is made to a court for the liquidation of the estate of a partnership, application shall simultaneously be made, whether in terms of this Act or another Act, for the liquidation of the separate estate of every partner, other than a partner who is not liable for partnership debts or a partner in respect of whom there is a lawful bar to the liquidation of his or her estate. [3(2); 13]

(2) The provisions of section 3, in so far as they are applicable, shall apply **mutatis mutandis** in respect of an application by members of a partnership for the liquidation of the partnership estate and the provisions of section 4 5, in so far as they are applicable, shall apply **mutatis mutandis** in respect of an application by a creditor or creditors of a partnership for the liquidation of the estate of the partnership. [New provision]

(3) A court granting a provisional or a final order for the liquidation of the estate of a partnership shall simultaneously grant an order for the liquidation of the separate estate of every

partner, except a partner who is not liable for partnership debts or a partner in respect of whom there is a lawful bar to the liquidation of his or her estate: Provided that if a partner has undertaken to pay the debts of the partnership within a period determined by the court and has given security for such payment to the satisfaction of the registrar, the separate estate of that partner shall not be liquidated by reason only of the liquidation of the estate of the partnership. [13(1)]

(4) In the case where there is no partner whose estate may be liquidated as contemplated in subsection (3), the court may nevertheless liquidate the partnership estate and in such event every director of a juristic person or member of a close corporation which juristic person or corporation is a partner of the partnership in question and every natural person who is a partner but whose estate may not be liquidated, shall for the purpose of performing any statutory requirement in respect of the partnership estate be deemed to be a person whose estate is under liquidation. [New provision]

(5) Where the separate estate of a partner is unable to meet fully the costs of the liquidation of that estate, the balance shall be paid out of the partnership estate and where the partnership estate is unable to meet fully the costs of liquidation the balance shall be paid out of the estates of the partners. [13(2)]

(6) If a partnership has been dissolved and the partnership estate is unable to pay its debts, the partnership estate may, on the application of a creditor of the partnership or a former partner, be liquidated as an insolvent estate and the provisions of subsections (1), (2), (3), (4) and (5) shall **mutatis mutandis** apply to such liquidation. [New provision]

7. **Malicious or vexatious application for liquidation.** - Whenever the court is satisfied that an application for the liquidation of a debtor's estate is malicious or vexatious, the court may allow the debtor forthwith to prove any damages which he or she may have suffered by reason of the provisional liquidation of his or her estate and award him or her such compensation as it deems fit. [15]

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

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

(a) the liquidation resolution has been registered

(i) by the Master in the case of a trust debtor;

(ii) by the Registrar of Companies in the case of a company debtor;

(iii) by the Registrar of Close Corporations in the case of a close corporation debtor;

(iv) by the relevant authority responsible for the administration of that specific type of debtor in the case of an association debtor; and

(b) the debtor has personally given all known creditors and the Master at least seven days notice of the meeting at which the liquidation resolution is to be considered;

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

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

(a) the date and time of the meeting at which the liquidation resolution is to be considered;

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

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

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

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

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

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

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

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

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

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

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

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

(a) except where the debtor is a trust debtor, lodge with the Master a certified copy of the liquidation resolution concerned; and

(b) send a copy of the liquidation resolution to the persons referred to in paragraphs (a) and (b) of subsection (1) of section 13; and

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

**CHAPTER 3 - SPECIAL PROVISIONS APPLICABLE TO SPECIFIC DEBTORS**

**9. Special provisions relating to the liquidation of certain debtors.** (1) If a debtor which has been, or is in the process of being liquidated in terms of the provisions of this Act is:

- (a) a long-term insurer as defined in section 1 of the Long-Term Insurance Act 52 of 1998, or a short-term insurer as defined in section 1 of the Short-Term Insurance Act 53 of 1998, or
- (b) a bank as defined in section 1 of the Banks Act 94 of 1990; or
- (c) a mutual bank as defined in section 1 of the Mutual Banks Act 124 of 1993; or
- (d) a pension fund as defined in section 1 of the Pension Funds Act 24 of 1956; or
- (e) a financial exchange as defined in section 1 of the Financial Markets Control Act 55 of 1989; or
- (f) a medical scheme as defined in section 1 of the Medical Schemes Act 72 of 1967; or
- (g) a management company as defined in section 1 of the Unit Trusts Control Act 54 of 1981; or
- (h) a co-operative as defined in section 1 of the Co-operatives Act 91 of 1981; or
- (i) a friendly society as defined in section 1 of the Friendly Societies Act 25 of 1956,

the provisions of this section must be applied when applying this Act to such a debtor.

(2) In the application for the liquidation of a debtor as referred to in paragraphs (a) to (i) of subsection (1), the registrar of such debtor shall be deemed to be a person authorized by section 4 to make an application to the court for the liquidation thereof.

(3) The registrar of any debtor as referred to in paragraphs (a) to (i) of subsection (1), may with the written consent of the Minister responsible for the administration of such debtor, make an application under section 4 for the liquidation of such a debtor if he or she is satisfied that it is in the interests of the beneficiaries or creditors of such debtor to do so.

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(4) In any sections of this Act-

- (a) any reference to the Master in respect of notice being given, shall be construed as a reference also to the registrar of the debtor concerned;
- (b) any reference to the Registrar of Companies shall be construed as a reference also to the registrar of the debtor concerned.

(5) If an application to the court for or in respect of the liquidation of a debtor as referred to in paragraphs (a) to (i) of subsection (1) is made by any other person than the registrar of the debtor concerned-

- (a) it shall not be heard unless copies of the notice of motion and of all accompanying affidavits and other documents filed in support of the application are lodged with the registrar of such debtor at least 15 days, or such shorter period as the court may allow on good cause shown, before the application is set down for hearing; and
- (b) the applicant concerned shall not, at any time before the application is set down for hearing, make public or cause to be made known to any person other than the registrar concerned, his or her intention to bring such an application, failing which the applicant shall be guilty of an offence and, on conviction, shall be sentenced to imprisonment for a period not exceeding X years, or a fine; and
- (c) if, for any reason, the registrar of the debtor concerned is satisfied that the application is contrary to the interests of such debtor or its beneficiaries, such registrar may join the application as a party and file affidavits and other documents in opposition to the application.

(6) No liquidation resolution relating to the liquidation of a debtor referred to in paragraphs (a) to (i) of subsection (1), as contemplated in section 8 or paragraph (d) of subsection (1) of section 4 of this Act, shall be registered by the Registrar of Companies in terms of section 200 of the Companies Act 61 of 1973, and no liquidation resolution to that effect in terms of the constitution of such a debtor which is not a company shall have legal force -

- (a) unless a copy of the notice referred to in paragraph (b) in subsection (2) of section 8 has been lodged also with the registrar of the debtor concerned; or

(b) if the registrar of such debtor, by notice to the debtor, declares that the resolution is contrary to an appropriate legislative provision which prohibits the adoption of such resolution.

(7) (a) Notwithstanding the provisions of the Companies Act 61 of 1973 or any other law under which a debtor as referred to in paragraphs (a) to (i) of subsection (1) has been incorporated, Chapter 24 of this Act shall, subject to this subsection and with the necessary changes, apply in relation to the judicial management of such a debtor, whether or not it is a company, and in such application the registrar of the debtor concerned shall be deemed to be a person authorised by section 4 of this Act to make an application to court for the liquidation thereof.

(b) The registrar of the debtor concerned may make an application under Chapter 24 of this Act for a judicial management order, in respect of such a debtor if he or she is satisfied that it is in the interests of the debtor or the beneficiaries of such debtor to do so.

(c) If an application to the court for the judicial management of a debtor as referred to in paragraphs (a) to (i) of subsection (1), is made by any other person than the registrar of the debtor concerned-

(i) it shall not be heard unless copies of the notice of motion and of all accompanying affidavits and other documents filed in support of the application are lodged with the registrar of the debtor concerned at least 15 days, or such shorter period as the court may allow on good cause shown, before the application is set down for hearing; and

(ii) the registrar of the debtor concerned may, if satisfied that the application is contrary to the interests of the debtor or its beneficiaries, join the application as a party and file affidavits and other documents in opposition to the application.

(d) As from the date on which a provisional or final judicial management order is granted in respect of a debtor as referred to in paragraphs (a) to (i) of subsection (1), any reference to such debtor shall, unless clearly inappropriate, be construed as a reference to the provisional or final judicial manager, as the case may be;



(8) Notwithstanding the provisions of this Act, a person recommended by the registrar of a debtor as referred to in paragraphs (a) to (i) of subsection (1), shall be appointed by the Master as co-liquidator or co-judicial manager, as the case may be.

(9) The provisions of this section may not in any way be amended or changed without prior consultation with, and written approval of such changes by, the Minister responsible for the administration of a debtor as referred to in paragraphs (a) to (i) of subsection (1).

#### **CHAPTER 4 - LIQUIDATION ORDERS AND COMMENCEMENT OF LIQUIDATION**

**10. Provisional liquidation order.** - (1) If a court hearing an application for the liquidation of the estate of a debtor as contemplated in section 3, 4 or 5 ~~or 4~~ is satisfied *prima facie* that -

- (a) the applicable requirements of section 3, 4 or 5 ~~or 4~~, as the case may be, have been complied with;
- (b) in the case of a natural person debtor there is reason to believe that the liquidation of the estate of the debtor will be to the advantage of his or her creditors;
- (c) the debtor has committed an act of insolvency, or that he or she is insolvent, or that the circumstances referred to in section 2(2)(a) to (c) are present; and
- (d) in the case of an application contemplated in section 5~~4~~, the applicant has a claim against the debtor as contemplated in subsection (1) of that section,

the court may grant a first order for the liquidation of the estate of the debtor. [10]

(2) A court granting a first liquidation order contemplated in subsection (1) ~~shall~~ may simultaneously grant a rule **nisi** calling upon the all interested parties and the respondent, if any, to appear on a date mentioned in the rule and show cause why his or her estate should not be liquidated finally. [11]

(3) The return day of the rule **nisi** may on the application of the respondent be anticipated for the purpose of discharging the order for first liquidation if 24 hours notice is given to the applicant. [11(3)]

(4) If the court does not grant a first liquidation order as contemplated in subsection (1) it may grant an order in terms of section 11, dismiss the application, postpone the hearing thereof, but not *sine die*, or make any other order which it deems just. [12(2)]

(5) When a first liquidation order is granted the registrar shall ensure that the particulars which shall in terms of section 3(2) and ~~54~~(3)(d) appear in the heading of the application appear also on the order. [9(3)(d)]

(6) If there are reasonable grounds to believe that ~~an insolvent~~ a natural person debtor or the management of a debtor may flee the country to avoid prosecution or to take assets out of the reach of creditors, the court may when it grants a first or final liquidation order, or at any time thereafter on an application by the liquidator issue an order that the passport or passports of the ~~insolvent~~ such person should be handed to the liquidator for the period stated in the order.

**11. Final liquidation order.** - (1) If at the hearing of an application as contemplated in section 3, ~~4~~ or ~~5~~ or pursuant to the rule **nisi** contemplated in section ~~10~~(2) the court is satisfied that -

- (a) in the case where the application for liquidation was made by a creditor, that creditor has established a claim against the debtor in accordance with section ~~54~~;
- (b) the debtor has committed an act of insolvency or is insolvent, or the circumstances referred to in section 2(2)(a) to (c) are present; and
- (c) in the case of a natural person debtor, there is reason to believe that it will be to the advantage of creditors of the debtor if his or her estate is liquidated,

it may make an order for the final liquidation of the estate of the debtor. [12(1)]

(2) If the court does not issue a provisional order in terms of section 10, and is not satisfied as contemplated in subsection (1), it shall dismiss the application for the liquidation of the estate of the debtor and set aside the first liquidation order or require further proof of the allegations in the application and postpone the hearing for a reasonable period but not **sine die**. [12(2)]

(3) When a final liquidation order is granted the registrar shall ensure that the particulars which shall in terms of section 3(2) and 5(3)(d) appear in the heading of the application appear also on the order.

**12. Obligations of creditor upon whose application a liquidation order is made.**

(1) The creditor upon whose application a liquidation order is made shall, at his or her own cost, prosecute all the proceedings in the liquidation until a liquidator is appointed. [14(1)]

(2) The liquidator shall pay to the said creditor his or her costs in respect of the prosecution of the liquidation proceedings, as costs of the liquidation and the costs so payable to the said creditor shall be taxed according to the tariff applicable in the court that made the liquidation order. [14(2)]

**13. Notice and commencement of liquidation.** - (1) The registrar of the court that ~~which~~ has granted a first liquidation order shall without delay send a copy of that order and of any order amending or discharging that order -

(a) to the registrar of deeds of every deeds registry in the Republic; and [17(1)(b)(ii)]

(b) to the sheriff of the district in which the ~~insolvent~~ debtor resides, has its registered office or principal place of business, or appears to be carrying on business, or owns property. [17(1)(b)(i)][357 Companies Act]

(2) Every registrar of deeds and every sheriff who has received a copy of an order sent to him or her in pursuance of subsection (1) shall note thereon the date and time when it was received by him or her. [17(2)]

(3) A registrar of deeds who has received a copy of a first liquidation order or a copy of the liquidation resolution referred to in section 8 shall enter a **caveat** against the transfer of all immovable property or the cancellation or cession of every bond registered in the name of or belonging to the insolvent debtor, and if the registrar receives a copy of an order discharging a liquidation order, he or she shall cancel every **caveat** entered in respect of such first liquidation order. A **caveat** entered in terms of this subsection shall expire ten years after the date of the liquidation order in question, or date of the registration of a duly registered liquidation resolution as referred to in section 8. [17(3)]

(4) The registrar of the court shall without delay send a copy of every first provisional or final liquidation order and any other order made by the court in respect of the insolvent debtor or the liquidator of the insolvent estate, to the Master. [17(1)(a)]

(5) Upon the granting of a first liquidation order the applicant who applied for the order shall without delay cause a notice of the order to be published in the **Gazette**. [17(4)]

## **CHAPTER 5 - EFFECT OF LIQUIDATION**

**14. Effect of liquidation on insolvent debtor and his or her property.** - (1) The issuing of a first liquidation order, or the registration of a liquidation resolution in terms of section 8, in respect of a debtor an insolvent shall have the effect that all the property of the debtor concerned shall be deemed to be in the custody and under the control of the Master until a liquidator has been appointed, the debtor insolvent is divested of his or her or its estate, and that his or her or its insolvent estate vests in the Master until a liquidator is appointed whereupon the insolvent estate vests in the liquidator shall be deemed to be in the custody and control of the liquidator. [20(1)(a)]

(2) The estate of the insolvent debtor remains ~~vested~~ in the custody and under the control of the liquidator until it reverts to the insolvent debtor in terms of a composition or compromise contemplated in section 71 Chapters 22 or 23 of this Act, or until the liquidation order is set aside property is re-vested in the debtor or the debtor's estate in terms of section 104(1)(d) or any other provision in this Act which makes provision for the setting aside of a liquidation order or a liquidation resolution adopted in terms of section 8.[25(1)]

(3) If the liquidator vacates his or her office or dies or becomes incompetent to exercise his or her powers and perform his or her duties, the estate shall vest in any remaining liquidator or if there is none, in the Master until the appointment of a new liquidator. [25(2)]

(4) After the expiry of every caveat entered in terms of sections ~~10~~ 13(3), ~~62~~ 45(8), or ~~98~~ 103(3) or paragraph 16 of Schedule 4 in respect of the property of a debtor ~~an insolvent~~ any act of registration in respect of such property brought about by such debtor ~~him~~ shall be valid in spite of the fact that the property formed part of the insolvent estate. [25(3)]

(5) If a debtor ~~person~~ who is or was insolvent unlawfully disposes of immovable property which forms part of his or her insolvent estate, the liquidator may recover the value of the property so disposed of -

- (a) from the debtor ~~insolvent~~ or former debtor ~~insolvent~~; or
- (b) from any person who, knowing such property to be part of the insolvent estate, acquired such property from the debtor ~~insolvent~~ or former debtor ~~insolvent~~; or
- (c) from any person who acquired such property from the debtor ~~insolvent~~ or former debtor ~~insolvent~~ without giving sufficient value in return, in which case the amount so recovered shall be the difference between the value of the property and any value given in return. [25(4)]

(6) (a) The execution of a judgment in respect of property of the debtor ~~insolvent~~ shall be stayed as soon as the sheriff becomes aware of the issuing of a first liquidation order against the debtor ~~insolvent~~, unless the court orders otherwise. [20(1)(c)]

(b) The execution of a judgment in respect of property of the debtor shall be stayed as soon as the sheriff becomes aware of the adoption of a liquidation resolution by the debtor in terms of section 8; Provided that the sheriff shall hold over such execution of a judgment until such time as he is satisfied that the resolution in question has been registered with the necessary authority in terms of section 8(2)(a), failing which he shall continue with the execution of the judgment as if the liquidation resolution in question had not been adopted.

- (c) If costs in connection with the sale in execution of assets of the debtor insolvent have already been incurred when the execution of a judgment is stayed as contemplated in paragraph (a), the Master may on the application of the liquidator, on the conditions he or she finds just and subject to confirmation of the sale price by the Master or by resolution of a meeting of creditors of the estate, approve the continuation of the sale for the benefit of the insolvent estate, in which case the costs of the sale before or after liquidation shall be deducted from the proceeds. [20(2)]
- (d) The liquidator of an insolvent estate is entitled to recover from a creditor of the debtor insolvent the net amount of any payment in pursuance of the execution of any judgement made to such creditor after the granting of the first liquidation order or after the adoption of a liquidation resolution in pursuance of section 8. [New provision]
- (7) For the purposes of this section -
- (a) the following property shall be excluded from the estate of a natural person's debtor's insolvent estate:
- (i) the necessary beds, bedding and wearing apparel of the insolvent and his or her family;
  - (ii) the necessary furniture (other than beds) and household utensils of the insolvent in so far as they do not exceed R2000 in value;
  - (iii) stock, tools and agricultural implements of a farmer, in so far as they do not exceed R2000 in value;
  - (iv) the supply of food and drink in the house sufficient for the needs of the insolvent and his or her family during one month;
  - (v) tools and implements of trade, in so far as they do not exceed R2000 in value;
  - (vi) professional books, documents or instruments necessarily used by the insolvent in his or her profession, in so far as they do not exceed R2000 in value;

(vii) such arms and ammunition as the insolvent is required by law, regulation or disciplinary order to have in his or her possession as part of his or her equipment; and [82(6)]

(b) all other property of the ~~insolvent debtor~~ at the date of the issuing of the first liquidation order, or at the date of the adoption of a liquidation resolution in pursuance of section 8, including property or the proceeds thereof which are in the hands of the sheriff under a writ of attachment or a warrant of execution, and, subject to section ~~15 16~~, all property acquired by or which accrued to the ~~insolvent debtor~~ during his or her insolvency, shall notwithstanding the provisions of any other law form part of the ~~insolvent's debtor's~~ insolvent estate. [20(2)]

(8) The Minister may change the amounts referred to in subsection (7)(a)(ii), (iii), (v) and (vi) from time to time by notice in the **Gazette**. [New provision]

**15. The effect of liquidation on civil proceedings by or against the insolvent debtor.**

(1) The issuing of a first liquidation order in respect of a ~~debtor an insolvent~~, or the adoption and subsequent registration of a liquidation resolution as provided for in section 8, has the effect that all civil proceedings instituted in a court by or against the ~~debtor insolvent~~ shall, subject to the provisions of section ~~15 16~~(8), be stayed. [20(1)(b)]

(2) Proceedings which have been stayed in terms of subsection (1) may with the consent of the court or liquidator appointed in terms of section ~~55 71~~ or with three weeks' notice to the liquidator be continued against the insolvent estate. The opposite party may apply to the Registrar to substitute the liquidator for the ~~insolvent debtor~~ in the proceedings. [75(1)]

(3) The liquidator may, by giving written notice to all parties and to the registrar, substitute himself or herself as party for the ~~insolvent debtor~~ in proceedings by or against the ~~debtor insolvent~~, other than proceedings contemplated in section ~~15 16~~(7). [New provision]

(4) The court may on application by the liquidator or a creditor who has proved a claim against the insolvent estate prohibit the continuation of proceedings against the insolvent estate if the court is of the opinion that the institution or continuation of the proceedings was delayed unreasonably and that the continuation of the proceedings will delay the finalisation of the insolvent estate unreasonably. [75(1)]

(5) After the confirmation of the liquidator's first account by the Master and more than three months after the conclusion of the first meeting no person shall institute legal proceedings against the insolvent estate in respect of any liability which arose before the date of liquidation: Provided that the court may, subject to the provisions of section ~~90~~ 100 and subject to such conditions as the court may impose, permit the institution of such proceedings if it is of the opinion that there was a reasonable excuse for the delay in instituting the proceedings. [75(2)]

## **CHAPTER 6 - RIGHTS AND OBLIGATIONS OF DEBTOR DURING INSOLVENCY**

**16. Rights and obligations of insolvent debtor during insolvency.** - (1) The fact that a natural person debtor entering into a contract is insolvent shall not affect the validity of that contract: Provided that if the insolvent debtor thereby purports to dispose of any property of his insolvent estate or, without the consent in writing of the liquidator of his or her estate, enters into any contract whereby any earnings which accrues to his or her insolvent estate in terms of subsection (5) is or is likely to be adversely affected, the contract shall in either case be voidable at the option of the liquidator, but subject to the provisions of section ~~16~~ 17. [23(1) & (2)]

(2) ~~The insolvent~~ A natural person debtor may follow any profession or occupation and, subject to subsection (5), he or she may collect for his or her own benefit any remuneration for work done or payment for professional services rendered by him or her or someone on his or her behalf after the issuing of the first liquidation order. [23(3)]

(3) Any person who, after the date of liquidation of ~~an insolvent's~~ a debtor's estate, became a creditor of the insolvent debtor as a result of illegal conduct on the part of the insolvent debtor shall be entitled to payment of the debt out of any assets that accrued to the insolvent estate as a result of the said illegal conduct to the extent that such debt cannot be recovered from



**Annexure E**

**Draft Insolvency and Business Recovery Bill**

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| the ~~insolvent debtor~~ personally and after payment of all costs attributable to such assets: Provided that the said creditor was not at the time when he or she became a creditor aware of and could not by exercising reasonable care have acquired knowledge of the illegal conduct.

| (4) (a) ~~The insolvent~~ A natural person debtor shall keep a detailed record of all assets and income received by him or her from whatever source and of all expenses incurred by him or her and he or she shall for a period of one year from the issuing of the first liquidation order send to the liquidator monthly during the first week of every month a statement of his or her income and expenses during the preceding month, confirmed by an affidavit or a solemn declaration, and after the expiry of the said period of one year he or she shall send to the liquidator annually a return of his or her income and expenses for the preceding year, likewise sworn to or confirmed, and in addition he or she shall at the written request of the liquidator within seven days after such request, submit to the liquidator particulars of income received and expenses incurred by him or her for the period indicated by the liquidator. [23(4)]

| (b) The liquidator may at all reasonable times inspect the records referred to in paragraph (a) and may require the ~~insolvent debtor~~ to submit proof in support of such records and of expenses which he or she claims to have incurred for his or her own support or that of his or her dependants. [23(4)]

| (5) No benefit in terms of any pension law or the rules of a fund which is claimable by a natural person debtor ~~the insolvent~~ and is paid after the date of liquidation of his or her estate, and no social benefit which is so claimable and paid, shall form part of the ~~insolvent's debtor's~~ insolvent estate, except to the extent that such benefit exceeds R200 000 paid prior to the date of rehabilitation in the year after the date of liquidation or a subsequent year. [123(7)]

(6) The Minister may amend the amount in subsection (5) by notice in the Gazette in order to take account of subsequent fluctuations in the value of money.

- (7) (a) The liquidator may issue from the magistrates court of the district in which the ~~insolvent~~ natural person debtor resides, carries on business or is employed a notice calling on the ~~insolvent~~ debtor to appear at a hearing before the court in chambers on a date specified in such notice to give evidence on and supply proof of the earnings received by the ~~insolvent~~ debtor or his or her dependants out of the exercise of his or her profession, occupation or employment and all assets or income received by the insolvent or his or her dependants from whatever source and his or her estimated expenses for his or her own support and that of his or her dependants.

The notice, substantially in the form of Form E† G of Schedule 1 to this Act, shall be drawn up by the liquidator, shall be signed by the liquidator and the clerk of the court and shall be served by the sheriff on the ~~insolvent~~ debtor at least 7 days before the date specified in the notice for the hearing, in the manner prescribed by the Uniform Rules of Court for the service of process in general.

The court may at any time in the presence of the ~~insolvent~~ debtor postpone the proceedings to such date as the court may determine and may order the ~~insolvent~~ debtor to produce such documents as the court may specify at the hearing on the date determined by the court.

On the appearance of the ~~insolvent~~ debtor before the court the court in chambers shall call upon the ~~insolvent~~ debtor to give evidence under oath or affirmation on his or her earnings or estimated expenses contemplated in the first paragraph above and the court shall receive such further evidence as may be adduced either orally or by affidavit or in such other manner as the court may deem just by or on behalf of either the ~~insolvent~~ debtor or the liquidator as is material to the determination of the said earnings or estimated expenses.

The court shall after the hearing issue a certificate indicating which proportion of the ~~insolvent's~~ debtor's future earnings, if any, is not required for such support and shall accrue to his or her insolvent estate.

- (b) The liquidator may submit a copy of a certificate contemplated in paragraph (a) to the insolvent's employer whereupon the employer shall be obliged to transmit to the liquidator in accordance with the certificate the amount stated therein. [23(5)]

- (c) Any property which the ~~insolvent debtor~~ obtains after the issuing of a first liquidation order with earnings which do not in terms of a certificate contemplated in paragraph (a) accrue to his or her insolvent estate, shall not form part of the insolvent estate. [New provision]

(8) If an emoluments attachment order issued by a court in respect of a judgment debtor prior to the date of liquidation of his estate is in force when his estate is liquidated, such order shall remain in force for a period of six months from the date of the first liquidation order. The employer upon whom the emoluments attachment order was served shall in accordance with the order make payments to the liquidator for the benefit of the insolvent estate. [65J.(1) Magistrates' Courts Act]

- (9) (a) ~~The insolvent~~ A natural person debtor may sue or be sued in his or her own name without reference to the liquidator of his or her estate in any matter relating to status or any right in so far as it does not affect his or her insolvent estate or in respect of any claim due to or against him or her under this section but no cession of his or her earnings after the date of liquidation of his or her estate, whether made before or after the issuing of the first liquidation order, shall be of any effect so long as his or her estate is under liquidation. [23(6)]
- (b) ~~The insolvent~~ A natural person debtor may be sued in his or her own name for any delict committed by him or her after the date of liquidation of his or her estate, and his or her insolvent estate shall not be liable therefor. [23(10)]
- (c) ~~The insolvent~~ A natural person debtor may for his or her own benefit recover any compensation for any loss or damage which he or she may have suffered, whether before or after the date of liquidation of his or her estate, by reason of any defamation or personal injury: Provided that where such compensation recovered by the ~~insolvent debtor~~ includes medical or other expenses a creditor in respect of such expenses is entitled to be paid out of the compensation or recover the compensation from the ~~insolvent debtor~~ even though the claim for such expenses arose before the date of liquidation of the estate: Provided further that the ~~insolvent debtor~~

shall not without leave of the court institute any action against the liquidator of his or her estate on the ground of malicious prosecution or defamation. [23(8)]

(10) Any property claimable by the liquidator from the insolvent debtor under this section may be recovered from the insolvent debtor by warrant of execution to be issued by the registrar upon the production to him or her of a certificate by the Master that the property stated therein is so claimable. [23(11)]

(11) The insolvent in the case of a natural person debtor, the partners in the case of a partnership debtor and the management of a debtor in the case of any other debtor, shall at the request of the liquidator assist the liquidator to the best of his or her ability in collecting, taking charge of or realising any property belonging to the insolvent estate and, in the case of a natural person debtor, the liquidator shall during the period of such assistance, give to the insolvent debtor out of the insolvent estate such an allowance in money or in goods as is, in the opinion of the Master, necessary to support the insolvent debtor and his or her dependants. [23(12)]

(12) ~~The insolvent~~ A natural person debtor shall keep the liquidator informed in writing of his or her postal and residential address. [23(13)]

(13) If a notice is to be conveyed to ~~an insolvent~~ a natural person debtor in terms of this Act personal notice shall be given to ~~the insolvent~~ such debtor to the address in subsection (11). [23(14)]

## **CHAPTER 7 - IMPEACHABLE DISPOSITIONS**

**17. Alienation by insolvent debtor of property to third party who is in good faith.** If ~~the insolvent~~ a debtor, without the consent of the liquidator of his or her estate, alienates for value any property which he or she acquired after the date of liquidation of his or her estate and which forms part of his or her insolvent estate, or any right to such property, to a person who proves that he or she was not aware and had no reason to suspect that the estate of the insolvent debtor was under liquidation, the alienation shall nevertheless be valid. [24(1)]

**18. Presumptions relating to property in possession of insolvent debtor.** - (1) Whenever an insolvent a debtor has acquired the possession of property and the liquidator of his or her estate claims that property for the benefit of the insolvent estate that property shall be presumed to belong to the insolvent estate, unless the contrary is proved. [24(2)]

(2) If any person who became a creditor of the insolvent debtor after the date of liquidation of the insolvent's debtor's estate alleges against the insolvent debtor or the liquidator that property acquired by the insolvent debtor does not belong to the insolvent estate and claims any right thereto, then it shall be presumed, unless the contrary is proved, that the said property does not belong to the insolvent estate. [24(2)]

**19. Disposition without value.**- (1) Every disposition of property not made for value may be set aside by the court if such disposition was made by the insolvent debtor within two years before the presentation of the application for liquidation of his or her estate to the Registrar or within three years before the presentation of the application for liquidation to the Registrar if the disposition was made in favour of an associate: Provided that if it is proved by someone opposing the setting aside of the disposition that the liabilities of the insolvent debtor at any time after the making of the disposition exceeded his or her assets by less than the value of the property disposed of, the disposition may be set aside only to the extent of such excess. [26(1)]

(2) A disposition of property not made for value, which was set aside under subsection (1) or which was uncompleted by the insolvent debtor, shall not give rise to any claim in competition with the creditors of the insolvent's debtor's estate: Provided that in the case of a disposition of property not made for value, which was uncompleted by the insolvent debtor, and which -

- (a) was made by way of suretyship, guarantee or indemnity; and
- (b) has not been set aside under subsection (1),

the beneficiary concerned may compete with the creditors of the insolvent's debtor's estate for an amount not exceeding the amount by which the value of the insolvent's debtor's assets exceeded his or her liabilities immediately before the making of that disposition. [26(2)]

**20. Antenuptial contracts.** - (1) No immediate benefit under a duly registered antenuptial contract given in good faith by one spouse to the other or to any child to be born of the marriage shall be set aside as a disposition without value, unless the application for the

liquidation of the estate of the spouse who gave the benefit was presented to the Registrar within two years of the registration of that antenuptial contract.

(2) In subsection (1) the expression "immediate benefit" means a benefit given by a transfer, delivery, payment, cession, pledge, or special bond of property completed before the expiration of a period of three months as from the date of the marriage. [27(2)]

**21. Voidable preferences.** - (1) Every disposition of his or her property made by a debtor which has the effect that any one of his or her creditors receives a benefit to which he or she would not have been entitled had the debtor's estate been under liquidation at the time of the making of the disposition may be set aside by the court if -

- (a) the debtor's liabilities exceeded the value of his or her assets immediately after the making of the disposition; and
- (b) the disposition was made within 6 months before the presentation of the application for liquidation of the debtor's estate to the Registrar or within 12 months before the said presentation in the case where it was made to an associate of the debtor,

unless the person for whose benefit the disposition was made, proves that it was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above the other, and if he or she is an associate of the debtor, also proves that he or she was not aware and had no reason to suspect that the debtor's liabilities would exceed the value of his or her assets immediately after the making of the disposition. [29(1)]

(2) For purposes of subsection (1) it shall be presumed unless the contrary is proved, that a disposition was made not in the ordinary course of business if -

- (a) it was made by way of payment of a debt that was not due and payable or not legally enforceable;
- (b) it embodied payment in an unusual form or a form other than that originally agreed upon;

- (c) it was made by way of securing an existing unsecured debt or securing a debt in novation or substitution of an existing unsecured debt which existed for more than one month after the creditor in respect of such debt performed his or her obligations in respect of the transaction giving rise to that debt. [New provision]

(3) Any disposition of his or her property by a debtor at a time when his or her liabilities exceed his or her assets, made with the intention of preferring one of his or her creditors above another, may be set aside by the court if the application for the liquidation of the estate of the debtor is presented to the Registrar within 3 years after the making of the disposition. [30(1)]

(4) For purposes of this section a surety of a debtor or a person by law in a position analogous to that of a surety shall be deemed to be a creditor of the debtor. [30(2)]

(5) Every disposition of property made under a power of attorney, whether revocable or irrevocable, shall for the purposes of this section, be deemed to be made at the time at which the transfer or delivery or mortgage of such property takes place. [29(3)]

**22. Collusive dealings for prejudicial disposition of property.** - (1) Any transaction entered into by a debtor before or after the liquidation of his or her estate in collusion with another person for disposing of property belonging to the debtor or the debtor's estate in a manner which had the effect of prejudicing his or her creditors or preferring one creditor above another, may after the liquidation of his or her estate be set aside by the court. [31(1)]

(2) Any person who was a party to such collusion shall be liable to make good any loss thereby incurred by the insolvent estate and shall pay for the benefit of the estate, by way of penalty, such sum as the court may determine, which sum shall not be more than the amount by which he or she would have benefited if the disposition had not been set aside, and if he or she is a creditor he or she shall also forfeit his or her claim against the insolvent estate. [31(2)]

(3) The compensation and penalty referred to in subsection (2) may be recovered in any proceedings for the setting aside of the transaction concerned. [31(3)]

**23. Application of sections 19, 21 and 22 to certain debtors.** (1) The provisions of section 19, 21 and 22 shall apply to a trust debtor, company debtor, close corporation debtor and association debtor if such debtor has been liquidated in terms of the provisions of this Act.

(2) For the purposes of applying sections 19, 21 and 22 to a trust debtor, company debtor, close corporation debtor or association debtor, the event which shall be deemed to correspond with the presentation of the application for liquidation of a debtor shall be-

(a) where the liquidation order has superseded a voluntary liquidation by members, the date of registration of the special resolution or resolution, as the case may be, to liquidate the debtor; and

(b) where the liquidation order has superseded a voluntary liquidation by creditors in terms of section 8, the date on which notice was given to creditors of the liquidation resolution to liquidate the debtor; and

(c) in the case of a voluntary liquidation by resolution in terms of section 8, the date upon which notice was given to creditors to liquidate the debtor by resolution. [Section 340(2) of the Companies Act]

(2) Any cession or assignment by a trust debtor, company debtor, close corporation debtor or association debtor of all of its property to trustees for the benefit of all its creditors shall be void. [Section 340(3) of the Companies Act]

**24. Certain contributions to pension funds may be recovered for benefit of insolvent estate.** - (1) If an insolvent a debtor at any time within two years before the presentation to the Registrar of the application for the liquidation of his or her estate undertook new obligations in respect of a fund at a time when the insolvent's debtor's liabilities exceeded his or her assets, or as a result of which his or her liabilities exceeded his or her assets, the liquidator of his or her estate may recover from the fund or funds concerned for the benefit of the insolvent estate any contribution in respect of such new obligation which together with the total contributions in respect of existing obligations, exceed the amount of R10000 per annum: Provided that if it is proved by someone opposing the recovery of contributions that the liabilities of the insolvent debtor at any time after the new obligation was undertaken exceeded his or her assets by less than the said amount which the liquidator may recover the amount which may be recovered shall not be greater than the amount by which the insolvent's debtor's liabilities exceeded his or her assets: Provided further that payment by one fund to another fund upon



termination of service or dissolution of a fund and contributions to a new fund in so far as they replace contributions to another fund shall not be regarded as new obligations: Provided further that if contributions which are recoverable have been made to more than one fund, or membership has been transferred from one fund to another, the amount which may be recovered from any such fund shall be proportioned according to the contributions made or transferred to each fund in respect of such new obligations.

(2) The Minister may amend the amount in subsection (1) by notice in the Gazette in order to take account of subsequent fluctuations in the value of money.

(3) Notwithstanding the provisions of any other law, a fund from which any contribution is recovered as contemplated in subsection (1) may reduce the benefits to which the ~~insolvent~~ debtor concerned would have been entitled in terms of the rules of the fund in respect of such contributions, in proportion to the contributions so recovered from the fund.

(4) No greater amount shall be recovered from a fund in terms of subsection (1) than the amount that would have been payable to ~~the insolvent~~ debtor if the fund had been dissolved on the date when the amount is recovered.

(5) If the full amount in terms of subsection (1) cannot be recovered because of the limitation in subsection (4), the liquidator may recover the deficit proportionately from the ~~insolvent~~ debtor personally in respect of benefits which he or she received from the said fund within three years after date of liquidation, and from another beneficiary in respect of benefits which he or she received from the said fund before or within three years after the date of liquidation in connection with the ~~insolvent~~ debtor.

(6) If a fund had bought an annuity for a member from an insurer, the fund may recover from the insurer that part of the purchase price paid out of contributions recoverable in terms of subsection (1) and the insurer may, notwithstanding the provisions of any other law, reduce the future benefits in respect of the annuity accordingly: Provided that the amount so recovered shall not exceed the value of the ~~insolvent's~~ debtor's annuity on the date when the amount is recovered.

(7) If the insolvent debtor conceals the payment of a contribution to a fund from his or her creditors or partakes in the concealment thereof or resigns himself or herself thereto, the liquidator may recover contributions made before creditors discovered the payment of the contribution, or could reasonably have discovered if they had acted with due care, irrespective of whether the said contributions were made within two years before presentation to the Registrar of the application for the liquidation.

(8) The provisions of this section shall not prejudice the rights of a liquidator or creditors in terms of the common law or this Act, if contributions were made fraudulently to the disadvantage of creditors or if there were collusive dealings as contemplated in section ~~21~~ 22.

(9) If the payment of premiums in respect of a life policy is a contributions to a fund in terms of this section, the provisions of section 63 of the Long Term Insurance Act, 1998 (Act No. 52 of 1998) shall not apply. [New provision]

**25. Attachment of property in possession of associate.** (1) If a liquidator suspects that a disposition of property by the insolvent debtor to an associate of the insolvent debtor may be liable to be set aside, the liquidator may instruct the sheriff to attach such property.

(2) The sheriff shall-

- (i) take into his or her personal custody all cash, share certificates, bonds, bills of exchange, promissory notes and other securities and compile a specified list thereof;
- (ii) without delay deposit in a banking account as contemplated in section 89(1)(a) or (b) all cash taken into his or her custody;
- (iii) in so far as possible leave all other movable which he or she has attached, other than animals, in a properly locked storage place or appoint a suitable person to keep the said property in his or her custody, in which case he or she shall hand to such person a copy of an inventory of the property left in his or her custody and he or she shall draw that person's attention to the offence contemplated in section 136(2)(f) in respect of the unauthorised disposition of property under attachment;

(iv) be entitled to fees according to Tariff A in Schedule 2.

(3) The property must be released if the sheriff is instructed to do so by the liquidator.

(4) The liquidator shall instruct the sheriff to release property as soon as it is evident that attachment of the property is not required to safeguard the interests of the estate in the setting aside of a disposition of property.

(5) An associate may apply to the Court for appropriate relief if property of the associate is attached or held under attachment without reasonable cause.

(6) The costs of attachment of the property shall form part of the costs of liquidation.

**26. Certain rights not affected by improper disposition.** - (1) A person who, in return for any disposition which is in terms of section ~~18, 20 or 21~~ 19, 21 or 22 liable to be set aside, has parted with any property or security which he or she held or who has lost any right against another person shall, if he or she acted in good faith, not be obliged to restore any property or other benefit received under such disposition, unless the liquidator has indemnified him or her for parting with such property or security or for losing such right. [33(1)]

(2) Section ~~18, 20 and 21~~ 19, 21 and 22 shall not affect the rights of any person who acquired property in good faith and for value from any person other than a person whose estate was subsequently liquidated. [33(2)]

(3) The setting aside of a disposition made by a debtor in terms of section ~~18, 20 or 21~~ 19, 21 or 22 shall not discharge a surety for the debtor.

**27. Set-off.** - If two persons have entered into a transaction the result whereof is a set-off, wholly or in part, of debts which they owe one another and the estate of one of them is liquidated within a period of six months after the taking place of the set-off, or if a person who had a claim against another person (hereinafter in this section referred to as the debtor) has ceded that claim to a third person against whom the debtor had a claim at the time of the cession, with the result

that the one claim has been set-off, wholly or in part, against the other, and within a period of one year after the cession the estate of the debtor is liquidated; then the liquidator of the insolvent estate may in either case abide by the set-off or he may, if the set-off was not effected in the ordinary course of business, disregard it and call upon the person concerned to pay to the estate the debt which he would owe it but for the set-off, and thereupon that person shall be obliged to pay that debt and may prove his claim against the estate as if no set-off had taken place: Provided that any set-off shall be effective and binding on the trustee of the insolvent estate if it takes place between an exchange or a market participant as defined in section 1 and any other party in accordance with the rules of such an exchange, or if it amounts to payment of a net amount in terms of section 32. [46]

**28. Payment of debt to insolvent debtor after liquidation.** - If on or after the date of liquidation of ~~an insolvent's~~ a debtor's estate (hereinafter in this section referred to as the insolvent) a debtor of the insolvent pays to the insolvent a debt that was due before the date of liquidation or otherwise fulfils any obligation towards the insolvent the cause of which arose before the date of liquidation, such payment or such fulfilment shall be void, unless the debtor proves that it was made or done in good faith without knowledge on his or her part of the liquidation. [22]

**29. Institution of proceedings on behalf of insolvent estate** - (1) Proceedings for the setting aside of any disposition of property made by a debtor or for the recovery of any debt, asset, compensation, penalty or benefit of whatever kind for the benefit of the insolvent estate of the debtor may be instituted by the liquidator and, if the liquidator fails to take any such steps they may be taken by any creditor on behalf of the insolvent estate upon having indemnified the liquidator against all costs thereof to the reasonable satisfaction of the liquidator. [32(1)]

(2) If any creditor has taken proceedings under subsection (1) no creditor who was not a party to the proceedings shall derive any benefit from any moneys or from the proceeds of any property recovered as a result of such proceedings before the claim and costs of every creditor who was a party to such proceedings have been paid in full.

(3) In any such proceedings the insolvent debtor, or the management of the debtor, may be compelled to give evidence on a subpoena issued on the application of any party to the proceedings or he or she may be called upon by the court to give evidence and the provisions of

section ~~65~~ 52(6) shall **mutatis mutandis** apply to the giving of evidence at such proceedings. [32(2)]

(4) In any such proceedings under section ~~18, 20, or 21~~ 19, 21 or 22 it is presumed, until the contrary has been proved, that the liabilities of the debtor exceeded his or her assets or the value of his or her assets at any time within 3 years before the date of liquidation of the estate.

(5) When the court sets aside any disposition of property it shall declare the liquidator entitled to recover the alienated property or in default of such property the value thereof at the date of the disposition or at the date on which the disposition is set aside, whichever is the higher, and interest may be recovered on the value of such property in accordance with section 2A of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975). [32(3)]

#### **CHAPTER 8 - EFFECT OF LIQUIDATION UPON CERTAIN CONTRACTS**

**30. Uncompleted acquisition of immovable property by insolvent debtor.** - (1)  
If before the date of liquidation of his or her estate ~~an insolvent~~ a debtor had entered into a contract for the acquisition of immovable property by him or her and such property had not yet been transferred to him or her at the date of liquidation, the liquidator of the insolvent estate may elect either to abide by the contract or to abandon it.

(2) The other party to the said contract may call upon the liquidator by written request to exercise his or her choice and if the liquidator fails to exercise his or her choice and to notify the other party thereof within 6 weeks after he or she has received the written request, the other party may apply to the court for an order for the cancellation of the contract and for restoring any such immovable property which came in possession or under the control of the ~~insolvent~~ debtor or the liquidator by virtue of the contract.

(3) The court may, in respect of an application referred to in subsection (2), make any order it finds just.

(4) The provisions of this section shall not affect any right which the said other party may have to establish against the insolvent estate a concurrent claim for any loss suffered by him or her as a result of the non-fulfilment of the contract. [35]

**31. Transactions on an exchange.** - (1) If upon the date of liquidation of the estate of a market participant the obligations of such market participant in respect of any transaction entered into prior to the date of liquidation have not been fulfilled, the exchange in question in respect of any obligation owed to it, or any other market participant in respect of obligations owed to such market participant, shall in accordance with the rules of that exchange applicable to any such transaction be entitled to terminate all such transactions and the liquidator of the insolvent estate of the market participant shall be bound by such termination. [35A(2)]

(2) No claim as a result of the termination of any transactions as contemplated in subsection (1) shall exceed the amount due upon termination in terms of the rules of the exchange in question. [35A(3)]

(3) Any rules of an exchange and the practices thereunder which provide for the netting of a market participant's position or for set-off in respect of transactions concluded by the market participant or for the opening or closing of a market participant's position shall upon the date of liquidation of the estate of the market participant be binding on the liquidator in respect of any transaction or contract concluded by the market participant prior to such date of liquidation, but which is, in terms of such rules and practices, to be settled on a date occurring after the date of liquidation, or settlement of which was overdue on the date of liquidation. [35A(4)]

(4) ~~Sections 341(2) of the Companies Act, 1973 (Act No. 61 of 1973), and sections 18 and 19 and 21 of this Act shall not apply to property disposed of in accordance with the rules of an exchange. [35A(5)]~~

**32. Agreements providing for termination and netting.** - (1) Subject to the provisions of subsection (2), in this section "agreement" means -

- (a) an agreement which provides that, in the event of the estate of a party thereto or the estate of a party to two or more agreements with the same counterparty, being liquidated before such party has performed fully in terms of the agreement or one or more of the agreements;
  - (i) all unperformed obligations of the parties terminate or may be terminated; and
  - (ii) the termination values of the unperformed obligations are determined or may be determined; and
  - (iii) the termination values are netted or may be netted, so that only a net amount (whether in South African currency or some other currency) is payable to or by a party; or
- (b) any agreement declared by the Minister after consultation with Minister of Finance, by notice in the Gazette to be an agreement for the purposes of this section.

(2) In this section "agreement" does not include -

- (a) a transaction contemplated in section ~~27~~ 31; or
- (b) a netting arrangement as contemplated in the National Payment System Act, 1998 (Act No. 78 of 1998); or
- (c) any agreement declared by the Minister after consultation with the Minister of Finance, by notice in the Gazette to not be an agreement for the purposes of this section.

(3) Upon the liquidation of the estate of a party to an agreement all unperformed obligations arising out of such agreement or all such agreements between the same parties shall, notwithstanding any conflicting rule of the common law, automatically be terminated as at the date of liquidation, termination values be calculated at market value at that date and a net amount be payable.

**33. Effect of liquidation of estate of seller under reservation of ownership contract. -**  
The liquidation of the estate of a seller under a reservation of ownership contract shall not give a right to the liquidator of the estate to reclaim property sold under the contract. [New provision.]

**34. Goods purchased not on credit but not paid for.** - (1) If a ~~person~~ debtor, before the date of liquidation of his or her estate, received delivery of movable property bought by him or her and the purchase price of such property had not been paid in full at the time of the delivery despite a term of the contract that the purchase price shall be paid on delivery of the property, the seller may, after the liquidation of the purchaser's estate, reclaim the property if within 14 days after the delivery thereof he or she has given notice in writing to the purchaser or the liquidator or the Master that he or she reclaims the property. [36(1)]

(2) If the liquidator disputes the seller's right to reclaim the property he or she shall, within 14 days after having received notice of the claim, notify the seller in writing that he or she disputes the claim, whereupon the seller may within 14 days after the receipt of the said notice, institute legal proceedings to enforce his or her right. [36(1)]

(3) For the purposes of subsection (1) a contract of purchase and sale shall be deemed to provide for the payment of the purchase price upon delivery of the property in question to the purchaser, unless the seller has agreed that the purchase price or any part thereof shall not be payable before or at the time of such delivery. [36(2)]

(4) The liquidator of the purchaser's insolvent estate shall not be obliged to restore any property reclaimed by the seller in terms of subsection (1), unless the seller refunds to him or her every part of the purchase price already received by him. [36(3)]

(5) Except as provided in this section, a seller shall not be entitled to recover any property which he or she sold and delivered to a purchaser whose estate was liquidated after the sale, only by reason of the fact that the purchaser failed to pay the purchase price. [36(4)]

**35. Effect of liquidation upon lease.** - (1) This section does not apply to a financial lease.

(2) A lease of movable or immovable property shall not be terminated by the liquidation of the estate of the lessee, but the liquidator of the insolvent estate may, without prior notice, terminate the lease by notice in writing to the lessor with the approval of the Master or in terms of a resolution of creditors taken at a meeting of creditors of the insolvent estate. [37(1)]



(3) The lessor may claim from the insolvent estate compensation for any loss which he or she may have sustained by reason of the non-performance of the terms of the lease. [37(1)]

(4) If the liquidator does not within 3 months of his or her appointment notify the lessor that he or she continues the lease on behalf of the insolvent estate, he or she shall be deemed to have terminated the lease at the end of the said three months. [37(2)]

(5) The rent due in terms of the lease from the date of liquidation of the estate of the lessee to the termination or cession of the lease by the liquidator, shall be included in the cost of the liquidation. [37(3)]

(6) The termination of the lease by the liquidator in terms of this section shall deprive the insolvent estate of any right to compensation for improvements, other than improvements made in terms of an agreement with the lessor, made to the leased property during the period of the lease. [37(4)]

**36. Contract of service terminated by insolvency of employer.** - (1) Notwithstanding the provisions of section 197 of the Labour Relations Act, 1995 (Act No. 66 of 1995), the liquidation of the estate of an employer shall terminate the contract of service between the employer and his or her employees that was in existence at the date of liquidation. [38]

(2) Any employee whose contract of service has been so terminated shall be entitled to claim compensation from the insolvent estate of his or her employer for any loss which he or she may have sustained by reason of the termination of his or her contract of service prior to its expiration. [38]

## **CHAPTER 9 - APPOINTMENT OF LIQUIDATOR**

**37. Appointment of liquidator.** - (1) A creditor of the estate with a liquidated claim, the cause of which arose before liquidation and who will after proof of the claim have the right to vote for a liquidator at a meeting, may in writing nominate a person to be appointed by the Master as liquidator.

(2) The Master shall as soon as possible after 10:00 a.m. on the second working day after the granting of the first liquidation order, or, in the case of a voluntary liquidation by resolution in terms of section 8, after receipt of a duly adopted liquidation resolution in terms of paragraph (b) subsection (2) of section 8, or after the time when a liquidator ceases to function as liquidator according to the provisions of section 73, as if the nominations were votes for a liquidator at a meeting, appoint the liquidator or liquidators nominated by creditors in nominations received by the Master before 10:00 a.m. on the said working day: Provided that the Master may reject a nomination or amend the amount of a claim in a nomination if it appears from the information in nominations that the creditor's claim cannot be proved at a meeting or cannot be proved for the amount reflected in the nomination.

(3) If the Master deems it necessary for the proper administration of an insolvent estate he or she may at any time appoint one additional liquidator after 48 hours notice by telefax, electronic mail, or personal delivery to each liquidator appointed or to be appointed in terms of subsection (2) of the reasons for an additional appointment.

(4) If

(a) in the case of a liquidation by the court the appointment of a liquidator is so urgent that it cannot be delayed until the second working day after the granting of the first liquidation order the Court may when granting the order simultaneously appoint a provisional liquidator for the preservation of the estate on such conditions regarding the giving of security or otherwise the court deems fit; or

(b) in the case of a voluntary liquidation by resolution in terms of section 8 the appointment of a liquidator is so urgent that it cannot be delayed for forty eight hours after receipt of the duly adopted liquidation resolution by the Master in terms of subsection (10) of section 8, the Master may appoint a provisional liquidator at any time after receipt of the notice of the meeting referred to in paragraph (b) of subsection (2) of section 8: Provided that the Master shall only appoint such liquidator if requested to do so by a creditor or creditors as provided for in subsection (1).

(5) The provisional liquidator shall after his or her appointment proceed to recover and take into possession all the assets and property of the insolvent estate and shall give effect to any directions by the Court.

(6) In the event of the provisional liquidator not being appointed in terms of subsection (2) or (7), the provisional liquidator shall vacate his or her office when a liquidator is appointed in terms of subsection (2) or (8) and shall deliver the assets, property and books to the liquidator and account to the liquidator.

(7) The provisional liquidator is entitled to remuneration taxed by the Master in accordance with Tariff B in Schedule 2.

(8) Failing any valid nomination for the appointment of a liquidator in terms of subsection (2) the Master shall appoint a person of his or her choice as liquidator.

(9) If in the case of a liquidation by the court the Master is unable to appoint a liquidator he shall, after the issue of a final order and after giving notice to the person who applied for liquidation and in the **Gazette**, report to the court with or without any formal application or motion and request the court to set aside the liquidation order.

(10) The court may on receipt of the Master's report referred to in subsection (8) set aside the liquidation order, or refer the report back to the Master and direct the Master to proceed by way of formal application or motion at the cost of the estate, or make any other order it deems fit.

(11) The written nomination referred to in subsection (1) shall be substantially in the form of Form AA of Schedule 1 to this Act.

(12) No person shall be appointed in terms of subsection (2) or (8) unless he or she has given security to the satisfaction of the Master for the proper exercise of his or her powers and performance of his or her duties as liquidator and has lodged an affidavit stating that he or she is not disqualified in terms of section 57. [18(1)]

(13) A liquidator appointed in terms of subsection (2) or (8) shall, before the first meeting of creditors of the insolvent estate, be obliged to give effect to any direction given to him or her by the Master. [18(2)]

(14) The Master shall keep a public record, which must be updated at least every 14 days, of appointments in terms of subsection (3) or section 68(4) which shall reflect the name and reference number of the estate, the name and address of the person appointed, the amount of security called for and the reasons for the appointment.

## **CHAPTER 10 - POWERS AND DUTIES OF LIQUIDATORS**

**38. Liquidator shall serve first liquidation order on insolvent debtor and attach property belonging to insolvent estate.** - (1) In the case of a liquidation by the court the liquidator shall immediately after his or her appointment serve a copy of the first liquidation order on the ~~insolvent debtor~~ and in the case of a natural person debtor, if the name of the insolvent's spouse appears on the order he or she shall serve a copy of the order also on the spouse. When a copy of a first liquidation order is served on ~~an insolvent a debtor~~ he or she shall be supplied with two copies of the form referred to in section ~~34~~ 39(1)(b). [16(1); new provision]

(2) When serving the first liquidation order the liquidator shall in so far as it is possible, obtain the following particulars in respect of the ~~insolvent debtor~~ and his or her spouse, if applicable, namely -

- (a) the full name, date of birth and identity number or registration number of the ~~insolvent debtor~~;
- (b) where applicable, the ~~insolvent's debtor's~~ marital status and, if he or she is married in community of property, the full name, date of birth and identity number of his or her spouse. [18A]

(3) If the name, date of birth, ~~or~~ identity number or registration number of the ~~insolvent debtor~~ or his or her spouse which appears on the first liquidation order is incorrect or if any of these particulars are not stated the liquidator shall note the correct particulars on the copy of the first liquidation order and he or she shall send a copy thereof to the registrar of every deeds registry in the Republic together with a copy of his or her letter of appointment and he or she shall also send a copy of the order on which the particulars have thus been noted, to the applicant, the Master and to the registrar of the court. [18A]

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(4) Service of a copy of a liquidation order may be effected by the liquidator's clerk or by the sheriff, if requested thereto by the liquidator, in which event the provisions of subsections (2) and (3) relating to the particulars which shall be endorsed on the copy of the order shall apply to the said clerk or sheriff, as the case may be. [New provision]

(5) Service of a copy of a liquidation order shall be carried out in accordance with the Uniform Rules of Court: Provided that if the insolvent debtor has been absent from his or her usual place of residence or his or her business in the Republic during a period of 21 days, the court may be approached for directions with regard to some other mode of service. [11(2)]

(6) The liquidator shall, after the issue of his or her appointment, attach all the movable property in the possession of the insolvent debtor and he or she shall compile a full inventory thereof. Such property in respect of which a person allegedly has a right of pledge or a right of retention or which is under judicial attachment shall not be attached but shall be shown on the inventory. [19(1)] [69(1)]

(7) The liquidator shall -

- (a) take into his or her personal custody all books of account, invoices, vouchers, business correspondence and any other records relating to the affairs of the insolvent debtor and make a specified list of all such books, documents and other records;
- (b) if the insolvent debtor or a director, member, officer or trustee of the debtor is present, ask him or her whether the list referred to in paragraph (a) is a complete list of all books and records relating to his or her affairs and note his or her reply on the list;
- (c) note on the list any explanation which the insolvent debtor or management of the debtor gives with regard to the books, documents and other records relating to his or her affairs or in respect of any books, documents or other records which he or she is unable to supply;
- (d) take into his or her personal custody all cash, share certificates, bonds, bills of exchange, promissory notes and other securities and compile a specified list thereof;
- (e) without delay deposit in a banking account as contemplated in section ~~83~~ 89(1)(a) or (b) all cash which he or she has taken into his or her custody;

- (f) in so far as is possible leave all other movable property which he or she has attached, other than animals, in a properly locked storage place or appoint a suitable person to keep the said property in his or her custody, in which case he or she shall hand to such person a copy of an inventory of the property left in his or her custody and he or she shall draw that person's attention to the offence contemplated in section 136 (2)(f) in respect of the unauthorised disposition of property under attachment. [19(1)]

(8) The liquidator may perform the attachment himself or herself or he or she may cause the attachment to be performed in whole or in part by the Sheriff. The Sheriff shall be entitled to fees taxed by the Master according to tariff A in Schedule 2 and the rules for the construction of that tariff.[New provision]

- (9) (a) Any person who has an interest in the insolvent estate or in any property which is attached is entitled to be present or may authorise a person to be present on his or her behalf when property of the insolvent estate is attached and when an inventory in respect thereof is compiled. [19(2)]

- (b) If the ~~insolvent~~ debtor or his or her representative is present, he or she shall sign the inventory and a copy thereof shall be handed to him or her and any comment which he or she may have with regard to the inventory or with regard to any assets, books or records of the ~~insolvent~~ debtor not included in the inventory should be attached to the inventory. [New provision]

(10) The liquidator shall send a copy of the inventory to the Master. [19(4)]

(11) The liquidator shall cause the property attached to be valued by an appraiser appointed in terms of section 6 of the Administration of Estates Act, 1965 (Act 65 of 1965) or some other person approved by the Master and he or she shall supply the Master with a copy of the valuation. [69]

(12) In the case of a trustee debtor, company debtor, close corporations debtor or association debtor -

- (a) The court may at any time after making a liquidation order, or after a liquidation resolution for the voluntary liquidation of a debtor in terms of section 8 of this Act has been adopted, order any director, member, trustee, banker, agent or officer of the debtor concerned to pay, deliver, convey, surrender, or transfer to the liquidator of the debtor forthwith, or within such time as the court directs, any money, property or books and papers in his hands to which the debtor is prima facie entitled.
- (b) The court may order any director, member, trustee, purchaser or other person by whom money is due to any such debtor which is being liquidated, to pay the same into a banking institution registered under the Banks Act 94 of 1990, to be named by the court for the account of the liquidator instead of to the liquidator, and such order may be enforced in the same manner as if it had ordered payment to the liquidator.
- (c) All moneys paid into a banking institution as aforesaid in the event of a liquidation by the court shall be subject in all respects to the orders of the court. [Section 362 of the Companies Act]

**39. Insolvent Debtor shall hand over books to liquidator and shall submit statement of affairs to Master and liquidator.** - (1) When a liquidation order is served upon an insolvent a debtor as contemplated in section 38(1), the insolvent debtor shall -

- (a) immediately hand over to the liquidator all books of account, invoices, vouchers, business correspondence and any other records relating to his or her affairs and obtain from him or her a specified receipt in respect thereof; [16(1)]
- (b) (i) in the case of a natural person debtor or partnership debtor within 7 days after the service of the said order submit to the Master and the liquidator one copy each of a statement of affairs as on the date of liquidation, compiled in a form substantially corresponding to Form A of Schedule 1 and which shall contain the particulars provided for in that Form, which particulars shall be confirmed by affidavit. [16(2)]
- (ii) in the case of a trust debtor, company debtor, close corporation debtor or association debtor, the persons who at the time of the

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liquidation order or adoption of the liquidation resolution were responsible for the management of such debtor, and such persons who have been responsible for the management of the debtor, or who participated in its formation, at any time within one year before the first liquidation order or adoption of the liquidation resolution, as may be required by the Master to do so, shall within 7 days after the service of the said order or adoption of the resolution submit to the Master two copies of a statement of affairs as on the date of liquidation, compiled in a form substantially corresponding to Form A of Schedule 1 and which shall contain the particulars provided for in that Form, which particulars shall be confirmed by affidavit; Provided that the Master may exempt any person referred to in this paragraph from the obligation to comply with such requirement if such person satisfies him by affidavit that he is unable to make out or cause to be made out or to verify such statement as to the affairs of the debtor concerned. [Section 363(2) and (3) of the Companies Act]

(2) All stock in trade enumerated in a statement of affairs contemplated in subsection (1) shall be valued at cost price or at the market value thereof at the time of the making of the sworn statement, whichever value is the smallest. [16(4)]

(3) If the Master is satisfied that the insolvent debtor was unable to draw up the statement of affairs that was submitted he or she may allow a person who has assisted the insolvent debtor or his or her spouse, where applicable, to draw up the statement of affairs to recover from the insolvent estate the costs which the Master determines. [16(5)]

**40. Liquidator may obtain search warrant.** - (1) If the liquidator suspects that any book, document or record relating to the affairs of the insolvent debtor or any property belonging to the insolvent debtor is being concealed or otherwise unlawfully withheld from him or her he or she may apply to the magistrate within whose area of jurisdiction such book, document, record or property is suspected to be or a magistrate who presided at a questioning in terms of section ~~65, 66 or 68~~ 52, 53 or 55, for a search warrant.



(2) If it appears to a magistrate to whom such application is made on the ground of an affidavit, or evidence given at a questioning in terms of section 52, 53 or 55 or answers to question contemplated in section 54(3)(b) that there is substantiated reason to suspect that a book, document or other record relating to the affairs of the insolvent debtor or property belonging to the insolvent estate is being concealed in possession of a person or at a place or on a vehicle or vessel or in a container of whatever nature or is otherwise unlawfully withheld from the liquidator, within the area of jurisdiction of the said magistrate, he or she may issue a warrant authorising the liquidator or a police officer to search a person, or place or vehicle, vessel or container mentioned in the warrant and to take possession of such book, document, record or property.

(3) The provisions of sections 21, 27 and 29 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) shall, in so far as they are applicable, apply **mutatis mutandis** with regard to the execution of a warrant referred to in subsection (2). [69]

**41. Registration of name and address with liquidator.** (1) Any person who claims to be a creditor of the estate may register his or her name and address in the Republic with the liquidator of the estate upon payment to the liquidator of a fee of R200 and may indicate property which he or she claims to hold as security for a claim.

(2) The Minister may amend the amount in subsection (1) by notice in the Gazette in order to take account of subsequent fluctuations in the value of money.

(3) Thereupon the liquidator shall send to that address a notice of every meeting of creditors of the estate, a copy of every report contemplated in section 42(1), a copy of every notice in terms of section 93(2) that an account will lie open for inspection and a notice of the date, time and place of the sale of any property which a person claims to hold as security in terms of subsection (1).

(4) The liquidator shall send a copy of an account which has been advertised to lie open for inspection to a person registered in terms of this section upon the request of the person for a copy of the account and upon payment of the reasonable costs to make a copy of the account and send the copy to the person.

(5) Failure on the part of the liquidator to comply with a provision of this section shall constitute a failure to perform his or her duties but shall not invalidate anything done under this Act.

**42. Liquidator's report.** - (1) The liquidator shall investigate the affairs of the insolvent debtor and the business transactions entered into by him or her before the liquidation of his or her estate and shall at the first meeting of creditors of the insolvent estate, or in so far as he or she is then not ready to do so, at a special meeting of creditors submit a full written report on those affairs and transactions and on any matter of importance relating to the insolvent debtor or the insolvent estate. The liquidator shall in particular report on -

- (a) the assets and liabilities of the insolvent estate;
- (b) whether, in his or her opinion, there is a risk of a contribution by creditors in terms of section ~~94~~ 99, or indicate why he or she is unable to express an opinion on the matter;
- (c) the cause of the insolvent's debtor's insolvency;
- (d) in the case of a natural person debtor, partnership debtor, trust debtor or association debtor in appropriate circumstances, the bookkeeping relating to the insolvent's debtor's affairs, the question whether proper bookkeeping in respect of his or her business transactions was carried out and if not, in what respect it is defective, insufficient or incorrect;
- (e) in the case of a company debtor, close corporation debtor or association debtor in appropriate circumstances, whether or not the debtor has kept the accounting records required by section 284 of the Companies Act 61 of 1973, or section 56 of the Close Corporations Act 69 of 1984, and, if not, in what respects the requirements of those sections have not been complied with. [Section 402(g) of the Companies Act and section 79(g) of the Close Corporations Act]
- (f) the question whether the insolvent debtor appears to have contravened any provision of this Act or to have committed any other offence, in particular whether he or she has failed to submit a statement of affairs and, in the case of a natural person debtor, of his or her income and expenses as required by this Act;
- (g) where applicable, the monthly income and expenses of the insolvent, any allowance made by the liquidator to the insolvent by way of maintenance

- for himself or herself and his or her family, and the assistance given to the liquidator during the period for which the allowance was paid;
- (h) any business carried on on behalf of the insolvent estate and the result thereof;
  - (i) any legal proceedings instituted by or against the insolvent debtor which were suspended by the liquidation of the estate and any other legal proceedings which are pending or may be instituted against the insolvent estate;
  - (j) any transaction entered into by the insolvent debtor before the liquidation of his or her estate in respect of the acquisition of immovable property which was not transferred to him or her or any transaction entered into by the insolvent debtor as lessee;
  - (k) the names of secured creditors with the amounts of the secured claims and steps taken or envisaged to investigate the validity of security or the reasons why it was not regarded as necessary to investigate the validity of security;
  - (l) any other matter relating to the administration or the realisation of the insolvent estate requiring direction of the creditors. [81(1)]
  - (m) in the case of a company debtor, or association debtor in appropriate circumstances, whether there are or appear to be any grounds for an order by the court under section 219 of the Companies Act 61 of 1973, disqualifying a director from office as such; [Section 400(1) of the Companies Act]
  - (n) in the case of a trust debtor, company debtor, close corporation debtor or association debtor, whether or not any trustee, director, officer or member or former trustee, director, officer or member appears to be personally liable for damages or compensation to the debtor or for any debts or liabilities of the debtor as provided for in this or any other Act; [Section 402(d) of the Companies Act]
  - (o) whether or not further enquiry is in his or her opinion desirable in regard to any matter relating to the promotion, formation or failure of the debtor or the conduct of its business; [Section 402(f) of the Companies Act and section 79(f) of the Close Corporations Act]

(2) The liquidator shall supply the Provincial Commander of the Commercial Branch of the South African Police Service with an affidavit containing a report relating to any offence which the ~~insolvent~~ debtor in his or her opinion committed and shall on request of the Branch supply the further particulars that the Branch may require. A copy of the liquidator's report to the Branch shall be sent to the Master. [81(4)]

**43. Recovery of debts due to estate.** The liquidator shall, in the notification of his or her appointment in the **Gazette**, call on all persons indebted to the estate of which he or she is liquidator to pay their debts within a period and at a place stated in the notice, and if any such person fails to do so, the liquidator shall forthwith recover payment from him or her, if need be by legal process. [77]

**44. Remuneration of liquidator.** - (1) A liquidator shall be entitled to a reasonable remuneration for his or her services and for expenses incurred by him or her in the administration of an insolvent estate.

(2) The remuneration and expenses referred to in subsection (1) shall be taxed by the Master in accordance with Tariff B in Schedule 2 to this Act.

(3) The liquidator may apply for an increase in remuneration, in the case of an increase of R50 000 or more at least 14 days after a copy of his or her application with the reasons for the increase has been delivered to proved creditors who will be affected by the increase by personal notice. The Master may for good cause increase or decrease the liquidator's remuneration or disallow his or her remuneration, either wholly or in part, by reason of any failure of or delay in the discharge of his or her duties or on account of any improper performance of his or her duties, and in particular the Master may increase the liquidator's remuneration to compensate him or her for the time spent in assisting with criminal prosecutions or investigating the affairs of the ~~insolvent~~ debtor.

(4) The Minister may by notice in the **Gazette** amend the said tariff.

(5) Any person who employs the liquidator or who is a fellow employee of or who is ordinarily in the employment of the liquidator shall not be entitled to any remuneration out of the

insolvent estate for services rendered to the estate, and a liquidator or his or her partner shall not be entitled to remuneration out of the estate for services rendered to the estate, except the remuneration to which he or she is under this Act entitled as a liquidator. [63]

(6) A liquidator shall not be entitled to receive any remuneration before the liquidation account making provision for the remuneration has been confirmed as provided in section ~~90~~ 95, unless payment of such remuneration or part thereof has been approved in writing by the Master.

**45. General duties and powers of liquidator.** - (1) The liquidator of an insolvent estate shall proceed forthwith to recover and take into his or her possession all the assets and property of the insolvent estate and he or she shall apply the said assets and property, as far as they extend, in satisfaction of the costs of the administration of the estate and the claims of creditors of the estate and if any cash balance remains, he or she shall deal therewith in accordance with the provisions of section ~~93~~ 98. [69(1); 391 Companies Act]

(2) The liquidator shall, in addition to any powers that he or she has in terms of this Act, have power to perform any act which is necessary for the proper administration and distribution of the estate and, except where otherwise provided by this Act, he or she need not obtain formal authorisation for the performance of any such act. [386(4)(i) Companies Act]

- (3) The liquidator shall in particular have the power -
- (a) to execute in the name of and on behalf of the estate all deeds, receipts and other documents; [386(1)(a) Companies Act]
  - (b) to prove a claim in the estate of any debtor of the insolvent estate and to receive payment or a dividend in respect thereof; [386(1)(b) Companies Act]
  - (c) to draw, accept, make or endorse any bill of exchange or promissory note in the name of or on behalf of the estate: Provided that any such act by which the estate is burdened with additional liabilities shall require the authorisation of the Master or the creditors of the estate; [386(1)(c) Companies Act]

- (d) to carry on the business of the ~~insolvent~~ debtor or any part thereof: Provided that the liquidator may, pending the obtaining of authorisation thereto, only carry on the business of the ~~insolvent~~ debtor in so far as it is necessary that expenses of the estate be paid or necessary expenses be incurred in order to avoid loss; [80; 386(4)(f) Companies Act]
- (e) to obtain credit for the payment of necessary expenses which he or she is obliged to incur before funds for the payment thereof are available; [New provision]
- (f) to convene a meeting of creditors of the estate; [386(1)(d) Companies Act]
- (g) to take the necessary measures for the protection and the administration of the estate. [386(1)(e) Companies Act]

(4) The liquidator shall, if authorised thereto by the Master or by resolution of a meeting of creditors of the estate, have the power -

- (a) to institute or defend any legal steps in civil proceedings by or against the estate and to settle such proceedings; [18(3), 73(1); 386(4)(a) Companies Act]
- (b) to submit to determination of arbitrators any dispute concerning the estate; [62(4); 386(4)(e) Companies Act]
- (c) to compromise or admit any claim submitted for proof at a meeting of creditors of the estate, including any unliquidated claim,; [78(2), 78(3); 386(4)(c) Companies Act]
- (d) to disallow or reduce a claim in terms of section ~~46~~ 62;
- (e) to carry on the business or part of the business of the ~~insolvent~~ debtor in accordance with the directions of the Master or the creditors of the estate; [80;386(4)(f) Companies Act]
- (f) to exercise his or her election in respect of contracts entered into before liquidation, including his or her election in terms of section ~~26 or 30~~ 30 or 35; [35, 37; 386(4)(g) Companies Act]
- (g) to sell or alienate property of the insolvent estate, subject to the directions of the Master or the creditors of the estate: Provided that if such property or a portion thereof is subject to rights of a secured creditor the secured

creditor must give his or her consent in writing; [80bis, 82; 386 (2B) and (4)(h) Companies Act]

- (h) to engage the services of an attorney or advocate or any other professional person or to employ any other person to render services on behalf of the insolvent estate; [73(1), 73(1A), 97(2)(c)]
- (i) to dispose of a debt owing to the estate or to accept payment of a reasonable part of a debt in full settlement of the debt or to give a reasonable extension of time for payment of a debt or part thereof; [78(1); 386(4)(b) Companies Act]
- (j) to draw, accept, make or endorse any bill of exchange or promissory note by which the estate is burdened with liabilities; [386(1)(c) Companies Act]
- (k) in the case of a natural person debtor, to make available to the insolvent debtor or his or her dependants a sum of money or assets for his or her maintenance or that of his or her dependants; [79]
- (l) to make available to the insolvent debtor assets of the insolvent estate in excess of the values referred to in section ~~14~~ 14(6) or the amounts fixed in terms of section 14(7): [New provision]

Provided that the powers set out in this subsection can before the issue of a final order only be exercised with the consent of the insolvent debtor, the management of a debtor or the court.

(5) A liquidator or a debtor who disagrees with the assets made available in terms of subsection (4)(l) by resolution of a meeting of creditors can refer the matter to the Master for his or her decision.

(6) A liquidator may at any time, approach the court in regard to any matter arising from the liquidation and the court may give directions or grant the liquidator all powers that in its opinion are necessary for the proper administration, liquidation and distribution of the insolvent estate in question. [386(5) Companies Act]

(7) Notwithstanding the provisions of any law relating to tax or duties a liquidator of an insolvent estate shall be entitled -

- (a) to inspect any return or other document submitted to the Commissioner for the South African Revenue Services by or on behalf of ~~an insolvent a~~ debtor or the spouse of ~~an insolvent a~~ debtor, where applicable, in connection with tax or duties; [81(2)]
- (b) to make copies of any such return; [81(2)]
- (c) to have any such copy, certified as correct by or on behalf of the Commissioner; [81(2)]
- (d) at his or her request to be apprised in writing by or on behalf of the Commissioner of the basis for any estimated assessment made in terms of any revenue law. [New provision]

(8) A liquidator may, before or after the rehabilitation of ~~an insolvent a~~ natural person debtor, with the written consent of the Master, by notice to the officer charged with the registration of title to immovable property in the Republic, in respect of immovable property or a bond registered in the name of the ~~insolvent~~ debtor, or his or her spouse if he or she is married in community of property, cause a **caveat** to be entered against the transfer of the immovable property or the cancellation or cession of the bond referred to in the notice. [18B(1)]

(9) The notice referred to in subsection (8) shall be accompanied by the written consent of the Master and shall identify sufficiently the person in respect of whom and the property or bond in respect of which the **caveat** is to be registered so as to enable the officer charged with the registration to enter the **caveat** as contemplated in subsection (8). The **caveat** shall remain in force until the date indicated by the Master in his consent. [18B(2),(3)]

(10) If any entry in a return contemplated in subsection (7) is relevant in any civil or criminal proceedings in which the ~~insolvent~~ debtor or the insolvent estate is involved, that return or a copy thereof, purporting to be certified as contemplated in subsection (7), shall be admissible in those proceedings on its mere production by any person and such certified copy shall have the same evidentiary value as the original return. [81(2)]



(11) No provision in any contract, including the Memorandum or Articles of Association of a company, which purports to regulate the manner in which property belonging to a person shall be disposed of on or after his or her insolvency or which on his or her insolvency limits a person's power to dispose of his or her rights to property as he or she wishes, shall bind the liquidator of such person's insolvent estate. [New provision]

## **CHAPTER 11 - MEETINGS AND QUESTIONING OF DEBTOR AND OTHER PERSONS**

**46. First meeting of creditors.** - (1) A liquidator of an insolvent estate appointed in terms of section ~~32~~ 37 shall convene a first meeting of creditors to be held within 60 days of his or her appointment by notice in the **Gazette**. [40]

(2) The notice referred to in subsection (1) shall state the time and place of the meeting and the matters that will be dealt with and shall be published in the **Gazette** not less than 14 days before the date fixed for the meeting. Personal notice shall, not less than 14 days before the date fixed for the meeting, be given to the insolvent debtor and to every creditor of the insolvent debtor whose name and address is known to the liquidator or which he or she can reasonably obtain. [41]

(3) The liquidator shall at least 14 days before the date determined in the **Gazette** for the holding of the first meeting of creditors of the estate send by personal notice to every creditor whose name and address are known to him or her or which he or she can reasonably obtain, the following documents namely:

- (a) a copy of the report contemplated in section ~~36~~ 42(1);
- (b) a copy of the inventory contemplated in section ~~33~~ 38(4);
- (c) a copy of the valuation contemplated in section ~~33~~ 38(11);
- (d) a written draft of any resolution or direction which in his or her opinion should be taken or given at that meeting;
- (e) a copy of the notice contemplated in subsection (2); [81(1) **bis** (a)]
- (f) any composition which is to be considered.

(4) The liquidator shall submit to the Master or a magistrate who is to preside at the meeting, before the time of the day advertised for the commencement of the meeting on or before the second working day before the date determined for the meeting of creditors -

- (a) a copy of the report contemplated in section ~~36~~ 42(1)(a);
- (b) a copy of the documents contemplated in subsection (3)(b), (c), (d) and (e); and
- (c) an affidavit containing a list of the names and addresses of the creditors to whom the documents referred to in subsection (3) have been sent. [81(1) **bis** (b)]

(5) Any one or more of the following matters may be dealt with at the meeting:

- (a) the proof of claims against the estate;
- (b) the questioning of any person in terms of the Act;
- (c) the considering of the report of the liquidator;
- (d) the nomination and appointment of one or more co-liquidators;
- (e) the considering of a composition;
- (f) the giving of directives to the liquidator with regard to any matter affecting the liquidation of the estate. [New provision]

(6) If the first meeting of creditors is held before a final liquidation order is given, the liquidator's report shall deal with the question whether the liquidation of the debtor's estate will probably be to the advantage of his or her creditors and the said question shall be considered at the said meeting or at a subsequent meeting of creditors and the liquidator shall submit a report to the court and the applicant on this question before the court considers whether a final liquidation order should be made. [New provision]

(7) If the liquidator is unable to convene a meeting in the manner contemplated in subsection (1) he or she shall obtain the Master's permission to convene the meeting within the time determined by the Master. [New provision]

(8) If the liquidator fails to convene a meeting as contemplated in subsections (1) or (7), the Master may take any steps he or she deems necessary to force the liquidator to convene a meeting of creditors of the insolvent estate. [New provision]

(9) If the majority in value of creditors voting at the meeting rejects the liquidator's report the liquidator shall submit a report to an adjourned or subsequent meeting or refer the report to the Master who may give such directions with regard to the report as he or she deems appropriate. [New provision]

**47. Special meeting of creditors.** - (1) The liquidator of an insolvent estate may at any time and shall, if requested thereto by not less than one fourth in value of creditors who have proved claims against the estate or on request of the Master or whenever a composition has to be considered, convene a special meeting of creditors of the estate [42]: Provided that the liquidator shall convene a special meeting for the proof of claims if requested to do so by a creditor who tenders payment.

(2) Any one or more of the following matters may be dealt with at a special meeting of creditors:

- (a) The proof of claims against the estate;
- (b) the questioning of any person in terms of the Act;
- (c) considering of a composition;
- (d) the giving of directives to the liquidator with regard to any matter affecting the liquidation of the insolvent estate. [New provision]

(3) The liquidator shall not less than 14 days before the date set for the meeting referred to in subsection (1) publish in the **Gazette** a notice of the time and place of the meeting and the matters to be dealt with.[41]

(4) The liquidator shall at least 14 days before the date determined in the Gazette for the holding of the meeting send by personal notice to every creditor whose name and address are known to him or her or which he or she can reasonably obtain, the following documents, namely:

- (a) any composition which is to be considered;

- (b) a copy of any report contemplated in section 42(1) to be considered at the meeting;
- (c) a written draft of any resolution or direction which in his or her opinion should be taken or given at that meeting;
- (d) a copy of the notice contemplated in subsection (3). [81(1)*bis*(a)]

(5) The liquidator shall before the time of day advertised for the commencement of the meeting on or before the second working day before the date set for the meeting lodge with the person who is to preside at the meeting copies of the documents sent to creditors in terms of subsection (4) together with a list of the names and addresses of the persons to whom they were sent. [81(1)*bis*(b)]

(6) The liquidator may at any time after his report has been accepted by creditors or the Master by notice in the **Gazette** fix a date after which creditors who have not proved claims against the estate will be excluded from participation in any distribution in terms of an account which will be submitted to the Master within two weeks after the said date. The said notice shall be published not less than 4 weeks before the date so fixed and before such publication a copy thereof shall be sent by personal notice to each unproved creditor whose name and address are known to the liquidator or which he or she can reasonably obtain. [Companies Act 366(2)]

**48. General provisions relating to meetings of creditors.** - (1) A meeting shall, subject to subsection (9), be convened

- (a) in the magisterial district where the ~~insolvent~~ debtor had his main place of business at the time of liquidation, or
- (b) if the ~~insolvent~~ debtor did not carry on a business or if it is unclear where the ~~insolvent's~~ debtor's main business was situated, in the magisterial district where the ~~insolvent~~ debtor had his ordinary residence or registered office at the date of liquidation; or
- (c) if the ~~insolvent~~ debtor did not have his ordinary residence or registered office within the Republic or it is unclear where he had his ordinary residence or registered office, within the magisterial district of the court which issued the liquidation order.

(2) The Master or an officer of his or her office appointed by him or her shall, subject to subsection (4), preside at a meeting of creditors convened within a magisterial district in which the Master has an office. [39(2)]

(3) If a meeting of creditors is to take place in a magisterial district where the Master has no office, the magistrate of the district concerned or a person appointed by him or her shall, subject to subsection (4), preside at the meeting. [39(2)]

(4) The Department of Justice shall ensure that sufficient magistrates who may hold court under the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), are available to preside over creditors' meetings to be held before a Master or a magistrate, where such a magistrate is required to consider the incarceration of recalcitrant witnesses.

(5) A liquidator may convene any meeting to be held before himself or herself at any place within the magisterial district contemplated in subsection (2), but no questioning can take place at such a meeting and if a questioning must be held or if any person who avers that he or she is a creditor of the insolvent estate demands, before or during the meeting, that the meeting must be held or continued before the Master or a magistrate, the meeting shall be held or continued before the Master or the magistrate contemplated in subsection (1). The liquidator shall announce at the meeting when and where the meeting will be continued or convene the meeting to be held before the Master or the magistrate. [New provision]

(6) The presiding officer at a meeting of creditors shall keep a record of the proceedings, which he or she shall certify at the conclusion of the meeting, and if he or she is not the Master, he or she shall transmit the record to the Master. [39(5)]

(7) A meeting of creditors may, if necessary, be adjourned from time to time. [39(5)]

(8) A meeting may after an adjournment be presided over by a different presiding officer and a meeting before the Master may be adjourned to take place before a magistrate.

- (9) With the consent of the Master
- (a) a meeting may be convened in a magisterial district other than the district contemplated in subsection (1); and
  - (b) a meeting may after an adjournment take place at a different place, including a place in another magisterial district.

(10) The place where a meeting of creditors is held shall, subject to section ~~65~~ 52(4), be accessible to the public. [39(6)]

(11) The publication of any statement made by any person or any evidence given at a meeting of creditors shall be privileged to the same extent as the publication of evidence given in a court of law. [39(6)]

(12) A meeting of creditors shall, if duly convened, for purposes of this Act be deemed to be a meeting of creditors although no creditor or only one creditor or his or her representative attended the meeting personally. [New provision]

**49. Voting at meeting of creditors.** - (1) Every creditor of an insolvent estate who has proved a claim against the estate shall, subject to subsection (3), be entitled to vote at a meeting of creditors of the estate. [52(1)]

(2) A creditor may vote on all matters relating to the administration of the estate, but may not vote on matters relating to the distribution of the assets of the estate or the payment of costs of liquidation. [53(1)]

- (3) A creditor may not vote -
- (a) in respect of any claim which was ceded to him or her after commencement of the proceedings for the liquidation of the debtor's estate, or after the adoption of a liquidation resolution as contemplated in section 8 of this Act; or [52(4)]
  - (b) on the question as to whether steps should be taken to contest his or her claim or preference. [52(6)]

- (4) (a) Voting by creditors takes place according to value except where this Act provides that voting shall take place according to number and value. [52(2) and 53(2)]
- (b) (i) In the case of voting according to number the number of votes brought out in favour of a resolution and those brought out against the resolution are determined, without taking into account the value represented by the votes. [New provision]
- (ii) In the case of voting according to value the aggregate value of votes brought out in favour of a resolution and the aggregate value of votes brought out against the resolution are determined, without taking into account the number of votes for or against the resolution. [54(4)]
- (5) (a) A secured creditor is entitled to vote on the full value of his or her claim in respect of any matter affecting his or her security or on the election of a liquidator.
- (b) On a matter other than those mentioned in paragraph (a)
- (i) a secured creditor may vote only if he or she had placed a monetary value on his or her security when he or she proved his or her claim or the liquidator has obtained a valuation of the security or the security has been realised.
- (ii) If a secured creditor's security has been realized, the creditor may vote on the amount (if any) by which his or her claim exceeds the proceeds of the realization of the security.
- (iii) If the security has not been realized, the secured creditor may vote on the amount (if any) by which his or her claim exceeds -
- (aa) the value placed by him or her on the security; or
- (bb) the valuation of the security obtained by the liquidator; whichever is the greater. [52(5)]
- (6) A creditor may vote personally or through an agent appointed thereto by him or her by power of attorney.

(7) No person shall vote as an agent of a creditor, unless he or she submits proof of his or her mandate. [New provision]

(8) Every resolution taken at a meeting of creditors and the result of the voting on any matter shall be recorded in the minutes of the meeting and in so far as a resolution contains a directive to a liquidator, it shall be binding upon the liquidator. [53(3)]

(9) Any directive of creditors which infringes the rights of any creditor may be set aside by the court on application within 90 days or such further period as the court may allow for good cause by the court on application by the creditor, or the liquidator with the consent of the Master. [53(4)]

(10) No resolution of creditors that a specific attorney, auctioneer or any other person be employed in connection with the administration of an insolvent estate shall be binding upon the liquidator, but creditors may by resolution recommend the employment of any such person and if the liquidator does not accept the recommendation the Master's decision in respect of such employment shall be final. [53(5)]

**50. Insolvent Debtor and other persons shall attend meetings of creditors. - ~~An insolvent~~ A natural person debtor, the partners of a partnership debtor and the management of a trust debtor, company debtor, close corporation debtor or association debtor shall attend all meetings of creditors of ~~his or her~~ the insolvent estate in question and of which he or she is notified in writing by the liquidator or an adjourned meeting which he or she is directed by the presiding officer to attend, unless he or she is excused in writing by the liquidator, the Master or the person who is to preside at such meeting from attending such meeting or the resumption of such adjourned meeting. [64(1)]**

**51. Summons to attend meeting of creditors and notice to furnish information. -**

(1) If the officer who presides or is to preside at a meeting of creditors or any Master or magistrate has reasonable ground for believing that a person -

- (a) has or had in his or her possession or custody property belonging to the insolvent estate; or
- (b) is indebted to the insolvent estate; or



- (c) is able to give material information on any matter relating to the ~~insolvent~~ debtor or his or her business or affairs, whether before or after the liquidation of his or her estate, or concerning any property which at any time belonged to the insolvent estate; or
- (d) has in his or her possession or custody any book, document, or record relating to the ~~insolvent's~~ debtor's affairs or his or her property,

he or she may summon the said person to appear at a meeting of creditors of the insolvent estate at a time stated in the summons, in order to be questioned in terms of section ~~65~~ 52 and, where applicable, to produce the books, documents, or records specified in the summons. [64(2)]

(2) A summons referred to in subsection (1) shall be substantially in the form of Form E of Schedule 1 to this Act. [New provision]

**52. Questioning of insolvent debtor and other persons.** - (1) The presiding officer at a meeting of creditors of an insolvent estate may call upon the ~~insolvent~~ debtor or any person summoned for questioning or the production of any book, document or record in terms of section ~~64~~ 51, or any other person who is present and who possesses relevant information, to appear before him or her and to give evidence, to be questioned on all matters relating to the ~~insolvent~~ debtor or his or her business or affairs, whether before or after the liquidation of the estate, and concerning any property which at any time belonged to the insolvent estate or to produce a book, document or record and the said presiding officer shall administer to such person the oath or take from him or her an affirmation to speak the truth. [65(1)]

(2) A person who, in terms of subsection (1), is called upon to testify or to produce a book, document, or record may be questioned by the presiding officer, the liquidator and a proved creditor on whose request that person was summoned or called upon to testify, or the representative of any of them, and the presiding officer may allow any other creditor to put questions to that person through the presiding officer to the extent that the presiding officer in his discretion allows such questions. [65(1)]

(3) A person called upon in terms of subsection (1) to testify may be assisted by a representative and such representative may question the said person only in so far as it is necessary to clarify answers given by him or her. [65(3)]

**Annexure E**

**Draft Insolvency and Business Recovery Bill**

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(4) The place where proceedings under this section takes place shall be accessible to the public: Provided that if in the opinion of the presiding officer it is necessary for the effective questioning of a person or for the maintenance of good order or the protection of the public interest, he or she may order that the proceedings or any part thereof shall take place behind closed doors or that any particular person or persons may not be present during any particular stage of the proceedings or that the proceedings or any part thereof may not be published. [39(6)]

(5) If a banker is summoned in terms of section ~~64~~ 51 or ordered in terms of section ~~67~~ 54 to produce documents, books or statements or give information, such banker shall, notwithstanding the law relating to privilege, be obliged to produce such documents, books or statements or give such information. [65(2)]

(6) Notwithstanding the provisions of any other law or the common law, but subject to the court's power to avoid questioning being conducted in an oppressive, vexatious or unfair manner, no person questioned in terms of this section may refuse to answer a question because the answer may prejudice him or her in any criminal or disciplinary proceedings which have been or may be instituted against him or her or apply for a postponement of the questioning until the criminal or disciplinary proceedings have been finalised: Provided that evidence given by a person in terms of this section is not admissible against him or her in criminal or disciplinary proceedings, except in criminal proceedings where such person is charged in connection with evidence given during the questioning with perjury or the giving of false evidence under oath or affirmation or a contravention of section ~~68~~ 55(3) for refusal or failure to answer lawful questions fully and satisfactorily. [65(2), (2A),(b)]

(7) The ~~insolvent~~ debtor or management of a debtor shall at a questioning under this section be required to declare that he or she has disclosed all his or her affairs or the affairs of the debtor fully and correctly. [65(4)]

- (8) The presiding officer at proceedings in terms of this section -
- (a) shall disallow all questions that are irrelevant and may disallow questions that would prolong the proceedings unnecessarily; [65(1)]
  - (b) shall record the proceedings or cause them to be recorded. [65(3)]

(9) A person who in answer to a summons issued in terms of section ~~64~~ 51 attends a meeting of creditors or a person called upon in terms of this section to testify at such meeting or to produce books, documents, or records including the ~~insolvent~~ debtor, shall be entitled to the witness fees to which he or she would have been entitled if he or she were a witness in civil proceedings before a court of law. [65 (7)]

(10) Any evidence given under this section shall, subject to the proviso to subsection (6), be admissible in any proceedings instituted against the person who gave such evidence and any record of a questioning introduced in such proceedings shall form part of the record of the proceedings.

(11) The liquidator may in terms of an agreement with a creditor repay the creditor's costs and expenses in connection with questioning conducted by the creditor if sufficient money is recovered as a result of the investigation and in the absence of such an agreement the court or the Master may order that the whole or any part of such costs or expenses shall form part of the costs of liquidation.

**53. Questioning by commissioner.** - (1) The liquidator or any creditor of an insolvent estate may at any time after the liquidation of the ~~insolvent's~~ debtor's estate apply to the court or the Master -

- (a) that a person known or suspected to have in his or her possession any property belonging to the insolvent estate or to be indebted to the insolvent estate or to be able to give material information regarding the affairs of the ~~insolvent~~ debtor or of his or her property, be summoned to appear before a commissioner for questioning; and [417(1) Companies Act]
- (b) that a suitable person be appointed as commissioner to carry out the questioning contemplated in paragraph (a). [418(1)(a) Companies Act]

(2) A creditor who makes an application contemplated in subsection (1) shall furnish security to the satisfaction of the court or the Master for all costs in connection with the questioning. [New provision]

**Annexure E**

**Draft Insolvency and Business Recovery Bill**

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(3) If the court or the Master grants an application referred to in subsection (1) the Court or the Master-

- (a) shall appoint a magistrate or any other person the court or the Master deems suitable, as commissioner with the assignment to carry out the questioning in terms of this section; and [418(1)(a) Companies Act]
- (b) may summon a person referred to in subsection (1)(a) to appear before the said commissioner and to produce any books, documents or records in his or her custody or under his or her control relating to the insolvent debtor on a date and at a place stated in the summons in order to be questioned with regard to the affairs of the insolvent debtor. [417(2)(a), 417(3) Companies Act]

(4) A summons referred to in subsection (2) shall be substantially in the form of Form E4 of Schedule 1 to this Act.

(5) A commissioner appointed in terms of subsection (3) shall administer the oath to the person who appears before him or her for questioning or take from him or her an affirmation to speak the truth. [418(1)(a) Companies Act]

(6) A commissioner has the power to summons witnesses and to question them and to require the production of documents. [418(2) Companies Act]

(7) If a commissioner -

- (a) has been appointed by the Master, he shall, in such manner as the Master may direct, report to the Master; or
- (b) has been appointed by the court, he shall, in such manner as the court may direct, report to the Master and the court,

on any questioning referred to him. [418(3) Companies Act]

(8) The provisions of subsections (2), (3), (5), (6), (7), (8) and (9) of section ~~65~~ 52 shall apply **mutatis mutandis** with regard to the giving of evidence and the production of documents in terms of this section. [(2): 418(1)(c) Companies Act; (3): 417(1A) Companies Act; (6): 416(2)(b) Companies Act; (8)(a): 418(c) Companies Act; (9): 417(5) Companies Act]

(9) A witness who gave evidence in terms of this section shall at his or her own cost be entitled to a copy of the record of his or her evidence. [418(4) Companies Act]

(10) A creditor at whose request a questioning is carried out in terms of this section shall be liable for all costs and expenses incurred in connection with the questioning: Provided that the court or the Master may order that the whole or any part of such costs or expenses shall be reckoned as costs of the liquidation. [417(6) Companies Act]

(11) A questioning in terms of this section and any application therefor shall be private and confidential, unless the court or the Master, either generally or in respect of any particular person, directs otherwise. [417(7) Companies Act]

**54. Liquidator may put written questions or call for accounts, books, documents, records or information.**

(1) If in the opinion of the liquidator of an insolvent estate it would be convenient to obtain information concerning the affairs of the insolvent debtor by means of written questions and answers instead of oral evidence given at a meeting of creditors of the estate contemplated in section 51 or an interrogation in terms of section 52 or a questioning in terms of section 53, he or she may send such written questions to the insolvent debtor, or the persons responsible for the management of such debtor, or a creditor or to any other person to be answered by him or her.

- (2) (a) Questions contemplated in subsection (1) may be put to the insolvent debtor or such other person with regard to all matters relating to his or her business or affairs, whether before or after the liquidation of his or her estate, and with regard to any property which at any time belonged to the insolvent estate.
- (b) Questions may be put to a creditor of the estate with regard to a claim proved by him or her against the estate or a claim offered for proof.
- (c) Questions may be put to
- (i) any other person with regard to any transaction which such person had with the insolvent debtor, or
  - (ii) any property, books, documents or records of the insolvent debtor which such person had in his or her possession

within 36 months before the date of liquidation of the estate of the insolvent debtor.

- (3) (a) Personal notice of the questions contemplated in subsection (1) shall be given to the person to whom they are put.
- (b) The written answers to the questions shall be sworn to or affirmed and shall be sent to the liquidator by certified mail or telefax or delivered by hand within 14 days after receipt of the questions.

(4) The provisions of subsections (5) and (6) of section ~~65~~ 52 are **mutatis mutandis** applicable with regard to the written answers to questions referred to in this section.

(5) The answers to questions referred to in this section shall be regarded as evidence given in terms of section ~~65~~ 52.

(6) The giving of answers to questions referred to in this section or a refusal to give such answers shall not prevent a person from being summoned in terms of section ~~64~~ 51 or from being questioned in terms of section ~~65~~ 52 or section ~~66~~ 53 and shall not absolve a person from the obligation to give evidence when called upon to do so. [New provision]

(7) The liquidator of an insolvent estate may by written notice order any person with whom the insolvent debtor or his or her spouse had an account or transactions within 12 months before the date of the liquidation of the insolvent's debtor's estate to furnish the liquidator within 7 days or such longer period as the liquidator may allow, with a statement reflecting the state of the said account or the debits, credits and balance due in respect of the transactions during the said period of 12 months.

(8) The liquidator may by written notice order any person whom he or she has reason to believe to be in possession or control of any book, document, record or material information relating to the affairs of the insolvent debtor or his or her spouse, before or after the liquidation of the insolvent's debtor's estate or of property which belong or had belonged to the insolvent debtor or his or her spouse, to make the book, document, record information or property specified in the said notice available to the liquidator within 7 days of the date of the said notice or within such

longer time as the liquidator may allow and such person shall allow the liquidator or someone on behalf of the liquidator to make copies of or extracts from any such book, document or record.

**55. Questioning by or on behalf of the Master.** - (1) If at any time after the liquidation of ~~an insolvent's~~ a debtor's estate and before his rehabilitation or dissolution, as the case may be, the Master is of the opinion that the ~~insolvent~~ debtor or the liquidator of the insolvent estate or any other person is able to give information or is in possession of books, documents or records which the Master considers desirable to obtain, concerning the ~~insolvent~~ debtor or his or her insolvent estate or the administration of the estate or concerning any demand made against the estate, the Master may by notice in writing delivered to the ~~insolvent~~ debtor or the liquidator or such other person, summon him or her to appear before the Master or before a magistrate at a place and on a date and time stated in the notice, and to furnish all the information within his or her knowledge concerning the ~~insolvent~~ debtor or his or her estate or the administration of the estate and produce the books, documents or records specified in the notice. [152(2)]

(2) The notice referred to in subsection (1) shall be substantially in the form of Form E5 of Schedule 1 to this Act.

(3) The Master may at any time appoint a person to investigate the books, documents, records and vouchers of the liquidator and direct the liquidator to deliver to the person so appointed or to the Master any book, document, or record relating to or property belonging to the insolvent estate of which he or she is the liquidator. The reasonable costs incurred in performing such an investigation shall, unless the court otherwise orders, be regarded as part of the costs of liquidation, and if the liquidator is removed from office consequent upon such an investigation, it shall be paid by the liquidator **de bonis propriis**. [Companies Act 381(3), (4), (5)]

(4) After having questioned the person summoned in terms of subsection (1), the Master or the magistrate may deliver to him or her a notice to appear again before the Master or the magistrate at a place and time stated in the notice and to furnish such further information or to produce any book, document, or record specified in such notice. [152(3)]

(5) A person summoned in terms of subsection (1) may be questioned by the Master or the magistrate presiding at the proceedings and if a person other than the liquidator is summoned in terms of the said subsection, the liquidator or his or her representative may cross-examine the

person concerned in regard to evidence given by him or her and to the extent that the presiding officer allows any person having an interest in the estate or the administration thereof or his or her representative may question the person concerned. The reasonable costs of such questioning shall, unless the court otherwise orders, be regarded as part of the costs of liquidation, and if the liquidator is removed from office consequent upon such a questioning, it shall be paid by the liquidator **de bonis propriis**. [152(4)]

(6) The provisions of section ~~65~~ 52(3), (5), (6), (7) and (8) shall **mutatis mutandis** apply to questioning under this section. Section ~~65~~ 52(9) shall apply **mutatis mutandis** but the liquidator of the insolvent estate shall not be entitled to witness fees. [152(5) and (7)]

(7) Proceedings under this section shall be private and confidential and without the permission of the presiding officer at the proceedings no person whose attendance thereat is not necessary shall be present at the proceedings and no publication of the proceedings shall take place without the permission of the said presiding officer. [New provision]

**56. Enforcing summonses and giving of evidence.** (1) If a person summoned under section ~~64, 66 or 68~~ 51, 53 or 55 fails to appear at a meeting of creditors or questioning in answer to the summons, or if ~~an insolvent a debtor or management of such debtor~~ fails to attend a hearing in terms of section 16(5)(a) or a meeting of creditors in terms of section ~~63~~ 50, or fails to remain in attendance at that hearing or meeting, any magistrate for the district where the meeting, questioning or hearing was scheduled to be held who may hold a court under the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), may issue a warrant, authorizing any member of the police force to apprehend the person summoned or the ~~insolvent debtor~~, as the case may be, and to bring him before the said magistrate.

(2) Unless the person summoned or the ~~insolvent debtor~~, as the case may be, satisfies the said magistrate that he had a reasonable excuse for his failure to appear at or attend such meeting, questioning or hearing, or for absenting himself from the meeting, hearing or questioning, the said magistrate may commit him or her to prison to be detained there until such time as the said magistrate may determine, and the officer in charge of the prison to which the said person or ~~insolvent debtor~~ was committed, shall detain him or her and produce him or her at the time and place determined by the magistrate for his or her production.



**Annexure E**

**Draft Insolvency and Business Recovery Bill**

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(3) If a person summoned as aforesaid, appears in answer to the summons but fails to produce any book, document or record which he or she was summoned to produce, or if any person who may be questioned at a meeting of creditors in terms of section ~~65~~ 52 or during an interrogation in terms of section ~~66 or 68~~ 53 or 55 or a hearing in terms of section 16(5)(a) refuses to be administered the oath or make an affirmation to speak the truth at a meeting of creditors, questioning or hearing at which he or she is called upon to give evidence or refuses to answer any question lawfully put to him or her under the said sections or does not answer the question fully and satisfactorily, the said magistrate may issue a warrant committing the said person to prison, where he or she shall be detained until he or she has undertaken to do what is required of him or her, but subject to the provisions of subsection (5).

(4) If a person who has been released from prison after having undertaken in terms of subsection (3) to do what is required of him or her, fails to fulfil his or her undertaking, the said magistrate may commit the person to prison as often as may be necessary to compel him or her to do what is required of him or her.

(5) Any person committed to prison under this section may apply to the court for his or her discharge from custody and the court may order the discharge if it finds that the person was wrongfully committed to prison or is being wrongfully detained.

(6) In connection with the apprehension of a person or with the committal of a person to prison under this section, the magistrate who issued the warrant of apprehension or committal to prison shall enjoy the same immunity which is enjoyed by a judicial officer in connection with any act performed by him or her in the exercise of his or her functions.

(7) The said magistrate may upon the request of the liquidator, the Master, a Commissioner or a proved creditor and after giving the witness or the ~~insolvent~~ debtor the opportunity to be heard, order the witness or the ~~insolvent~~ debtor to pay costs occasioned by failure contemplated in subsection (1) and the costs to have him or her brought before the magistrate in the amount determined by the Magistrate. [New provision]

**57. Suspected commission of offence shall be reported to Commercial Branch.** (1) If it appears from an answer or statement given by a person who is questioned under section ~~65, 66, 67 or 68~~ 52, 53, 54 or 55, that there are reasonable grounds for believing that any person has

committed an offence, the presiding officer at the proceedings, or the liquidator in the case of proceedings under section 67 54, shall submit the answer or statement or a certified copy thereof with supporting documents, if any, and report such suspicion to the Provincial Commander of the Commercial Branch of the South African Police Service and set out the grounds on which the suspicion rests. If the presiding officer is not the Master, a copy of the answer or statement and supporting documents, if any, and the report to the Branch shall be sent to the Master.

(2) The said Branch shall with due consideration of the provisions of section 65 52(6) investigate whether criminal proceedings should be instituted in the matter. [67]

**58. Proof of record of proceedings of meetings of creditors.** - (1) Any record purporting to be a record of the proceedings at a meeting of the creditors of an insolvent estate or a questioning held under this Act and purporting to have been signed by a person describing himself or herself as Master or magistrate or other presiding officer or commissioner shall, upon its mere production in judicial proceedings, be **prima facie** proof of the proceedings recorded therein.

(2) Unless the contrary is proved, it shall be presumed that any meeting of creditors or any questioning referred to in subsection (1) was duly convened and held and that all acts performed thereat were validly performed. [68]

## CHAPTER 12 - CLAIMS

**59. Claim by partnership creditor against estate of insolvent partner.** - When the estate of a partner in a partnership is liquidated and the partnership is as a result thereof dissolved without the partnership being placed under liquidation, any claim that a creditor of the partnership might have against the estate of the insolvent partner shall be regarded as an unliquidated claim until the debts of the partnership have been settled in terms of the dissolution of the partnership. [New provision]

**60. Claims against partnerships.** - When the estate of a partnership and the estates of the partners in that partnership are under liquidation simultaneously any claim in respect of a partnership debt shall be proved against the partnership estate, irrespective of the fact that a partner

might be personally liable for such debt. In so far as the partnership estate is insufficient to meet such debt a creditor who has proved his or her claim against the partnership estate shall for the balance of his or her claim have a claim against the separate estates of the partners without formal proof of his or her claim in respect of such balance. The liquidator of the estate of a partner shall be entitled to any balance of the partnership's estate that may remain after satisfying the claims of the creditors of the partnership estate, so far as that partner would have been entitled thereto if his or her estate had not been liquidated. [49]

**61. Proof of claims.** (1) Any person who has a liquidated claim against an insolvent estate, the cause of which arose on or before the date of liquidation of the estate, or the authorised agent of such person, may at any time before the final distribution of the estate, but subject to the provisions of section ~~47~~ 63, prove that claim against the estate. [44(1)]

(2) A claim against an insolvent estate shall be admitted at a meeting of creditors of the estate if it has been proved to the satisfaction of the presiding officer on the face of the claim form, documents in connection with the claim submitted by the creditor or another person, if any, and on the evidence, if any, by the creditor. If the claim has not been proved in this manner, the presiding officer shall reject it. [44(3)]

(3) A creditor who holds security for his or her claim shall place a monetary value on his or her security, or have his or her voting rights limited in terms of section ~~42~~ 49(5). [44(4)]

(4) The rejection of a claim shall, subject to the provisions of section ~~11~~ 12(5), not debar the claimant from proving the claim at a later meeting of creditors or by an action at law. [44(3)]

(5) Every claim shall be proved by an affidavit in a form corresponding substantially with Form B or C of Schedule 1 to this Act and, subject to subsections (10) and (11) no oral evidence shall be received in support of any claim. [44(4)]

(6) The affidavit contemplated in subsection (5) and all documents submitted in support of the claim or a copy thereof shall be lodged with the person who is to preside at the meeting of creditors, before the time of day advertised for the commencement of the meeting on or before the

second working day before the date of the meeting, failing which the claim shall not be admitted at that meeting unless the presiding officer is of the opinion that the creditor had a reasonable excuse for his or her failure to lodge the claim with the presiding officer within the said time. [44(4)]

(7) Where appropriate the amount of a claim may be expressed in a foreign currency, but all claims in a foreign currency shall be paid in its equivalent in Rand and the conversion date of Rand to a foreign currency shall be the date of liquidation.

(8) A claimant who has proved a claim which is deficient in any respect may at a subsequent meeting of creditors prove a corrected claim. [44(4)proviso]

(9) The documents referred to in subsection (6) may be perused free of charge by the liquidator, the ~~insolvent~~ debtor and any creditor of the insolvent estate or the representative of any of them during office hours at the office of the person who is to preside at the meeting and the liquidator, ~~insolvent~~ debtor, or creditor may submit motivated objections to the prove of a claim at the meeting where the claim is submitted for proof or with the presiding officer before the meeting. [44(5)]

(10) Any person who has an unliquidated claim against an insolvent estate may tender such claim for proof at a meeting of creditors, but such claim shall not be admitted to proof until it has been accepted by the liquidator by way of compromise or proved in an action at law. When such claim is compromised or proved in an action at law it shall be deemed to have been proved and admitted against the estate at the meeting where it was submitted for proof, unless the creditor informs the liquidator in writing within seven days of the compromise or judgment that he or she abandons the claim.[78(3)]

(11) The presiding officer at the meeting of creditors may of his or her own motion or at the request of the liquidator or his or her representative or any creditor who has proved a claim at a meeting of creditors or the representative of such creditor, call upon any person present at the meeting who wishes to prove a claim or who has proved a claim against the estate to submit to questioning by the presiding officer, the liquidator or his or her representative or any such creditor or his or her representative in regard to such claim, and for purposes of such questioning the presiding officer shall administer to the said person the oath or take from him or her a solemn

declaration to speak the truth: Provided that a creditor who has proved a claim at a meeting shall not be permitted to question a creditor who wishes to prove a claim at the same meeting before the claim of such creditor has been admitted or rejected. [44(7)]

(12) Any person who wishes to prove or who has at any time proved a claim against an insolvent estate and who is absent from a meeting of creditors may be summoned in writing by the presiding officer in a summons substantially in the form of Form ~~E2~~ EE of Schedule 1 to this Act to appear before him or her at a place and time stated in the summons for the purpose of being questioned by the presiding officer, the liquidator or a creditor who has proved a claim against the estate, or the representative of the liquidator or such creditor in regard to such claim, and the provisions of subsection (11) with regard to the administering of the oath or the taking of a solemn declaration shall **mutatis mutandis** apply with regard to the giving of evidence by such person. [44(8)]

(13) If a person who wishes to prove a claim is called upon to be questioned as contemplated in subsection (12) and fails without reasonable excuse to appear or refuses to take the oath or make a solemn declaration or to submit to questioning or to answer fully and satisfactorily any lawful question put to him or her, his or her claim, may be rejected. [44(9)]

**62. Liquidator shall examine claims.** - (1) The person who presided at a meeting of creditors shall, if he or she is not the liquidator, after the meeting deliver to the liquidator every claim proved against the insolvent estate at that meeting and every document submitted in support of any claim. [45(1)]

(2) The liquidator shall examine the claims and supporting documents referred to in subsection (1) and all available books, documents or records relating to the insolvent estate for the purpose of ascertaining whether the estate in fact owes the claimant the amount claimed and the liquidator may require the claimant to submit additional supporting proof of his or her claim and, in the case where the claim is based on an estimate, the basis on which the estimate was arrived at. [45(2)]

(3) If the liquidator disputes a claim after it has been proved at a meeting of creditors, he or she may, with the authority of the Master or creditors in terms of section 45(4) and after having afforded the claimant the opportunity of substantiating his or her claim or any part thereof,

reduce or disallow the claim, and he or she shall forthwith notify the claimant and the Master in writing of such reduction or disallowance of the claim. [45(3)]

(4) The reduction or disallowance of a claim as contemplated in subsection (4) shall subject to the provisions of section ~~11~~ 12(5) not debar a claimant from establishing his or her claim by means of an action at law. [45(3)]

**63. Late proof of claims.** - (1) Subject to the provisions of section ~~80~~ 84(8), a creditor of an insolvent estate who has not proved his or her claim against the estate before a date fixed in terms of section 47(6) shall, subject to subsection (2), not be entitled to share in the distribution of the assets reflected in an account submitted to the Master within 2 weeks after the said date. [104(1)]

(2) If the Master is satisfied that a creditor referred to in subsection (1) has a reasonable excuse for the delay in proving his or her claim, the Master may permit him or her to prove his or her claim before the confirmation of the account contemplated in subsection (1) and the Master may order the liquidator to draw up a new account in which provision is made for the claim so proved, provided that the creditor tenders all costs in connection with the drawing-up of the new account, including wasted advertisement costs, if any. [104(1)]

(3) A creditor of an insolvent estate who has proved a claim against the estate and who was not in terms of subsection (2) permitted to share in the assets reflected in an account, shall, in so far as available funds allow, be entitled to be awarded out of any subsequent distribution account the amount to which he or she would have been entitled under the earlier distribution account if he or she had proved his or her claim in time. [104(2)]

(4) A creditor who delayed proving his or her claim pending the outcome of proceedings for the setting aside of any disposition of property made by a debtor or for the recovery of any debt, asset, compensation, penalty or benefit of whatever kind for the benefit of the insolvent estate of the debtor shall not be entitled to share in the distribution of any money or the proceeds of property recovered as a result of such proceedings. [104(2)]

**64. Conditional claims.** - (1) A creditor who has a claim against an insolvent estate which is dependent upon the fulfilment of a condition, may request the liquidator to place a value on the claim.

(2) If a liquidator places a value on a claim referred to in subsection (1), he or she shall indicate in writing the grounds on which he or she arrived at the valuation.

(3) The valuation of a conditional claim by a liquidator is subject to review by the court on application of the creditor.

(4) After a conditional claim has been valued as contemplated in this section, the claim may be proved by the creditor for the amount of the valuation.

(5) If the condition upon which a claim is dependent is fulfilled before the inclusion of the amount referred to in subsection (4) in a proposed distribution account, the claim may be proved in full. If the condition is fulfilled after provision had already been made in a distribution account for the claim contemplated in subsection (4), the balance of the claim may be proved, subject to the provisions relating to the late proving of claims. [48]

**65. Arrear interest and debt due after liquidation.** - (1) A creditor may prove a claim against an insolvent estate in respect of a capital debt and interest thereon which has accrued at the date of liquidation. [50(1)]

(2) No claim shall be proved for interest which accrues after the date of liquidation, but such interest is payable in the circumstances set out in sections ~~75~~ 79(5) and ~~80~~ 84(5). [New provision]

(3) The capital amount of a debt which becomes payable after the date of liquidation shall be reduced by twelve percent of that amount per annum compounded monthly on completed months from the date of liquidation to the date on which the debt becomes payable. [50(2)]

**66. Withdrawal of claim.** - (1) A creditor who has proved a claim against an insolvent estate may withdraw his or her claim by written notice to the liquidator.

(2) A liquidator who receives a notice of withdrawal of a claim shall give personal notice to the Master of the withdrawal.

(3) A creditor who has withdrawn his or her claim remains liable for his or her **pro rata** share of the costs of liquidation up to the date when the notice of withdrawal was received by the liquidator.

(4) A creditor who has withdrawn his or her claim may by written notice to the liquidator cancel his or her withdrawal, but if he or she does so he or she shall not be entitled to payment of his or her claim out of the estate until all other creditors who have proved claims have been paid in full.

(5) If a creditor cancels his or her withdrawal as contemplated in subsection (4), he or she shall not be liable for liquidation costs for which he or she was not liable at the time of the cancellation of the withdrawal of his or her claim. [51]

**67. Creditor may not recover the debt from insolvent estate which is recovered from another source.** A creditor who has proved a claim against an insolvent estate and who, after the date of liquidation of the insolvent estate, has received payment of that debt in whole or in part, from a source other than the insolvent estate, shall notify the liquidator in writing of such payment within 60 days from receiving payment and if he or she fails to do so double the amount paid to him or her out of the insolvent estate to which he or she is not entitled, may be recovered from him or her. [New provision]

**CHAPTER 13 - ELECTION, APPOINTMENT AND DISQUALIFICATION OF LIQUIDATORS**

**68. Election of liquidator.** - (1) Any creditor of an insolvent estate who has proved claims against the estate may vote for one liquidator at the first meeting of creditors or a subsequent meeting convened to elect a liquidator. [54(1)]



- (2) (a) A liquidator is elected by the majority in number and in value of the votes of creditors who are entitled to vote and who voted at such meeting. [54(2)]
- (b) If no candidate for the office of liquidator has obtained a majority in number and in value of the votes, the candidate who has obtained a majority of votes in number shall be deemed to be elected as liquidator if no candidate has obtained a majority of votes in value, and the candidate who has obtained a majority of votes in value shall be deemed to have been so elected if no candidate has received a majority of votes in number. [54(3)(a)]
- (c) If one candidate obtained a majority of votes in value and another a majority in number, both such candidates shall be deemed to be elected as liquidators, and if either of them declines to share the office of liquidator with the other, the other candidate shall be deemed to be the sole elected liquidator. [54(3)(b)]

(3) If no liquidator is elected at a meeting of creditors the liquidator appointed by the Master in terms of section ~~32~~ 37 shall be the liquidator of the estate. [18(4), 54(5)]

(4) If the Master deems it necessary for the proper administration of an insolvent estate he or she may at any time appoint one additional liquidator after 48 hours notice by telefax, electronic mail, or personal delivery to each liquidator appointed or to be appointed in terms of subsection (2) or (3) of the reasons for an additional appointment.

**69. Persons disqualified from being liquidators.** - (1) Any of the following persons shall be disqualified from being elected or appointed as a liquidator -

- (a) any person who is not a member of a professional body recognised under subsection (2) or who is not permitted to act as a member of that body in terms of its rules; [New provision]
- (b) an insolvent; [55(a)]
- (c) any person who does not reside in the Republic;
- (d) where applicable, the spouse of the ~~insolvent~~ debtor concerned; [55(b)]

- (e) any person who is by consanguinity related or deemed to be related in the first, second or third degree of relationship, as determined in accordance with section 1(3)(d) or (e) of the Intestate Succession Act, 1987 (Act No. 81 of 1987), to such insolvent debtor or to his or her spouse; [55(b)]
- (f) a minor or any other person under legal disability; [55(c)]
- (g) any person who is declared under section ~~59~~ 75 to be disqualified, while such disqualification lasts, or any person removed by the court from office of trust on account of misconduct; [55(g)]
- (h) a corporate body or any other entity which is not a natural person; [55(h)]
- (i) any person who has been convicted, in the Republic or elsewhere, of an offence in terms of this Act or an offence of which dishonesty is an element and who was sentenced to imprisonment without the option of a fine or to a fine of not less than R1000.[55(i)]
- (j) any person who was, at any time, a party to an agreement or arrangement with any debtor or creditor whereby he or she undertook that he or she would, when performing the functions of a liquidator, grant or endeavour to grant to, or obtain or endeavour to obtain for any debtor or creditor any benefit not provided for by law; [55(j)]
- (k) any person who has by means of any misrepresentation or any reward or offer of any reward, whether direct or indirect, induced or attempted to induce any person to nominate him or her as liquidator to vote for him or her as liquidator or to effect or assist in effecting his or her election as liquidator of any insolvent estate; [55(k)]
- (l) any person who at any time during a period of twelve months immediately preceding the date of liquidation acted as the bookkeeper, accountant or auditor of the insolvent debtor; [55(l)]
- (m) any person with a proven interest opposed to the general interest of the creditors of the insolvent estate.

(2) The Minister may from time to time publish by notice in the **Gazette** the name of a recognised professional body if it appears to him or her that such body regulates the practice of a profession and maintains and enforces rules for ensuring that a member of such body is a fit and proper person to be appointed as liquidator and meets acceptable requirements for education and practical experience and training. [New provision]

(3) A notice recognising a professional body may be revoked by a further notice if it appears to the Minister that the body no longer satisfies the requirements of subsection (2). A notice revoking a previous notice may provide that members of such body continue to be treated as authorised to act as liquidators for a specified period after the revocation takes effect. [New provision]

**70. Master may refuse to appoint elected liquidator.** - (1) The Master may on any one or more of the following grounds refuse to appoint as liquidator a person elected in terms of section ~~52~~ 68, namely that the said person -

- (a) was not properly elected;
- (b) is in terms of section ~~53~~ 69 disqualified from being appointed as liquidator or as liquidator of the insolvent estate in question;
- (c) has failed to give security, within 7 days after his or her election or within such longer period as the Master may allow, to the satisfaction of the Master for the proper performance of his or her duties as liquidator;[57(1)]

(2) If the Master refuses to appoint as liquidator a person elected as such, he or she shall notify such person in writing of the reason for his or her refusal. [57(1)]

(3) Any person aggrieved by the appointment of a liquidator or the refusal of the Master to appoint a person elected as liquidator, may within a period of seven days from the date of such appointment or refusal submit his objections to the Master in writing. The Master shall within seven days of the receipt by him of the objections inform the objector and the person elected, if applicable, of his decision. Any interested party may apply to the court for a review of the Master's decision within fourteen days after the Master has informed the objector and the person elected, if applicable, of his decision. [57(7)]

(4) Whenever the Master refuses to appoint as liquidator a person elected as such, or the court has set aside an appointment of a liquidator by the Master, the Master shall direct the liquidator appointed in terms of section ~~32~~ 37 to convene a meeting of creditors of the insolvent estate for purposes of electing another person as liquidator in the place of such person or liquidator. [57(2)]

- (5) The notice of the meeting referred to in subsection (4) -
- (a) shall state that the purpose of the meeting is to elect a liquidator;
  - (b) shall set out the reason in subsection (1) (a), (b) or (c), why the Master has refused to appoint the person elected as liquidator, or shall state that the appointment of the liquidator has been set aside by the court;
  - (c) shall be published in the **Gazette** not less than 14 days and not more than 21 days before the date fixed for the meeting;
  - (d) shall be sent by personal notice to every creditor who has proved a claim against the estate. [57(2)]

(6) The meeting mentioned in subsection (4) shall be held as if it were the continuation of a first meeting of creditors held after an adjournment thereof. [57(3)]

(7) If the Master refuses to appoint as liquidator a person elected at a meeting convened in terms of subsection (4), he or she shall notify such person in writing and state the reason for his or her refusal, as contemplated in subsection (2), whereupon the Master may, if he or she deems it necessary for the proper administration of the estate, appoint as joint liquidator any person whom he or she regards as a suitable person for appointment. [57(4)]

(8) All the provisions of this Act relating to a liquidator shall apply to a liquidator appointed by the Master under this section. [57(6)]

**71. Appointment of liquidator and security.** - (1) When final liquidation order has been made and a person elected as liquidator has given security to the satisfaction of the Master for the proper performance of his or her duties and lodged an affidavit stating that he or she is not disqualified in terms of section ~~53~~ 69, the Master shall, subject to section ~~54~~ 70, appoint him or her as liquidator and issue him or her with a letter of appointment, which shall be valid throughout the Republic. [56(2)]

(2) After the receipt of his or her letter of appointment the liquidator shall make known his or her appointment and his or her address by notice in the **Gazette**. [56(3)]

(3) The costs to the liquidator of giving security shall, up to a maximum amount which the Master deems reasonable, be included as part of the costs of the liquidation. [56(6)]

(4) The Master may at any time call for additional security, or reduce the security given by the liquidator if the liquidator has to the satisfaction of the Master accounted for any property in the estate and the Master is of the opinion that the reduced security will suffice to indemnify the estate or the creditors against any maladministration by the liquidator of the remaining property in the estate. [56(7)]

**72. Joint liquidators shall act jointly.** - (1) When more than one liquidator has been appointed in respect of an insolvent estate all such liquidators shall act jointly in performing their functions as liquidators and each of them shall be jointly and severally liable for every act performed by them jointly. [56(4)]

(2) Whenever liquidators of an insolvent estate disagree on any matter relating to the estate, the matter shall be referred to the Master who shall determine the question in issue or give directions as to the procedure to be followed for the determination thereof. [56(5)]

**73. Vacation of office of liquidator.** (1) A liquidator shall vacate his or her office -

- (a) if his or her estate is liquidated;
- (b) if he or she is in terms of the Mental Health Act, 1973 (Act No. 18 of 1973), received and detained in an institution contemplated in the said Act or if he or she is declared by a competent Court to be incapable of managing his or her own affairs;
- (c) if he or she is convicted in the Republic or elsewhere of an offence of which dishonesty is an element and is sentenced to imprisonment without the option of a fine or to a fine of at least R1000. [58]

(2) Whenever a liquidator of an insolvent estate vacates his or her office for whatever reason, any legal proceedings pending against the estate shall not lapse merely by reason of the vacating of office and may, with the permission of the court, be continued in the name of any remaining or newly appointed liquidator.

**74. Removal of liquidator from office by the Master.** - (1) The Master shall remove a liquidator from office -

- (a) if he or she was not qualified for appointment as liquidator or if his or her appointment was unlawful; [60(a)]
- (b) if the majority in value and the majority in number of the creditors who have proved claims against the estate -
  - (i) have requested the Master in writing to do so; or
  - (ii) have at a meeting of creditors of the estate, after notice of the intended resolution was given, resolved, that the liquidator shall be removed from office; [60(d)]
- (c) if he or she resigns from the office of liquidator; [61]
- (d) if he or she is temporarily absent from the Republic for a period longer than 60 days without the permission of the Master, or contrary to the conditions, if any, set by the Master when he or she gave permission;
- (e) if after his or her appointment he or she becomes disqualified from being a liquidator; [60(a)]

and the Master may remove a liquidator from office on the ground that he or she has failed to perform satisfactorily any duty imposed upon him or her by this Act or to comply with a lawful demand of the Master.

(2) The Master may, when a liquidator has been formally charged with the committal of an offence, or on the strength of a complaint made to him or her on affidavit, or evidence given at an ~~interrogation~~ questioning in terms of section ~~65, 66 or 67~~ 52, 53 or 54, or written answers in terms of section ~~67~~ 54 and pending an investigation by him or her into the suitability of a liquidator to remain in office, suspend the liquidator from office and, if necessary, appoint an interim liquidator for the preservation of the estate: Provided that the Master shall in the case of a complaint, evidence or written answers, without delay carry out the necessary investigation and either remove the liquidator from office or set aside the suspension and in the case of a liquidator charged with an offence remove the liquidator from office or set aside the suspension as soon as the prosecution has been finalised. [New provision]

(3) No person shall be appointed as interim liquidator unless he or she has given security to the satisfaction of the Master for the proper exercise of his or her powers and performance of his or her duties as interim liquidator and has lodged an affidavit stating that he or she is not disqualified in terms of section ~~53~~ 69. [New provision]

(4) The interim liquidator shall after his or her appointment proceed to recover and take into possession all the assets and property of the insolvent estate and all books of account, invoices, vouchers, business correspondence and any other records relating to the affairs of the debtor insolvent and may apply for a search warrant in terms of section ~~35~~ 40. [New provision]

(5) The interim liquidator shall give effect to any directions by the Master and may without the authorisation of the Master as contemplated in section ~~62~~ 45 perform any act which is necessary for the preservation of the estate until the suspension of the liquidator is set aside or another liquidator is appointed. [New provision]

(6) The interim liquidator is entitled to remuneration taxed by the Master in accordance with Tariff B in Schedule 2. [New provision]

(7) The interim liquidator vacates his or her office when the suspension of the liquidator is set aside or a liquidator is appointed in the place of the removed liquidator and shall deliver the assets, property, books, documents or records to the liquidator and give account to the liquidator. [New provision]

**75. Court may declare liquidator disqualified or remove liquidator.** - If in the opinion of the court it is in the interests of the proper administration of an insolvent estate, it may, on the application of the Master or any other interested party -

- (a) declare any person disqualified from being a liquidator of the estate; or
- (b) remove from office any person who has been appointed as liquidator; and
- (c) declare such a person incapable of being elected or appointed as liquidator under this Act during his or her lifetime or for such other period as determined by the court. [59]

**76. Election of new liquidator.** - (1) When one of two or more joint liquidators of an insolvent estate has vacated his or her office, has been removed from office by the Master or the court, or has resigned or died, the Master shall direct the remaining liquidator or liquidators to convene a meeting of creditors of the estate for the purpose of electing a new liquidator in the place of the one who vacated his office and when a majority of proved creditors in value at any time requests it the Master shall direct the liquidator or liquidators to convene a meeting for the election of a further liquidator.

(2) When every liquidator or the sole liquidator of an insolvent estate has vacated his or her office, has been removed from office by the Master or the court, or has resigned or died, the Master shall direct the liquidator appointed in terms of section 37 to convene a meeting of creditors of the estate for the purpose of electing a liquidator.

(3) The provisions of section 38 ~~46~~(2) shall **mutatis mutandis** apply to a meeting referred to in subsections (1) or (2). [62]

#### **CHAPTER 14 - RIGHTS AND DUTIES OF CREDITORS**

**77. Realization of security.** - (1) A secured creditor of an insolvent estate shall as soon as he or she becomes aware of the liquidation of the estate notify the liquidator in writing of the nature and extent of his or her security and the amount of his or her claim. [83(1)]

(2) If such property consists of securities as defined in section 1 of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985), or a financial instrument as defined in section 1 of the Financial Markets Control Act, 1989 (Act No. 55 of 1989), the creditor may, subject to the provisions of subsection (5), after giving the notice mentioned in subsection (1), realize the property in the following manner: [83(2)]

- (a) if it is property of a class ordinarily sold through a stockbroker as defined in section 1 of the Stock Exchanges Control Act, 1985, the creditor may, subject to the provisions of the said Act and (where applicable) the rules referred to in section 12 thereof, forthwith sell it through a stockbroker, or if the creditor is a stockbroker, also to another stockbroker; or



(b) if it is a financial instrument, the creditor may, subject to the provisions of the Financial Markets Control Act, 1989, and rules referred to in section 17 thereof, forthwith sell it through a financial instrument trader as defined in section 1 of the said Act, or, if the creditor is a financial instrument trader or financial instrument principal as defined in section 1 of the said Act, also to another financial instrument trader or financial instrument principal. [83(8)]

(3) A creditor who has realized property contemplated in subsections (2) shall forthwith pay over to the liquidator the proceeds after deduction of the reasonable costs of realization and furnish the liquidator with vouchers in support of the realization of the property and the costs of realization. [83(10)]

(4) A secured creditor with security other than property contemplated in subsection (2) shall as soon as possible after liquidation place the liquidator in possession of the security and a secured creditor with security contemplated in subsection (2) which has not been realized by the creditor before the first meeting of creditors, shall within five days after the commencement of that meeting or within such longer period as the liquidator may allow, place the liquidator in possession of the security and the liquidator shall cause the security to be valued by an appraiser appointed in terms of section 6 of the Administration of Estates Act, 1965 (Act 65 of 1965) or some other person approved by the Master and he or she shall supply the Master with a copy of the valuation. [83(6)]

(5) A creditor who has placed the liquidator in possession of property held by him or her as security shall not thereby lose the security to which he or she is entitled in respect of such property. [47]

(6) Subject to subsection (7) and section ~~62~~ 45(4), the liquidator shall realize the property made available to him or her pursuant to subsection (5) for the benefit of a creditor whose claim is secured by such property. [83(11)]

(7) The liquidator may, if authorised thereto by the Master or by resolution at a meeting of creditors of the estate, sell property constituting the security of a creditor whose claim ranks first in preference and who has proved his or her claim against the estate, to such creditor at a value agreed upon between the liquidator and the creditor. [New provision]

(8) After proof of his or her claim and the realisation of the security, any secured creditor is entitled to payment of his or her secured claim if he or she has furnished security to the satisfaction of the liquidator for the repayment of the payment with interest at the rate prescribed in terms of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), if according to the confirmed account the creditor is not entitled to the payment or a part thereof. [83(10)]

**78. Attachment of property upon failure to deliver to liquidator.** - (1) If a creditor has failed to place the liquidator in possession of the property constituting his or her security as contemplated in section ~~73~~ 77(5), the liquidator shall send to him or her a written demand by personal notice to place the liquidator in possession and if the creditor fails to do so within 7 days after such demand was delivered or sent to him or her, the liquidator may obtain from the Master or the magistrate of the district where the property is or is situated a warrant directing the sheriff to attach such property and to place the liquidator in possession of the property.

(2) The creditor concerned shall be liable for all costs resulting from his or her failure to place the liquidator in possession of the property and if such costs cannot be recovered from the said creditor they shall form part of the costs of realizing the security in terms of section ~~75~~ 79(4). [83(6)]

**79. Application of proceeds of security.** - (1) A secured creditor shall be entitled to share in the distribution of the proceeds of his or her security only if he or she has proved a claim against the insolvent estate. [83(10)]

(2) Any interest due in respect of a secured claim in respect of any period not longer than two years before the date of liquidation shall be secured as if it were part of the capital debt. [89(3)]

(3) If the claim of a secured creditor exceeds the sum payable to him or her in respect of his or her security, he or she shall be entitled to rank against the estate in respect of the excess as a concurrent creditor, unless when proving his or her claim he or she had indicated that he or she relied solely on his or her security for the fulfilment of his or her claim. [83(12), 89(2)]

(4) The costs of maintaining, conserving and realizing any security shall be paid out of the proceeds of that security if sufficient and, if insufficient, the costs shall be paid by the secured creditor who would have been entitled, in priority to other creditors, to the proceeds if it had been sufficient to cover the said costs. [89(1)]

(5) The liquidator's remuneration in respect of any security and a proportionate share of any excess of minimum liquidator's remuneration over the ordinary tariff, a proportionate share of the costs incurred by the liquidator in giving security for his or her proper administration of the estate, a proportionate share of the Master's fees, calculated on the proceeds of the security, and if the property is immovable, any assessment rates as defined in subsection (7) which is or will become due thereon in respect of any period not exceeding two years immediately preceding the date of the liquidation and in respect of the period from that date to the date of the transfer of that property by the liquidator of that estate, with any interest or penalty which may be due on the said assessment rates in respect of any such period, shall form part of the costs of realization.

(6) Notwithstanding the provisions of any law which prohibits the transfer of any immovable property unless any assessment rates as defined in subsection (7) due thereon have been paid, that law shall not debar the liquidator of an insolvent estate from transferring any immovable property in that estate for the purpose of liquidating the estate, if the liquidator has paid or offered reasonable security for payment of the assessment rates which may have been due on that property in respect of the periods mentioned in subsection (5) and no preference shall be accorded to any claim for such assessment rates in respect of any other period.

(7) For the purposes of subsections (4) and (6) "assessment rates" in relation to immovable property means any amount payable periodically in respect of that property to the State or for the benefit of a provincial administration or to a body established by or under the authority of any law in discharge of a liability to make such periodical payments, if that liability is an incident of the ownership of that property, but excluding any payment for services rendered in respect of such property.

(8) After payment of the costs referred to in subsection (4), the balance of the proceeds of the security shall be applied in satisfying, in order of preference of secured creditors, first the capital sums of claims secured by the said security, and thereafter simple interest on the capital sums at the rate prescribed in terms of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), or a higher rate of interest by virtue of a lawful stipulation in writing, from date of liquidation to the date of payment. [95(1)]

(9) Any balance of the proceeds of the security remaining shall be added to the free residue of the insolvent estate. [83(12)]

(10) If a creditor whose claim is secured by a special mortgage over immovable property belonging to the insolvent estate has not proved his claim and the liquidator is not satisfied that the debt in question has been discharged or abandoned, he shall deposit with the Master for payment into the Guardians' Fund the proceeds of the sale of the former mortgagee's security to an amount not exceeding such capital amount of the said mortgage and such arrears of interest for which the mortgagee would have been a secured creditor, after deduction of an amount equal to the costs which the secured creditor would have had to pay if he or she had proved a claim and had stated in the affidavit submitted in support of his or her claim that he or she relied for the satisfaction of his or her claim solely on the proceeds of the sale of the said property. The amount so deposited or the part thereof to which the former mortgagee may be entitled shall be paid to him or her if, within a period of one year after confirmation in terms of section 95 of the distribution account under which the money is distributed, he or she applies therefor to the Master and the Master is satisfied after proof of the former mortgagee's claim, that he or she is entitled to the amount or part thereof.

(11) Any amount deposited with the Master in terms of subsection (7) which has not been paid out to the former mortgagee, as in that subsection provided, shall after the expiry of the year mentioned in that subsection be distributed among the creditors who have proved claims against the insolvent estate prior to the confirmation of the said distribution account, as if the amount had, at the time of such confirmation, been available for distribution among them.

(12) Any creditor claiming to be entitled to share in the said distribution shall apply in writing to the Master for payment of his or her share, and the Master may pay out to such creditor or may hand the money to the liquidator, if any, for distribution among the creditors entitled thereto, or, if there is no liquidator, may appoint a liquidator on such conditions as the Master may think fit to impose for the purpose of making such distribution.

(13) Any liquidator charged with the duty of making such a distribution shall submit to the Master a supplementary account in respect thereof and the provisions of this Act relating to an account shall apply in respect of such supplementary account. [95(2)-(5).]

**80. Security in respect of reserved ownership or financial lease.** - (1) If a creditor could immediately before the liquidation of the estate of a debtor assert his or her ownership to property delivered to a debtor under a reservation of ownership contract or a financial lease the property shall, subject to the rights of other secured creditors, upon the liquidation of the estate of the debtor be deemed to be held by the creditor or his or her successor in title (herein referred to as the creditor) as security for the amount outstanding in respect of the purchase price of the property or the balance owing on the financial lease. [84(1)]

(2) If property referred to in subsection (1) was returned by the debtor to the creditor within three months before the date of liquidation of the debtor's estate, the liquidator may demand from the creditor that he or she deliver to the liquidator the property or its value at the date when it was returned to him or her, subject to payment to the creditor by the liquidator or to deduction from the value (as the case may be) of the difference between the total amount payable under the transaction and the total amount actually paid. [84 (2)]

**81. Security in respect of landlord's hypothec.** - (1) A landlord's hypothec shall confer a preference with regard to the property which is subject to the hypothec, for rent due in respect of the period immediately prior to the date of liquidation, but not exceeding rent for a period of -

- (a) three months, if the rent is payable monthly or at shorter intervals than one month; or
- (b) six months, if the rent is payable at intervals exceeding one month but not exceeding three months; or

- (c) nine months, if the rent is payable at intervals exceeding three months but not exceeding six months; or
- (d) fifteen months, if the rent is payable at intervals exceeding six months. [85(2)]

(2) A tacit or legal hypothec other than a landlord's hypothec in subsection (1) shall not confer any preference against an insolvent estate. [85(1)]

**82. Certain mortgages afford no security or preference.** - With the exception of a *kustingsbrief*, no special bond or a general bond over movables, or a general clause in a special bond over movables passed for the purpose of securing the payment of an existing unsecured debt or obtaining a preference for an existing concurrent debt which was incurred more than two months prior to the lodging of the bond with the registrar of deeds concerned for registration, or for the purpose of securing the payment of a debt or obtaining a preference for a debt incurred in novation of or substitution for any such first-mentioned debt, shall confer any security or preference if the application for the liquidation of the estate of the debtor is lodged with the Registrar within six months after such lodging of the said bond with the registrar of deeds: Provided that a bond shall be deemed not to have been lodged as aforesaid if it was withdrawn from registration. [88]

## **CHAPTER 15 - COSTS OF LIQUIDATION AND APPLICATION OF FREE RESIDUE**

**83. Costs of liquidation.** - (1) The costs of liquidation shall include -

- (a) the sheriff's charges incurred since the date of liquidation; [97(2)(a)]
- (b) fees payable to the Master in connection with the liquidation; [97(2)(b)]
- (c) the costs, as taxed by the registrar of the court, incurred in connection with the application by a debtor for the liquidation of his or her estate or of a creditor for the liquidation of a debtor's estate, excluding the costs of opposition to such application, unless the court has ordered that such costs shall be included in the costs of liquidation; [97(3)]

- (d) the amount determined by the Master for the preparation of a statement of his or her affairs by the insolvent debtor as required by section 39; [97(2)(c)]
- (e) the remuneration of an interim liquidator appointed in terms of section 37 and of the liquidator, including the costs incurred by the liquidator in giving security for the proper administration of the estate; [97(2)(c)]
- (f) any expenses incurred by the Master or by a presiding officer in carrying out the provisions of this Act, unless otherwise ordered by the Master or the court and subject to the provisions of section ~~68~~ 55(2); [153(2)]
- (g) the salary, wages or fees of any person who was engaged or appointed by the liquidator in connection with the administration of the estate; [73(1A); 97(2)(c)]
- (h) such costs incurred in the administration of a deceased estate before the liquidation of the estate as the Master may allow; [New provision]
- (i) all other costs of the administration and the liquidation of the estate of the insolvent debtor. [97(2)(c)]

(2) The taxed fees of the sheriff in connection with proceedings stayed in terms of section 15 shall be regarded as costs of liquidation of the estate; [New provision]

(3) The costs of liquidation referred to in subsections (1) and (2) shall rank **pari passu** and abate in equal proportion, if necessary. [97(2)(c)]

**84. Application of the free residue.** - (1) The free residue of an insolvent estate shall be applied in the first place in defraying the costs of liquidation contemplated in section ~~79~~ 83, but excluding the costs referred to in section ~~75~~ 79(4). [97(1)]

- (2) Thereafter the balance of the free residue shall be applied in paying -
  - (a) to an employee who was employed by the insolvent debtor—
    - (i) any salary or wages, for a period not exceeding three months, due to an employee;

- (ii) any payment in respect of any period of leave or holiday due to the employee which has accrued as a result of his or her employment by the insolvent debtor in the year in which liquidation occurred and the previous year, whether or not payment thereof is due at the date of liquidation;
    - (iii) any payment due in respect of any other form of paid absence for a period not exceeding three months immediately prior to the date of liquidation of the estate; and
  - (b) any contributions which were payable by the insolvent debtor, including contributions which were payable in respect of any of his or her employees, and which were, immediately prior to the liquidation of the estate, owing by the insolvent debtor, in his or her capacity as employer, to any pension, provident, medical aid, sick pay, holiday, unemployment or training scheme or fund, or any similar scheme or fund under the provisions of any law or to such a fund administered by a bargaining or statutory council recognized in terms of the Labour relations Act, 1995 (Act No. 66 of 1995).
- (3)
- (a) The payments in subsection (2) shall not exceed the smaller of R20 000 or six months' salary in respect of a single employee.
  - (b) The Minister may amend the amount in paragraph (a) by notice in the **Gazette** in order to take account of subsequent fluctuations in the value of money.
- (4)
- (a) The claim referred to in subsection (2)(a)(i) shall be preferred to the claims referred to in subsections (2)(a)(ii), (iii) and (iv) and (2)(b).
  - (b) The claims referred to in subsection (2)(a)(ii), (iii) and (iv) shall be preferred to the claims referred to in subsection (2)(b) and shall rank equally and abate in equal proportions, if necessary.
  - (c) The claims referred to in subsection (2)(b) shall rank equally and abate in equal proportions, if necessary.



- (5) For the purposes of this section—
- (a) 'salary and wages' includes all cash earnings which the employee is entitled to receive from the employer, but excludes other benefits;
  - (b) 'unemployment fund' does not include the unemployment insurance fund referred to in section 6 of the Unemployment Insurance Act, 1966 (Act No. 30 of 1966).

(6) The Minister may, after consultation with the National Economic, Development and Labour Council established by section 2(1) of the National Economic, Development and Labour Council Act, 1994, by notice in the Gazette exclude from the operation of the provisions of this section a category of employees, schemes or funds specified in the notice by reason of the fact that there exists any other type of guarantee which affords the employees, schemes or funds protection which is equivalent to the protection as provided in this section.

(7) A director of a company employed by the company or a member of a close corporation employed by the corporation is not entitled to payment in terms of this section.

- (8) (a) Thereafter any balance of the free residue shall be applied in paying maintenance due by ~~the insolvent~~ a natural person debtor in terms of a court order and in arrear at the date of liquidation of the estate, for a period not exceeding three months subject to the maximum amount of R20 000.
- (b) The Minister may amend the amount in paragraph (a) by notice in the **Gazette** in order to take account of subsequent fluctuations in the value of money. [New provision]

(9) Thereafter any balance of the free residue shall be applied in paying simple interest from the date of liquidation to the date of payment on the claims paid in terms of subsections (1) to (8) in their order of preference at the rate of interest prescribed in terms of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975).

(10) Thereafter the balance of the free residue shall, subject to any maximum amount in terms of a bond, be applied in payment of the proved claims of creditors who are holders of a

general bond over movables or a special bond over movables with a general clause, registered in the deeds registry, in their order of preference with simple interest from the date of liquidation to the date of payment at the rate of interest prescribed in the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), or a higher rate of interest by virtue of a lawful stipulation agreed upon in writing.

(11) Thereafter any balance of the free residue shall be applied in payment of the concurrent claims of creditors proved against the estate, in proportion to the amount of each claim. [103(1)(a)]

(12) When the concurrent claims have been paid in full, any balance of the free residue shall be applied in payment of simple interest on such claims from the date of liquidation to the date of payment, in proportion to the amount of each such claim. [103(1)(b)]

(13) The interest referred to in subsection (12) shall be calculated at the rate of interest prescribed in terms of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), unless the amount of the claim bears interest at a higher rate of interest by virtue of a lawful stipulation agreed upon in writing. [103(2)]

(14) An employee of the ~~insolvent~~ debtor shall be entitled to payment in terms of subsection (2)(a) even though he or she has not proved a claim against the estate in respect thereof, but the liquidator may require the employee to submit an affidavit indicating the amount due to him or her. [100(3)]

**85. Costs incurred in respect of legal services.** - (1) Subject to the provisions of subsection (2), costs incurred to engage the services of attorneys or counsel or both to perform legal work on behalf of the estate except costs awarded against the estate in legal proceedings, shall not be subject to taxation by the taxing master of the court if the liquidator has entered into any written agreement in terms of which the fees of any attorney or counsel will be determined in accordance with a specific tariff: ~~Provided that no contingency fees agreement referred to in section 2(1) of the Contingency Fees Act, 1997 (Act No. 66 of 1997), shall be entered into without the express prior written authorization of the creditors.~~

(2) If—

- (a) the liquidator has not entered into an agreement under subsection (2); or
- (b) there is any dispute as to the fees payable in terms of such an agreement

the costs shall be taxed by the taxing master of the High Court having jurisdiction or, where the costs are not subject to taxation by the said taxing master, such costs shall be assessed by the law society or bar council concerned or, where the counsel concerned is not a member of any bar council, by the body or person designated under section 5(1) of the Contingency Fees Act, 1997.

(3) No bill of costs based upon an agreement entered into under subsection (1) shall be accepted as cost of liquidation of the estate, unless such bill is accompanied by a declaration under oath or affirmation by the liquidator stating—

- (a) that he or she had been duly authorized by either the creditors or the Master, as the case may be, to enter into such an agreement;
- (b) that any legal work specified in such bill has been performed to the best of his or her knowledge and belief;
- (c) that any disbursements specified in such bill have been made to the best of his or her knowledge and belief; and
- (d) that, to the best of his or her knowledge and belief, the attorney or counsel concerned has not overreached him or her.

(4) Notwithstanding anything to the contrary contained in this Act, the Master may disallow any costs incurred under this section if the Master is of the opinion that any such costs are excessive, unnecessary, incorrect or improper or that the liquidator acted in bad faith, negligently or unreasonably in incurring any such costs.[73(2)]

(5) If it appears to the court that a legal representative or legal adviser has, with intent to benefit himself or herself, improperly given legal advice or acted with intent to benefit himself or herself, whether for or against an insolvent estate, or has caused any unnecessary expense in that regard, the court may order that such expense or any part thereof shall be borne by that legal representative or legal adviser personally.[74]

**CHAPTER 16 - SPECIAL PROVISIONS RELATING TO THE SALE OF PROPERTY BELONGING TO THE INSOLVENT ESTATE**

**86. Non-compliance with provisions of Act in sale of property of insolvent estate.** - (1) If property of an insolvent estate is sold without the provisions of this Act having been complied with, the sale shall be void unless the purchaser proves that he or she acquired the property in good faith and for value and, where applicable, that a court order authorising the sale was not a prerequisite.

(2) Any person who disposes of property of an insolvent estate contrary to the provisions of this Act shall be liable to make good to the estate twice the amount of the loss which the estate might have sustained as a result of any such disposition. [82(8)]

**87. Bona fide sale of property in possession of insolvent debtor.** - (1) The owner of movable property which was in the possession or custody of a person debtor at the date of liquidation of that person's debtor's estate, shall, subject to the provisions of section 80, not be entitled to recover that property if it has, in good faith, been sold as part of the said person's debtor's insolvent estate, unless the owner has, by notice in writing given before the sale to the liquidator or the Master, demanded the return of that property. [36(5)]

(2) If property contemplated in subsection (1) has been sold as part of the insolvent estate, the former owner of the property may recover from the liquidator, before the confirmation of the liquidator's account as contemplated in section-~~90~~ 95 the net proceeds of the sale of that property, unless he or she has recovered the property itself from the purchaser, and thereupon he or she shall lose any right to reclaim the property as contemplated in subsection (1). [36(6)]

**88. Persons incompetent to acquire property from insolvent estate.** - The liquidator or an auctioneer employed to sell property of the insolvent estate in question or an employer, employee or associate of such liquidator or auctioneer shall not acquire any property of the insolvent estate unless the acquisition is authorised by an order of the court. [82(7)]

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**CHAPTER 17 - BANKING ACCOUNTS, INVESTMENTS AND MONEYS BELONGING TO THE INSOLVENT ESTATE**

**89. Banking accounts and investments.** - (1) The liquidator of an insolvent estate -

- (a) shall open a cheque account in the name of the estate with a bank within the Republic and shall deposit therein all moneys received by him or her on behalf of the estate;
- (b) may open a savings account in the name of the estate with a bank within the Republic and may transfer thereto from the account referred to in paragraph (a) moneys not immediately required for the payment of any claim against the estate;
- (c) may place moneys deposited in an account referred to in paragraph (a) and not immediately required for the payment of any claim against the estate, on interest-bearing deposit with a Bank within the Republic. [70(1)]

(2) Whenever required by the Master to do so, the liquidator shall notify the Master in writing of the Bank and the office, branch office or agency thereof with which he or she has opened an account or placed a deposit referred to in subsection (1) and furnish the Master with a bank statement or other sufficient evidence of the state of the account. [70(2)]

(3) All cheques or orders drawn upon an account referred to in subsection (1) shall contain the name of the payee and the cause of payment and shall be drawn to order and be signed by every liquidator or his or her authorised agent. [70(4)]

(4) The Master and any surety for the liquidator, or any person authorised by such surety, shall have the same right to information in regard to an account referred to in subsection (1) as the liquidator himself or herself has, and may examine all vouchers relating thereto, whether in the hands of the bank or the liquidator. [70(5)]

(5) The Master may, after notice to the liquidator, direct in writing the manager of any office, branch office or agency with which an account referred to in subsection (1) has been opened, to pay over into the Guardian's Fund all moneys standing to the credit of that account at the time of the receipt by the said Manager of that direction, and all moneys which may thereafter be paid into that account, and the said Manager shall carry out that direction. [70(6)]

**90. Recording of receipts by liquidator.** - (1) The liquidator of an insolvent estate shall immediately after his or her appointment open a record in which all moneys, goods, accounts and other documents received by him or her on behalf of the estate are recorded. [71(1)]

(2) The Master may at any time direct the liquidator in writing to produce the said record for inspection and every creditor who has proved a claim against the estate and, if the Master so orders, every person claiming to be a creditor or surety for the liquidator, may inspect the said record at all reasonable times. [71(2)]

**91. Unlawful retention of moneys or use of property by liquidator.** - (1) A liquidator who, without lawful cause, retains any money exceeding one hundred rand belonging to the insolvent estate of which he or she is liquidator, or knowingly permits his or her co-liquidator to retain such a sum of money longer than the earliest day after its receipt on which it was possible for him or her or his or her co-liquidator to pay that money into a bank, or who uses or knowingly permits his or her co-liquidator to use any property of the insolvent estate, except for the benefit of the estate, shall, in addition to any other penalty to which he or she may be liable, be liable to pay into the estate an amount equal to double the amount so retained or double the value of the property so used. [72(1)]

(2) The amount which a liquidator is liable to pay in terms of subsection (1) may be deducted from any remuneration to which he or she is entitled out of the insolvent estate or may be recovered from him or her by action in a court of law at the instance of his or her co-liquidator or the Master or any creditor who has proved a claim against the estate. [72(2)]

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**CHAPTER 18 - ESTATE ACCOUNTS, DISTRIBUTION AND CONTRIBUTION**

**92. Estate Accounts.** - (1) Subject to subsections (5), (6) and (7), a liquidator shall within a period of six months from the date of his or her appointment as final liquidator in terms of section ~~55~~ 71(1) submit to the Master a liquidation account and a distribution account of the proceeds of the property in the insolvent estate available for payment to creditors, or if any surplus is not required for the payment of claims, costs and charges or interest, the liquidator shall indicate a distribution account of such surplus, or if all realisable property in the insolvent estate has been realised and brought into account and the proceeds are insufficient to cover the costs and charges referred to in section ~~79~~ 83 a contribution account apportioning the liability for the deficiency among creditors who are liable to contribute. [91(1)]

(2) The accounts referred to in subsection (1) shall be substantially in the form set out in Form D of Schedule 1: Provided that the Master may insist on strict compliance with any item of the said Form. [New provision]

(3) If a liquidation account is not a final account, the liquidator shall from time to time as the Master may direct, but at least every six months unless he or she has received an extension of time as contemplated in subsections (5), (6) or (7), submit to the Master periodical accounts in form and in all other respects similar to the accounts mentioned in subsection (2). [92(4)]

(4) If the estate of a partnership is under liquidation, separate accounts shall be submitted in respect of the partnership and the estate of each partner whose estate is under liquidation. [92(5)]

(5) If a liquidator is unable to submit an account to the Master within the period of six months as required by subsection (1) or (3), he or she shall before the expiration of such period or within the further period that the Master may allow, submit to the Master an affidavit in which he or she shall state -

- (a) the reasons for his or her inability to submit the account concerned; and
- (b) those affairs, transactions or matters relating to the insolvent debtor or the insolvent estate as the Master may require; and

(c) the amount of money available for payment to creditors or, if there is no free residue or the free residue is insufficient to meet all costs referred to in section ~~79~~ 83, the deficiency the creditors are liable to make good, and the Master may thereupon extend such period to a date determined by him or her. [109(1)]

(6) If the Master extends the period in terms of subsection (5) the liquidator shall inform proved creditors of the extension by personal notice and enclose a copy of the affidavit in terms of the subsection.

(7) If a liquidator fails to submit an account within the period required by subsection (1) or before the date determined by the Master in terms of subsection (5), the Master may, subject to subsection (7), serve a notice on the liquidator in which he or she is required -

- (a) to submit the account concerned to the Master; or
- (b) if he or she is unable to submit such account, to submit an affidavit as contemplated in subsection (5) to the Master,

within a period of 14 days from the date of the notice and the Master may, if the account concerned or the said affidavit is not submitted to him or her, after the expiration of the said 14 days extend such period to a date determined by him or her. [109(2)]

(8) If the Master refuses to extend the period as contemplated in subsection (7), the liquidator may apply by motion to the court, after having given the Master notice of his or her intention to make the application, for an order extending the said period and the court may thereupon make such order as it deems fit. [109(3)]

(9) If a liquidator has funds in hand which, in the opinion of the Master, ought to be distributed ~~among creditors of the estate~~ and the liquidator has not submitted to the Master a plan for the distribution of those funds, the Master may direct him or her in writing to submit to the Master a plan for the distribution of those funds, although the period prescribed in subsection (1) or (3) may not have elapsed. [110]

(10) If any liquidator fails to submit any account to the Master as and when required by or under this Act, or to submit any vouchers in support of such account upon the request of the Master, or to perform any other duty imposed upon him by this Act or to comply with any



reasonable demand of the Master for information or proof required by him in connection with the liquidation or distribution of an estate, the Master or any person having an interest in the liquidation or distribution of the estate may, after giving the liquidator not less than fourteen days' notice, apply to the court for an order directing the liquidator to submit such account or any vouchers in support thereof or to perform such duty or to comply with such demand.

(11) The costs adjudged to the Master or to such person shall, unless otherwise ordered by the Court, be payable by the liquidator **de bonis propriis**.

**93. Copies of liquidator's accounts to be open for inspection.** - (1) The liquidator shall as soon as possible after he or she has submitted an account to the Master as contemplated in section 87 92 transmit a copy of the account to the magistrate of the district in which the ~~insolvent debtor~~ resided or carried on business before his or her ~~insolvency liquidation~~ in the case where there is no Master's office in the said district, and if the ~~insolvent debtor~~ resided or carried on business in a portion of a district in respect of which an additional magistrate or assistant magistrate permanently carries out the functions of the magistrate of the district at a place other than the seat of the magistracy of that district, a copy of the account shall be sent to that additional magistrate or assistant magistrate. [108(1)]

(2) The liquidator shall give notice in the **Gazette** that the account will lie open for inspection by ~~creditors~~ any person having an interest in the estate at the place and during the period stated in the notice and shall give personal notice to each creditor who has proved a claim against the estate. [108(2)]

(3) Every such account and every copy thereof transmitted to a magistrate shall be open for inspection by ~~creditors~~ any person having an interest in the estate of the estate in question at the office of the Master and of such magistrate during a period of 14 days as from the date of the publication of the notice in the **Gazette**. [108(3)]

(4) A magistrate who has received a liquidator's account shall cause a notice to be affixed in a public place in or about his or her office that the account will lie open for inspection at his or her office during the period stated in the notice. [108(4)]

(5) After the expiration of the said period the magistrate shall endorse upon the account a certificate that the account was open for inspection at his or her office as hereinbefore provided, and he or she shall transmit the account to the Master. [108(5)]

**94. Objections to liquidator's account.** - (1) The ~~insolvent~~ debtor or any person having an interest in the estate may at any time after the commencement of the period contemplated in section ~~88~~ 93 until the liquidator's account is confirmed in terms of section ~~90~~ 95 submit to the Master in writing any objection to that account, stating the reasons for such objection. [111(1)]

(2) If the Master is of the opinion that any such objection is well founded or if, apart from any objection, he or she is of the opinion that the account is in any respect incorrect or that it contains any improper charge or that the liquidator acted **mala fide**, negligently or unreasonably in incurring any costs included in the account and that the account should be amended, he or she may direct the liquidator to amend the account or may give such other direction in connection therewith as he or she may think fit. [111(2)]

(3) Any person who feels aggrieved by any such direction of the Master or by the Master's refusal to sustain an objection so lodged, including the liquidator, may within 14 days as from the date of the Master's direction apply to the court for relief and the court shall have the power to consider the merits of any such matter, to hear evidence and to make any order it deems fit. [111(2)(a)]

(4) When any direction by the Court affects the interests of a person who has not lodged an objection the account so amended shall again lie open for inspection by creditors in the manner and with the notice prescribed by section ~~88~~ 93, unless the person affected as aforesaid consents in writing to the immediate confirmation of the account. [111(2)(b)]

**95. Confirmation of liquidator's accounts.** - When a liquidator's account has been open to inspection as prescribed by this Act and -

(a) no objection has been lodged; or

- (b) an objection has been lodged and the account has been amended in accordance with the direction of the Master and has again been open for inspection, if necessary, and no application for relief has been made to the court in terms of section ~~89~~ 94(3); or
- (c) an objection has been lodged but withdrawn or has not been sustained and the objector has not applied to court for relief,

the Master shall confirm the account and his or her confirmation shall notwithstanding mistakes in the account be final save as against a person who may have been permitted by the court before any dividend has been paid under the account, to reopen it. [112]

**96. Distribution of estate and collection of contributions.** (1) Immediately after the confirmation of a liquidator's account the liquidator shall give notice of the confirmation in the **Gazette** and shall state in that notice that a dividend to creditors, and where applicable, members or other persons, is in the course of payment or that a contribution is in the course of collection from creditors, as the case may be, and that every creditor liable to contribute is required to pay to the liquidator the amount for which he is liable. [113(1)]

(2) If any contribution is payable the liquidator shall specify fully in that notice the address at which payment of the contribution is to be made and he or she shall send a copy of the notice by personal notice to every creditor who is liable to contribute. [113(2)]

(3) Immediately after the confirmation of a liquidator's account but not later than two months after such confirmation the liquidator shall in accordance therewith distribute the estate or collect from each creditor who is liable to contribute, the amount for which he or she is liable. [113(3)]

**97. Liquidator to produce acquittances for dividends or pay over unpaid dividends to Master.** - (1) The liquidator shall within three months after the confirmation of the account lodge with the Master the receipts for dividends paid to creditors or other persons and if there is a contribution account, the vouchers necessary to complete the account: Provided that a cheque purporting to be drawn payable to a creditor or other person in respect of a dividend due to him or her and paid by the banker on whom it is drawn, or a statement by a Bank that the Bank of the creditor has credited or has been instructed to credit the account of the creditor with the amount of the dividend shall be accepted by the Master in lieu of any such receipt. [114(1)]

(2) If any such dividend has at the expiration of a period of two months from the confirmation of the account under which it was payable, not been paid to the creditor or other person who is entitled thereto, the liquidator shall within three months after confirmation of the account pay the dividend over to the Master who shall deposit it in the Guardian's Fund on account of the creditor or other person. [114(2)]

**98. Surplus to be paid into Guardian's Fund.** - Except in the case of a partnership debtor, in which case the provisions of section 48 shall apply, if after the confirmation of a final account there is any surplus in an insolvent estate which is not required for the payment of claims, costs, charges or interest, the liquidator shall after the confirmation of that account-

(a) in the case of a natural person debtor, pay the surplus over to the Master who shall deposit it in the Guardian's Fund and after the rehabilitation of the insolvent shall pay it out to the debtor at his or her request; [116]

(b) in the case of a trust debtor, pay the surplus over to the trustees of the trust or, if there are no trustees, to the Master who shall deposit it in the Guardian's Fund and upon application by the capital beneficiaries as determined by the trust deed, pay it out to them: Provided that if the circumstances for the capitalisation of the trust as determined by the trust deed have not yet taken place, the Master may, after having appointed new trustees in the trust concerned, pay such funds to the new trustees so appointed;

(c) in the case of a company debtor, distribute such surplus among the members according to their rights and interests in the company: Provided that such distribution shall be subject to any contrary provisions contained in the memorandum or articles of such company;

(d) in the case of a close corporation debtor, distribute such surplus among the members according to their rights and interests in the corporation: Provided that such distribution shall be subject to any contrary provisions contained in the founding statement, or association agreement entered into by the members, of such corporation;

(e) in the case of an association debtor, distribute such surplus among the members according to their rights and interests in the association: Provided that such distribution shall be subject to any contrary provisions contained in the founding statement, constitution, memorandum or articles of association of such association.

**99. Contribution by creditors towards cost of liquidation.** - Where there is no free residue in an insolvent estate or where the free residue is insufficient to meet all the costs mentioned in section ~~79~~ 83 the following rules shall apply with regard to the liability of creditors to pay contributions towards defraying any such deficiency: [106]

- (a) The creditor upon whose application the liquidation order was made, whether or not he or she has proved a claim against the estate, shall be liable to contribute not less than the amount he or she would have had to contribute if he or she had proved a claim for the amount stated in his or her application for liquidation and where he or she is a secured creditor, without reliance on his or her security; [14(3)]
- (b) each concurrent creditor shall be liable to pay a contribution in proportion to his or her concurrent claim; [106]
- (c) if a creditor has withdrawn his or her claim, he or she shall be liable to pay a contribution only so far as is provided in section ~~50~~ 66 and if a creditor withdraws his or her claim within 5 days after the date of any resolution of creditors he or she shall be deemed to have withdrawn the claim before anything was done in pursuance of that resolution; [106(b)]
- (d) if a claim has been reduced or disallowed by a liquidator in terms of section ~~46~~ 62(4) the creditor shall, unless the claim is subsequently admitted by means of compromise or proved in action at law, be liable to pay a contribution, in respect of costs incurred before the date of notice referred to in the said subsection on the amount of the claim before the claim was reduced or disallowed and in the case of a reduced claim in respect of costs incurred after the date of the said notice, on the amount to which the claim was reduced by the liquidator. [New provision]

**100. Enforcing payment of contribution.** - (1) If a creditor who is liable to contribute under an account has failed to pay the amount of his or her liability within a period of 30 days after the date of the sending or delivery to him or her of a notice referred to in section ~~94~~ 96(2) the liquidator may take out a writ of execution for the amount of the creditor's liability in the magistrate's court in which the creditor could be sued for the contribution in question. [118(1)]

(2) Whenever a creditor who is liable to contribute under an account is in the opinion of the Master and of the liquidator unable to pay the contribution for which he or she is liable or whenever the liquidator has incurred expenses in connection with the recovery of any contribution,

which expenses are in the opinion of the Master and the liquidator irrecoverable, the liquidator shall as soon as practicable and in any event within such period as the Master may prescribe therefor, frame and submit to the Master a supplementary contribution account wherein he or she shall apportion the share of the creditor who is unable to pay or the expenses in question among the other creditors who are in the opinion of the Master and the liquidator able to pay. [118(2)]

(3) The provisions of subsection (2) shall **mutatis mutandis** apply whenever a creditor who is liable to contribute under a first or further supplementary account is, in the opinion of the Master and the liquidator, unable to pay the contribution for which he or she is liable, or whenever the liquidator has incurred expenses in connection with the recovery of a contribution under a first or further supplementary account which are, in the opinion of the Master and the liquidator, irrecoverable by the liquidator. [118(3)]

(4) The liquidator may in lieu of complying with the requirements of section ~~88~~ 93 in connection with any supplementary contribution account, furnish a copy of that ~~plan~~ account to every creditor who is liable to contribute thereunder and thereupon the provisions of subsection (1) shall **mutatis mutandis** apply. [118(4)]

## **CHAPTER 19 - REHABILITATION OF NATURAL PERSONS**

**101. Rehabilitation.** - (1) ~~An insolvent~~ A natural person debtor may, subject to the provisions of subsection (2), apply to the court for an order for his or her rehabilitation -

- (a) at any time after the confirmation by the Master of a distribution account providing for the full payment of all claims proved against the estate, with interest thereon from the date of liquidation, calculated in terms of section ~~80~~ 84(5) and (6) and all costs of liquidation; or [124(5)]
- (b) at any time after the Master has issued a certificate of acceptance of a composition as contemplated in section ~~71~~ 119; or [124(1)]
- (c) in any other case, but subject to subsection (2), after the expiration of four years from the date of the confirmation by the Master of the first liquidation account in the estate. [124(2)(a)]

(2) In the case where ~~an insolvent~~ a debtor has been convicted in respect of the existing or any prior insolvency for an offence referred to in section ~~101~~ 136(1)(a), (b), (d), (e) or (g) or 2(e) or (f) or for any other fraudulent act, the ~~insolvent~~ debtor may not apply to the court for an order for his or her rehabilitation before a period of five years has elapsed from the date of the conviction concerned.

(3) The Master may on the request of the ~~insolvent~~ debtor recommend to the court that an application referred to in subsection (1)(c) may be made before the expiration of the said period of four years but no such application shall be made within a period of twelve months from the said date or, in the case where the ~~insolvent's~~ debtor's estate was liquidated prior to the liquidation in respect of which he or she applies for rehabilitation, within a period of three years from the said date. [124(2)(b) and proviso to 124(2)]

(4) ~~An insolvent~~ A debtor who wishes to apply for a rehabilitation order shall -

- (a) send a written notice of his or her intended application by mail, telefax, electronic mail, or personal delivery-
  - (i) in the case of an application contemplated in subsection (1)(a), to the Master and the liquidator, not less than four weeks before the date of the intended application; or [124(1)]
  - (ii) in the case of an application contemplated in subsection (1)(b), (c) or (d), to the Master and the liquidator (if there is one), not less than six weeks before the date of the intended application, and by way of notice in the **Gazette**, and he or she shall send a copy of the said notice by mail, telefax, electronic mail, or personal delivery to every creditor of the estate whose name and address are known to him or her or which he or she can readily obtain; and [124(2)]
- (b) furnish security to the registrar of the court in the amount of or to the value of R5000 in respect of the costs of any person who may oppose the application for rehabilitation and who may be awarded costs by the court. [125]

(5) The Minister may amend the amount in subsection (3) by notice in the **Gazette** in order to take account of subsequent fluctuations in the value of money.

(6) The notice referred to in subsection (4)(a)(i) or (ii) shall state the estimated value and reflect full details of the assets of the ~~insolvent~~ debtor at the time of the application. [New provision]

(7) ~~An insolvent~~ A debtor shall in support of his or her application for rehabilitation submit an affidavit that he or she has made a complete surrender of his or her estate and that he or she has not granted or promised any benefit to any person or entered into any secret agreement with intent to induce the liquidator of the estate or any creditor not to oppose the application for rehabilitation. The said affidavit shall contain a statement of his or her assets and liabilities and of his or her earnings and his or her own as well as his or her spouse's contribution to his household, on the date of the application. Furthermore the court shall be apprised of the dividend (if any) paid to his or her creditors, what further assets in the insolvent estate are available for realisation and the estimated value thereof, the total amount of all claims proved against the estate, and the total amount of his or her liabilities at the date of liquidation of his or her estate. If application is made for rehabilitation pursuant to subsection (1)(b), the ~~insolvent~~ debtor shall set out the particulars of the composition and shall state whether there are or are not creditors whose claims against the estate have not been proved, and if there are such creditors, shall state their names and addresses and particulars of their claims. [126]

(8) A liquidator who has received a notice contemplated in subsection (4)(a) shall report to the Master any facts which in his or her opinion would warrant the court to refuse, postpone or qualify the ~~insolvent's~~ debtor's rehabilitation. [124(4)]

(9) A partnership whose estate has been sequestrated shall not be rehabilitated.

**102. Opposition to rehabilitation or refusal of rehabilitation by court.** - (1) The Master shall report to the court on the merits of the application and furnish a copy of the report to the applicant or the applicant's attorney. The Master, the liquidator or any other person having an interest in the estate may appear in person or through a legal representative to oppose the application. [127(1)]

(2) If the court is satisfied on the strength of a certificate by the Master or on any other evidence that the ~~insolvent~~ debtor has intentionally impeded, obstructed or delayed the administration of his or her insolvent estate -



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- (a) through failure to submit a statement of affairs in accordance with the requirements of the Act; or
- (b) through failure to make available to the liquidator of the estate in accordance with written directives by the liquidator or the Master property belonging to the insolvent estate which was in his or her possession or custody or under his or her control or any book, document or record relating to his or her affairs which was in his or her possession or custody or under his or her control; or
- (c) through failure to notify the liquidator of the estate of the existence of any book, document, or record relating to his or her affairs which was not in his or her possession or custody or under his or her control, and as to where such book, document, or record could be found, or of any property belonging to his or her insolvent estate which was not mentioned in his or her statement of affairs, and as to where such property could be found; or
- (d) through failure to keep the liquidator of the estate informed of any change of his or her address during the period of three years after the liquidation of his or her estate; or
- (e) through failure to comply with section ~~15~~ 16(3); or
- (f) through any other act or omission,

the court shall not grant a rehabilitation order until the expiry of a period of 10 years after the date of liquidation of his or her estate. [New provision]

(3) The court may, whether the application for rehabilitation is opposed or not, refuse the application or postpone the hearing of the application or grant the application for rehabilitation subject to any condition it may think fit, including any provision that the ~~insolvent~~ debtor shall consent to judgment against him or her for the unpaid portion of a debt proved against the estate or which could have been proved against the estate or for such lesser amount that the court may determine, but in such instance no execution shall take place in terms of the judgment save with permission of the court and after proof that the ~~insolvent~~ debtor has since the date of liquidation of the estate acquired property or income which is available for the payment of his or her debts, and apart from such judgment the court may impose any other condition with regard to any property or income which may in future accrue to the ~~insolvent~~ debtor. The court may order the ~~insolvent~~ debtor to pay the costs of any opposition to the application for rehabilitation, unless the court is satisfied that the opposition is vexatious. [127(2), (3)]

(4) When granting an order for rehabilitation in respect of an application made in terms of section 96 101(1)(b), the court may order that any obligation incurred by the applicant on or before the date of of his or her estate and which, but for the order, would be discharged as a result of the rehabilitation, shall remain of full force and effect notwithstanding the rehabilitation. [127(4)]

(5) The registrar of the court shall forthwith give notice to the Master of every order for rehabilitation which is granted by the court. [127(5)]

**103. Rehabilitation by effluxion of time.** - (1) Any insolvent debtor not rehabilitated by the court within a period of ten years from the date of liquidation of his or her estate, shall be deemed to be rehabilitated after the expiry of that period unless a court upon application by an interested person after notice to the insolvent debtor orders otherwise prior to the expiration of the said period of ten years. [127A(1)]

(2) If a court makes an order under subsection (1), the registrar of the court shall send a copy of the order to the Master and every officer charged with the registration of titles to immovable property in the Republic. The Master shall forward a copy of the order to the liquidator.[127A(2)]

(3) Whenever such officer receives such order he or she shall enter a **caveat** against the transfer of all immovable property and the cancellation of every bond registered in the name of the insolvent debtor or which belongs to the insolvent debtor. The **caveat** remains in force until the date on which the insolvent debtor is rehabilitated. [127A(3), (4)]

**104. Effect of rehabilitation.** - (1) Subject to the provisions of subsection (2) and any conditions which the court may have imposed when granting an order for rehabilitation, the rehabilitation of an insolvent a debtor shall have the effect -

(a) of putting an end to the liquidation; [129(1)(a)]

- (b) of discharging all debts of the ~~insolvent~~ debtor which were due, or the cause of which had arisen, on or before the date of liquidation, and which did not arise out of any fraud on his or her part or the commission by him or her of any offence referred to in sections ~~101~~ 136(1)(e) or section ~~101~~ 136(1)(c) in respect of a previous liquidation; and [129(1)(b)]
- (c) of relieving the ~~insolvent~~ debtor of every disability resulting from the liquidation.

(2) The rehabilitation of an ~~insolvent~~ a debtor shall not affect -

- (a) the rights of a liquidator or of creditors under a composition;
- (b) the power or duties of the Master or the duties of the liquidator in connection with a composition;
- (c) the right of the liquidator or of creditors to any part of the ~~insolvent's~~ debtor's estate which is vested in the liquidator but as yet not distributed by him or her;
- (d) the liability of a surety for the ~~insolvent~~ debtor;
- (e) the liability of any person to pay any penalty or suffer any punishment under any provision of this Act. [129(3)]

(3) Evidence of a conviction on any offence contemplated in subsection (1)(b) shall be admissible in subsequent civil proceedings as **prima facie** evidence that the ~~insolvent~~ debtor committed the offence in question.

**105. Penalties for unlawful inducement to accept compromise or in connection with rehabilitation.**

(1) It shall be unlawful for any person to offer or promise to any other person any benefit in order to induce him or her to accept an offer of composition or to agree to or refrain from opposing an application for the rehabilitation of an ~~insolvent~~ a debtor, or as a consideration for his or her acceptance of an offer of composition or for supporting or refraining from opposing an application for the rehabilitation of an ~~insolvent~~ a debtor and any person who has accepted or agreed to accept any such benefit, whether for himself or herself or for any other person, shall be liable to pay, by way of penalty, for the benefit of the other creditors of the insolvent estate -

- (a) a sum equal to the amount of any claim proved by him or her against the estate; and

- (b) the amount or value of the benefit promised or given; and
- (c) in the case of a composition, the amount paid or to be paid to him or her under the composition. [130]

(2) The liquidator shall be competent to enforce the penalty referred to in subsection (1) and if he or she fails to do so any creditor of the estate may enforce the penalty in the name of the liquidator, if he or she indemnifies the liquidator against all costs in connection with such action. [131]

**CHAPTER 20 - SPECIAL PROVISIONS RELATING TO TRUST DEBTORS, COMPANY DEBTORS, CLOSE CORPORATION DEBTORS AND ASSOCIATION DEBTORS IN LIQUIDATION**

**106. Provisions relating to contributories in the case of a company limited by guarantee.**

(1) In the case of a liquidation by the Court or of a creditors' voluntary liquidation by resolution of a company (incorporated in terms of the Companies Act 61 of 1973) limited by guarantee, the liquidator shall, if necessary, settle a list of contributories.

(2) A past member of a company limited by guarantee shall not be liable to contribute to its assets unless-

- (a) at the commencement of the liquidation there is unsatisfied debt or liability of the company contracted before he ceased to be a member; and
- (b) it appears to the liquidator that the present members are unable to satisfy the contributions required to be made by them in pursuance of this Act.

(3) As soon as the liquidator has settled the list of contributories, he shall send a notice to every person included in the list, stating that fact and the extent of the liability of that person.

(4) Any person who objects to his inclusion in the list, shall be entitled within fourteen days from the date of the notice to file an objection with the liquidator in the form of an affidavit giving full reasons why he should not be included in the list.

(5) The liquidator may accept the objection and amend the list of contributories or he may reject such objection and shall, if the objection is rejected, notify the person concerned accordingly by registered post.

(6) A person whose objection has been rejected, shall be entitled, within fourteen days from the date of the notice provided for in subsection (3), to apply to the Master for a ruling as to whether his name should be included in the list, and the Master shall direct the liquidator to include his name in or to exclude it from the said list.

(7) (a) A liquidator shall proceed to recover from the contributories a proportion of or the full amount of their liability as may be required from time to time, taking into consideration the probability that some of the contributories may partly or wholly fail to pay the amount demanded from them.

(b) In the event of the death of any contributory or the insolvency of his estate, the liquidator may recover the contribution from the estate concerned.

(8) (a) The liability for the payment of any amount by a contributory to the company shall be a debt due by him to the company as from the date on which the amount was demanded from him by the liquidator.

(b) A contributory shall not be entitled to set off against his liability any amount due to him by the company in respect of dividends, profits or directors' remuneration.

(9) The liquidator shall adjust the rights of the contributories among themselves, and distribute any surplus among the persons entitled thereto.

(10) A letter of demand by the liquidator to a contributory for the payment of a contribution shall be *prima facie* evidence that the amount thereby appearing to be due, is due.

(11) All books and papers of the company and of the liquidator shall, as between the contributories and the company, be *prima facie* evidence of the truth of all matters therein recorded. [Sections 395 to 399 of the Companies Act]

**107. Attorney-General may make application to Court for disqualification of director.**

(1) When an Attorney-General, upon receipt of the report referred to in section 57 and after such further enquiry as he may deem fit, is satisfied that there are grounds for an application to the Court for an order in terms of section 219 of the Companies Act 61 of 1973, he may make such application to the Court.[Section 401 of the Companies Act]

**108. Dissolution of company debtors, close corporation debtors and association debtors. -**

(1) In any liquidation, when the affairs of a company debtor or close corporation debtor have been completely liquidated, the Master shall transmit to the Registrar of Companies and Close Corporations a certificate to that effect and send a copy thereof to the liquidator.

(2) The Registrar of Companies and Close Corporations shall record the dissolution of the company or close corporation and shall publish notice thereof in the Gazette.

(3) The date of dissolution of the company or close corporation shall be the date of recording referred to in subsection (2).

(4) In the case of an association debtor the certificate of the Master under sub-section (1) shall constitute its dissolution.

[Section 419 of the Companies Act]

**109. Court may declare dissolution void. -** When a company debtor, close corporation debtor or association debtor has been dissolved, the Court may at any time on an application by the liquidator of such debtor, or by any other person who appears to the Court to have an interest, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon any proceedings may be taken against such debtor as might have been taken if such debtor had not been dissolved.

[Section 420 of the Companies Act]

**110. Registrar of Companies and Close Corporations to keep a register of directors of dissolved companies and members of other bodies corporate. -** (1) The Registrar of Companies and Close Corporations shall establish and maintain a register of directors of

companies and members of other bodies corporate which have been dissolved and which were liquidated under the terms of this Act, and cause to be entered therein, in respect of each such director or member

(a) his full forenames and surname, and any former forenames and surname, his nationality, if not South African, his occupation, his date of birth and his last known residential and postal addresses;

(b) the name of the company or body corporate of which he was a director or member, as the case may be, when such company or body corporate was dissolved for the reason that it was liquidated in terms of this Act and, where more than one company or body corporate was dissolved at the same time, the names of those companies or bodies corporate;

(c) the date of his appointment as director or the date on which he became a member;

(d) the date of dissolution of the company or companies or body corporate or bodies corporate.

(2) The liquidator shall, within fourteen days after the date of the certificate referred to in section 108 (1), send to the Registrar of Companies and Close Corporations on a prescribed form, in duplicate, in respect of each director of the company or member of the body corporate who was a director or member thereof at a date within two years before the commencement of the liquidation, the particulars referred to in subsection (1) (a) to (d) of this section, together with a statement as to which director or member, in his opinion, was the effective cause of the company or body corporate being liquidated in terms of this Act.

(3) The Registrar of Companies and Close Corporations shall, under cover of a prescribed form, send to each director or member one copy of the particulars furnished under subsection (2) in respect of that director or member, and where the liquidator has in a statement furnished under the said subsection expressed any opinion as to which director or member was the effective cause of the company or body corporate being liquidated in terms of this Act, the Registrar of Companies and Close Corporations shall at the same time send a copy of such statement to the director or member named therein.

(4) A director or member may, within one month of the date of the form referred to in sub-section (3), object, by affidavit or otherwise, to his name being entered in the register referred to in subsection (1).

(5) If after considering the objections made by or on behalf of a director or member or if a director or member fails to object and the Registrar of Companies and Close Corporations is of opinion that the name of the director or member should be entered in the register, he shall inform such director or member accordingly.

(6) The Registrar of Companies and Close Corporations shall, on the expiration of one month after the date of his decision under subsection (5) or, if an application under subsection (7) is then pending, after the application has been disposed of and the Court has not ordered otherwise, enter the name of the director or member in the register.

(7) Any person aggrieved by the decision of the Registrar of Companies and Close Corporations to make an entry or not to make an entry in the register, shall be entitled, within one month of the date of such decision, to apply to the Court for relief, and the Court shall have power to consider the merits of the matter, to receive further evidence and to make any order it deems fit.

(8) Any liquidator who fails to comply with the provisions of subsection (2), shall be guilty of an offence.

(9) The provisions of section 9 of the Companies Act 61 of 1973, as to the inspection of documents kept by the Registrar of Companies and Close Corporations and extracts therefrom certified by the Registrar of Companies and Close Corporations shall **mutatis mutandis** apply to the register to be maintained by him under this section. [Section 421 of the Companies Act]

**111. Change of address by directors and secretaries and certain former directors and secretaries.** (1) Any person who is a director or secretary of a company debtor which is being liquidated and who, after the liquidation of such company debtor has commenced but before the liquidator's final account has in terms of section 95 been confirmed, changes his residential or



postal address, shall notify the liquidator by registered post of his new residential or postal address within fourteen days after such change, or, if the liquidator has not been appointed on the date of such change, within fourteen days after the appointment of the liquidator.

(2) Any person who fails to comply with any requirement of subsection (1) shall be guilty of an offence.

(3) Whenever at the trial of any person charged with an offence referred to in sub-section (2) it is proved that such person is a director or secretary of a company debtor which is being liquidated and that he has changed his residential or postal address after the liquidation of that company has commenced and that the liquidator has no written record of such change, it shall be presumed, unless the contrary is proved, that he did not notify the liquidator of such change. [Section 363A of the Companies Act]

(4) The provisions of subsections (1), (2) and (3) shall apply **mutatis mutandis** to members of a close corporation registered in terms of the Close Corporations Act 69 of 1984. [New provision in respect of close corporations]

**112. Delinquent directors and others to restore property and to compensate the company.**

(1) Where in the course of the liquidation or judicial management of a company debtor incorporated in terms of the Companies Act 61 of 1973, it appears that any person who has taken part in the formation or promotion of the company, or any past or present director or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the company or has been guilty of any breach of faith or trust in relation to the company the court may, on the application of the Master or of the liquidator or of any creditor or member or contributory of the company, enquire into the conduct of the promoter, director or officer concerned and may order him to repay or restore the money or property or any part thereof, with interest at such rate as the court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retention, breach of faith or trust as the court thinks just.

(2) This section shall apply notwithstanding that the offence is one for which the offender may be criminally responsible. [Section 423 of the Companies Act]

**113. Private prosecution of directors and others.** (1) If it appears in the course of the liquidation of a trust debtor, company debtor, close corporation debtor or association debtor that any past or present trustee, director, member or officer of the debtor has been guilty of an offence for which he is criminally liable under this Act or, in relation to the debtor or the creditors of the debtor, under the common law, the liquidator shall cause all the facts known to him which appear to constitute the offence, to be laid before the Attorney-General concerned and, if the said Attorney-General certifies that he declines to prosecute, the liquidator may, subject to the provisions of section 45, institute and conduct a private prosecution in respect of such offence.

(2) The court may, upon application by the liquidator, order the whole or any portion of the costs and expenses incidental to such private prosecution to be paid out of the assets of the debtor in priority to all other liabilities. [Section 426 of the Companies Act]

**CHAPTER 21 - PERSONAL LIABILITY FOR FRAUDULENT TRADING,  
INSOLVENT TRADING AND BY MEMBERS OF CLOSE CORPORATIONS**

**114. Liability for fraudulent or reckless conduct of business.** (1) When a debtor is liquidated in terms of the provisions of this Act, or is placed under judicial management in terms of Chapter 24 of this Act, and it appears that any business of the debtor was or is being carried on recklessly or with intent to defraud creditors of the debtor or creditors of any other person or for any fraudulent purpose, the court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the debtor, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the debtor as the court may direct. [Section 424(1) of the Companies Act]

(2) The provisions of this section shall have effect notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is made. [Section 424(4) of the Companies Act]

**115. Insolvent trading.** (1) If a debtor is liquidated in terms of the provisions of this Act, or is placed under judicial management in terms of the provisions of Chapter 24 of this Act, the court may, upon application, declare that any person responsible for the management of the debtor who caused or allowed the debtor to incur a debt at a time when he or she knew or had

reasonable grounds to suspect that the debtor would not be able to pay such debt as well as its other debts as they fell due, shall be liable to pay such amount as awarded under this section.

(a) For the purposes of this section the facts which a person referred to in subsection (1) ought to know or ascertain, the conclusions which he or she ought to reach and the steps which he or she ought to take are those which would be known or ascertained or reached or taken by a reasonable diligent person having both-

(i) the general knowledge, skill and experience that may reasonably be expected of a person carrying out similar functions as are entrusted to and carried out by that person in relation to the debtor; and

(ii) the general knowledge, skill and experience that such person has.

(b) Proof that-

(i) the liabilities (including prospective and contingent liabilities) of the debtor exceeded its assets, fairly valued, when the debt was incurred; or

(ii) that the particular person committed an offence in respect of the accounting records of the debtor in respect of the period during which the debt was incurred; or

(iii) that the particular person failed to take all reasonable steps to ensure that the accounting records in respect of the period during which the debt was incurred are surrendered or transferred to the liquidator,

shall be prima facie evidence that the particular person, at the time the debt was incurred, had reasonable grounds to believe that the debtor would not be able to pay its debts as they fell due.

(2) Without prejudice to the defences which may be raised against an application under this section, a person, if he or she establishes one or more of the following defences, will not be held liable in terms of subsection (1) where, at the time the debt was incurred-

(a) he or she had no knowledge of the transaction and could not reasonably be expected to have had knowledge of such a transaction; or

- (b) he or she believed that the debtor would be able to repay the debt because a competent and reliable person was responsible for monitoring the solvency of the debtor and for reporting to him or her and was fulfilling that responsibility satisfactorily; or
- (c) he or she did not take part in the management of the debtor on account of illness or for some other good reason; or
- (d) he or she took all reasonable steps to prevent the debtor from incurring such debt; or
- (e) he or she took all reasonable steps to ensure that the creditor is informed that the debtor had reasonable grounds to believe that it would not be able to repay that debt when it fell due.

(3) The court shall determine the amount payable with reference to the loss that was or will be suffered by the creditors on account of the insolvent trading and-

- (a) the amount so determined will be payable to the applicant or applicants for distribution among the creditors represented in the application, or for distribution in such a way as the court may be requested to order, and the court may make any such order as it deems just and equitable in the circumstances;
- (b) in determining the amount and its fair distribution among the creditors, the court shall have regard to the extent to which a particular creditor negligently or intentionally contributed to his or own loss.

(4) The provisions of this section shall apply notwithstanding that the person or persons concerned may be criminally liable in respect of the matters on which the declaration by the court is based. [New provision]

**Repayments by members of close corporations.** (1) Where a close corporation debtor is being liquidated in terms of this Act, any payment made to a member by reason only of his membership within a period of two years before the commencement of the liquidation of the corporation, shall be repaid to the corporation by the member, unless such member can prove that

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**Annexure E**

**Draft Insolvency and Business Recovery Bill**

- (a) after such payment was made, the corporation's assets, fairly valued, exceeded all its liabilities; and
- (b) such payment was made while the corporation was able to pay its debts as they became due in the ordinary course of its business; and
- (c) such payment, in the particular circumstances, did not in fact render the corporation unable to pay its debts as they became due in the ordinary course of business.

(2) A person who has ceased to be a member of the corporation concerned within the said period of two years, shall also be liable for any repayment provided for in subsection (1) if, and to the extent that, repayments by present members, together with all other available assets, are insufficient for paying all the debts of the corporation.

(3) A certificate given by the Master as to the amount payable by any member or former member in terms of subsection (1) or (2) to the corporation, may be forwarded by the liquidator to the clerk of the magistrate's court in whose area of jurisdiction the registered office of the corporation is situated, who shall record it, and thereupon such notice shall have the effect of a civil judgment of that magistrate's court against the member or former member concerned.

(4) The court in question may, on application by a member or former member referred to in subsection (2), make any order that it deems fit in regard to any certificate referred to in subsection (3). [Section 70 of the Close Corporations Act]

**117. Repayment of salary or remuneration by members of a close corporation debtor.**

(1) If a close corporation debtor is being liquidated in terms of this Act, and-

- (a) any direct or indirect payment of a salary or other remuneration was made by the corporation within a period of two years before the commencement of its liquidation to a member in his capacity as an officer or employee of the corporation; and
- (b) such payment was, in the opinion of the Master, not **bona fide** or reasonable in the circumstances,

the Master shall direct that such payment, or such part thereof as he may determine, may be repaid by such member to the corporation.

(2) A person who has within a period of two years referred to in subsection (1)(a) ceased to be a member of a corporation referred to in that subsection may, under the circumstances referred to therein, be directed by the Master to make a repayment provided for in subsection (1), if, and to the extent that, any such repayments by present members are, together with all other available assets, insufficient for paying all the debts of the corporation.

(3) The provisions of subsections (3) and (4) of section 116 shall **mutatis mutandis** apply in respect of any repayment to a corporation in terms of subsection (1) or (2). [Section 71 of the Close Corporations Act]

## **CHAPTER 22 - COMPOSITIONS**

**118. Pre-liquidation composition with creditors.** (1) Any natural person debtor, partnership debtor, trust debtor, close corporation debtor or association debtor who cannot pay his or her debts and who wants to offer his or her creditors a composition, may lodge a signed copy of the composition and a complete sworn statement in the form prescribed in the Annexure with the magistrate's court in the district where he or she normally resides, or carries on business, (hereafter referred to as "the court"). If the composition provides for the immediate payment of a cash amount for distribution among creditors, the amount shall, pending the outcome of the offer of composition, be invested in an interest-bearing savings account in trust with an attorney or someone else whom the court approves. The debtor shall offer proof that the cash amount has been invested in this manner.

(2) If a debtor incurs debt during the period from lodging the composition with the magistrate until creditors have voted on the composition, he or she shall notify the creditor who offers him or her credit of the pending composition and at the first appearance before a magistrate in connection with the composition, he or she shall provide full particulars concerning any such debt incurred by him or her. During the said period or after a composition has been accepted, a debtor or the management of such debtor shall not alienate, encumber or voluntarily dispose of any property which shall be made available to creditors in terms of the composition or do anything which can impede compliance with the composition. A debtor or management of such debtor who contravenes these provisions shall be guilty of an offence and upon conviction be liable to a fine not exceeding one thousand rand or to imprisonment not exceeding six months or to both such fine and such imprisonment.

(3) On receipt of the composition and statement, the court determines a date for the questioning of the debtor or the management of such debtor and the consideration of the composition by the creditors of the debtor (hereafter referred to as the “hearing”), if it appears to the court that no such date has been determined during the preceding six months. The date determined shall give the debtor sufficient time to notify creditors of the hearing, as prescribed in subsection (4).

(4) The debtor shall at least 14 days before the date determined for the hearing send by mail, telefax, electronic mail, or personal delivery to each of his or her creditors a copy of the composition and of the statement and a notice with the case number and the place and date of the hearing. The debtor shall before the date of the hearing offer proof to the court that he or she gave notice in the prescribed manner.

(5) At the hearing -

- (a) a creditor may, whether he or she has received notice or not, prove the debt and object to a debt listed in the statement by the debtor;
- (b) every debt listed by the debtor in the said statement shall, subject to any amendments to it by the court, be deemed to be proved, unless a creditor objects to it or the court rejects it or requires that it be corroborated by evidence;
- (c) a creditor whose debt is being objected to by the debtor or another creditor or who is required by the court to corroborate his debt with evidence, shall prove his debt;
- (d) a court may defer the proving of a debt and the consideration of the composition, or allow the other creditors to vote on the composition, and if a composition is accepted, the debt is added to the listed debts at a later stage when it is proved;
- (e) the debtor may be questioned by the court and by any creditor whose debt has been acknowledged or proved, or by any other interested party with the permission of the court, about -
  - (i) his or her assets and liabilities;
  - (ii) his or her present and future income and that of his or her spouse living in with him or her;

- (iii) his or her standard of living and the possibility of living more frugally; and
- (iv) any other matter which the court considers to be relevant.

(6) If it appears to the court at the hearing that a debt, other than a debt which is based upon or derives from a judgment debt, is disputed between the debtor and the creditor or between the creditor and another creditor of the debtor, the court may, after it has investigated the objection, admit or disallow the debt or part thereof.

(7) Any person whose debt has been disallowed in terms of subsection (6) may institute an action or continue with an action which has already been instituted in respect of such debt.

(8) If a person contemplated in subsection (7) obtains judgment in respect of a debt contemplated in that subsection, the amount of the judgment is added to the list of proved debts referred to in subsection (5).

(9) A creditor may by written power of attorney authorise any person to appear at a hearing on his or her behalf and to do everything at such hearing which the creditor would have been entitled to do.

(10) The hearing may be deferred by the court and the proposed composition may be amended or revoked with the permission of the debtor.

(11) A composition is not accepted if a creditor demonstrates to the satisfaction of the magistrate that it accords a benefit to one creditor over another creditor to which he or she would not have been entitled on liquidation of the debtor's estate. If the composition is accepted by the majority in number and ~~2/3~~ two-thirds in value of the concurrent creditors who vote on the composition, the court shall certify that the composition is accepted as such and thereafter the composition is binding on all creditors who have been informed of the hearing or appeared at the hearing, but the right of a secured or otherwise preferent creditor shall not be prejudiced by the composition, unless he or she consents to the composition in writing.



- (12) (a) If the composition provides for payments by the debtor in determined instalments or otherwise, the acceptance of the composition has the effect of a judgment in terms of section 65 of the Magistrates' Courts Act 32 of 1944 in respect of the payments. Any person who in terms of the composition shall receive the payments on behalf of creditors, or if there is no such person, any creditor who is in terms of the composition entitled to a benefit out of the payments, shall have the rights which a judgment creditor would have in terms of the section.
- (b) If any person is appointed in terms of the composition to execute the composition, he or she shall be entitled to the remuneration which is payable in terms of the composition.
- (13) (a) The court may at any time on application of the debtor or an interested person direct the debtor to appear for such further questioning as the court may deem necessary, after notice to creditors of at least 14 days by mail, telefax, electronic mail, or personal delivery by the debtor or the interested person, as the case may be. The court may -
- (i) revoke the composition for cogent reasons; and
  - (ii) authorise a debtor who on reasonable grounds is not able to comply with his or her obligations in terms of the composition to submit an amended composition to creditors in the manner and with the consequences contemplated in subsection (1).
- (b) Without limiting the phrase "cogent reason" in subsection 13(a)(i), it shall include the following:
- (i) If the debtor does not comply with his or her obligations in terms of the composition; or
  - (ii) If the debtor renders false information in his or her statement or in the course of the questioning; or
  - (iii) If the debtor gives a benefit in respect of a claim which falls under the composition to a creditor on whom the composition is binding and who is not entitled to the benefit in terms of the composition.

(14) Any creditor who is entitled to a benefit in terms of the composition can, notwithstanding the provisions of subsection (13), after 14 days notice to the debtor apply to the court to revoke the composition if the debtor does not comply with his or her obligations in terms of the composition. The creditor must submit an affidavit in support of his or her application. The court shall order that the composition be revoked if the debtor did not substantially comply with his or her obligations.

(15) If the composition is revoked, or if the estate of a debtor has been liquidated in terms of ~~the Insolvency Act ... of 19...~~ this Act before he or she complied with his or her obligations in terms of the composition, the claim of a creditor is restored to the extent that the claim has not been satisfied in terms of the composition.

(16) If a composition is not accepted by the required majority, and the court is of the opinion that the debtor is unable to make available to creditors substantially more than that which he or she offered in the proposed composition, the court shall either:

(a)- declare that the proceedings in terms of this section have ceased and that the debtor is once again in the position he or she was prior to the commencement thereof; or

(b)- determine whether or not the provisions of section 74 of the Magistrates Court Act 32 of 1944 can be applied to the debtor in question and, if so, apply the provisions accordingly and within the discretion of the presiding officer. inquire from the debtor whether he or she prefers that his or her assets be administered and divided in terms of the Insolvency Act this Act and his or her debts be acquitted in terms of the said Act as though his or her estate were liquidated on the date on which his or her choice was exercised, but without being regarded as insolvent or his or her estate as being liquidated when any other Act is applied. If the debtor affirms, the court shall forward to the Master of the High Court a certificate stating that the debtor exercised the choice and the statement submitted by the debtor. The debtor shall not be required to submit a statement of affairs. The court shall forward the certificate to the Registrar of Deeds who shall enter a **caveat** as if a liquidation order had been issued on the date when the debtor exercised his or her choice. The court may instruct the sheriff to attach assets and books in terms of the Insolvency Act this Act. If any creditor who declares his or her particulars of claim accepts liability for the cost of

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~~administration as if his or her claim has been proved, the Master shall, after receipt of the certificate, appoint a liquidator who shall hold such office until a liquidator is elected at a first meeting. The Master shall convene a meeting for the election of a liquidator and proof of claims and if no claims are proved at the meeting and a liquidator has not yet been appointed, the Master shall consider the estate to be concluded until a creditor accepts liability for the costs as if he or she has proved a claim. In all matters not provided for in this subsection the debtor or his or her estate or matters related to the debtor or his or her estate shall be dealt with as if the estate of the debtor was liquidated on the date when the debtor exercised his or her choice.~~

(17) Between the determination of a date for a hearing and the conclusion of the hearing no creditor with a claim the cause of which arose before the determination of the date, shall without the permission of the court institute any action against the debtor or apply for the liquidation of the estate of the debtor.

**119. Post-liquidation Composition.** - (1) ~~An insolvent~~ A debtor may at any time after the issuing of the first liquidation order but after he or she has submitted his or her statement of affairs as required by section ~~34~~ 39, submit to the liquidator of his or her estate a written offer of composition. [119(1)]

(2) If the liquidator is of the opinion that there is a likelihood that the creditors of the estate will accept the offer of composition, he or she shall as soon as possible after the receipt of the offer send a copy thereof together with his or her report thereon and notice of the time and the place of the meeting at which the composition will be considered by personal notice to every creditor whose name and address are known to the liquidator or which he or she can reasonably obtain. If a special meeting is convened to consider a composition the notice in the **Gazette** shall be published not less than 14 days and not more than 21 days before the date fixed for the meeting. [119(2), (5) and (6)]

(3) If the liquidator is of the opinion that there is no likelihood that creditors will accept the offer of composition, he or she shall inform the ~~insolvent~~ debtor that the offer is unacceptable and that he or she does not propose to send a copy thereof to the creditors. The ~~insolvent~~ debtor may thereupon require the Master to review the liquidator's decision and the Master may, after

having considered the offer and the liquidator's report thereon, direct the liquidator to submit the offer to the creditors of the estate in the manner provided in subsection (2). [119(3) and (4)]

(4) If the offer is accepted by a majority in number and two-thirds in value of the concurrent creditors who have voted on the offer and payment under the composition has been made or security for such payment has been given as specified in the composition, the insolvent debtor shall, subject to subsection (5), (6) and (7), be entitled to a certificate under the hand of the Master of the acceptance of the offer. [119(7)]

(5) An offer of composition which contains any condition under which any creditor would obtain as against another creditor any benefit to which he or she would not have been entitled upon the distribution of the estate in the ordinary manner, shall be invalid. [119(7)]

(6) Subject to subsection (5), a condition providing for the discharge of a provisional liquidation order or the setting aside of a final liquidation order upon the acceptance of an offer of composition shall not be invalid. [New provision]

(7) If the composition provides for the giving of security, the nature of the security shall be fully specified and if it consists of a surety bond or guarantee, every surety shall be named. [119(7)]

(8) The liquidator shall, despite the absence of a resolution of creditors authorising him or her to do so, be competent to approach the court for the cancellation of a composition, the setting aside of an order providing for the discharge of a first liquidation order or an order setting aside a final liquidation order, or for other relief if the insolvent debtor or any other person has failed to give effect to the terms of the composition or to comply with the provisions of this section, or if the offer of composition supplied incorrect information which might reasonably have resulted in the requisite majority of creditors voting in favour of the composition. [New provision]

(9) An offer of composition which has been accepted as aforesaid shall be binding upon the insolvent debtor and upon all creditors of the insolvent estate in so far as their claims are not

secured or preferent but the right of any secured or preferent creditor shall not be prejudiced thereby, except in so far as he or she has expressly and in writing waived his or her preference. [120(1)]

(10) If the composition is subject to the condition that any property in the insolvent estate shall be restored to the insolvent debtor, the acceptance of the composition shall divest the liquidator of such property and vest such property in the insolvent debtor as from the date on which such property is in pursuance of the composition to be restored to the insolvent debtor, but subject to any condition provided for in the composition. [120(2)]

(11) A composition shall not affect the liability of a surety for the insolvent debtor or any liability regarding transactions that are invalid or liable to be set aside. [120(3)]

(12) When the estate of a partnership and the estate of a partner in that partnership are simultaneously under liquidation, the acceptance of an offer of composition by the separate creditors of the partner shall not take effect until the expiration of a period of six weeks as from the date of a notice in writing of that acceptance given by the liquidator of the partner's separate estate to the liquidator of the partnership estate, or if the liquidator of the partner's estate is also the liquidator of the partnership estate, as from the date of the acceptance of the composition. The said notice shall be accompanied by a copy of the deed embodying the composition. [121(1)]

(13) At any time during the period of six weeks referred to in subsection (12) the liquidator of the partnership estate may take over the assets of the estate of the insolvent partner if he or she fulfils the obligations of the insolvent partner in terms of the composition, other than obligations to render any service or obligations which only the insolvent partner can fulfil: Provided that if the composition provides for the giving of any specific security, the Master shall determine what other security the liquidator of the partnership estate may give in lieu thereof. [121(2)]

(14) Any moneys to be paid and anything to be done for the benefit of creditors in pursuance of a composition shall be paid and shall be done, as far as practicable, through the liquidator: Provided that any creditor who has failed to prove his or her claim before the liquidator has made a final distribution among those creditors who have proved their claims, shall be entitled

to recover direct from the insolvent debtor within six months from the confirmation by the Master of the account under which the distribution was made, any payments to which he or she may be entitled under the composition and the liquidator shall have no duty in regard thereto, and after the said distribution the creditor shall have no claim against the insolvent estate. [123(1)]

(15) When a composition has been entered into between an insolvent debtor and the creditors of his or her estate and the liquidation order has not been discharged or set aside, the liquidator of that estate shall frame a liquidation account and distribution account of the assets which are or will become available for distribution among the creditors under the composition, and all the provisions of this Act which relate to a liquidation account and distribution account of assets among creditors shall apply in connection with the liquidation account and distribution account, and the assets. [123(2)]

## CHAPTER 23 - COMPROMISES

**120. Compromise between a company and its creditors.** - (1) Where any compromise is proposed between a debtor, as defined in subsection (8), and its creditors or any class of them, the court may, on the application of the debtor or any creditor or member of the debtor or, in the case of a debtor being liquidated, of the liquidator, or if the debtor is subject to a judicial management, of the judicial manager, order a meeting of the creditors or class of creditors, to be summoned in such manner as the court may direct.

(2) If the compromise is agreed to by a majority in number representing three-fourths in value of the creditors or class of creditors present and voting either in person or by proxy at the meeting, such compromise shall, if sanctioned by the court, be binding on all the creditors or the class of creditors, and also on the debtor or on the liquidator if the debtor is being liquidated or on the judicial manager if the debtor is subject to a judicial management order.

(3) No such compromise shall effect the liability of any person who is a surety for the debtor.

(4) If the compromise is in respect of a debtor being liquidated and provides for the discharge of the liquidation order or for the dissolution, where applicable, of the debtor without

liquidation, the liquidator of the debtor shall lodge with the Master a report in terms of section 42 and a report as to whether or not any person who forms part of the management of the debtor is or appears to be personally liable for damages or compensation to the debtor or for any debts or liabilities of the debtor under any provision of this Act, and the Master shall report thereon to the Court.

(5) The Court, in determining whether the compromise should be sanctioned or not, shall have regard to the number of creditors or creditors of a class present or represented at the meeting referred to in subsection (2) voting in favour of the compromise and to the report of the Master referred to in subsection (4).

(6) (a) An order by the Court sanctioning a compromise shall have no effect until a certified copy thereof has been lodged with the Registrar under cover of the prescribed form and registered by him.

(b) A copy of such order of court shall be annexed to every copy of the memorandum or similar document, if applicable, of the debtor issued after the date of the order.

(7) If a debtor fails to comply with the provisions of subsection (6)(b), the debtor and every person who forms part of the management of such debtor who is a party to the failure, shall be guilty of an offence.

(8) For the purposes of this section, a “debtor” means an association of persons that has been accorded legal personality in terms of the common law or in terms of a statutory provision.

[Section 311 of the Companies Act]

**120A. Information as to compromises.** (1) Where a meeting of creditors or any class of creditors or of members or any class of members is summoned under section 120 for the purpose of agreeing to a compromise, there shall -

(a) with every notice summoning the meeting which is sent to a creditor or member, be sent also a statement -

(i) explaining the effect of and alternatives to the compromise; and

(ii) in particular stating any material interests of the management of the debtor, whether as directors or as members or as creditors of the debtor or otherwise, and the effect thereon of the compromise, in so far as it is different from the effect on the like interests of other persons; and

(b) in every notice summoning the meeting which is given by advertisement, be included either such a statement as aforesaid or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement.

(2) Where the compromise affects the rights of debenture-holders of a company, the said statement shall give the like explanation and statement as respects the trustee of any deed for securing the issue of the debentures as it is required to give as respects the company's directors.

(3) Where a notice given by advertisement includes a notification that copies of the said statement can be obtained by creditors or members entitled to attend the meeting, every such creditor or member shall, on making application in the manner indicated by the notice, be furnished by the debtor free of charge with a copy of the statement.

(4) Where a debtor makes default in complying with any requirement of this section, the debtor and every person who is part of the management of the debtor who is a party to the default, shall be guilty of an offence, and for the purpose of this subsection any liquidator of the debtor and any trustee of a deed for securing the issue of debentures of a company shall be deemed to be an officer of the debtor: Provided that a person shall not be liable under this subsection if he shows that the default was due to the refusal of any other person, being a director or trustee for debenture-holders, to supply the necessary particulars as to his interests and that fact has been stated in the statement.

(5) It shall be the duty of every person who forms part of the management of a debtor and of every trustee for debenture-holders, where applicable, to give notice to the debtor of such matters relating to himself as may be necessary for the purposes of this section, and if he makes default in complying with such duty, he shall be guilty of an offence. [Section 312 of the Companies Act]



**120B. Provisions facilitating reconstruction or amalgamation.** (1) If an application is made to the Court under this section for the sanctioning of a compromise proposed between a company and any such persons as are referred to in this section, and it is shown to the Court that the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as the “transferor company”) is to be transferred to another company (in this section referred to as the “transferee company”) the Court may, either by the order sanctioning the compromise or by any subsequent order, make provision for all or any of the following matters:

- (a) The transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;
- (b) the allotment or appropriation by the transferee company of any shares, debentures or other like interests in that company which under the compromise are to be allotted or appropriated by that company to or for any person;
- (c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;
- (d) the dissolution, without liquidation, of any transferor company;
- (e) the provision to be made for any persons who, within such time and in such manner as the Court may direct, dissent from the compromise;
- (f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out;

Provided that no order for the dissolution, without liquidation, of any transferor company shall be made under this subsection prior to the transfer in due form of all the property and liabilities of the said company.

(2) Where an order under this section provides for the transfer of property or liabilities, that property shall by virtue of the order vest in, subject to transfer in due form, and those liabilities shall become the liabilities of, the transferee company.

(3) If an order is made under this section, every company in relation to which the order is made shall, within thirty days after the making of the order, cause a copy thereof to be lodged

with the Registrar, under cover of the prescribed form, for registration, and if default is made in complying with this subsection, the company shall be guilty of an offence.

(4) In this section the expression “property” includes property, rights and powers of every description, and the expression “liabilities” includes duties.

(5) Notwithstanding the provisions of subsection (8) the expression “company” in this section does not include any company other than a company within the meaning of the Companies Act 61 of 1973.

[Section 313 of the Companies Act]

## **CHAPTER 24 - JUDICIAL MANAGEMENT**

**121. Circumstances in which certain debtors may be placed under judicial management.** - (1) When a company debtor, close corporation debtor, trust debtor or association debtor by reason of mismanagement or for any other cause-

(a) is unable to pay its debts or is probably unable to meet its obligations; and

(b) has not become or is prevented from becoming a successful concern, and there is a reasonable possibility that, if it is placed under judicial management, it will be enabled to pay its debts or to meet its obligations and become a successful concern, the Court may, if it appears just and equitable, grant a judicial management order in respect of that debtor.

(2) An application to Court for a judicial management order in respect of any debtor may be made by any of the persons who are entitled under section 3 and 4 to make an application to Court for the liquidation of a debtor, and the provisions of section 3 and 4 as to the application for liquidation shall **mutatis mutandis** apply to an application for a judicial management order.

(3) When an application for the liquidation of a debtor is made to court under this Act and it appears to the court that if the debtor is placed under judicial management the grounds for its liquidation may be removed and that it will become a successful concern and that the granting of a judicial management order would be just and equitable, the Court may grant such an order in respect of that debtor.

**122. Provisional judicial management order.** - (1) The court may on an application under section 121 (2) or (3) grant a provisional judicial management order, stating the return day, or dismiss the application or make any other order that it deems just.

(2) A provisional judicial management order shall contain-

(a) directions that the debtor named therein shall be under the management, subject to the supervision of the court, of a provisional judicial manager appointed as hereinafter provided, and that any other person vested with the management of the debtor's affairs shall from the date of the making of the order be divested thereof; and

(b) such other directions as to the management of the debtor, or any matter incidental thereto, including directions conferring upon the provisional judicial manager the power, subject to the rights of the creditors of the debtor, to raise money in any way without the authority of shareholders as the court may consider necessary,

and may contain directions that while the debtor is under judicial management, all actions, proceedings, the execution of all writs, summonses and other processes against the debtor be stayed and be not proceeded with without the leave of the court.

(3) The court which has granted a provisional judicial management order, may at any time and in any manner, on the application of the applicant, a creditor or member, the provisional judicial manager or the Master, vary the terms of such order or discharge it.

**123. Custody of property and appointment of provisional judicial manager on the granting of judicial management order.** - Upon the granting of a provisional judicial management order-

(a) all the property of the debtor concerned shall be deemed to be in the custody of the Master until a provisional judicial manager has been appointed and has assumed office;

(b) the Master shall without delay-

(i) appoint a provisional judicial manager (who shall not be the auditor of the debtor or any person disqualified under this Act from being appointed as liquidator in a liquidation) who shall give security for

the proper performance of his duties in his capacity as such, as the Master may direct, and who shall hold office until discharged by the court as provided in section 135;

- (ii) convene separate meetings of the creditors, the members and debenture-holders (if any) of the debtor for the purposes referred to in section 125.

**124. Duties of provisional judicial manager upon appointment.** - A provisional judicial manager shall-

- (a) assume the management of the debtor and recover and reduce into possession all the assets of the debtor;

- (b) within seven days after his appointment lodge with the Registrar concerned, under cover of the prescribed form, a copy of his letter of appointment as provisional judicial manager; and

- (c) prepare and lay before the meetings convened under section 137(b) a report containing-

- (i) an account of the general state of the affairs of the debtor;

- (ii) a statement of the reasons why the debtor is unable to pay its debts or is probably unable to meet its obligations or has not become or is prevented from becoming a successful concern;

- (iii) a statement of the assets and liabilities of the debtor;

- (iv) a complete list of creditors of the debtor (including contingent and prospective creditors) and of the amount and the nature of the claim of each creditor;

- (v) particulars as to the source or sources from which money has been or is to be raised for purposes of carrying on the business of the debtor; and

- (vi) the considered opinion of the provisional judicial manager as to the prospects of the debtor becoming a successful concern and of the removal of the facts or circumstances which prevent the debtor from becoming a successful concern.

**125. Purpose of meetings convened under section 137(b)(ii).** - (1) Any meeting convened under section 123(b)(ii) shall be presided over by the Master or a magistrate having jurisdiction in the area where the meeting is held and shall be convened and held in the manner prescribed by section 46 in respect of a meeting in the liquidation of a debtor in terms of this Act.

(2) The purpose of any such meeting shall be-

(a) to consider the report of the provisional judicial manager under section 124(c) and the desirability or otherwise of placing the debtor finally under judicial management, taking into account the prospects of the debtor becoming a successful concern;

(b) to nominate the person or persons (not being disqualified under section 69) whose names shall be submitted to the Master for appointment as final judicial manager or managers;

(c) in the case of any such meeting of creditors, the proving of claims against the debtor; and

(d) to consider the passing of a resolution referred to in section 130.

(3) The chairman of any such meeting shall prepare and lay before the Court a report of the proceedings of such meeting, including a summary of the reasons for any conclusion arrived at under subsection (2) (a).

(4) The provisions of this Act relating to the proof of claims against a debtor which is being liquidated and to the nomination and appointment of a liquidator of any such debtor shall **mutatis mutandis** apply with reference to the proof of claims against a debtor which has been placed under judicial management and the nomination and appointment of a judicial manager of such a debtor.

**126. Return day of provisional order of judicial management and powers of the court.** - (1) Any return day fixed under section 122 shall not be later than sixty days after the date of the provisional judicial management order but may be extended by the court on good cause shown.

(2) On such return day the court may after consideration of-

- (a) the opinion and wishes of creditors and members of the debtor;
- (b) the report of the provisional judicial manager under section 124;
- (c) the number of creditors who did not prove claims at the first meeting of creditors and the amounts and nature of their claims;
- (d) the report of the Master; and
- (e) the report of the Registrar,

grant a final management order if it appears to the court that the debtor will, if placed under judicial management, be enabled to become a successful concern and that it is just and equitable that it be placed under judicial management, or may discharge the provisional order or make any other order it may deem just.

(3) A final judicial management order shall contain-

- (a) directions for the vesting of the management of the debtor, subject to the supervision of the court, in the final judicial manager, the handing over of all matters and the accounting by the provisional judicial manager to the final judicial manager and the discharge of the provisional judicial manager, where necessary;
- (b) such other directions as to the management of the debtor, or any matter incidental thereto, including directions conferring upon the final judicial manager the power, subject to the rights of the creditors of the debtor, to raise money in any way without the authority of shareholders or members, as the court may consider necessary.

(4) The court which has granted a final judicial management order, may at any time and in any manner vary the terms of such order on the application of the Master, the final judicial manager or a representative acting on behalf of the general body of creditors of the debtor concerned by virtue of a resolution passed by a majority in value and number of such creditors at a meeting of those creditors.

**127. Duties of final judicial manager.** - A judicial manager shall, subject to the provisions of the memorandum and articles of the company, or founding statement of the corporation, or partnership agreement of the partnership, or trust instrument of the trust concerned in so far as they are not inconsistent with any direction contained in the relevant judicial management order-

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- 
- (a) take over from the provisional judicial manager and assume the management of the debtor;
- (b) conduct such management, subject to the orders of the court, in such manner as he may deem most economic and most promotive of the interests of the members and creditors of the debtor;
- (c) comply with any direction of the court made in the final judicial management order or any variation thereof;
- (d) lodge with the Registrar-
- (i) a copy of the judicial management order and of the Master's letter of appointment under cover of the prescribed form;
- (ii) in the event of the judicial management order being cancelled, a copy of the order cancelling it, within seven days of his appointment or of the cancellation of such judicial management order, as the case may be;
- (e) keep such accounting records and prepare such annual financial statements, interim reports and provisional annual financial statements as the debtor or its directors, members or other officers would have been obliged to keep or prepare if it had not been placed under judicial management;
- (f) convene the annual general meeting and other meetings of members of the debtor provided for by the Companies Act, Close Corporations Act, partnership agreement or trust instrument and in that regard comply with all the requirements with which the directors, members, partners or trustees of the debtor would in terms of such authority have been obliged to comply if the debtor had not been placed under judicial management;
- (g) convene meetings of the creditors of the debtor by notices issued separately on the dates on which the notices convening annual general meetings of the debtor are issued or on which any interim report is sent out to members and in the case of a private company not later than six months after the end of its financial year, and submit to such meetings reports showing the assets and liabilities of the debtor, its debts and obligations as verified by the auditor or accounting officer of the debtor, and all such information as may

be necessary to enable the creditors to become fully acquainted with the debtor's position as at the date of the end of the financial year or the end of the period covered by any such interim report or, in the case of a private company, as at a date six months after the end of its financial year;

(h) lodge with the Master copies of all the documents submitted to the meetings as provided in paragraphs (f) and (g);

(i) examine the affairs and transactions of the debtor before the commencement of the judicial management in order to ascertain whether any director, member, past director, past member officer or past officer of the debtor has contravened or appears to have contravened any provision of any Act or has committed any other offence, and within six months as from the date of his appointment submit to the Master such reports as are in terms of section 42 required to be submitted to the Master by a liquidator, and in relation to which the provisions of that section shall apply;

(j) examine the affairs and transactions of the debtor before the commencement of the judicial management in order to ascertain whether any director, member, past director, past member, officer or past officer of the debtor is or appears to be personally liable for damages or compensation to the debtor or for any debts or liabilities of the debtor, and within six months from the date of his appointment prepare and submit to the Master and to the next succeeding meeting of members and of creditors of the debtor, a report containing full particulars of any such liability; and

(k) if at any time he is of opinion that the continuation of the judicial management will not enable the debtor to become a successful concern, apply to the Court, after not less than fourteen days' notice by registered post to all members and creditors of the debtor, for the cancellation of the relevant judicial management order and the issue of an order for the liquidation of the debtor.

**128. Application of assets during judicial management.** - (1) A judicial manager shall not without the leave of the court sell or otherwise dispose of any of the debtor's assets save in the ordinary course of the debtor's business.



(2) Any moneys of the debtor becoming available to the judicial manager shall be applied by him in paying the costs of the judicial management and in the conduct of the debtor's business in accordance with the judicial management order and so far as the circumstances permit in the payment of the claims of creditors which arose before the date of the order.

(3) The costs of the judicial management and the claims of creditors of the debtor shall be paid **mutatis mutandis** in accordance with the law relating to a liquidation in terms of Chapter II of the Companies Act 61 of 1973.

**129. Remuneration of provisional judicial manager or judicial manager.** - (1) The provisional judicial manager or the judicial manager shall be entitled to such remuneration for his services as may be fixed by the Master from time to time.

(2) In fixing the remuneration the Master shall take into account the manner in which the provisional judicial manager or the judicial manager has performed his functions and any recommendation by the members or creditors of the debtor relating to such remuneration.

(3) The provisions of section 44 of this Act shall apply with reference to any fixing of remuneration by the Master under this section.

**130. Pre-judicial management creditors may consent to preference.** - (1) (a) The creditors of a debtor whose claims arose before the granting of a judicial management order in respect of such debtor may at a meeting convened by the judicial manager or provisional judicial manager for the purpose of this subsection or by the Master in terms of section 123(b)(ii), resolve that all liabilities incurred or to be incurred by the judicial manager or provisional judicial manager in the conduct of the debtor's business shall be paid in preference to all other liabilities not already discharged exclusive of the costs of the judicial management, and thereupon all claims based upon such first-mentioned liabilities shall have preference in the order in which they were incurred over all unsecured claims against the debtor except claims arising out of the costs of the judicial management.

(b) If a judicial management order is superseded by a liquidation order-

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(i) the preference conferred in terms of paragraph (a) shall remain in force except in so far as claims arising out of the costs of the liquidation are concerned; and

(ii) all claims based on such liabilities incurred by the judicial manager shall be taken to have been proved and the provisions of section 61 shall not apply in respect thereof.

(2) (a) A meeting convened by the provisional judicial manager or the judicial manager in terms of subsection (1) shall be convened by him by written notice sent by registered post at least ten days before the date of the meeting, as specified in the notice, to every creditor of the debtor whose name and address is known to him, and also by notice in one or more newspapers circulating in the district where the debtor's main place of business or registered address is situated.

(b) The last-mentioned notice shall comply with the provisions of section 46 of this Act and shall appear at least ten days before the date of the meeting.

(3) The provisional judicial manager or the judicial manager, as the case may be, shall preside over a meeting referred to in subsection (2), and the provisions of sections 46 and 49 shall apply **mutatis mutandis** in respect of the conduct of any such meeting, the right to vote thereat, the manner of voting and the calculation of the value of votes: Provided that for the purposes of voting at any such meeting convened by a provisional judicial manager, the claims of creditors shall be determined to the satisfaction of the provisional judicial manager.

**131. Voidable and undue preferences in judicial management.** - (1) Every disposition of its property which if made by a natural person could for any reason be set aside in terms of section 19, 21 and 22, may, if made by a debtor unable to pay its debts, be set aside by the court at the suit of the judicial manager in the event of the debtor being placed under judicial management, and the provisions of sections 19, 21 and 22 shall **mutatis mutandis** apply in respect of any such disposition.

(2) For the purposes of this section the event which shall be deemed to correspond with a liquidation order under section 19, 21 or 22 shall be the presentation to the court of the application in pursuance of which a judicial management order is granted.

**132. Period of judicial management to be discounted in determining preference under mortgage bond.** - The time during which any debtor being a mortgage debtor in respect of any mortgage bond, is subject to a judicial management order, shall be excluded in the calculation of any period of time for the purpose of determining whether such mortgage bond confers any preference in terms of section 82.

**133. Position of auditor and accounting officer in judicial management.** - Notwithstanding the granting of a judicial management order in respect of any debtor and for so long as the order is in force, the provisions of the Companies Act 61 of 1973, or Close Corporations Act 69 of 1984, relating to the appointment and reappointment of an auditor or accounting officer and the rights and duties of an auditor or accounting officer shall continue to apply as if any reference in the said provisions to the directors or members of the debtor were a reference to the judicial manager.

**134. Application to judicial management of certain provisions of liquidation.** - (1) The provisions relating to questioning in terms of sections 52, 53, 54 and 55 of this Act apply **mutatis mutandis** to judicial management.

**135. Cancellation of judicial management order.** - (1) If at any time on application by the judicial manager or any person having an interest in the debtor it appears to the court which granted a judicial management order that the purpose of such order has been fulfilled or that for any reason it is undesirable that such order should remain in force, the court may cancel such order and thereupon the judicial manager shall be divested of his functions.

(2) In cancelling any such order the Court shall give such directions as may be necessary for the resumption of the management and control of the debtor by the officers thereof.

## **CHAPTER 25 - OFFENCES**

**136. Offences.** - (1) ~~An insolvent~~ A debtor or the management of such debtor shall be guilty of an offence -

- (a) if before or after the liquidation of ~~his or her estate~~ the debtor's estate he or she conceals or parts with or intentionally destroys any book or

- accounting record relating to his or her affairs or the affairs of the debtor or if he or she intentionally erases the information contained therein or makes it illegible or permits any other person to perform any such act in regard to any such book or accounting record; or [132(a)]
- (b) if before or after the liquidation of his or her estate or the estate of the debtor he or she alienates property, obtained by him or her or the estate on credit and not paid for, otherwise than in the ordinary course of business; or [132(c)]
- (c) if he or she, despite having been expressly asked about his or her or the debtor's financial standing and credit worthiness, falsely conceals his or her or the debtor's insolvent status and as a result thereof obtains credit for more than R500; or [137(a)]
- (d) if he or she offers or promises to any person any reward in order to procure the acceptance by a creditor of his or her estate or the estate of the debtor of an offer of compromise or, in the case of a natural person debtor, to induce a creditor not to oppose an application for rehabilitation or to give up any investigation in regard to the estate or to conceal any information in connection therewith; or [137(b)]
- (e) if at any time within two years before the date of liquidation of his or her estate or the estate of the debtor he or she, with intent to obtain credit or the extension of credit, intentionally gave false information in connection with his or her or the debtor's assets and liabilities to a creditor or to anyone who became his or her or the debtor's creditor on the strength of information given by him or her to such person, or intentionally concealed any material fact or made any false representation with regard thereto; or [133]
- (f) in the case of a natural person debtor, if before the liquidation of his or her estate he or she carried on any business or for his or her own account practised any profession or occupation and has failed to keep proper accounting records of all business transactions, income, expenditure, assets and liabilities and to retain the accounting records for a period of at least three years; or [134]
- (g) in the case of a natural person debtor, if at any time when his or her liabilities exceeded his or her assets or at any time within six months immediately prior to the date of liquidation of his or her estate he or she

reduced his or her assets through gambling, betting or risky speculation or contracted debts which were not reasonably necessary in connection with business or occupation or for his or her own maintenance or that of his or her dependants; or [135(3)(b)]

- (h) if he or she contracted any debt of R100 or more or debts to the aggregate of R500 or more, without any reasonable expectation of being able to discharge such debt or debts; or
- (i) if he or she without good cause fails to submit a statement of his or her affairs or the affairs of the debtor as required by section 39(1)(b); or [137(c)]
- (j) if he or she without lawful cause fails to attend any meeting or continuation of a meeting of creditors of his or her estate or the estate of the debtor of which he or she has been notified writing or the continuation of such meeting which he or she has been directed by the presiding officer of the meeting to attend at the time and place determined by the presiding officer; [66, 139(1)]
- (k) if at any time during the liquidation of his estate or the estate of the debtor he knows or suspects that any person has lodged or intends to lodge a nomination contemplated in section 37 which is false or has proved or intends to prove a false claim against his estate or the estate of the debtor and fails to inform the Master in the case of a nomination and the Master and the liquidator of his estate or the estate of the debtor in the case of a claim in writing of that knowledge or suspicion within 14 days as from the date upon which he acquired that knowledge or upon which his suspicion was aroused.

(2) Any person who -

- (a) evades the service of a summons on or a notice to him or her as contemplated in section 17(6)(a), 51, 53, or 55 or who without lawful cause fails to attend at the time and place determined in the summons or notice or having appeared, without lawful cause fails to remain in attendance until he or she is excused from further attendance by the presiding officer of the meeting concerned; or [66; 139(1), 417(4), 418(5) Companies Act ]

- (b) who has been called up for questioning in terms of section 17(6)(a), 51, 53 or 55 and who refuses to be sworn as a witness or to take an affirmation or who without lawful cause refuses or fails to answer any question lawfully put to him or her or who without lawful cause refuses or fails to produce any book, document, or record which is in his or her possession or custody and which he or she is in terms of the summons or a direction of the presiding officer of the meeting obliged to produce; or [66, 139(1)]
- (c) without lawful cause fails to comply with a written order of a liquidator contemplated in section 54(7) or (8); or [New provision]
- (d) without lawful cause fails to answer fully and correctly any written questions put to him or her by the liquidator of the insolvent estate in terms of section 54 or to submit the said answers within the time and in the manner contemplated in section 54(3); or [New provision]
- (e) receives any benefit or accepts any promise of a benefit as a reward for having kept in abeyance or stopped any action for the liquidation of the estate of the ~~insolvent debtor~~ or for having undertaken to keep such action in abeyance or to stop it or for having agreed to a composition or rehabilitation or for not opposing it or for having undertaken to agree to such composition or rehabilitation or not to oppose it or for having kept any inquiry in connection with any matter relating to the insolvent estate in abeyance or for having undertaken to hold it in abeyance or for having concealed particulars of ~~an insolvent a debtor~~ or an insolvent estate or for having undertaken to conceal such information; or [141]
- (f) before or after the liquidation of the estate of ~~an insolvent a debtor~~, conceals, parts with, damages, destroys, alienates or otherwise disposes of property attached in terms of section ~~22A 25~~ or property belonging to the ~~insolvent debtor~~ or his or her insolvent estate with intent to frustrate the attachment of such property by virtue of a liquidation order, in terms of section ~~22A 25~~, or with intent to prejudice creditors of the insolvent estate; or [142(1)]

- (g) has in his or her possession or custody or under his or her control property belonging to an insolvent estate and who intentionally fails to notify the liquidator of the insolvent estate as soon as possible of the existence and whereabouts of such property and to make it available to the liquidator; or [142(2)]
- (h) intentionally impedes or hinders a liquidator appointed in terms of section 68 or a liquidator appointed in terms of this Act or any person acting under his or her command, in the execution of his or her duties, [145]
- (i) makes or causes to be made or allows to be made a false nomination in terms of section 37 or who signs such a nomination without reasonable grounds for believing it to be correct, or who knowingly submits a false nomination to the Master,

shall be guilty of an offence.

(3) A liquidator of an insolvent estate who intentionally or negligently fails to submit to the Master an account or to pay over a sum of money within 30 days from the date on which he or she became obliged to submit such account or pay over such sum of money, or fails to comply with the duties in section ~~33~~ 38 within 30 days from the date of liquidation shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand rand or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment. [144]

- (4)
  - (a) Any person who is convicted of an offence contemplated in subsection (1)(a) or (b) or subsection (2)(f), (g) or (h) shall be liable to a fine or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment.
  - (b) Any person who is convicted of an offence contemplated in subsection (1)(c), (d), (e), (f), (g), (h), (i), (j) or (k) or subsection (2)(e) shall be liable to a fine or imprisonment for a period not exceeding twelve months or to both such fine and such imprisonment.
  - (c) Any person who is convicted of an offence contemplated in subsection (1)(h) or subsection (2)(a), (b), (c), (d) or (h) shall be liable to a fine or to imprisonment not exceeding six months or to both such fine and such imprisonment. [132-145]

**CHAPTER 26 - CROSS-BORDER INSOLVENCIES**

**137. Purpose and aims.** The purpose of this Chapter of the Act is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of—

- (a) co-operation between the courts and other competent authorities of the Republic and foreign States involved in cases of cross-border insolvency;
- (b) greater legal certainty for trade and investment;
- (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) protection and maximization of the value of the debtor's assets; and
- (e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

**138. Scope of application.** This Chapter applies where—

- (a) assistance is sought in the Republic by a foreign court or a foreign representative in connection with a foreign proceeding; or
- (b) assistance is sought in a foreign State in connection with a proceeding under the laws of the Republic relating to insolvency; or
- (c) a foreign proceeding and a proceeding under the laws of the Republic relating to insolvency in respect of the same debtor are taking place concurrently; or
- (d) creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under the laws of the Republic relating to insolvency.



**139. Definitions.** For the purposes of this Chapter—

- (a) "foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;
- (b) "foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;
- (c) "foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of paragraph (f) of this section;
- (d) "foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;
- (e) "foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;
- (f) "establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.
- (g) "curator" means a curator appointed in terms of section 6 of the Financial Institutions (Investment of Funds) Act, 1984 (Act No. 39 of 1984), or section 69 of the Banks Act, 1990 (Act No. 94 of 1990), or section 81 of the Mutual Banks Act, 1993 (Act No. 124 of 1993);
- (h) "receiver" means a receiver or other person appointed by the High Court to administer a compromise or arrangement under section 120 of this Act.

**140. International obligations of the Republic.** To the extent that this Chapter conflicts with an obligation of the Republic arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

**141. Competent court.** The functions referred to in this Chapter relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by the High Court.

**142. Authorization of trustee, liquidator, judicial manager, curator, or receiver to act in a foreign State.** A trustee, liquidator, judicial manager, curator, or receiver is authorized to act in a foreign State on behalf of a proceeding under the laws of the Republic relating to insolvency, as permitted by the applicable foreign law.

**143. Public policy exception.** Nothing in this Chapter prevents the court from refusing to take an action governed by this Chapter if the action would be manifestly contrary to the public policy of the Republic.

**144. Additional assistance under other laws.** Nothing in this Chapter limits the power of a court or a trustee, liquidator, judicial manager, curator, or receiver to provide additional assistance to a foreign representative under other laws of the Republic.

**145. Interpretation.** In the interpretation of this Chapter, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

**146. Right of direct access.** A foreign representative is entitled to apply directly to a court in the Republic.

**147. Limited jurisdiction.** The sole fact that an application pursuant to this Chapter is made to a court in the Republic by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of the Republic for any purpose other than the application.

**148. Application by a foreign representative to commence a proceeding under the laws of the Republic relating to insolvency.** A foreign representative is entitled to apply to commence a proceeding under the laws of the Republic relating to insolvency if the conditions for commencing such a proceeding are otherwise met.

**149. Participation of a foreign representative in a proceeding under the laws of the Republic relating to insolvency.** Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under the laws of the Republic relating to insolvency.

**150. Access of foreign creditors to a proceeding under the laws of the Republic relating to insolvency.** (1) Subject to paragraph (2) of this section, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under the laws of the Republic relating to insolvency as creditors in the Republic.

(2) Paragraph (1) of this section does not affect the ranking of claims in a proceeding under the laws of the Republic relating to insolvency, except that the claims of foreign creditors shall not be ranked lower than non-preferent claims.

(3) Without derogating from the application of the law and practice of the Republic generally, the ranking of claims in respect of assets in the Republic shall be regulated by the law and practice of the Republic on the ranking of claims.

**151. Notification to foreign creditors of a proceeding under the laws of the Republic relating to insolvency.** (1) Whenever under the laws of the Republic relating to insolvency notification is to be given to creditors in the Republic, such notification shall also be given to the known creditors that do not have addresses in the Republic. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.

(2) Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or other, similar formality is required.

(3) When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall—

- (a) indicate a reasonable time period for filing claims and specify the place for their filing;
- (b) indicate whether secured creditors need to file their secured claims; and
- (c) contain any other information required to be included in such a notification to creditors pursuant to the law of the Republic and the orders of the court.

**152. Application for recognition of a foreign proceeding.** (1) A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.

(2) An application for recognition shall be accompanied by—

- (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
- (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
- (c) in the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

(3) An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

(4) The court may require a translation of documents supplied in support of the application for recognition into an official language of the Republic.

**153. Presumptions concerning recognition.** (1) If the decision or certificate referred to in section 152(2) indicates that the foreign proceeding is a proceeding within the meaning of section 139(a) and that the foreign representative is a person or body within the meaning of section 139(d), the court is entitled to so presume.

(2) The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.

(3) In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

**154. Decision to recognize a foreign proceeding.** (1) Subject to section 143, a foreign proceeding shall be recognized if—

(a) the foreign proceeding is a proceeding within the meaning of section 139(a);

(b) the foreign representative applying for recognition is a person or body within the meaning of section 139(d);

(c) the application meets the requirements of section 152(2); and

(d) the application has been submitted to the court referred to in section 4.

(2) The foreign proceeding shall be recognized—

(a) as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or

(b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of section 139(f) in the foreign State.

(3) An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.

(4) The provisions of sections 152, 153, 154 and 155 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

**155. Subsequent information.** From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of—

- (a) any change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and
- (b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

**156. Relief that may be granted upon application for recognition of a foreign proceeding.**

(1) From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including—

- (a) staying execution against the debtor's assets;
- (b) entrusting the administration or realization of all or part of the debtor's assets located in the Republic to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;
- (c) any relief mentioned in section 158(1)(c), (d) and (g).

(2) An order issued in terms of subsection (1) shall be dealt with as contemplated in section 13 of this Act.

(3) Unless extended under section 158(1)(f), the relief granted under this section terminates when the application for recognition is decided upon.

(4) The court may refuse to grant relief under this section if such relief would interfere with the administration of a foreign main proceeding.

**157. Effects of recognition of a foreign main proceeding.** (1) Upon recognition of a foreign proceeding that is a foreign main proceeding—

(a) commencement or continuation of individual legal actions or individual legal proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;

(b) execution against the debtor's assets is stayed; and

(c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

(d) section 15 of this Act shall apply with regard to assets situated in the Republic to the same extent as if the insolvent was sequestrated by a court in the Republic.

(2) The scope, and the modification or termination, of the stay and suspension referred to in subsection (1) of this section are subject to the provisions of sections 14 and 17 of this Act, and the court may at the request of the foreign representative or a person affected by subsection (1) modify or terminate the scope of the stay and suspension to the extent that it considers appropriate.

(3) Subsection (1)(a) does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.

(4) Subsection (1) does not affect the right to request the commencement of a proceeding under the laws of the Republic relating to insolvency or the right to file claims in such a proceeding.

**158. Relief that may be granted upon recognition of a foreign proceeding.** (1) Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—

(a) staying the commencement or continuation of individual legal actions or individual legal proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under section 157(1)(a);

- (b) staying execution against the debtor's assets to the extent it has not been stayed under section 157(1)(b);
- (c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 157(1)(c);
- (d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
- (e) entrusting the administration or realization of all or part of the debtor's assets located in the Republic to the foreign representative or another person designated by the court;
- (f) extending relief granted under section 156(1);
- (g) granting any additional relief that may be available to a trustee, liquidator, judicial manager, curator, or receiver under the laws of the Republic.

(2) Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the Republic to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in the Republic are adequately protected.

(3) In granting relief under this section to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of the Republic, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

(4) Without derogating from the application of rules of the Republic generally, in granting relief under this section the court shall indicate the rules of the Republic relating to the administration, realization or distribution of a debtor's estate in South Africa that will apply and may modify any such rules or set out conditions subject to which any such rule should be applied.



**159. Protection of creditors and other interested persons.** (1) In granting or denying relief under section 156 or 158, or in modifying or terminating relief under subsection (3), the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

(2) The court may subject relief granted under section 156 or 158 to conditions it considers appropriate.

(3) The court may, at the request of the foreign representative or a person affected by relief granted under section 156 or 158, or at its own motion, modify or terminate such relief.

**160. Actions to avoid acts detrimental to creditors.** (1) Upon recognition of a foreign proceeding, the foreign representative has standing to initiate any legal action to set aside a disposition that is available to a trustee or liquidator under the laws of the Republic relating to insolvency.

(2) When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the legal action relates to assets that, under the law of the Republic, should be administered in the foreign non-main proceeding.

**161. Intervention by a foreign representative in proceedings in the Republic.** Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of the Republic are met, intervene in any proceedings in which the debtor is a party.

**162. Cooperation and direct communication between a court of the Republic and foreign courts or foreign representatives.** (1) In matters referred to in section 166, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a trustee, liquidator, judicial manager, curator, or receiver.

(2) The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

**163. Cooperation and direct communication between the trustee, liquidator, judicial manager, curator, or receiver and foreign courts or foreign representatives.** (1) In matters referred to in section 138, a trustee, liquidator, judicial manager, curator, or receiver shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives.

(2) The trustee, liquidator, judicial manager, curator, or receiver is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives.

**164. Forms of cooperation.** Cooperation referred to in sections 162 and 163 may be implemented by any appropriate means, including—

- (a) appointment of a person or body to act at the direction of the court;
- (b) communication of information by any means considered appropriate by the court;
- (c) coordination of the administration and supervision of the debtor's assets and affairs;
- (d) approval or implementation by courts of agreements concerning the coordination of proceedings;
- (e) coordination of concurrent proceedings regarding the same debtor.

**165. Commencement of a proceeding under the laws of the Republic relating to insolvency after recognition of a foreign main proceeding.** After recognition of a foreign main proceeding, a proceeding under the laws of the Republic relating to insolvency may be commenced only if the debtor has assets in the Republic; the effects of that proceeding shall be restricted to the assets of the debtor that are located in the Republic and, to the extent necessary to implement cooperation and coordination under sections 162, 163 and 164, to other assets of the debtor that, under the law of the Republic, should be administered in that proceeding.

**166. Coordination of a proceeding under the laws of the Republic relating to insolvency and a foreign proceeding.** Where a foreign proceeding and a proceeding under the laws of the Republic relating to insolvency are taking place concurrently regarding the same debtor, the court shall seek cooperation and coordination under sections 162, 163 and 164, and the following shall apply—

(a) when the proceeding in the Republic is taking place at the time the application for recognition of the foreign proceeding is filed,

(i) any relief granted under section 156 or 158 must be consistent with the proceeding in the Republic; and

(ii) if the foreign proceeding is recognized in the Republic as a foreign main proceeding, section 157 does not apply;

(b) when the proceeding in the Republic commences after recognition, or after the filing of the application for recognition, of the foreign proceeding,

(i) any relief in effect under section 156 or 158 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in the Republic; and

(ii) if the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in section 157(1) shall be modified or terminated pursuant to section 157(2) if inconsistent with the proceeding in the Republic;

(c) in granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of the Republic, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

**167. Coordination of more than one foreign proceeding.** In matters referred to in section 166, in respect of more than one foreign proceeding regarding the same debtor, the court shall seek cooperation and coordination under sections 162, 163 and 164, and the following shall apply—

(a) any relief granted under section 156 or 158 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;

(b) if a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under section 156 or 158 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding;

(c) if, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

**168. Presumption of insolvency based on recognition of a foreign main proceeding.** In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under the laws of the Republic relating to insolvency, proof that the debtor is insolvent.

**169 Rule of payment in concurrent proceedings.** Without prejudice to secured claims or rights *in rem*, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under the laws of the Republic relating to insolvency regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

## **CHAPTER 27 - GENERAL PROVISIONS**

**170. Court may stay or set aside liquidation.** (1) The Court may at any time after the commencement of the liquidation of a debtor on the application of any liquidator, creditor, trustee or member, and on proof to the satisfaction of the Court that all proceedings in relation to the liquidation ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary liquidation on such terms and conditions as the Court may deem fit.

(2) The Court may, as to all matters relating to a liquidation, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence. [Section 354 of the Companies Act]

**171. Meetings to ascertain wishes of creditors and others.** (1) Where by this Act the court is authorised, in relation to a liquidation, to have regard to the wishes of creditors, beneficiaries, members or contributories-

(a) the value of the respective creditors' claims and the voting rights of the various members or contributories of the debtor in terms of its trust deed, memorandum, articles, founding statement, agreement or constitution shall also be taken into consideration; and

(b) the court may, if it thinks fit, for the purpose of ascertaining the wishes of such creditors, beneficiaries, members or contributories direct meetings of the creditors, beneficiaries, members or contributories to be called, held and conducted in such manner as it directs, and may appoint a person to act as chairman of any such meeting and to report the result thereof to the court. [Section 413 of the Companies Act]

**172. Dispositions and share transfers, or transfer of a members' interest after liquidation void.** (1) Every transfer of an interest in a trust, shares of a company, members' interest in a close corporation or other right conferred by agreement or the constitution of an association debtor being liquidated, or alteration in the status of its members or beneficiaries effected after the commencement of the liquidation without the sanction of the liquidator, shall be void.

(2) Every disposition of its property (including rights of action) by any debtor being liquidated made

(a) in the case of a liquidation by the court, after the application for the liquidation has been filed with the Registrar, and

(b) in the case of a voluntary liquidation by resolution in terms of section 8, after the date upon which notice was given to creditors to liquidate the debtor by resolution, shall be void unless the Court otherwise orders.[Section 341 of the Companies Act]

**173. Inspection of records of company debtor, close corporation debtor or association debtor being liquidated.** (1) Any person having an interest in a debtor which is being liquidated in terms of this Act may apply to the court for an order authorising him or her to inspect any or all of the books and papers of that debtor, whether in possession of the debtor or the liquidator, and the court may impose any condition it thinks fit in granting that authority.

(2) The provisions of subsection (1) shall not be construed as affecting any powers or rights conferred by any law upon any department of State or any person acting under its authority at all times to inspect or cause to be inspected, the books and papers of any company or corporation being liquidated. [Section 360 of the Companies Act]

**174. General provisions relating to Chapter 7 or Chapter 21 proceedings.** (1) Subject to the provisions of this section and any resolution of creditors passed at a meeting of creditors, the liquidator or administrator will have the power, in his own name but on behalf of creditors:

- (a) to conclude a contingency fees agreement as referred to in section 2(1) of the Contingency Fees Act 1997 (Act No. 66 of 1997);
- (b) to commence any proceedings as contemplated in Chapter 7 or 21;
- (c) to settle or compromise any such proceedings or claims relating thereto; and
- (d) to receive any amounts pursuant to any such proceedings or settlement or compromise.

(2) Prior to concluding any contingency fees agreement or commencing any such proceedings, the liquidator or administrator shall advise all proved creditors by personal notice of the steps he proposes to take, with reasons and an explanation of this section and its effect.

**Annexure E**

**Draft Insolvency and Business Recovery Bill**

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(3) Any creditor who does not within two weeks object in writing to the proposed steps will be deemed to have approved such steps and will, for purposes of such proceedings and claims, be regarded as a participating creditor.

(4) If any creditor does object:

(a) The objecting creditor will, for purposes of the proceedings and claims in question, be regarded as an excluded creditor;

(b) The liquidator or administrator may not exercise any of the powers referred to in 1(b) above on behalf of such creditor.

(5) All receipts and expenditure in connection with the proceedings and claims in question shall be accounted for in a special account in such a way that only participating creditors will benefit from any proceeds and contribute to any expenditure, and further subject to any directions which the Court may give in this regard:

(6) The liquidator or administrator will not be required to give security for the costs of any such proceedings, unless the court on application of the defendant or respondent is satisfied that the proceedings are frivolous or vexatious.

(7) Any amounts received by the liquidator or administrator arising from any such proceedings or claims shall, for purposes of remuneration and distribution of proceeds, be treated as if they were proceeds of estate assets.

(8) The application referred to in subsection (1) may be brought by the liquidator of the debtor on behalf of creditors who extended credit to the debtor while it was engaged in insolvent trading or, if the liquidator refuses or fails to obtain the necessary authority or directions from creditors in terms of section 45 of this Act, by such a creditor or group of creditors.

(9) If any creditor has taken proceedings under subsection (1) no creditor who was not a party to the proceedings shall derive any benefit from any moneys or from the proceeds of any property recovered as a result of such proceedings before the claim and costs of every creditor who was a party to such proceedings have been paid in full.

**Annexure E**

**Draft Insolvency and Business Recovery Bill**

(10) Where any such liability has been investigated and prima facie established by way of statutory enquiry, the proceedings may be launched by way of notice of motion and supported by the evidence obtained by way of enquiry. If the court is unable to decide the case on the papers and the enquiry record, disputes of fact shall be referred to oral evidence as may be necessary.

(11) In any such proceedings, the court may give such further directions, whether in regard to limitation, quantification, procedure, distribution of proceeds or otherwise as it thinks proper for the purpose of giving effect to any order it may make. In particular:

(a) it may order that a person is liable for the costs of investigating the liability of such person or the costs of administration in the estate or such part thereof as the court may direct.

(b) (i) Where the court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to the declaration, and in particular may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the debtor to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the debtor held by or vested in him or any company or person on his behalf or any person claiming as assignee from or through the person liable or any company or person acting on his behalf, and may from time to time make such further orders as may be necessary for the purpose of enforcing any charge imposed under this subsection.

(ii) For the purposes of this subsection, the expression “assignee” includes any person to whom or in whose favour, by the direction of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration given in good faith and without notice of any of the matters on the ground of which the declaration is made. [Section 424(2)(a) and (b) of the Companies Act]

(c) Without prejudice to any other criminal liability incurred, where any business of a debtor is carried on recklessly or with such intent or for such purpose as is mentioned in subsection (1), every person who was knowingly



a party to the carrying on of the business in the manner aforesaid, shall be guilty of an offence. [Section 424(3) of the Companies Act]

(d) The claim of a creditor against the debtor in respect of the debt which gave rise to a declaration in terms of Chapter 7 or 21, will be reduced by the amount received by the creditor in terms of the declaration.

**175. Giving of evidence after conviction for failure to testify.** - (1) Any person who is serving a term of imprisonment for the offence contemplated in section 136(2)(c) and who declares himself or herself willing to give the required evidence or to produce the required books, documents, or records may, on the written application of the Master or another person who is to preside at a meeting or to chair a commission, made to the head of the institution where the said person is being held in custody, be brought before the Master or other person for the hearing of such evidence or the production of the required books, documents, or records. [66(2), 66(3)]

(2) A person contemplated in subsection (1) who has given the required evidence or produced the required books, documents, or records may on his or her own application be brought before the court which imposed the sentence and that court may, irrespective of whether or not it is composed as it was when the sentence was imposed, suspend the remaining portion of the sentence or any portion thereof upon the conditions that it deems just, if the court is satisfied that the said person has answered fully and correctly all questions put to him or her or produced all books, documents, or records required of him or her, in so far as it was possible for him or her to do so. [66(5)]

(3) In order to satisfy itself concerning the facts contemplated in subsection (2), the court may accept as conclusive proof of those facts a certificate given by the presiding officer to the effect that the said person had appeared before him or her and had answered fully and correctly all questions put to him or her and produced all books, documents, or records required of him or her. [New provision]

**176. Criminal liability of partners, administrators, servants or agents.** - (1) Any person who -

(a) is or was a member of a partnership or who is or was a person responsible for the management of a debtor and who does or omits to do in relation to

**Annexure E**

**Draft Insolvency and Business Recovery Bill**

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any property or to the affairs of that partnership or debtor or of the insolvent estate of that partnership or debtor; or

- (b) is or was charged with the administration of an estate and who does or omits to do in relation to any property or to the affairs of that estate; or
- (c) as a servant or agent has had the sole or practical control of any property or of the affairs of his or her employer or principal and who does or omits to do in relation to that property or the affairs of his or her employer or principal or of the insolvent estate or his or her former employer or principal,

any act which, if done or omitted by him or her in like circumstances in relation to his or her own property or affairs or to any property belonging to, or the affairs of his or her insolvent estate, would have constituted an offence under this Act, shall be deemed to have committed that offence. [143(1)]

(2) The liability under subsection (1) of a partner, person responsible for the management of a debtor, servant or agent shall not affect the liability under that subsection or under any other provision of this Act, of another partner or person responsible for the management of a debtor or of a servant or agent of the same partnership, or of the employer or principal of the employee or agent who is so liable. [143(2)]

**177. Jurisdiction of court.** - (1) A court shall have jurisdiction in respect of an application for the liquidation of the estate of any ~~person~~ debtor who -

- (a) on the date of the application -
  - (i) is domiciled within the court's area of jurisdiction; or
  - (ii) owns or is entitled to property situate within the court's area of jurisdiction; or
  - (iii) has its registered office or main place of business within the court's area of jurisdiction; or
- (b) at any time within twelve months immediately before the date of the application ordinarily resided or carried on business within the court's area of jurisdiction. [149(1)]

(2) A court which has jurisdiction over a person debtor or the insolvent estate of a person debtor by virtue of subsection (1) shall have jurisdiction in respect of any matter regulated by this Act arising out of the liquidation of the estate of the said person debtor. [New provision]

(3) When it appears to a court equitable or convenient that the estate of a person debtor over whom it has jurisdiction in terms of subsection (1) should be liquidated by another court in the Republic the court may decline to exercise jurisdiction in the matter and make such order as it finds appropriate. [149(1) proviso]

(4) Foreign representatives and creditors have access to the court as provided in Chapter 2 of this Act, and liquidation of the estate of a debtor shall be limited as provided in that Chapter.

(5) The court may rescind or vary any order made by it under the provisions of this Act. [149(2)]

**178. Appeals.** - (1) Any person aggrieved by a final liquidation order, or by a refusal to grant a provisional order or to grant a liquidation order without a provisional liquidation order, or by an order setting aside a provisional liquidation order, or any other appealable order made in terms of this Act may, subject to the provisions of section 20(4) and (5) of the Supreme Court Act, 1959 (Act No. 59 of 1959), appeal against such order. [150(1), (5)]

(2) The rules applicable to appeals from judgments or orders given in civil matters by the court concerned shall, subject to subsection (3), **mutatis mutandis** apply to appeals contemplated in subsection (1). [150(2)]

(3) Notwithstanding the provisions of any other law, the noting of an appeal against a final liquidation order shall not have the effect of suspending the operation of any provision of this Act: Provided that pending judgment on appeal no property belonging to the insolvent estate shall be realised without the written consent of the debtor insolvent or, failing such consent, permission granted by order of court on an application by an interested person who has furnished security to the satisfaction of the court for restitution in the event of the appeal being successful. [150(3)]

(4) If an appeal against a final liquidation order is allowed, the respondent may be ordered to pay all liquidation costs. [150(4)]

**179. Review.** - (1) Any person aggrieved by any decision, order or taxation of the Master or by a decision by the liquidator or by a decision or order of an officer presiding at a meeting of creditors of an insolvent estate, including the liquidator, may, within 90 days or such further period as the court may allow for good cause shown, bring such decision, order or taxation under review by the court upon notice to the Master or the presiding officer as the case may be and to any other person whose interests are affected. [151]

(2) If all or most of the creditors are affected by an application referred to in subsection (1), notice need to be given to the liquidator only. [151 proviso]

(3) The court reviewing any decision, order or taxation shall have the power to consider the merits of any such matter, to hear evidence and to make any order it deems fit: Provided that it shall not re-open any confirmed liquidator's account otherwise than as is provided in section 90. [151 second proviso]

(4) If the court on review confirms any decision, order or taxation of the Master or officer referred to in subsection (1) the applicant's costs shall not be paid out of the estate concerned unless the court otherwise directs. [151 bis]

**180. Master's fees.** - The Master shall in respect of the matters mentioned in Schedule 3, ensure that the fees specified therein are recovered in the manner prescribed in the Schedule.

**181. Custody and destruction of documents.** - (1) The Master shall have custody of all documents relating to an insolvent estate. [154(1)]

(2) The liquidator of an insolvent estate may after one year has elapsed as from the confirmation by the Master of the final liquidation account destroy all books, documents and records in his or her possession relating to the insolvent estate, unless the Master consents to the earlier destruction of such book, documents or records or directs that they be retained for the longer period determined by him or her. [155(1)]

(3) The Master may destroy all records in his or her office relating to an insolvent estate after five years have elapsed as from the rehabilitation of the insolvent debtor or the dissolution of a company debtor, close corporation debtor or association debtor in appropriate circumstances, or confirmation of the final account in the estate of any other debtor. [155(2)]

**182. Insurer's liability in respect of indemnification of insolvent debtor.** - Whenever any person (herein referred to as the insurer) is obliged to indemnify another person (herein referred to as the insured) in respect of any liability incurred by the insured towards a third party, such third party shall, on the liquidation of the estate of the insured, be entitled to recover from the insurer the amount of the insured's liability towards the third party, but not exceeding the maximum amount for which the insurer is bound in terms of the indemnity. [156]

**183. Non-compliance with directives.** - (1) Nothing done under this Act shall be invalid merely by reason of the non-compliance with any directive prescribed by or in terms of this Act, unless in the opinion of the court, or if the court is not involved, in the opinion of the Master or the presiding officer, a substantial injustice has thereby been caused which cannot be remedied by an appropriate order of the court, the Master or the presiding officer. [157(1)]

(2) No defect or irregularity in the election or appointment of a liquidator shall vitiate anything done by him or her in good faith. [157(2)]

**184. Regulations and other powers of Minister.** - (1) The Minister may make regulations prescribing -

- (a) the procedure to be observed in Masters' offices in connection with insolvent estates;
- (b) the form, and manner of conducting proceedings under this Act;
- (c) the manner in which fees payable under this Act shall be paid and brought to account. [158]

(2) The Minister may by notice in the **Gazette** amend Schedule 2. [158bis]

**185. Amendment and repeal.** - (1) The laws mentioned in Schedule 3 are hereby amended or repealed to the extent indicated in the third column of the Schedule. [1]

(2) Anything done under any provision of any law repealed by subsection (1) which may be done under a corresponding provision of this Act, shall be deemed to have been done under that corresponding provision.

**186. Short title and commencement.** - This Act shall be called the Insolvency and Business Recovery Act, 2..., and shall come into operation on a date fixed by the President in the **Gazette**. [159]

**SCHEDULE 1**

**FORM A**

**STATEMENT OF DEBTOR'S AFFAIRS**

**FAILURE TO SUBMIT THIS FORM TO THE MASTER AND THE LIQUIDATOR  
WITHIN 7 DAYS IS A CRIMINAL OFFENCE AND MAY DELAY REHABILITATION,  
WHERE APPLICABLE**

**PART 1**

**B A L A N C E S H E E T  
OF.....\***

\* Here insert the name in full of the debtor

| Liabilities                       | R | c | Assets  | R | c |
|-----------------------------------|---|---|---|---|---|
| Debts due as per Part 5 . . . . . |   |   | Immovable property as per<br>part 2 . . . . .       |   |   |
|                                   |   |   | Movable property as per<br>Part 2 . . . . .         |   |   |
|                                   |   |   | Outstanding claims, etc, as<br>per Part 3 . . . . . |   |   |
|                                   |   |   | Deficiency/surplus . . . . .                        |   |   |
| Total                             |   |   | Total   |   |   |

**PART 2****IMMOVABLE PROPERTY**

|                                    | Description of property | Situation and extent | Mortgages and other secured claims | Estimated values |
|------------------------------------|-------------------------|----------------------|------------------------------------|------------------|
| Property situate in the Republic   |                         |                      |                                    | R                |
| Property situate elsewhere . . . . |                         |                      |                                    | c                |
|                                    |                         |                      | Total                              |                  |

**PART 3****ANY MOVABLE PROPERTY WHATSOEVER WHICH IS NOT INCLUDED IN PART 4 OR PART 5**

|  | Description of property | Estimated value |
|--|-------------------------|-----------------|
| Property situate in the Republic . . . |                         | R               |
| Property situate elsewhere . . . . .   |                         | c               |
|  | Total                   |                 |

**Note:** Movable property includes assets such as insurance policies and credit balances in accounts with banks or other institutions or persons. Any merchandise mentioned in this part shall be valued at its cost price or at its market value at the time of the making of this statement, whichever is the lower, and the statement shall be supported by detailed stock sheets relating to such merchandise.



**PART 4****OUTSTANDING CLAIMS, BILLS, BONDS AND OTHER SECURITIES**

|                     | Names and residential and postal address of the debtor | Particulars of claim | Estimated amount good | Estimated amount bad or doubtful |
|---------------------|--|----------------------|-----------------------|----------------------------------|
| In the Republic . . |  |                      | R           c         | R           c                    |
| Elsewhere . . . . . |  |                      |                       |                                  |
|                     |  | Total                |                       |                                  |

**PART 5****LIST OF CREDITORS**

| Name and address of creditor | Nature and value of security for claim | Nature of claim | Amount of claim |
|------------------------------|--|-----------------|-----------------|
|                              |  |                 | R           c   |
|                              |  | Total           |                 |

**PART 6**

**MOVABLE ASSETS PLEDGED, HYPOTHECATED, SUBJECT TO A RIGHT OF RETENTION OR UNDER ATTACHMENT IN EXECUTION OF A JUDGMENT**

| Description of asset | Estimated value of asset | Nature of charge on asset | Amount of debt to which charge relates | Name of creditor in whose favour charge is |
|----------------------|--------------------------|---------------------------|--|--|
|                      |                          |                           |  |  |

| The nominal amount of unpaid capital liable to be called up is R\* .....

| \* This information to be provided by a company debtor

**PART 7**

**ENUMERATION AND DESCRIPTION OF EVERY BOOK OR DOCUMENTING RECORD IN USE BY THE DEBTOR AT TIME OF THE LIQUIDATION OR AT TIME WHEN ~~HE OR SHE~~ THE DEBTOR CEASED CARRYING ON BUSINESS**

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**PART 8**

**DETAILED STATEMENT OF CAUSES OF DEBTOR'S INSOLVENCY**

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**PART 9**

**PERSONAL INFORMATION (TO BE COMPLETED BY NATURAL PERSON DEBTORS)**

State whether the debtor is married, widowed or divorced

.....

If the debtor is or was married, state -

- (a) name or names of spouse or spouses (a 'spouse' means not only a wife or husband in the legal sense, but also a person who in terms of any legal system or recognised custom is recognised as such a person's spouse and also any person with whom such person is cohabitating in a marriage relationship, irrespective of whether or not he or she is lawfully married to any other person).

.....

.....

.....

- (b) whether the debtor is or was married in or without community of property and whether the accrual system applies

.....

.....

- (c) date of marriage

.....

- (d) whether the matrimonial property system has been changed since entering into the marriage and, if so, the nature of the change

.....  
.....

- (e) full names and date of birth of the spouse and, if an identity number has been assigned, the identity number of the spouse

.....  
.....

State the debtor's nationality

.....

State the debtor's place of birth, date of birth and, if an identity number has been assigned, the identity number

.....  
.....

Was the debtor's estate or the estate of a partnership in which the debtor is or was a partner previously liquidated or placed in bankruptcy, whether in the Republic or elsewhere?

.....

If the preceding answer is in the affirmative, state -

- (a) whether debtor's own estate or his partnership's estate was (i) liquidated; or (ii) placed in bankruptcy

.....  
.....

- (b) the place where and the date when that estate was liquidated or placed in bankruptcy

.....  
.....

- (c) whether the debtor has been rehabilitated or his estate released; if so, when

.....  
.....

**PART 10**

**AFFIDAVIT/SOLEMN DECLARATION**

I, ..... declare under oath/solemnly and sincerely declare\* that to the best of my knowledge and belief the statements contained in this Schedule are true and complete, and that every estimated amount therein contained is fairly and correctly estimated.

Signature of declarant .....

Sworn/solemnly declared before me on the .....day of ..... at  
.....

.....  
Commissioner of Oaths  
.....  
Full names  
.....  
Business address  
.....  
Designation and area or office

[Schedule 1, Form B]



**SCHEDULE 1: FORM AA [New form]**

**NOMINATION FOR LIQUIDATOR**

(Clause 37)

RE: \_\_\_\_\_ ("the Debtor")

1. I understand that application has been/is to be made to the High Court for an order for the placing of the Debtor in liquidation.
2. I declare that \_\_\_\_\_ ("the Creditor") is a creditor of the Debtor.
3. I hereby nominate \_\_\_\_\_ of \_\_\_\_\_ telephone number \_\_\_\_\_ for appointment as liquidator and request you to make the necessary appointment. The Creditor intends proving a claim and voting for the final appointment of the aforementioned person at the first meeting of creditors in this estate.
4. I declare that the Creditor is not a person disqualified, in terms of the provisions of sections 42 of the Insolvency Act from voting for the appointment of the aforesaid person as liquidator. As far as I am aware the nominated person is not disqualified from the aforesaid appointment by virtue of the provisions of section 54 of the Insolvency Act.
5. I further declare that I have satisfied myself that the amount reflected herein as owing by the Debtor to the Creditor is, to the best of my knowledge and belief, true and correct.
- 6.1 NAME OF CREDITOR: \_\_\_\_\_
- 6.2 ADDRESS OF CREDITOR: \_\_\_\_\_
- 6.3 TELEPHONE NUMBER OF CREDITOR: \_\_\_\_\_
- 6.4 FAX NUMBER OF CREDITOR (IF ANY) \_\_\_\_\_
- 6.5 E-MAIL ADDRESS OF CREDITOR (IF ANY) \_\_\_\_\_
7. AMOUNT OF CLAIM: \_\_\_\_\_  
(Amount in words)
8. CAUSE OF ACTION: The amount owing by the Debtor to the Creditor is owing in respect of:

**Annexure E**

**Draft Insolvency and Business Recovery Bill**

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Official Stamp Company/Business, Close  
Corporation/Financial Institution

\_\_\_\_\_  
**SIGNATURE**

\_\_\_\_\_  
**DATE**

\_\_\_\_\_  
**PRINTED NAME**

\_\_\_\_\_  
**CAPACITY**

**FORM B**

**AFFIDAVIT FOR PROOF OF ANY CLAIM OTHER THAN A CLAIM BASED ON A PROMISSORY NOTE OR OTHER BILL OF EXCHANGE**

Strike out inapplicable words where \* occurs.

In the insolvent estate of: .....

Date of liquidation: .....

Name of creditor: .....

Address of creditor: .....

E-mail address of creditor .....

Fax number of creditor .....

Amount of claim at date of liquidation: .....

I, .....declare \*under oath/solemnly as follows

(1) \*I am the creditor/I am the .....(capacity) of the creditor and have authority to make this declaration and submit the claim for proof as appears from the attached documentation.

(2) \*I have personal knowledge of the nature and particulars of the claim/I have satisfied myself as to the nature and particulars of the claim.  
[44(4)]

(3) \*The claim was not obtained by cession after the commencement of liquidation proceedings/The claim was obtained by cession on .....(date).  
[44(4)]

(4) The nature of the claim (for instance money advanced, goods delivered, salary due) is ..... as appears from the attached documentation or declaration.

[44(2)]

(In respect of debts which accrued over a period or in respect of which payments were made a statement shall be submitted with a brief description of all debits and credits over the period of 12 months immediately preceding the date of liquidation.)

[44(6)]

(5) The debt arose on or since ..... (date).The debt was due to me on the date of liquidation/The debt or part thereof became due to me or will become due to me after liquidation as set out on the attached statement.

(6) \*I hold no security in respect of the debt/The particulars of security held by me for payment of the debt and the value placed be me on the security (if a value is placed on the security) are as follows:

.....  
.....  
.....

\* I do not rely on my security for the payment of my claim./I rely solely on my security for the payment of my claim.

[44(4)]

**Annexure E**

**Draft Insolvency and Business Recovery Bill**

(7) \*To the best of my knowledge no one except the insolvent estate is liable for the debt or a part thereof/The particulars of others who are to my knowledge liable for the debt and the security held in respect thereof are as follows . . . . .  
 . . . . .  
 . . . . .  
 . . . . .

\* (8) I authorize the liquidator to have any dividend due to me transferred electronically to my banking account (supply name of account, branch number and account number. . . . .  
 . . . . .

.....  
 Signature of declarant

\*Sworn to/ solemnly declared before me on: .....(date) at .....(place)

.....  
 Commissioner of oaths  
 .....  
 Full names  
 .....  
 Business address  
 .....  
 Designation and area or office

[Schedule 1, Form B]

**FORM C**

**AFFIDAVIT FOR THE PROOF OF A CLAIM BASED ON A PROMISSORY NOTE OR OTHER BILL OF EXCHANGE**

Strike out inapplicable words where \* occurs.

In the insolvent estate of: .....

Date of liquidation: .....

Name of creditor: .....

Address of creditor: .....

E-mail address of creditor .....

Fax number of creditor .....

Amount of claim at date of liquidation: .....

I, .....declare \*under oath/solemnly as follows

- (1) \*I am the creditor/I am the .....(capacity) of the creditor and have authority to make this declaration and submit the claim for proof as appears from the attached documentation.
- (2) \*I have personal knowledge of the nature and particulars of the claim/I have satisfied myself as to the nature and particulars of the claim.  
[44(4)]
- (3) \*The claim was not obtained by cession after the commencement of liquidation proceedings/The claim was obtained by cession on .....(date).  
[44(4)]
- (4) The debtor was on the date of liquidation and still is indebted to me by virtue of the following \*promissory note/bill of exchange:

**Annexure E**

**Draft Insolvency and Business Recovery Bill**

| Date of note or bill | Name of maker or drawer | Name of acceptor | Name of person to whom payable | Date when payable | Name of endorser | Amount |
|----------------------|-------------------------|------------------|--------------------------------|-------------------|------------------|--------|
|                      |                         |                  |                                |                   |                  |        |

(5) The nature of the claim (for instance money advanced, goods delivered, salary due) is ..... as appears from the attached documentation or declaration.

[44(2)]

(In respect of debts which accrued over a period or in respect of which payments were made a statement shall be submitted with a brief description of all debits and credits over the period of 12 months immediately preceding the date of liquidation.)

[44(6)]

(6) That the said \*note/bill is in all respects genuine and valid.

(7) \*I hold no security in respect of the debt / The particulars of security held by me for payment of the debt and the value placed by me on the security (if a value is placed on the security) are as follows:

.....  
 .....  
 .....

\* I do not rely on my security for the payment of my claim./I rely solely on my security for the payment of my claim.

[44(4)]

**Annexure E**

**Draft Insolvency and Business Recovery Bill**

(8) \*To the best of my knowledge no one except the insolvent estate is liable for the debt or a part thereof/ The particulars of others who are to my knowledge liable for the debt and the security held in respect thereof are as follows . . . . .  
 . . . . .  
 . . . . .  
 . . . . .

\* (9) I authorize the liquidator to have any dividend due to me transferred electronically to my banking account (supply name of account, branch number and account number). . . . .  
 . . . . .

.....  
 Signature of declarant

\*Sworn to/ solemnly declared before me on: .....(date) at .....(place)

.....  
 Commissioner of oaths  
 .....  
 Full names  
 .....  
 Business address  
 .....  
 Designation and area or office

[Schedule 1, Form D]



**FORM D**

**FORM AND CONTENTS OF ACCOUNTS**

1. The accounts shall be lodged on A4 standard paper and totals shall be added up separately at the foot of each sheet with a total at the end of each account. [New provision]

**2. Heading**

The heading of the account shall contain the following information:

- (a) The name of the ~~insolvent~~ debtor;
- (b) the address of the ~~insolvent~~ debtor;
- (c) the identity number or date of birth or registration number of the ~~insolvent~~ debtor;
- (d) the date of liquidation;
- (e) the ordinal number of the account or supplementary account;
- (f) the nature of the account (eg liquidation account);
- (g) where applicable, whether it is a final or supplementary account;
- (h) whether it is a distribution account or a contribution account or both;
- (i) the Master's reference number.

[New provision]

**3. Liquidation account**

3.1 A liquidation account shall contain a record of all receipts derived from the realisation of assets and disbursements made or to be made in defraying the costs of liquidation, except receipts and disbursements reflected in a trading account. [92(1)]

3.2 The record of receipts and disbursements shall reflect full particulars explaining their nature and state the amount thereof in a money column. [92(2)]

3.3 The gross proceeds of assets shall be reflected and the disbursements incidental to the realisation shall be entered as disbursements. [New provision]

3.4 Receipts and disbursements shall upon the request of the Master be supported by satisfactory vouchers numbered consecutively in the top right-hand corner by reference to the number appearing in the account opposite the relative item. [92(3)]

3.5 The account shall reflect separately the distribution to be made (if any) to secured claims, preferent claims and concurrent claims and the contribution to be levied (if any). [New provision]

3.6 If security has been realised, the liquidation account shall contain a free residue account dealing with receipts not subject to security and consecutively numbered encumbered asset accounts dealing with receipts subject to security. [New provision]

3.7 If disbursements or income are apportioned amongst the free residue and encumbered asset accounts the liquidation account shall indicate how the apportionment has been calculated. [New provision]

3.8 An encumbered asset account shall be drawn to indicate the proceeds of the realization of security, the disbursements payable out of the proceeds of the security and the amount payable to a creditor or creditors with the period for and rate at which interest before and after liquidation (if any) has been calculated. [New provision]

#### **4. Trading account**

When the liquidator carried on business by either purchasing stock or entering into new transactions for the purpose of trading, a separate trading account including the following items only, shall be submitted:

- (a) The value of the stock on hand at the date of liquidation shown on the credit side;
- (b) the receipts and disbursement on the trading account;

- (c) the value of stock on hand at the date on which the accounts were made up shown on the debit side with a note of the items in the liquidation account reflecting the proceeds of the stock that has been realised (if any). [93]

**5. Bank reconciliation**

5.1 The liquidator shall lodge complete statements up to the date on which the accounts were made up of all accounts opened in terms of section 84. [92(3)]

5.2 The account shall contain a bank reconciliation statement with the following information:

- (a) The balance in the cheque account and the date at which the bank statement reflected that balance;
- (b) the amount of the contribution provided for in the contribution account (if any);
- (c) the amount (if any) of each outstanding deposit with sufficient particulars to explain its nature or a reference to the item in the liquidation account which together with the even numbered voucher (if any) explain its nature;
- (d) the amount of each disbursement in the liquidation account that must still be paid with sufficient particulars to explain its nature or a reference to the item in the liquidation account which together with the even numbered voucher, if any, explain its nature;
- (e) the amount of the payment (if any) still to be made to each secured creditor with an explanation if this amount does not agree with the amount reflected in the distribution account;
- (f) the total amounts to be paid to preferent creditors and concurrent creditors (if any) with an explanation if these amounts do not agree with the totals reflected in the distribution account;
- (g) the amount (if any) to be transferred to a next account.  
[New provision]

**6. Distribution account, contribution account or contribution and distribution account**

6.1 The liquidator shall, upon the request of the Master, lodge all proved claims and unproved claims admitted or compromised by the liquidator or proved in an action at law.

6.2 The account shall indicate the basis for contribution if this is not the amount of the concurrent claim and contain the following columns that are applicable to the account:

- (a) claim reference number;
  - (b) creditor's name and if dividends are to be transferred electronically the account name, branch number and account number of the creditor's account;
  - (c) total claim;
  - (d) concurrent claim;
  - (e) secured claim;
  - (f) award in previous accounts;
  - (g) concurrent award with a separate column for interest after liquidation (if any) and an explanation in the account of the rate at and period for which interest has been calculated;
  - (h) secured or preferent award;
  - (i) amount of contribution;
  - (j) shortfall.
- [94, 105]

6.3 In the event of the debtor being a company debtor or close corporation debtor, the account shall in addition also contain a list of the amounts returnable to contributories, if applicable, and such list shall contain the following columns that are applicable to the account:

- (a) The full christian names and surname of the contributory;
- (b) The number of shares or percentage of the members interest held by the contributory;
- (c) The amount returnable to the contributory expressed as a dividend in the rand.

[List B, CM 101, Regulations to the Companies Act]

**7. Certificate**

7.1 Each liquidator shall sign the certificate under oath or affirmation. [107]

7.2 The certificate shall state that the account contains a true account of the administration of the estate. [107]

7.3 If it is a final account, the certificate shall state that so far as the liquidator is aware all the assets of the insolvent estate have been disclosed in the accounts. [107]

7.4 If it is not a final account, the certificate shall reflect a list of all unrealised assets of which the liquidator is aware with the reason why the assets have not been realised and an estimate of the value of the assets. [92(4)]

**FORM E1 [New form]**

**NOTICE IN TERMS OF SECTION ~~15(5)(A)~~ (7)(a) OF THE INSOLVENCY ACT  
?? OF 20?? (THE "ACT") TO ATTEND A HEARING IN TERMS OF SECTION  
~~15(5)(A)~~ (7)(a) OF THE ACT**

In re

INSOLVENT ESTATE OF .....

MASTER'S REFERENCE NO .....

To: .....

You are hereby notified in terms of section ~~15(5)(a)~~ (7)(a) to appear at a hearing to be held at..... (details of venue) on the.....day of..... 19....., at..... to give evidence and supply proof of earnings received by you or your dependants out of the exercise of your profession, occupation or employment and all assets or income received by you or your dependants from whatever source and the estimated expenses for your own support and that of your dependants.

Dated at.....this.....day of....., 19.....,

.....

Magistrate

(Here insert details of the name, address  
telephone number, fax number and e-mail  
of the liquidator or the attorneys acting for the liquidator)

NOTE:

Your attention is specifically drawn to the provisions of sections ~~68A~~ 56 and ~~101~~ 136(2)(a) and (b) of the Act which sections are printed on the reverse side hereof.

| [Print on back, sections ~~68A~~ 56 and ~~101~~ 136(2)(a) and (b).]

FORM E2 [New form]

**SUMMONS IN TERMS OF SECTION ~~45(11)~~ 61(12) OF THE INSOLVENCY ACT ?? OF 20?? (THE "ACT") TO ATTEND A MEETING OF CREDITORS FOR QUESTIONING IN TERMS OF SECTION ~~45(11)~~ 61(12) OF THE ACT**

In re  
INSOLVENT ESTATE OF .....  
MASTER'S REFERENCE NO .....

To: .....

You are hereby summonsed in terms of section ~~45(11)~~ 61(12) to appear in person at a meeting of creditors in the above estate to be held at ..... (details of venue) on the.....day of..... 19....., at..... to be questioned by the presiding officer, the liquidator or a creditor who has proved a claim against the estate, or the representative of the liquidator or such creditor in regard to your claim against the insolvent estate. You are summonsed to bring with you all books, documents or records in support of your claim.

Dated at.....this.....day of....., 19.....,

.....

Presiding Officer

(Here insert details of the name, address telephone number, fax number and e-mail of the liquidator or the attorneys acting for the liquidator)

NOTE:

In terms of clause ~~45(12)~~ 61(13), if a person who wishes to prove a claim is called upon to be questioned as contemplated in subsection (12) and fails without reasonable excuse to appear or refuses to take the oath or make a solemn declaration or to submit to questioning or to answer fully and satisfactorily any lawful question put to him or her, his or her claim, may be rejected.



**Annexure E**

**Draft Insolvency and Business Recovery Bill**

**FORM E3 [New form]**

**SUMMONS IN TERMS OF SECTION ~~64(1)~~ 51(1) OF THE INSOLVENCY ACT ?? OF 20?? (THE "ACT")  
TO ATTEND A MEETING OF CREDITORS FOR QUESTIONING IN TERMS OF SECTION ~~65~~ 52 OF THE  
ACT**

In re

INSOLVENT ESTATE OF .....

MASTER'S REFERENCE NO .....

To: .....

You are hereby summonsed in terms of section ~~64(1)~~ 51(1) to appear in person at a meeting of creditors in the above estate to be held at ..... (details of venue) on the.....day of..... 19...., at..... to give evidence and to be questioned on all matters relating to the insolvent or his or her business or affairs, whether before or after the liquidation of the estate, and concerning any property which at any time belonged to the insolvent estate and to produce to the presiding officer at the meeting all the books, papers and documents specified hereunder:

**LIST OF BOOKS, PAPERS OR DOCUMENTS TO BE PRODUCED**

| Description of book, paper or document | Date (if any) | Copy or original required |
|--|---------------|---------------------------|
|  |               |                           |
|  |               |                           |
|  |               |                           |
|  |               |                           |

Dated at.....this.....day of....., 19.....,

.....  
Presiding Officer

(Here insert details of the name, address  
telephone number, fax number and e-mail  
of the liquidator or the attorneys action for the liquidator)

**NOTES:**

1. A cheque for witness fees in the form of appearance money and travelling allowances in the sum of R .... (....., Rand) is attached to your copy of the summons. You are entitled to make representations to the Presiding Officer of the meeting for additional necessary witness fees.
2. Your attention is specifically drawn to the provisions of subsections ~~65~~ 52(3), ~~65~~ 52(6), ~~65~~ 52(9), ~~69~~ 57(10) and ~~68A~~ 56 of the Act which sections are printed on the reverse side hereof.

[Print on back, subsections ~~65~~ 52 (3), (6), (9) and (10) and section ~~68A~~ 56.]

**Annexure E**

**Draft Insolvency and Business Recovery Bill**

**FORM E4 [New form]**

**SUMMONS IN TERMS OF SECTION 66 53(3)(b) OR 66 53(5) OF THE INSOLVENCY ACT ?? OF 20?? (THE "ACT") TO ATTEND A QUESTIONING IN TERMS OF SECTION 66 53 OF THE ACT**

In re

INSOLVENT ESTATE OF .....

MASTER'S REFERENCE NO .....

To: .....

You are hereby summonsed in terms of section 66 53(3)(b) or 66 53(5) to appear in person at a questioning in the above estate to be held at ..... (details of venue) on the.....day of..... 19....., at..... to be questioned on property in your possession belonging to the insolvent estate, amounts due by you to the insolvent estate and all matters relating to the affairs of the insolvent and his or her property and to produce to the presiding officer at the questioning all the books, documents or records specified hereunder:

**LIST OF BOOKS, DOCUMENTS OR RECORDS TO BE PRODUCED**

| Description of book, document or record | Date (if any) | Copy or original required |
|---|---------------|---------------------------|
|   |               |                           |
|   |               |                           |
|   |               |                           |
|   |               |                           |

Dated at.....this.....day of....., 19.....,

.....

Master/Court/  
Presiding Officer

(Here insert details of the name, address telephone number, fax number and e-mail of the liquidator or the attorneys acting for the liquidator)

**NOTES:**

1. A cheque for witness fees in the form of appearance money and travelling allowances in the sum of R .... (....., Rand) is attached to your copy of the summons. You are entitled to make representations to the Presiding Officer of the meeting for additional necessary witness fees.
2. Your attention is specifically drawn to the provisions of sections 65 52(3), (6), (9), (10), 66 53(7), (8) and (10), 68A 56 and 101 136(2)(a) and (b) of the Act which sections are printed on the reverse side hereof.

[Print on back, sections 65 52(3), (6), (9), (10), 66 53(7), (8) and (10), 68A 56 and 101 136(2)(a) and (b).]

**Annexure E**

**Draft Insolvency and Business Recovery Bill**

**FORM E5 [New form]**

**SUMMONS IN TERMS OF SECTION ~~68~~ 55(1) OF THE INSOLVENCY ACT ?? OF 20??  
(THE "ACT") TO ATTEND A QUESTIONING IN TERMS OF SECTION ~~68~~ 55 OF THE ACT**

In re

INSOLVENT ESTATE OF .....

MASTER'S REFERENCE NO .....

To: .....

You are hereby summonsed in terms of section ~~68~~ 55(1) to appear in person at a questioning in the above estate to be held at ..... (details of venue) on the.....day of..... 19....., at..... to furnish information and to be questioned on all information within your knowledge concerning the insolvent or his or her estate or the administration of the estate and to produce to the presiding officer at the meeting all the books, documents and records specified hereunder:

**LIST OF BOOKS, DOCUMENTS OR RECORDS TO BE PRODUCED**

| Description of book, document or record | Date (if any) | Copy or original required |
|---|---------------|---------------------------|
|   |               |                           |
|   |               |                           |
|   |               |                           |
|   |               |                           |

Dated at.....this.....day of....., 19.....,

.....  
Master of the High Court

Your attention is specifically drawn to the provisions of sections ~~65~~ 52(3), ~~65~~ 52(6), ~~65~~ 52(9), ~~65~~ 52(10), ~~68~~ 55(5), ~~68~~ 55(6) ~~68A~~ 56 and ~~101~~ 136(2)(a) and (b) of the Act which sections are printed on the reverse side hereof.

[Print on back, sections ~~65~~ 52(3), (6), (9), (10), ~~68~~ 55(5), (6), ~~68A~~ 56 and 101 136(2)(a) and (b).]

**FORM F**

**STATUTORY DEMAND IN TERMS OF SECTION 2(3)(a)(i) OF THE INSOLVENCY AND BUSINESS RECOVERY ACT**

**WARNING**

This is an important document. If you should fail to respond to the document within twenty-one days after service thereof your estate may be liquidated and your assets taken away from you.

**DEMAND**

To: \_\_\_\_\_

Address: \_\_\_\_\_

The creditor claims that you are indebted to him or her for the following amount which is now due and payable and that he holds no security for the amount claimed.

| <u>When incurred</u> | <u>Type of debt<br/>(cause of action)</u> | <u>Amount due as at<br/>the date of the<br/>demand</u> |
|----------------------|---|--|
|                      |   |  |
|                      |   |  |

The creditor demands that you pay the amount due within three weeks after the service of this demand or give security to the reasonable satisfaction of the creditor therefor, or enter into a compromise in respect thereof.

**Annexure E**

**Draft Insolvency and Business Recovery Bill**

Should you fail to comply with this demand, this does not preclude you from opposing an application for the liquidation of your estate. If you deny indebtedness wholly or in part, you should contact the creditor without delay.

SIGNATURE: \_\_\_\_\_

NAME OF CREDITOR: \_\_\_\_\_

(PRINT)

DATE: \_\_\_\_\_

CAPACITY: \_\_\_\_\_

(IF NOT CREDITOR PERSONALLY)

ADDRESS: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

TEL NO: \_\_\_\_\_

PERSON YOU MAY CONTACT IF NOT CREDITOR PERSONALLY:

NAME: \_\_\_\_\_

ADDRESS: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Annexure E**

**Draft Insolvency and Business Recovery Bill**

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If debt obtained by cession or otherwise:

|                                 | <u>Name</u> | <u>Date of cession or other act</u> |
|---------------------------------|-------------|-------------------------------------|
| <b><u>Original creditor</u></b> |             |                                     |
| <b><u>Cessionaries</u></b>      |             |                                     |
|                                 |             |                                     |
|                                 |             |                                     |

**SCHEDULE 2**

**TARIFF A**

**SHERIFF'S FEES (SECTION 33 38)**

In this Tariff a reference to the tariff in an item refers to the items in the tariff applicable according to Rule 68 of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa (otherwise known as the Uniform Rules of Court), as amended from time to time.

1. For service or attempted service of documents the tariff in item 2.
2. For each separate attachment of property the tariff in item 5.
3. For making an inventory and the list of books and records referred to in section 33(7) of the Act the tariff in item 6.
4. For reporting on the attachment of assets the tariff in item 7.
5. For making of all necessary copies of documents the tariff in item 9.
6. Travelling allowance, per kilometre or fraction thereof according to the tariff in item 3.
7. For each necessary letter, excluding formal letters accompanying attachment or service of documents the tariff in item 12.
8. For each necessary attendance by telephone (in addition to prescribed trunk charges) the tariff in item 13.

9. For sending and receiving of each necessary facsimile per A4 size page (in addition to telephone charges) the tariff in item 14.
10. Bank charges: Actual costs incurred regarding bank charges and cheque forms.
11. For any work necessarily done by or on behalf of the sheriff in performing the duties under section 38 of the Act, for which no provision is made in this tariff: An amount to be determined by the Master.

**RULES FOR THE CONSTRUCTION OF THE TARIFF AND THE GUIDANCE OF THE SHERIFF**

- (1) Where there are more ways than one of doing any particular act, the least expensive way shall be adopted unless there is some reasonable objection thereto, or unless the party at whose instance process is executed desires any particular way to be adopted at his or her expense.
- (2) Where any dispute arises as to the validity or amount of any fees or charges the matter shall be determined by the Master.
- (3) The sheriff may pay rent, if necessary for premises required for the storage of goods attached, for a period of one month or such longer period as the Master or the liquidator shall authorize.



**TARIFF B**

**REMUNERATION OF LIQUIDATOR (SECTIONS 66)**

1. On the gross proceeds of any immovable property sold by the liquidator or the value at which property constituting security has been disposed of to a creditor in settlement of his or her claim or the gross proceeds of any sales by the liquidator in carrying on the business of the ~~insolvent~~ debtor, or any part thereof, in terms of section ~~62~~ **67(3)(d)** 5 per cent
2. On the gross proceeds of any other movable property sold by the liquidator or other gross amounts collected by the liquidator 10 per cent.

Provided that the total remuneration of a liquidator in terms of this tariff shall not be less than two thousand five hundred rand.

**REMUNERATION OF INTERIM LIQUIDATOR (SECTION 62)**

A reasonable remuneration to be determined by the Master, not to exceed the rate of remuneration of a liquidator under this tariff.

[Schedule 2, Tariff B]

**TARIFF C**

**MASTER'S FEES OF OFFICE (SECTION 83(1)(b))**

1. On all insolvent estates under final liquidation in which the total gross value of the assets according to the liquidator's account for each complete R5 000

..... R25  
subject to a minimum fee of R500 and a maximum fee of R25 000.

2. (a) For a copy of or an extract from any document preserved in the office of a Master, when made in such office (including the certification of such copy or extract), a fee of R4,50 shall be paid.

(b) For the certification of such copy or extract not made in such office a fee of R9,00 shall be paid.

3. On any amount paid by the liquidator into the Guardians' Fund for account of creditors, a commission of five per cent shall be payable, to be deducted by the Master from the moneys so paid into the Guardians' Fund.

4. (a) The fees referred to in item 1 shall be assessed by the Master and shall be payable on or before a date determined by the Master to any receiver of revenue. Proof of such payment shall be submitted by the liquidator to the Master.

(b) The payment of the fees referred to in item 2 shall be denoted-  
(i) by affixing adhesive revenue stamps to; or  
(ii) by impressing stamps by means of a franking machine approved by the Commissioner for Inland Revenue

on, the written request for the rendering by the Master of the service in question.

[Schedule 3]

**SCHEDULE 3**  
**PROVISIONS OF LAWS AMENDED OR REPEALED**

[            ]            **Words in bold type in square brackets indicate omissions from existing enactments.**

\_\_\_\_\_            **Words underlined with solid line indicate insertions in existing enactments.**

| No and year of law | Short title                   | Extent of amendment or repeal   |
|--------------------|-------------------------------|---|
| Act No. 32 of 1944 | Magistrates' Courts Act, 1944 | <p>1. The amendment of section 65A by the addition of the following subsection:</p> <p style="padding-left: 40px;">“(5) If it appears to the court during proceedings in terms of subsection (1) that there are reasonable grounds for suspecting that any person has committed an offence, the court shall transmit the relevant information and certified copies of relevant documents to the <del>Commercial Crime Unit</del> <u>Provincial Commander of the Commercial Branch of the South African Police Service</u> in whose area of jurisdiction the proceedings was held or the offence is suspected of having been committed to enable the <del>Unit</del> <u>Branch</u> to determine whether criminal proceedings should be instituted in the matter.”.</p> <p>2. The amendment of section 74 by the substitution for paragraph (b) of subsection (1) of the following paragraph:</p> <p style="padding-left: 40px;">“(b) states that the total amount of all his <u>unsecured</u> debts does not exceed the amount determined by the Minister from time to time by notice in the <b>Gazette</b>.”.</p> <p>3. The amendment of section 74B by the addition of the following subsection:</p> |

| No and year of law | Short title                         | Extent of amendment or repeal   |
|--------------------|-------------------------------------|---|
|                    |                                     | <p>“(6) If it appears to the court during a hearing in terms of subsection (1) that there are reasonable grounds for suspecting that any person has committed an offence, the court shall transmit the relevant information and certified copies of relevant documents to the <del>Commercial Crime Unit</del> Provincial Commander of the Commercial Branch of the South African Police Service in whose area of jurisdiction the proceedings was held or the offence is suspected of having been committed to enable the <del>Unit</del> Branch to determine whether criminal proceedings should be instituted in the matter.”.</p> <p>4. Section 74X set out in Schedule 4 is hereby inserted after section 74W.</p> |
| Act No. 66 of 1965 | Administration of Estates Act, 1965 | <p>The amendment of section 88 by the substitution for subsection (1) of the following subsection:</p> <p>"(1) Subject to the provisions of sub-sections (2) and (3), interest calculated on a monthly basis at the rate per annum determined from time to time by the Minister of Finance, and compounded annually at the thirty-first day of March, shall be allowed on each rand of the principal of every sum of money received by the Master for account of any minor, lunatic, unborn heir or any person having an interest therein of a usufructuary, fiduciary or fideicommissary nature, or for an insolvent in terms of section 93 of the Insolvency Act, 1997."</p>  |
| Act No. 68 of 1969 | Prescription Act, 1969              | <p>The amendment of section 13 by the substitution for paragraph (g) of subsection (1) of the following paragraph:</p> <p>“(g) the debt is the object of a claim <b>[filed]</b> against the estate of a debtor who is deceased <b><u>before the distribution in accordance with the final account in terms of the Administration of Estates Act, 1966 (Act No. 66 of 1965)</u></b>; or against the insolvent estate of the debtor or against</p>  |

## Annexure E

## Draft Insolvency and Business Recovery Bill

| No and year of law | Short title         | Extent of amendment or repeal   |
|--------------------|---------------------|---|
|                    |                     | a company in liquidation or against an applicant under the Agricultural Credit Act, 1966 (Act No. 28 of 1966) <b><u>before the conclusion of the first meeting; or.</u></b>   |
| Act No. 53 of 1979 | Attorneys Act, 1979 | The amendment of section 83 by the insertion after paragraph (g) of subsection (11) of the following paragraph:<br><b><u>“(h) a candidate for appointment as liquidator or judicial manager who informs a creditor of an insolvent estate or of a company of the liquidation of the insolvent estate or the judicial management or liquidation of the company and indicates that he or she is available for such appointment.”.</u></b> |

## Annexure E

## Draft Insolvency and Business Recovery Bill

| No and year of law | Short title         | Extent of amendment or repeal   |
|--------------------|---------------------|---|
| Act No. 61 of 1973 | Companies Act, 1973 | <p>1. The amendment of section 311 by the substitution thereof of the following section:</p> <p><b>“311. [Compromise and a]Arrangement between a company[,] and its members [and creditors]. - (1)Where any [compromise or] arrangement is proposed between a [company and its creditors or any class of them or between a] company and its members or any class of them, the Court may, on the application of the company or any [creditor or] member of the company [or, in the case of a company being wound up, of the liquidator, or if the company is subject to a judicial management order, of the judicial manager], order a meeting of the [creditors or class of creditors, or of the] members of the company or class of members [(as the case may be),] to be summoned in such manner as the Court may direct.</b></p> <p>(2) If the [compromise or] arrangement is agreed to by [-</p> <p><b>(a) a majority in number representing three-fourths in value of the creditors or class of creditors; or</b></p> <p><b>(b)] a majority representing three-fourths of the votes exercisable by the members or class of members, [(as the case may be)] present and voting either in person or by proxy at the meeting, such [compromise or] arrangement shall, if sanctioned by the court, be binding on [all the creditors or the class of creditors, or on] the members or class of members [(as the case may be)] and also on the company [or on the liquidator if the company is being liquidated or on the judicial manager administrator if the company is subject to a judicial management order].</b></p> <p>(3) No such [compromise or] arrangement shall effect the liability of any person who is a surety for the company.</p> <p><b>[(4) If the [compromise or] arrangement is in respect of a company being liquidated and provides for the discharge of the liquidation order or for the dissolution of the company without liquidation, the liquidator of the company shall lodge with the Master a report in terms of section 41 and a report as to whether or not any director or officer or past director or officer of the company is or appears to be personally liable for damages or compensation to the company or for any debts or liabilities of the company under any provision of this Act, and the Master shall report thereon to the Court.]</b></p> |

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|  |  | <p>(5) The Court, in determining whether the [<b>compromise or</b>] arrangement should be sanctioned or not, shall have regard to the number of members or members of a class present or represented at the meeting referred to in subsection (2) voting in favour of the [<b>compromise or</b>] arrangement [<b>and to the report of the Master referred to in subsection (4)</b>].</p> <p>(6)(a) An order by the Court sanctioning [<b>a compromise or</b>] <b>an</b> arrangement shall have no effect until a certified copy thereof has been lodged with the Registrar under cover of the prescribed form and registered by him.</p> <p>(b) A copy of such order of court shall be annexed to every copy of the memorandum of the company issued after the date of the order.</p> <p>(7) If a company fails to comply with the provisions of subsection (6)(b), the company and every director and officer of the company who is a party to the failure, shall be guilty of an offence.</p> <p>(8) In this section “company” means any company incorporated in terms of the provisions of the Companies Act 61 of 1973, [<b>liable to be liquidated under this Act</b>] and the expression “arrangement” includes a reorganization of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both these methods.”</p> <p>2. The amendment of section 312 by the substitution thereof of the following section:</p> <p><b>“312. Information as to [compromises and] arrangements.</b></p> <p>- (1) Where a meeting of [<b>creditors or any class of creditors or of</b>] members or any class of members is summoned under section 311 for the purpose of agreeing to [<b>a compromise or</b>] <b>an</b> arrangement, there shall -</p> <p>(a) with every notice summoning the meeting which is sent to a [<b>creditor or</b>] member, be sent also a statement -</p> <p>(i) explaining the effect of the [<b>compromise or</b>] arrangement; and</p> <p>(ii) stating all relevant information material to the value of the shares and debentures concerned in any arrangement; and</p> |
|--|--|--|

|  |  |  |
|--|--|--|
|  |  | <p>(iii) in particular stating any material interests of the directors of the company, whether as directors or as members or as creditors of the company or otherwise, and the effect thereon of the <b>[compromise or]</b> arrangement, in so far as it is different from the effect on the like interests of other persons; and</p> <p>(b) in every notice summoning the meeting which is given by advertisement, be included either such a statement as aforesaid or a notification of the place at which and the manner in which <b>[creditors or]</b> members entitled to attend the meeting may obtain copies of such a statement.</p> <p>(2) Where the <b>[compromise or]</b> arrangement affects the rights of debenture-holders of the company, the said statement shall give the like explanation and statement as respects the trustee of any deed for securing the issue of the debentures as it is required to give as respects the company's directors.</p> <p>(3) Where a notice given by advertisement includes a notification that copies of the said statement can be obtained by <b>[creditors or]</b> members entitled to attend the meeting, every such <b>[creditor or]</b> member shall, on making application in the manner indicated by the notice, be furnished by the company free of charge with a copy of the statement.</p> <p>(4) Where a company makes default in complying with any requirement of this section, the company and every director or officer of the company who is a party to the default, shall be guilty of an offence, and for the purpose of this subsection any <b>[liquidator of the company and any]</b> trustee of a deed for securing the issue of debentures of the company shall be deemed to be an officer of the company: Provided that a person shall not be liable under this subsection if he shows that the default was due to the refusal of any other person, being a director or trustee for debenture-holders, to supply the necessary particulars as to his interests and that fact has been stated in the statement.</p> <p>(5) It shall be the duty of every director of a company and of every trustee for debenture-holders to give notice to the company of such matters relating to himself as may be necessary for the purposes of this section, and if he makes default in complying with such duty, he shall be guilty of an offence."</p> |
|--|--|--|



|  |  |   |
|--|--|---|
|  |  | <p>3. The amendment of section 313 by the substitution thereof of the following section:</p> <p><b>“313. Provisions facilitating reconstruction or amalgamation.</b> - (1) If an application is made to the Court under this section for the sanctioning of <b>[a compromise or an]</b> arrangement proposed between a company and any such persons as are referred to in this section, and it is shown to the Court that the <b>[compromise or]</b> arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as the “transferor company”) is to be transferred to another company (in this section referred to as the “transferee company”) the Court may, either by the order sanctioning the <b>[compromise or]</b> arrangement or by any subsequent order, make provision for all or any of the following matters:</p> <ul style="list-style-type: none"> <li>(a) The transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;</li> <li>(b) the allotment or appropriation by the transferee company of any shares, debentures or other like interests in that company which under the <b>[compromise or]</b> arrangement are to be allotted or appropriated by that company to or for any person;</li> <li>(c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;</li> <li>(d) the dissolution, without liquidation, of any transferor company;</li> <li>(e) the provision to be made for any persons who, within such time and in such manner as the Court may direct, dissent from the <b>[compromise or]</b> arrangement;</li> <li>(f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out:</li> </ul> <p>Provided that no order for the dissolution, without liquidation, of any transferor company shall be made under this subsection prior to the transfer in due form of all the property and liabilities of the said company.</p> |
|--|--|---|

|  |  |   |
|--|--|---|
|  |  | <p>(2) Where an order under this section provides for the transfer of property or liabilities, that property shall by virtue of the order vest in, subject to transfer in due form, and those liabilities shall become the liabilities of, the transferee company.</p> <p>(3) If an order is made under this section, every company in relation to which the order is made shall, within thirty days after the making of the order, cause a copy thereof to be lodged with the Registrar, under cover of the prescribed form, for registration, and if default is made in complying with this subsection, the company shall be guilty of an offence.</p> <p>(4) In this section the expression “property” includes property, rights and powers of every description, and the expression “liabilities” includes duties.</p> <p>(5) Notwithstanding the provisions of section 311(8) the expression “company” in this section does not include any company other than a company within the meaning of the Companies Act 61 of 1973.”</p> <p>4. The amendment of section 337 by the substitution of the definition of “<b>contributory</b>” of the following paragraph:<br/> “<b>contributory</b>’, in relation to a company limited by guarantee, means any person who has undertaken to contribute to the assets of the company in terms of section 52(3)(b) in the event of its being wound up [<b>and, in relation to any company which is unable to pay its debts and is being wound up by the court or by a creditors’ voluntary winding-up, includes ay person who is liable to contribute to the costs, charges and expenses of the winding-up of the company</b>].”</p> <p>5. The amendment of section 338 by the substitution of the following subsections:<br/> “(1) The provisions of this Act relating to the <b>voluntary</b> winding-up of a company <b>by its members</b>, shall not apply to any company if its winding-up was commenced before the commencement of this Act, and the winding-up of any such company shall be continued as if this Act had not been passed.</p> |
|--|--|---|

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|  |  | <p>(2) When a company having shares which are not fully paid up, is wound up <b><u>as a voluntary winding-up by members</u></b> under this Act, the provisions of the repealed Act in respect of such shares and the contributories in relation thereto shall continue to apply in respect of such a company, notwithstanding the repeal of that Act.”</p> <p>6. The repeal of section 339.</p> <p>7. The repeal of section 340.</p> <p>8. The amendment of section 341 by the substitution of the following subsection:<br/> “(1) Every transfer of shares of a company being wound up <b><u>as a voluntary winding-up by members</u></b>, or alteration in the status of its members effected after the commencement of the <b><u>voluntary</u></b> winding-up without the sanction of the liquidator, shall be void.<br/> <b>[(2) Every disposition of its property (including rights of action) by any company being wound up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders.]</b>”</p> <p>9. The amendment of section 342 by the substitution of the following subsection:<br/> “(1) In every <b><u>voluntary</u></b> winding-up of a company <b><u>by its members</u></b> the assets shall be applied in payment of the costs, charges and expenses incurred in the winding-up and, <b>[subject to the provisions of section 435(1)(b), the claims of creditors as nearly as possible as they would be applied in payment of the costs of sequestration and the claims of creditors under the law relating to insolvency and,]</b> unless the memorandum or articles otherwise provide, shall be distributed among the members according to their rights and interests in the company.<br/> <b>[(2) The provisions of the law relating to insolvency in respect of contributions by creditors towards any costs shall apply to every winding-up of a company.]</b>”</p> <p>10. The amendment of section 343 by the substitution of the following subsection:<br/> “(1) A company may be <b><u>only</u></b> be wound up <b><u>in terms of this Act voluntarily by members as provided for in section 349.</u></b></p> |
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|  |  | <p>(2) A voluntary winding-up of a company may be -</p> <p>(a) a creditors' voluntary winding-up; or</p> <p>(b) a members' voluntary winding-up.]"</p> <p>11. The repeal of section 344.</p> <p>12. The repeal of section 345.</p> <p>13. The repeal of section 346.</p> <p>14. The repeal of section 347.</p> <p>15. The repeal of section 348.</p> <p>16. The amendment of section 349 by the substitution of the following section:</p> <p><b>"349. Circumstances under which company may be wound up voluntarily by members.</b> - A company, not being an external company, may be wound up [voluntarily] <b>as a voluntary winding-up by members</b> if the company has by special resolution resolved that it be so wound up."</p> <p>17. The amendment of section 350 by the substitution of the following subsection:</p> <p>"(3) Unless otherwise provided, in a members' voluntary winding-up the liquidator may without the sanction of the Court exercise all powers [by this Act] given to the liquidator in a [winding-up] <b>liquidation</b> by the Court <b>in terms of the Insolvency and Business Recovery Act ?? of 20??</b>, subject to such directions as may be given by the company in general meeting."</p> <p>18. The repeal of section 351.</p> <p>19. The amendment of section 352 by the substitution of the following subsection:</p> <p>"(1) A voluntary winding-up of a company <b>by its members</b> shall commence at the time of the registration in terms of section 200 of the special resolution authorizing the winding-up."</p> |
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|  |  | <p>20. The amendment of section 353 by the substitution of the following subsections:</p> <p>“(1) A company which is being wound up <b>as a voluntary winding-up by members [voluntarily]</b> shall, notwithstanding anything contained in its articles, remain a corporate body and retain all its powers as such, but shall from the commencement of the winding-up cease to carry on its business except in so far as may be required for the beneficial winding-up thereof.</p> <p>(2) As from the commencement of a voluntary winding-up <b>by members</b> all the powers of the directors of the company concerned shall cease except in so far as their continuance is sanctioned[-</p> <p style="padding-left: 40px;">(a) <b>by the liquidator or the creditors in a creditors' voluntary winding-up; or</b></p> <p style="padding-left: 40px;">(b) <b>by the liquidator or the company in general meeting [in a members' voluntary winding-up].”</b></p> <p>21. The amendment of section 354 by the substitution of the following section:</p> <p><b>“354. Court may stay, convert or set aside winding-up. -</b></p> <p>(1) The Court may at any time after the commencement of a <b>voluntary</b> winding-up <b>by members</b>, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the <b>voluntary</b> winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of <b>[any] the</b> voluntary winding-up on such terms and conditions as the Court may deem fit.</p> <p><b><u>(1A) The Court may at any time after the commencement of a voluntary winding-up by members, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the voluntary winding-up by members ought to be converted to a liquidation by the Court in terms of the provisions of the Insolvency and Business Recovery Bill 00 of 20??, make an order converting the proceedings to a liquidation by the Court in terms of the said Act.</u></b></p> <p>(2) The Court may, as to all matters relating to <b>an application in terms of subsections (1) or (1A), [a winding-up,]</b> have regard to the wishes of the creditors or members as proved to it by any sufficient evidence.”</p> |
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|  |  | <p>22. The amendment of section 355 by the substitution of the following subsections:</p> <p>“(1) In any review by the Court of any matter under the <b>voluntary</b> winding-up of a company <b>by members</b> where the general body of <b>[creditors,]</b> members or contributories is affected, notice to the liquidator shall be notice to them.</p> <p>(2) The Court shall not authorise the re-opening of any duly confirmed account or plan of distribution or of contribution otherwise than as is provided <b>for in this Act [in section 408].</b>”</p> <p>23. The amendment of section 356 by the substitution of the following subsection:</p> <p>“(1) <b>[The Master shall upon receipt of a copy of any winding-up order of any company lodged with him give notice of such winding-up in the Gazette.</b></p> <p><b>(2)]</b> Any company which has passed a special resolution under section 349 for its voluntary winding-up, shall within 28 days after the registration of that resolution in terms of section 200[-</p> <p><b>(a)]</b> lodge with the Master a certified copy of the resolution concerned, together with[-</p> <p><b>(i) in the case of a members' voluntary winding-up if] a certified copy of</b> any further resolution nominating a person or persons for appointment as liquidator or liquidators of the company <b>[has been passed, a certified copy of that resolution; or</b></p> <p><b>(ii) in the case of a creditors' voluntary winding-up, two certified copies of the statement referred to in section 363 (1);] and</b></p> <p><b>[(b)]</b> give notice of the voluntary winding-up of the company in the <b>Gazette.</b></p> <p><b>(2) [(3)]</b> Any company which fails to comply with any provision of subsection <b>[(2)] (1)</b> and every director or officer thereof who knowingly authorised or permitted such failure, shall be guilty of an offence.”</p> |
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|  |  | <p>24. The amendment of section 357 by the substitution of the following subsections:</p> <p>“(1) A copy of every <b><u>special resolution for the voluntary winding-up by members of any company passed under section 349, and of every order of court amending or setting aside the proceedings in relation to the winding-up, shall, within fourteen days after the registration of the resolution in terms of section 200 or the making of the order, be transmitted by that company [winding-up order, whether provisional or final and of any order staying, amending or setting such order aside, made by the Court, shall forthwith be transmitted by the Registrar of the Court]</u></b> to-</p> <p>(a) the sheriff of the province in which the registered office of the company or main office of the body corporate is situate and to the sheriff of every province in which it appears that the company or such body corporate owns property;</p> <p>(b) every registrar or other officer charged with the maintenance of any register under any Act in respect of any property within the Republic which appears to be an asset of such company;</p> <p>(c) the messenger of every magistrate's court by the order whereof it appears that property of such company is under attachment.</p> <p>(2) Where the assets of any such company are under four hundred rand in value, the Court may direct that its movable assets may, upon such terms as to security as it may determine, remain in the custody of such person as may be specified in the directions, and in that event it shall not be necessary to transmit a copy of any order to any sheriff or messenger.</p> <p><b>[(3) A copy of every special resolution for the voluntary winding-up of any company passed under section 349 and of every order of court amending or setting aside the proceedings in relation to the winding-up shall, within fourteen days after the registration of the resolution in terms of section 200 or the making of the order, be transmitted by that company to the officers and registrars referred to in paragraphs (a), (b) and (c) of subsection (1).]</b></p> |
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|  |  | <p>(4)(a) Any officer and registrar to whom a copy of any such order or resolution is transmitted in terms of subsection (1) <b>[or (3)]</b> shall record such copy and note thereon the day and hour of receipt thereof.</p> <p>(b) Any registrar and officer referred to in paragraph (b) of subsection (1) shall upon receipt of a copy of any order or resolution referred to in subsection (1) <b>[or (3)]</b>, enter a caveat in his register accordingly.</p> <p>(5) Any company which fails to comply with any of the requirements of subsection <b>[(3)] (1)</b> and every director or officer of such a company who knowingly is a party to such failure, shall be guilty of an offence.”</p> <p>25. The repeal of section 358.</p> <p>26. The amendment of section 359 by the substitution of the following subsections:</p> <p>“(1) When <b>[the Court has made an order for the winding-up of a company or]</b> a special resolution for the voluntary winding-up of a company <b>by its members</b> has been registered in terms of section 200-</p> <p>(a) All civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator; and</p> <p>(b) any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void.</p> <p>(2)(a) Every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.</p> <p>(b) If notice is not so given the proceedings shall be considered to be abandoned unless the Court otherwise directs.”</p> |
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|  |  | <p>27. The repeal of section 360.</p> <p>28. The amendment of section 361 by the substitution of the following subsections:</p> <p>“(1) <b>In any winding-up by the Court all the property of the company concerned shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office.]</b></p> <p>(2) In any <b>voluntary</b> winding-up of [any] a company <b>by its members</b>, at all times while the office of the liquidator is vacant or he is unable to perform his duties, the property of the company shall be deemed to be in the custody and under the control of the Master.</p> <p>(3) If for any reason it appears expedient, the Court may <b>[by the winding-up order or by any subsequent order]</b> direct that all or any part of the property, immovable and movable (including rights of action), belonging to the company, or to trustees on its behalf, shall vest in the liquidator in his official capacity, and thereupon the property or the part thereof specified in the order shall vest accordingly, and the liquidator may, after giving such indemnity (if any) as the Court may direct, bring or defend in his official capacity any action or other legal proceedings relating to that property, or necessary to be brought or defended for the purpose of effectually winding-up the company and recovering its property.”</p> <p>29. The amendment of section 362 by the substitution of the following subsections:</p> <p>“(1) The Court may at any time after <b>[making a winding-up order or after]</b> a special resolution for the voluntary winding-up of a company <b>by its members</b> has been registered in terms of section 200, order any director, member, trustee, banker, agent or officer of the company concerned to pay, deliver, convey, surrender or transfer to the liquidator of the company forthwith, or within such time as the Court directs, any money, property or books and papers in his hands to which the company is <i>prima facie</i> entitled.</p> |
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|  |  | <p>(2) The Court may order any director, member, purchaser or other person from whom money is due to any company which is being wound up <u>as a voluntary winding-up by members</u>, to pay the same into a banking institution registered under the Banks Act, <u>[1965 (Act 23 of 1965)] 1990 (Act 94 of 1990)</u>, to be named by the Court for the account of the liquidator instead of to the liquidator, and such order may be enforced in the same manner as if it had ordered payment to the liquidator.</p> <p>(3) All moneys paid into a banking institution as aforesaid in the event of a winding-up by the Court shall be subject in all respects to the orders of the Court.”</p> <p>30. The repeal of section 363.</p> <p>31. The repeal of section 363A.</p> <p>32. The repeal of section 364.</p> <p>33. The repeal of section 365.</p> <p>34. The repeal of section 366.</p> <p>35. The amendment of section 367 by the substitution of the following subsections:</p> <p>“<u>(1) For the purpose of conducting the proceedings in [a] the voluntary winding-up of a company by its members</u>, the Master shall appoint a liquidator or liquidators as <u>[hereinafter] provided for in sections 37 or 68 of the Insolvency and Business Recovery Act 00 of 20??</u>.</p> <p><u>(2) The Master shall, subject to the provisions of section 70 of the Insolvency and Business Recovery Act 00 of 20??, appoint the person or persons nominated by the company in the resolution referred to in section 356(1) as liquidator or liquidators of the company concerned.</u></p> <p><u>(3) The provisions of sections 37, 68, 69, 70, 71, 72, 73, 74, 75 and 76 of the Insolvency and Business Recovery Act 00 of 20??, shall apply mutatis mutandis to the liquidator or liquidators appointed in terms of this section.</u>”</p> <p>36. The repeal of section 368.</p> <p>37. The repeal of section 369.</p> <p>38. The repeal of section 370.</p> <p>39. The repeal of section 371.</p> |
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|  |  | <p>40. The repeal of section 372.</p> <p>41. The repeal of section 373.</p> <p>42. The repeal of section 374.</p> <p>43. The repeal of section 375.</p> <p>44. The repeal of section 376.</p> <p>45. The repeal of section 377.</p> <p>46. The repeal of section 378.</p> <p>47. The repeal of section 379.</p> <p>48. The repeal of section 380.</p> <p>49. The repeal of section 381.</p> <p>50. The repeal of section 382.</p> <p>51. The repeal of section 383.</p> <p>52. The amendment of section 384 by the substitution of the following subsections:</p> <p>“(1) In any <b>voluntary</b> winding-up <b>of a company by its members</b>, a liquidator shall be entitled to <b>[a reasonable remuneration for his services to be taxed by the Master in accordance with the prescribed tariff of remuneration] the same remuneration as a liquidator in terms of section 44 of the Insolvency and Business Recovery Act 00 of 20??</b>;</p> <p>Provided that[, in the case of a members' voluntary winding-up,] the liquidator's remuneration may be determined by the company in general meeting.</p> <p>(2) <b><u>The provisions of section 44 of the Insolvency and Business Recovery Act 00 of 20??, shall <i>mutatis mutandis</i> be applicable in the determination of the liquidator's remuneration in terms of this section</u></b> [The Master may reduce or increase such remuneration if in his opinion there is good cause for doing so, and may disallow such remuneration either wholly or in part on account of any failure or delay by the liquidator in the discharge of his duties.</p> |
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|  |  | <p>(3) No person who employs or is a fellow employee or in the ordinary employment of the liquidator, shall be entitled to receive any remuneration out of the assets of the company concerned for services rendered in the winding-up thereof and no liquidator shall be entitled either by himself or his partner to receive out of the assets of the company any remuneration for his services except the remuneration to which he is entitled under this Act.”</p> <p>53. The repeal of section 386 and the substitution thereof of the following subsection:<br/>“(1) <u>The liquidator in any voluntary winding-up by members shall <i>mutatis mutandis</i> have the same powers as a liquidator in terms of section 45 of the Insolvency and Business Recovery Act 00 of 20??, and which has been appointed in terms of that Act.</u>”</p> <p>54. The repeal of section 387.</p> <p>55. The amendment of section 388 by the substitution of subsection (1) of the following subsection:<br/>“(1) Where a company is being wound up <u>as a voluntary winding-up by members, [voluntarily,]</u> the liquidator or any member <u>[or creditor or contributory]</u> of the company may apply to the Court to determine any question arising in the winding-up or to exercise any of the powers which the Court might exercise if the company were being <u>liquidated in terms of the provisions of the Insolvency and Business Recovery Act 00 of 20??</u> [wound up by the Court].”</p> |
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|  |  | <p>56. The amendment of section 390 by the substitution of the following subsections:</p> <p>“(1) Where a company is proposed to be or is being wound up voluntarily <b>as a voluntary liquidation by members</b>, and the whole or part of its business or property is proposed to be transferred or sold to another company, whether registered under this Act or not (in this section called the transferee company), the liquidator of the first-mentioned company (in this section called the transferor company) may, with the sanction of a special resolution of that company, conferring either a general authority on the liquidator or an authority in respect of any particular arrangement, receive in compensation or part compensation for the transfer or sale, shares, policies or other like interests in the transferee company, for distribution among the members of the transferor company, or may enter into any other arrangement, whereby the members of the transferor company may, in lieu of receiving cash, shares, policies or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the transferee company[<b> Provided that, in the case of a creditors' voluntary winding-up, the powers of the liquidator conferred by this section shall not be exercised save with the consent of three-fourths in number and value of the creditors present or represented at a meeting called by him for that purpose and of which not less than fourteen days' notice has been given, or with the sanction of the Court</b>].</p> <p>(5) A special resolution shall not be invalid for the purposes of this section by reason that it is passed before or concurrently with a resolution for <b>the voluntary</b> winding-up <b>of</b> the company <b>by its members</b> or for nominating liquidators, but if an order is made within a year of such resolution for winding-up the company by the Court, the special resolution shall not be valid unless sanctioned by the Court.”</p> <p>57. The repeal of section 391.<br/> 58. The repeal of section 392<br/> 59. The repeal of section 393.</p> |
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|  |  | <p>60. The repeal of section 394 and the substitution thereof of the following section:<br/> <b><u>“394. Banking accounts and investments. - The provisions of sections 89, 90 and 91 of the Insolvency and Business Recovery Act 00 of 20?? shall <i>mutatis mutandis</i> be applicable to the liquidator of a company which is being wound up as a voluntary winding-up by members.”</u></b></p> <p>61. The repeal of section 395.<br/>         62. The repeal of section 396.<br/>         63. The repeal of section 397.<br/>         64. The repeal of section 398.<br/>         65. The repeal of section 399.<br/>         66. The repeal of section 400.<br/>         67. The repeal of section 401.<br/>         68. The repeal of section 402.</p> <p>69. The repeal of section 403 and the substitution thereof of the following section:<br/> <b><u>“403. Liquidator’s duty to file liquidation and distribution account. - The liquidator of a company which is being wound up as a voluntary winding-up by members as provided for in this Act, shall have the same obligation to lodge liquidation and distribution accounts as provided for in section 92 of the Insolvency and Business Recovery Act 00 of 20??, and the provisions of sections 93, 94, 95. 96, 97 and 98 of the Insolvency and Business Recovery Act 00 of 20??, shall <i>mutatis mutandis</i> be applicable to such an account or accounts.”</u></b></p> <p>70. The repeal of section 404.<br/>         71. The repeal of section 405.<br/>         72. The repeal of section 406.<br/>         73. The repeal of section 407.<br/>         74. The repeal of section 408.<br/>         75. The repeal of section 409.</p> |
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|  |  | <p>76. The repeal of section 410.</p> <p>77. The repeal of section 411.</p> <p>78. The repeal of section 412.</p> <p>79. The repeal of section 413.</p> <p>80. The repeal of section 414.</p> <p>81. The repeal of section 415.</p> <p>82. The repeal of section 416.</p> <p>83. The repeal of section 417.</p> <p>84. The repeal of section 418.</p> <p>85. The repeal of section 419 and the substitution thereof of the following section:<br/> <b>“419. Dissolution of companies and other bodies corporate. - <u>The provisions of section 108 of the Insolvency and Business Recovery Act 00 of 20??, shall mutatis mutandis be applicable to a company being wound up as a voluntary winding-up by members.</u>”</b></p> <p>86. The repeal of section 420 and the substitution thereof of the following section:<br/> <b>“420. Court may declare dissolution void. - <u>The provisions of section 109 of the Insolvency and Business Recovery Act 00 of 20??, shall mutatis mutandis be applicable to a company being wound up as a voluntary winding-up by members.</u>”</b></p> <p>87. The repeal of section 421.</p> <p>88. The amendment of section 422 by the substitution of subsection (1) of the following subsection:<br/> <b>“422. Disposal of records of dissolved company. - (1)</b><br/> When any company has been wound up <b><u>as a voluntary winding-up by members</u></b>, and is about to be dissolved, the books and papers of the company and of the liquidator may be disposed of[-<br/> <p style="padding-left: 40px;"><b>(a) in the case of a winding-up by the Court, in such way as the Master may direct;</b></p> </p> |
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|  |  | <p>(b) <b>in the case of a members' voluntary winding-up,]</b> in such way as the company by special resolution may direct[;</p> <p>(c) <b>in the case of a creditors' voluntary winding-up, in such way as the creditors may direct]."</b></p> <p>89. The repeal of section 423 and the substitution thereof of the following section:</p> <p><b><u>"423. Delinquent directors and others to restore property and to compensate the company. -(1) The provisions of section 112 of the Insolvency and Business Recovery Act 00 of 20??, shall <i>mutatis mutandis</i> be applicable to a company being wound up as a voluntary winding-up by members."</u></b></p> <p>90. The amendment of section 424 by the substitution of subsection (1) of the following subsection:</p> <p><b><u>"(1) When it appears[, whether it be in a winding-up, judicial management or otherwise,]</u> that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of [<b>the Master, the liquidator, the judicial manager,</b>] any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct."</b></p> <p>91. The repeal of section 425.</p> <p>92. The amendment of section 426 by the substitution thereof of the following section:</p> <p><b><u>"426. Private prosecution of directors and others. - (1) The provisions of section 113 of the Insolvency and Business Recovery Act 00 of 20??, shall <i>mutatis mutandis</i> be applicable to a company which is being wound up as a voluntary winding-up by members."</u></b></p> <p>93. The repeal of Chapter XV (Judicial Management).</p> |
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| <p>Act No. 69 of 1984</p> | <p>Close Corporations Act, 1984</p> | <p>1. The amendment of section 64 by the substitution of subsection (1) of the following subsection:</p> <p>“(1) If it at any time appears that any business of a corporation was or is being carried on recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose, a Court may on the application of <b>[the Master, or]</b> any creditor<del>[,]</del><b> or member [or liquidator]</b> of the corporation, declare that any person who was knowingly a party to the carrying on of the business in any such manner, shall be personally liable for all or any of such debts or other liabilities of the corporation as the Court may direct, and the Court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing that liability.”</p> <p>2. The amendment of section 66 by the substitution of subsections (1) and (2) of the following subsections:</p> <p>“(1) The provisions of the Companies Act which relate to the <b>voluntary</b> winding-up of a company <b>by its members</b>, including the regulations made thereunder, (except sections 337, 338, <b>[344, 345, 346(2), 347(3),]</b> 349, <b>[364, 365(2),]</b> 367 <b>[to 370, inclusive]</b>, <b>[377, 387,]</b> 389, 390, <b>[395 to 399, inclusive, 400(1)(b), 401, 402, 417, 418,]</b> 419(4), <b>[421,]</b> 423 and 424), shall apply <i>mutatis mutandis</i> and in so far as they can be applied to the <b>voluntary</b> liquidation of a corporation <b>being wound up as a voluntary winding-up by its members</b> in respect of any matter not specifically provided for in this Part or in any other provision of this Act.</p> <p>(2) For the purposes of subsection (1) -</p> <p>(a) any reference in a relevant provision of the Companies Act, and in any provision of the <b>[Insolvency Act, 1936 (Act No. 24 of 1936)] <u>Insolvency and Business Recovery Act, 20?? (Act No. 00 of 20??)</u></b>, made applicable by any such provision -“</p> <p>3. The amendment of section 67 by the substitution of subsection (1) of the following subsection:</p> <p>“(1) A corporation may be wound up voluntarily if all its members so resolve at a meeting of members called for the purpose of considering the <b>voluntary</b> winding-up of the corporation, and sign a written resolution that the corporation be wound up voluntarily by members <b>[or creditors, as the case may be]</b>.”</p> <p>4. The repeal of section 68.</p> |
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|  |  | <p>5. The repeal of section 69.</p> <p>6. The repeal of section 70.</p> <p>7. The repeal of section 71.</p> <p>8. The repeal of section 72.</p> <p>9. The amendment of section 73 by the substitution of subsection (1) of the following subsection:</p> <p style="padding-left: 40px;">“(1) Where in the course of the <b>voluntary</b> winding-up of a corporation <b>by its members</b> it appears that any person who has taken part in the formation of the corporation, or any former or present member, officer or accounting officer of the corporation has misapplied or retained or become liable or accountable for any money or property of the corporation, or has been guilty of any breach of trust in relation to the corporation, a Court may, on the application of <b>[the Master or of the liquidator or of]</b> any creditor or member of the corporation, inquire into the conduct of such person, member, officer or accounting officer and may order him to repay or restore the money or property, or any part thereof, with interest at such rate as the Court considers just, or to contribute such sum to the assets of the corporation by way of compensation or damages in respect of the misapplication, retention or breach of trust, as the Court considers just.”</p> <p>10. The repeal of section 74 and the substitution thereof of the following section:</p> <p style="padding-left: 40px;"><b>“74. Appointment of liquidator. - (1) <u>The provisions of sections 37 and 68 to 76, inclusive, of the Insolvency and Business Recovery Act 00 of 20??, shall apply mutatis mutandis to the appointment of a liquidator in the case of a corporation being wound up as a voluntary winding-up by members; Provided that the Master shall take into consideration any resolution or further resolution passed at a meeting of members nominating a person as liquidator.</u>”</b></p> <p>11. The repeal of section 75.</p> <p>12. The repeal of section 76.</p> <p>13. The repeal of section 77.</p> <p>14. The repeal of section 78.</p> |
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|  |  | 15. The repeal of section 79.<br>16. The repeal of section 80.<br>17. The repeal of section 81. |
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**SCHEDULE 4**

**STATEMENT IN RESPECT OF PROPOSED PRE-LIQUIDATION COMPOSITION**

**(SECTION 118)**

**PART A**

**PERSONAL PARTICULARS OF DEBTOR**

Full names and surname . . . . .  
. . . . .

Address . . . . .

(Documents in connection with the composition may be delivered to the debtor at this address until such time as he or she has notified the magistrate of a change of address)

Date of birth . . . . .

Identity number, if one has been assigned . . . . .

Marital status . . . . .

If married, state—

full names of spouse (“spouse” means a spouse in the legal sense, and even if there is such a spouse, also a spouse according to any law or custom or a person of any sex living with another as a spouse) . . . . .  
. . . . .

date of birth of spouse . . . . .

identity number of spouse, if one has been assigned . . . . .

whether the debtor is or was married in or without community of property and whether the accrual system applies  
. . . . .

date of marriage . . . . .

whether the matrimonial property system has changed since entering into the marriage and, if so, the nature of the change . . . . .  
. . . . .

Whether the debtor’s estate has been placed under administration during the last five years or whether it is under administration at present and, if so, the date of the administration order and whether it has been concluded . . . . .  
. . . . .

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Whether the debtor has during the last six months lodged a composition with a magistrate for submission to creditors .....

Whether the debtor's estate has been liquidated during the last ten years and, if so, the date of liquidation and the Division of the High Court that issued the liquidation order .....

.....

**PART B**

**APPLICABLE STATUTORY PROVISIONS**

The debtor declares that he or she is aware of the following statutory provisions in connection with his or her application:

If the composition provides for the payment of a cash amount for distribution among creditors, the amount shall, pending the outcome of the offer of composition, be invested with an attorney or someone else whom the court approves in an interest-bearing savings account in trust. The debtor shall offer proof that the cash amount has been invested in this manner.

If a debtor incurs debt during the period from lodging the composition with the magistrate until creditors have voted on the composition, he or she shall notify the creditor who offers him or her credit of the pending composition and at the first appearance before a magistrate in connection with the composition, he or she shall provide full particulars concerning the said debt incurred by him or her. During the said period or after a composition has been accepted, a debtor shall not alienate, encumber or voluntarily dispose of any property which shall be made available to creditors in terms of the composition or do anything which can impede compliance with the composition. A debtor who contravenes these provisions shall be guilty of an offence.

If the composition provides for payments by the debtor in determined instalments or otherwise, the acceptance of the composition has the effect of a judgment in terms of section 65 of the Magistrates' Courts Act 32 of 1944 in respect of the payments. Any person who in terms of the composition shall receive the payments on behalf of creditors, or if there is no such person, any creditor who is in terms of the composition entitled to a benefit out of the payments, shall have the rights which a judgment creditor would have in terms of the section.

The magistrate may revoke the composition for cogent reasons. "Cogent reason" shall include the following:

1. If the debtor does not comply with his or her obligations in terms of the composition;  
or

2. If the debtor renders false information in his or her statement or in the course of the questioning; or
3. If the debtor gives a benefit in respect of a claim which falls under the composition to a creditor on whom the composition is binding and who is not entitled to the benefit in terms of the composition.

**PART C**

**INCOME AND EXPENDITURE**

The name and business address of the debtor's employer or, if the debtor is not employed, the reason why he or she is not employed

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The debtor's trade or vocation and his or her gross weekly or monthly income as well as the income of his or her spouse living in with him or her, and particulars of all deductions therefrom by way of debit order or otherwise, supported as far as possible by written statements by the employer of the debtor or his or her spouse

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.....  
.....

A detailed list of the debtor's weekly or monthly necessary expenses and the expenses of persons who are dependent on him or her, including the travelling expenses of the debtor or his or her spouse to and from work and such expenses of his or her children to and from school, and expenses required to retain assets that are subject to the composition

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The number and ages of persons who are dependent on the debtor or his or her spouse and their relationship to the debtor or his or her spouse

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**PART D**

**ASSETS**

**(i) Assets not subject to the composition**

| <u>Description of asset</u> | <u>Value</u> | <u>Subject to secured claim?</u><br><u>(Bond, property tax, pledge,</u><br><u>cession, hire-purchase,</u><br><u>instalment contract, etc)</u> |
|-----------------------------|--------------|---|
| .....                       |              |   |
| .....                       |              |   |
| .....                       |              |   |
| .....                       |              |   |
| .....                       |              |   |
| .....                       |              |   |
| .....                       |              |   |
| .....                       |              |   |
| .....                       |              |   |
| .....                       |              |   |

**(ii) Assets subject to the composition**

| <u>Description of asset</u> | <u>Value</u> | <u>Subject to secured claim?</u><br><u>(Bond, property tax, pledge,</u><br><u>cession, hire-purchase,</u><br><u>instalment contract, etc)</u> |
|-----------------------------|--------------|---|
| .....                       |              |   |
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The debtor affirms that assets which are subject to the composition are in safe custody, that obligations in respect of the assets are included in “necessary expenses” in Part C above, and that such obligations will be fulfilled until conclusion of the composition.

**PART E**

**DEBTS**

**(i) Debts not subject to security**

| <u>Name and address of debtor</u> | <u>Amount</u> | <u>Give particulars if the debt is not immediately claimable</u> |
|-----------------------------------|---------------|--|
| .....                             |               |  |
| .....                             |               |  |
| .....                             |               |  |
| .....                             |               |  |
| .....                             |               |  |
| .....                             |               |  |

**(ii) Debts subject to security**

| <u>Name and address of debtor</u> | <u>Amount</u> | <u>Nature of security and identification of asset subject to security (Part D above)</u><br><u>Give particulars if the debt is not immediately claimable</u> |
|-----------------------------------|---------------|--|
| .....                             |               |  |
| .....                             |               |  |
| .....                             |               |  |
| .....                             |               |  |
| .....                             |               |  |
| .....                             |               |  |

**Annexure E**

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Name and address of any other person who is apart from the debtor liable for any of the abovementioned debts

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**AFFIDAVIT/SOLEMN DECLARATION**

I,.....declare under oath/solemnly and sincerely declare\* that to the best of my knowledge and belief the statements contained in this form are true and complete, and that every estimated amount therein contained is fairly and correctly estimated.

.....

Signature of declarant

Sworn/solemnly declared before me on the .....day of.....at.....

.....

Commissioner of Oaths

.....

Full names

.....

Business address

.....

Designation and area of office

\* Delete which is not applicable.

[New provision]