

**A COMPARATIVE STUDY OF THE EFFECTS OF LIQUIDATION  
OR BUSINESS RESCUE PROCEEDINGS ON THE RIGHTS OF  
THE EMPLOYEES OF A COMPANY**

by

**ENGELA PETRONELLA JOUBERT**

submitted in accordance with the requirements  
for the degree of

**DOCTOR OF LAWS**

at the

**UNIVERSITY OF SOUTH AFRICA**

**SUPERVISOR: PROF A LOUBSER**

**JULY 2018**

# DECLARATION

Engela Petronella Joubert

36626112

LLD (Doctor of Laws)

A COMPARATIVE STUDY OF THE EFFECTS OF LIQUIDATION OR BUSINESS RESCUE PROCEEDINGS ON THE RIGHTS OF THE EMPLOYEES OF A COMPANY.

I declare that the above thesis is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

\_\_\_\_\_  
SIGNATURE

\_\_\_\_\_  
DATE

*Aan Marie en Harry,  
Julle fondasie het gesorg dat ek hiertoe in staat was, dankie!*

## **SUMMARY**

Whenever legal disciplines overlap interesting scenarios occur and differences in opinions create intellectual tension. One such interesting scenario occurs when employees' rights are affected during a company's liquidation or business rescue. The employees of a company are normally the last persons to find out that a company is struggling financially. They are also the only stakeholders who are in no position to negotiate their risk should the company be liquidated. It is therefore necessary to evaluate the rights given to employees during a company's liquidation and business rescue. The fundamental ideologies of company law, insolvency law and labour law are challenged and examined to attempt a harmonizing result that respects the core of each discipline. It is crucial to determine whether an appropriate balance is struck between the interests of all the stakeholders of the company during these procedures.

The aim of this thesis is to evaluate whether South Africa manages to strike this balance. If employee rights are protected whilst a company is restructured back to solvency and success, this balance will be struck. An evaluation will also be made whether employees are always better protected during business rescue than in liquidation.

The study analyses employee rights in a company's liquidation and during a company's restructuring process. The comparative study of employee rights in liquidation and rescue is done with the jurisdictions of Australia and England – countries with similar procedures.

Important conclusions show that South Africa protects employee rights during business rescue procedures the best. An appropriate balance is indeed struck between the interests of all stakeholders of a company during business rescue procedures and employees are most of the time better off after a restructuring than in a liquidation. Should the recommendations for law reform be implemented in our legislation, South Africa will overcome the few obstacles currently in its way to be seen as a world leader where employee rights are concerned in liquidation proceedings as well as business rescue.

## **KEY TERMS**

Business rescue; Employees; Employee rights; Liquidation; Voluntary administration; Administration; Company; Employment contract; Ranking of claims; Reorganisation.

## ACKNOWLEDGEMENTS

This thesis would not have been possible without the support, love and encouragement of many people. I would like to thank the following people for the role they played on this journey:

**Professor Anneli Loubser**, my supervisor. Thank you for believing in me and supporting me throughout the project. Thank you for supporting my ideas and joining in the hard work to make this project a success. It was a privilege to have had you by my side.

**Professor Chris Nagel**, a dear colleague, friend and excellent editor. Thank you, Prof, for being by my side and for all your hard work and support. It is an honour to thank you.

**Etienne**, thank you for believing in me and supporting me every day. Your sacrifices did not go unnoticed. Thank you for doing everything you could to make the long hours bearable.

**Mia, Marli and Mieke**, thanks so much for all the breakfasts, cups of coffee and love you showered me with. Your understanding and support contributed to me completing my degree. I will always treasure “We believe in you” in my heart.

My parents in law, **Marlene and David**, thank you for your support and help and for believing in me.

My friends, family and colleagues, for the messages of encouragement and support, I really appreciate it.

**Liana Viljoen** at the OR Tambo Law Library, your help and friendly assistance made every part of the research an enjoyable journey.

**Professor Juanitta Calitz, Dr Jenny Gant and Professor Jason Harris**, thank you for your assistance in finding sources. I appreciate it.

July 2018

# TABLE OF CONTENTS

<b>DECLARATION</b> .....	<b>ii</b>
<b>SUMMARY</b> .....	<b>iv</b>
<b>ACKNOWLEDGEMENTS</b> .....	<b>v</b>
<b>TABLE OF CONTENTS</b> .....	<b>vi</b>
<b>CHAPTER 1 INTRODUCTION</b> .....	<b>1</b>
1 THE NEED TO PROTECT EMPLOYEE RIGHTS IN INSOLVENCY PROCEEDINGS .....	1
2 EMPLOYEES AS STAKEHOLDERS IN THE COMPANY .....	3
2.1 Introduction .....	3
2.2 Meaning of “stakeholder” .....	5
3 ROLE OF THE CONSTITUTION.....	8
4 ROLE OF LABOUR LAW IN INSOLVENCY AND RESCUE .....	9
5 ROLE OF COMPANY LAW AND THE INFLUENCE OF THE KING REPORTS ON MODERN COMPANY LAW IN SOUTH AFRICA .....	11
6 POSITION OF EMPLOYEES IN INSOLVENCY LAW .....	16
7 IS A THREE-WAY HARMONISATION POSSIBLE? .....	17
8 INTERNATIONAL TRENDS.....	19
9 METHODOLOGY.....	19
10 RESEARCH QUESTIONS .....	21
11 ABBREVIATIONS AND REFERENCES .....	24
<b>CHAPTER 2 SOUTH AFRICA</b> .....	<b>26</b>
1 INTRODUCTION .....	26
2. EMPLOYEE RIGHTS IN LIQUIDATION.....	30
2.1 Employee’s right to commence liquidation.....	31
2.2 Employee’s right to be notified and informed of liquidation.....	32
2.3 Effect of liquidation on employment contract of employees.....	36
2.4 Employee’s right to participate in consultations during liquidation .....	40
2.5 Employee’s right to be present at meetings and to vote during liquidation .....	41
2.6 Ranking of employee claims during liquidation .....	42
2.6.1 Employee’s claim for the suspension of the employment contract.....	43
2.6.2 Ranking of employee claims during liquidation .....	43
2.7 Evaluation of employee rights in liquidation .....	46
3. EMPLOYEE RIGHTS IN BUSINESS RESCUE .....	47
3.1 Employee’s right to commence business rescue .....	54
3.1.1 Section 131(1) right to commence proceedings .....	54
3.1.2 Evaluation of right to commence proceedings .....	57
3.2 Employee’s right to be notified and informed of business rescue .....	59
3.2.1 Voluntary rescue procedure.....	59
3.2.2 Compulsory rescue procedure.....	61

3.2.3	Miscellaneous aspects regarding notice and information .....	62
3.3	Employee's right to participate in consultations during business rescue .....	65
3.4	Role of employees and their rights in respect of business rescue plan.....	67
3.5	Employee's right to be present at meetings and vote during business rescue.....	69
3.6	Effect of business rescue on employment contracts.....	71
3.6.1	Section 136 of the Companies Act of 2008 .....	71
3.6.2	Sections 189 and 189A of the Labour Relations Act of 1995 .....	75
3.6.3	Transfer of a business as a going concern and section 197 of the Labour Relations Act 1995 .....	77
3.7	Ranking of employee claims during business rescue and the effects in a subsequent liquidation .....	79
3.7.1	Employment-related money due and payable at commencement of business rescue .....	79
3.7.1.1	Nature of the claim .....	79
3.7.2	Employee-related money becoming due and payable during business rescue .....	81
3.7.2.1	Statutory preferences created in section 135 of the Companies Act 2008.....	81
3.7.2.2	Employees as "super-preferent" creditors in terms of section 135 .....	84
3.8	Evaluation of employee rights in business rescue .....	86
4	CONCLUSION .....	86
<b>CHAPTER 3 AUSTRALIA .....</b>		<b>88</b>
1	INTRODUCTION .....	88
2	EMPLOYEE RIGHTS IN LIQUIDATION .....	88
2.1	Employee's right to commence liquidation.....	93
2.2	Employee's right to be notified and informed of liquidation.....	93
2.3	Effect of liquidation on employment contracts .....	95
2.4	Employee's right to participate in consultations during liquidation .....	96
2.5	Employee's right to be present at meetings and to vote during liquidation .....	98
2.6	Ranking of employee claims during liquidation.....	99
2.6.1	Employee entitlements under the Corporations Act 2001 .....	100
2.6.1.1	Priority payments: Wages and superannuation .....	101
2.6.1.2	Priority payments: Leave entitlements .....	101
2.6.1.3	Priority payments: Retrenchment payments .....	102
2.6.2	Employee entitlements under the Fair Work Act 2009 .....	103
2.6.3	Employee entitlements under the Fair Entitlements Guarantee Act 2012 .....	103
2.6.3.1	Background to the Fair Entitlements Guarantee Act 2012 and GEERS .....	103
2.6.3.2	The Fair Entitlements Guarantee Act 159 of 2012.....	106
2.7	Employee's right to receive reports by liquidator .....	109
2.8	Employee's right to remove a liquidator and appoint another liquidator .....	109

2.9	Evaluation of employee rights in liquidation .....	109
3	EMPLOYEE RIGHTS IN VOLUNTARY ADMINISTRATION .....	111
3.1	Brief outline of the voluntary administration procedure in Part 5.3A .....	113
3.2	Various rights of employees in voluntary administration .....	115
3.2.1	Employee's right to commence voluntary administration .....	115
3.2.2	Employee's right to be notified and informed of voluntary administration .....	117
3.2.3	Employee's right to participate in consultations during voluntary administration .....	118
3.2.4	Employee's role in developing the deed of company arrangement (DOCA) .....	120
3.2.5	Employee's right to be present at a meeting and vote during voluntary administration.....	121
3.2.6	Effect of voluntary administration on employment contracts .....	123
3.2.6.1	Transfer of a business during voluntary administration.....	125
3.2.7	Ranking of employee claims during voluntary administration .....	126
3.2.8	Employee's right to receive reports by the administrator .....	128
3.2.9	Employee's right to remove an administrator and appoint a new administrator.....	128
3.2.10	Evaluation of employee rights in voluntary administration .....	128
4	CONCLUSION .....	129
<b>CHAPTER 4 ENGLAND .....</b>		<b>133</b>
1	INTRODUCTION .....	133
2	EMPLOYEE RIGHTS IN LIQUIDATION .....	134
2.1	Employee's right to initiate liquidation.....	135
2.2	Employee's right to be notified and informed of liquidation.....	135
2.3	Effect of liquidation on employment contracts .....	137
2.3.1	Effect of liquidation on employment contracts .....	137
2.3.2	Effect of transfer or sale of the business as a going concern on an employment contract .....	139
2.4	Employee's right to participate in consultations during winding-up.....	141
2.5	Employee's right to be present at a meeting and vote during liquidation .....	141
2.6	Ranking of employee claims during liquidation .....	142
2.6.1	Payments provided for by the State.....	143
2.6.2	Payments provided for by the insolvent estate .....	146
2.7	Evaluation of employee rights in liquidation .....	148
3	EMPLOYEE RIGHTS IN ADMINISTRATION .....	149
3.1	Commencement of administration .....	153
3.2	Employee's right to be notified and informed of administration proceedings .....	155
3.3	Employee's right to participate in consultations during administration .....	156
3.4	Employee's right to be present at meetings and vote during administration proceedings.....	158
3.5	Effect of administration on employment contracts .....	159
3.5.1	Role of the administrator.....	159
3.5.2	Development of the law .....	160
3.5.3	Legislative intervention .....	162



3.5.4	Solution and current position .....	163
3.5.5	Effect of a transfer or sale of a business as a going concern during administration .....	164
3.6	Ranking of employee claims during administration.....	165
3.6.1	Administration expenses.....	165
3.6.2.	Schedule B1 of the Insolvency Act 1986 .....	167
3.7	Evaluation of employee rights in administration.....	169
4	CONCLUSION .....	170
<b>CHAPTER 5 CONCLUSION .....</b>		<b>173</b>
1	INTRODUCTION .....	173
2	COMPARATIVE CONCLUSION ON EMPLOYEE RIGHTS IN LIQUIDATION AND BUSINESS RESCUE.....	175
2.1	Introduction .....	175
2.2	Employee's right to commence proceedings .....	175
2.3	Employee's right to be notified and informed about proceedings .....	177
2.5	Employee's right to participate in consultations .....	181
2.6	Role of employees and their rights in respect of business rescue plan or deed of company arrangement.....	183
2.7	Employee's right to be present at meetings and to vote during proceedings.....	184
2.7	Ranking of employee claims.....	185
2.7.1	Claims related to the termination of the employment contract.....	185
2.7.2	Claims for remuneration .....	186
2.8	Transfer of the business as a going concern .....	189
3	RECOMMENDATIONS.....	191
3.1	Employee rights in business rescue .....	191
3.1.1	Final finding .....	191
3.1.2	Recommendations.....	191
4	FINAL REMARKS .....	196
<b>BIBLIOGRAPHY .....</b>		<b>199</b>
1	BOOKS AND CHAPTERS IN BOOKS.....	199
2	REPORTS AND STATEMENTS .....	202
2.1	South Africa .....	202
2.2	Australia.....	202
2.3	England.....	203
2.4	Other.....	204
3	MASTERS AND DOCTORAL THESES .....	205
3.1	Doctoral theses.....	205
3.2	Masters theses .....	205
4	JOURNAL ARTICLES .....	206
5	LEGISLATION .....	211
6	CASELAW .....	213
7	INTERNET .....	219



# CHAPTER 1 INTRODUCTION

## 1 THE NEED TO PROTECT EMPLOYEE RIGHTS IN INSOLVENCY PROCEEDINGS

It is of the utmost importance to determine the various rights and obligations of a stakeholder when different disciplines of law intersect in one specific legal procedure.

One such intersection occurs when employee rights have to be determined in case of a company's<sup>1</sup> rescue procedure or its liquidation. The following statement goes to the core of this situation:

“The juncture at which insolvency and labour law meet is an area of legal regulation where the tension between commercial interests, on the one hand, and the general right of employees to social protection, on the other, is arguably at its greatest.”<sup>2</sup>

In an instant, the branches of company law, insolvency law and labour law intertwine and apply concurrently to the same situation and procedure. This requires an exploration into the possible way forward without disregarding the growth potential of any one of these individual branches of the law by unfairly or unnecessarily making one subject to the others.

It is inevitable that the concurrent application of more than one legal discipline will result in a conflict of interests. Not only is one confronted with disciplines that grapple with their own contradicting philosophies, but the realities of all the individual conflicts in each branch are combined in a quest to give a justifiable effect to the outcome of a single problem.

This study undertakes a comparison between the effects in South African law on the rights of employees resulting from a company's liquidation and when it is placed in business rescue proceedings. It further compares these effects to the rights of employees in two foreign

---

<sup>1</sup> For the meaning of “company” see ss 1, 8 and 129 of the Companies Act of 2008. Chapter 6 of the Companies Act of 2008 applies *mutatis mutandis* to the close corporation as business form. In terms of s 66(1A) of the Close Corporations Act of 1984 business rescue was also made applicable to close corporations in terms of Item 6(1) of Schedule 3 to the Companies Act.

<sup>2</sup> Van Eck *et al* 2004 SALJ 907.

jurisdictions, namely, Australia<sup>3</sup> and England.<sup>4</sup>

The purpose of the comparative study is firstly to evaluate whether South Africa is on par with other jurisdictions as far as the treatment of employees and employee rights is concerned. The scope of employee protection is investigated in order to establish whether employee rights are overprotected in business rescue proceedings in South Africa as this may cause the proceedings to fail. If such overprotection does occur business rescue will fail to become a viable alternative to liquidation in appropriate cases.

The second purpose is related to the alternative goal of business rescue found in its definition in section 128(1)(b)(iii) in instances where it is not possible to rescue the company and enable it to continue in existence on a solvent basis. In such a case business rescue may also be commenced with the aim of achieving a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company. It is thus foreseen that in these cases liquidation of the company will follow the business rescue proceedings. As will be shown in this thesis, employees will in most cases also be creditors of the company for unpaid remuneration and other benefits but it is in the preservation of jobs that business rescue is regarded as presenting the biggest advantage to employees.<sup>5</sup> This is true for any jurisdiction. It is also true that the saving of jobs as an objective in rescue proceedings is absent. It should never be the goal when rescue proceedings commence. The main purpose of any restructuring is the successful continuation of the business.

If the company itself is rescued and returned to solvency, the advantage to employees is obvious since most of them will retain their jobs, although some retrenchments may be unavoidable to reduce costs. However, available statistics provided by the Companies and Intellectual Property Commission show that by December 2016, of the 2422 business rescue cases that had been started there had only been substantial implementation of business rescue plans in 29 per cent of business rescue cases commenced and terminated since implementation

---

<sup>3</sup> See chapter 3.

<sup>4</sup> See chapter 4.

<sup>5</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2012] 2 All SA 433 (GSJ) [15]; *Lidino Trading 580 CC v Cross Point Trading (Pty) Ltd* 2012 ZAFSHC 155 [19]; and *Cardinet (Pty) Ltd v Wedgewood Golf and Country Estate (Pty) Ltd* (unreported case no 19599/2012 (WCC) 30 January 2013) 53.

of the Companies Act of 2008 on 1 May 2011 and 252 of these cases ended in liquidation.<sup>6</sup> A report on the state of business rescue commissioned by the Companies and Intellectual Properties Commission indicated that in the majority of cases these rescue plans provided for a sale of the business or assets of the company, and the end result was thus almost the same as a liquidation.<sup>7</sup> Furthermore, in another 10 per cent of cases the company went into liquidation before the business rescue was completed. It is therefore also important to determine whether, even if the company itself is not rescued, employees are left in a better position than if the company had gone directly into liquidation.

## 2 EMPLOYEES AS STAKEHOLDERS IN THE COMPANY

### 2.1 Introduction

Chapter 6 of the Companies Act of 2008<sup>8</sup> introduced a new corporate rescue mechanism termed business rescue. South Africa was in dire need of a workable corporate rescue procedure as the predecessor of business rescue proceedings, judicial management, was generally perceived to be a “dismal failure”.<sup>9</sup>

One of the striking features of the new business rescue dispensation is employees’ prominent role and influence in the process of business rescue. In the initial stages of the drafting of the 2008 Companies Act, the aim to protect employees was already clear as the recognition of their interests was expressly voiced.<sup>10</sup> In summarising the content of each chapter of this Act reference was made to the fact that in business rescue the “interests of the workers” would be “notably” protected by affording them the following rights and powers:

- a) Employees are recognised as creditors of the company who have a voting right in respect of any part of unpaid salaries or remuneration;

---

<sup>6</sup> [http://www.cipc.co.za/files/8114/9131/0792/Status\\_of\\_Business\\_Rescue\\_in\\_South\\_Africa\\_December\\_2016\\_version1\\_0.pdf](http://www.cipc.co.za/files/8114/9131/0792/Status_of_Business_Rescue_in_South_Africa_December_2016_version1_0.pdf) (Date of use: 10 April 2018).

<sup>7</sup> Prof Marius Pretorius of Business Enterprises University of Pretoria *Business Rescue Status Quo Report* 2015.

<sup>8</sup> Act 71 of 2008, hereafter referred to as the 2008 Companies Act.

<sup>9</sup> Burdette (Part 1) 2004 *SAMLJ* 241; Loubser 2013 *SAMLJ* 437. For a detailed discussion of reasons why judicial management failed, see *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* [2001] 1 All SA 223 (C).

<sup>10</sup> *Explanatory Memorandum* 13; Loubser (Part 1) 2010 *TSAR* 509; Loubser *LLD Thesis* 54.

- b) employees need to be consulted in the development and drafting of the business rescue plan;
- c) employees are given the opportunity to address creditors in the meeting before the business rescue plan is voted on; and
- d) employees have the power to buy out dissenting creditors who have voted against the approval of the business rescue plan.<sup>11</sup>

It is necessary to examine and compare the rights that employees have in the rescue process of a company with their rights in the winding-up or liquidation of a company.<sup>12</sup> These two processes, namely, business rescue and liquidation are related. A company qualifies to initiate business rescue proceedings if it is financially distressed.<sup>13</sup> A company that meets the criteria of “financially distressed” in the case of business rescue, will often also qualify for a liquidation order because it is commercially insolvent.<sup>14</sup>

A number of recommendations were made by the Department of Trade and Industry in an attempt to streamline South Africa’s corporate insolvency and rescue procedures with modern tendencies in international jurisdictions. Only two of the recommendations are relevant to this research. Firstly, it was mentioned that in the event of the winding-up of a company, a “multiplicity of interests” need to be considered and specific reference was made to those of the employees of a company.<sup>15</sup> Secondly, in discussing the business rescue procedure, it was stated that it was time to “create a system of corporate rescue appropriate to the needs of a modern South African economy”.<sup>16</sup>

After the specific reference to the different interests that have to be acknowledged during the winding-up of a company and the mentioning of the needs of a modern South Africa where the recommendations dealt with the future of the South African rescue process, it did not come as a

---

<sup>11</sup> *Explanatory Memorandum* 14.

<sup>12</sup> The terms “winding-up” and “liquidation” are used interchangeably as synonyms throughout the study.

<sup>13</sup> “Financially distressed” is defined in s 128(f) as follows: “(i) it appears to be reasonably unlikely that the company will be able to pay all its debts as they become due and payable within the immediate ensuing six months; or (b) it appears to be reasonably likely that the company will become insolvent within the immediate ensuing six months.” S 129 of the Companies Act provides for a voluntary proceeding initiated by the directors of the company and s 131 provides for a compulsory initiation by affected persons.

<sup>14</sup> This was confirmed by the Supreme Court of Appeal in *Oakdene Square Properties v Farm Bothasfontein (Kyalami)* 2013 (4) SA 539 (SCA).

<sup>15</sup> *SA Company Law for the 21<sup>st</sup> Century* 43.

<sup>16</sup> *SA Company Law for the 21<sup>st</sup> Century* 45.

surprise that the Companies Act amplified what had already been recommended. In terms of section 7(k), one of the purposes of the Act is “to provide for the efficient rescue and recovery of financially distressed companies, in a manner that *balances the rights and interests of all relevant stakeholders*”.<sup>17</sup>

## 2.2 Meaning of “stakeholder”

It is of paramount importance to strike the correct balance in order to avoid possible abuse where the scale can be tipped in favour of one of the stakeholders’ exclusive interests.<sup>18</sup>

The term “stakeholder” is not defined in the Companies Act of 2008. Once again, one is faced with the challenge to ensure that a solid understanding is achieved of what is meant by the term “stakeholder” in the realm of company law. Using a holistic approach when dealing with company law and keeping in mind the approach introduced by King III, namely, “people, planet and profit” it is quite easy to interpret the word “stakeholder” to include a bigger group of interest bearers than just shareholders. Creditors and employees are two more possible constituents that immediately come to mind when a wide interpretation of the term is used. The *King IV Report on Corporate Governance for South Africa* was published in 2016 and defined the term “stakeholder” as follows:

“Those groups of individuals that can reasonably be expected to be significantly affected by an organization’s business activities, outputs or outcomes, or whose actions can reasonably be expected to significantly affect the ability of the organization to create value over time.”<sup>19</sup>

King IV continues in its glossary and adds to the meaning of “stakeholder” by defining the “internal stakeholders” to include the employees of the organisation.<sup>20</sup> A very important point is then made that “internal stakeholders are always *materia*<sup>21</sup> stakeholders, but external

---

<sup>17</sup> Own emphasis; see *Welman v Marcelle Props 193 CC and Another* [2012] JOL 28714 (GSJ) [16] and [25] and *Collard v Jataro Connect (Pty) Ltd and Others* [2017] JOL 38032 (WCC) [13–14].

<sup>18</sup> *King III Report* 15.

<sup>19</sup> *King IV Report* 17.

<sup>20</sup> *King IV Report* 17.

<sup>21</sup> Own emphasis.

stakeholders may or may not be material”.<sup>22</sup> If this statement does not show the important role employees play in a company’s existence, no other reference probably will.

Two Australian authors describe stakeholders as

“[t]he individuals and constituencies that contribute, either voluntarily or involuntarily to its [the company’s] wealth-creating capability and activities, and that are therefore its potential beneficiaries and/or risk bearers”.<sup>23</sup>

The following is a useful explanation of the term “stakeholder”:

“The meanings of ‘stake’ and ‘holder’ are important within stakeholder thinking. Simply stated, the word ‘stake’ means a right to do something in response to any act or attachment. Since ‘rights’ are generally attached with liabilities, this word also denotes the liabilities a person possesses for enjoying a particular right. Hence, a stake could be a legal share of something, it could be, for instance, a financial involvement with something. From the organizational stakeholder perspective, three sources of stakes [are identified]: ownership at one extreme, interest in between, and legal and moral rights at the other extreme. The word ‘holder’ is comparatively easy to understand. It denotes a person or entity that faces some consequences or needs to do something because of an act or to meet a certain need.”<sup>24</sup>

Another Australian definition of stakeholders, labelled as “the most inclusive definition” by Botha,<sup>25</sup> reads as follows:

“Those group or individuals that: (a) can be reasonably expected to be significantly affected by the organisation’s activities, products and/or service; or (b) whose actions can reasonably be expected to affect the

---

<sup>22</sup> *King IV Report* 17.

<sup>23</sup> Dickfos and Anderson <http://www98.griffith.edu.au/dspace/handle/10072/24030> (Date of use: 12 November 2017) 5; Kaplan *LLM Thesis* 4.

<sup>24</sup> Rahim 2011 *MJBL* 306 as discussed by Botha 2015 *PER* 8.

<sup>25</sup> Botha *LLD Thesis* 10.



ability of the organisation to successfully implement its strategies and achieve its objectives.”<sup>26</sup>

The definition of “affected person” for purposes of business rescue thus includes all the stakeholders: shareholders and creditors of the company; registered trade unions representing employees of the company as well as individual employees not affiliated to a registered trade union.<sup>27</sup>

The significant role which the interests of employees play in a company is reiterated in the meaning of the concept “corporate citizenship” as defined in the *King IV Report on Corporate Governance in South Africa* which was issued in 2016. King IV followed on the ground-breaking work done by the previous King reports and codes. The previous “triple bottom line”<sup>28</sup> and now “triple context” as referred to in King IV reiterates that company law encompasses the economy, the society and the environment.<sup>29</sup> The importance of a holistic approach is found in the King IV report which states that “these three dimensions are intertwined and should be viewed as an integrated whole”.<sup>30</sup> This forms part of the integrated-thinking approach advocated by the King IV Report.

Corporate governance and the increased awareness of corporate social responsibility urged South Africa to keep in line with international governance principles. Corporate citizenship is defined as:

“[T]he recognition that the organisation is an integral part of the broader society in which it operates, affording the organisation standing as a juristic person in that society with rights but also responsibilities and obligations. It is also the recognition that the broader society is the licensor of the organisation.”<sup>31</sup>

---

<sup>26</sup> Du Plessis *et al Principles* 24 as discussed by Botha 2015 *PER* 9.

<sup>27</sup> S 128(1)(a) of the 2008 Companies Act.

<sup>28</sup> *King II Report* 10; see also the discussion by Botha 2014 *PER* 2073; and Botha *LLD Thesis* 3.

<sup>29</sup> *King IV Report* 24.

<sup>30</sup> *King IV Report* 24.

<sup>31</sup> *King IV Report* 11.

Chapter 6 of the 2008 Companies Act, and particularly the many sections in this chapter dealing with employees, are analysed in detail in the discussion of employee participation and employee rights.

### 3 ROLE OF THE CONSTITUTION

Not only does the Constitution acknowledge employee rights in various sections in the Bill of Rights,<sup>32</sup> but the Labour Relations Act of 1995 is one of only a limited number of statutes that prevail over the provisions of the Companies Act of 2008 in case of an inconsistency between the two Acts.<sup>33</sup> One of the primary aims of the Labour Relations Act is “to promote employee participation in decision-making in the workplace”.<sup>34</sup> It is thus very clear that a corporate rescue regime suitable for a *modern* South Africa implies that a very active role will be played by employees of a company. It will become evident that their role is not restricted to the abovementioned aim of the Labour Relations Act.

The winds of change in traditional corporate law and insolvency law became noticeable after important socio-economic milestones were reached in South Africa, the most important milestone being the adoption of the Constitution of the Republic of South Africa, 1996. The Constitution is the sovereign law in South Africa and all law must be consistent with it.

In *Pharmaceutical Manufacturers of South Africa: In Re Ex Parte President of the Republic of South Africa*<sup>35</sup> the status of the Constitution was reiterated and it was stated that “the Constitution is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to the constitutional control”.

The relevance of the Constitution and its influence on labour law, corporate law and insolvency law can be seen particularly in the rights contained in the Bill of Rights.<sup>36</sup> Some of the sections contained in the Bill of Rights have direct application on these branches of the law and other sections have indirect application. For example, employees have direct protection in

---

<sup>32</sup> The most important section is s 23 which grants the right to fair labour practices to everyone.

<sup>33</sup> LRA of 1995; s 5(4)(b)(i)(*bb*) of the 2008 Companies Act .

<sup>34</sup> S 1(2)(5)(iii) of the LRA 66 of 1995.

<sup>35</sup> 2000 (2) SA 674 (CC) [44].

<sup>36</sup> Contained in chapter 2 of the Constitution, 1996.

section 23 which guarantees a right to fair labour practices.<sup>37</sup> Creditors in insolvency law and company law have a right to access to information.<sup>38</sup> Both insolvency law and company law, if applied strictly, potentially pose a threat to some of these fundamental rights contained in the Constitution.<sup>39</sup> Even though these rights are given express protection, it is not absolute. Section 36 provides for the limitation of any of these rights provided that such limitation is “reasonable and justifiable” considering all relevant factors that justify such limitation.

It is clear that the legal principles applicable to three very distinct legal branches meet in the determination of employee rights during a company’s liquidation process and business rescue proceedings. As already mentioned, these branches are labour law, corporate law and insolvency law.

Notwithstanding the fact that specific interests must be acknowledged when dealing with a specific branch of the law, limitation of trite rights and interests may be justifiable when one attempts to reconcile the many competing interests in a specific area of the law.

Because this thesis focuses on employee rights, it is apt to start with a definition of labour law and a brief introduction to the position of labour rights in South Africa.

#### **4 ROLE OF LABOUR LAW IN INSOLVENCY AND RESCUE**

Labour law can be defined as follows:

“Labour Law is a body of legal rules which regulate relationships between employers and employees, between employers and trade unions, between employers’ organisations and trade unions, and relationships between the State, employers, employees, trade unions and employers’ organisations.”<sup>40</sup>

Many corporate lawyers and academics share the view that company law is about the corporation and the making of a profit. Although this may be true when looking at it from a purely corporate law perspective, it cannot be ignored that “the interdependence between employers

---

<sup>37</sup> Van Eck *et al* 2004 SALJ 902.

<sup>38</sup> S 32 of the Constitution.

<sup>39</sup> Sharrock *et al Hockley* 13.

<sup>40</sup> Van Jaarsveld *et al Principles and Practice of Labour Law* par 52, 2–3; for more definitions of the term labour law, Botha *LLD Thesis* 14, 15.

and employees in the commercial context is obvious”.<sup>41</sup>

Employees as stakeholders of a company are directly affected when the company is financially distressed: not only do they face possible retrenchment and job losses, but when a company struggles financially there will inevitably be arrear and unpaid salaries and other forms of remuneration. Employees then also become creditors of the insolvent estate and have a role to play in the liquidation proceedings.<sup>42</sup>

It is important to adopt a flexible approach when one is faced with such a multi-faceted study as the present one. The key is to find a way of integrating the ideals of each independent discipline. Such integration is definitely not impossible; all it takes is recognition of the fact that there is no other option. Where an insolvent company needs to address creditors’ demands and try to take care of its employees while at the same time attempting to act in the best interests of the company, one cannot be stubborn and try and resolve the matter from a siloed perspective.

Smith’s remarks are right on target in this regard:

“Company law regulates the actions of companies in the market. Unfortunately, very little attention is bestowed on the interests of the employees in company law, either nationally or internationally. As far as insolvency law is concerned, the position is not much different. There would thus seem to be a vacuum in research in this field, since it certainly cannot be argued that employees are not closely connected to the companies they work for and on which their livelihoods depend. Employees deserve to have more attention paid to their often precarious position. It should be evident that labour can only do so much and that other branches of the law, including company law, must address some of the new challenges facing markets.”<sup>43</sup>

A lot has happened since these words by Smit were published in 2006. It will become evident that the “vacuum” referred to by Smit has indeed become smaller and, with reference to the

---

<sup>41</sup> Westbrook *et al Business Insolvency Systems* 183.

<sup>42</sup> Westbrook *et al Business Insolvency Systems* 183.

<sup>43</sup> Smit 2006 *TSAR* 152–153; Botha 2014 *PER* 2044–2045.

various King Reports and the 2008 Companies Act, that significant rights and entitlements have been bestowed on employees, not only in the company law realm but also where companies are faced with financial distress and insolvent circumstances. Significant progress was made in the process that resulted in South Africa having a globalised application and inter dynamics with company law, insolvency law and labour law.<sup>44</sup>

Botha remarks that company law and labour law operate in different “worlds”.<sup>45</sup> Although it is true that these two disciplines operate on completely different principles and fundamental themes, South Africa slowly but surely succeeded to break down the barriers that existed between these two different “worlds”. The momentum of corporate social responsibility and King’s approach to the “triple bottom line” theory definitely assisted with the harmonisation of some age-old principles associated with company law and labour law.

South Africa has a very high unemployment rate.<sup>46</sup> An effective business rescue procedure may lower this high figure since one of the direct positive consequences flowing from a company or business that is rescued is that the workforce will remain in place and that employees will not lose their jobs.<sup>47</sup> This is in line with the government’s commitment to saving jobs.<sup>48</sup> It is an extremely delicate exercise when the principles of labour law and business rescue intersect. Smit notes that labour law has its limitations and it “does not constitute the *primary* influence on social welfare”.<sup>49</sup>

## **5 ROLE OF COMPANY LAW AND THE INFLUENCE OF THE KING REPORTS ON MODERN COMPANY LAW IN SOUTH AFRICA**

The change of focus in South African company law was first noticed with the issue of the first *King Report on Corporate Governance* in 1994. From the outset, employees played a significant role in corporate governance as is seen in the King reports.<sup>50</sup>

---

<sup>44</sup> Botha *LLD Thesis 2*.

<sup>45</sup> Botha *PER* 2014 2047; for a discussion of the interaction between corporate rescue and labour law see Loubser 2005 *IIR* 57–69.

<sup>46</sup> According to Stats SA’s Quarterly Labour Force Survey Quarter 1 2018 issued in May 2018 this rate was calculated at 26,7% <http://www.statssa.gov.za/?p=11139> (Date of use: 30 June 2018).

<sup>47</sup> Loubser 2005 *IIR* 57.

<sup>48</sup> Burdette (Part 2) 2004 *SAMLJ* 426; Loubser 2005 *IIR* 57.

<sup>49</sup> Smit *LLD Thesis* 6; own emphasis.

<sup>50</sup> Botha *LLD Thesis* 6.

The role and influence given to employees in the first report gradually snowballed into massive rights, interests and influence being accumulated in the newest King IV report.

King I was regarded as ground-breaking work on corporate governance and it received international recognition with its aim to promote “the highest standards of corporate governance in South Africa”.<sup>51</sup> It was the start of an era and there was truth in the promise that the “21st century would be the century of governance”.<sup>52</sup> With the publication of the King I report, corporate governance was “institutionalised” in South Africa.<sup>53</sup> An atmosphere of governance was established in company law and the importance of the need to take cognisance of the fact that companies co-exist with society and the environment was recognised.<sup>54</sup> Although the report was aimed at governing mainly larger corporations and companies listed on the Johannesburg Stock Exchange, banks, insurance companies and financial companies, it laid down sound standards of conduct and was recommended to be used by all companies in South Africa. The first steps for an integrated approach that needs to take the interests of all stakeholders into account were firmly laid down.<sup>55</sup>

The ethos of the King reports relies on the following three key elements: leadership, sustainability and corporate citizenship. In lay terms: the company’s governing body, the board of directors, need to take the interests of all relevant stakeholders into consideration when managing the company towards obtaining economic wealth.

King II aptly starts in its introduction and background section with a reference to Sir Adrian Cadbury’s words:

“Corporate governance is concerned with holding the balance between economic and social goals and between individual and communal goals. . . the aim is to align as nearly as possible the interests of individuals,

---

<sup>51</sup> The Institute of Directors (IoD) stands at the fore when reference is made to any of the King Reports on Corporate Governance. Mervin E King, a retired judge of the Supreme Court of Appeal, was approached by the IoD to chair a committee on corporate governance. *King II Report 7*.

<sup>52</sup> *King II Report 14*; see also Botha 2015 *PER 2*.

<sup>53</sup> *King II Report 7*.

<sup>54</sup> *King II Report 7*.

<sup>55</sup> “King report on corporate governance for South Africa 2002 – What it means to you” [http://www.mervynking.co.za/downloads/CD\\_King2.pdf](http://www.mervynking.co.za/downloads/CD_King2.pdf) (Date of use: 7 November 2017).

corporations and society.”<sup>56</sup>

Another significant milestone was achieved with the enactment of the Companies Act of 2008 in 2011.<sup>57</sup> Botha remarks that South Africa’s company law underwent a “dramatic overhaul” with the incorporation of this Act.<sup>58</sup> The change in focus was enhanced with the *King III Report on Corporate Governance*<sup>59</sup> which was published in 2009 in response to the coming into force of the long-awaited company legislation that is cannot be regarded as “new” any more. Sustainability became a focus even in South African company law and one of the focus points of King III was the integration of social, environmental and economic issues. It entailed that a company would be regarded as a “reasonable citizen” taking cognisance of the interests and values of the planet, its people and profit in the same ratio.<sup>60</sup> The scene was then double set for employees and the protection afforded to this one group as stakeholder of the company to receive significant consideration and protection.

King III furthermore embraced the “stakeholder inclusive” approach,<sup>61</sup> which is explained as follows:

“[T]he board of directors considers the legitimate interests and expectations of stakeholders on the basis that this is the *best interests of the company*, and not merely as an instrument to serve the interests of the shareholders.”<sup>62</sup>

King IV defines “stakeholder inclusivity” as follows:

“An approach in which the governing body takes into account the legitimate and reasonable needs, interests and expectations of all material

---

<sup>56</sup> *King II Report* 7.

<sup>57</sup> Botha 2015 *PER* 6; Botha 2014 *PER* 2073.

<sup>58</sup> Botha *LLD Thesis* 3.

<sup>59</sup> The King Committee compiled this report with the help of sub-committees.

<sup>60</sup> *King III Report* 11.

<sup>61</sup> This approach was already firmly laid down in *King II Report* 8; *King III Report* 11; see also Botha 2015 *PER* 3. The “enlightened shareholder value approach” stands in direct contrast to the “stakeholder inclusive” approach. According to the enlightened shareholder value approach the interests of the shareholders of the company must be served, and should those interests still be served when taking the interests of stakeholders such as creditors, employees, customers and suppliers into consideration it will be acceptable, but if the interests of the shareholders are not served, the stakeholders’ interests should not be taken into account; see Cassim *Contemporary Company Law* 20 – 21 for a detailed discussion of the enlightened shareholder value approach.

<sup>62</sup> *King III Report* 12; own emphasis.

stakeholders in the execution of its duties in the best interests of the organisation over time.”<sup>63</sup>

According to this definition and approach, modern companies give equal interest-bearing rights and expectations to “all sources of value creation” with specific reference to “social capital”,<sup>64</sup> thereby explicitly including employees and a company’s workforce.

Part 5.5 of King IV contains a section on stakeholder relationships and starts off with reference to principle 16 which reads as follows:

“In the execution of its governance role and responsibilities, the governing body should adopt a stakeholder-inclusive approach that balances the needs, interests and expectations of material stakeholders in the best interests of the organisation over time.”<sup>65</sup>

As part of the recommended practices regarding stakeholder relationships it is stated that the governing body should manage stakeholder risk as an integrated part of the organisation’s risk management.<sup>66</sup> The two most exposed risks that employees face during their employment are the possibility of not being paid and the continued existence of their employment relationship with the company. This makes employee entitlements and the protection of their contracts paramount risks that employees are exposed to on a daily basis.

Business rescue was included as one of the so-called “new issues” in the King III report.<sup>67</sup> Although South Africa was correctly referred to as “unique” the report mentions that South Africa was in dire need of a workable piece of legislation to address business rescue.<sup>68</sup> This would be in the best interests of not only the country as a whole, but also of shareholders, creditors, employees and other stakeholders.

It is a well-known ideal in corporate rescue procedures that it should be possible to downsize

---

<sup>63</sup> *King IV Report 17.*

<sup>64</sup> *King IV Report 17.*

<sup>65</sup> *King IV Report 17.*

<sup>66</sup> *King IV Report 17.*

<sup>67</sup> *King III Report 15.*

<sup>68</sup> *King III Report 15.*



the workforce of a business without too many formalities whenever it is struggling financially.<sup>69</sup> Such a statutory provision would result in almost immediate financial relief for the company. However, in South African corporate law the only possible way to do so is to follow the strict labour law principles contained in the Labour Relations Act.

It is submitted that there is a “complex interrelationship between the protection of employee interests and the encouragement of business rescue”.<sup>70</sup> Botha states that one is faced with a “multi-dimensional” investigation when the legal principles of company law and labour law intersect.<sup>71</sup> Although it is the ideal to protect employee rights during a rescue procedure and in liquidation, it must be borne in mind that over-protection of employee rights may result in the demise of the company and hamper the possible successful rescue and the dividend available to be distributed to creditors in the event of liquidation. This predicament is captured in the following:

“Employees ought to realize that although the right to fair labour practices purports to afford them extensive protection, it may regrettably, boil down to very little in the face of financial realities posed by an insolvent employer.”<sup>72</sup>

It is very important to maintain a careful balance of the rights of employees during business rescue proceedings. On the one hand, if the scale tips too heavily in favour of employee rights in a business rescue procedure it might well hamper the success of the rescue procedure. On the other hand, if their rights are not adequately protected, there is a real risk of abuse of the business rescue proceedings to retrench workers without having to comply with the usual statutory requirements and procedures. A perfect balance is almost impossible to find: “Thus the interests of employees are argued both to be served by reorganisation and to make reorganisation difficult or impossible.”<sup>73</sup>

---

<sup>69</sup> Burdette (Part 2) 2004 *SAMLJ* 425; Loubser 2005 *IIR* 64.

<sup>70</sup> Westbrook *et al Business Insolvency Systems* 199.

<sup>71</sup> Botha 2015 *PER* 3; Botha 2014 *PER* 2043.

<sup>72</sup> Van Eck *et al* 2004 *SALJ* 925.

<sup>73</sup> Westbrook *et al Business Insolvency Systems* 201.

## 6 POSITION OF EMPLOYEES IN INSOLVENCY LAW

It is normal to experience tension when one is confronted with a conflict of interests in legal disciplines. Some of the contentious matters can be described as overreactions. Although it is true that the protection of labour is and should be entrenched in other pieces of legislation, it is submitted that it is doubtful whether the recognition of employee interests in the Constitution was the only reason why employees were placed in a separate category of creditors in an insolvent estate.<sup>74</sup>

The Insolvency Act<sup>75</sup> deals with employee entitlements in two different ways. Firstly, employee claims for arrear remuneration, leave claims and other claims during a company's liquidation are dealt with in section 98A.<sup>76</sup> Section 38 deals with the effect of sequestration of the employer's estate on employment contracts.<sup>77</sup> Employees have a statutory preferent claim for salaries and other remuneration.<sup>78</sup> This statutory preferent claim is capped and if there are any additional unpaid claims the employee will have to turn to the free residue as a concurrent creditor.<sup>79</sup>

Comparative international jurisdictions, Australia and the United Kingdom, provide for a public fund that is used to pay out employee entitlements.<sup>80</sup> . Although this study does not examine the viability or possibility of introducing something similar in South Africa, having such a fund does have advantages. The advantages of having such a fund are firstly, that the burden of paying unpaid remuneration to employees in the event of liquidation falls away and does not have to be dealt with in the insolvent estate.<sup>81</sup> This increases the pool of the free residue which in turn may be divided amongst the concurrent creditors of the insolvent estate. In the event of a business rescue the possibility of having such a fund to pay unpaid salaries and arrear remuneration to employees generates more cash for the company that may be used as post-

---

<sup>74</sup> Van Eck *et al* 2004 SALJ 902; see also van Eck *et al* 2004 SALJ 902 for a detailed discussion of the effect of labour law on insolvency law.

<sup>75</sup> Act 24 of 1936, hereafter referred to as the Insolvency Act of 1936.

<sup>76</sup> Insolvency Act of 1936.

<sup>77</sup> Insolvency Act of 1936.

<sup>78</sup> S 98A of the Insolvency Act of 1936. The amount of each claim and the maximum amount claimable in terms of the statutory preferent claim are dealt with in detail at a later stage in chapter 2.

<sup>79</sup> S 103 of the Insolvency Act of 1936.

<sup>80</sup> Westbrook *et al Business Insolvency Systems* 186; The Fair Entitlements Guarantee Act 2012 regulates the public fund in Australia.

<sup>81</sup> Westbrook *et al Business Insolvency Systems* 187.

commencement financing. Secondly, employees have the peace of mind that their unpaid remuneration will be paid to them as the payment is not subject to the vote of other creditors or the availability of funds in an already financially distressed company.<sup>82</sup>

## 7 IS A THREE-WAY HARMONISATION POSSIBLE?

The challenge one is faced with when dealing with a topic that encompasses such a variety of interests, is to marry them in a manner that will be fair and just for all stakeholders involved.

When one thinks of labour law, insolvency law and company law, different and unequal playing fields come to mind. Over centuries and sometimes in today's modern age some scholars and academics still consider them as separate fields of law, each contained in its own silo. In labour law the ideal to balance the position of employee on the one hand and the employer on the other hand creates numerous challenges. The intricacy of labour law is evident in the number of Acts applicable to this discipline alone.<sup>83</sup>

Insolvency law on the other hand experiences similar unequal playing fields when the rights of debtors and the rights of creditors conflict. One of the first things one notices in any research on foreign insolvency jurisdictions is that a country is classified as being either "debtor friendly" or "creditor friendly".<sup>84</sup> The primary objective of any insolvency law system is to find the correct balance between the rights and interests of creditors and the society.<sup>85</sup> This balance will differ from jurisdiction to jurisdiction based on the individual stance the country takes socially, economically and politically. Cutting to the core, the only relevant questions in insolvency law are whether there is an advantage for creditors and whether they are treated equally.

One cannot deny the influence of corporate social responsibility on corporate law. This influence is evident in the shift from a pure shareholder approach when dealing with company law, to the current stakeholder approach. The challenge is to make a convincing case for recognising the interests of employees in this specific area of the law. Even in pure capitalist

---

<sup>82</sup> Westbrook *et al Business Insolvency Systems* 187.

<sup>83</sup> To name but a few, the Constitution of the Republic of South Africa, 1996, the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997, the Employment Equity Act 55 of 1998, the Skills Development Act 97 of 1998, the Unemployment Insurance Act 63 of 2001, the Occupational Health and Safety Act 85 of 1993 and the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

<sup>84</sup> *Principles for Effective Insolvency and Creditor/Debtor Regimes* Item 74, 26.

<sup>85</sup> *Principles for Effective Insolvency and Creditor/Debtor Regimes* Item 74, 26.

branches of the law, such as corporate law, a changed landscape is being explored.<sup>86</sup>

This can be seen in the acknowledgement that a “wider variety of interests” is to be considered when dealing within the realms of corporate law.<sup>87</sup> This so-called “wider variety of interests” includes investors, employees, consumers, the general public and the planet as stakeholders.<sup>88</sup> The reference to investors is surely the only reference to the capitalist approach of company law as it was known over many centuries. This stakeholder (investors) equates to capital and the possibility of making profit. The inclusion of the “environment” indicates that there is a growing awareness that interests outside the company must also be acknowledged. The recognition of “employees” is the highlight of the changing landscape to recognise the labour side in company law. This acknowledgement of the role that labour and employees play in corporate law is in line with Smit’s statement that “labour is not a commodity”.<sup>89</sup> This principle is in line with international recognised labour principles and lays the foundation of the first principle of the Constitution of the International Labour Organisation.<sup>90</sup>

The final word on the longstanding debate about whose interests a company director must honour to fulfil his fiduciary duty to act in the best interest of the company has not been spoken yet.<sup>91</sup>

It will become evident throughout this study that the primary objective of company law *to promote the company and accumulate profits*, the primary objective of insolvency law *to comply with the well-known principles of concursus creditorum and advantage for creditors* and the primary objective of labour law *to protect the employee in an employment situation*, are not easy to reconcile without a flexible and open-minded approach.<sup>92</sup> In some instances the primary object of one discipline will have to stand back and step aside to allow the object of the legislature to prevail or to ensure fairness.

---

<sup>86</sup> Esser 2009 *SAMLJ* 191.

<sup>87</sup> Esser 2009 *SAMLJ* 191.

<sup>88</sup> Esser 2009 *SAMLJ* 191.

<sup>89</sup> Smit *LLD Thesis* 30; see the discussion of the principle “labour is not a commodity” in Botha 2014 *PER* 2050; 2052 and footnotes 53 and 61.

<sup>90</sup> Smit *LLD Thesis* 30.

<sup>91</sup> Lombard and Joubert 2014 *JCLS* 211. For further discussion see Lombard and Joubert 2014 *JCLS* 211, footnotes 1 and 2 and 212 footnote 5.

<sup>92</sup> Own emphasis. Kimhi and Doebert 2015 *ABILR* 492.

## 8 INTERNATIONAL TRENDS

In a study of this nature it is important to consider international trends to seek guidance and to provide a framework to serve as point of departure to ensure that a developing country such as South Africa is on track and making good progress towards accomplishing international best practice.

Internationally, it is a well-known principle that employees must be protected whenever their employer faces financial distress. In 2005 the World Bank issued revised principles on this topic.<sup>93</sup> In respect of the role of employees this report states that “workers are a vital part of an enterprise, and careful consideration should be given to balancing the rights of employees with those of other creditors”.<sup>94</sup>

In the United Nations Commission on International Trade Law’s<sup>95</sup> *Legislative Guide* the protection of employment is established as one of the broad goals of an insolvency regime. In order to maintain stability in any legal regime the insolvency law of a country must strive to balance its economic, social and political goals.<sup>96</sup>

## 9 METHODOLOGY

The research follows a pragmatic approach and focuses on the position of employee rights in South Africa in liquidation and during business rescue proceedings. The legal position is compared to the position of employees in two international jurisdictions.

When referring to “employee rights” it must be borne in mind that the term has a twofold meaning for purposes of this study. Firstly, the position regarding employee entitlements, namely, claims for unpaid remuneration and other claims is examined and secondly the position regarding the employment contract and protection from retrenchment is highlighted.

Chapter 2 of the study sets out the position in South Africa and compares employee rights in liquidation and during business rescue respectively. This is done by interpreting legislation and applying court cases to the letter of the law. Academic authors’ submissions are also referred to

---

<sup>93</sup> *Principles for Effective Creditor Rights*.

<sup>94</sup> *Principles for Effective Creditor Rights* Principle C12.4.

<sup>95</sup> Hereafter UNICITRAL. Item 15, 14.

by incorporating viewpoints in textbooks and evaluating articles in law journals.

Chapter 3 starts the international comparative analysis and considers the position of employees in Australia.

Employee rights in England come under the spotlight in chapter 4. In comparing both these jurisdictions to South Africa, relevant legislation and sources are incorporated to support discussions and statements made.

Various considerations were taken into account before deciding on these comparative jurisdictions. Although many authors offer diverse justifications for comparing Australia and English company law with one another, the main reason why these two jurisdictions were included in this study is the fact that South Africa shares a commonwealth heritage with Australia and the United Kingdom which was influenced by English law.<sup>97</sup> It is also acknowledged that South Africa's rescue legislation shares many common rescue themes with the comparative legislation.<sup>98</sup> Another similarity between South Africa and Australia is the fact that both their rescue procedures are regulated by company law legislation.<sup>99</sup> Other justifications such as the fact that Australia's corporate rescue procedure is "sophisticated and established"<sup>100</sup> and that both Australia and England "had sophisticated corporate recovery regimes in place for decades"<sup>101</sup> should be frowned upon. Not only was South Africa the country with the first corporate rescue procedure enacted in the Companies Act 46 of 1926, but Australia's Part 5.3 which came into effect in 2001 can barely be labelled as operative for decades. A discussion of the corporate rescue mechanisms in these two countries is included in chapters 3 and 4 respectively.

All relevant international instruments<sup>102</sup> that might impact on employee rights in the various jurisdictions, where applicable, are also considered.

Finally, chapter 5 contains recommendations regarding amendments to existing legislation

---

<sup>96</sup> UNICITRAL *Legislative Guidelines* Item 15 and 16, 15.

<sup>97</sup> Kaplan *LLM Thesis* 15.

<sup>98</sup> Levenstein *LLD Thesis* 103.

<sup>99</sup> Companies Act 71 of 2008 in South Africa and the Corporations Act 2001 in Australia; Kaplan *LLM Thesis* 15.

<sup>100</sup> Kaplan *LLM Thesis* 11;

<sup>101</sup> Levenstein *LLD Thesis* 103.

that may be necessary to provide adequate protection to the rights of employees without unnecessarily prejudicing the potential success of the rescue of a business or the effect on employee rights in a liquidation.

## 10 RESEARCH QUESTIONS

The rights of employees may be dealt with in three possible ways during the business rescue procedure of a company in financial distress or during the liquidation of a company:

- (a) Employee rights may be ignored. This was the case with judicial management under the Companies Act of 1973.<sup>103</sup> The consequences of this option are that the procedure is subject to the usual principles of labour law that apply to any (successful) company;
- (b) the rights of employees may be enhanced to offer them additional protection during the rescue process. It seems as if this is the option chosen by the legislature in the Companies Act of 2008; or
- (c) legislation may curtail employee rights, for example, by making it easier for the company to retrench workers during business rescue and reduce the costs of running the business, or by simply treating employees in the same way they are treated in the event of liquidation.<sup>104</sup>

The first part of the research question of this thesis is to establish whether the (special) protection of the rights of employees in South Africa during and after business rescue proceedings places the business rescue procedure at a disadvantage when compared to liquidation. The second part examines whether employees will not ultimately be in a better position if the company enters liquidation from the start.

---

<sup>102</sup> For example, the International Labour Organisation (ILO) and Principles for Effective Creditor Rights in Insolvency Systems.

<sup>103</sup> Companies Act 61 of 1973.

<sup>104</sup> See Kimhi and Doebert 2015 *ABILR* 491 for a detailed discussion of international trends regarding employee protection legislation. The authors submit that two schools of thought have developed. In the first place, reference is made to the procedural approach as followed in the United States of America. According to this approach, rights given to employees during non-bankruptcy must reflect employee rights in bankruptcy. The second school stems from the European jurisdictions of France, the Netherlands and Germany. Here employees enjoy strong employee protection during non-bankruptcy situations, but the moment the company is confronted with bankruptcy, that strong labour protection is watered down.

This is done by identifying various employee rights in liquidation and business rescue. Comparative research is conducted to evaluate employee rights in liquidation and in rescue procedures. The basic employee rights that are researched in liquidation and on which conclusions will be drawn are:

- (a) Employee's right to commence liquidation
- (b) Employee's right to be notified and informed of liquidation
- (c) Employee's right to participate in consultations during liquidation
- (d) Employee's right to be present at a meeting and vote during liquidation
- (e) Effect of liquidation on the employment contract of an employee
- (f) Ranking of employee claims during liquidation and
- (g) The effect of the transfer of the business as a going concern in liquidation.

The same process is followed when considering the following basic employee rights during business rescue proceedings:

- (a) Employee's right to commence business rescue
- (b) Employee's right to be notified and informed of business rescue
- (c) Employee's right to participate in consultations during business rescue
- (d) Role of employees and their rights in respect of a business rescue plan
- (e) Employee's right to be present at a meeting and vote during business rescue
- (f) Effect of business rescue on the employment contract of an employee
- (g) Ranking of employee claims during business rescue and the effects in a subsequent liquidation and
- (h) The effect of the transfer of the business as a going concern in business rescue.

It must be noted that in some jurisdictions unique rights are found which are only discussed in relation that specific jurisdiction. When concluding, all identified employee rights are taken into consideration.

If it is found to be true that employee rights are overprotected it might lead to a situation where other stakeholders – particularly creditors – will avoid the use of business rescue proceedings even where it would have been appropriate to save the business as well as the jobs associated with it.





## 11 ABBREVIATIONS AND REFERENCES

The bibliography contains a comprehensive list of all references used in the thesis. For ease of reference, footnotes refer only to the surnames of writers and reference is then either made to the year of a specific publication or short keywords are used to distinguish work by the same author. Abbreviations are exclusively used in footnotes. A list of abbreviations and acronyms follows:

Alternative Law Journal	ALJ
American Bankruptcy Institute Law Review	ABILR
Australian Business Law Review	ABLR
Australian Insolvency Journal	AIJ
Australian National Audit Office Report	ANAO
Australian Securities and Investment Commission	ASIC
Brooklyn Journal of International Law	BJIL
Commercial Law Journal	CLJ
Commercial Law Quarterly	CLQ
Company and Securities Law Journal	CSLJ
Company Law Newsletter	CLN
Company Lawyer	CL
Comparative and International Law Journal of Southern Africa	CILSA
Corporate Insolvency	CI
Government Gazette	GG
Government Notice	GN
Industrial Law Journal	ILJ
Insolvency Intelligence	II
International Insolvency Review	IIR
International Journal of Comparative Labour Law and Industrial Relations	IJCLLIR
International Labour Organisation	ILO

## INTRODUCTION

---

Journal of Corporate Law Studies	JCLS
Journal of Judicial Science	JJS
Journal of Corporate and Commercial Law and Practice	JCCL&P
Law Institute Journal	LIJ
Law, Democracy and Development	LDD
Macquarie Journal of Business Law	MJBL
Marquette Law Review	MLR
Modern Company Law for a Competitive South African Economy	MCLCSAE
Nottingham Law Journal	NLJ
Potchefstroom Electronic Law Journal	PER
South African Law Journal	SALJ
South African Mercantile Law Journal	SAMLJ
Stellenbosch Law Review	Stell LR
Sydney Law Review	SLR
The King's College Law Journal	KCLJ
Transfer of Undertakings (Protection of Employment)	TUPE
Tydskrif vir Suid-Afrikaanse Reg	TSAR
United Nations Commission on International Trade Law	UNCITRAL

To the best of my knowledge the law stated in the thesis was correct as at 31 January 2018.

## CHAPTER 2 SOUTH AFRICA

### 1 INTRODUCTION

Until fairly recently employee rights in the realm of company law were not high on the priority list as a topic of debate.<sup>1</sup> Employees and their interests in insolvency law are referred to as the “lost souls” of insolvency law in some ways.<sup>2</sup> Finch explains this by referring to the important role that employees have to play in a company’s success, yet in insolvency matters the law does little to protect them.<sup>3</sup> Smit remarked in 2001 that “company law remains largely unconcerned with employees”<sup>4</sup> and added that the South African Companies Act<sup>5</sup> was “silent on the position of employees”<sup>6</sup>. Smit’s concerns came under the spotlight in the review process that preceded the current Companies Act 71 of 2008.

Before its reform, South Africa’s company law was regarded as outdated when compared to the corporate law regimes of international jurisdictions, and taking into account the enormous change in the country’s legal, political, social and economic environment since 1994, a complete overhaul was due.<sup>7</sup> The aim of the policy paper published by the Department of Trade and Industry in May 2004,<sup>8</sup> was to provide a framework for a new Companies Act for South Africa with guidelines for a process of technical consultations.<sup>9</sup>

South Africa’s insolvency law has been awaiting reform even longer. With an Insolvency Act dating back to 1936, and despite many amendments, the Insolvency Act<sup>10</sup> has not kept up with modern day developments. It was due to trade union initiatives that reform on the insolvency front became the topic of debate.<sup>11</sup> The subsequent reform that took place in insolvency law by

---

<sup>1</sup> The Companies Act 71 of 2008 contains a number of provisions related to employee rights in general and Chapter 6 of the Act that contains business rescue provisions abounds with references to employee rights and employee participation.

<sup>2</sup> Finch *Corporate Insolvency Law* 778; see also Cassim *Contemporary Company Law* 884.

<sup>3</sup> Finch *Corporate Insolvency Law* 778.

<sup>4</sup> Smit *LLD Thesis* 10.

<sup>5</sup> Act 61 of 1973, hereafter the 1973 Companies Act or the Companies Act of 1973.

<sup>6</sup> Smit *LLD Thesis* 11.

<sup>7</sup> According to Mandisi Mpahlwa, Minister of Trade and Industry 2004, *SA Company Law for the 21<sup>st</sup> Century* 3.

<sup>8</sup> *SA Company Law for the 21<sup>st</sup> Century* 7.

<sup>9</sup> See Mongalo *Modern Company Law* xiii for a detailed discussion on the company law reform process.

<sup>10</sup> Act 24 of 1936, hereafter the Insolvency Act or the Insolvency Act of 1936.

<sup>11</sup> In August 1999 COSATU issued a notice to Nedlac which triggered the negotiations for the amendments of insolvency laws specifically in instances where a company is liquidated and the liquidation could have a negative

introducing the 2002 amendments was driven by the labour force. Although the full implication of all these amendments is discussed later in this chapter,<sup>12</sup> it is worth mentioning here that the preamble to the Insolvency Amendment Act of 2002<sup>13</sup> explains the purpose of the amendments as follows: “To amend the Insolvency Act, 1936, so as to further regulate the effect of sequestration on employment contracts and claims for severance and retrenchment pay.”

Although the Insolvency Second Amendment Act of 2002<sup>14</sup> further amended some sections and introduced new sections into the Insolvency Act, it also contained three amendments to the Companies Act of 1973.<sup>15</sup> The main purpose of the amendments was to compel the company to give notice to employees and trade unions of an application for the winding-up of the company and to provide service of winding-up orders on employees and trade unions.

Although the reform of South Africa’s insolvency legislation became a topic of debate and discussion during the late 1980s, not much has changed. The University of Pretoria’s Centre for Advanced Corporate and Insolvency Law produced a Draft Insolvency Bill that was published by the South African Law Reform Commission in 1996 and on 5 March 2003 Cabinet approved the introduction of the Draft Insolvency and Business Recovery Bill.<sup>16</sup> Unfortunately, despite an optimistic publication date of sometime during 2004, this “unified insolvency act”, has not materialised.

One of the key roles government had to play in the corporate law reform process was to promote employment opportunities.<sup>17</sup> The policy paper laid down several ideals. The development of South Africa’s economy was a priority and according to the policy paper, company law should accomplish that by

- (a) encouraging entrepreneurship – included in this objective was the creation of employment opportunities; and

---

impact on the rights of workers. See further in this regard Van Eck *et al* 2004 *SALJ* 906 and note 27; also Boraine and Van der Linde (Part 1) 1998 *TSAR* 621.

<sup>12</sup> See par 2.3 and 2.6 below.

<sup>13</sup> Act 33 of 2002, published in *GG* 24026 on 6 November 2002.

<sup>14</sup> Act 69 of 2002, published in *GG* 24285 on 22 January 2003.

<sup>15</sup> S 346 of the 1973 Companies Act was amended by the insertion of s (4A) after subsection 4, the insertion of s 346A as well as the amendment of s 347 by inserting s (1A) after subsection (1).

<sup>16</sup> For detail regarding the reform process and the work done by the Centre for Advanced Corporate and Insolvency Law see Burdette (Part 1) 2004 *SAMLJ* 241–243; Burdette *LLD Thesis*; Boraine and Van der Linde 1998 (Part 1) *TSAR* 621; Boraine and Van der Linde 1999 (Part 2) *TSAR* 38; and Smith and Boraine 2002 *ABILR* 140–143.

- (b) encouraging transparency and recognising the broader social role of enterprises.<sup>18</sup>
- (c) The emphasis placed on the findings in the policy paper is paramount if cognisance is taken of the fact that the abovementioned objectives of company law were partly incorporated in section 7 of the promulgated Companies Act that sets out the purposes of the Act.<sup>19</sup>

This policy paper also recognised the need to review the relationship between company law and the rules for the protection of employee interests.<sup>20</sup> By then, three years had passed since Smit's comment that company law ignores the role of the employee. It was about time to consider the interests of the employees since

“[their] association with the company is the closest, and [their] survival and dependency are largely determined by the management and the prosperity of the company where they spend the majority of their productive time”.<sup>21</sup>

Employees are not only extremely vulnerable in liquidations because their main source of income, namely, their salary and wages might probably be at risk, but their vulnerability is exacerbated by the fact that they are not in a position to spread their risk between different enterprises in the way creditors and shareholders are able to do.

Carolus sums up this predicament of employees by stating:

“It is not an exaggeration to say that the financial security of employees is sometimes so closely related to the stability of a company that the insolvency of the latter means financial disaster for its labour force.”<sup>22</sup>

The policy paper acknowledged that a company's existence and chances of success are inevitably linked to the interests of its employees and that they must be accounted for as stakeholders of the company.<sup>23</sup> Employees are not to be treated as commodities.<sup>24</sup> It is trite that

---

<sup>17</sup> *SA Company Law for the 21<sup>st</sup> Century* 8.

<sup>18</sup> *SA Company Law for the 21<sup>st</sup> Century* 9.

<sup>19</sup> S 7(b)(i) and (ii).

<sup>20</sup> *SA Company Law for the 21<sup>st</sup> Century* 10.

<sup>21</sup> Smit *LLD Thesis* 10.

<sup>22</sup> Carolus *et al* 2007 *LDD* 109.

<sup>23</sup> *SA Company Law for the 21<sup>st</sup> Century* 22; 25.

no employee is irreplaceable but if a company is struggling financially it is important for the company to be able to rely on the loyalty of its employees.

Chapter 4 of the policy paper identified the primary focus areas for reform. It stated that the interests of the employees form part of many concerns that need to be taken care of in the case of a company's winding-up.<sup>25</sup> The neglect of employee rights and the non-participation of employees in a company's liquidation have been referred to as "employee impotence", stressing the vulnerability that employees face.<sup>26</sup>

The policy paper concluded with chapter 5 that examined the way forward. One of the actions needed was that the policy paper had to be debated at the National Economic Development and Labour Council.<sup>27</sup> This indicated the important role that labour was to play in the reform of South Africa's company law.

In the King Code of Corporate Governance<sup>28</sup> more reference was made to the role that employees were to play in a company. It emphasised that the success of 21<sup>st</sup> century companies lay in the harmonious role of "planet, *people* and profit"<sup>29</sup> that had to be balanced. The need for a successful business rescue regime was also examined in King III and it was again emphasised that the ability to rescue a company that experienced financial difficulty would serve the interests of shareholders, creditors, *employees* and other stakeholders.<sup>30</sup>

While acknowledging the fact that South Africa tries to keep up with international developments in insolvency, company law and labour law, it is important to recognise the influence that an international body such as the United Nations Commission on International Trade Law<sup>31</sup> has on our country's insolvency law and law reform in general.<sup>32</sup> In its 2004 Legislative Guide on Insolvency Law reference is made to the balance that needs to be struck

---

<sup>24</sup> Rau-Foster <http://www.workplaceissues.com/aremp/> (Date of use: 19 May 2016).

<sup>25</sup> *SA Company Law for the 21<sup>st</sup> Century* 41.

<sup>26</sup> Faul *LLM Thesis* 16.

<sup>27</sup> *SA Company Law for the 21<sup>st</sup> Century* 49. The National Economic Development and Labour Council (Nedlac) plays an important role in the labour market and aims to address former irregularities and inadequacies associated with labour law. See also "Nedlac Founding Declaration" 5 <http://www.new.nedlac.org.za> (Date of use: 3 February 2016).

<sup>28</sup> *King III Report* 11.

<sup>29</sup> Own emphasis.

<sup>30</sup> *King III Report* 15; own emphasis.

<sup>31</sup> Hereafter referred to by its acronym UNCITRAL

<sup>32</sup> For example, South Africa was one of the first countries to adopt the UNCITRAL Model Law on Cross-border Insolvency; see in this regard Smith and Boraime 2002 *AMILR* 135.

when considering all possible branches of the law.<sup>33</sup> The point of departure as regards insolvency law is as follows:

“Generally, the mechanism must strike a balance not only between the different interests of these stakeholders,<sup>34</sup> but also between these interests and the relevant social, political and other policy considerations that have an impact on the economic and legal goals of insolvency proceedings.”<sup>35</sup>

According to the UNCITRAL guide, the “first objective of maximisation of value is closely linked to the balance to be achieved in insolvency law”.<sup>36</sup> The balance referred to is that between liquidation and reorganisation. The gist of this balance is that “insolvency law needs to balance the advantages of near-term debt collection through liquidation. . . against preserving the value of the debtor’s business through reorganization”.<sup>37</sup>

If such a balance can be struck employment will be protected.<sup>38</sup> The possibility that insolvency law should include reorganisation as an alternative to liquidation makes sense as the basic components of the business will be kept together. This makes reorganisation more valuable because of the advantage that creditors might receive more than in the case of liquidation while employees do not lose their jobs.<sup>39</sup>

## 2. EMPLOYEE RIGHTS IN LIQUIDATION

Chapter 14 of the 1973 Companies Act is applicable to the winding-up or liquidation of an insolvent company because the Companies Act of 2008 did not repeal the provisions applicable to the winding-up or liquidation of insolvent companies.<sup>40</sup>

Section 339 of the Companies Act 1973 furthermore provides that the Insolvency Act will

---

<sup>33</sup> *UNCITRAL Legislative Guide* 9.

<sup>34</sup> The stakeholders referred to include “the debtor, the owners and the management of the debtor, the creditors . . . the employees” etc; see *UNCITRAL Legislative Guide* 9.

<sup>35</sup> *UNCITRAL Legislative Guide* 9.

<sup>36</sup> *UNCITRAL Legislative Guide* 11; see also Burdette (Part 1) 2004 *SAMLJ* 241 for a detailed discussion of the *UNCITRAL Legislative Guide*.

<sup>37</sup> *UNCITRAL Legislative Guide* 11.

<sup>38</sup> *UNCITRAL Legislative Guide* 11.

<sup>39</sup> *UNCITRAL Legislative Guide* 11.

<sup>40</sup> Item 9(1) of Schedule 5 of the Companies Act 71 of 2008 makes chapter 14 of the Companies Act 61 of 1973 applicable to the winding-up of insolvent companies pending the promulgation of a new Insolvency Act.



apply *mutatis mutandis* to a matter not specifically dealt with in Chapter 14 of the Companies Act 1973 where a company unable to pay its debts is liquidated, in so far as it is applicable.

Employee rights in liquidation are thus mainly regulated by the Companies Act 1973,<sup>41</sup> the Insolvency Act 1936 and the Labour Relations Act 1995.

## 2.1 Employee's right to commence liquidation

Section 346 of the Companies Act provides that an application for the winding-up or liquidation<sup>42</sup> of an insolvent company can be made to court by the company, one or more creditors of the company or a shareholder.<sup>43</sup> The section includes prospective or contingent creditors in the reference to creditors<sup>44</sup> and the restriction of shareholders contained in section 346(2) means that the member's name must have been contained in the securities register for at least six months before the application for winding-up or liquidation of the company may be brought.

The fact that no direct reference is made in section 346 to any right that an employee might have to commence liquidation proceedings of the company comes as no surprise: the continued existence of the company is of paramount importance to any employee and no employee would prefer to place their own employer in the process that eventually will lead to its termination and dissolution.

The question arises whether an employee who is owed money by the company will qualify as a creditor of the company and in this capacity have the right to initiate winding-up or liquidation proceedings against the company. There is no easy answer to this question.<sup>45</sup>

It is a trite principle of the law of contract that whenever a party performs his part of the contractual obligations a personal right vests. This means that the employee acquires a right against the employer to claim payment for the work that he has done. According to the definition

---

<sup>41</sup> All references to the Companies Act in part 2 dealing with insolvent liquidations are to the Companies Act 61 of 1973 unless specifically stated otherwise.

<sup>42</sup> Winding-up and liquidation have the same meaning and are used interchangeably throughout the thesis.

<sup>43</sup> S 346(1)(a)–(c). The persons mentioned here are “the only” ones who have *locus standi* in terms of this section. See Delpont *Henochsberg* 65.

<sup>44</sup> S 346(1)(b).

<sup>45</sup> The word “creditor” is not defined in the Insolvency Act. Employees who are owed money by the company need not prove a claim in respect of s 98A(1)(a). All other creditors who allege that the company owe them money must prove a claim. This contributes to the uncertainty regarding the position of employees as creditors.

of an employment contract the employee renders his services and in return receives remuneration for such performance.<sup>46</sup> This means that the moment the company owes money to an employee, the employee has a personal right against the company for the payment of such money. The employee therefore qualifies as a creditor of the company.<sup>47</sup> Evans refers to these employees as “employee creditors”.<sup>48</sup>

It is submitted that employees therefore will have the right to initiate the liquidation of the company where remuneration or other employment-related monies are owed to them. This right accrues to employees in their capacity as creditors of the company and not as employees. This position of employees in South Africa corresponds with the right of employees in Australia<sup>49</sup> and England.<sup>50</sup>

## 2.2 Employee’s right to be notified and informed of liquidation

When an applicant applies for the winding-up of a company he must, at the time his application is presented to the court in terms of section 346, furnish a copy of such application to every registered trade union that represents any employee of the company<sup>51</sup> and to the employees themselves.<sup>52</sup> Prior to 2002, trade unions advocated for timeous notification in the situation where an employer was to be liquidated.<sup>53</sup>

As from 1 August 2002 section 197B of the Labour Relations Act<sup>54</sup> provides for the disclosure of information concerning insolvency to the employees. Section 197B(1) provides that when a company is having financial problems that might “reasonably” result in the company’s liquidation, consulting parties as set out in section 189(1) of the Labour Relations Act need to be advised. These parties include any person whom the employer is required to consult with in terms of a

---

<sup>46</sup> See *Coca Cola SABCO (Pty) Ltd v Van Wyk* LAC JA11/2013 at 22 on 7 and 24 on 8 and *Hendor Mining Supplies (Pty) Ltd v NUMSA and another* LAC JA55/2014 at 16 on 8 where it was held that a claim for arrear wages was a contractual claim that an employee has against the employer; see also Van Niekerk *et al* *Law@Work* 85.

<sup>47</sup> Delpont *Henochsberg* 446.

<sup>48</sup> Evans 2004 *SAMLJ* 465.

<sup>49</sup> Chapter 3, par 2.1.

<sup>50</sup> Chapter 4, par 2.1.

<sup>51</sup> S 346(4A)(a)(i).

<sup>52</sup> S 346(4A)(a)(ii).

<sup>53</sup> Van Eck *et al* 2004 *SALJ* 923.

<sup>54</sup> In terms of the Labour Relations Amendment Act 12 of 2002.

collective agreement,<sup>55</sup> or where no collective agreement is in place, a workplace forum<sup>56</sup> or registered trade union.<sup>57</sup> Where there are no workplace forums or trade unions representing employees, the company has to consult with employees likely to be affected by the insolvency.<sup>58</sup> Section 197B(2) compels a company that applies for liquidation or when an application for its liquidation is made to provide the employees with a copy of the application<sup>59</sup> within two days at the time of making the application or 12 hours in urgent matters.<sup>60</sup> Section 189 further provides that the employer must engage in negotiations regarding the details of the possible dismissals.<sup>61</sup> The employer must also issue a written notice to the employees and disclose all relevant information regarding the reasons for the proposed dismissals, the number of employees that might be affected thereby, how he will choose who will be dismissed and who will remain employed, when the dismissals will take place, severance pay to be paid, and the possibility of future employment assistance that the employee could expect from the employer during the period of dismissal.<sup>62</sup>

The Insolvency Second Amendment Act<sup>63</sup> provided for improved notification provisions specifically to favour the position of employees in liquidation.<sup>64</sup> Section 346 of the Companies Act was amended to provide that a copy of the liquidation order must be delivered to all creditors, including every registered trade union and the employees themselves.<sup>65</sup>

Three sections of the 1973 Companies Act were amended or substituted by the Insolvency Second Amendment Act 69 of 2002. These amendments and substitutions all contributed to a more favourable position where notice to employees in the liquidation process is concerned. Firstly section 346 of the 1973 Companies Act was amended by the insertion of subsection (4A) after subsection 4 where the application for winding-up is concerned. Section 346(4A)(a)

---

<sup>55</sup> S 189(1)(a) of the Labour Relations Act 1995.

<sup>56</sup> S 189(1)(i) of the Labour Relations Act 1995.

<sup>57</sup> S 189(1)(ii) of the Labour Relations Act 1995.

<sup>58</sup> S 189(1)(c) and (d) of the Labour Relations Act 1995.

<sup>59</sup> Labour Relations Act 1995.

<sup>60</sup> S 197B(2)(a) of the Labour Relations Act 1995.

<sup>61</sup> S 189(2) of the Labour Relations Act 1995; see also Van Eck *et al* 2004 *SALJ* 924.

<sup>62</sup> S 189(3) of the Labour Relations Act 1995. This section of the Labour Relations Act 1995 is also discussed in par 3.6.2 which deals with the situation where a company in financial distress considers business rescue as an alternative to liquidation.

<sup>63</sup> Act 69 of 2002 that came into operation on 1 January 2003 (see GN 121 of 2003 in GG 24285 of 22 January 2003).

<sup>64</sup> Evans 2004 *SAMLJ* 464.

<sup>65</sup> S 4(2) and 9(4A) of the Insolvency Act of 1936.

provides that the applicant must give a copy of the application to every registered trade union that represents any of the company's employees. A copy must also be furnished to the employees themselves.<sup>66</sup> This notice to employees must be done by fixing a copy of the application to any notice board to which the employees have access inside the premises of the company<sup>67</sup> or to the front gate of the premises if the employees do not have access to the inside of the property.<sup>68</sup>

Secondly, section 346A was inserted after section 346 and concerns the service of the winding-up order. Section 346A provides that a copy of a winding-up order must be served on every trade union and on the employees of the company<sup>69</sup> by fixing a copy of the application to a notice board inside the premises.<sup>70</sup>

Lastly, section 347 was amended by the insertion of subsection (1A) after subsection (1). However, this insertion does not affect employees explicitly as it deals with a malicious application order and damage that can be claimed by the company if it can be proved.

The copy of the application that must be furnished to the trade unions and employees must be attached to a notice board inside the premises of the company if the employees have access to the workplace,<sup>71</sup> otherwise the copy of the application must be attached to the front gate of the workplace from which the company normally conducts business.<sup>72</sup>

Section 346A of the 1973 Companies Act deals with the serving of a winding-up order and like section 346 discussed above, the order must be served on every registered trade union<sup>73</sup> and on individual employees.<sup>74</sup> The manner in which the order must be served corresponds with the way in which the application has to be served in terms of section 346(4A).<sup>75</sup>

---

<sup>66</sup> S 346(4A)(a)(ii).

<sup>67</sup> S 346(4A)(a)(ii)(aa).

<sup>68</sup> S 346(4A)(a)(ii)(bb).

<sup>69</sup> S 346A(1)(a) and (b).

<sup>70</sup> S 346A(2) provides: "For the purposes of serving the winding-up order in terms of subsection (1), the sheriff must establish whether the employees of the company are represented by a trade union and determine whether there is a notice board inside the premises of the company to which the employees have access."

<sup>71</sup> S 346(4A)(a)(ii)(aa).

<sup>72</sup> S 346(4A)(a)(ii)(bb).

<sup>73</sup> S 346A(1)(a).

<sup>74</sup> S 346A(1)(b); see Loubser 2005 *II*R 63–64 for a detailed discussion of s 346A and 346(4A).

<sup>75</sup> S 346(4A)(a)(ii)(aa) and (bb).

In *EB Steam Company (Pty) Ltd v Eskom Holdings SOC Ltd*,<sup>76</sup> Wallis AJ held that the furnishing of information to employees and trade unions of the company in terms of section 346 (4A) is peremptory. This requirement serves to protect the interests of employees and should be regarded as having priority in liquidation matters.<sup>77</sup> It was stated that “peremptory” means that it is not permissible for the court to grant a final winding-up order if these requirements were not complied with.<sup>78</sup> It therefore was regarded as inappropriate to grant the final liquidation order. The court ruled that the order was only provisional and that the employees had to be furnished with a copy of the applicant’s papers.<sup>79</sup> Although the role that employees play in liquidation is restricted due their employment contracts being suspended on the granting of the winding-up order, it is pleasing to see that their interests are looked after. The decision in *EB Steam Company* showed that amendments to legislation happen for a reason and that the judiciary is prepared to order time to pass in a case to ensure compliance with the letter of the law. Employees therefore have the right to oppose liquidation applications.

In Australia, employees do not have specific rights to receive information in their capacity as employees of the company.<sup>80</sup> In England,<sup>81</sup> employees only enjoy the right to receive information regarding liquidation in their capacities as creditors of the company, as is the case in Australia.

It is my belief that employees in South Africa are treated fairly in this regard. Considering that their employment position will change dramatically<sup>82</sup> once winding-up proceedings commence and that they do not have a right to support or reject such commencement, the very minimum right that they should have, is the right to know what is happening.<sup>83</sup>

---

<sup>76</sup> [2014] 1 All SA 294 (SCA) para 22–23; see also *Pilot Freight (Pty) Ltd v Von Landsberg Trading (Pty) Ltd* [2014] ZAGPJHC 203. The Labour Relations Amendment Act 12 of 2002 introduced s 197B which deals with an employer’s obligation to disclose information to its employees in the event of insolvency. See the reference to this and the *EB Steam* case in *Pilot Freight (Pty) Ltd v Von Landsberg Trading (Pty) Ltd* [11] at 30.

<sup>77</sup> See also *Pilot Freight (Pty) Ltd v Von Landsberg Trading (Pty) Ltd* [2014] ZAGPJHC 203 [31] at 12.

<sup>78</sup> *EB Steam Company (Pty) Ltd v Eskom Holdings SOC Ltd* [2014] 1 All SA 294 (SCA) [25].

<sup>79</sup> *EB Steam Company (Pty) Ltd v Eskom Holdings SOC Ltd* [2014] 1 All SA 294 (SCA) [27] and [29].

<sup>80</sup> Chapter 3, par 2.2.

<sup>81</sup> Chapter 4, par 2.2.

<sup>82</sup> The employment contracts will be suspended for 45 days where after the liquidator will decide whether to continue with them or to terminate them. See par 2.3 for a detailed discussion of s 38 of the Insolvency Act 1936 and the effect of liquidation on the employment contract.

<sup>83</sup> Some of the radical changes to their position of employment are discussed later where the position of employment contracts come under the spotlight and their preferences are capped to minuscule amounts as statutory preferent creditors; see par 2.3 and 2.6 below.

### 2.3 Effect of liquidation on employment contract of employees

Every employee has a basic right to fair labour practices which is enshrined in the South African Constitution.<sup>84</sup> One of the fundamental labour right is the right not to be unfairly dismissed. This implies that if an employer wants to terminate the employment relationship with an employee, that termination is subject to a set of rules regulated by the Labour Relations Act.<sup>85</sup> Not only is a valid reason (substantive fairness) necessary before an employer may dismiss an employee, the employer will also have to follow a correct and fair procedure (procedural fairness). Where the dismissal is based on operational requirements and it appears to be unfair due to a lack of evidence of a substantive reason, or in the event where the correct procedure was not followed by the company, the latter will be liable for compensation.<sup>86</sup>

Section 213 of the Labour Relations Act acknowledges that financial difficulty might justify the dismissal of employees based on operational requirements. This justifies the situation where an employer dismisses an employee due to “economic, structural or similar needs” which would include a situation where a company is in financial distress and needs to downsize the workforce. However, the Labour Relations Act does not contain any provision regarding the termination of employment contracts in cases of insolvency.<sup>87</sup>

Until 2003, the common-law principle applicable to uncompleted contracts governed the situation where a company was liquidated.<sup>88</sup> The rule was that employment contracts were terminated automatically.<sup>89</sup>

The Insolvency Amendment Act<sup>90</sup> came into effect on 1 January 2003 and changed the landscape for employees with regard to the effect of liquidation on their employment contracts. Section 38 of the Insolvency Act of 1936 was replaced with a new section 38.

---

<sup>84</sup> S 23 of Act 108 of 1996.

<sup>85</sup> 66 of 1995.

<sup>86</sup> S 188 of the LRA of 1995. S 194(1) provides for the amount for which the company will be liable in this situation. The amount is equal to an employee’s remuneration for a period of 12 months and is calculated on the date of dismissal.

<sup>87</sup> Van Eck *et al* 2004 SALJ 908.

<sup>88</sup> Boraine and Van der Linde (Part 2) 1999 TSAR 38.

<sup>89</sup> S 38 of the Insolvency Act of 1936; Van Eck *et al* 2004 SALJ 908.

<sup>90</sup> Act 33 of 2002 (see GN 1388 of 2002 in GG 24026 of 8 November 2002); see Steenkamp and Warrassaly 2002 LDD 151 for a discussion of the effect of the 2002 Insolvency Act amendments on labour law.

Before 1 January 2003 the liquidation of a company terminated the employment contracts of the employees automatically.<sup>91</sup> The repealed section 38 provided that liquidation of a company will terminate the employment contract between the employer and employee. The employee had a claim for compensation which he could institute against the company due to loss suffered as a result of the premature termination of the employment contract.

That was the end of employment contracts under the previous section 38 of the Insolvency Act of 1936. There was no possibility of the revival of an employment contract despite the possibility that the provisional liquidation order could be discharged.<sup>92</sup>

Dismissed employees were entitled to compensation for the loss suffered due to the termination of their employment contracts.<sup>93</sup> They were also entitled to preferent claims to a maximum amount of R2 000, or payments for a period not exceeding two months for arrear salary, wages and other payments.<sup>94</sup>

The current section 38 provides that employment contracts are suspended from the time the order has been granted.

The liquidation of the company therefore results in the employment contracts being suspended<sup>95</sup> for a maximum period of 45 days after appointment of the final liquidator during which time he has to decide the employees' fate.<sup>96</sup> If the liquidator intends retaining the employees, he must agree to continued employment with the affected employees.<sup>97</sup> In the absence of such pertinent agreement with the employees, their employment contracts will terminate at the end of the 45 days. Where the liquidation of the company is due to its inability to pay debt, the transitional provisions<sup>98</sup> make chapter 14 of the 1973 Companies Act applicable.

---

<sup>91</sup> S 38 of the Insolvency Act of 1936. S 38 is made applicable by the provisions of s 339 of the Companies Act of 1973 when a company, unable to pay its debts, is liquidated. For a discussion of the position before 1 January 2003 see Meskin *et al Insolvency Law* 5.21.10.1 at 5-74(2F) and further.

<sup>92</sup> Steenkamp and Warrassaly 2002 *LDD* 156.

<sup>93</sup> S 38 of the 1936 Insolvency Act.

<sup>94</sup> Evans 2004 *SAMLJ* 463 and also s 100 of the Insolvency Act of 1936 prior to its repeal by the Judicial Matters Second Amendment Act 122 of 1998.

<sup>95</sup> S 38(1) of the Insolvency Act as amended. According to s 38(9) employment contracts will be terminated after this 45-day suspension period unless an agreement was made in terms of s 38(6). For a discussion of the position after 1 January 2003 see Meskin *et al Insolvency Law* 5.21.10.2 at 5-74(5) and further.

<sup>96</sup> S 38(9) of the Insolvency Act of 1936.

<sup>97</sup> *Van der Merwe and Others v Zonnekus Mansion (Pty) Ltd (in liquidation) and Another (Commissioner for the South African Revenue Service and Another Intervening)* (17150/2016) [2016] ZAWCHC 193 [48].

<sup>98</sup> Provided for in Item 9(1) of Schedule 5 of the 2008 Companies Act.

Section 339 of the 1973 Companies Act becomes relevant and the law regulating the winding-up of insolvent companies becomes applicable.

This change was considered to be “more favourable”.<sup>99</sup> Writers were of the opinion that the “primary aim of the amendments” was to save jobs.<sup>100</sup> I disagree. The mere fact that employees are granted a 45-day suspension period can hardly be seen as the saving of their jobs. In fact, during the period of suspension, employees are not required to render services and no remuneration is payable to them.<sup>101</sup> In fact, their position worsened as “no employee benefits” accrued to them during the time of suspension.<sup>102</sup> The only direct benefits that flowed from the 45-day suspension period were the opportunity granted to employees to be part of consultations with the liquidator<sup>103</sup> and the right to claim unemployment insurance benefits. During this period of suspension an employee is not required to work but he or she is not entitled to remuneration or any other employment benefits.<sup>104</sup> The aim of such consultation was to reach agreement on possible ways to save the business or rescue the business if possible.<sup>105</sup>

In a recent decision, *Ngwato v Van der Merwe NO*,<sup>106</sup> the court confirmed that in lieu of the interplay between section 38 of the Insolvency Act of 1936 and the transitional measures provided for in the 2008 Companies Act, employment contracts are suspended with effect from the granting of the provisional (or final) liquidation order.<sup>107</sup>

No employment contract may be terminated by any liquidator during liquidation proceedings, unless consultations took place between the liquidator, trade unions, workplace forums and employees in accordance with any applicable collective agreement.<sup>108</sup> The consultation must be aimed at agreeing on an appropriate measure to try and save the business of the company.<sup>109</sup>

---

<sup>99</sup> Evans 2004 *SAMLJ* 463.

<sup>100</sup> Steenkamp and Warrassaly 2002 *LDD* 156.

<sup>101</sup> S 38(2)(a).

<sup>102</sup> S 38(2)(b).

<sup>103</sup> S 38(6).

<sup>104</sup> S 38(2)(a)–(b). In terms of s 38(3) an employee whose services have been suspended due to the liquidation of the company is entitled to unemployment benefits in terms of s 35 of the Unemployment Insurance Act 63 of 2001. See also Evans 2004 *SAMLJ* 463 for a general discussion.

<sup>105</sup> S 38(7). Various options were available. See s 38(7)(a)–(d) for the possible outcomes of the consultations. The position regarding the consultations between the liquidator and employees is described in more detail later.

<sup>106</sup> (2014/28470) [2016] GJ (6 May 2016).

<sup>107</sup> *Ngwato v Van der Merwe NO* (2014/28470) [2016] GJ (6 May 2016) [60(1)].

<sup>108</sup> S 38(5).

<sup>109</sup> S 38(6).



Examples of these measures include the sale of the business of the company as envisaged by section 197A,<sup>110</sup> transferring business as a going concern, a section 311 compromise regulated by the 1973 Companies Act<sup>111</sup> or any other applicable alternative. Where a liquidator chooses one of these alternatives he would probably not terminate the employment contracts during liquidation as a sale of the business as a going concern would result in the contracts being carried over to the new employer.

Section 197A of the Labour Relations Act 1995 regulates the transfer of employment contracts when a business is transferred from an old company to a new company in the case of insolvency.<sup>112</sup> The effects of such transfer are the following: the old employer is automatically replaced by the new employer and all employment contracts that existed before the provisional winding-up of the old company are transferred to the new company;<sup>113</sup> all rights and duties that existed between the old company and the employees at the time of the transfer remain rights and obligations between the old company and the employees;<sup>114</sup> everything the old company did regarding his employees remains his conduct;<sup>115</sup> and the transfer does not interfere with the continuity of the employment contract.<sup>116</sup>

After the 45-day suspension period, the employment contract will be automatically terminated as mentioned earlier.<sup>117</sup>

When an employment contract is suspended or terminated, the employee is entitled to a concurrent claim for compensation for loss suffered due to the premature termination of the employment relationship.<sup>118</sup> The employee will also be able to claim severance benefits as a preferent claim from the insolvent estate of the employer in accordance with section 41 of the Basic Conditions of Employment Act.<sup>119</sup>

---

<sup>110</sup> Of the Labour Relations Act 66 of 1995.

<sup>111</sup> S 311 of the 1973 Companies Act has been repealed by the 2008 Companies Act and compromises with creditors now form part of Chapter 6 in s 155.

<sup>112</sup> S 197A(1) of the LRA. The same principles are applicable to a compromise with creditors in terms of s 155 of the 2008 Companies Act.

<sup>113</sup> S 197A(2)(a) of the LRA.

<sup>114</sup> S 197A(2)(b) of the LRA.

<sup>115</sup> S 197A(2)(c) of the LRA.

<sup>116</sup> S 197A(2)(d) of the LRA.

<sup>117</sup> S 38(9)(b).

<sup>118</sup> S 38(10).

<sup>119</sup> Act 75 of 1997.

The situation regarding employment contracts will always be a sensitive issue. Not only will employees lose their employment and all the concomitant when a company goes into liquidation, but they will face many administrative challenges should they wish to use the rights afforded to them in terms of the abovementioned legislation.

The reforms in this area and the fact that the legislator is concerned about the rights of employees in the event of the company being liquidated, are steps in the right direction. That the reform was initiated by the labour force was to be expected and the fact that their initiatives were ultimately incorporated by Parliament in the amendments to the law of insolvency should be welcomed.<sup>120</sup>

In Australia, employees are in an unfortunate position as the publication of the winding-up order serves as a notice of dismissal to them.<sup>121</sup> Employment contracts are thus terminated. The liquidator may choose to keep some employees employed on the old terms and conditions. Other contracts are treated more favourably in Australia and do not end automatically once the winding-up order has been published. All employment contracts in England are also terminated automatically upon liquidation. If the liquidator decides to retain employees, their remuneration will form part of the claims payable as cost of the liquidation.<sup>122</sup> Employees in South Africa are still in a more favourable position regarding their employment contract in liquidation than the employees are in England during administration.<sup>123</sup> This is a good reflection on the treatment of employee rights in general in South Africa.

## **2.4 Employee's right to participate in consultations during liquidation**

There is no mention in the legislation of any right of an employee to participate in consultations during the winding-up of an insolvent company. Section 414 of the Companies Act of 1973 only refers to the duty of directors and officers of a company to attend the first and second creditors meeting. They do not have any participation rights at these meetings in their capacities as

---

<sup>120</sup> Boraine and Van Eck 2003 *ILJ* 1840.

<sup>121</sup> See chapter 3, par 2.3.

<sup>122</sup> See chapter 4, par 2.3.

<sup>123</sup> In liquidation in South Africa employment contracts are suspended 45 days after the appointment of the liquidator and in England employee contracts are regarded as adopted if employees are still in continued employment of the company 14 days after the appointment of the administrator during administration. See chapter 4, par 3.5.

directors or officers, only as creditors of the company. They must also attend any additional meetings on demand by the liquidator.

Section 38(5) of the Insolvency Act 1936 provides that a liquidator may not terminate any employment contracts unless he has consulted with persons in terms of a collective agreement or in terms of a workplace forum, or registered trade unions where their members might be affected, or with the employees themselves or represented by someone.<sup>124</sup>

However, if employees are creditors of the company because monies are owed to them they will have the right to participate as creditors in consultations with the liquidator.<sup>125</sup>

Employees have direct consultation rights if the employer wishes to dismiss them prior to liquidation of a company due to operational requirements. Sections 189 and 189A of the Labour Relations Act of 1996 govern this aspect of consultation in the case of retrenchment of employees and will then be applicable, but not during the liquidation of the company.<sup>126</sup>

In contrast, employees in Australia have an active role to play during consultations in liquidation of a company.<sup>127</sup> Employees may not only nominate an employee to represent their interests on a committee of inspection, but they may also play an active role in the committee of inspection by monitoring, advising and directing the liquidator.

## **2.5 Employee's right to be present at meetings and to vote during liquidation**

Section 412 of the 1973 Companies Act provides for two types of meetings, namely, meetings of creditors<sup>128</sup> and meetings of shareholders and contributories.<sup>129</sup> Once again reference is made to sections of the Insolvency Act of 1936 that will apply to meetings of creditors and voting rights

---

<sup>124</sup> S 38(5)(a) and (b) of the Insolvency Act 1936.

<sup>125</sup> This is according to s 38(8) of the 1936 Insolvency Act where creditors may take part in consultation with the consent of the liquidator.

<sup>126</sup> See in general Van Eck *et al*/2004 SALJ 911 and further for more detail on the role of the LRA in the event where an employer dismisses employees based on operational requirements. A more detailed discussion of s 189 and 189A of the LRA is done in par 3.6 below where the effect of business rescue on employment contracts is discussed.

<sup>127</sup> See chapter 3, par 2.3 for a detailed discussion. The position in England is worse than in South Africa as employment contracts are automatically terminated in the case of liquidation. See chapter 4, par 2.3.

<sup>128</sup> S 412(1)(a).

<sup>129</sup> S 412(1)(b).

attributed to creditors.<sup>130</sup>

Employees do not enjoy the right to be present at a meeting. In South Africa, employees do not have a right to vote during winding-up procedures because of the automatic suspension and eventual termination of their employment contracts. The position in both Australia<sup>131</sup> and England<sup>132</sup> is very similar.

It is submitted that “employee creditors” will have this right but not in their capacities as employees but as creditors.

Although at first glance it might look dark for any employee participation in meetings and voting, I believe that employees have the necessary rights in this regard, albeit not in the capacity of employees, but as creditors of the company. They are able to ensure that their position as employees is taken care of and where doing so is impossible, their entitlements as creditors should compensate for their loss of employment.

## **2.6 Ranking of employee claims during liquidation**

South Africa is said to follow a “Model Two: Bankruptcy Preference Approach” as far as employee preferences during liquidation are concerned.<sup>133</sup> This merely means that South Africa is placed in a category together with many other countries around the world that use a system which provides for a general preference for employee-related entitlements that rank below a company’s secured creditors and administration cost.<sup>134</sup> The other characteristic of a model two country is the fact that there is no guarantee fund for employee claims.<sup>135</sup>

The ranking of employee claims during liquidation are divided into two parts. The first part deals with the type of claim and the ranking of such claim where the employment contract was

---

<sup>130</sup> S 412(2) and s 416.

<sup>131</sup> See chapter 3, par 2.5.

<sup>132</sup> See chapter 4, par 2.5.

<sup>133</sup> Johnson 2011 *USAID* 13.

<sup>134</sup> Johnson 2011 *USAID* at 13.

<sup>135</sup> The possible creation of a guarantee fund for employee entitlements is explored as a recommendation in chapter 5. This possibility has the potential to create another pool of funds which will create a safety net for employees for unpaid claims when a company goes into liquidation or business rescue. The real value this guarantee fund will have, is to remove the huge burden on struggling companies to get post-commencement finance and for the post-

suspended or terminated in terms of section 38(10) of the 1936 Insolvency Act. The second part consists of a detailed discussion of the type of claim and the ranking of such claim for remuneration and other employee entitlements owing to employees in accordance with section 98A of the Act.

### 2.6.1 Employee's claim for the suspension of the employment contract

Where an employment contract has either been suspended or terminated<sup>136</sup> an employee is entitled to claim compensation for loss suffered because of such suspension or termination.<sup>137</sup> Apart from a concurrent claim for breach of contract because their contracts were terminated prior to their expiration, employees also have a concurrent claim for severance benefits against the company.<sup>138</sup>

A concurrent claim is an unsecured claim against the free residue of an insolvent estate. Concurrent claims are only paid after statutory preferent claims have been paid. Concurrent creditors normally only receive a *pro rata* portion of their claim. Normally concurrent creditors are only paid a dividend of their concurrent claims and very often they receive nothing at all.<sup>139</sup>

South Africa, England<sup>140</sup> and Australia<sup>141</sup> provide for a claim based on the premature termination of the employment contract. There are no differences between the jurisdictions.

### 2.6.2 Ranking of employee claims during liquidation

The Judicial Matters Second Amendment Act<sup>142</sup> changed the playing field for employees and their claims during liquidation. The new section 98A which provided for "improved"<sup>143</sup> employee

---

commencement finance to serve the company and not to provide for the payment of unpaid salaries – thus also trying to get lenders to agree more easily to the granting of post-commencement funding.

<sup>136</sup> In terms of s 38(1) or (9) respectively of the Insolvency Act.

<sup>137</sup> S 38(10).

<sup>138</sup> S 38(10).

<sup>139</sup> In *Botha v Botha* [2016] ZAFSHC 194 [30] and [32] Daffue J explained the predicament in which concurrent creditors find themselves when a liquidation is at hand. Not only must they prove their claims against the estate whereby a possibility of contributing is created but in many instances they receive an "insignificant dividend".

<sup>140</sup> Chapter 4, par 2.6.

<sup>141</sup> Chapter 3, par 2.6.

<sup>142</sup> Act 122 of 1998.

<sup>143</sup> Evans 2004 *SAMLJ* 462.

entitlements and preferent rankings of their claims was inserted as a result of this amendment.

Turning to employee entitlements and the ranking of these claims during the liquidation of the company it is clear that despite the fact that provision is made for these entitlements, all of the said entitlements have limitations attached to them, be it on the amount that can be claimed or on the period for which it can be claimed. It will be shown that neither the amount claimable nor the restriction placed on the period for which it can be claimed has any well-founded explanation or reason attached to it.

Employee entitlements in liquidation enjoy statutory preference status.<sup>144</sup> These claims are paid from the free residue after the secured creditors have been paid.<sup>145</sup> Sections 96 to 102 of the Insolvency Act contain the different statutory preferent claims and the predetermined order of preference is laid down in the Act.<sup>146</sup>

Section 98A sets out the position of salary and wages owed to employees.<sup>147</sup> The preferences of employee entitlements are as follows:

- (a) salary or wages due to an employee. The Act restricts the period to three months' salary or wage. This is further capped by an amount of R12 000;<sup>148</sup>
- (b) leave or holiday payment due to an employee accrued by the insolvent in the year of insolvency or the previous year, whether or not payment is due at the date of sequestration with a maximum amount of R4 000;<sup>149</sup>
- (c) payment due in respect of any other form of paid absence for a period not more than three months prior to the date of sequestration with a maximum claim of R4 000;<sup>150</sup>

---

<sup>144</sup> The Insolvency Act of 1936 created these preferences, hence the term *statutory* preference. Their preference are to those concurrent claims that rank after them when the free residue is distributed.

<sup>145</sup> Sharrock *et al Hockley* 184.

<sup>146</sup> This means that the payment for the preference created in s 96, for example, will be paid before the preference created in s 97. The individual sections may determine their own preferences within the section. See also Sharrock *et al Hockley* 184.

<sup>147</sup> The sections containing statutory preferent claims that will be paid in priority to employee's salary and wages include funeral and death-bed expenses (s 96), cost of sequestration (s 97) and cost of execution (s 98).

<sup>148</sup> S 98A(1)(a)(i). The Minister of Trade and Industry set out these maximum amounts in GN R865 in GG No 21519 dated 1/9/00. The Minister has the power to change these maximum amounts from time to time. This claim ranks before all the claims mentioned in s 98A(1).

<sup>149</sup> S 98A(1)(a)(ii). The claims mentioned in this section and in the following sub-sections (iii) and (iv) rank before the claim for contributions as set out in s 98A(1)(b) and rank equally and abate in equal proportions (s 98A(4)(b)).

<sup>150</sup> S 98A(1)(a)(iii).

- (d) any severance or retrenchment pay due to the employee in terms of any law applicable or as a result of termination in terms of section 38, capped at R12 000;<sup>151</sup> and
- (e) any due contributions by the company to a medical aid, provident fund, pension fund *etcetera*, to a maximum of R12 000 in respect of each fund or scheme.<sup>152</sup>

An employee is entitled to be paid his claim in respect of his salary, leave and other payment mentioned in the said section without needing to prove a claim.<sup>153</sup> Should the employees also want to claim the remaining part of any of the abovementioned claims that might have exceeded the values as capped in section 98A, they can do so by claiming them as concurrent creditors from the remainder of the free residue once all statutory preferent creditors have been paid. The predicament that employees then will face is that, because they will have to prove their claims as concurrent creditors, they will risk having to pay a contribution if the free residue is insufficient to pay for the sequestration costs.<sup>154</sup>

It is my opinion that these maximums provided by the Minister are totally outdated. Section 98A(2)(b) states that the power granted to the Minister in section 98A(2) to determine maximum amounts must “take into account subsequent fluctuations in the value of money”.

The last review of the amounts claimable was done in 1998 by the Judicial Matters Second Amendment Act 122 of 1998, and almost twenty years have lapsed since. That makes it safe to say that a review of these amounts is long overdue! Based on the consumer price index, the average inflation rate in South Africa increased annually since 2000.<sup>155</sup> In 2008 the average inflation rate in South Africa reached an all-time high of 11,50%.<sup>156</sup> It is my belief, based on these figures, that no fluctuations in the value of money has ever been considered by the Minister to keep up with adjustments to the above maximums.

---

<sup>151</sup> S 98A(1)(a)(iv) see also s 41(1) BCEA and Van Niekerk *et al Law@Work* at 93.

<sup>152</sup> S 98A(1)(b). This preference of R12 000 is not in respect of each employee, but is applicable to each scheme or fund as a whole.

<sup>153</sup> S 44 of the Insolvency Act. S 98A(3) does make provision that support of any claim may be required. The fact that an employee is not required to prove a claim, means that the employee cannot be held liable to pay a contribution should the free residue be insufficient to cover sequestration costs.

<sup>154</sup> See also Van Eck *et al* 2004 SALJ 919.

<sup>155</sup> According to Stats SA <http://www.statssa.gov.za/publications/P0141/CPIHistory.pdf>? (Date of use: 5 February 2016).

<sup>156</sup> According to Stats SA <http://www.statssa.gov.za/publications/P0141/CPIHistory.pdf>? (Date of use: 5 February 2016).

The position in both Australia<sup>157</sup> and England<sup>158</sup> is more positive in respect of employee entitlements. This is mainly due to the Government-funded safety nets that are used to pay out these entitlements. These safety nets have been in place in Australia since 2000. In England, the State stands in for both insolvency payments to employees and redundancy payments.

Reform in order to provide for a better return for employees if they lose their employment is long overdue in South Africa. I agree with Darvas that it is one thing to grant preference to a claim, but a completely different thing if there is no funds with which to pay the preferent claim.<sup>159</sup> Possible suggestions as regards reform are made below.<sup>160</sup>

## **2.7 Evaluation of employee rights in liquidation**

After examining employee rights in the liquidation of a company it comes as no surprise that their rights are mainly based on their status as creditors of the company. Only three direct rights are afforded to them in their capacity as employees of the company: firstly the right to be informed when liquidation proceedings have commenced; secondly their right to remain employed for another 45-day period after appointment of the final liquidator and not to have their employment contracts terminated immediately when a liquidation order has been issued; and thirdly the enhancement of their right to employee entitlements by insolvency law reforms.

Despite the fact that employees only enjoy these rights in their capacity as employees, it must be emphasised that due to the long-standing principle of insolvency law that recognises employees as creditors in the event where any employment-related payment is due and payable, employees can no longer be seen as those “lost souls” in insolvency law.

It is understandable that employees do not have a more intricate role to play in the case of a company’s liquidation.

It is my belief that employees have sufficient participation rights and protection in the

---

<sup>157</sup> Chapter 3, par 2.6.

<sup>158</sup> Chapter 4, par 2.6.

<sup>159</sup> Darvas 1999 *CSLJ* 105.

<sup>160</sup> See chapter 5.



liquidation process of a company.<sup>161</sup> The position of employees in South Africa is by far more favourable than the positions of employees in both England and Australia.

### 3. EMPLOYEE RIGHTS IN BUSINESS RESCUE

Chapter 6 of the Companies Act<sup>162</sup> is interspersed with references to the role of employees and the rights afforded to them during business rescue proceedings.<sup>163</sup> Loubser points out that the protection of workers' interest "prominently features as an object of the new business rescue proceedings"<sup>164</sup> and remarks that some rights enjoyed by employees in business rescue have no equivalent in other comparable judicial systems.<sup>165</sup> This statement is still relevant to South Africa's employee rights. Delpont aptly refers to employees as part of the "principal stakeholders" in the business rescue process<sup>166</sup> and remarks that "chapter 6 is sensitive to the protection of employees during the business rescue process".<sup>167</sup> According to Levenstein employees are dealt with "very specifically" in business rescue.<sup>168</sup> One reason given for the so-called special treatment" of employees is the fact that they are a specific class of creditors in a company: a class that had no negotiation power in establishing their priority when claims are paid.<sup>169</sup>

From a labour-law perspective and acknowledging the enormous role that the Constitution and labour legislation play in South Africa, it is without doubt pleasing to see that employees have a pertinent role to play and a very loud voice in business rescue proceedings. Not only is job security one of the primary objectives of every employee in a company, it is also vital for any country's economy to ensure that their unemployment figure diminishes.<sup>170</sup>

Cassim depicts chapter 6 as "pro-employee" and states that employee interests sometimes

---

<sup>161</sup> Positive reform of the amounts claimable as statutory preferent will cause South Africa to be a leading jurisdiction when employee rights in liquidation is considered. See chapter 5 for recommendations.

<sup>162</sup> 71 of 2008. The references to the Companies Act in this section all refer to the Companies Act 71 of 2008, unless otherwise indicated.

<sup>163</sup> See Loubser and Joubert 2015 *ILJ* 21 for a detailed discussion.

<sup>164</sup> Loubser (Part 1) 2010 *TSAR* 509.

<sup>165</sup> Loubser *LLD Thesis* 53. The specific right referred to by Loubser is the right of employees to initiate business rescue proceedings.

<sup>166</sup> Delpont *Henochsberg* 444; see also *Richter v Absa Bank Limited* (20181/2014) [2015] ZASCA 100 [14].

<sup>167</sup> Delpont *Henochsberg* 480 (27).

<sup>168</sup> Levenstein *LLD Thesis* 455. Note that the references to Levenstein 2015 *LLD Thesis* can also be found in Levenstein *Business Rescue Proceedings*.

<sup>169</sup> Darvas 1999 *CSLJ* 105.

<sup>170</sup> Cassim *Contemporary Company Law* 863; see also Levenstein *LLD Thesis* 458; 461.

trump the idea of “creditor wealth maximisation”.<sup>171</sup>

Having said that, it must be kept in mind what the possible outcome could be in a situation where a company is struggling financially and doing everything in its power to keep suppliers and creditors satisfied and at the same time adhering to stringent labour laws making it almost impossible for the ailing company to be granted a breathing space by reducing its payroll obligations. Overprotection of employee rights during a company’s business rescue may have the unintended result that the company cannot be saved due to excessive employee entitlements that devour any possible finance.<sup>172</sup> Rajak points out that even though employees are seen as “a vital constituency” in the discussion of business rescue, they are not a “simple, single consideration” and caution must be taken to establish a strategy which will consider both short-term and long-term employee benefits.<sup>173</sup> Short-term benefits include the retention of the workforce to persevere jobs and job security and to ensure that the unemployment rate stays static, while the long-term benefits may be to downsize the workforce and slim down the payroll but keep the company in existence.

It therefore came as no surprise that many authors were sceptical about the power that Chapter 6 gave to employees<sup>174</sup> and made no secret of the possible abuse of the system.<sup>175</sup> Other writers remarked that the “excessive” employee rights contained in chapter 6 caused an imbalance between stakeholders that created “commercial distortions and uncertainties” which in the long run might negatively impact on the success of the business rescue procedure.<sup>176</sup> It is six years later and no sign of abuse in the hands of either employees or trade unions have been noted. In fact, the courts have repeatedly shown that they are extremely sensitive to adhere to the purpose of the 2008 Companies Act<sup>177</sup> and to balance the interests of all stakeholders involved. It is submitted that judicial reference to section 7(k) of the Companies Act 2008 is almost as popular and regular in business rescue cases as reference to section 128(b) – the

---

<sup>171</sup> Cassim *Contemporary Company Law* 885.

<sup>172</sup> Joubert *et al* 2011 *IJCLLIR* 17.

<sup>173</sup> Rajak and Henning 1999 *SALJ* 285–286.

<sup>174</sup> Loubser *LLD Thesis* 53; Joubert *et al* 2011 *IJCLLIR* 67; 84; Faul *LLM Thesis* 32.

<sup>175</sup> Loubser (Part 1) 2010 *TSAR* 510.

<sup>176</sup> Faul *LLM Thesis* 6.

<sup>177</sup> S 7(k) of the Companies Act of 2008.

definition of business rescue that also contains the objectives of business rescue.<sup>178</sup>

Despite the fact that the saving of jobs is not pertinently mentioned as one of the express objectives of business rescue in section 128(b)(iii), many cases include possible job retention as an unwritten object of business rescue.<sup>179</sup> The first instance is found in *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others*<sup>180</sup> where Claassen J interpreted the meaning of rescuing a company and noted that “rescuing of a company means achieving the *goals* set out in the definition of ‘business rescue’ as stated in paragraph (b) of section 128(1) of the Act . . . It appears that this goal is primarily directed at the prevention of unnecessary liquidations of companies *and the subsequent loss of its employees’ employment*”.<sup>181</sup>

Shortly after the *Oakdene* case, Kruger J stated in *Lidino Trading 580 CC v Cross Point Trading (Pty) Ltd*<sup>182</sup> that “the interest of employees is *prominently* featured as an *object* of business rescue proceedings”.<sup>183</sup> Despite the fact that attention was given to the interests of employees in an application for business rescue, Cross Point had no employees, the application for business rescue was dismissed and a provisional liquidation order was granted.<sup>184</sup> This illustrates that the court take other factors into consideration when dealing with business rescue applications. The merits of the case are more important than the various interests to be served.

It is comforting to know that cases such as *BP Southern Africa (Pty) Ltd v Intertrans Oil SA*

<sup>178</sup> To name a few, see *Welman v Marcelle Props 193 CC and Another* [2012] JOL 28714 (GSJ) [16] and [25]; *Collard v Jatara Connect (Pty) Ltd and Others* [2017] JOL 38032 (WCC) [13–14]; *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2015 (5) SA 192 (SCA) [42]; *Shoprite Checkers (Pty) Ltd v Berryplum and Others* 47327/2014 [2015] ZAGPPHC (9 March 2015) [57]; *Cloete Murray and Another NNO v FirstRand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) [12]; *FirstRand Bank Ltd v KJ Foods CC (In business rescue)* [2017] 3 All SA 1 (SCA) [24], [33] and [75]; *Van der Merwe and Others v Zonnekus Mansion (Pty) Ltd (in liquidation) and Another (Commissioner for the South African Revenue Service and Another Intervening)* (17150/2016) [2016] ZAWCHC 193 (19 December 2016) [51]; *Panamo Properties (Pty) Ltd and Another v Nel and Others NNO* 2015 (5) SA 63 (SCA) [1] and [34]; *Knipe v Kameelhoek (Pty) Ltd and Others* (2120/2016) [2017] ZAFSHC 116 (22 June 2017) [13] and *Commission of South African Revenue Services v Beginsel* 2013 (1) SA 307 (WCC) [1] and [22]; see also Cassim *Contemporary Company Law* 861.

<sup>179</sup> In *National Labor Relations Board v Bildisco & Bildisco, Debtor-in-Possession et al* 465 US 513 (1983) 528 it was acknowledged that one of the “fundamental purposes of reorganisation”, is to prevent job losses; see also Jacobs and Smit 2016 *JJS* 125.

<sup>180</sup> [2012] 2 All SA 433 (GSJ) [15].

<sup>181</sup> Own emphasis, [2012] 2 All SA 433 (GSJ) [15].

<sup>182</sup> 2012 ZAFSHC 155 [19].

<sup>183</sup> Own emphasis.

<sup>184</sup> *Lidino Trading 580 CC v Cross Point Trading (Pty) Ltd* [2012] ZAFSHC 155 [19].

(Pty) Ltd and Others<sup>185</sup> keep a clear mind even when consideration is given to the interests of employees. Although it was submitted that business rescue should be preferred to liquidation<sup>186</sup> due to the fact that further job losses will not help the economy,<sup>187</sup> where rescue is not the appropriate remedy the court will use its discretion and order the company to be placed in provisional liquidation.

Many cases referred to the possible benefit that employees may enjoy due to a company being placed in rescue; and the fact that no employees were to benefit from the company being placed in rescue resulted in some courts deciding that rescue was not the appropriate remedy.<sup>188</sup> In *Cardinet (Pty) Ltd v Wedgewood Golf and Country Estate (Pty) Ltd*<sup>189</sup> the court granted the business rescue order and despite the fact that there were no employees in the company, the court took one of the objectives of the Companies Act, namely, the achievement of economic and social benefits,<sup>190</sup> into consideration and remarked that a successful business rescue will contribute to job creation. It is submitted that employment and the possibility of job creation are not the only factors that need to be considered when dealing with an application for business rescue. The main objectives as stated in section 128(b)(iii) remain the focus of any business rescue as both will have positive results for employees.

In the unreported case of *KJ Foods CC v First National Bank*,<sup>191</sup> Mavundla J referred to the balancing of interests and remarked that “the court must incline towards the preserving the rights of the workers rather than allow immediate liquidation of the company”. He further remarked that allowing the close corporation to enter business rescue “managed to stave off the potential job loss which would have resulted through liquidation”.<sup>192</sup> KJ Foods CC was in the production and supply industry of baking and delivering bread to informal small businesses. The close

---

<sup>185</sup> 2017 (4) SA 592 (GJ).

<sup>186</sup> *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others* 2017 (4) SA 592 (GJ) [77].

<sup>187</sup> *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others* 2017 (4) SA 592 (GJ) [78].

<sup>188</sup> See Loubser and Joubert 2015 ILJ 32; and also *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* [2012] 2 All SA 433 (GSJ) [15] where Claassen J strongly states that “[e]mployees stand to gain substantial benefits from business rescue proceedings which precede liquidation”; *Lidino Trading 580 CC v Cross Point Trading (Pty) Ltd In re: Mabe v Cross Point Trading 215 (Pty) Ltd* [2012] JOL 29305 (FB) [23A]; *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FS).

<sup>189</sup> *Cardinet (Pty) Ltd v Wedgewood Golf and Country Estate (Pty) Ltd* (unreported case no 19599/2012 (WCC) 30 January 2013) 53.

<sup>190</sup> S 7(d).

<sup>191</sup> (75627/2013) [2015] ZAGPPHC 221 (23 April 2015) 10.

<sup>192</sup> *KJ Foods CC v First National Bank* (75627/2013) [2015] ZAGPPHC 221 (23 April 2015) [14].

corporation existed for more than 20 years and had about 220 employees. The business started to experience financial difficulties due to market loss and a business rescue plan was prepared. In terms of this plan all employees would remain employed and business rescue would provide a better guarantee to all stakeholders than the alternative, namely, liquidation. The business rescue was granted. Mavundla J ended his judgment with the following:

“Of importance is whether there are reasonable grounds to believe that business rescue is viable and job loss for many can be averted or even delayed. That is a value judgment, the court must make.”<sup>193</sup>

FirstRand appealed this decision. In *FirstRand Bank Ltd v KJ Foods CC (In business rescue)*,<sup>194</sup> FirstRand voted against the business rescue plan. It was of the opinion that the creditors would be in a worse position if the business rescue plan was approved than the situation they would be in if the company was liquidated. FirstRand also argued that the employees would stay employed should the business be sold as a going concern in terms of liquidation. Schoeman AJA remarked that FirstRand was wrong. After taking into consideration the interests of all stakeholders – including those of the employees – FirstRand’s vote against the business rescue plan was set aside as being inappropriate.<sup>195</sup>

The retention of jobs as a sentiment when considering the granting of a business rescue order, was also referred to in *Richter v Absa Bank Limited*.<sup>196</sup> In this case there was a business rescue application after the final liquidation order had been granted. The judge emphasised the fact that business rescue “seeks to protect the interests of a wider group of persons than liquidation”.<sup>197</sup> The role of the company to achieve “economic and social benefits is given prominence”.<sup>198</sup> The court therefore held that an affected person may apply for business rescue although a final order for liquidation was ordered. The question is whether this does not extend the rights of employees as affected persons a bit too far. It is submitted that the answer is negative. I agree with Dambuza AJA that as long as there is a possibility that business rescue will result in a success, nothing should stand in the way of achieving it.

<sup>193</sup> *KJ Foods CC v First National Bank* (75627/2013) [2015] ZAGPPHC 221 (23 April 2015) [14].

<sup>194</sup> [2017] 3 All SA 1 (SCA).

<sup>195</sup> *FirstRand Bank Ltd v KJ Foods CC (In business rescue)* [2017] 3 All SA 1 (SCA) [84]–[86].

<sup>196</sup> *Richter v ABSA Bank Ltd* 2015 (5) SA 57 (SCA) [15].

<sup>197</sup> *Richter v ABSA Bank Ltd* 2015 (5) SA 57 (SCA) [14].

<sup>198</sup> *Richter v ABSA Bank Ltd* 2015 (5) SA 57 (SCA) [14].

Although the courts are inclined towards granting a business rescue order where employees and the saving of jobs are at stake, the absence of employees and jobs to be saved is also a factor that is taken into account when courts do not see business rescue as a viable option. In two very recent decisions, *Firststrand Bank Limited v Normandie Restaurants Investments and Another*<sup>199</sup> and *Knipe v Kameelhoek (Pty) Ltd and Others*,<sup>200</sup> the court held that because business rescue was not the appropriate remedy it would lead to an abuse of the process should the order be granted. This proves that employees play a vital role in the discretion of judges when business rescue is considered an appropriate remedy in a given scenario.

Job preservation is not only in the minds of the courts. Insolvency writers, with little sympathy for employees, also acknowledge the importance of job retention. Burdette states that

“the socio-economic reality in South Africa dictates that businesses should be saved where possible, not only for the benefit of the economy, but also for the benefit of the employees who stand to lose their livelihood”.<sup>201</sup>

Company law experts also acknowledge the role of employees. Loubser adds that

“One of the main advantages of a successful corporate rescue is that it prevents or at least limits the job losses caused by business failure.”<sup>202</sup>

Cassim remarks that “preserving continuity of employment is undoubtedly an important underlying policy objective”.<sup>203</sup> Levenstein submits that the “ongoing role of employees in the company must not be underestimated”.<sup>204</sup>

This is indeed good news and a step in the right direction taking into consideration South Africa’s unemployment rate.<sup>205</sup>

Employees’ rights are acknowledged in three different capacities during business rescue

---

<sup>199</sup> (189/2016) [2016] ZASCA 178 (25 November 2016) [13].

<sup>200</sup> (2120/2016) [2016] ZAFSHC 193 (10 November 2016) [29]; see also Delpont *Henochsberg* 447.

<sup>201</sup> Burdette (Part 2) 2004 *SAMLJ* 447; see also Levenstein *LLD Thesis* 468.

<sup>202</sup> Loubser 2005 *IIR* 57; see also Loubser 2007 *CILSA* 152.

<sup>203</sup> Cassim *Contemporary Company Law* 899.

<sup>204</sup> Levenstein *LLD Thesis* 463.

<sup>205</sup> According to Stats SA the unemployment rate reached an all-time high during the third quarter of 2017. It currently stands at 26,7% according to the Quarter 1 2018. See <http://www.statssa.gov.za> (Date of use: 1 November 2017) and <http://www.statssa.gov.za/?p=11139> (Date of use: 30 June 2018).

proceedings. This shows that employees play an integral role in business rescue and that their participation is “inclusive and important”.<sup>206</sup> This created a triple tier for employee involvement in a company’s business rescue which makes employees “central participants”<sup>207</sup> in the rescue process. Kruger J did not only agree that employee rights are acknowledged in business rescue proceedings, but he put it stronger and remarked in *Lidino Trading* that employee rights are “secured” by business rescue proceedings.<sup>208</sup> They are firstly regarded as so called “affected persons”,<sup>209</sup> which capacity gives rise to various significant rights, secondly, they enjoy rights stemming from the employment relationship that exists with the company<sup>210</sup> and thirdly they are seen as creditors of the company.<sup>211</sup>

Employees are included in the definition of “affected persons” in section 128(a) of the Act. Section 128 provides for the following stakeholders to qualify as “affected persons”: a shareholder or a creditor of the company,<sup>212</sup> any registered trade union that represents employees of the company,<sup>213</sup> and any unrepresented employee in his personal capacity or through representatives.<sup>214</sup> This clearly includes a single employee.<sup>215</sup> Delport remarks that “it is a noticeable facet of the business rescue procedure that employees have many more rights than they would have, for example, under the insolvency or winding-up provisions”.<sup>216</sup> This comes as no surprise. Prior to the enactment of the 2008 Companies Act, academics waited with bated breath for the possible abuse from employees and trade unions.<sup>217</sup>

Employees enjoy various rights in chapter 6 which they may exercise in numerous ways and in different capacities.<sup>218</sup> Cassim remarks that the “fair and equitable treatment of employees” is one of the “primary goals of a good business rescue process”.<sup>219</sup> They are also included in the definition of “creditor” not only in their capacity as employees of the company but also where

---

<sup>206</sup> Levenstein *LLD Thesis* 463.

<sup>207</sup> Faul *LLM Thesis* 49.

<sup>208</sup> *Lidino Trading 580 CC v Cross Point Trading (Pty) Ltd* 2012 ZAFSHC 155 [19].

<sup>209</sup> S 128(a).

<sup>210</sup> See s 144 in general.

<sup>211</sup> These rights include the right to vote on a proposed business rescue plan.

<sup>212</sup> S 128(1)(a)(i).

<sup>213</sup> S 128(1)(a)(ii).

<sup>214</sup> S 128(1)(a)(iii).

<sup>215</sup> Cassim *Contemporary Company Law* 867.

<sup>216</sup> Delport *Henochsberg* 444.

<sup>217</sup> Joubert *et al* 2011 *IJCLIR* 67.

<sup>218</sup> Rushworth 2010 *MCLCSAE* 396.

<sup>219</sup> Cassim *Contemporary Company Law* 884.

amounts relating to their employment is due by the company any time before commencement of business rescue proceedings.<sup>220</sup> All rights afforded to the creditors of the company therefore will also vest in the employees as far as applicable.<sup>221</sup>

Section 144 confers additional rights on employees. These rights may be exercised by employees represented by a trade union<sup>222</sup> or, where they are not so represented, “directly” by employees or by representatives.<sup>223</sup> Part C of chapter 6 refers specifically to the rights of affected persons during business rescue and employees are discussed first in section 144. This emphasises the important role that employees play in this process. When one looks at the definition of “affected persons” in section 128(a), employees are only referred to in the third place, but their rights are discussed first in part C. These rights in section 144 fall into two main categories: firstly, the right to receive information and initiate business rescue proceedings, and secondly, rights regarding the business rescue plan.<sup>224</sup> Section 144(5) also provides that all the rights attributed to employees in terms of this section are over and above the rights employees might have in terms of any other law, contract, collective agreement, shareholding, *etcetera*.

The discussion below of the various rights of the employees explains which rights are enjoyed by the employees in their capacity as employees and which rights are conferred on them as creditors of the company.

### **3.1 Employee’s right to commence business rescue**

#### **3.1.1 Section 131(1) right to commence proceedings**

Section 131(1) provides for any affected person to apply to court at any time to place a company under supervision and to commence business rescue proceedings.<sup>225</sup> Employees as affected persons may exercise all their rights collectively through a registered trade union, or, if not so

---

<sup>220</sup> Delpont *Henochsberg* 446.

<sup>221</sup> See Loubser and Joubert 2015 *ILJ* 38–39 for a general discussion of employee rights as creditors.

<sup>222</sup> S 144(1)(a) of the 2008 Act.

<sup>223</sup> S 144(1)(b) of the 2008 Act; Delpont *Henochsberg* 502 states that many of the rights contained in s 144 are duplicates of rights afforded to employees in their capacities as affected persons.

<sup>224</sup> Loubser and Joubert 2015 *ILJ* 35. See also par 3.1–3.5 below for a discussion of these special rights.

<sup>225</sup> See also the discussion by Faul *LLM Thesis* 46 and the reference to Bagchi 2011 *MLR* 869 that labels this right to initiate proceedings as one of the examples where employees have a “hard voice”.



represented, they may exercise them “directly”<sup>226</sup> or through employee representatives. A single employee, not represented by a trade union or represented by a representative therefore has the right to commence business rescue proceedings.

In the first known case thus far where employees applied to court in terms of section 131(1) to place a company under business rescue proceedings, *The Employees of Solar Spectrum Trading 83 (Pty) Ltd v Afgri Operations Ltd*,<sup>227</sup> Kollapen J emphasised that employees should not be placed in a weaker position than other affected parties. In terms of section 128(1)(a) an affected person is defined as “a” shareholder or creditor of the company. This clearly shows that a single creditor or single shareholder will be regarded as an affected person and will be able to apply to commence business rescue proceedings. Taking into consideration the statement by Kollapen J that employees should not be placed in a weaker position than other affected parties, it is fair to deduct that a single employee will also have this right. The same rules are applicable and the question remains whether a single employee will have the resources to use this right. What is important to know is that the 2008 Companies Act provides for a single employee to commence business rescue. Whether a single employee (or shareholder) will use it remains to be seen. The applicants in the case represented 76 employees of Solar Spectrum Trading 83 (Pty) Ltd. All the employees lived on the farm for many years and many employees also had dependants living with them.<sup>228</sup>

I disagree with Swart’s<sup>229</sup> remark that this case brought about a paradigm shift in moving away from a liquidation culture to a rescue culture. I do agree that this case contributed substantially to the role that labour has to play in business rescue proceedings, but I submit that a lot more is necessary before one could suggest that there was a change in culture.

*National Union of Metal Workers of South Africa obo Hlongwane and Others v Wilro Supplies CC*<sup>230</sup> was another ground-breaking case where a trade union applied for a close corporation’s business rescue. This case made history and prevented the liquidation of Wilro Supplies CC, thereby saving 165 jobs.<sup>231</sup> In this case the Labour Court held that employees were unfairly

---

<sup>226</sup> S 128(1)(a)(iii) and s 144(1)(a) and (b) of the 2008 Companies Act.

<sup>227</sup> [2012] ZAGPPHC 359.

<sup>228</sup> *Employees of Solar Spectrum Trading 83 (Pty) Ltd v Afgri Operations Ltd* [2012] ZAGPPHC 359 [35].

<sup>229</sup> Swart 2014 *Obiter* 419.

<sup>230</sup> (JS 207/12) [2015] ZALCJHB 96 (19 March 2015).

<sup>231</sup> Steyn <https://mg.co.za/article/2015-07-09-numsa-forces-company-into-rescue> (Date of use: 19 November 2017).

dismissed and made a reinstatement order against Wilro Supplies CC. The value of the reinstatement award was R1,7 million. In reaction, the close corporation's members brought an application to place the close corporation in liquidation. The National Union of Metal Workers of South Africa then brought a counter-application against the close corporation to place the corporation in business rescue. The court held that business rescue was the better option as the employees' interests would be better served under rescue than in liquidation. The National Union of Metal Workers of South Africa became the first labour organisation in South Africa to take this step and use their right as affected persons in terms of section 131(1) of the 2008 Companies Act. This case showed that organised labour plays a positive and pro-active role in business rescue. The court held that there were reasonable prospects of rescuing the close corporation and of the rescue being beneficial to all parties and granted the order.

This conduct by individual employees and trade unions to turn to section 131(1) and implement their right to institute business rescue proceedings is a positive sign that employees and labour organisations have become aware of their rights in terms of chapter 6.<sup>232</sup> It therefore cannot be said any more that employees and labour forces are unaware and ignorant of their rights in section 131(1).<sup>233</sup>

The right of an employee to commence business rescue proceedings includes the right to suspend liquidation proceedings. Section 131(6) states that where liquidation proceedings are in progress the application for business rescue proceedings will suspend the liquidation proceedings until the court refuses the application for business rescue or in the case where the

---

<sup>232</sup> This application by NUMSA has been regarded as a "significant development" and indicates that "workers are playing a more meaningful role in the direction of a company"; Steyn <https://mg.co.za/article/2015-07-09-numsa-forces-company-into-rescue> (Date of use: 19 November 2017).

<sup>233</sup> Jacobs and Smit 2016 *JJS* 129. A study done by Prof Marius Pretorius of Business Enterprises University of Pretoria *Business Rescue Status Quo Report* 2015, in which the understanding of business rescue three years after enactment were researched, stated that employees' level of awareness and knowledge of business rescue were "non existing" (28). It was further submitted that employees were the "most non-knowledgeable" about business rescue (49) and that employees were "completely uninformed" about rescue and that unions "showed little interest" (66). These are harsh viewpoints deserving of a few remarks. Firstly, the question whether employees are aware of the Chapter 6 business rescue procedure and the fact that Chapter 6 protects employee rights extensively are two different things. What is important is the fact that the legislation grants excessive rights to employees in business rescue. When they become "knowledgeable" or in time to come when trade unions show "more interest", the rights will still be contained in the legislation; secondly, Pretorius indicated in two instances (28 and 66) that research among employees were "aborted" as they were "completely uninformed". This is the wrong way of doing: where during a study it is seen that a group of participants or affected persons is uninformed, the alternative is to inform them of their rights and create an awareness under these participants. To abort a study among them merely based on ignorance is not a productive way of informing them.

court grants the business rescue order, until the business rescue proceedings end. This gives employees valuable information. Not only can an application to commence rescue procedures stop liquidation proceedings that have already commenced but in the case where the business rescue order is granted the preferences created in terms of section 135 of the Act will continue to apply, even if the company is subsequently liquidated.<sup>234</sup>

This right of an employee to commence business rescue procedures cannot even be restricted in the case where his employment contract was suspended. In *Richter v Bloempro CC*,<sup>235</sup> Bam J addressed this issue. Section 38 of the Insolvency Act provides that employment contracts are suspended with the granting of the liquidation order. The issue that came under the spotlight was whether an employee whose employment contract was suspended remains an affected person for purposes of commencing business rescue proceedings.<sup>236</sup> The court confirmed that an employee remains an affected person with *locus standi* to apply for a business rescue order in terms of section 131(1)<sup>237</sup> despite the fact that his employment contract was suspended in liquidation. Even if the liquidator chooses not to continue with his employment during liquidation it has no effect on his status as an affected person.<sup>238</sup>

In terms of section 131(5), once the court has granted a compulsory business rescue order, the affected person who made the application for the company to be placed under rescue must nominate an interim business rescue practitioner to be appointed. After the interim business rescue practitioner has been nominated his nomination must be ratified by holders of a majority of the independent creditors' voting interests at the first creditors' meeting.<sup>239</sup>

### 3.1.2 Evaluation of right to commence proceedings

Although Loubser<sup>240</sup> stated that the right of employees to commence business rescue

---

<sup>234</sup> S 135(4).

<sup>235</sup> *Richter v Bloempro CC and Others* 2014 (6) SA 38 (GP).

<sup>236</sup> *Richter v Bloempro CC and Others* 2014 (6) SA 38 (GP) [12].

<sup>237</sup> *Richter v Bloempro CC and Others* 2014 (6) SA 38 (GP) [13]; see also the discussion by Loubser and Joubert 2015 *ILJ* 29.

<sup>238</sup> *Richter v Bloempro CC and Others* 2014 (6) SA 38 (GP) [13].

<sup>239</sup> S 131(5) of the Companies Act of 2008.

<sup>240</sup> Loubser *LLD Thesis* 53.

proceedings seemed “excessive and has no equivalent in any other comparable system” and the UNCITRAL guide warns against improper use of the commencement standard for business rescue,<sup>241</sup> Burdette is of the opinion that it is appropriate in the South African sphere to make it possible for employees to approach the court for relief where the company is experiencing financial difficulties and has not commenced rescue procedures.<sup>242</sup>

It is my opinion that the legislature must be lauded for including employees as affected persons who have this right. It is the duty of the court in every case to test the application against the burden of proof required for the application to succeed before the order is granted. There is thus a safety net incorporated in the application standard which will counteract any vexatious and malicious applications by employees and trade unions.

Not only do employees have everything to lose if the company is liquidated – and therefore grab at the slightest opportunity to keep the company alive – but South Africa cannot afford to have yet another increase in its unemployment rate.

It must be mentioned that although this right is an example of employees having a “hard voice”,<sup>243</sup> there must be caution against possible abuse.<sup>244</sup> A hard voice provides a form of participation in or direct input into the management and direction of a business.<sup>245</sup> One of the reasons why employees may abuse this right is that the employee entitlements in business rescue are much more attractive than the preferences attributed to them under liquidation proceedings. The granting of the order is still in the hands of the judge which makes the gateway for possible abuse by employees much narrower.<sup>246</sup> The employees as applicants must make out a *prima facie* case that there is a reasonable prospect that the company will be rescued should the order to commence proceedings be granted.

To date, no proof could be found of any abusive or vexatious application by employees or trade unions. Suffices it to say that the initial fears expressed by commentators that labour will

---

<sup>241</sup> *UNCITRAL Legislative Guide* 54.

<sup>242</sup> Burdette (Part 2) 2004 *SAMLJ* 412.

<sup>243</sup> Bagchi 2011 *MLR* 884.

<sup>244</sup> See Loubser *LLD Thesis* 54 for possible reasons why this right may be abused by employees and trade unions.

<sup>245</sup> Bagchi 2011 *MLR* 871.

<sup>246</sup> See Loubser *LLD Thesis* 54–55 where it is submitted that due to the possible negative effect that such an abuse may have on a company's reputation and business, provision must be made for a remedy that can be used by the company to claim at least possible damages by employees.

abuse their right to commence business rescue procedures were wrong.

South Africa indeed takes the lead when this right is examined. Loubser's statement that no such right exists in comparative jurisdictions holds true. In Australia<sup>247</sup> and England<sup>248</sup> employees do not have this right to commence rescue procedures in their capacity as employees of the company. In both jurisdictions creditors, including employees who are owed money by the company may apply for commencement.

### **3.2 Employee's right to be notified and informed of business rescue**

An employee's right to receive notices and be informed is mentioned throughout chapter 6. This is a basic right of any stakeholder in a company and although it does not always directly involve employee participation in the affairs of the company, employees feel included in the happenings of a company which results in a feeling of control and empowerment.<sup>249</sup> These rights are highlighted in the following discussion of the voluntary and compulsory procedures and are evaluated thereafter.

#### **3.2.1 Voluntary rescue procedure**

Section 129 provides for a voluntary procedure in which the directors pass a resolution to place the company in business rescue. Although employees of the company are precluded from using this route to place a company under rescue, they are not entirely left out of this option. All affected persons must be notified within five days after the company filed a resolution to commence business rescue proceedings.<sup>250</sup> Apart from their right to be informed at a very early stage of the initiation of business rescue proceedings in terms of section 129, affected persons

---

<sup>247</sup> Chapter 3, par 3.2.1.

<sup>248</sup> Chapter 4, par 3.1.

<sup>249</sup> Faul *LLM Thesis* 44. Bagchi 2011 *MLR* 884. Some writers such as Faul and Bagchi refer to this right of employees as a so-called "soft voice". According to them, the right merely places the employees on an equal bargaining field to prevent a situation where things happen in a company and the employees get to know of the happenings last. This "soft voice" stands in direct contrast to the "hard voice" that gives the employees the ability to effect change, for example, by being able to vote on the proposed business rescue plan.

<sup>250</sup> S 129(3)(a). Loubser and Joubert 2015 *ILJ* 26. See also reg 123 of the Companies Regulations 2011 for a detailed description of the notification process.

are also entitled to be notified of the appointment of the business rescue practitioner.<sup>251</sup>

In *Panamo Properties (Pty) Ltd and Another v Nel and Others NNO*,<sup>252</sup> Wallis JA dealt with the consequences of a situation where the section 129(3) and 129(4) requirements had not been complied with. The statutory notice that was sent to Panamo's creditors did not contain a sworn affidavit setting out the facts relevant to the grounds upon which the board resolution was founded, the business rescue practitioner was not appointed in time and the notice informing the affected persons of the appointment of the business rescue practitioner had not been sent. The court held that a business rescue application will not automatically be terminated where these requirements were not complied with. Although section 130(5) provides that the decision to commence business rescue proceedings will lapse and become a nullity, it does not mean the business rescue is terminated. Only the court has the power to terminate a business rescue.<sup>253</sup> The implication is that employees might not be informed timeously about the commencement of business rescue proceedings which might prejudice them.

Because business rescue may end in a company being liquidated, the rights afforded to employees in terms of section 197B of the Labour Relations Act of 1995 are also applicable here.<sup>254</sup>

Not only do employees as affected persons have the right to be informed in the case where business rescue proceedings have been initiated voluntarily, they also have the right to be notified where the board of directors of a company in financial distress decides not to initiate business rescue proceedings.<sup>255</sup> It is submitted that the right to receive this kind of information equips employees with knowledge that would otherwise have been undisclosed. They will be able to use it to their advantage even if they are only alerted to all their rights during the procedure.<sup>256</sup>

---

<sup>251</sup> According to s 129(4)(b) the affected persons must be notified within five business days after the notice of the business rescue practitioner's appointment has been filed with the Companies and Intellectual Property Commission (CIPC).

<sup>252</sup> 2015 (5) SA 63 (SCA).

<sup>253</sup> S 132(2)(a)(i) of the 2008 Act.

<sup>254</sup> See the discussion of s 197B in par 2.3.

<sup>255</sup> S 129(7). Loubser and Joubert 2015 *ILJ* 27 for a discussion of the possible consequences of such notification.

<sup>256</sup> See *Meskin et al Insolvency Law* 18–24. Such a notice that must be delivered to all affected persons must either be delivered in person according to reg 123(5)(a) of the Companies Regulations 2011 or each affected person must be informed of the availability of a copy of the notice in accordance with s 6(11)(b)(ii) of the 2008 Companies Act read together with reg 6 of the Companies Regulations 2011. See further regarding the methods of delivery *Meskin et al Insolvency Law* 18-24–18-25.

Although affected persons do not have the right to commence voluntary business rescue proceedings in terms of section 129, they have a significant role to play in the course of the procedure. Employees as affected persons have the right to apply to court at any time after the resolution has been adopted until the business rescue plan has been adopted, to set aside the resolution commencing voluntary rescue proceedings.<sup>257</sup> Section 130(1)(a) provides for various grounds to contest the viability of the resolution. These grounds are: (i) there is no reasonable basis for believing that the company is in financial distress; (ii) there is no reasonable prospect of rescuing the company; and (iii) non-compliance with procedural requirements.

### 3.2.2 Compulsory rescue procedure

In terms of section 131(2)(b) where an application has been filed to start business rescue proceedings by the court, all affected persons must be notified of such application in the prescribed manner.<sup>258</sup> Regulation 124 deals with the notification requirements. It states that an applicant that applies for the compulsory business rescue of a company must notify all affected persons that such application has been made to court. Further, a copy of such application must be delivered to each affected person known to the applicant. The inclusion of the word “known” poses problems. Does that mean only the persons that the applicant knows about or is there a responsibility on the applicant to ensure that everybody is reached? On the one hand it might seem unreasonable to expect the applicant to ensure that all affected persons are informed because it might be impossible to obtain the relevant information, but on the other hand it might be an easy way out if “known” is interpreted literally and only refers to actual knowledge. This uncertainty came before the court in *Engen Petroleum Ltd v Multi Waste (Pty) Ltd and Others*,<sup>259</sup> which stated that an applicant must take all reasonable steps to identify the affected persons and the addresses to which the notices should be delivered. The applicant therefore must do something more to obtain the information of affected parties than merely relying on the information of persons with which he might be familiar. It is submitted that what will constitute reasonable steps will depend on each case and the steps taken in each case.

---

<sup>257</sup> S 130(1)(a) of the Companies Act 2008.

<sup>258</sup> S 131(8).

<sup>259</sup> 2012 (5) SA 596 (GSJ) [24].

Regulation 7(1) states that a notice or document must be delivered in accordance with section 6(10) or 6(11) of the Act or as set out in Table CR 3 that deals with the methods and times for delivery of documents contemplated in the Act.<sup>260</sup> These requirements are definitely time-consuming and have cost implications which are unnecessary given the short time frames associated with business rescue. Recommendations regarding the providing of information to employees during business rescue are made below.<sup>261</sup>

### 3.2.3 Miscellaneous aspects regarding notice and information

If business rescue proceedings have not come to an end after three months the business rescue practitioner must prepare monthly updated reports on the progress of the process and deliver such report to each affected person and to the court or the Commission.<sup>262</sup>

When the business rescue practitioner investigates the affairs of the company and concludes that no reasonable prospect exists for the company to be rescued, he must inform the court, the company and all affected persons in the prescribed manner.<sup>263</sup> This obligation remains throughout the whole business rescue process. If the business rescue practitioner concludes that there is no reasonable grounds to believe that the company is in financial distress, he must also inform the court, the company and all affected persons.<sup>264</sup>

Section 144(3)(a) states that a registered trade union and any employees not represented by a trade union are entitled to receive notice in the prescribed manner and form at their workplace and at the head office of their trade union of each court proceeding, decision, meeting or any

---

<sup>260</sup> Table CR 3 states that when a document is to be delivered to a trade union it must be delivered by “handing the notice or a certified copy of the document to a responsible employee who is apparently in charge of the main office of the union or for the purposes of s 13(2), if there is a union office within the magisterial district of the firm required to notify its employees in terms of these regulations, at that office. If there is no person willing to accept service, by affixing a certified copy of the notice or document to the main door of that office”. The date and time of the deemed delivery will be recorded on the receipt for the delivery or on the date and time sworn to by the affidavit of the person who fixed the document, unless there is evidence that the document was fixed on a different time and date. Where the document is to be delivered to employees of the company it will be deemed as delivered when the notice or certified copy of the document is fixed in a prominent place in the workplace where it can be easily read by employees “on the date and at the time sworn to by affidavit of the person who affixed the document, unless there is conclusive evidence that the document was affixed on a different date or at a different time”.

<sup>261</sup> Chapter 5, par 3.1.2.

<sup>262</sup> S 132(3)(a)–(b). See in general Delpont *Henochsberg* 480(9) for more information and the regulation of this in terms of reg 125.

<sup>263</sup> S 141(2)(a)(i). See Delpont *Henochsberg* 494 regarding the notification requirements.

<sup>264</sup> S 141(2)(b). Delpont *Henochsberg* 495 submits that such notification be done in accordance with reg 125(1).



other event related to business rescue.<sup>265</sup> This right ensures that employees are updated about the process.

According to section 148, the business rescue practitioner must convene a meeting within ten business days after his appointment to report to a meeting of employee's representatives<sup>266</sup> whether or not he believes that there is a reasonable prospect of rescuing the company.

Employees therefore have a right to be notified of the commencement of business rescue proceedings where a shareholder, creditor or trade union commences the process in terms of section 131.

Although it is just to include employees in the notification procedures throughout business rescue proceedings, it is my opinion that the excessiveness of this right places a huge burden on the company.<sup>267</sup> Not only will employees receive notification in their capacities as affected persons, but in the event where they qualify as creditors of the company, they will also be notified of the events taking place during business rescue proceedings. Their right to receive notices is not unjust, but the need for multiple notices is superfluous. Loubser correctly remarks that repeated notifications "place an unnecessary administrative and cost burden on the company".<sup>268</sup>

Alternative ways of informing employees and other stakeholders of the company of the process must be explored. In the recent business rescue case of *Evrax Highveld Steel and Vanadium Ltd (in business rescue)*,<sup>269</sup> the company posted links on their company website with directions to all notifications and reports that was handled by Matuson Associates.<sup>270</sup> By doing this and informing the affected persons that the administration of the business rescue would be disclosed in this manner, individual notices, emails and registered post would be eliminated. It is

---

<sup>265</sup> S 144(3)(a).

<sup>266</sup> See also Loubser and Joubert 2015 *ILJ* 36.

<sup>267</sup> See par 3.8.6 for a discussion of the joining of employees in cases of business rescue. The question whether employee rights are not also affected when a business rescue plan is set aside is also discussed in par 3.2.3.

<sup>268</sup> Loubser (Part 1) 2010 *TSAR* 514.

<sup>269</sup> Registration number 1960/001900/06.

<sup>270</sup> <http://www.evraxhighveld.co.za> (Date of use: 17 May 2016); see also [http://www.evraxhighveld.co.za/BusinessRescue/Update%20Report%20-%20Evrax%20Highveld%20Steel%20and%20Vanadium%20Limited%20\(Jan%202017\).pdf](http://www.evraxhighveld.co.za/BusinessRescue/Update%20Report%20-%20Evrax%20Highveld%20Steel%20and%20Vanadium%20Limited%20(Jan%202017).pdf) (Date of use: 19 November 2017). Another report was sent to the CIPC and all affected parties in January 2017. The report contained a detailed discussion and update of the business rescue procedure. One paragraph dealt with "employee Payments" and it was stated that approximately 11% of the total employee claims had been paid to them and it was indicated that the last payment occurred on 15 December 2016. In total, R30 896 283 in employee claims was paid.

my belief that technology should be used in this regard. By adopting such alternatives, companies will be freed from “intricate procedural burdens”.<sup>271</sup>

Section 144(3) allows a registered trade union and individual employees who are not represented by a trade union to participate in any court proceedings arising during business rescue.<sup>272</sup> This section opens the door to join them in any matter that will affect their interests.<sup>273</sup>

In *Luthuli Power Corporation (Pty) Ltd and Others v Transfix Transformers SA (Pty) Ltd*,<sup>274</sup> Daffue J agreed that NUMSA and the employees of Transfix Transformers SA had not been properly cited as parties to the proceedings or been joined properly. Another way of safeguarding the interests of employees was found in *Newcity Group v Allan David Pellow NO*.<sup>275</sup> In this case non-unionised employees were added to the list of respondents but as the so-called “second affected party”. In this case the jobs of 140 employees were at risk should the company be placed in liquidation.

It might be more usual for employees to be joined in cases where they are joined as affected persons but in their capacity as creditors. The importance of joining in the case where creditors anticipate that payment will be made to them in respect of an approved business rescue plan was confirmed in *Absa Bank Ltd v Naude NO and Others*.<sup>276</sup> The test whether there has been non-joinder was stated as whether a party has “direct and substantial interest in the subject matter” which my prejudice that party if he was not joined. It is submitted that business rescue as a whole is a situation in which employees have a direct and substantial interest. Therefore they are to be joined not only when there is unpaid money owed to them but also because they are

---

<sup>271</sup> See Loubser *LLD Thesis* 514 note 97.

<sup>272</sup> S 144(3)(b).

<sup>273</sup> Although there are not many cases where employees or trade unions were joined, employees were joined as fourth respondents in *Air Liquide (Pty) Ltd v Evraz Highveld Steel and Vanadium LTD (in Business Rescue)* case no 26911/2016; see <http://www.evrazhighveld.co.za/BusinessRescue/Joinder%20Application%20Part%201.pdf> (Date of use: 21 November 2017).

<sup>274</sup> Unreported case number 1981/2016, judgment delivered on 22 December 2016 by Daffue J in the HC Free State Division of the High Court [40].

<sup>275</sup> Unreported case number (577/2013) [2014] ZASCA 162 (1 October 2014).

<sup>276</sup> 2016 (6) SA 540 (SCA) [10]. See also *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd and Others* (624/2016) [2017] ZASCA 131 where the court ruled that because creditors have direct and substantial interests in a business rescue application, the non-joinder of creditors will be fatal to the relief sought in the

employees with an interest in the outcome of the process.

In *Golden Dividend v Absa Bank*,<sup>277</sup> the Supreme Court of Appeal ruled that the non-joinder of creditors in a business rescue application is “fatal”.

Australia has already incorporated the use of websites to provide employees with information during voluntary administration.<sup>278</sup> England still neglects employees as far as notice to them is concerned. Although so-called “prescribed persons” are to receive information during administration, employees are not specifically included in this definition.<sup>279</sup>

### 3.3 Employee’s right to participate in consultations during business rescue

Employees have a right to participate in the hearing of an application in terms of section 131 to place the company under compulsory business rescue.<sup>280</sup>

In terms of section 150(1), the business rescue practitioner must consult with the affected persons before he prepares a business rescue plan.<sup>281</sup>

This right to participate in consultations merely provides employees with a voice and possible influential powers. Although this right is referred to as a “soft voice” given to employees, it is submitted that the possible outcome of their influence does not only have participation value on their side. If employee committees are well prepared and with eager involvement of trade unions in the positive outcome of business instances, employees might end up with a “hard voice” through which change can be affected.

Section 144(3)(g) contains a peculiar right afforded to employees. If the proposed business

---

application. For further information on the joining of creditors in a business rescue application see Delpont *Henocheberg* 474–475.

<sup>277</sup> Unreported case number (569/2015) [2016] ZASCA 78 (30 May 2016) [10].

<sup>278</sup> Chapter 3, par 3.2.2.

<sup>279</sup> Chapter 4, par 3.2.

<sup>280</sup> S 131(3). See also *Engen Petroleum Ltd v Multi Waste (Pty) Ltd* 2012 (5) SA 569 (GSJ) regarding the acknowledgment of affected persons’ right to participate. Affected persons therefore do not require the court’s approval to intervene according to *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd* 2012 (5) 515 (GSJ). Note that the court in *Engen Petroleum Ltd v Multi Waste (Pty) Ltd* 2012 (5) SA 569 (GSJ) 603 remarked that leave to intervene could be regarded as a “procedural requirement”.

<sup>281</sup> See par 3.4 below for detailed information.

rescue is rejected, employees may propose the development of an alternative plan or present an offer to acquire the interests of one or more of the affected persons.<sup>282</sup>

All affected persons in the company also have the right to participate in the hearing of an application for the setting aside of the business rescue resolution.<sup>283</sup> In *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group*,<sup>284</sup> Rogers AJ held that it does not seem necessary for affected persons to apply to court for leave to intervene in such way.<sup>285</sup>

Section 144(3) provides for the formation of an employees' committee.<sup>286</sup> The function of the committee is to liaise with the business rescue practitioner at any time to protect the employees' interests and to incorporate their views in decision-making.<sup>287</sup> The shareholders of the company do not have such a right. This is strange as the Act provides that all affected parties must be treated the same.

One of the duties of the business rescue practitioner is to convene a meeting of employees' representatives.<sup>288</sup> The main objective of this meeting to be held within 10 days after the business rescue practitioner's appointment, is to inform the representatives whether he believes that a reasonable prospect exists for business rescue to be successfully implemented.<sup>289</sup> Notice of the meeting must be given to every registered trade union as well as non-represented employees.<sup>290</sup> The functions of such employee committees include the following according to section 149:

- (a) to consult with the practitioner about the proceedings to follow;
- (b) to receive and consider reports related to the proceedings; and

---

<sup>282</sup> This must be done in accordance with s 153.

<sup>283</sup> S 130(4).

<sup>284</sup> 2011 (5) SA 600 (WCC).

<sup>285</sup> S 131(3) has similar wording as s 130(4) and therefore it is submitted that the same approach should be followed as intimated by Rogers AJ in the *Pinnacle Point* case above n 285. See also *Absa Bank Ltd v Golden Dividend 339 (Pty) Ltd and Others* 2015 (5) SA 272 (GP) and the discussion in Delpont *Henochsberg* 464(9).

<sup>286</sup> S 144(3)(c).

<sup>287</sup> Loubser and Joubert 2015 *ILJ* 36.

<sup>288</sup> S 148(1).

<sup>289</sup> Delpont *Henochsberg* 514.

<sup>290</sup> S 148(2).

- (c) to act independently from the practitioner to ensure an arms' length between the employees and the practitioner.<sup>291</sup>

It is clear from the functions listed above that employee representative committees do not have any power to instruct the business rescue practitioner. The main function and the practical benefit derives from the employee representatives' committee lie in the fact that individual employees represented by trade unions acquire the right to consult with the practitioner and stay informed throughout the whole rescue process.

Membership of such employee (representatives) committee is regulated by section 149(2).<sup>292</sup> No provision is made in the Act for a similar committee of shareholders of the company.

Some of these rights attributed to employees as affected parties as discussed above are quite extreme with no comparative equivalent in other jurisdictions.

### **3.4 Role of employees and their rights in respect of business rescue plan**

The business rescue procedure inevitably and naturally will have an effect on a company's employees. The business rescue plan therefore must disclose the possible effect it will have on the claims of employees and on the terms and conditions of their employment.<sup>293</sup>

Employees have numerous rights pertaining specifically to the business rescue plan.<sup>294</sup> Firstly, the business rescue practitioner must consult with any registered trade union representing employees in the company as well as unrepresented employees<sup>295</sup> during the development of the business rescue plan.<sup>296</sup> This makes employees active participants during the whole process. Employees must then be given sufficient time to review the plan to enable them to make submissions to be considered at the creditors' meeting where the rescue plan will be considered. Section 146 that deals with the rights of shareholders of the company during business rescue is

---

<sup>291</sup> S 149(1). This section also gives creditors the right to form creditor representative committees.

<sup>292</sup> Creditors' membership rights are also dealt with in this section.

<sup>293</sup> S 150(2)(c)(ii). See also Loubser and Joubert 2015 *ILJ* 37.

<sup>294</sup> These rights are set out in s 144.

<sup>295</sup> As well as registered trade unions and employees so represented.

<sup>296</sup> S 144(3)(d).

silent on corresponding rights afforded to the shareholders of the company. No mention is made to shareholders that are involved in the development of the plan or to be consulted by the practitioner during his preparation of the plan, or time to revise the plan or the opportunity to make submissions before the plan is voted on.

Secondly, employees are entitled to attend this meeting of creditors and are allowed to make submissions before the creditors vote on the approval of the plan.<sup>297</sup> Shareholders also have this right when their class rights will be changed by the plan.<sup>298</sup>

Thirdly, in the event where the business rescue plan is not approved, but rejected, the employees may propose the development of an alternative plan.<sup>299</sup> This is the case where the business rescue practitioner does not use any of his powers in terms of section 153(1). If the employees propose amendments to the original business rescue plan, they are not allowed to vote on such a motion unless they are voting in their capacity as creditors of the company.

Fourthly, if the plan is rejected, the employees have the right to make a binding offer to acquire<sup>300</sup> the interests of any person who voted against the adoption of the plan.<sup>301</sup> Employees are treated in the same way as shareholders regarding the acquisition of interests. Creditors are only allowed to acquire the voting interests of other creditors.<sup>302</sup> Employees may acquire the rights of both creditors and shareholders who voted against the plan in terms of section 144(3)(g)(ii). Employees therefore are in a much better position when the acquisition of shares is compared to the rights that creditors have to acquire shares only from other creditors.

The meaning of the term “binding offer” was unclear until the Supreme Court of Appeal brought clarity. Initially, in *African Banking Corporation of Botswana v Kariba Furniture Manufacturers (Pty) Ltd (In Business Rescue) and Others*,<sup>303</sup> it was held that once an offeror

---

<sup>297</sup> S 144(3)(e).

<sup>298</sup> S 146(d).

<sup>299</sup> See also Loubser (Part 2) 2010 *TSAR* 695–696 on the three different options available in terms of s 153.

<sup>300</sup> This acquisition will be at the value that will be available in the case of liquidation.

<sup>301</sup> S 144(3)(g)(i).

<sup>302</sup> S 144(3)(g)(ii) read with s 153(1)(b)(ii).

<sup>303</sup> *African Banking Corporation of Botswana v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2013 (6) SA 471 (GNP) [29].

made a binding offer, the offer could not be withdrawn by the offeror and it was automatically binding on the offeree. This judgment basically treated this as a cram-down provision in terms of which the offeror could cram down the voting rights of an offeree. In a subsequent case, *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others*,<sup>304</sup> the court disagreed with *Kariba* and held that “binding” in the words “binding offer”, binds the offeror as he is not able to withdraw the offer until the offeree has either accepted the offer or rejected it. In another case in 2014, *ABSA Bank Limited v Caine NO and Another, In Re; ABSA Bank Limited v Caine NO and Another*,<sup>305</sup> the court also held that the offer is binding on the offeror and that the offeree has a discretion either to accept or to reject it. The Supreme Court of Appeal clarified the meaning of the term “binding offer” and held that a binding offer in terms of section 153(1)(b)(ii) made to creditors who oppose the adoption of the business rescue plan is not automatically binding on the offeree and that the offeree may not unilaterally be deprived of its voting rights.<sup>306</sup>

Employees in South Africa enjoy extensive rights in respect of the business rescue plan. Neither in Australia nor in England do employees have such substantial rights or influential powers in the development of the administration plan. In Australia, employees may contribute to the deed of company arrangement in their capacities as creditors of the company<sup>307</sup> and in England employees’ role is limited to the provision of a statement of company affairs to the administrator.<sup>308</sup>

It is submitted that South Africa law goes a bit far regarding employees’ role in the development of the plan. They have more rights than creditors or shareholders in the process.

### **3.5 Employee’s right to be present at meetings and vote during business rescue**

Section 144(3)(e) makes provision for employees to be present at the meeting of holders of voting interest – even if they are not creditors and attending merely in their capacity as

employees – and to make submissions to the meeting before the proposed business rescue plan

<sup>304</sup> [2014] 1 All SA 173 (KZP) [60].

<sup>305</sup> [2014] ZAFSHC 46 [27].

<sup>306</sup> *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2015 (5) SA 192 (SCA) [18]. See Bradstreet 2017 (1) *JCCL&P* 72 in which this decision of the Supreme Court of Appeal is critically analysed.

<sup>307</sup> Chapter 3, par 3.2.4

is voted upon.<sup>309</sup> Loubser raised a concern regarding the meaning of this right to employees: are employees who have no vote themselves because they are not creditors of the company allowed to apply to court to have the votes of creditors set aside?<sup>310</sup> She indicated the danger associated with such a scenario as “forcing approval of the plan onto a majority of creditors with large claims who could suffer serious prejudice as a result of a defective plan while the employees are not subject to any immediate personal financial risks”.<sup>311</sup>

No mention is made in the Act of a corresponding right enjoyed by the shareholders of the company.

Employees are regarded as creditors of the company and in such capacity they have a voting interest that is equivalent to the amount of their unpaid remuneration before business rescue started. Section 144(2) makes specific mention of the fact that that employees who have unpaid moneys due and payable to them are regarded as “preferred unsecured creditors” of the company.

Section 144(3)(f) provides for employees to vote with creditors in such capacity through an employee representative or through a trade union to approve a proposed business rescue plan. Any unrepresented employee is also entitled to vote with creditors on a motion to approve a proposed business rescue plan.<sup>312</sup>

In Australia<sup>313</sup> and England<sup>314</sup> creditors enjoy this right. Employees will therefore also have this right provided they are creditors of the company. In Australia specific reference is made to employees who will have a role to play in this regard.

---

<sup>308</sup> Chapter 4, par 3.3.

<sup>309</sup> S 152(1)(c) confirms this right of employees and provides that a practitioner must allow the employees' representative to address the meeting before voting takes place; see also Loubser *Inappropriateness* 230.

<sup>310</sup> Loubser *Inappropriateness* 230.

<sup>311</sup> Loubser *Inappropriateness* 230.

<sup>312</sup> S 144(3)(f). This right enures to an employee to the extent that he is also a creditor of the company.

<sup>313</sup> Chapter 3, par 3.2.5.

<sup>314</sup> Chapter 4, par 3.5.



### 3.6 Effect of business rescue on employment contracts

Section 136 of the Companies Act of 2008 regulates the effect of business rescue proceedings on employment contracts. Although the heading of the section indicates that it deals with employee contracts and employees it is misleading. In fact, section 136 deals with contracts in general and specifically with employment contracts.

This is a sensitive topic in any rescue process and needs to be treated with the required circumspection and caution. Cassim observes that “[o]ne of the primary goals of a good business rescue process is the fair and equitable treatment of employees of a financially distressed company”.<sup>315</sup> The discussion below first focuses on section 136 of the Companies Act which deals with the way in which the Act deals with employment contracts in business rescue. The amended position regarding dismissals based on operational requirements in sections 189 and 189A of the Labour Relations Act is addressed thereafter.

#### 3.6.1 Section 136 of the Companies Act of 2008

Contracts in general and employment contracts specifically play a significant role in any company’s business. When one thinks of a company, supply contracts, letting and hiring, purchase and sale, manufacturing contracts and employment contracts come to mind. For as long as a company is in business, contracts need to be honoured. This is also true when a company finds itself in financial distress. The employees can do the job, they can manufacture the products and they can run the office. It is difficult to imagine a struggling company with no employees. It is easy to start the thought of restructuring and rescue with retrenchment in mind. The only reason one would do that is to free up capital. Such capital will provide the “breathing space” associated with the granting of the moratorium. Retrenchment is not an easy option and considering the know-how and skills that will flow out of the already-struggling company, adds tension to the already-stressful situation of financial distress.

It must be highlighted that this section deals differently with employment contracts than with contracts in general. Section 136(1)(a) deals with the power of the business rescue practitioner when employment contracts are being decided upon and section 136(1)(b) deals with all other

---

<sup>315</sup> Cassim *Contemporary Company Law* 884.

types of contracts. The focus is on the position of employment contracts.

The general rule regarding employment contracts is that employees who were employed by the company before the commencement of business rescue proceedings will remain employed, with no change to their position before rescue proceedings commenced.<sup>316</sup> The only two exceptions to this general rule is when changes are made to the conditions of employment in the ordinary course of attrition<sup>317</sup> where employees resign, retire or pass away and where both employer and employee agreed on changes to their employment relationship.<sup>318</sup> In *Solidarity v Vanchem Vanadium Products (Pty) Ltd and Others*,<sup>319</sup> the Labour Court confirmed that the business rescue practitioner is allowed to suspend employment contracts provided that such dismissals were made in accordance with the Labour Relations Act 1995.

It comes as no surprise that the Labour Relations Act 1995 plays a visible role during business rescue proceedings. One would think that the Companies Act 2008 deals with company law and should thus be followed. Section 5 of the Companies Act deals with the general interpretation of the Act and provides that when there is an inconsistency between a provision of the Companies Act 2008 and a provision of the Labour Relations Act 1995, the provision of the Labour Relations Act 1995 will prevail.<sup>320</sup>

Labour law does not only affect section 136(1) of the Companies Act. Another section that is influenced by labour law is section 133 that provides for a general moratorium on legal proceedings against the company. The interplay between the section 133 moratorium and labour-related matters became the subject of various court cases and created uncertainty and confusion as to the effect that the moratorium will have on employment contracts and claims by employees. Section 133 provides that no legal proceedings against the company or in relation to property of the company may start or continue unless, amongst other conditions, the business rescue practitioner gives his written consent<sup>321</sup> or it is ordered with the leave of the court.<sup>322</sup> In

---

<sup>316</sup> S 136(1)(a).

<sup>317</sup> S 136(1)(a)(i).

<sup>318</sup> S 136(1)(a)(ii).

<sup>319</sup> Unreported case no J385/2016 and J393/2016 LC [36].

<sup>320</sup> S 5(4)(b)(i)(bb) of the 2008 Act.

<sup>321</sup> S 133(1)(a) of the 2008 Act.

<sup>322</sup> S 133(1)(b) of the 2008 Act.

2013, the case of *Fabrizio Burda v Integcomm (Pty) Ltd*,<sup>323</sup> started the confusion when it was held that the section 133 moratorium is applicable to employment-related disputes referred to the Labour Court and the Commission for Conciliation, Mediation and Arbitration. This meant that all legal proceedings must be stayed – unfair dismissal proceedings included.

In 2014 the court in *NUMSA v Motheo Steel Engineering*,<sup>324</sup> held that the section 133 moratorium is in conflict with the provisions of the Labour Relations Act of 1995 and that the latter Act prevails in case of a conflict between the Companies Act and the Labour Relations Act.<sup>325</sup>

*Sondamase and another v Ellerine Holdings Limited (in business rescue) and another*<sup>326</sup> was decided in 2016. In this case two employees of Ellerines Furnishers (Pty) Ltd were the applicants. They were dismissed based on operational requirements. Prior to their dismissal they lodged a grievance against the company claiming discrimination and other unfair labour practices.<sup>327</sup> They referred a dispute to the Commission for Conciliation, Mediation and Arbitration which was unresolved, then turned to the Labour Court and delivered a statement of their claim. Ellerines raised amongst other things that section 133 provides for a general moratorium and that therefore all legal proceedings against the company were stayed. The court considered the purpose of the moratorium and held that there is no conflict between section 133 of the Companies Act 2008 and the Labour Relations Act 1995 and that the moratorium is also applicable to employment-related matters.<sup>328</sup> Therefore, the employees' claims are suspended during business rescue. The court in *Sondamase* referred to the Supreme Court of Appeal in *Chetty t/a Nationwide Electrical v Hart and another NNO*,<sup>329</sup> where the court interpreted section 133 to place a moratorium on all legal proceedings – be it in court or during arbitration.<sup>330</sup>

---

<sup>323</sup> Unreported case no JS539/2012 LC 29 November 2013 [12]–[13].

<sup>324</sup> Unreported case no J271/2014 LC 7 February 2014.

<sup>325</sup> S 210 of the Labour Relations Act 1995 prevails over other Act, except for the Constitution. S 5(4)(b)(i)(bb) of the Companies Act 2008 also provides that the provisions of the Labour Relations Act 1995 prevails when there is conflicting provisions in the Companies Act 2008 and the Labour Relations Act 1995.

<sup>326</sup> Unreported case no C669/2014 LC 22 April 2016.

<sup>327</sup> *Sondamase and another v Ellerine Holdings Limited (in business rescue) and another* (unreported case no C669/2014 LC 22 April 2016) [1].

<sup>328</sup> *Sondamase and another v Ellerine Holdings Limited (in business rescue) and another* (unreported case no C669/2014 LC 22 April 2016) [12].

<sup>329</sup> [2015] 6 SA 424 (SCA) [26–29].

<sup>330</sup> *Sondamase and another v Ellerine Holdings Limited (in business rescue) and another* (unreported case no C669/2014 LC 22 April 2016) [16].

Thereafter in *Ellerine Furnishers (Pty) Ltd (in business rescue) and others v FGWU obo Cleopatra Somtsewu*,<sup>331</sup> the court relied on *Sondamase*<sup>332</sup> and reviewed and set aside an award by the Commission for Conciliation, Mediation and Arbitration. The court followed the decision in *Motheo Steel Engineering*.<sup>333</sup>

It is submitted that both the Labour Relations Act 1995 in section 210 and the Companies Act 2008 in section 5 are very clear and unambiguous in that the Labour Relations Act 1995 will prevail in case of conflicting provisions. It is believed that there is a conflict between section 133 and labour-related matters and that the Labour Relations Act 1995 should prevail, resulting in the moratorium not being applied in labour-related matters. The only answer will be for the High Court to resolve the issue of the section 133 moratorium and labour-related matters in order to settle the confusion.

Employment contracts are further entrenched. The business rescue practitioner is precluded from entirely, partially or conditionally suspending any contractual obligation of the company arising during business rescue from an employment agreement that existed when business rescue commenced.<sup>334</sup> Even a court does not have the power to cancel an employment contract.<sup>335</sup>

In no other jurisdiction, such as Australia<sup>336</sup> or England,<sup>337</sup> are employment contracts protected during the rescue process like in South Africa. It is submitted that despite the importance of ensuring employees of their employment, it is necessary to be able to treat employment contracts in a manner that makes business sense during rescue as well. I am of the opinion that it must be made easier for the business rescue practitioner to terminate employment contracts during rescue to free up capital to try and save the business. Payroll is one of the highest costs a company must deal with in its day-to-day running.

---

<sup>331</sup> Unreported case no JR1836/2015 LC 26 April 2016.

<sup>332</sup> *Sondamase and another v Ellerine Holdings Limited (in business rescue) and another* (unreported case no C669/2014 LC 22 April 2016).

<sup>333</sup> *NUMSA v Motheo Steel Engineering* (unreported case no J271/2014 LC 7 February 2014).

<sup>334</sup> S 136(2A).

<sup>335</sup> S 136(2A)(b). See also section 140(1)(c) and 140(2) that deals with the power of the business rescue practitioner to remove any person from office who formed part of the management of the company. It is submitted that the removal from office does not mean that the person is also removed as employee of the company; Loubser and Joubert 2015 *ILJ* 34.

<sup>336</sup> Chapter 3, par 3.2.6.

<sup>337</sup> Chapter 4, par 3.5.

### 3.6.2 Sections 189 and 189A of the Labour Relations Act of 1995

It is not the objective of business rescue to facilitate the dismissal of employees and sections 189 and 189A of the Labour Relations Act will prevail in setting procedures for the retrenchment of employees in terms of the business rescue plan.<sup>338</sup> Section 136(1)(b) provides that any retrenchment of employees as envisaged by the business rescue plan must comply with sections 189 and 189A of the Labour Relations Act 1995.

Section 189 and 189A was inserted into the Labour Relations Act 1995 by section 44 and section 45 of the Labour Relations Amendment Act of 2002.<sup>339</sup> The focus of these insertions was to provide direction in the case where employers wanted to dismiss employees due to financial or operational reasons. The relevance to the discussion is based on the fact that when an employer company enters business rescue it is financially distressed. Section 136(1)(b) of the Companies Act makes sections 189 and 189A of the Labour Relations Act applicable to any possible retrenchment that might occur during business rescue.

The first important issue that is addressed in section 189(1) is the fact that an employer who wishes to retrench one or more of his employees due to operational requirements has to consult with the relevant people in terms of a collective agreement or workplace forum.<sup>340</sup> Section 189(1)(b)(ii) refers specifically to trade unions that must be consulted by the employer should any of their members be affected by the dismissals. Where there are no workplace forums or trade unions, the employees themselves must be consulted.<sup>341</sup> Section 189(2) obliges an employer to enter into a “meaningful joint consensus-seeking process” with the consulting parties in order to agree on matters concerning retrenchments.<sup>342</sup>

The employer must then in writing issue a written notice in terms of which he invites the other parties to engage in consultation and the employer must make a written disclosure of, amongst other things, the reasons for the dismissals, alternatives considered by the employer, the number

---

<sup>338</sup> S 189 and 189A of the LRA 66 of 1995.

<sup>339</sup> Act 12 of 2002.

<sup>340</sup> S 189(1)(a)–(b)(i) of the LRA.

<sup>341</sup> S 189(1)(c) and (d) of the LRA.

<sup>342</sup> S 189(2) of the LRA. These measures include alternatives to dismissals, measures to minimise the number of dismissals, changing the timing of the dismissals and mitigating the negative effects of the dismissals, the selection criteria that will be used in determining who will be dismissed and the severance payable in the case of dismissals.

of employees that will be affected, the selection criteria,<sup>343</sup> when the dismissals will take place, severance pay proposed, assistance offered to the employees and possible re-employment.<sup>344</sup>

Two specific aspects that also have to be disclosed by the employer during this process is the number of employees employed by him<sup>345</sup> and the number of employees dismissed based on operational requirements in the preceding 12 months.<sup>346</sup> The employer must also allow an employee to make representations on any matter related to the dismissals at hand<sup>347</sup> and where representations were made in writing by the employee, the employer must respond in writing.<sup>348</sup> If the employer does not agree with any representation made by an employee, he must state his reason for disagreeing.<sup>349</sup>

Section 189A of the Labour Relations Act deals specifically with dismissals based on operational requirements in companies with more than 50 employees. Special rules apply in such a situation and the provisions of section 189A must be complied with. Section 189A(2) provides that in case of such dismissals, the employer must give notice of the possible dismissals, any employee may participate in a strike and an employer in a lock-out and the parties may agree to change time periods for consultation or facilitation. When parties request facilitation or consultation, a facilitator must be appointed.<sup>350</sup> If the employees consider using their right to strike they must comply with section 189A(9)–(12). Where an employer did not follow a fair procedure any consulting party may approach the Labour Court within 30 days<sup>351</sup> for remedies.<sup>352</sup> Section 189A(19) sets out the instances in which a dispute regarding dismissal is regarded as fair. The reason for these special rules is the fact that many employees are concerned and the employer will have to comply with procedures of which the Minister, Nedlac and other parties are part, while various other pieces of labour legislation are relevant and become applicable.

The right to strike is a constitutional right available to employees. Although employees cannot

---

<sup>343</sup> The selection criteria used by the employer must have been agreed on by the parties or where no criteria have been agreed upon, the selection criteria must be fair and objective: s 189(7) of the LRA.

<sup>344</sup> S 189(3) of the LRA.

<sup>345</sup> S 189(3)(i) of the LRA.

<sup>346</sup> S 189(3)(j) of the LRA.

<sup>347</sup> S 189(5) of the LRA.

<sup>348</sup> S 189(6)(b) of the LRA.

<sup>349</sup> S 189(6)(a) of the LRA.

<sup>350</sup> S 189A(3) of the LRA. S 189A(3)–(8) of the LRA deals with the facilitations process.

<sup>351</sup> S 189A(17)(a) of the LRA.

<sup>352</sup> S 189A(13) of the LRA.

be deprived of this right, trade unions should inform employees of the negative effect it will have in a rescue situation due to valuable time that will be wasted on resolving employee matters that will hamper the success of dealing with a financially struggling company.

Taking South Africa's unemployment rate into consideration and keeping in mind that any successful reorganisation or rescue attempt will result in job preservation, it is not surprising that the Act goes to extreme protection measures where employee contracts are concerned.

### 3.6.3 Transfer of a business as a going concern and section 197 of the Labour Relations Act 1995

One of the options available to a business rescue practitioner during business rescue proceedings is to transfer the business to another employer.

Section 197 of the Labour Relations Act provides for the transfer of a solvent business to another employer. Despite the fact that business rescue is defined as a procedure available to a company in "financial distress" it is submitted that due to the definition of financial distress in section 128(f) it is possible that a company may still be solvent when business rescue commences.<sup>353</sup>

Section 197 deals with the transfer of employment contracts when the company is solvent and the business is transferred from one employer to a new employer.<sup>354</sup> The transfer of the business has the following important consequences:<sup>355</sup>

- (a) the new employer automatically substitutes the old employer with regard to all employment contracts that existed immediately before the transfer;

---

<sup>353</sup> S 128(f) provides that a company is in financial distress if (i) it is reasonably unlikely that the company will be in a position to pay debts as they become due and payable in the ensuing six months or (ii) that it is reasonably likely for the company to become insolvent in the ensuing next six months. Many things can happen in six months and it is possible that the company never becomes insolvent due to the commencement of business rescue proceedings. The company is until then solvent, albeit under financial distress.

<sup>354</sup> For purposes of s 197(a) and (b) and s 197A of the LRA "business" include the whole or a part of any business, trade, undertaking or service; and "transfer" means the transfer of a business by one employer ("the old employer") to another employer ("the new employer") as a going concern.

<sup>355</sup> S 197(1) of the LRA.

- (b) all the rights and duties which existed between the old employer and the new employer continue to exist as if they existed between the new employer and the employee;
- (c) anything done by the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and
- (d) the transfer does not interrupt an employee's continuity of employment.

Section 197(7) provides that the old employer is jointly and severally liable with the new employer up to a year after the transfer to any employee who becomes entitled to receive a payment contemplated in subsection 7(a) as a result of the employee's dismissal for a reason relating to the employer's operational requirements or the employer's liquidation or sequestration, unless the old employer is able to show that it has complied with the provisions of this section. Furthermore, the old and new employer are jointly and severally liable in respect of any claim concerning any term or condition of employment that arose prior to the transfer.<sup>356</sup>

Section 197A will have to be complied with at the moment when the company becomes insolvent during business rescue proceedings. The provisions of this section have been discussed under liquidation earlier on in this chapter.<sup>357</sup>

Despite the fact that South Africa is not a member state of the European Union, the European Union's Directives influenced the South African policy makers. The following are examples of instances where South African labour legislation followed European Union social policy developments:

- (a) The Labour Relations Act of 1996 initially only provided direction where the employment contracts of solvent companies were transferred to new owners.<sup>358</sup>

Section 197A of the Labour Relations Act was introduced in 2002 and dealt with

---

<sup>356</sup> S 179(8).

<sup>357</sup> Par 2.3.

<sup>358</sup> S 197 of the Labour Relations Act 1996.



the transfer of undertakings of insolvent companies. This was in line with the 2001 Directive which was also applicable to insolvent companies.<sup>359</sup>

- (b) Although section 197A provided for much the same protection to employment contracts in the case of transfer in insolvent circumstances, two important exceptions existed which were in line with the 2001 Directive.<sup>360</sup> These were claims for unpaid salary and leave against the old employer which did not transfer as claims to the new employer. Employees thus had to claim same from the old employer and the new employer could not be held liable for any unfair dismissals of former employees.<sup>361</sup>

### **3.7 Ranking of employee claims during business rescue and the effects in a subsequent liquidation**

Two different situations are discussed here. Firstly, the scenario where any employment-related money was due and payable to an employee *before* business rescue proceedings commenced and secondly, the situation where any remuneration, reimbursement for expenses and other monies became due and payable to an employee *after* business rescue proceedings commenced.<sup>362</sup> The ranking of the employee claim differs depending on the situation and the legislation deals with the claim in two different sections.

#### **3.7.1 Employment-related money due and payable at commencement of business rescue**

##### **3.7.1.1 *Nature of the claim***

Where any remuneration, reimbursement for expenses or other employment-related monies were due and payable before business rescue proceedings commenced and remain in arrears, they will be treated as preferred, unsecured claims against the company.<sup>363</sup>

---

<sup>359</sup> See Joubert *et al* 2011 *IJCLLIR* 70.

<sup>360</sup> Article 5 of the 2001 Directive.

<sup>361</sup> Boraine and Van Eck 2003 *ILJ* 1840.

<sup>362</sup> Own emphasis.

<sup>363</sup> S 144(2).

Not only arrear salary or wages are included in the claim that employees will have against the employer. All *employment-related monies* are included in this preference.<sup>364</sup> This is much more than the statutory preferent claim envisaged by section 98A of the Insolvency Act of 1936.

In a very recent judgment, *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd (in Business Rescue) and Another*,<sup>365</sup> it was stated that the claim envisaged by section 144(2) during business rescue is much wider than the insolvency-related one as contemplated in section 98A of the 1936 Insolvency Act.<sup>366</sup> The dispute in the case was whether so-called “incentive remuneration”, a bonus or commission in this instance, was a preferred claim as referred to in section 144(2) of the 2008 Companies Act or whether it was a concurrent claim. Sher AJ held that the money claimed by the applicant was indeed included in the ambit of section 144(2) and Booyesen was as such a preferred creditor and not a concurrent one.<sup>367</sup>

No definition of “preferred, unsecured” creditor is given in Chapter 6 of the 2008 Companies Act. Unsecured is understandable as employees generally do not have security in any form for monies owed to them by the company for services rendered. What is difficult to grasp is the description of their claims as “preferred”. Keeping in mind the status of employee claims attributed to them in the liquidation of a company, “preferred” seems to indicate that their claims rank “before” other unsecured claims. Delpont remarks that the use of the term “preferred” in Chapter 6 is confusing due to the fact that no order for the payment of creditors’ claims is made.<sup>368</sup>

Section 144(2) does not limit the claim in any way. It states that employees are preferred, unsecured creditors for purposes of Chapter 6 for any unpaid remuneration, reimbursement for expenses related to employment due and payable by a company to an employee at any time before the beginning of the company’s business rescue proceedings.

This entitlement is much more than the limited amount available to employees when the

---

<sup>364</sup> Own emphasis; see also Delpont *Henochsberg* 502.

<sup>365</sup> [2017] 1 All SA 862 (WCC) [65].

<sup>366</sup> *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd (in Business Rescue) and Another* [2017] 1 All SA 862 (WCC) [65].

<sup>367</sup> *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd (in Business Rescue) and Another* [2017] 1 All SA 862 (WCC) [65].

<sup>368</sup> Delpont *Henochsberg* 502.

company is placed in liquidation.<sup>369</sup>

### 3.7.2 Employee-related money becoming due and payable during business rescue

#### 3.7.2.1 *Statutory preferences created in section 135 of the Companies Act 2008*

The Act regards any remuneration, reimbursement for expenses or other employment-related arrear amounts becoming due and payable to an employee during business rescue proceedings, but that remains unpaid, as post-commencement finance.<sup>370</sup> It is submitted that the fact that unpaid employee claims that became due and payable during business rescue proceedings are regarded as post-commencement finance was the biggest mistake made by the drafters of the Act. It is critical that this section must be amended to provide for post-commencement finance apart from employee claims that may simply be regarded as preferred claims.<sup>371</sup>

It is submitted that the wording of the legislature is clear on the ranking of claims in terms of section 135 despite the fact that the courts struggle with the interpretation thereof.<sup>372</sup> In two cases where the ranking of the preference was discussed, the courts erred in applying the intention of the legislature. In *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company Ltd*<sup>373</sup> and *Redpath Mining South Africa (Pty) Ltd v Marsden NO and Others*<sup>374</sup> the courts gave an order of preference regarding the ranking of post-commencement claims.

A few comments need to be made regarding these cases. Kgomo J was the presiding judge in both cases. The references in the cases where the ranking of creditors' claims are set out are an exact copy and paste.<sup>375</sup> Even the secondary sources referred to are the same.<sup>376</sup> *Merchant*

<sup>369</sup> See par 2.6.1.

<sup>370</sup> S 135(1)(a).

<sup>371</sup> This is discussed as a recommendation for reform in Chapter 5, par 3.1.2.

<sup>372</sup> Stoop and Hutchison 2017 *PER* 18.

<sup>373</sup> (13/12406) [2013] ZAGPJHC 109 (10 May 2017)..

<sup>374</sup> (18486/2013) [2013] ZAGPJHC 148 (14 June 2013). [60].

<sup>375</sup> In *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd and Another* (13/12406) [2013] ZAGPJHC 109 (10 May 2013)) [19], [20], [21] and [22] corresponds exactly with [58], [59], [60] and [61] of *Redpath Mining South Africa (Pty) Ltd v Marsden NO and Others* (18486/2013) ZAGPJHC 148 (14 June 2013) .

<sup>376</sup> Kgomo J referred to Stein and Everingham where reference is made to s 135 of the Companies Act.

*West*<sup>377</sup> was decided on 10 May 2013 and *Redpath*<sup>378</sup> on 14 June of the same year. The preference of claims were ranked by Kgomo J in both cases as follows:<sup>379</sup>

- (a) firstly, the practitioner for his remuneration and expenses for costs of the business rescue proceedings;
- (b) secondly, employees for any remuneration which became due and payable after the business rescue proceedings were initiated;
- (c) thirdly, secured lenders or other creditors for post-commencement finance;
- (d) fourthly, unsecured lenders and other creditors for post-commencement finance;
- (e) fifthly, secured lenders or other creditors for any loan or supply made before business rescue proceedings commenced;
- (f) sixthly, employees for remuneration due and payable before business rescue proceedings started and
- (g) seventhly, unsecured lenders or other creditors made prior to business rescue proceedings.

It must be noted that section 135(3) does not make reference to secured claims before business rescue began. The fifth priority listed by Kgomo J above is nowhere to be found in the Act. The fact that the same preferences were reiterated by Kgomo in *Redpath* should under normal instances indicate that there is certainty regarding the interpretation of the Act. Unfortunately, Kgomo J erred. It is a relief to know that these references by Kgomo J in both cases are only seen as *obiter* remarks and therefore not binding in later interpretations of section 135's ranking of claims.<sup>380</sup>

The importance of correct legal interpretation was the topic in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.<sup>381</sup> Immense danger lurks when incorrect interpretation is done by

---

<sup>377</sup> *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd and Another* (13/12406) [2013] ZAGPJHC 109 (10 May 2013)).

<sup>378</sup> *Redpath Mining South Africa (Pty) Ltd v Marsden NO and Others* (18486/2013) ZAGPJHC 148 (14 June 2013).

<sup>379</sup> In *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd and Another* (13/12406) [2013] ZAGPJHC 109 (10 May 2013) [21] and in *Redpath Mining South Africa (Pty) Ltd v Marsden NO and Others* (18486/2013) ZAGPJHC 148 (14 June 2013) [59].

<sup>380</sup> Delpont *Henochsberg* 482(45).

<sup>381</sup> 2012 (4) SA 593 (SCA).

the judiciary and ambiguity is created. This is especially true where the meaning of the section is clear. Wallis JA stressed the importance of correct interpretation by stating:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.”<sup>382</sup>

Not only does this excerpt stress the importance of clear meaning interpretation, it also highlights the fact that such interpretation must be done keeping the context in mind as well as having regard to the reasons why it was enacted originally. Kgomo J undoubtedly erred by including the ranking of “secured lenders or other creditors for any loan or supply made before business rescue proceedings commenced” as a fifth priority. Thereby uncertainty was created and the caution mentioned in *Endumeni*, namely, that “judges should be careful not to diverge from interpretation into legislation: any meaning derived from a text must be grounded in the language thereof”<sup>383</sup> was ignored.

The interpretation of section 135 in *Merchant West*<sup>384</sup> and *Redpath*<sup>385</sup> by Kgomo J definitely does not correspond with the approach laid down in *Endumeni*.<sup>386</sup>

---

<sup>382</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at [18].

<sup>383</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) [18], see also Stoop and Hutchison 2017 *PER* 19.

<sup>384</sup> *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd and Another* (13/12406) [2013] ZAGPJHC 109 (10 May 2013).

<sup>385</sup> *Redpath Mining South Africa (Pty) Ltd v Marsden NO and Others* (18486/2013) ZAGPJHC 148 (14 June 2013).

<sup>386</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

### 3.7.2.2 Employees as “super-preferent” creditors in terms of section 135

Many writers and judges submit that a so-called “super-preference” for employee claims during business rescue is created in terms of section 135(3).<sup>387</sup> This super-preferential status stems from the following claims that employees may have and include:

- a) claims for any remuneration, reimbursement for expenses and other employment-related amounts due and payable during business rescue will enjoy preference over any claims by lenders who provided actual post-commencement finance irrespective whether the loans are secured or not;<sup>388</sup> and
- b) preferential treatment over all unsecured claims against the company.<sup>389</sup>

These claims in terms of section 135(3) are treated equally and rank before any claims by unsecured or secured post-commencement finance lenders.<sup>390</sup>

Writers differ as to whether post-commencement finance was the correct way for the legislature to have dealt with employee claims. Delpont submits that it is “rather unusual” for post-commencement finance to make provision for employee claims.<sup>391</sup> He remarks that employee costs will fall in the definition of cost of business rescue proceedings of the company and are provided for by section 135(3).<sup>392</sup> Stoop and Hutchison differ and state that the inclusion of employee claims as post-commencement finance shows that the section is in line with the Companies Act’s approach to be stakeholder inclusive.<sup>393</sup> They see it as a “laudable attempt to ensure that employees are protected”.<sup>394</sup> I agree with Stoop and Hutchison. When a company enters business rescue proceedings it is already in financial trouble. One of the first short payments a distressed company makes is their payroll and it is necessary to ensure that employee’s interests are looked after. Even though I agree that the current lay-out of section 135

---

<sup>387</sup> Loubser and Joubert 2015 *ILJ* 35; see also *Lidino Trading 580 CC v Cross Point Trading (Pty) Ltd* 2012 ZAFSHC 155 [19], *Oakdene Square Properties (Pty) Ltd and Others and Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2012] 2 All SA 433 (GSJ) [15], see also Cassim’s reference to so called “queue-jumping” in *Contemporary Company Law* 884; see also Levenstein *LLD Thesis* 455.

<sup>388</sup> S 135(3)(a)(i).

<sup>389</sup> S 135(3)(b)(ii). See also Loubser and Joubert 2015 *ILJ* 35 who submitted that this preference is not only over post-commencement unsecured claims but include pre-commencement unsecured claims.

<sup>390</sup> Cassim *Contemporary Company Law* 883.

<sup>391</sup> Delpont *Henochsberg* 480(23).

<sup>392</sup> Delpont *Henochsberg* 480(23).

<sup>393</sup> Stoop and Hutchison 2017 *PER* 17.

<sup>394</sup> Stoop and Hutchison 2017 *PER* 17.

does not offer much incentives<sup>395</sup> for investors or lenders to forward new capital for the company. Employees deserve the priority they are given in section 135 of the 2008 Companies Act.

Not only will employees enjoy this super preference regarding the abovementioned claims during business rescue, but in the event where liquidation proceedings follow a business rescue attempt, employees will continue to enjoy these preferences without any limitation as set out in section 98A of the Insolvency Act.<sup>396</sup> Section 135(4) clearly confers the preference in section 135 when business rescue proceedings are superseded by a liquidation order. Although this section has created many uncertainties as to the rankings of claims of the business rescue practitioner's claims and costs, it fortunately does not have direct implications for employee claims.<sup>397</sup>

In *Diener NO v Minister of Justice*<sup>398</sup> it was held that sections 135(4) and 143(5) of the Companies Act 2008 do not create a "super-preference" in respect of the claim for the business rescue practitioner's remuneration during business rescue. This is specifically in the situation where a business rescue procedure is converted into a liquidation. The court held that section 135(4) provides a business rescue practitioner with a preferent claim against the free residue after the costs of liquidation, before the claims of employees for post-commencement wages.<sup>399</sup> This judgment might also affect the so-called "super preferent" claims employees have when business rescue proceedings are superseded by liquidation proceedings. It is submitted that it will make sense to treat employee claims in the same way as that in which the court dealt with the remuneration of the business rescue practitioner. Not only will it contribute to uniformity when dealing with such claims, but it will also align the preference for employee claims in both the Insolvency Act and the Companies Act.

It is not unique to South Africa to have so-called super preferences for unpaid employee

---

<sup>395</sup> Stoop and Hutchison 2017 *PER* 17.

<sup>396</sup> See the discussion of the s 98A claims in par 2.6.2.

<sup>397</sup> In *Diener NO v The Minister of Justice* 30123/2015 (GP) the court had to decide where the fees of a business rescue practitioner and those of attorneys where a liquidation application superseded the business rescue application rank. Dewrance JA concurred with the finding of the Master that the cost of the business rescue practitioner must be dealt with in terms of ss 143(3) and 135(4). There is a preference in favour of the business rescue practitioner for his claim before the claims of other secured or unsecured creditors. When s 135(4) of the Companies Act is read with s 97 of the Insolvency Act, the conclusion reached is that the remuneration of the business rescue practitioner and expenses incurred during business rescue which are still due and payable in the case of the following liquidation application must be paid after the costs as set out in s 97; see par 60. According to Delpont *Henochsberg* 482(46) such claims must be proved and are not deemed as costs of administration.

<sup>398</sup> *Diener NO v Minister of Justice and Others* 2018 (2) SA 399 (SCA) [49].

<sup>399</sup> *Diener NO v Minister of Justice and Others* 2018 (2) SA 399 (SCA).

entitlements during a corporate rescue. The challenge or problem is not related to employees having super preference status; the problem comes in where this super preference status is attributed to employees in the sections that deal with post-commencement finance. Post-commencement finance is a necessity in any rescue procedure and it is of paramount importance to have measures in place that will protect any post-commencement lender. Such protection will be achieved when post-commencement lenders feel that their money will be paid back to them as a matter of priority. Section 135 of the Act fails to grant post-commencement lenders such guarantee.

Alternative measures will have to be explored. These measures are dealt below with as recommendations.<sup>400</sup>

### **3.8 Evaluation of employee rights in business rescue**

It is trite that several authors and company lawyers struggle to see why it is of such importance to protect employee rights during business rescue proceedings. It is my opinion that it should be a *naturale* of any restructuring to protect employees and their rights during the restructuring of a company.

It is submitted that employee rights are intertwined with a company's well-being and existence, as creditors rely on a healthy business for the payment of their claims and shareholders rely on company management to make sound business decisions that would not hamper the payment of reasonable dividends. It therefore is positive to see that employees in South Africa have adequate participation rights during business rescue, that their employment contracts are protected and that their claims enjoy protection. In the interests of social justice and acknowledging the ideals of corporate social responsibility it is non-negotiable to grant as much protection to employees as possible. Obviously, the challenge is to strike a balance that will serve the interests of all stakeholders in a viable and fair manner.

## **4 CONCLUSION**

Having examined the rights of employees under liquidation and under business rescue, the

---

<sup>400</sup> See chapter 5.



ultimate conclusion is that the employee benefits under chapter 6 of the Companies Act 71 of 2008 totally outweigh the employee rights in a company's winding-up or liquidation.<sup>401</sup>

Chapter 6 undoubtedly gives employees a voice during the procedure that will keep the company alive – the procedure that will safeguard their employment and secure their income. It is my opinion that the initial scepticism of many writers and practitioners that feared a possible abuse on the part of employees was taken out of perspective and was overly pessimistic. Although the inclusion of employees in the 2008 Companies Act and the many rights attributed to them came as a consequence of the involvement of government and organised labour, no possible abuse of the provisions were seen in business rescue applications, which proves that an application for a company to be placed under business rescue is not granted on a “whimsical basis.”<sup>402</sup> It therefore is submitted that those perceptions and fears were proven wrong during the past five years since the enactment of the now not so new Companies Act.

---

<sup>401</sup> Delpont *Henochsberg* 480(23)–(24).

<sup>402</sup> Sewanyana <http://www.bowman.co.za/eZines/News-Letter-More.asp> (Date of use: 15 February 2013).

## CHAPTER 3 AUSTRALIA

### 1 INTRODUCTION

Australia's liquidation dispensation originated in English liquidation laws and is currently regulated by the Corporations Act.<sup>1</sup> The fact that Australia and South Africa share a commonwealth heritage<sup>2</sup> with English law makes it very appropriate and relevant to examine the manner in which Australia deals with employee rights in their liquidation and corporate rescue procedures.

Australia's corporate rescue procedure is called voluntary administration. Official management, Australia's previous corporate rescue procedure, was based on South Africa's judicial management and became law in 1961.<sup>3</sup> In 1993 the Corporate Law Reform Act<sup>4</sup> repealed official management. The reasons given for the repeal are almost identical to those provided by South African writers and judges when judicial management came under fire. The general consensus was that official management was not a successful corporate rescue regime. The fact that it was not a very popular mechanism and barely used in practice contributed to its abolition.<sup>5</sup> Official management was replaced with voluntary administration in 2001 by Part 5.3A of the Corporations Act<sup>6</sup> which regulates Australia's corporate rescue procedure.

### 2 EMPLOYEE RIGHTS IN LIQUIDATION

Liquidation in Australia corresponds to a great extent with liquidation in both South Africa and the United Kingdom. Australia's corporate liquidation is based on bankruptcy laws that were specifically adapted to regulate corporate liquidation.<sup>7</sup> The part of the Corporations Act of 2001 that deals with corporate insolvency can be traced back to the Winding Up Act of 1844 that regulated the liquidation process in England.<sup>8</sup>

---

<sup>1</sup> See Murray and Harris *Keay's Insolvency* par 1.15 at 7 for a detailed discussion of the history and development of Australian insolvency law. The Corporations Act 2001 regulates the current liquidation dispensation in Australia.

<sup>2</sup> Kloppers 1999 *Stell LR* 419; see also Martin *LLM Thesis* 39.

<sup>3</sup> Rajak and Henning 1999 *SALJ* 263 and Anderson 2001 *IIR* 107.

<sup>4</sup> 1992 (Cth).

<sup>5</sup> Rajak and Henning 1999 *SALJ* 263; see also Westbrook *et al Business Insolvency Systems* 122.

<sup>6</sup> 50 of 2001 (Cth).

<sup>7</sup> Murray and Harris *Keay's Insolvency* 320.

<sup>8</sup> Winding Up Act 1844 (7 & 8 Vict c111), see also Murray and Harris *Keay's Insolvency* 320.

The application for the liquidation of a company can be made in three ways. The general procedure to apply for an insolvent company's liquidation is either where a creditor applies to court for the company to be placed in liquidation or where the members resolve to liquidate the company. This general approach resembles the voluntary and compulsory routes that are also found in South African insolvency law. A special power is granted to the Australian Securities and Investments Commission to order the winding-up of a company.<sup>9</sup>

It comes as no surprise that Australia treats employee rights during liquidation in almost the same way as South Africa. This reflects the adage that "the core of corporate law remains fairly preoccupied with the rights of shareholders".<sup>10</sup> According to Mitchell, the "interests of non-shareholder stakeholders do not figure prominently"<sup>11</sup> and "within corporate law, there appears to be no comparable capacity for employees to supplant and succeed shareholders in defined situations".<sup>12</sup> Employees are recognised in insolvency albeit in their capacity as creditors for unpaid employee entitlements.<sup>13</sup>

Although employees are not prominent role players in the liquidation or winding-up of a company in Australia, the protection of employee entitlements in an employer's insolvency has been a public policy objective for a long time.<sup>14</sup> Employees in their capacity as creditors in respect of remuneration and monies owing to them have only a basic role and influence in this process.<sup>15</sup> This role is regarded as unimportant and words such as "figure" and "species" are used when employees' role and the type of creditor are described.<sup>16</sup> Employees are classified as "a special class of unsecured creditors"<sup>17</sup> and Symes refers to them as "the most common and largest group of statutory priority creditors".<sup>18</sup> "Priority creditor status" is employees' "primary

---

<sup>9</sup> This power is granted to ASIC (Australian Securities and Investments Commission) in terms of the Corporations Amendment (Phoenixing and Other Measures) Act 2012 (Cth). The importance of this power and the role it plays in employees and employee entitlements discussed in par 3.2.6.2.

<sup>10</sup> Mitchell *et al* 2005 *Intersections* 17.

<sup>11</sup> Mitchell *et al* 2005 *Intersections* 17.

<sup>12</sup> Mitchell *et al* 2005 *Intersections* 18.

<sup>13</sup> Mitchell *et al* 2005 *Intersections* 18.

<sup>14</sup> Fitzgerald, *in the matter of Advance Healthcare Group Ltd* [2008] FCA 1604 par 13.

<sup>15</sup> An employee is regarded as a creditor of a company where an employee is owed money for unpaid salaries, superannuation and various forms of leave, including annual leave, sick leave and long service leave. Retrenchment pay and other benefits are also included. See also ASIC *Information Sheet 46* 1; see also Mitchell *et al* 2005 *Intersections* 18.

<sup>16</sup> Mitchell *et al* 2005 *Intersections* 18.

<sup>17</sup> ASIC *Information Sheet 45* 1.

<sup>18</sup> Symes *Statutory Priorities* 107.

form” of safeguard.<sup>19</sup> Employee priority has also been described as a “superior priority over other unsecured creditors”.<sup>20</sup>

Arjunan sympathises with the “precious little” rights that the Corporations Act confers on employees during a company’s liquidation.<sup>21</sup> Knowing that employees stand the most to lose in the event of a company’s liquidation and given their vulnerability because of the possible loss of their livelihood when a company is wound up, employees are often regarded as “innocent victims of a corporate collapse”.<sup>22</sup> This is very unfortunate. Etukakpan aptly refers to the peculiar and “symbiotic” relationship between employer and employee – the employee is dependent on remuneration while the employer cannot operate his business without the services rendered by the employee.<sup>23</sup> Feber, amongst others, refers to employees as the “lost voice” in insolvency procedures.<sup>24</sup> One of the reasons most frequently given for their vulnerability is that employees are not in a position to manage the risk associated with a possible corporate collapse and it is said that “personal and social costs of business failure fall disproportionately on employees”.<sup>25</sup>

Despite numerous justifications<sup>26</sup> for the protection of employee entitlements, employees are easily forgotten in the event of a company’s liquidation where they are not regarded as creditors of the company. Some of these arguments are:

- (a) Employees can be seen as granting a “loan” to the company by rendering their services. This “loan” is granted by the employees who are not in a position to assess their risk by scrutinising the financial affairs of a company – the way a normal financial institution would have been able to do; they are also not in a position to minimise their risk by demanding security from the company.<sup>27</sup>

<sup>19</sup> Whelan and Zwier [http://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0015/1710015/95-Protectionofemployeeentitlements\\_final\\_12.pdf](http://law.unimelb.edu.au/_data/assets/pdf_file/0015/1710015/95-Protectionofemployeeentitlements_final_12.pdf) (Date of use: 28 November 2017) 3.

<sup>20</sup> *Improving Australia’s corporate insolvency laws* 27.

<sup>21</sup> Arjunan 1993 CSLJ 142.

<sup>22</sup> Arjunan 1993 CSLJ 142 referred to in Symes *Statutory Priorities* 128.

<sup>23</sup> Etukakpan 2014 NLJ 34.

<sup>24</sup> Feber [http://www.cimejes.com/word\\_doc/Employee%20Entitlements%20in%20Insolvency.pdf](http://www.cimejes.com/word_doc/Employee%20Entitlements%20in%20Insolvency.pdf) (Date of use: 28 November 2017) 4; see also Etukakpan 2014 NLJ 34 for a reference to employees as the “lost voice” in insolvency law.

<sup>25</sup> Whelan and Zwier [http://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0015/1710015/95-Protectionofemployeeentitlements\\_final\\_12.pdf](http://law.unimelb.edu.au/_data/assets/pdf_file/0015/1710015/95-Protectionofemployeeentitlements_final_12.pdf) (Date of use: 28 November 2017) 2.

<sup>26</sup> Symes *Statutory Priorities* 126; see also 129–131 where Symes compares international approaches to the notion of protecting employee entitlements; see also Darvas 1999 CSLJ 107.

<sup>27</sup> Symes *Statutory Priorities* 126; Mitchell *et al* 2005 *Intersections* 18.

- (b) Employees have not negotiated a price to be put on their labour if they are not paid their employee entitlements.<sup>28</sup>
- (c) Employees are regarded as having “imperfect” information regarding the financial status of the company when they agree to render their services and while rendering their services to the company.<sup>29</sup>
- (d) Where other unsecured creditors of an insolvent company rely on a small dividend as a possible source of income in case of liquidation, employees may rely on their unpaid salary as their only source of income.<sup>30</sup>
- (e) Employees are less likely to enforce their rights against the company, especially where they are not part of organised labour and the legal cost involved may be beyond their reach.<sup>31</sup>

During the late 1980s, the predicament faced by employees of insolvent employers came under the spotlight and the Harmer Report recognised the vulnerability of employees.<sup>32</sup> At the end of 1990, after huge corporate collapses<sup>33</sup> that exposed the weak position of employees and the reality of losing all employee entitlements during a corporate collapse, the Australian government initiated the first government-funded safety-net scheme which was one of many to come.<sup>34</sup>

<sup>28</sup> Symes *Statutory Priorities* 126.

<sup>29</sup> Symes *Statutory Priorities* 127.

<sup>30</sup> Symes *Statutory Priorities* 127.

<sup>31</sup> Symes *Statutory Priorities* 128.

<sup>32</sup> This report was prepared as part of a project for the Australian Law Reform Commission in 1988 and its formal title was *General Insolvency Inquiry (Report no 45)*. It can be accessed at <http://www.alrc.gov.au/report-45>.

<sup>33</sup> For example: the *Grafton Meatworks* companies closed down in 1997 and 300 employees lost their entitlements just before Christmas 1997. Apart from almost \$3 million in annual leave, the employees were also entitled to long service leave, redundancy payments and other entitlements; in *Gilbertson Abattoir, Grafton*, also in 1997, almost 300 employees lost around AU\$ 3 million in entitlements which consisted of accrued leave, severance pay and redundancy payments. Although the employees initially did not receive any payment, they later received 16% of their entitlements; *CSA Copper Mine, Cobar* (1998) where 270 lost a fair share of their entitlements; *Woodlawn Copper, Lead and Zinc Mine* (1998) where 154 employees lost out on entitlements; *Austral Pacific Vehicles* (1998) where a staggering 780 employees lost their entitlements; *Oakdale Colliery, Camden* (1999) where 125 employees lost AU\$6,3 million in accrued employee entitlements and *Baybrook Manufacturing Collapse* (1999) where 70 employees lost their entitlements; for further detail and information see Feber [http://www.cimejes.com/word\\_doc/Employee%20Entitlements%20in%20Insolvency.pdf](http://www.cimejes.com/word_doc/Employee%20Entitlements%20in%20Insolvency.pdf) (Date of use: 28 November 2017) 9.

<sup>34</sup> See the discussion of EESS, GEERS and FEG in par 2.6.2.

Australia ratified and accepted Part 2 of the Convention on the Protection of Workers' Claims (Employer's Insolvency)<sup>35</sup> in 1994. In terms of this document a privilege is given to the ranking of employee claims in insolvency. The statutory priority contained in section 556 of the Corporations Act<sup>36</sup> creates a significant role to be played by employees in modern-day corporate insolvency and is "well justified"<sup>37</sup> and deserving of the "law's sympathy."<sup>38</sup> There is no discrimination among employees – all employees are protected, irrespective of their level of employment or the industry in which they are employed.<sup>39</sup> According to Symes, the legislator followed an "inclusive approach" and wages, superannuation contributions, leave entitlements and retrenchment pay are claimable without any limitations or cap on the amount.<sup>40</sup>

The Insolvency Law Reform Act of 2016 eventually created some rights for employees during a company's liquidation. The Act was enacted in two parts. The first stage of the reform was enacted on 1 March 2017 and the final stage on 1 September 2017. The second stage significantly improved the rights of employees. Not only did they acquire some of the rights in their "secondary" capacity as creditors of the company, but they were also granted direct rights in their capacity as employees of the company. These rights accrue to employees in any form of "external administration" which includes voluntary administration and any form of liquidation, whether provisional or final.

Although the role of employees during liquidation is examined by using the same method as that used in chapter 2 where their role in South Africa was analysed, not too much detail is given where their only role is that of creditors in the liquidation process. More attention is given to those areas where they receive special treatment and play a bigger role than merely that of creditors of the company.

---

<sup>35</sup> Convention 1992 (C173) Article 3.

<sup>36</sup> 2001 (Cth).

<sup>37</sup> Symes *Statutory Priorities* 107 and 128.

<sup>38</sup> O' Donovan 1976 *ABLR* 257.

<sup>39</sup> Symes *Statutory Priorities* 126.

<sup>40</sup> Symes *Statutory Priorities* 108 and 126.

## 2.1 Employee's right to commence liquidation

Section 459P of the Corporations Act determines who may apply for the liquidation or winding-up of a company. Creditors are the "usual applicants" for the liquidation of a company but many other potential applicants also have standing to apply for liquidation.<sup>41</sup>

Creditors as applicants include secured creditors or contingent or prospective creditors. A contingent or prospective creditor must have leave of the court to apply for the liquidation of a company.

Employees therefore will be included in the definition of "creditor" if they obtained a judgment against the company which was not paid. They are regarded as creditors of the company due to their contractual rights to accrued entitlements under their employment contracts.<sup>42</sup> Employees may not initiate liquidation or winding-up procedures of a company in their capacity as employees.

## 2.2 Employee's right to be notified and informed of liquidation

The Corporations Act does not contain any specific reference to an employee's right to be notified and informed of winding-up proceedings. It is the liquidator's responsibility to inform creditors and other interested parties of a company's liquidation.<sup>43</sup> The Insolvency Law Reform Act of 2016 entitled creditors to request information from the liquidator. Section 70-40 provides that creditors may by resolution request a liquidator to provide them with information, a report or documentation during the course of the liquidation.<sup>44</sup> In terms of section 70-40(2) the liquidator has to comply with such a request unless in his opinion the information so requested is not relevant to the process, or if he would breach his duties as liquidator towards the company if he

---

<sup>41</sup> S 459P(1) of the Corporations Act provides for the following to also have the right to apply for the companies liquidation: (a) the company; (b) a contributory; (c) a director; (d) the liquidator or provisional liquidator; and (e) ASIC (Australian Securities and Investment Commission) and a prescribed agency. Some of these applicants require the leave of the court to apply for the winding-up of a company. See also Murray and Harris *Keay's Insolvency* par 11.240 at 399.

<sup>42</sup> Feber [http://www.cimejes.com/word\\_doc/Employee%20Entitlements%20in%20Insolvency.pdf](http://www.cimejes.com/word_doc/Employee%20Entitlements%20in%20Insolvency.pdf) (Date of use: 28 November 2017) 4.

<sup>43</sup> Murray and Harris *Keay's Insolvency* par 15.90 at 500.

<sup>44</sup> Schedule 2 Insolvency Practice Schedule s 70-40(1) of the Corporations Act 2001 (Cth).

were to provide such information or if there is no reason to comply with the request.<sup>45</sup> An individual creditor has the same right.<sup>46</sup>

Although there is no direct reference to employees who have this right, the liquidator has a “significant responsibility” to inform creditors and “others with an interest of knowing” about the liquidation and its progress.<sup>47</sup> It is my opinion that employees fall in the category of “others with an interest of knowing”. This is because they will be affected in their capacity as creditors of the company and the granting of a liquidation order has a direct effect on their employment contracts with the company.

The right to receive notice and to be informed during a company’s liquidation is available to employees in their capacity as creditors of the company and not in their capacity as employees. A creditor’s right to be informed about a company’s liquidation includes the right to receive written reports about the liquidation<sup>48</sup> as well as the information received where the liquidator calls creditors’ meetings to give feedback to the latter regarding the progress of the liquidation.<sup>49</sup> The duty of the liquidator to investigate the affairs of the company, to report his findings to the creditors and to investigate any unfair preferences that may be recoverable, any commercial transactions which may be set aside and any possible claims that there might be against company officers, creates a right to receive that information on the part of the creditors. This right given to employees stems from the right of a creditor.<sup>50</sup>

The only notification relevant to employees of the company is when a court has made a winding-up order. The publication of such order operates as a notice of dismissal to all employees of the company.<sup>51</sup> The effect of liquidation on the employment contracts of the employees<sup>52</sup> and resulting employment-related claims<sup>53</sup> are discussed below.

Section 600G of the Corporations Act provides for electronic notifications if the recipient

<sup>45</sup> Schedule 2 Insolvency Practice Schedule s 70-40(2) of the Corporations Act 2001 (Cth).

<sup>46</sup> Schedule 2 Insolvency Practice Schedule s 70-45 of the Corporations Act 2001 (Cth).

<sup>47</sup> Murray and Harris *Keay’s Insolvency* par 15.90 at 500.

<sup>48</sup> *ASIC Information Sheet 45*.

<sup>49</sup> *ASIC Information Sheet 45*, 3.

<sup>50</sup> *ASIC Information Sheet 45*, 2.

<sup>51</sup> *Re General Rolling Stock Co* (1886) 1 Eq 346. This aspect is discussed in par 2.5.

<sup>52</sup> See par 2.3.

<sup>53</sup> See par 2.6.



---

agrees thereto.<sup>54</sup>

### 2.3 Effect of liquidation on employment contracts

The Corporations Act is silent on the effect of liquidation or winding-up on employment contracts.

The employment situation is regulated by common law and the only legislative response to the position of employees is to be found in the Fair Work Act of 2009.<sup>55</sup> This Act contains ten national employment standards which are obligatory and aimed at protecting employees from possible unfair treatment by employers. One of the standards deals with notice of termination and redundancy pay and provides for up to five weeks' notice and 16 weeks' severance pay on redundancy. Division 11 of the Fair Work Act regulates notice of termination and redundancy pay. Section 117(1) clearly states that no employment relationship may be terminated unless the required notice was given to the employee.

Apart from the Fair Work Act, the Australian government also created the position of Fair Work Ombudsman.<sup>56</sup> This platform serves as information station and sets out the rights and obligations in the workplace. The Ombudsman provides free services to employees; it also tends to provide education and strives to resolve workplace issues.

If a court makes a winding-up order, the publication thereof serves as a notice of dismissal to all employees of the company.<sup>57</sup> The liquidator plays an important role in this regard. If the liquidator decides to keep the company's business in operation for a period after the court order was made, he may waive the notice of dismissal. Employees will then remain employed on the same basis as that regulated by their (existing) employment contracts.<sup>58</sup> The liquidator may also decide to disregard existing employment contracts and dismiss employees and re-employ them on a new basis which will result in the liquidator not being bound by the provisions of existing employment contracts.

---

<sup>54</sup> Murray and Harris *Keay's Insolvency* par 15.90 at 500 where the possible effect of the ILRB 2015 on s 600G is discussed.

<sup>55</sup> The Fair Work Act of 2009 as amended was up to date on 20 September 2017.

<sup>56</sup> For detailed information on the Fair Work Ombudsman see <https://www.fairwork.gov.au> (Date of use: 7 February 2018).

<sup>57</sup> Murray and Harris *Keay's Insolvency* par 13.80 at 441. See also *Re General Rolling Stock Co* (1866) 1 Eq 346 as discussed in Murray and Harris *Keay's Insolvency* par 13.80 at 441 and footnote 48.

<sup>58</sup> *Re Associated Dominions Assurance Society Ltd* (1962) 109 CLR 516.

It comes as a disturbing surprise that employment contracts are terminated by the mere publication of the winding-up order and that other contracts are dealt with differently. The appointment of a liquidator does not automatically terminate contracts.<sup>59</sup> One would think that employment contracts would be treated in the same manner as, and on equal terms with, other contracts, or even better.

No specific procedure deals with the transfer of a business in liquidation. The procedure that is available for the transfer of businesses is discussed under voluntary administration and should it be made applicable to liquidation it is assumed the same criteria and the Fair Work Act will apply.<sup>60</sup>

The termination of the services of employees gives rise to contractual claims for breach of contract. Employees may claim damages after they have lodged a proof of debt.<sup>61</sup> They are also eligible for redundancy payments as provided for in section 119 of the Fair Work Act of 2009 and section 556(1)(h) of the Corporations Act of 2001.<sup>62</sup>

## 2.4 Employee's right to participate in consultations during liquidation

Employees have the right to participate in consultations during winding-up proceedings in their capacity as creditors and since September 2017 also in their capacity as employees. The Insolvency Law Reform Act which came into force on 1 March 2017 dramatically changed the landscape for Australian employees.<sup>63</sup> Employees received direct participation rights in consultations in their capacity as employees by being able to appoint an employee representative to serve on a committee of inspection.

One of the significant changes brought about by the Insolvency Law Reform Act is that former committees of creditors are now referred to as committees of inspection.<sup>64</sup> Committees of

---

<sup>59</sup> For more detail see Murray and Harris *Keay's Insolvency* par 13.85 at 442. A discussion of uncompleted contracts and contracts containing "ipso facto" clauses is beyond the ambit of this thesis.

<sup>60</sup> See par 3.2.6.1.

<sup>61</sup> See Murray and Harris *Keay's Insolvency* par 13.80 at 441 and the discussion of *Re RS Newman Ltd* [1916] 2 Ch 309; *Re Kenedale Pty Ltd* (1987) 12 ACLR 449; (1988) 6 ACLC 359.

<sup>62</sup> This is discussed in par 2.6.

<sup>63</sup> See the detailed discussion and exposition of these rights of employees in par 2.4.

<sup>64</sup> Harris <https://australianinsolvency.com/2017/03/07/ilra-changes-to-va/> (Date of use: 1 December 2017) 2.

inspection Division 80 of the Insolvency Practice Schedule and Insolvency Practice Rules for bankruptcy and corporations now contain harmonised rules that are applicable to voluntary administrations and liquidation.<sup>65</sup> The functions of these committees of inspection are found in the Insolvency Practice Schedule section 80-35 which provides as follows:

- “(1) A committee of inspection has the following functions:
- (a) to advise and assist the external administrator of the company;
  - (b) to give directions to the external administrator of the company;
  - (c) to monitor the conduct of the external administration of the company;
  - (d) such other functions as are conferred on the committee by this Act;
  - (e) to do anything incidental or conducive to the performance of any of the above functions.”

The reference to “external administration” is defined in the schedule to include a company that is under administration or in provisional or final liquidation.<sup>66</sup> The liquidator must consider directions given to him by the committee of inspection. Although he is not obliged to adhere to proposals made by these committees, he must take cognisance of them<sup>67</sup> and provide reasons to the committee if he does not follow them.<sup>68</sup>

The most significant provision of the Insolvency Law Reform Act 2016 from an employee’s point of view is section 80-25 which gives employees direct participation rights in the committees of inspection by enabling them to appoint an employee as a committee member. This is ground-breaking progress as it the first time that employees are afforded any direct right to enforce participation in liquidation proceedings in their capacity as employees and not to acquire information second hand in their capacity as creditors. Section 80-25(1) provides that an individual employee or employees as a group that represents “at least 50% in value of entitlements owing to or in respect of employees by the company” may appoint another employee to serve as a member of the committee of inspection. Such employee or employees

---

<sup>65</sup> Harris <https://australianinsolvencylaw.com/2017/09/04/ilra-committees-of-inspection/> (Date of use: 1 December 2017) 1.

<sup>66</sup> S 5-15 of the Schedule.

<sup>67</sup> S 80-35(2) of the Insolvency Practice Schedule.

<sup>68</sup> S 80-35(3) of the Insolvency Practice Schedule.

will thus directly represent employees' interests.<sup>69</sup>

The right to participate in consultations are best highlighted where the liquidator convenes creditors' meetings. The right to participate includes their right to voice their wishes on a specific matter at the meeting.<sup>70</sup> Where approval is needed regarding the liquidator's fee, creditors also have the right to air their opinions.<sup>71</sup>

A liquidator may also ask creditors whether they wish to arrange for a committee of inspection to be formed. If they do decide to appoint such a committee, the creditors that form part of the committee will have even more participation rights in the liquidation of the company and will play an even more direct role in the liquidation as they will assist the liquidator in various roles and decisions that need to be taken.<sup>72</sup> Employees therefore do have the prospect of playing a more active role in the liquidation of the company as the liquidator must consider directions given by the members of the committee of inspection despite the fact that he is not obliged to follow them.<sup>73</sup>

## **2.5 Employee's right to be present at meetings and to vote during liquidation**

This right vests in employees only in their capacity as creditors of the company. According to the Corporations Regulation, before a person may vote at a creditors' meeting, he or she must have submitted particulars of the claim against the company to the chairperson of the meeting.<sup>74</sup> The liquidator will provide the debtor with a "proof of debt" form that must be completed and returned before the meeting.<sup>75</sup>

The manner of voting and the possibility of voting by proxy are not discussed here as these

---

<sup>69</sup> Harris <https://australianinsolvencylaw.com/2017/09/04/ilra-committees-of-inspection/> (Date of use: 1 December 2017) 2-3.

<sup>70</sup> ASIC Information Sheet 45 3.

<sup>71</sup> ASIC Information Sheet 45 3; see also s 473(3) where the role of creditors in establishing the liquidator's remuneration is discussed.

<sup>72</sup> ASIC Information Sheet 45 5. Such roles and decisions include the approval of the exercising of some of the liquidator's powers on behalf of all creditors.

<sup>73</sup> ASIC Information Sheet 45 6.

<sup>74</sup> Reg 5.6.23(1)(b). See also Murray and Harris *Keay's Insolvency* par 11.50 at 377.

<sup>75</sup> ASIC Information Sheet 45 4. The chairperson at the meeting has the power to accept or exclude the creditor (reg 5.6.26(3)) where after the creditor has the right to appeal to court against the decision within 14 days. See Murray and Harris *Keay's Insolvency* par 11.50 at 377 for more detail.

aspects go beyond the ambit of the thesis.<sup>76</sup>

## 2.6 Ranking of employee claims during liquidation

Employee entitlements were treated as a so-called “bankruptcy priority” under the Corporations Law and the Bankruptcy Act of 1966. Such entitlements ranked after secured creditors’ claims, but before the claims of other unsecured creditors. In 1993 the ranking of employee entitlements was improved and given priority over the Commissioner of Taxation.<sup>77</sup>

Section 556 of the Corporations Act, 2001 regulates employee entitlements. They are discussed separately in accordance with their priority and the status of the claim.

The difference between the ranking of employee claims before and after liquidation proceedings have commenced are as follows:<sup>78</sup>

(a) Ranking of employee claims before liquidation has commenced:

- (1) Employee claims rank after secured creditors, general expenses of liquidation incurred by the liquidator and the cost for the winding-up application.
- (2) Section 556 of the Corporations Act 2001 gives it a statutory preference.

(b) Ranking of employee claims after liquidation has commenced:

- (1) Employee claims are regarded as unsecured claims and employee entitlements are paid before other unsecured claims.<sup>79</sup>
- (2) If the liquidator decides to carry on with the business of the company during liquidation, employee claims must be paid out of assets as general cost of the winding-up process.

---

<sup>76</sup> See Murray and Harris *Keay’s Insolvency* for related detail and further discussion of creditor votes.

<sup>77</sup> Tax Priorities Legislation Amendment Act (1993) as referred to in Feber [http://www.cimejes.com/word\\_doc/Employee%20Entitlements%20in%20Insolvency.pdf](http://www.cimejes.com/word_doc/Employee%20Entitlements%20in%20Insolvency.pdf) (Date of use: 28 November 2017) 11.

<sup>78</sup> A more detailed discussion of each scenario follows in the next paragraphs.

<sup>79</sup> Darvas 1999 *CSLJ* 106.

## 2.6.1 Employee entitlements under the Corporations Act 2001

The right of employees to claim outstanding amounts in priority dates back to the bold statement in 1881 by Malins VC in *Re Association of Land Financiers*<sup>80</sup> that “it seems absurd that a poor man whose week’s wages are unpaid should have to wait and come in with the general body of creditors”<sup>81</sup> and that “it is monstrous to suppose that the Legislature could have intended the servants of a company to be left utterly destitute”.<sup>82</sup>

Section 556 of the Corporations Act provides for special priority payments. These payments are to be made in priority to all other unsecured debts and claims should there be funds left after payment of the fees and expenses of the liquidator. If the liquidator decides to continue trading while the company is in liquidation, any employee entitlements accruing during that period will be expenses of the liquidation proceedings and will be paid as such and not under normal employee priorities as set out in section 556(1)(e). Employee claims fall within the ambit of this section and the different priorities are discussed separately and in the order that they appear in the legislation, namely, outstanding wages and superannuation; outstanding leave of absence; and retrenchment payments.

There is an exception to the *pari passu* rule in section 555 regarding the payment of employee entitlements. This means that each class mentioned above must be paid in full before the next class is paid. The total amount owing to outstanding wages and superannuation therefore must be paid before leave of absence will be paid. If there are insufficient funds available to pay the claims of the class in full, the funds available for payment will be calculated on a *pro rata* basis. This will have the effect that the next class or the rest of the classes will not be paid at all.

If a company retains employees to assist in its winding-up, section 558 of the Corporations Act sets out the priority of entitlements for the period between the appointment of the liquidator and the end of the liquidation.<sup>83</sup> Such employees will be entitled to payment under section 556 as

---

<sup>80</sup> (1881) 16 Ch D 373.

<sup>81</sup> *Re Association of Land Financiers* (1881) 16 Ch D 373 at 374.

<sup>82</sup> *Re Association of Land Financiers* (1881) 16 Ch D 373 at 375. The legislation referred to is the Bankruptcy Act of 1986. The judge in the Chancery Division pointed out that s 10 of the Judicature Act of 1875 which created the priority for servants’ wages to be paid before other debts should be extended to winding-up.

<sup>83</sup> S 558 of the Corporations Act 2001 (Cth); see also Anderson *Employee Entitlements* 52.

if the company terminated their services and gave them a right to redundancy payments.

#### 2.6.1.1 *Priority payments: Wages and superannuation*

Section 556(1)(e) provides that employees are entitled to receive priority payments for “wages, superannuation contributions and superannuation guarantee charges” due to them by the company before liquidation. “Wages” are defined as “amounts payable to or in respect of an employee of the company (whether the employee is remunerated by salary, wages, commission or otherwise) under an industrial instrument”.<sup>84</sup> According to this section there is no limitation on the amount claimable and no maximum period for which it can be claimed. The amount claimable by so-called “excluded employees”<sup>85</sup> is limited.

Although bonuses are not included in the definition of wages, a contractual undertaking by the employer to pay out a bonus to an employee will rank together with the wage priority.<sup>86</sup>

Superannuation contributions appear as a priority together with wages in section 556(1)(e)<sup>87</sup> and are defined as “a contribution by the company to a fund for the purposes of making provision for obtaining superannuation benefits for an employee of the company or for dependants of such an employee”.<sup>88</sup>

#### 2.6.1.2 *Priority payments: Leave entitlements*

Section 556(1)(g) deals with leave entitlements. In terms of their leave entitlements, employees are eligible to receive all amounts due up to the relevant date. The types of leave include long service leave, extended leave, recreation leave, annual leave, sick leave or any other form of

---

<sup>84</sup> S 9 of the Corporations Act 2001 (Cth). “Wages” include amounts payable as part of allowance or reimbursement but exclude payments made in relation to leave of absence. S 9 further defines “industrial instrument” as “a contract of employment or a law, award, determination or agreement relating to terms and conditions of employment”.

<sup>85</sup> According to s 556(2) “excluded employees” are the following: An employee who has also been a director any time during the year preceding the liquidation; an employee who is a director after the date of liquidation; an employee who is a spouse of a current director or past director; and a relative of a current director or past director. The limitation applicable to their priority payment in terms of s 556(1A) is \$2 000 for wages and superannuation and \$1500 for outstanding leave entitlements (s 556(1B)) for days classified as non-priority days as defined in s 556(2).

<sup>86</sup> See Symes *Statutory Priorities* 117 and the reference to *Walker and Sherman v Andrew* (2002) 20 ACLC 1476; *Re Galaxy Media Pty Ltd (in liq)* (2002) 20 ACLC 73 in note 65.

<sup>87</sup> The Corporate Law Reform Act 1992 (Cth) made it clear that superannuation enjoys the same priority as wages; see also Symes *Statutory Priorities* 117.

<sup>88</sup> S 556(2).

absence.<sup>89</sup> The Act does not provide for any limitation or maximum regarding the amount that can be claimed for leave.<sup>90</sup>

Leave entitlements place a huge burden on companies as these amounts add up quickly.<sup>91</sup> Symes states that there may be a possibility of abuse where an employee knows about possible financial problems that the employer might face and bargains for maximum leave periods when his employment contract is renegotiated.<sup>92</sup> Only employees who are in an employment relationship with the employer may claim the amount due for leave. The existence of an employment contract is therefore a prerequisite for this priority entitlement.<sup>93</sup>

### 2.6.1.3 *Priority payments: Retrenchment payments*

Section 556(1)(h) governs retrenchment payments.<sup>94</sup> Employees who wish to claim retrenchment payments from their insolvent employer have to prove three things. Firstly, that they are entitled to payment of an amount by the company,<sup>95</sup> secondly, in the case of leave claims for absence, that they have a right to such payment under an employment contract, reward or agreement,<sup>96</sup> and thirdly, that the amount is payable due to the termination of the employment relationship by the employer.<sup>97</sup>

The definition of retrenchment payment includes severance pay and payments in lieu of notice but does not specify that the payment had to become payable before or after the date of liquidation.<sup>98</sup> “Excluded employees”<sup>99</sup> are not entitled to any amount in relation to non-priority days.<sup>100</sup>

<sup>89</sup> S 9 of the Corporations Act 2001 (Cth).

<sup>90</sup> Symes *Statutory Priorities* 119. S 556(1B) limits the amount of leave payment claims for excluded employees to \$1 500 for non-priority days.

<sup>91</sup> See Holding 1995 *LIJ* 790.

<sup>92</sup> Symes *Statutory Priorities* 119.

<sup>93</sup> Where an award was made to an employee, he will also be able to claim in terms of s 556(1)(g)(ii) as the requirement for the priority payment is that there must be some sort of right pursuant to an industrial instrument.

<sup>94</sup> *McGrath v Sturesteps; Sturesteps v HIH Overseas Holdings Ltd (in liquidation)* [2011] NSWCA 315 confirmed the preferent payment of retrenchment payments to employees at par 22.

<sup>95</sup> S 556(2) of the Corporations Act (Cth).

<sup>96</sup> S 556(2) of the Corporations Act (Cth).

<sup>97</sup> S 556(2) of the Corporations Act (Cth).

<sup>98</sup> S 9 of the Corporations Act (Cth); Murray and Harris *Keay's Insolvency* par 15.380 at 534.

<sup>99</sup> Note 85 above.

<sup>100</sup> S 556(1C).



If an employment contract existed immediately before the date of liquidation, employees are entitled to receive retrenchment payments. Their services will be regarded as having been terminated by the company on the liquidation date.<sup>101</sup> The court in *McEvoy v Incat Tasmania Pty Ltd*<sup>102</sup> held that the purpose of section 558(1) is

“to ensure that employees would not in a winding up lose priority for annual and long service leave which was still accruing but had not yet fallen due at the commencement of the winding up . . . [otherwise] the employees whose employment was about to come to an end as a result of the winding up would be disadvantaged when compared with employees whose rights had accrued as they would miss out on the benefits which they were intended to be given”.

## 2.6.2 Employee entitlements under the Fair Work Act 2009

Section 119 of the Fair Work Act 2009 regulates redundancy payments when the employer is insolvent or bankrupt. Employees are entitled to redundancy payment in terms of section 119(1). Section 119(1)(b) provides for redundancy payment if an employer is insolvent. The amount of redundancy payment is calculated by taking the continued employment of the employee and determining a base rate of pay for the hours worked.<sup>103</sup>

## 2.6.3 Employee entitlements under the Fair Entitlements Guarantee Act 2012

### 2.6.3.1 *Background to the Fair Entitlements Guarantee Act 2012 and GEERS*

Australia is one of the countries that introduced a government scheme which acts as a safety net for unpaid employee entitlements when a company is liquidated.

This safety net, a result of a recommendation of the Harmer Report in 1988, allowed for the

---

<sup>101</sup> S 558(1).

<sup>102</sup> [2003] FCA 810; (2003) 130 FCR 503; 21 ACLC 1,463; 1,473.

<sup>103</sup> Redundancy pay periods are provided for by s 119(2) of the Fair Work Act 2009.

commonwealth government to assume employee priorities when a company enters liquidation.<sup>104</sup>

In 1999 a Ministerial Discussion Paper<sup>105</sup> called for comments on the protection of employee entitlements during a company's liquidation. The discussion paper proposed two options regarding the protection of employee entitlements in case of a company's liquidation, while capped payments with regard to the maximum amount claimable and a maximum period for which amounts could be claimed in the case of liquidation were envisaged.<sup>106</sup> The outcome of the discussion paper was that the Federal Government opted for a four-week payment option for employees whose services were terminated as a result of their employer's insolvency. The Employee Entitlements Support Scheme (EESS) was introduced on 1 January 2000. The main objective of this government-funded safety net was to assist employees to retain their employee entitlements when the employer's business was liquidated. Although the aim was to assist employees, the ultimate objective was not to stand in for the whole of the unpaid entitlement claim.<sup>107</sup> The Federal Government is reported to have made the first pay-out in March 2000.<sup>108</sup>

In September 2001 a special scheme was established after the collapse of the Ansett group. The Special Employee Entitlements Scheme for Ansett group employees assisted the almost 16 000 employees who lost their jobs.<sup>109</sup>

On 20 September 2001 a new scheme known as the General Employee Entitlements and Redundancy Scheme (GEERS) was announced. The scheme applied to employment terminations as a result of insolvency that occurred on or after 12 September 2001.<sup>110</sup> GEERS replaced EESS and provided for a higher proportion of unpaid employee entitlements than was the case under EESS.<sup>111</sup> According to the GEERS scheme, the government was to absorb the

---

<sup>104</sup> *Harmer Report* 723–725.

<sup>105</sup> The Minister of Employment, Workplace Relations and Small Business issued the discussion paper in August 1999: "The Protection of Employee Entitlements in the Event of Employer Insolvency."

<sup>106</sup> See the discussion in Symes *Statutory Priorities* 147.

<sup>107</sup> *ANAO Report* 2014-15, 13.

<sup>108</sup> Symes *Statutory Priorities* 148.

<sup>109</sup> *ANAO Report* 2014-15, 14; see also Feber [http://www.cimejes.com/word\\_doc/Employee%20Entitlements%20in%20Insolvency.pdf](http://www.cimejes.com/word_doc/Employee%20Entitlements%20in%20Insolvency.pdf) (Date of use: 28 November 2017) 13.

<sup>110</sup> Feber [http://www.cimejes.com/word\\_doc/Employee%20Entitlements%20in%20Insolvency.pdf](http://www.cimejes.com/word_doc/Employee%20Entitlements%20in%20Insolvency.pdf) (Date of use: 28 November 2017) 13.

<sup>111</sup> *ANAO Report* 2014-15, 14; see also Feber [http://www.cimejes.com/word\\_doc/Employee%20Entitlements%20in%20Insolvency.pdf](http://www.cimejes.com/word_doc/Employee%20Entitlements%20in%20Insolvency.pdf) (Date of use: 28 November 2017) 13.

section 556 employee priorities and all unpaid wages, accrued annual leave, accrued long service leave, accrued pay in lieu of notice and limited redundancy entitlements<sup>112</sup> were paid.<sup>113</sup> The Commonwealth Department of Employment administered this scheme and all claims under GEERS were paid as an advance.<sup>114</sup> The insolvency practitioner would institute claims against the Commonwealth and the latter would, upon payment of the claim, become a creditor of the insolvent estate in place of the employee. Section 560 confers on the Commonwealth the same priority as that of employees in terms of section 556(1).<sup>115</sup>

Employees would qualify to receive assistance under GEERS for unpaid employee priorities if

- (a) their employment was terminated due to liquidation proceedings that were initiated;
- (b) they were owed employee entitlements, and
- (c) They lodged a claim within the prescribed time frame.<sup>116</sup>

Employees were eligible to claim the following entitlements under GEERS: unpaid and shortfall of wages;<sup>117</sup> all unpaid annual leave and long service leave; all unpaid pay in lieu of notice; and redundancy pay.<sup>118</sup>

GEERS provided for a maximum annual wage that could be claimed. If an employee earned more than the maximum at the date on which his employment was terminated, he would only be able to claim such maximum.<sup>119</sup>

Not all employees had the option of using this safeguard. In the following instances no assistance was available in terms of the GEERS scheme:

---

<sup>112</sup> Up to sixteen weeks' redundancy entitlements were claimable under GEERS.

<sup>113</sup> The GEERS advances were treated as advances under the Corporations Act and if funds became available, DEEWR would seek to recover payments from the company up to the amounts paid to employees under GEERS.

<sup>114</sup> Feber [http://www.cimejes.com/word\\_doc/Employee%20Entitlements%20in%20Insolvency.pdf](http://www.cimejes.com/word_doc/Employee%20Entitlements%20in%20Insolvency.pdf) (Date of use: 28 November 2017)14.

<sup>115</sup> Section references are to the Corporations Act 2001 (Cth).

<sup>116</sup> *ASIC Information Sheet 463*. Such a claim must be lodged within 12 months from the date on which the employee lost his or her job or the date on which the company entered liquidation, whichever is the later.

<sup>117</sup> These amounts were limited to a three-month period prior to the appointment of the liquidator.

<sup>118</sup> A maximum of 16 weeks' redundancy pay is claimable under GEERS.

<sup>119</sup> The maximum annual wage is available at <https://www.jobs.gov.au/> (Date of use: 22 January 2018) and it is updated annually.

- (a) If the company was under a process of administration, receivership or where a deed of company arrangement or a creditors' trust were applicable;
- (b) people who did not meet the definition of an employee, such as an independent contractor, agent or sub-contractor; or
- (c) if the insolvent company could meet the outstanding employee entitlements.<sup>120</sup>

Employer superannuation contributions were not covered by GEERS.<sup>121</sup>

It should be noted that all employee entitlement safety-net schemes, EESS, SEESA and GEERS, came about as administrative arrangements<sup>122</sup> and not through legislation.

### 2.6.3.2 *The Fair Entitlements Guarantee Act 159 of 2012*

The Fair Entitlements Guarantee Act was introduced in 2012 and replaced GEERS as a government-funded safety net for unpaid employee entitlements. It is important to note that this scheme was established by means of legislation and thus created a legal obligation on government to render support to employees.<sup>123</sup> The scheme is administered by the Department of Employment. The scheme was described as being important “to fulfil a significant community need” by protecting employee entitlements which would be lost if employees were to lose their jobs as a result of an employer’s insolvency.<sup>124</sup> Although alternatives for the protection of employee entitlements do exist they are “insufficient to adequately protect employees”.<sup>125</sup>

The main objectives of the Fair Entitlements Guarantee Act are, firstly, to provide for the Commonwealth to pay advances of unpaid employee priorities in certain instances<sup>126</sup> and, secondly, for the Commonwealth to recover the advances paid for unpaid employee priorities through winding-up from payments received by the company in the liquidation process.<sup>127</sup>

<sup>120</sup> ASIC Information Sheet 46 3.

<sup>121</sup> If employer superannuation contributions were pursuable, the Australian Taxation Office could be contacted.

<sup>122</sup> ANAO Report 2014-15, 14.

<sup>123</sup> ANAO Report 2014-15, 14.

<sup>124</sup> Explanatory Memorandum for the Fair Entitlements Guarantee Act of 2012.

<sup>125</sup> Explanatory Memorandum for the Fair Entitlements Guarantee Act of 2012.

<sup>126</sup> S 3(a) of the 2012 Act sets out the first objective. S 3(a)(i)–(iii) contains the instances in which the Commonwealth will pay the advances to the employees, namely, “(i) the employers are insolvent or bankrupt; and (ii) the end of the employment of the former employees was connected with that insolvency or bankruptcy; and (iii) the former employees cannot get payment of the entitlements from other sources”.

<sup>127</sup> S 3(b) of the Fair Entitlements Guarantee Act of 2012 (the “FEG Act”).

Where a company is liquidated, eligible employees may use this Act to claim their unpaid employee priorities from the Australian government. This means that employees may use the Act as a safety net to claim unpaid employee entitlements. Employees are assured that their entitlements are protected should the insolvent employer be unable stand in for unpaid claims. Where employees make use of this claim option the Commonwealth becomes a priority creditor of the liquidated company. The Commonwealth obtains a right to receive dividend pay-outs as a creditor of the company.

The following may be claimed in terms of the Fair Entitlements Guarantee Act:<sup>128</sup> Up to 13 weeks' unpaid wages;<sup>129</sup> unpaid annual leave and long service leave; up to 5 weeks' payment in lieu of notice; and up to 4 weeks' redundancy pay per full year service.

In terms of section 18 of the Act no amount may be claimed under FEG if the liquidator of the company can satisfy the claim within 112 days. No superannuation contributions can be claimed under FEG.<sup>130</sup>

The following table<sup>131</sup> sets out the different government-funded schemes established in Australia over the past 15 years, the entitlements covered and maximum employee entitlements claimable:

<sup>128</sup> Fair Entitlements Guarantee (FEG), Department of Employment at <https://www.employment.gov.au/fair-entitlements-guarantee-feg> (Date of use: 22 June 2016). It should be noted that unpaid superannuation guarantee contributions will not be paid under FEG. The Australian Taxation Office should be approached for unpaid superannuation payments. S 19 of the FEG Act regulates the calculation of the amount of employee entitlements.

<sup>129</sup> S 6 of the FEG Act defines wages and includes allowances, loadings, amounts payable for overtime, amounts payable at penalty rates and other amounts. Discretionary payments such as bonuses, reimbursements, travel expenses and amounts not payable on an ongoing basis are excluded from the definition of wages (s 7(2) and (3)); ss 5 and 26–27 stipulates that the current indexed maximum wage per week is AU\$2 451 per week. If an employee is owed more than AU\$2 451 per week, that portion will have to be paid by the liquidator if surplus funds are available for such pay-out; see the fact sheet <https://docs.jobs.gov.au/documents/what-assistance-can-feg-provide> (Date of use: 22 January 2018) 1. According to *ANAO Report 2014-15* at note 41 on 32 under current arrangements the maximum wage per week is indexed on 1 July each year. This was last done in August 2013. As part of the 2014–15 Budget the government announced a freeze on the indexation of the maximum weekly wage rate until 1 July 2018. This change came into effect on 1 July 2014.

<sup>130</sup> See the fact sheet <https://docs.jobs.gov.au/documents/what-assistance-can-feg-provide> (Date of use: 22 January 2018) 1.

<sup>131</sup> Note that the basics for the table and the information on EESS, SEESA and GEERS were obtained from Ferber [http://www.cimejes.com/word\\_doc/Employee%20Entitlements%20in%20Insolvency.pdf](http://www.cimejes.com/word_doc/Employee%20Entitlements%20in%20Insolvency.pdf) (Date of use: 28 November 2017) 13-14. The inclusion of FEG and the change in layout is the author's work.

<b>Scheme</b>	<b>EESS</b>	<b>SEESA</b>	<b>GEERS</b>	<b>FEG</b>
<b>Period</b>	Claims until 11 September 2001	Ansett employees	Claims from 12 September 2001 until December 2012	Claims from December 2012
<b>Wages</b>	Up to 4 weeks	All unpaid	All unpaid	Up to 13 weeks
<b>Annual leave</b>	Up to 4 weeks	All accrued annual leave	All accrued annual leave	All accrued annual leave
<b>Long service leave</b>	Up to 12 weeks	All accrued long service leave	All accrued long service leave	All accrued long service leave
<b>Leave in lieu of notice</b>	Up to 5 weeks	All accrued	All accrued	Up to 5 weeks
<b>Redundancy entitlements</b>	Up to 4 weeks	Up to 8 weeks	Up to 8 weeks	Up to 4 weeks
<b>Maximum salary</b>	AU\$40 000 pa	No maximum	Calculated on salary indexed annually	Calculated on salary indexed annually AU\$ 31 863 <sup>132</sup>
<b>Maximum payment</b>	AU\$20 000	No maximum in total – individual maximums applicable.	No maximum in total – individual maximums applicable.	No maximum in total – individual maximums applicable.
<b>Commonwealth contribution</b>	Half to the scheme benefits	All of scheme benefits	All of scheme benefits	All of scheme benefits

Since 2000 and the introduction of EESS, the Australian Government has distributed almost AU\$1,5 billion in advances in terms of government-funded employee entitlement safety nets of

<sup>132</sup> This is calculated on the indexed amount of AU\$2 451 per week. Ss 5 and 26–27 of the FEG Act stipulates that the current indexed maximum wage per week is AU\$2 451. If an employee is owed more than AU\$2 451 per week, that portion will have to be paid by the liquidator if surplus funds are available for such pay-out; see the fact sheet <https://docs.jobs.gov.au/documents/what-assistance-can-feg-provide> (Date of use: 22 January 2018) 1. According to ANAO Report 2014-15 at note 41 on 32 under current arrangements, the maximum wage per week is indexed on 1 July each year. This was last done in August 2013. As part of the 2014–15 Budget the government announced a freeze on the indexation of the maximum weekly wage rate until 1 July 2018. This change came into effect on 1 July 2014.

---

which only 13% has been recovered by the Commonwealth.<sup>133</sup>

## **2.7 Employee's right to receive reports by liquidator**

The Insolvency Law Reform Act 2016 entitled creditors of the company to receive reports by the liquidator during a company's liquidation. Again, this right is given to employees in their capacity as creditors of the company and not purely because they are employees. If there are no unpaid claims and employees are paid in full they will not have this right. The Insolvency Practice Rules provide that the liquidator shall give information, provide reports or produce documents to creditors.<sup>134</sup> The rules may further prescribe the manner in which the information is given, the timeframes applicable, circumstances when the information must be given and who will be responsible for the cost of the information provided.<sup>135</sup>

## **2.8 Employee's right to remove a liquidator and appoint another liquidator**

Section 90-35 of the Insolvency Practice Rules provides that creditors may remove a liquidator and appoint another liquidator. This right accrues to employees in their capacity as creditors of the company and not simply because they are employees. Creditors at a meeting may resolve to remove an existing liquidator and to appoint a new one.<sup>136</sup> The only requirement is that the creditor has to give notice of five business days before the meeting to all parties interested and entitled to receive the notice.

## **2.9 Evaluation of employee rights in liquidation**

It is clear that employees do not have a role to play in a company's liquidation or winding-up in Australia. How ironic is this? Upon registration a company acquires separate legal personality.<sup>137</sup> A company cannot act on its own and employs people to act on its behalf. However, the same people who empower the company are denied a say in the very procedure that will terminate their livelihood. Mitchell explains this predicament:

---

<sup>133</sup> ANAO Report 2014-15, 16.

<sup>134</sup> Schedule 2 Insolvency Practice Schedule s 70-50(1) of the Corporations Act 2001 (Cth).

<sup>135</sup> Schedule 2 Insolvency Practice Schedule s 70-50(2) of the Corporations Act 2001 (Cth).

<sup>136</sup> Schedule 2 Insolvency Practice Schedule s 70-35(1) of the Corporations Act 2001 (Cth).

<sup>137</sup> *Salomon v Salomon* [1897] AC 22.

---

“While it is true that through entitlement accrual, employees are in effect lending funds or working capital to their employer (in aggregate, employer entitlements in Australian companies currently probably exceed \$50 billion), unlike other suppliers of finance, employees are *involuntary creditors*, at zero interest.”<sup>138</sup>

Employees only have a say in their capacity as creditors of the company and not in their capacity as employees. The only situation in which employees have “real” rights is when their entitlements are at stake. The situation where their employment relationships are terminated is of very little importance as they do not enjoy any protection whatsoever, apart from the fact that they are entitled to claim damages due to the premature termination of their contractual relationship with the company.

The most significant advantage that employees do have during liquidation is the safety net created by the Fair Entitlements Guarantee Act which is Government-operated and does not place any obligation on the liquidator. If any additional payments are made during the liquidation process and if the liquidator is able to make payments, the government will enjoy priority status. However, employees will not have all to lose as they will be caught in the safety net.

It is important to keep in mind that most of the government-funded safety nets came about as a result of major corporate collapses. The EESS was introduced following the National Textiles collapse in January 2000 and the SEESA came into operation after the Ansett disaster. Although it may be true that it is better to have a mechanism in place to provide a safety net than nothing at all, an adequate scheme should be developed and improved in years where no major collapse threatens, rather than doing damage control, turning employee entitlements into a welfare case and using taxpayers’ money to try and make good what was lost.

Employee priorities have been well embedded in Australia since 1825 and although many other priorities, for example tax priorities, came under scrutiny for possible removal, major developments in aiding and improving Australia’s employee entitlements are strongly protected.<sup>139</sup>

---

<sup>138</sup> Mitchell *et al* 2005 *Intersections* 18; own emphasis.

<sup>139</sup> Symes *Statutory Priorities* 107.



### 3 EMPLOYEE RIGHTS IN VOLUNTARY ADMINISTRATION

Voluntary administration is Australia's corporate rescue mechanism and was introduced by the Corporations Act 2001 in Part 5.3A in 2001<sup>140</sup> It is seen as an "interim form of external administration"<sup>141</sup> and Anderson labels it "a desirable form of external administration . . . the ideal form of insolvency administration *for the protection of employment and the entitlements of employees*".<sup>142</sup>

Australia's corporate rescue process started off with official management. In 1983 the Australian Law Reform Commission led an enquiry into the law relating to insolvency. At this time the options available in Australia when a company was struggling financially were schemes of arrangement<sup>143</sup> and official management.<sup>144</sup> Neither option was ideal for a company in distress as a scheme of arrangement was a protracted and expensive procedure while official management was formal and seldom used.<sup>145</sup>

After evaluating official management in 1983, the Harmer Report recommended that Australia should move towards an informal alternative to liquidation that was more flexible, easily implemented and as inexpensive as possible.<sup>146</sup> According to the Commission, the options available in Australia for dealing with financially distressed companies were too conservative. The voluntary administration reforms then came to the fore. Despite the fact that the Commission recognised that the saving of jobs and the improvement of employment benefits would also be a positive effect of the reform of the administration process, this objective of voluntary administration never transpired in concrete detail in Part 5.3A.<sup>147</sup> The Corporate Law Reform Bill was published in 1992 and official management was repealed by the Corporate Law Reform Act of 1992.<sup>148</sup> Voluntary administration was now the rescue option for financially struggling

<sup>140</sup> This procedure is supported by the Corporations Regulations 2001 (Cth).

<sup>141</sup> Murray and Harris *Keay's Insolvency* par 19.90 at 683.

<sup>142</sup> Anderson 2012 *CSLJ* 170; own emphasis.

<sup>143</sup> S 411 of the Corporations Law.

<sup>144</sup> Under the former Part 5.3 of the Corporations Law; see also Sellars

<https://www.oecd.org/corporate/ca/corporategovernanceprinciples/1873984.pdf> (Date of use: 30 November 2017) 1.

<sup>145</sup> *Harmer Report* 46; Murray and Harris *Keay's Insolvency* par 19.05 at 667; Sellars <https://www.oecd.org/corporate/ca/corporategovernanceprinciples/1873984.pdf> (Date of use: 30 November 2017) 1.

<sup>146</sup> *Harmer Report* 54; see also Murray and Harris *Keay's Insolvency* par 19.05 at 667; and Anderson 2001 *IIR* 82.

<sup>147</sup> Darvas 1999 *CSLJ* 109.

<sup>148</sup> Murray and Harris *Keay's Insolvency* par 19.05 at 667.

companies in Australia and Part 5.3A came into effect on 23 June 1993.<sup>149</sup> It provided for a reorganisation process and offered a flexible, quick and easy decision-making process which had to be inexpensive.<sup>150</sup>

The purpose of voluntary administration as stated in section 435A of the Corporations Act corresponds with the purpose of business rescue contained in section 128 of the South African Companies Act. Section 435A provides:

“The object of this Part is to provide for the business, property and affairs of an insolvent company to be administered in a way that:

- (a) maximises the chances of the company, or as much as possible of the business, continuing in existence; or
- (b) if it is not possible for the company or its business to continue in existence – results in a better return for the company’s creditors and members than would result from an immediate winding up of the company.”

Anderson is of the opinion that Part 5.3A

“strikes something of a balance between the needs of creditors to seek maximum return on their funds and the aim of preserving the business of the company if possible as assessed independently and expertly by the insolvency professional”.<sup>151</sup>

It is clear that, as is the case with its South African counterpart, the saving of jobs is not seen as an ancillary objective of the reorganisation process. This may not come as a surprise as Australia’s unemployment figure of 5,5% in October 2017<sup>152</sup> does not even come close to South

<sup>149</sup> Sellars <https://www.oecd.org/corporate/ca/corporategovernanceprinciples/1873984.pdf> (Date of use: 30 November 2017) 1.

<sup>150</sup> *Harmer Report* 46; see also Murray and Harris *Keay’s Insolvency* par 19.05 at 667; and Sellars <https://www.oecd.org/corporate/ca/corporategovernanceprinciples/1873984.pdf> (Date of use: 30 November 2017) 2.

<sup>151</sup> Anderson 2001 *IIR* 82.

<sup>152</sup> Australian Bureau of Statistics, Labour Force, Australia, October 2017 <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6202.0> (Date of use: 30 November 2017).

Africa's 27,7%.

Although neither South Africa nor Australia included the saving of jobs as a specific and separate objective of their corporate reorganisation procedures, it is trite that the preservation of jobs goes hand in hand with a successful reorganisation as is mentioned repeatedly in discussions of voluntary administration and its objectives.<sup>153</sup>

Despite the fact that the saving of jobs is not a specific objective of the legislation, the judiciary in the words of Young J expressed strong sentiments that the retention of employment is a strong objective when it comes to voluntary administration.<sup>154</sup> Young J remarked that "...it was in the interests of Australia that as much employment as possible be maintained."<sup>155</sup>

According to Murray and Harris "creditors are the ones affected by a company's difficulties and they are the ones who are given the power to decide its fate".<sup>156</sup> Listing this as an advantage of voluntary administration clearly illustrates where the sympathy in Australia lies – not with employees, but with creditors.

The notion of rather considering and protecting creditors' interests in voluntary administration is highlighted by Murray and Harris who stated that "employees are not specifically affected by the legislation, although their retention as employees will very much depend on the outcome of the Pt 5.3A process".<sup>157</sup> This is a disturbing thought. Not only will employees' whole existence and livelihood be affected should their retention not be affected positively through the Pt 5.3A process, but they are denied many rights in this process that may change their lives forever.

### 3.1 Brief outline of the voluntary administration procedure in Part 5.3A

The process of voluntary administration starts with the appointment of an administrator.<sup>158</sup> Because the company is still in operation, employees are still rendering their services. The court is not involved in the appointment process and the administrator can be appointed either by the

---

<sup>153</sup> Anderson 2012 CSLJ 170, 171.

<sup>154</sup> *Sydney Land Corporation (Pty) Ltd v Kalon (Pty) Ltd* 1997 26 ACSR 427 at 430.

<sup>155</sup> *Sydney Land Corporation (Pty) Ltd v Kalon (Pty) Ltd* 1997 26 ACSR 427 at 430.

<sup>156</sup> Murray and Harris *Keay's Insolvency* par 19.15 at 670.

<sup>157</sup> Murray and Harris *Keay's Insolvency* par 19.90 at 683.

<sup>158</sup> S 435C(1)(a) of the Corporations Act 2001; see Anderson 2001 *IIR* 81 for a detailed discussion of the whole process.

directors or by the liquidator, provisional liquidator or charge holder.<sup>159</sup> By the end of the first business day after the administrator's appointment, notice of his appointment must be lodged with the Australian Securities and Investment Commission.<sup>160</sup> Written notice of such appointment must be given to the company and other charge holders over assets of the company and within three days after the administrator's appointment, notices must be published in the relevant newspapers.<sup>161</sup>

A first meeting of creditors must be scheduled within five business days after the appointment of the administrator.<sup>162</sup> The aim of the meeting is to reach as many creditors of the company as possible to determine whether a committee of inspection should be appointed, to determine such committee's members should it be appointed and to consider the appointed administrator and remove him if necessary.<sup>163</sup> After its appointment the committee plays a consultative role. It may discuss matters regarding the voluntary administration with the administrator and consider reports.<sup>164</sup>

The administrator must convene a second meeting of creditors in order to provide creditors with the opportunity to decide on the company's way forward.<sup>165</sup> At this meeting, the administrator will report to the creditors on the company's business, property and affairs. The administrator must also provide the creditors with a statement that sets out his opinion of what will be in the best interest of the creditors, namely, to accept the deed of company arrangement, to proceed with winding-up or to end the administration.<sup>166</sup> Voting is an integral part of the second meeting of creditors and is regulated by the regulations.<sup>167</sup>

<sup>159</sup> Ss 436A, 436B and 436C deal with the appointment of the administrator.

<sup>160</sup> S 450A of the Corporations Act 2001.

<sup>161</sup> S 450A of the Corporations Act 2001.

<sup>162</sup> S 436E of the Corporations Act 2001.

<sup>163</sup> S 436E of the Corporations Act 2001 regulates the first meeting of creditors.

<sup>164</sup> Darvas 1999 *CSLJ* 109.

<sup>165</sup> S 439A–439C of the Corporations Act 2001 regulates the second meeting of creditors.

<sup>166</sup> S 439A(4) of the Corporations Act 2001.

<sup>167</sup> Reg 5.6.21 and 5.6.25 set out the basics regarding voting at the second meeting of creditors.

## 3.2 Various rights of employees in voluntary administration

### 3.2.1 Employee's right to commence voluntary administration

Voluntary administration commences with the appointment of an administrator by the company,<sup>168</sup> the liquidator or provisional liquidator,<sup>169</sup> or by a secured party with an enforceable security over the whole, or substantially the whole, of a company's property.<sup>170</sup>

Employees of the company have no direct commencement rights, but employees who have moneys owing to them will have the right to initiate voluntary administration procedures and appoint an administrator in their capacity as creditors of the company.

The Corporations Act does not define the term "creditor". It is necessary to clarify its meaning as it is important to know who are regarded as creditors in a company's voluntary administration. Both members of academia and the judiciary assisted in giving meaning to the term "creditor" and specifically attempted to incorporate the position of employees within its ambit.

One of the unambiguous viewpoints which needs further explanation is that "[e]mployees are *of course* creditors of the company".<sup>171</sup>

It is welcoming to see that the judiciary follows an inclusive approach to the question whether employees qualify as "creditors" of a company. In *Re Midland Coal, Coke and Iron Co*,<sup>172</sup> Lindley LJ considered the meaning of the term "creditor" and said that "the word creditor is used in the widest sense, and . . . it includes all persons having any pecuniary claims against the company".<sup>173</sup> Although this definition of the term "creditor" was used in cases dealing with schemes of arrangement, the Full Court of the Supreme Court of Victoria adopted this approach

---

<sup>168</sup> S 436A of the Corporations Act.

<sup>169</sup> S 436B of the Corporations Act.

<sup>170</sup> S 436C of the Corporations Act.

<sup>171</sup> Murray and Harris *Keay's Insolvency* par 19.90 at 683; own emphasis.

<sup>172</sup> [1895] 1 Ch 267.

<sup>173</sup> *Re Midland Coal, Coke and Iron Co* [1895] 1 Ch at 277. This case dealt with schemes of arrangement and the meaning that was followed in a number of cases; see references to these cases and further discussion in Anderson and Morrison *Crutchfield* 74. It must be noted that a contrary view was taken in *Daydream Island International Resort v Cushway Blackford* (1995) 13 ACLC 82. In this case the court preferred a more restrictive meaning of "creditors" for the purposes of section 444D. This opinion is not recommended or to be followed. See Anderson and Morrison *Crutchfield* 76.

for purposes of Part 5.3A in *Brash Holdings v Katile Pty Ltd*.<sup>174</sup> The court considered the meaning of “creditors” for purposes of Part 5.3A and held as follows:

- “(a) The word creditor should, in the absence of any good reason otherwise be read as used in the same sense throughout Pt 5.3A.
- (b) Part 5.3A was concerned with all of the ‘creditors for the time being of the company’.
- (c) ‘Creditors for the time being of the company’ meant, in effect, those who would have been creditors on the assumption that the company was in liquidation and the relevant date was the date specified in the deed of company arrangement, as mentioned in s 444D(1).
- (d) The expression ‘all creditors’ in s 444D(1) should not be confined to those having claims for money sums due and payable on or before the day specified in the deed.”

In *Green v Giljohann*,<sup>175</sup> the court applied the interpretation of the term “creditor” in *Brash Holdings*. This had the effect that an employee with a claim for one month’s salary in lieu of notice fitted the meaning of creditor as set out in sections 444D(1) and 444A(4)(1).

Despite the well-explained definition of the term “creditor” in *Brash Holdings*, contradictory views still exist. One such view is that of O’Donovan. He is of the opinion that employees are not specifically recognised as a “separate class of creditors” for purposes of voluntary administration.<sup>176</sup> In his view, employees are not regarded as creditors in the whole process of voluntary administration at all. They are not entitled to receive notices from the administrator, nor are they bound by the deed of company arrangement.<sup>177</sup> O’Donovan motivates this opinion with his view that Part 5.3A “is not designed to assist companies to compromise their employees’

---

<sup>174</sup> (1994) 12 ACLC 472; 13 ACSR 504; see also Symes and Duns *Australian Insolvency Law* 285.

<sup>175</sup> (1995) 17 ACSR 518.

<sup>176</sup> O’Donovan 1994 *CI* 459.

<sup>177</sup> O’Donovan 1994 *CI* 459.

statutory entitlements”.<sup>178</sup> This view expressly disregards and eliminates the many other rights that could and should be afforded to employees to have a say in the voluntary administration process of a company, even though it will be in their capacity as creditors and not as employees. O’Donovan’s opinion is rejected as there are no grounds for such interpretation when the rest of Part 5.3A is examined.

### 3.2.2 Employee’s right to be notified and informed of voluntary administration

In *Pasminco Limited*<sup>179</sup> the court dealt with the right of a creditor to be notified in voluntary administration proceedings. The court referred to the interests of creditors but specifically included employees and their right to be notified when it remarked that

“more particularly is this so where there is a large body of creditors, *such as employees*, each with claims modest by reference to the overall indebtedness of the companies subject to deeds of company arrangement, but substantial and significant for each employee”.<sup>180</sup>

The administrator must convene the first meeting of creditors and give notice to “as many creditors of the company as reasonably practicable”.<sup>181</sup> The first meeting must be held within eight business days after the administrator’s appointment and notice of the meeting must be given within five business days after his appointment.<sup>182</sup>

If the administrator were to follow O’Donovan’s view that he is not obliged to provide employees with notice of the first meeting of creditors as they should not be considered “creditors” for purposes of voluntary administration,<sup>183</sup> employees would not be informed of the process of voluntary administration. This indeed would be an unfair situation.

Section 439A(3) provides that the administrator must convene a second meeting of creditors. This is the important meeting where creditors decide on the future of the company. The

---

<sup>178</sup> O’Donovan 1994 *CI* 459.

<sup>179</sup> [2003] FCA 265; (2003) 45 ACSR 1.

<sup>180</sup> *Pasminco Ltd* [2003] FCA 265; (2003) 45 ACSR 1 at 19; own emphasis.

<sup>181</sup> S 436E(3).

<sup>182</sup> The business days are calculated by excluding the day of the administrator’s appointment. Public holidays are excluded from the calculation of business days. S 600G provided for electronic notification.

<sup>183</sup> O’Donovan 1994 *CI* at 459.

administrator must convene the meeting by again “giving written notice of the meeting to as many of the company’s creditors as reasonably practicable”.<sup>184</sup>

In *Re Ansett Australia Ltd and Mentha*<sup>185</sup> the administrators of the company were faced with about 16 000 Ansett workers. This number of employee-creditors did not include other creditors of the company. The company therefore faced an enormous administrative burden with huge financial implications if section 439A(3) notices had to be given by delivering it personally or by sending it by prepaid post, or fax or DX as contemplated by Corporations Regulation 5.6.12(2). The court therefore allowed the use of a website and a hotline that could be called by creditors to receive copies of notices and documentation.

Together with the notice of the second meeting, the administrator must provide creditors with a report in accordance with section 439A of the Corporations Act. This report basically sets out his opinion as to the purpose of the second creditors’ meeting. He has to indicate the financial position of the company and then explain whether he is in favour of the company entering into a deed of company arrangement, or whether it should terminate voluntary administration or enter liquidation.<sup>186</sup> The administrator’s report must be in the interests of the body of creditors as a whole.<sup>187</sup>

### 3.2.3 Employee’s right to participate in consultations during voluntary administration

Until recently employees did not have the right to participate in consultations during voluntary administration. They had this right only in their capacity as creditors of the company. This situation was changed significantly by the recent Insolvency Law Reform Act of 2016.<sup>188</sup> Part 3 of the Insolvency Practice Schedule as provided for by the Insolvency Law Reform Act 2016

<sup>184</sup> S 439A(3)(a).

<sup>185</sup> (2002) 188 ALR 186; [2002] FCA 2.

<sup>186</sup> S 439A(4) of the Corporations Act 2001.

<sup>187</sup> Murray and Harris *Keay’s Insolvency* par 19.315 at 725.

<sup>188</sup> The Insolvency Law Reform Act 2016 (Cth) was promulgated on 1 March 2017. The provisions of the Insolvency Practice Schedule that were enacted on 1 March 2017 include Part 1: Division 1 (Introduction) and Division 5 (Definitions); Part 2: Division 10 (Introduction); Division 15 (Register of liquidators / trustees); Division 20 (Registering liquidators, trustees); Division 25 (Insurance); Division 30 (Annual liquidator / trustee returns); Division 35 (Notice requirements); Division 40 (Disciplinary and other action); Division 45 (Court oversight); Division 50 (Committees under part 2) and Part 4: Division 95 (Introduction); Division 100 (Other matters) and Division 105 (The Insolvency Practice Schedule). See Harris <https://australianinsolvencylaw.com/2017/03/01/insolvency-law-reform-act/> (Date of use: 1 December 2017) at 2.



specifically changed the role of employees during consultations in voluntary administration.<sup>189</sup>

One of the significant changes brought about by the Insolvency Law Reform Act is the fact that former committees of creditors will now be referred to as committees of inspection.<sup>190</sup> Committees of inspection Division 80 of the Insolvency Practice Schedule and Insolvency Practice Rules for bankruptcy and corporations now contain harmonised rules that are applicable to voluntary administrations.<sup>191</sup> The functions of these committees of inspection are found in the Insolvency Practice Schedule section 80-35 which provides as follows:

“(1) A committee of inspection has the following functions:

- (a) to advise and assist the external administrator of the company;
- (b) to give directions to the external administrator of the company;
- (c) to monitor the conduct of the external administration of the company;
- (d) such other functions as are conferred on the committee by this Act;
- (e) to do anything incidental or conducive to the performance of any of the above functions.”

“[E]xternal administration” is defined in the schedule to include a company that is under administration or in provisional or final liquidation.<sup>192</sup> The administrator must consider directions given to him by the committee of inspection. Although he is not required to adhere to proposals made by these committees, he must take cognisance of them<sup>193</sup> and provide reasons to the

---

<sup>189</sup> Part 3 of the Insolvency Practice Schedule came into operation on 1 September 2017 and contains the following important division: Division 55 (Introduction); Division 60 (Remuneration); Division 65 (Funds handling); Division 70 (Information); Division 75 (Meetings); Division 80 (Committees of inspection); Division 85 (Directions by creditors) and Division 90 (Review of external administrations). See Harris <https://australianinsolvencylaw.com/2017/03/01/insolvency-law-reform-act/> (Date of use: 1 December 2017) 2.

<sup>190</sup> Harris <https://australianinsolvencylaw.com/2017/03/01/insolvency-law-reform-act/> (Date of use: 1 December 2017) 2.

<sup>191</sup> Harris <https://australianinsolvencylaw.com/2017/09/04/ilra-committees-of-inspection/> (Date of use: 1 December 2017) 1.

<sup>192</sup> S 5-15 of the Schedule.

<sup>193</sup> S 80-35(2) of the Insolvency Practice Schedule.

committee if he does not follow them.<sup>194</sup>

The most significant inclusion in the Insolvency Law Reform Act 2016 from an employee's point of view can be found in section 80-25 which gives employees direct participation rights in committees of inspection by enabling them to appoint an employee as a committee member. This is ground-breaking progress as it is the first time that employees are given any direct right to enforce in voluntary administration proceeding in their capacity as employees and not to acquire it second hand, in their capacity as creditors. Section 80-25(1) provides that an individual employee or employees as a group that represents "at least 50% in value of entitlements owing to or in respect of employees by the company" may appoint another employee to serve as a member of the committee of inspection. Such employee or employees therefore will directly represent the employees' interests.<sup>195</sup>

In *Re Ansett Australia; Rappas v Ansett Australia Ltd*<sup>196</sup> unions were allowed to represent employees as proxies during the first meeting of creditors.

In *Pasminco Ltd*<sup>197</sup> nominated members of two trade unions, Australia's Workers Union and the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union,<sup>198</sup> were included as members of the Committee of Creditors<sup>199</sup> at the first creditors' meeting.<sup>200</sup>

### 3.2.4 Employee's role in developing the deed of company arrangement (DOCA)

Employees, in their capacity as employees, do not have any direct right and role to play in the developing of a deed of company arrangement. During the second meeting<sup>201</sup> of creditors, the latter decide on the future of the company by voting on a deed of company arrangement. Because of a presumption that the company is in a process of insolvency, creditors play a major role in the voting.<sup>202</sup> The unfortunate truth is still that when a company enters a voluntary

---

<sup>194</sup> S 80-35(3) of the Insolvency Practice Schedule.

<sup>195</sup> Harris <https://australianinsolvencylaw.com/2017/09/04/ilra-committees-of-inspection/> (Date of use: 1 December 2017) 2-3.

<sup>196</sup> [2001] FCA 1348; (2001) 39 ACSR 296.

<sup>197</sup> [2003] FCA 265; (2003) 45 ACSR 1.

<sup>198</sup> Also known as the Australian Manufacturing Workers' Union (AMWU).

<sup>199</sup> In accordance with s 436E(1).

<sup>200</sup> Held pursuant to s 436E.

<sup>201</sup> See s 439A–439C regarding the second meeting of creditors.

<sup>202</sup> Anderson 2001 *IIR* at 101.

administration process, which is seen as a form of external administration,<sup>203</sup> creditors assume that the fate of the company is in their hands. This holds true only when employees are included in the definition of creditor.

The fact that employees who are owed money by the company are regarded as creditors of the company enables them to have a right to take part in this fundamental part of the process of Part 5.3A. The regulation provides that as a general rule any creditor is entitled to vote at the second meeting.<sup>204</sup> Regulation 5.6.21(2) stipulates that a resolution during the second meeting of creditors is carried provided that a majority of those creditors present in number vote in favour of the resolution and a majority in value of the creditors present vote in favour of it.<sup>205</sup>

Although the contents of a deed of company arrangement will differ from each reorganisation and according to the needs of each company, certain prescripts do exist regarding the contents of a deed of company arrangement.<sup>206</sup> Once the creditors have voted in favour of the deed of company arrangement, they are bound by the deed.<sup>207</sup>

According to O'Donovan, employees are not bound by the contents of the deed of company arrangement as they are not recognised as a separate class of creditors in voluntary administration.<sup>208</sup> O'Donovan's viewpoint was discussed earlier and rejected.

In *Pasminco* the trade unions representing the employees were actively involved in the voluntary administration process of the company.<sup>209</sup>

### 3.2.5 Employee's right to be present at a meeting and vote during voluntary administration

One of the important purposes of the first meeting of creditors is for the administrator to decide whether to appoint a committee of creditors.<sup>210</sup> Although employees are not included in the constituents of the meeting in their capacity as employees, they may be chosen to serve on the

<sup>203</sup> Murray and Harris *Keay's Insolvency* par 19.05 at 666.

<sup>204</sup> Reg 5.6.24E as referred to in Anderson 2001 *IIR* 104.

<sup>205</sup> Votes in terms of proxies are also included.

<sup>206</sup> S 444A(4); reg 5.3A.06 and Schedule 8A to the Regulations.

<sup>207</sup> S 444C(1). Certain exceptions do exist regarding secured creditors and lessors. See Anderson 2001 *IIR* 106 for a discussion of the exceptions.

<sup>208</sup> O'Donovan 1994 *CI* 459.

<sup>209</sup> *Pasminco Ltd* [2003] FCA 265; (2003) 45 ACSR 1; as discussed in par 3.2.3 above.

<sup>210</sup> S 436E(1) of the Corporations Act 2001.

committee in their capacity as creditors. If an employee representative were to be included in such creditor committee, it would provide employees with valuable information.<sup>211</sup>

Creditors of the company play an important role in the decision-making process during voluntary administration. In terms of section 439A of the Corporations Act, a second meeting of creditors must be convened within approximately 28 days from commencement of voluntary administration. The purpose of this meeting of creditors is to decide on one of three possible outcomes of the company, namely that (1) the company must execute a deed of company arrangement; (2) the process of voluntary administration must come to an end; or that (3) the company must be wound up.

Employees will have this right to be informed of the second meeting of creditors if they are treated as creditors of the company. They will receive written notice<sup>212</sup> of such meeting at least five business days prior to the meeting and will be entitled to be informed of the prescribed information about the meeting in the prescribed manner.<sup>213</sup> They will then receive a copy of the administrator's report about the company's business, property, affairs and financial situation and the statement will set out the administrator's opinion on the following matters:

- “i) whether it would be in the creditors' interest for the company to execute a deed of company arrangement;
- ii) whether it would be in the creditors' interests for the administration to end; or
- iii) whether it would be in the creditors' interest for the company to be wound up.”<sup>214</sup>

They will also be informed of the administrator's reasons and opinions regarding the abovementioned options which will enable them to make an informed decision as to what must happen to the company.<sup>215</sup>

<sup>211</sup> Darvas 1999 *CSLJ* 109.

<sup>212</sup> S 600G contains information regarding electronic notification procedures.

<sup>213</sup> S 439A(3).

<sup>214</sup> S 439A(4)(A)-(b)(i)-(iii).

<sup>215</sup> S 439A(4)(b)(iv)-(v).

In *Pasminco*,<sup>216</sup> the two unions represented a significant number of employees of the company who were also regarded as creditors. AWU had approximately 776 members and AMWU about 170 members. The creditors were spread around Australia because the Pasminco group operated from five different sites. The court therefore allowed union officials to obtain proxies from all their members within a reasonable time and vote on their behalf at the meeting.<sup>217</sup>

Goldstone R acknowledged the significant role that creditors of the company had to play in the administration of deeds of company arrangement and the successful implementation of voluntary administration in the case and remarked:

“I consider therefore that the Court should be concerned to ensure that whenever meetings of creditors subject to a deed of company arrangement are called that any inhibitions upon, or barriers to, creditors being able to have their voice heard or vote cast at such meetings be overcome. More particularly is this so where there is a large body of creditors, such as *employees*, each with claims modest by reference to the overall indebtedness of the companies subject to deed of company arrangement, but *substantial and significant for each employee*.”<sup>218</sup>

### 3.2.6 Effect of voluntary administration on employment contracts

Employees who also hold an office in the company will not be able to exercise the concomitant rights during voluntary administration as the administrator will assume all powers.<sup>219</sup> Employees will have to perform their contracts as usual until the administrator has made a decision regarding their employment status.<sup>220</sup>

In the event of voluntary administration there are two possibilities regarding employment

<sup>216</sup> *Pasminco Ltd* [2003] FCA 265; (2003) 45 ACSR 1.

<sup>217</sup> *Pasminco Ltd* [2003] FCA 265; (2003) 45 ACSR par 14–16. In *Re Ansett Australia Limited; Rappas v Ansett Australia Limited* (2001) 39 ACSR 296 Goldberg J also allowed twelve unions to have nominated officials appointed as attorneys for purposes of voting at the first meeting of creditors.

<sup>218</sup> *Pasminco Ltd* [2003] FCA 265; (2003) 45 ACSR [19].

<sup>219</sup> S 437C(1).

<sup>220</sup> See par 3.2.6 below.

contracts.<sup>221</sup> Firstly, the administrator may decide to terminate the employment relationship between the company and its employees. The administrator takes over the management of the company during voluntary administration and therefore takes control and decides over the affairs of the company.<sup>222</sup> Secondly, the administrator may decide to retain the employees. Both possibilities are examined below.

The administrator has a discretion to terminate employment contracts in voluntary administration. Because the administrator did not personally employ the employees – they were employed by the company – he will not incur any personal liability if he chooses to dismiss all or some of the employees.<sup>223</sup> If the administrator decides to terminate employment contracts it must be done in accordance with the Fair Work Act.<sup>224</sup> Section 385 of the Fair Work Act defines a dismissal as a “genuine redundancy” if a job that was done by a former employee became redundant due to a change in the employer’s operational requirements. Where a dismissal qualifies as genuine redundancy, an employee will be entitled to redundancy pay according to the National Employment Standards as contained in the Fair Work Act.<sup>225</sup> Not all employees are eligible for redundancy pay.<sup>226</sup>

Administrators who take on employment contracts after their appointment<sup>227</sup> will be obliged to perform in terms of such contracts. The administrator will pay ongoing wages and entitlements out of the assets and income while the company is still in business.<sup>228</sup> He will not be personally liable for the accrual of employee entitlements as these will be regarded as an expense of the voluntary administration procedure.<sup>229</sup>

It must be noted that no employee will be able to claim any unpaid employee entitlement under the Fair Entitlements Guarantee Act. The reason for this is simple. Section 10 of the Fair

<sup>221</sup> *Green v Giljohann* (1995) 17 ACSR 518.

<sup>222</sup> Murray and Harris *Keay’s Insolvency* par 19.90 at 683.

<sup>223</sup> Murray and Harris *Keay’s Insolvency* par 19.90 at 683.

<sup>224</sup> 28 of 2009.

<sup>225</sup> Part 2-2.

<sup>226</sup> Ss 121 and 123 of the Fair Work Act provide for certain excluded employees. S 121 states that employees who were in the employer’s employ for less than 12 months and employees of small business employers will not be able to claim redundancy pay in terms of s 119 of the Fair Work Act. S 123 contains a list of employees excluded from redundancy pay benefits. These excluded employees include employees dismissed due to serious misconduct, casual employees, apprentices and employees covered by an industry-specific redundancy scheme.

<sup>227</sup> In terms of s 443A.

<sup>228</sup> Murray and Harris *Keay’s Insolvency* par 19.90 at 683.

<sup>229</sup> Murray and Harris *Keay’s Insolvency* par 19.90 at 683.

Entitlements Guarantee Act states that one of the conditions for claiming an advance in terms of this Act is that an insolvency event had to happen to the employer.<sup>230</sup> Section 5 of the Act defines one of the meanings of an insolvency event as the event when a liquidator has been appointed in terms of the Corporations Act 2001.<sup>231</sup>

### 3.2.6.1 *Transfer of a business during voluntary administration*

If a business is transferred from an old employer to a new employer during voluntary administration Part 2-8 of the Fair Work Act of 2009 will apply to the transfer. Fair Work Australia obtained powers to adjudicate matters relating to the transfer of business in specific circumstances.<sup>232</sup> Section 311(1) of the Fair Work Act of 2009 defines the meaning of a “transfer of business”. It must be noted that the meaning of “transfer of business” under Australian law has a specific meaning which differs from the meanings found in both South Africa and England’s legislation. Section 311(1) sets four requirements for a transfer of business to take place. These requirements are:

- a) the employee’s employment with the old employer must be terminated;<sup>233</sup>
- b) the employee must be employed by the new employer within three months of the termination of the employment contract by the old employer;<sup>234</sup>
- c) the type of work the employee will perform under the new employer must be substantially the same as the work performed under the old employer;<sup>235</sup> and
- d) there must be a connection between the old employer and the new employer.<sup>236</sup>

Terminology such as “transferring employees”,<sup>237</sup> “transferable instrument”,<sup>238</sup> “approved enterprise agreement”,<sup>239</sup> are a few of the examples of definitions that apply to the transfer of business and regulated in the Fair Work Act of 2009. Only employees who meet the criteria of

<sup>230</sup> S 10(1)(b) of the Fair Entitlements Guarantee Act of 2012.

<sup>231</sup> S 5 under “insolvency event” meaning (a).

<sup>232</sup> Riley 2009 CLQ 15.

<sup>233</sup> S 311(1) (a).

<sup>234</sup> S 311(1)(b).

<sup>235</sup> S 311(1)(c).

<sup>236</sup> S 311(1)(d); s 311(3) – (6) specify what is required as a connection between the old employer and the new employer.

<sup>237</sup> S 311(2).

<sup>238</sup> S 312(1).

<sup>239</sup> S 312(1).

a “transferring employee” will be protected under Part 2-8 of the Fair Work Act of 2009.

The basic law regulating a transfer of business clearly states that the obligations of the old employer will also be the obligations of the new employer. This basic principle was acknowledged in *Svitzer Australia Pty Ltd v Maritime Union of Australia, The Northern New South Wales Branch*.<sup>240</sup>

It is clear that the law regulating transfers of businesses is more restricted in its application than the law regulating transfers of businesses in South Africa and England. The most significant restriction in Australian law is the fact that only some employees will be protected and the fact that there is no obligation on the new employer to employ existing employees.

### 3.2.7 Ranking of employee claims during voluntary administration

Employee entitlements that existed before the administrator was appointed, therefore before the company’s attempt to reorganise started, and pending the outcome of the Part 5.3A administration, usually will not be paid during voluntary administration.<sup>241</sup> Employees are seen as priority creditors regarding claims that arise during voluntary administration which means that they will be paid only after the cost of administration has been settled.<sup>242</sup>

In 2004 a review of corporate insolvency law was published by the Parliamentary Joint Committee on Corporations and Financial Services.<sup>243</sup> In this review, the committee found it justifiable that a deed of company arrangement during voluntary administration could treat creditors differently.<sup>244</sup> As regards the position of employees, the Joint Committee recommended that the Corporations Act be amended to include a mandatory provision. Up to this point no priority for employee entitlements existed in voluntary administration. According to this mandatory provision, the deed of company arrangement had to reserve the priority of creditors in a winding up, unless the affected creditors, here the employee creditors, agreed to waive their priority.<sup>245</sup> It

---

<sup>240</sup> [2011] FWA 7947 at 41.

<sup>241</sup> Murray and Harris *Keay’s Insolvency* par 19.90 at 683.

<sup>242</sup> Anderson 2012 *CSLJ* 180.

<sup>243</sup> *Corporate Insolvency Laws: A Stocktake*.

<sup>244</sup> *Corporate Insolvency Laws: A Stocktake* par 11.16, see also Finkelstein J’s discussion in *Fitzgerald, in the matter of Advance Healthcare Group Ltd* [2008] FCA 1604 [11].

<sup>245</sup> *Corporate Insolvency Laws: A Stocktake* at par 11.20, see also Finkelstein J’s discussion in *Fitzgerald, in the matter of Advance Healthcare Group Ltd* [2008] FCA 1604 [11].



is understandable that the inclusion of such a provision was advocated as employees were unlikely to support a deed of company arrangement if no provision had been made for the payment of employee entitlements. The non-inclusion of such provision would definitely hamper the success of voluntary administration as employee creditors would vote against the deed of company arrangement.<sup>246</sup> If a court was of the opinion that the deed offered creditors a better return than liquidation, the creditors or the administrator could request the court to uphold the deed of company arrangement.

This mandatory provision proposed by the Joint Committee was enacted as section 444DA of the Corporations Act.<sup>247</sup> A deed of company arrangement must contain a provision that entitles eligible employees to a priority at least equal to the entitlements provided for under section 556, 560 and 561 of the Corporations Act as in the case of liquidation,<sup>248</sup> or improve on the priority.<sup>249</sup>

Section 444DA does not apply where the eligible employees resolved that such provision shall not be included in the deed of company arrangement<sup>250</sup> or where a court approved the non-inclusion of such a provision.<sup>251</sup>

The main reason why employees would decide to resolve on the non-inclusion of the rule in section 444DA(1) is that they are convinced that their employee entitlements are better and higher in terms of the deed of company arrangement than what it would be in case of liquidation. It has been said that the inclusion of section 444DA was a “parliamentary intention to confer on employees during a DOCA the benefit of the wider priority”.<sup>252</sup> The administrator will have to convene a special meeting of eligible employees, giving them notice of the meeting and providing them with a copy of his statement in which he sets out his opinion on the non-inclusion of section 444DA(1). He will have to set out whether he is of the opinion that the non-inclusion will result in a better outcome for eligible employees as a whole under the DOCA compared to the situation under immediate winding-up of the company, or whether the outcome will be the same.<sup>253</sup> The

<sup>246</sup> *Improving Australia’s insolvency laws* 28.

<sup>247</sup> By the Corporations Amendment (Insolvency) Act 2007 (Cth).

<sup>248</sup> S 444DA(1) of the Corporations Act.

<sup>249</sup> Anderson *Employee Entitlements* 54.

<sup>250</sup> S 444DA(2)(a).

<sup>251</sup> S 444DA(2)(b).

<sup>252</sup> Gentry 2013 *AIL* 13.

<sup>253</sup> S 444DA(4)(a).

administrator will have to provide reasons for his opinion and any other information needed for eligible employees to make a decision on the matter referred to in section 444DA(1).<sup>254</sup>

### 3.2.8 Employee's right to receive reports by the administrator

The Insolvency Law Reform Act 2016 included a right of creditors of the company to receive reports by the administrator during a company's voluntary administration. Again, this right is given to employees in their capacity as creditors of the company and not purely because they are employees. In there are no unpaid claims and employees are paid in full they will not have this right. The Insolvency Practice Rules provide that the administrator has to give information, provide reports or produce documents to creditors.<sup>255</sup> The rules may further prescribe the manner in which the information must be given, the timeframes applicable, circumstances when the information must be given and who will be responsible for the cost of the information provided.<sup>256</sup>

### 3.2.9 Employee's right to remove an administrator and appoint a new administrator

Section 90-35 of the Insolvency Practice Rules provide for creditors to remove and replace an administrator. This right accrues to employees in their capacity as creditors of the company and not simply because they are employees. Creditors may resolve at a meeting to remove an existing administrator and to appoint a new one.<sup>257</sup> The only requirement is that the creditor has to give notice of five business days before the meeting to all parties interested and entitled to receive the notice.

### 3.2.10 Evaluation of employee rights in voluntary administration

Although voluntary administration is labelled by some as the "scenic route to liquidation", employees may receive more in voluntary administration than they would under liquidation.<sup>258</sup> There is a definite and positive development to be seen in the role that employees play during

---

<sup>254</sup> S 444DA(4)(b)-(c).

<sup>255</sup> Schedule 2 Insolvency Practice Schedule s 70-50(1) of the Corporations Act 2001 (Cth).

<sup>256</sup> Schedule 2 Insolvency Practice Schedule s 70-50(2) of the Corporations Act 2001 (Cth).

<sup>257</sup> Schedule 2 Insolvency Practice Schedule s 70-35(1) of the Corporations Act 2001 (Cth).

<sup>258</sup> Anderson 2012 CSLJ 187.

voluntary administration – even though the focus still falls on their right to employee entitlements during voluntary administration. South Africa is still a trendsetting country as far as the rights of employees in a restructuring scenario are concerned.

#### 4 CONCLUSION

It may seem that Australian employees enjoy adequate rights during liquidation and voluntary administration. This was not the case until very recently when the Insolvency Law Reform Act 2016 was enacted. Although employees enjoy somewhat more rights, most rights are still enjoyed in employees' capacity as creditors and not purely because they are employees of the company.

This means that they do not enjoy any of the following direct rights during liquidation or voluntary administration:

- (a) The right to institute proceedings.
- (b) The right to receive information.
- (c) The right to be present at meetings and vote.
- (d) The right to assist in the developing of the process.

Employees' rights to participate in consultations during both liquidation and voluntary administration were changed significantly by the Insolvency Law Reform Act that gave them direct power to elect an employee representative to serve on committees of inspection.

It must be very clear that I am not advocating that the role of employees in any of the procedures should be elevated to board-representation level. What I am advocating for is to allow employees to be *part* of the various procedures, not only as so-called "external creditors" or "outsiders"<sup>259</sup> but as active stakeholders who indeed have something to lose in the administration of the process. Riley succinctly states that "our legal system still treats the modern employee in very much the same way as the servant of the past: lucky to have gained employment, and subject to the manager's prerogative to command".<sup>260</sup> Riley also states that employees,

---

<sup>259</sup> Riley 2002 *ALJ* 113.

<sup>260</sup> Riley 2002 *ALJ* 113.

---

characterised as “external creditors” only acquire rights when the corporation is in a crisis.<sup>261</sup> I do not agree. Employees do not acquire many rights when corporations are facing financial difficulty or a possible collapse. The rights that they do acquire, relate to them as creditors.

Many writers refer to employees’ vulnerability when a facing liquidation or when a company enters voluntary administration. It is true that employees are vulnerable. They also invest in the company – “they commit time, energy, physical strength, talent and skill to the enterprise”.<sup>262</sup> And yes, they have government-funded safety nets available if the company is liquidated or at least the same priority in employee entitlements as regulated by the Corporations Act if the company enters into a deed of company arrangement. However, the question is not whether this solution is adequate but rather how employees can be equipped to manage possible risks that threaten their employment.

The answer is not difficult. Anyone is able to manage risk appropriately and be prepared for the unforeseen if they have the information necessary to do so. It is submitted that by making employees part of the liquidation process and by giving employees an active role to play in developing a deed of company arrangement, they will be able to “level the playing field” and be able to manage the risks associated with losing one’s job, forfeiting entitlements and being left on the street.<sup>263</sup>

To have access to government-funded safety nets when a company goes into liquidation is a privilege. Australia is a front-runner in the area of administering these safety nets, but the question remains why the taxpayer’s money must substitute a company’s responsibility to meet lost employee entitlements.

---

<sup>261</sup> Riley 2002 *ALJ* 113; Darvas 1999 *CSLJ* 106.

<sup>262</sup> Riley 2002 *ALJ* 113.

<sup>263</sup> Riley 2002 *ALJ* 113.





## CHAPTER 4 ENGLAND

### 1 INTRODUCTION

The United Kingdom has two insolvency procedures available to an insolvent corporate debtor, namely, liquidation of the company or administration. Liquidation bears the common meaning as in all other comparable jurisdictions – where one may loosely refer to the winding-up of the business, payment of claims and closing the doors of the company. In case of administration, an administrator is appointed with the main objective of rescuing the company.

South Africa and England share common ground in respect of company law. Not only did English company law influence South African company legislation,<sup>1</sup> but England also shares a commonwealth heritage with South Africa. It therefore makes sense to compare the law governing employee rights in liquidation and administration in England to the law governing liquidation and business rescue in South Africa.

Insolvency law in the United Kingdom is regulated by various instruments, namely, the Insolvency Act 1986,<sup>2</sup> the Insolvency Rules 1986<sup>3</sup> and the Enterprise Act 2002.<sup>4</sup>

An investigation into the evolution of the United Kingdom's insolvency laws plays an important role in understanding the reform process and current English law.

In 1977 the United Kingdom's Secretary of State for Trade initiated a project to review insolvency law.<sup>5</sup> The Cork Committee, chaired by Sir Kenneth Cork,<sup>6</sup> was tasked to make recommendations with specific focus on *inter alia* the following objectives:

- (a) to review the insolvency law and practices of England and Wales to identify necessary reforms;

---

<sup>1</sup> Cilliers and Benade *Corporate Law* 19.

<sup>2</sup> Insolvency Act 1986 (c 45).

<sup>3</sup> The Insolvency Rules 1986 are contained in a statutory instrument (SI 1986/1295) which sets out detail regarding procedure and the Insolvency Act. The rules are made in terms of s 411 of the Insolvency Act 1986 which confers powers to make rules for the purpose of giving effect to Parts I to VII of the Insolvency Act 1986. These rules only apply in England and Wales; see also Sealy and Milman *Annotated Guide* 693 for a discussion of the functions and roles of the Insolvency Rules. A complete overhaul of the Insolvency Rules was done in 2016 and the latest version of the Insolvency Rules came into effect on 6 April 2017.

<sup>4</sup> Enterprise Act 2002 (c 40).

<sup>5</sup> Hunter 1999 *CLJ* 433.

- (b) to develop an all-inclusive insolvency regime that harmonises and integrates all relevant systems; and
- (c) to consider viable alternatives to existing, formal insolvency procedures.<sup>7</sup>

The Report of the Cork Committee was published in 1982 and identified various insolvency law areas for reform.<sup>8</sup> The Report defined the objectives of a “good, modern insolvency law”.<sup>9</sup>

Finch referred to employees as the “lost souls in insolvency”<sup>10</sup> because their contribution to the company and their protection in case of insolvency do not even up. It is important to determine whether this remains a valid description of employees and their current position in liquidation and administration in England.

## 2 EMPLOYEE RIGHTS IN LIQUIDATION

The Employment Rights Act of 1996 and the Insolvency Act of 1986 apply to employees during a company’s liquidation.<sup>11</sup> The basic right that employees enjoy during liquidation is the priority to be paid monies owing to them by the insolvent employer. Although similar rights are recognised in South Africa,<sup>12</sup> Australia<sup>13</sup> and England, they are treated very differently in the respective jurisdictions.

The liquidator must act in the best interests of the body of creditors as a whole when payments are made to employees. His main task in liquidation is to maximise returns to creditors who are owed money by the insolvent employer.<sup>14</sup> The Employment Rights Act 1996 regulates employee rights during an employer’s insolvency.<sup>15</sup>

---

<sup>6</sup> Then Lord Major of London and a senior partner of Cork Gully, a firm of insolvency practitioners in London.

<sup>7</sup> Hunter 1999 *CLJ* 433.

<sup>8</sup> Department of Trade, Insolvency Law and Practice *Report of the Review Committee* (Cmnd 8558) 1982.

<sup>9</sup> Hunter 1999 *CLJ* 434. These aims were contained in Chapter 4 of the Cork Report in par 198 (a)–(f). More information regarding the so called “rescue culture” is available in par 4.3 below.

<sup>10</sup> Finch *Corporate Insolvency Law* 778.

<sup>11</sup> House of Commons Library, Briefing Paper SN 00651, 9 June 2017 [www.parliament.uk/commons-library](http://www.parliament.uk/commons-library) at 3 (Date of use: 3 January 2018).

<sup>12</sup> See chapter 2, par 2.

<sup>13</sup> See chapter 3, par 2.

<sup>14</sup> Schedule 6 of the Insolvency Act 1986 contains the order of priority in which the liquidator must make payments to creditors of the insolvent estate. This is discussed in par 4.2.6.2.

<sup>15</sup> This Act and the relevant sections are discussed in detail in par 4.2.6.1.



## 2.1 Employee's right to initiate liquidation

Section 124(1) of the Insolvency Act 1986 contains a list of people who may file a petition for a company to be wound up by the court. They are the company itself, the directors of the company, any creditor or creditors of the company, a contributory or contributories of the company, the official receiver and others.<sup>16</sup> Employees are not included in this list and it is clear that, as is the case in South Africa, employees do not have the right to initiate winding-up proceedings in that capacity in the United Kingdom.<sup>17</sup>

It may be assumed, however, that an employee who has a claim against the company for unpaid salary or wages or other payments related to his employment contract that are in arrears, has *locus standi* as a creditor of the company.<sup>18</sup> This is similar to the position in South Africa<sup>19</sup> and Australia.<sup>20</sup>

## 2.2 Employee's right to be notified and informed of liquidation

Once a petition is filed to have a company liquidated, the petitioner must serve a copy of thereof on the company and give notice in the *London Gazette*.<sup>21</sup> This serves as advertisement of the petition.<sup>22</sup>

Although there is no specific provision that requires notification to employees of such filing<sup>23</sup> the advertisement has been held to be notice "to the world".<sup>24</sup> Provision is made that a director of the company, a creditor or a contributory may request a copy of the petition from the petitioner.<sup>25</sup> No reference is made to an employee's right to request a copy either

---

<sup>16</sup> S 124(1) of the Insolvency Act 1986.

<sup>17</sup> See chapter 2, par 2.1.

<sup>18</sup> The ranking of employee claims, the limits applicable to the amount claimable and other administrative measures regarding employee claims are discussed in par 4.2.6.

<sup>19</sup> See chapter 2, par 2.1.

<sup>20</sup> See chapter 3, par 2.1.

<sup>21</sup> Insolvency Rules 2016 rule 7.10(1). Service on the company must take place at least 14 days before the date set for hearing: Fletcher *Law of Insolvency* 21-034, 663.

<sup>22</sup> Fletcher *Law of Insolvency* 21-034, 662.

<sup>23</sup> Insolvency Rules 2016 rule 7.10(3). Rule 7.5 sets out the contents of the petition and rule 7.7 provides that the petition be filed with the court.

<sup>24</sup> *London, Hamburg and Continental Exchange Bank, Re; sub nom. Emmerson's Case* (1865-1866) LR 1 Ch App 433 CA 231; Fletcher *Law of Insolvency* 21-036, 664.

<sup>25</sup> Insolvency Rules 2016 rule 7.11. A petitioner must comply with such request within two business days.

individually or via employees' representatives. If employees are creditors of the company due to money owing to them in the form of unpaid salary or wages, they are entitled to request a copy of the petition. The practice of not informing employees specifically about the commencement of what might develop into a winding-up procedure is unacceptable. Because all employment contracts are automatically terminated once the liquidation order is made, the advertisement of the petition does not affect the position of the employees. This may be the reason why an employee does not have a direct notification rights. Employees in South Africa have direct rights to receive information regarding the liquidation process.<sup>26</sup>

A creditor or contributory who intends to appear at the hearing of the petition has the right to deliver a notice of intention to appear to the petitioner.<sup>27</sup> No mention is made of a similar right on the part of an employee.

Once the court has made a winding-up order, the court must deliver the notice to the official receiver as soon as possible.<sup>28</sup> The official receiver becomes the liquidator of the company on the making of the winding-up order.<sup>29</sup> As soon as possible after the order was made the court must deliver two copies thereof to the official receiver.<sup>30</sup> The official receiver must deliver one of the copies to the company.<sup>31</sup> No mention is made of specific people who are entitled to such notice. Only broad reference is made to the "company." If one considers the unfair position that employees will face when the petition is granted, namely, that their employment contracts will be terminated, it is important to notify them as soon as the petition for liquidation is served to enable them to make informed decisions in time. The official receiver must further gazette the notice of the winding-up order and the notice of the order may be advertised as the official receiver feels fit.<sup>32</sup> The notice must also state that a winding-up order has been granted and the date on which it was granted.<sup>33</sup>

---

<sup>26</sup> See chapter 2 par 2.2.

<sup>27</sup> Insolvency Rules 2016 rule 7.14(1).

<sup>28</sup> Insolvency Rules 2016 rule 7.21.

<sup>29</sup> S 136(2) of the Insolvency Act 1986; Fletcher *Law of Insolvency* 22-002, 675.

<sup>30</sup> Insolvency Rules 2016 rule 7.22(1).

<sup>31</sup> Insolvency Rules 2016 rule 7.22(2)(a).

<sup>32</sup> Insolvency Rules 2016 rule 7.22(4).

<sup>33</sup> Insolvency Rules 2016 rule 7.22(5).

If employees are creditors of the company due to money owing to them in the form of unpaid salary or wages, they are entitled to receive progress reports from the liquidator regarding the liquidation.<sup>34</sup> Creditors and members are afforded the right to request further information in winding-up.<sup>35</sup> No direct mention is made of employees.

## 2.3 Effect of liquidation on employment contracts

The liquidator has an option to transfer or sell the business as a going concern during liquidation. The position relating to employment contracts is discussed first and then the treatment of employment contracts during a transfer or sale of the business.<sup>36</sup>

### 2.3.1 Effect of liquidation on employment contracts

Employment contracts are not automatically terminated when a company enters voluntary winding-up.<sup>37</sup> The liquidator continues the business for purposes of winding-up and when the business is concluded the employment contracts will be terminated.<sup>38</sup>

In the event of an employer's compulsory liquidation in England, all employment contracts are automatically terminated from the date of publication of the winding-up order.<sup>39</sup> This is because liquidation is regarded as a repudiation of employment contracts.<sup>40</sup>

If a company is liquidated by the court, the liquidator is regarded as an officer of the

---

<sup>34</sup> This corresponds with the position of employees in Australia where they also enjoy limited rights in this regard and only in their capacities as creditors of the company; see chapter 3 para 3.2.2.

<sup>35</sup> Insolvency Rules 2016 rule 18.9. Creditors and members also have this right in case of administration proceedings.

<sup>36</sup> Par 2.3.2.

<sup>37</sup> *Midland Counties District Bank Ltd v Attwood* [1905] 1 Ch 357; *Gerard v Worth of Paris* [1936] 2 All ER 905; *Pollard Corporate Insolvency* 76.

<sup>38</sup> S 87 of the Insolvency Act 1986 and Schedule 4 par 5; *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592 (CA) 606; *Pollard Corporate Insolvency* 77.

<sup>39</sup> *Re Foster Clark Ltd's Indenture Trusts, Loveland v Horscroft* [1966] 1 WLR 125; *Re General Rolling Stock Co* (1886) 33 Ch 366; *Commercial Finance Co Ltd v Ramsingh-Mahabir* (1994) 1 WLR 1297; *Fletcher Law of Insolvency* 22-005, 677. This position is in direct contrast with the position in South Africa where employment contracts are firstly suspended for 45 days and then terminated; see chapter 2 par 2.5. In Australia the granting of the liquidation order also serves as dismissal notice to employees and therefore the position in Australia in liquidation resembles the one in England; see chapter 3 par 2.5.

<sup>40</sup> *Wood International Insolvency* 16-032.

court.<sup>41</sup> As such, a liquidator has a duty towards all stakeholders of the company to act fairly.<sup>42</sup> The liquidator's first aim in liquidation is to look at the interests of the creditors and to ensure that the right balance is struck between the sometimes conflicting interests of the company itself, the directors, shareholders, creditors and employees.<sup>43</sup> The publication of the winding-up order has the effect that the employment contracts are terminated.<sup>44</sup> The publication of the order serves as notice of discharge of the employment contracts.<sup>45</sup>

Therefore, the question whether the liquidator will keep the employees employed or not is an important one. On the one hand, if the liquidator decides to continue with the business and to keep them (or some of them) employed, it will benefit the company.<sup>46</sup> On the other hand, additional liability will follow as it is trite that in the event of an insolvent liquidation money to pay claims is a scarce commodity and any additional liability needs to be restricted.

Where employment contracts are terminated automatically, the company is relieved from liability for remuneration and other payments that may become due and payable to employees during insolvency.

If the liquidator decides to adopt or continue with employment contracts, the new debts will be paid out as expenses of liquidation.<sup>47</sup>

Employees whose employment contracts have been terminated, will, apart from their preferent claims for arrear salary and other monies,<sup>48</sup> only have an unsecured concurrent claim for breach of contract against the insolvent estate.

---

<sup>41</sup> S 160 of the Insolvency Act 1986; Insolvency Rules 2016 rules 7.76, 7.79 and 7.86; Fletcher *Law of Insolvency* 22-078, 711; Pollard 1995 *ILJ* 142. In a voluntary winding-up a liquidator is not an officer of the court. Fletcher *Law of Insolvency* 19-037, 625.

<sup>42</sup> In *Ex Parte James* (1874) Ch App Cas 609 the court confirmed this duty. Because a liquidator is also an officer of the court the same can be said about him.

<sup>43</sup> Pollard (1995) *ILJ* 141.

<sup>44</sup> *Re Oriental Bank Corporation* (1886) 32 Ch 366; *Measures Bros Ltd v Measures* [1910] 2 Ch 248; *Fowler v Commercial Timber Co* [1930] 2 KB 1; see also Villiers 1999 *CL* 224.

<sup>45</sup> Villiers 1999 *CL* 224.

<sup>46</sup> Insolvency Act 1986 Schedule 4 Part II para 5 gives the liquidator the right to continue with the business of the company; *Re English Joint Stock Bank, ex Parte Harding* (1967) 3 Eq 341; Pollard *Corporate Insolvency* 76; Fletcher *Law of Insolvency* 22-082, 714.

<sup>47</sup> *Re Leyland DAF Ltd* [1995] 2 WLR 312 at 323; see also Villiers 1999 *CL* 224.

<sup>48</sup> These claims are discussed in par 2.6.

### 2.3.2 Effect of transfer or sale of the business as a going concern on an employment contract

One of the options available in insolvency proceedings is to transfer the business as a going concern.<sup>49</sup> This makes the Transfer of Undertakings (Protection of Employment) Regulations of 1981 applicable. The Regulations were used to put the European Union's Acquired Rights Directive<sup>50</sup> into effect. The Directive of 2001 addressed the transfer of insolvent businesses.<sup>51</sup>

The main objective of the Regulations is to protect employees and their employment contracts when a business or a part of it is transferred to a new owner. The applicability of these Regulations is dependent on the type of insolvency proceeding. A distinction is made between "terminal" and "non-terminal" insolvency processes. "Non-terminal" processes include administration and voluntary arrangements. "Terminal" insolvency proceedings include bankruptcy and liquidation.<sup>52</sup> In the latter case regulation 8(7) provides that the normal provisions of the Regulations may be relaxed or ignored. For regulation 8(7) to apply in liquidation the transfer must legally be "under the supervision of an insolvency practitioner".<sup>53</sup> Briefly: in a members' voluntary winding-up the employees of the company are protected by the Regulations.<sup>54</sup> During a compulsory liquidation and a creditors' voluntary winding-up, employees are not transferred to a new owner and the Regulations therefore are not applicable.<sup>55</sup> The timing of the transfer affects the applicability of regulation 8(7). When a company is in financial difficulty and considers to be liquidated and the business of the company is transferred before the liquidation process commences, it will be seen as a transfer in solvent circumstances. The Regulations therefore will not apply to the transfer and the employees will have claims for unpaid salary and other moneys against the company.

---

<sup>49</sup> Although various options exist as to how such a transfer can be done, the focus is on the effect of the employment contract in such an instance and not on the different possibilities as to how to achieve the sale of the business as a going concern; see Pollard 1996 *ILJ* 191 for a discussion of the various ways in which such a transfer can be effected.

<sup>50</sup> *Acquired Rights Directive*. The amendments to the Acquired Rights Directive in 1998 were then replaced by Directive 2001/23/EC which became operational on 12 March 2001.

<sup>51</sup> Joubert, Van Eck and Burdette 2011 *IJCLIR* 68.

<sup>52</sup> <https://www.businessrescueexpert.co.uk/tupe-regulations-in-insolvency> 2 (Date of use: 30 January 2018).

<sup>53</sup> *Ward Brothers (Malton) Ltd v Middleton* UKEAT 0249/13 and *Secretary of State for Trade and Industry v Slater* [2007] IRLR 928.

<sup>54</sup> <https://www.nidirect.gov.uk> (Date of use: 30 January 2018).

<sup>55</sup> <https://www.nidirect.gov.uk> (Date of use: 30 January 2018).

When the transfer takes place after liquidation has commenced it will be deemed to have taken place under the supervision of the insolvency practitioner and the Regulations will not apply.<sup>56</sup>

The general legal principle applicable when the Regulations apply is that all liabilities of the insolvent company with regard to its employees will automatically transfer to the purchaser.<sup>57</sup> This means that employees will retain all rights in terms of their employment contracts as originally agreed to by the now insolvent company and the employees.<sup>58</sup> Their employment contracts therefore will continue as if nothing happened. In the 2015 Employment Appeal Tribunal case of *Ferreira da Silva v Estado Português*,<sup>59</sup> the tribunal ruled that as long as an entity retains its original identity as before the transfer, the transfer is regarded as a relevant transfer and the Transfer of Undertakings (Protection of Employment) Regulations will apply. In this case a subsidiary company was wound up and the majority shareholder took over its activities.

At common law an employment contract will terminate when it is transferred to a new entity.<sup>60</sup> The directive brought about three levels of protection to ensure that the interests of employees are looked after when a transfer of business occurs.<sup>61</sup> Firstly, all employment contracts are transferred from the old employer to the new employer.<sup>62</sup> Secondly, employees must be protected against dismissal by both the old and new employer,<sup>63</sup> and thirdly, both the old and the new employer must consult with representatives of the affected employees before such transfer occurs and inform them of the date of the planned transfer, the reasons for such transfer and the implications of the transfer.<sup>64</sup> Because the levels of protection are applicable to solvent companies there was concern as to their application to insolvent companies. The 2001 Directive provided that the first two levels were not applicable to companies in

---

<sup>56</sup> TUPE 2001 Regulation 5; <https://www.businessrescueexpert.co.uk/tupe-regulations-in-insolvency> 3 (Date of use: 30 January 2018).

<sup>57</sup> TUPE 2001 Regulation 5.

<sup>58</sup> <https://www.businessrescueexpert.co.uk/tupe-regulations-in-insolvency> 1 (Date of use: 30 January 2018).

<sup>59</sup> [2015] ECJ C 160/14 CJEU.

<sup>60</sup> Lightman and Moss *Administrators and Receivers* 461. This is based on a principle of the law of contract that one party to a contract cannot be substituted with another without reaching consensus on the matter.

<sup>61</sup> Joubert, Van Eck and Burdette 2011 *IJCLLIR* 68.

<sup>62</sup> Article 3(1) of the 2001 Directive.

<sup>63</sup> Article 4 of the 2001 Directive.

<sup>64</sup> Article 7 of the 2001 Directive; see also Joubert, Van Eck and Burdette 2011 *IJCLLIR* 68.

liquidation, unless member countries provided otherwise.<sup>65</sup> It must be borne in mind that member states are free to apply provisions and laws that will have a better result for employees.<sup>66</sup>

The new Regulations on the Transfer of Undertakings (Protection of Employment) came into force in 2006 and completely replaced the 2001 Regulations.<sup>67</sup>

## **2.4 Employee's right to participate in consultations during winding-up**

Employees in England have no direct role to play as employees in consultations during winding-up because their employment contracts are terminated once the liquidation order is granted.<sup>68</sup> Although employment contracts in South Africa are not immediately terminated when a liquidation order is issued, employees in South Africa also have no direct role to play in consultations during liquidation.<sup>69</sup>

## **2.5 Employee's right to be present at a meeting and vote during liquidation**

Because employment contracts are terminated once the liquidation order is granted employees do not have a right to be present at meetings and vote during liquidation proceedings.

This position in England corresponds with the *status quo* in both South Africa<sup>70</sup> and Australia<sup>71</sup> where employees do not have direct rights to be present at meetings and vote during liquidation proceedings, unless they do so in their capacity as creditors of the

---

<sup>65</sup> Article 5(1) of the 2001 Directive. If member countries should decide to comply with all three levels of protection, article 5(2)(a) provides that the old employer's debts arising from any employment contracts and payable before the transfer will not be taken over by the new employer.

<sup>66</sup> Article 7 of the 2001 Directive; see also Pollard 1996 *ILJ* 194.

<sup>67</sup> TUPE 2006. Although South Africa is not a member of the European Union, the EU's Directives have influenced South African policy makers. For examples of instances where South African labour legislation followed European Union social policy developments, see chapter 2 par 3.6.3.

<sup>68</sup> See par 2.3 for a detailed discussion on the effect of liquidation on employment contracts.

<sup>69</sup> See chapter 2 par 2.3. Australia sets new boundaries as far as the right of an employee to participate in consultations during winding-up is concerned. Notable progression was made in Australia when employees were given direct participation rights in liquidation in September 2017; see chapter 3 par 2.4.

<sup>70</sup> See chapter 2, par 2.5.

<sup>71</sup> See chapter 3, par 2.5.

company, which happens in exceptional circumstances.<sup>72</sup>

## 2.6 Ranking of employee claims during liquidation

When a company is liquidated an employee has two basic options to claim payment that has become due and payable to him. The first option is to claim certain debts from the Secretary of State via the Redundancy Payments Service.<sup>73</sup> Redundancy pay will be paid to the employee provided that the employer is insolvent.<sup>74</sup> Section 166(5) of the Employment Rights Act of 1996 provides that an employer is regarded as insolvent where it is a company and a winding-up order has been made.<sup>75</sup> The second option available to an employee of an insolvent employer is to seek payment relief via the insolvency proceedings.<sup>76</sup>

The National Insurance Fund of the United Kingdom is made up from contributions paid by employers and employees to fund state benefits. Its basic function is to pay social security benefits in respect of illness, unemployment, pension and so forth. The contributory component is paid by employers and employees on their earnings.<sup>77</sup> The Employment Rights Act of 1996 provides that the Secretary of State shall pay employees from the National Insurance Funds on application if their employer is insolvent.<sup>78</sup>

For purposes of section 182 of the Employment Rights Act 1996 the insolvency of an employer includes both liquidation and administration. The only burden of proof that needs to be satisfied before the Secretary of State shall instruct payment to employees from the National Insurance Fund is firstly that the employer is insolvent, secondly that the employment contract has been terminated and thirdly that the employee is entitled to payment of the debt.<sup>79</sup> Section 230 provides a definition of employee and, summarised, someone will qualify

---

<sup>72</sup> The taking of decisions by creditors during liquidation will only happen in exceptional cases and is not a general occurrence but rather seen as a "rarity." Fletcher *Law of Insolvency* 22-060, 704.

<sup>73</sup> Ss 166 and 184 of the Employment Rights Act 1996 require the State to make these payments from the National Insurance Fund through the Redundancy Payments Service which is part of the Insolvency Service. This is in accordance with EU Directive 2008/94/EC.

<sup>74</sup> House of Commons Library, Briefing Paper SN 00651, 9 June 2017 [www.parliament.uk/commons-library](http://www.parliament.uk/commons-library) (Date of use: 2 July 2017).

<sup>75</sup> S 166(7)(a) of the Employment Rights Act of 1996.

<sup>76</sup> See par 2.6.2.

<sup>77</sup> Seely *House of Commons Briefing Paper* 4.

<sup>78</sup> S 182 of the Employment Rights Act 1996.

<sup>79</sup> S 182 Employment Rights Act 1996 (c 18); see par 2.6.1 for payments provided for under the National Insurance fund, the limit on such payments and the time periods for which they can be claimed.



as an employee for purposes of the Employment Rights Act 1996 if he or she renders services to an employer in terms of an employment contract that was concluded expressly or impliedly.<sup>80</sup>

It is interesting to note that redundancy payments are provided for in the Employment Rights Act 1996 and not in the Insolvency Act 1986.

### 2.6.1 Payments provided for by the State

In the United Kingdom, the State provides for various payments to be made to employees of insolvent employers.<sup>81</sup> These payments are made by the Secretary of State from the National Insurance Fund and are arranged by the Redundancy Payments Service.<sup>82</sup> Although total payment by the government cannot be guaranteed, various claims can be made. The debts covered by the Redundancy Payment Service include<sup>83</sup> the following:<sup>84</sup>

#### 1. Statutory notice pay

An employee qualifies to claim statutory notice pay in the following three instances: if the employee worked his statutory notice period and during that time did not receive payment from the employer; if the employee was dismissed without notice by the employer; and if the employee did not work his full notice period. If any additional payment is received during the notice period, that amount will be deducted from the statutory notice pay. A weekly limit of £489 is applicable.

---

<sup>80</sup> *Mr R Neufeld v A & N Communications in Print Ltd – In Liquidation, Secretary of State for Trade and Industry* 2008 WL 833727 dealt with ss 182 and 230 and the guidelines to consider when determining whether one is working with an employee/employment relationship or not. Note that the same protection is afforded to employees during administration proceedings.

<sup>81</sup> This is a distinguishing factor that England shares with Australia. A state fund to stand in for unpaid employee claims put England and Australia in an immediate advantageous position when compared to the corresponding position in South Africa where no government safety net exists. This possibility of creating a possible other source to safeguard employee claims in liquidation is examined in chapter 5 and forms part of possible recommendations; see par 5.4.1.2. See chapter 3 par 2.6.3 for a discussion of the government safety net scheme in Australia and specifically the Fair Entitlements Guarantee Act of 2012.

<sup>82</sup> House of Commons Library, Briefing Paper SN 00651, 9 June 2017 [www.parliament.uk/commons-library](http://www.parliament.uk/commons-library) 4 (Date of use: 3 January 2018). Examples of excluded employees are employees of the Crown and Parliamentary staff.

<sup>83</sup> S 166 and 184 of the Employment Rights Act 1996, House of Commons Library, Briefing Paper SN 00651, 9 June 2017 [www.parliament.uk/commons-library](http://www.parliament.uk/commons-library) at 4 (Date of use: 2 July 2017).

<sup>84</sup> An employee qualifies to receive £489 per week for each claim according to the Employment Rights (Increase of Limits) Order 2017.

## 2. Redundancy pay<sup>85</sup>

An employee may claim redundancy pay if he was made redundant and has been employed for two years or longer or where the employee applies in writing to his employer or an employment tribunal within six months after the employment ended.

Employees with two years' continuous employment qualify for this payment. The redundancy payment is based on what employees earn per week.<sup>86</sup> There is a statutory maximum of £489 on the claim.<sup>87</sup>

Section 166(1) of the Employment Rights Act 1996 contains specific provisions regarding state-guaranteed redundancy payments. These payments are separate from the Employment Rights Act's regulation of other State payments. The rights conferred on an employee under section 166 are triggered not only if the employer is insolvent and an employee may also claim these benefits from the Redundancy Payment Service. This is possible where the employer refuses to pay the employee and the latter has tried everything to claim payment from the employer but without success. The requirements for this claim is that the employee has been dismissed due to redundancy and has worked for the employer for a uninterrupted period of two years.<sup>88</sup>

---

<sup>85</sup> House of Commons Library, Briefing Paper SN 00651, 9 June 2017 [www.parliament.uk/commons-library](http://www.parliament.uk/commons-library) at 5 (Date of use: 3 January 2018); <https://www.gov.uk/your-rights-if-your-employer-is-insolvent/claiming-money-owed-to-you> (Date of use: 3 January 2018).

<sup>86</sup> Only eight weeks of arrear pay is claimable.

<sup>87</sup> The calculation of the payment is quite detailed and is done as follows: a week's pay is multiplied by the number of years of employment, calculated backwards from the date of dismissal up to a maximum of 20 years. Furthermore, the multiple for any year of employment is determined by the employee's age during that year. For example: 0,5 times a week's pay for each full year service in the event where the age of the employee during that year was less than 22; 1 time a week's pay for each full year service in the event where the age of the employee during that year was between 22 and 40; and 1,5 times a week's pay for each full year service in the event where the age of the employee during that year was 41 and above: House of Commons Library, Briefing Paper SN 00651, 9 June 2017 [www.parliament.uk/commons-library](http://www.parliament.uk/commons-library) 4 (Date of use: 3 January 2018). A practical example using the above formula will result in the following calculation. Assume employee A started his employment with employer B at the age of 20. He worked for employer B his whole life and after 22 years of service, employer B's estate is liquidated. Using the formula the following will happen: £489 (maximum earnings allowed per week) x 0,5 x 2 (number of years in the bracket until age 22) = £489; plus £489 (maximum earnings allowed per week) x 1 x 19 (number of years in the bracket until age 40) = £9 291; plus £489 (maximum earnings allowed per week) x 1,5 x 2 (number of years in the bracket for 41 and above) = £1 467 equals £11 247 in total statutory redundancy payment.

<sup>88</sup> S 166(1) of the Employment Rights Act 1996 and see House of Commons Library, Briefing Paper SN 00651, 9 June 2017 [www.parliament.uk/commons-library](http://www.parliament.uk/commons-library) 6 (Date of use: 3 January 2018). S 166(1) requires the employee to have "taken reasonable steps, other than legal proceedings, to recover payment". The requirement included in s 166(1) of "other legal proceedings" is qualified by s 166(4) and the result is that a judgment obtained from an employment tribunal qualifies as a reasonable step that the employee could have taken.

---

3. Holiday pay

A weekly limit of £489 for a maximum of six weeks is applicable.<sup>89</sup>

4. Unpaid pension contributions; and

5. A basic award for unfair dismissal<sup>90</sup>

This involves payment of a basic award made by an employment tribunal for compensation in case of unfair dismissal.<sup>91</sup> In the event of unfair dismissal, for instance where the employment contract was terminated without notice, an employment tribunal has the right to make a basic award based on a fixed formula, taking into account the years that the employee worked for the employer, his age and the weekly pay received as well as a compensatory award which actually compensates the employee for actual money lost.

The limit on these claims is subject to an increase or decrease in the Retail Price Index which is reviewed annually in September.<sup>92</sup> When the Retail Price Index for a year is higher or lower than that of a previous September, the Secretary of State is required to change the limits of the claims by the same percentage that the Retail Price Index increased or decreased.

It is submitted that this mechanism to stay current with an objective measure is an efficient way to ensure that claims correspond to what is going on in the economy. The fact that this method is based in labour legislation is definitely a workable recommendation for South Africa that is discussed later<sup>93</sup> as it has already received harsh criticism earlier.<sup>94</sup>

Her Majesty's Revenue and Customs is statutorily liable for payments to an employee whose employer is unable to make such payments itself due to insolvency. These payments

---

<sup>89</sup> This claim may also include holidays taken but not paid for. Holiday carried over from previous years may also fall in this category provided that the employment contract provided for it. House of Commons Library, Briefing Paper SN 00651, 9 June 2017 [www.parliament.uk/commons-library](http://www.parliament.uk/commons-library) at 4 (Date of use: 3 January 2018).

<sup>90</sup> According to the Employment Rights (Increase of Limits) Order 2017 (SI 2017/175) limits for compensation increased from 6 April 2017. Where the dismissal took place on or after 6 April 2017 the compensatory award will be £80 541. The maximum statutory redundancy payment and basic award will be £14 670. The Secretary of State has the power to increase limits in terms of s 34 of the Employment Relations Act 1999 (c 26).

<sup>91</sup> House of Commons Library, Briefing Paper SN 00651, 9 June 2017 [www.parliament.uk/commons-library](http://www.parliament.uk/commons-library) at 4 (Date of use: 3 January 2018).

<sup>92</sup> According to the Explanatory Note of the Employment Rights (Increase or decrease) Order 2017.

<sup>93</sup> See chapter 5 par 3.1.2.

<sup>94</sup> See chapter 2 par 2.7.

include maternity pay;<sup>95</sup> paternity pay and adoption pay;<sup>96</sup> and sick pay.<sup>97</sup>

The Pension Funds Act 2004<sup>98</sup> may protect pension schemes by means of the Pension Protection Fund. Section 124 of the Pension Schemes Act 1993<sup>99</sup> provides for the trustee of an occupational pension scheme or personal scheme to apply to the Secretary of State to pay unpaid pension contributions into the scheme on behalf of an employee during the twelve months prior to the employer's insolvency.<sup>100</sup>

## 2.6.2 Payments provided for by the insolvent estate

Claims that are not covered by the Redundancy Payments Service will form part of claims against the insolvent estate of the employer. Schedule 6 of the Insolvency Act 1986 creates a statutory preference for such claims. This means that although the debt is unsecured it is given statutory priority and paid from the proceeds of the insolvent estate before other unsecured creditors. Although there is no guarantee that these statutory preferent creditors' claims will be paid in full they at least are not at the back of the queue for payment. South Africa also gives statutory priority to employee claims.<sup>101</sup>

Schedule 6 of the Insolvency Act 1986 contains the priority order in which the liquidator must pay out any money realised after selling the assets of the insolvent company or collecting outstanding debts on behalf of it. Only the priorities affecting employees of the insolvent company are discussed.

---

<sup>95</sup> Statutory Maternity Pay (General) Regulations 1986 (SI 1986/1960), regulations 7(3), 7(4) and 30. See also House of Commons Library, Briefing Paper SN 00651, 9 June 2017 [www.parliament.uk/commons-library](http://www.parliament.uk/commons-library) at 7 (Date of use: 3 January 2018).

<sup>96</sup> Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002 (SI 2002/2822). House of Commons Library, Briefing Paper SN 00651, 9 June 2017 [www.parliament.uk/commons-library](http://www.parliament.uk/commons-library) 7 (Date of use: 3 January 2018).

<sup>97</sup> Statutory Sick Pay (General) Regulations 1982 (SI 1982/894) regulation 9B. House of Commons Library, Briefing Paper SN 00651, 9 June 2017 [www.parliament.uk/commons-library](http://www.parliament.uk/commons-library) at 7 (Date of use: 3 January 2017).

<sup>98</sup> Pension Funds Act 2004 (Ch 35).

<sup>99</sup> Pension Schemes Act (Ch 48).

<sup>100</sup> Such liabilities, subject to the limitations and capped amounts as provided for in ss 124–125 of the Pension Schemes Act 1993 must be paid by the Secretary of State. In the event of non-payment or insufficient payment by the Secretary of State, a complaint can be laid with an employment tribunal. House of Commons Library, Briefing Paper SN 00651, 9 June 2017 [www.parliament.uk/commons-library](http://www.parliament.uk/commons-library) 7 (Date of use: 3 January 2018); see also *Bloom v Pensions Regulator* 2011 WL 4832401 for a general discussion of payments related to pensions and pension contributions.

<sup>101</sup> Chapter 2 par 2.6.2.

Employees are listed as the third priority under Schedule 6 of the Insolvency Act 1986. The only two categories of claims ranking higher than employee claims are the claims of secured creditors in the form of a fixed charge<sup>102</sup> and liquidation costs.

The preferential debts regarding employees that are listed in Schedule 6 of the Insolvency Act 1986 are divided into three broad categories:

- (a) An amount payable as remuneration.<sup>103</sup> Such amounts include wages and salary; a guarantee payment as regulated by the Employment Rights Act 1996, Part III; payment owed for time off work, either in the case of ante-natal care, to perform union duties or time to look for work or training in the event of redundancy; remuneration on suspension on medical or maternity grounds; a protective award made by an employment tribunal where the employer did not undertake a proper redundancy consultation and remuneration payable to the employee in respect of absence from work, either caused by holiday or sickness.
- (b) An amount payable for vacation leave. This amount accrued as holiday remuneration does not have a limit.
- (c) An amount ordered to be paid to the employee in terms of the Reserve Forces (Safeguard of Employment) Act 1985.

Debts payable as remuneration is capped at a maximum of four months immediately preceding the insolvency and cannot exceed £800. If an employee has an excess claim for a period of longer than the four months or of more than the £800, he may claim the amount as a normal unsecured creditor.

---

<sup>102</sup> A debt secured by a mortgage bond or a lien over a specific asset.

<sup>103</sup> Amounts payable as remuneration include wages and salary; a guarantee payment as regulated by the Employment Rights Act 1996, Part III; payment owed for time off work, either in the case of ante-natal care, to perform union duties or time to look for work or training in the event of redundancy; remuneration on suspension on medical or maternity grounds; a protective award made by an employment tribunal where the employer did not undertake a proper redundancy consultation; and remuneration payable to the employee in respect of absence from work, either caused by holiday or sickness.

In *Day v Haine*<sup>104</sup> a dispute arose regarding the provability of a protective award<sup>105</sup> in liquidation proceedings. The judge *a quo* found that a protective award does not fall within the ambit of remuneration.<sup>106</sup> The Secretary of State submitted that it falls well within the meaning of rule 13.12(1)(b).<sup>107</sup> The judge held that a protective award that was made after the company went into liquidation falls outside the rule and therefore is not provable in liquidation. On appeal it was held that when interpreting the rule and taking Directive 98/59 into account<sup>108</sup> such protective awards were contingent liabilities of the insolvent company and as such provable in liquidation. This approach was confirmed in *Bloom v Pensions Regulator*.<sup>109</sup> It was unequivocally stated by Lloyd LJ that “if a liability of such company arises during the administration, and if winding up follows later, that liability can be the subject of proof in the liquidation”.<sup>110</sup>

Because the Insolvency Act 1986 regards employees as preferential creditors in respect of unpaid wages owing to them,<sup>111</sup> the insolvent estate is liable for a maximum of four months’ unpaid salaries with a limit of £800.<sup>112</sup> The insolvent estate is also liable for a preferential payment of the total amount of unpaid holiday pay.

## 2.7 Evaluation of employee rights in liquidation

It is evident and not really surprising from the discussion of the various rights that employees may have when a company is liquidated, that the two basic rights, namely, the right to receive payment that is unpaid and possible claims due to the termination of the employment contract, are the only rights that really receive attention during a company’s liquidation in

---

<sup>104</sup> [2008] EWCA Civ 626; [2008] BCC 845 (CA(Civ Div)); Sealy and Milman *Annotated Guide* 7.

<sup>105</sup> A protective award is an award given to an employee where the employer failed to consult on redundancies pursuant to [s 189 of the Trade Union and Labour Relations \(Consolidation\) Act 1992](#).

<sup>106</sup> Insolvency Rules 1986 Rule 12.3 and rule 13.12.

<sup>107</sup> Of the Insolvency Rules 1986.

<sup>108</sup> Insolvency Rules 1986 rule 13.12(1)(b). Directive 98/59 provides that protective awards may be made as long as there is a judicial or administrative procedure for the enforcement of the obligation. It basically provides a platform to ensure that these type of awards are made only when they can be enforced. What is the use of having a remedy that cannot be used in the liquidation of a company?

<sup>109</sup> 2011 WL 4832401 [23].

<sup>110</sup> *Bloom v Pensions Regulator* 2011 WL 4832401 [23].

<sup>111</sup> S 386 of the Insolvency Act 1986 (as amended by s 251 of the Enterprise Act 2002) contains categories of preferential creditors. Some of these categories include contributions made to occupational pension schemes and remuneration and accrued holiday pay of employees.

<sup>112</sup> S 182 of the Employment Rights Act 1996.

England. Apart from the fact that employees have different avenues to claim from, for instance the State and the insolvent employer, they do not really have a role to play if the company is liquidated.

One of the significant and distinguishing features of the position in the United Kingdom is that employment contracts are automatically terminated when a company enters liquidation.<sup>113</sup> Although employees may institute a claim for unlawful dismissal based on breach of contract, they do not have rights during the liquidation process.

England takes the lead over South Africa when the different avenues for claiming unpaid remuneration in the event of liquidation are examined. The following factors distinguish the position regarding employee priorities in England from the position in South Africa: Firstly, the State-guaranteed payments create a level of certainty for employees in England.<sup>114</sup> There is no such State guarantee in South Africa. Secondly, the fact that England uses an objective measure, namely, the Retail Price Index to provide for changes in maximum amounts claimable which is reviewed on a yearly basis, sets England in a position which remains relevant to the economy and inflation.<sup>115</sup>

### **3 EMPLOYEE RIGHTS IN ADMINISTRATION**

The Cork Report laid a solid foundation with regard to the importance of a rescue regime and the various interests that need to be acknowledged when a company is struggling financially. The primary aim that was specifically directed at rescue acknowledged that insolvency and its outcome “vitality” affected not only the insolvent company and its creditors, but also society in a broader sense.<sup>116</sup> It therefore was important to ensure that these “public interests” were also taken care of.<sup>117</sup>

---

<sup>113</sup> In South Africa the employment contracts are initially only suspended for 45 days. The liquidator then has the choice to continue with (some) employment contracts in which case they will continue until the company stops trading. If he decides not to continue with (some) employment contracts they will be terminated after the 45-day suspension period. See chapter 2 para 2.2.4. Australia has similar provisions in that the granting of the liquidation order serves as the notice of dismissal to terminate employment contracts. See chapter 3 par 2.5.

<sup>114</sup> The same level of certainty is created in Australia by the Fair Entitlements Guarantee Act of 2012 discussed in chapter 3 par 2.6.3.

<sup>115</sup> Both reasons are considered as recommendations in chapter 5 par 3.1.2.

<sup>116</sup> *Cork Report* par 198(i) and 198(j); Hunter 1999 *CLJ* 434.

<sup>117</sup> *Cork Report* par 198(i) and 198(j); Hunter 1999 *CLJ* 434.

The reference to other stakeholders and the recognition that their interests are impacted upon by the company and the outcome of liquidation, laid a foundation that seeks to safeguard the interests of, amongst other groups, the employees of a company.

Another aim of a good, modern insolvency law<sup>118</sup> identified by the Cork Committee is to establish alternatives to save companies that had the potential of contributing to the country's economy.<sup>119</sup>

The Cork Report emphasised that a rescue culture was one of the objectives of the United Kingdom's insolvency law reform because business failure had widespread consequences for many stakeholders, including employees.<sup>120</sup>

The Cork Committee referred to the social and economic importance of rescuing a company or business by stating:

“We believe that a concern for the livelihood and well-being of those dependent upon an enterprise, which may well be the lifeblood of a whole town or even a region, is a legitimate factor to which a modern law of insolvency must have regard.”<sup>121</sup>

Although the Cork Committee had such strong opinions regarding the preservation of the interests of employees during a company's rescue and the saving of jobs,<sup>122</sup> this is not included as one of the objectives of administration.<sup>123</sup>

The Insolvency Act of 1986 introduced the administration procedure and is said to have led to the creation of the concept of a “rescue culture” in England.<sup>124</sup>

Initially the Insolvency Act did not allow any distributions to creditors under administration. The argument that underpinned this rule was that should the administration not succeed and

---

<sup>118</sup> Hunter 1999 *CLJ* 434.

<sup>119</sup> *Cork Report* par 198(j); Sealy and Milman *Annotated Guide* 520.

<sup>120</sup> *Cork Report* par 198.

<sup>121</sup> *Cork Report* par 204.

<sup>122</sup> *Cork Report* par 203 and 204.

<sup>123</sup> Schedule B1 of the Insolvency Act 1986 par 3. This is similar to the situation in South Africa where the saving of jobs is not included in the purpose of business rescue: see chapter 2 par 2.3.

<sup>124</sup> Parr and Bennett 2005 // 156.



the company was subsequently liquidated, the available assets would then be realised and distributed among the creditors.<sup>125</sup> Clearly this created a problem in respect of employees as companies in administration could not make payments to employees even if they were successfully rescued. This position obviously needed to be reformed.

The necessary reform was brought about by the Enterprise Act 2002.<sup>126</sup> Its primary purpose was said to promote the already-recognised rescue culture.<sup>127</sup> The introduction of this Act has been referred to as a “radical reorganisation of corporate rescue procedures and creditor entitlements”.<sup>128</sup> One of the comments made regarding the introduction of the Enterprise Act 2002<sup>129</sup> was that it would encourage failed business owners “*to try again*”.<sup>130</sup>

In terms of this legislation, assets could be realised by administrators and distributions could also be made to employees and not only to creditors as the position was previously.<sup>131</sup>

Paragraph 3 of Schedule B1 of the Insolvency Act contains the purpose of administration. This paragraph contains four sub-sections which each prescribes how the administrator must perform his functions.

Paragraph 3(1) of Schedule B1 of the Insolvency Act provides that the administrator must perform his duties with one of three objectives in mind. The first objective is the rescue of the company as a whole.<sup>132</sup> This means that administration will have the effect that the company and all its constituents will return to a workable company once the administration is completed. The company as a whole with its business, shareholders, creditors and employees will continue to exist after the rescue procedure has been completed. The second objective is to achieve a better result for the group of creditors as a whole than would have

---

<sup>125</sup> *Bloom v Pensions Regulator* 2011 WL 4832401 [20].

<sup>126</sup> S 248 of the Enterprise Act of 2002 replaces Part II of the Insolvency Act 1986 with a new Part II. Schedule B1 of the Insolvency Act 1986 was inserted into the Insolvency Act 1986 by the Enterprise Act 2002 on 15 September 2003 in terms of s 248(1)(2). Together with the enactment of Schedule B1, the Insolvency (Amendment) Rules 2003 became effective on 15 September 2003 (SI 2003/1730). Schedule B1 applies administration as rescue procedure to England, Wales and Scotland. Fletcher *Law of Insolvency* 16-008, 487.

<sup>127</sup> Parr and Bennett 2005 II 166.

<sup>128</sup> Broc and Parry *Corporate Rescue* 150.

<sup>129</sup> Broc and Parry *Corporate Rescue* 151 footnote 25; comment made by Hewitt, the then Secretary of State for Trade and Industry who emphasised the need for reform of the rescue procedures.

<sup>130</sup> Broc and Parry *Corporate Rescue* 151 footnote 25; own emphasis.

<sup>131</sup> *Bloom v Pensions Regulator* 2011 WL 4832401 par 20.

<sup>132</sup> Par 3(1)(a).

been the case where the company was liquidated.<sup>133</sup> This means that the group of creditors will receive more in terms of money under administration than the dividend they would have received if the company was liquidated. The third objective is the selling of property to make a distribution to secured or preferred creditors of the company.<sup>134</sup>

Paragraph 3(2) obliges the administrator to perform his functions in the interests of the group of creditors of the company as a whole.

Paragraph 3(3) states that the administrator must perform his functions with the objective of rescuing the company as a going concern, unless it is not possible to achieve that result or if the administrator is convinced that the second objective would result in a better result for creditors.

Paragraph 3(4) clearly states that the administrator may attempt to achieve the third objective should he think that the first or second objective is not practicable and provided that he does not unnecessarily harm the interests of the group of creditors as a whole.

The administrator's primary objective therefore is to save the company as a whole. The objectives are referred to as a hierarchy.<sup>135</sup> If the administrator is not capable of saving the company as a whole, or where the second or third objective provides a better alternative to the group of creditors as a whole, the administrator may consider it.<sup>136</sup>

From the exposition and the wording used in paragraph 3 it is clear that the order of objectives is very important. Fletcher correctly submits that the structure of paragraph 3 and the way the objectives are described are "complex".<sup>137</sup> The paragraph starts off with the way in which the administrator must perform his functions with three possible objectives in mind. It becomes clear very quickly when reading paragraph 3 that the main theme of administration in England resolves around the interests of the group of creditors as a whole. Fletcher remarked that the traditional English tradition in insolvency law to elevate the interests of

---

<sup>133</sup> Par 3(1)(b).

<sup>134</sup> Par 3(1)(c).

<sup>135</sup> Fletcher *Law of Insolvency* 16-023, 497.

<sup>136</sup> Par 3(3) and (4); see also Sealy and Milman *Annotated Guide* 522.

<sup>137</sup> Fletcher *Law of Insolvency* 16-023, 497.

creditors is perpetuated by the emphasis on their interests when looking at paragraph 3.<sup>138</sup> Unfortunately this emphasis sets the scene for the way forward regarding the administration process.

When one compares the objectives of South Africa's business rescue procedure and those of the United Kingdom's administration, many similarities can be found both in purpose and procedure. Both jurisdictions regard the rescue of the company as a priority although in South Africa the possibility of providing a better dividend for creditors under rescue than would have been the situation under insolvency is included in its primary object<sup>139</sup> and in the United Kingdom it is regarded as a secondary object. The United Kingdom adds a third objective that is not present in the South African counterpart.<sup>140</sup>

### 3.1 Commencement of administration

In England, administration commences with the appointment of an administrator to manage the company, its business and property.<sup>141</sup> A company therefore enters administration when the appointment of the administrator takes effect<sup>142</sup> and remains in administration for as long as the appointment of the administrator is valid.<sup>143</sup>

An administrator is an officer of the court.<sup>144</sup> He or she may be appointed in one of three ways,<sup>145</sup> namely, by an administration order granted by the court;<sup>146</sup> by the company or the directors of the company;<sup>147</sup> and by the holder of a floating charge.<sup>148</sup>

The first two methods resemble the dual gateway found in South African law for

---

<sup>138</sup> Fletcher *Law of Insolvency* 16-024, 498.

<sup>139</sup> Insolvency Act of 1986 Schedule B1 par 3(1) and the Companies Act 71 of 2008 s 128(1)(b).

<sup>140</sup> This third objective is contained in the UK Insolvency Act Schedule B1 par 3(1)(c). It states as objective: "realising property in order to make a distribution to one or more secured or preferential creditors". Insolvency Act of 1986 Schedule B1 par 3(4) states that the company is only allowed to pursue the third objective if it is not practicable to achieve the first two objectives and the creditors will not be harmed unreasonably.

<sup>141</sup> Par 1(1) of Schedule B1 of the Insolvency Act 1986.

<sup>142</sup> Par 1(2)(b) of Schedule B1 of the Insolvency Act 1986.

<sup>143</sup> Par 1(2)(a) of Schedule B1 of the Insolvency Act 1986.

<sup>144</sup> Par 5 of Schedule B1 of the Insolvency Act 1986; see also *Ex Parte James* (1874) LR 9 Ch App 609.

<sup>145</sup> Par 2 of Schedule B1 of the Insolvency Act 1986.

<sup>146</sup> Par 10 of Schedule B1 of the Insolvency Act 1986.

<sup>147</sup> Par 22 of Schedule B1 of the Insolvency Act 1986.

<sup>148</sup> Par 14 of Schedule B1 of the Insolvency Act 1986.

commencing business rescue proceedings.<sup>149</sup>

The compulsory procedure starts with an application for an administration order of a company made to court<sup>150</sup> by any one of the following applicants:<sup>151</sup>

- (a) the company;
- (b) the directors of the company;
- (c) one or more creditors of the company;
- (d) a designated officer who acquired the power to apply for administration; or
- (e) a combination of persons listed above.<sup>152</sup>

Administration as an out of court procedure is also commenced by certain parties who lodge application documents at court. These parties include the company itself,<sup>153</sup> the directors of the company<sup>154</sup> and a party with a floating charge against the company.<sup>155</sup> A party who intends to appoint an administrator must give at least five business days' written notice of such appointment to any person who is entitled to appoint an administrator of the company.<sup>156</sup> A person who gives such notice must file a notice with the court and a document containing a statutory declaration.<sup>157</sup> The declaration must state that the company is or is likely to become unable to pay its debts, that the company is not in liquidation and that the appointment is not prevented.<sup>158</sup>

If the administration follows as an out of court procedure, it is cheaper, quicker and less formal – making it a much more appropriate option for a company already struggling

---

<sup>149</sup> Chapter 6 of the Companies Act 2008. Chapter 2 par 3.2.

<sup>150</sup> Par 12(1) of Schedule B1 of the Insolvency Act 1986.

<sup>151</sup> Par 12(1)(a)–(e) of Schedule B1 of the Insolvency Act 1986.

<sup>152</sup> Further to the persons listed in par 12(1) of Schedule B1 of the Insolvency Act 1986, a liquidator of a company (par 38), the supervisor of a creditors' voluntary administration (par 12(5) and s 7(4)(b) as well as the Financial Services Authority (according to the Financial Services Management Act of 2000) may apply for such a court order to place the company in administration; see Sealy and Milman *Annotated Guide* 527.

<sup>153</sup> Par 22(1) of Schedule B1 of the Insolvency Act 1986.

<sup>154</sup> Par 22(2) of Schedule B1 of the Insolvency Act 1986.

<sup>155</sup> Par 14 of Schedule B1 of the Insolvency Act 1986.

<sup>156</sup> Par 26(1)(b) of Schedule B1 of the Insolvency Act 1986. Notice to other persons may also be necessary and must comply with the prescripts of Form 2.8B.

<sup>157</sup> Par 27(1) and 27(2) of Schedule B1 of the Insolvency Act 1986.

<sup>158</sup> Par 27(2) of Schedule B1 of the Insolvency Act 1986.

financially to try and improve its position.<sup>159</sup>

The court will make an order placing a company in administration if two requirements are met, namely, that the company is unable to pay its debts or is likely to become unable to pay its debts<sup>160</sup> and that an administration order is reasonably likely to achieve the objectives of administration.<sup>161</sup>

Unlike South Africa, no mention is made of a time period to be proved. The absence of a time period in paragraph 11(a) of Schedule B1 of the Insolvency Act 1986 is problematic and renders the burden of proof unsure. This is an obvious flaw in the English procedure. The South African procedure is much clearer and to be preferred as it requires proof of the company's inability to pay its debts in the "immediate ensuing six months".

No provision is made for an employee to commence compulsory administration proceedings.<sup>162</sup> This is in direct contrast to the position in South Africa where a single employee as affected person may apply to have a company placed in business rescue.<sup>163</sup>

It may be assumed that an employee who is owed money by the company for arrear salaries and wages could qualify as a creditor of the company and by implication be able to apply to court have the company placed in administration.<sup>164</sup>

### **3.2 Employee's right to be notified and informed of administration proceedings**

An administrator must send out notices of his appointment to the company<sup>165</sup> and publish a

---

<sup>159</sup> Sealy and Milman *Annotated Guide* 525. Fletcher *Law of Insolvency* 16-040, 509 remarks that although the costs are less in a voluntary commencement procedure, there are still costs involved.

<sup>160</sup> Par 11(a) of Schedule B1 of the Insolvency Act 1986. S 128(1)(f) of the Companies 71 of 2008 specifically provides that a company will be regarded as financially distressed if it appears reasonably unlikely that the company will be able to pay all of its debts within the "immediate ensuing six months".

<sup>161</sup> Par 11(b) of Schedule B1 of the Insolvency Act 1986; the objectives as set out in par 3 of Schedule B1 of the Insolvency Act 1986.

<sup>162</sup> Par 12(1) provides that "only" the persons listed in the paragraph may make the application to court. These include the company, the directors, one or more creditors, a designated officer or a combination of the list of persons.

<sup>163</sup> See chapter 2 par 3.1.1 for a detailed discussion of this right. Not only is it afforded to them in legislation, but various cases have been reported where employees actually used this right.

<sup>164</sup> Par 12(4) provides for contingent and prospective creditors to be included in the category of creditors referred to in par 12(1)(c).

<sup>165</sup> Par 46(2)(a) of Schedule B1 of the Insolvency Act 1986.

notice of such appointment<sup>166</sup> as soon as possible. The administrator must as soon as possible obtain a list of creditors and send notices of his appointment to them.<sup>167</sup> Notices of his appointment must also be sent to so-called “prescribed” persons but employees are not included in this group.<sup>168</sup> The administrator therefore is under no obligation to notify the employees of the company of his appointment.

Employees in Australia enjoy this right only in their capacity as creditors of the company,<sup>169</sup> while South Africa almost goes to the other extreme as far as notification and information to employees are concerned.<sup>170</sup> Although I agree that employees have the right to be informed regarding a procedure that might affect the security of their jobs, it is my opinion that Chapter 6 of the Companies Act 71 of 2008 goes too far in ensuring that employees stay informed. By doing this, a burden is placed on the company and valuable time is spent by the business rescue practitioner to update information – time that could have been used to carry out his business rescue plan.<sup>171</sup>

### **3.3 Employee’s right to participate in consultations during administration**

The first role that employees have after the administrator has been appointed concerns the statement of the company’s affairs. The administrator may request one or more relevant persons to provide him with a statement of the company’s affairs.<sup>172</sup> The term “relevant person” is defined and this is where the first direct reference to an employee is found.<sup>173</sup> This means that an employee has a direct right to provide the administrator with a statement of the

---

<sup>166</sup> Par 46(2)(b) of Schedule B1 of the Insolvency Act 1986.

<sup>167</sup> Par 46(3)(a) and (b).

<sup>168</sup> Par 46(5) of Schedule B1 of the Insolvency Act 1986. The prescribed persons according to rule 2.27(2) are any receiver or administrative receiver; the petitioner under any pending winding-up petition, and any provisional liquidator; any sheriff charged with execution of legal proceedings against the company; any person who has distrained against the company or its property; and the supervisor of any creditors’ voluntary administration.

<sup>169</sup> See chapter 3 par 3.2.2.

<sup>170</sup> See chapter 2 par 3.2.

<sup>171</sup> Recommendations are made in chapter 5 par 3.1.2 regarding methods for making information available to affected persons during business rescue that will not compromise the time of the business rescue practitioner.

<sup>172</sup> Par 47 of Schedule B1 of the Insolvency Act 1986. Par 47(2) sets out the particulars that must be contained in the statement of company affairs, which include information regarding the property, debts and liabilities of the company.

<sup>173</sup> Par 47(3) of Schedule B1 of the Insolvency Act 1986 defines “relevant person” as (a) a person who is or has been an officer of the company; (b) a person who was part of the formation of the company during the period of one year ending with the date on which the company enters administration; (c) an employee of the company during that period; and (d) a person who is or has been an officer or employee of the company during that year.

company's affairs.<sup>174</sup> The capacity of an employee is qualified as it is stated that the reference to employment is a reference to an employment contract or a contract of services.<sup>175</sup>

The administrator must prepare a statement containing his proposals and indicating how he will achieve the purpose of the administration.<sup>176</sup> These proposals are presented at the initial meeting of creditors which must be convened within 10 weeks from the day on which the company entered administration.<sup>177</sup>

The administrator must present a copy of the statement containing his proposals to the initial creditors' meeting.<sup>178</sup> The administrator's proposals may be approved without changes<sup>179</sup> or with changes consented to by the administrator.<sup>180</sup> Approval of such proposals takes place by majority in value of the creditors voting at the meeting.<sup>181</sup> Where no quorum was present and approval of the proposals could not be made, the administrator may approach the court for approval. Rule 2.33(5) deals with instances where proposals are deemed to be approved and it appears that if there is no objection to a proposal it will be deemed to be approved.<sup>182</sup>

The administrator's proposals may also be revised.<sup>183</sup> Paragraph 68(1)(b) gives the administrator a discretion that allows him to make non-substantial revisions to the proposals.<sup>184</sup> If the administrator wishes to revise substantial parts of the proposal, the same procedure as that in respect of the initial approval has to be followed.<sup>185</sup> If a revision of the

---

<sup>174</sup> Par 47(1) of Schedule B1 of the Insolvency Act 1986.

<sup>175</sup> Par 47(4) of Schedule B1 of the Insolvency Act 1986; see further in this regard Sealy and Milman *Annotated Guide* 550 who state that the use of "employee" in par 47(3) and (4) may include a wide definition of the term which could refer to professionals such as auditors or bankers of the company as well.

<sup>176</sup> Par 49 of Schedule B1 of the Insolvency Act 1986; see also rule 2.33(2) for further requirements regarding the contents of the proposal.

<sup>177</sup> Par 51 of Schedule B1 of the Insolvency Act 1986.

<sup>178</sup> Par 51(3) of Schedule B1 of the Insolvency Act 1986.

<sup>179</sup> Par 53(1)(a) of Schedule B1 of the Insolvency Act 1986.

<sup>180</sup> Par 53(1)(b) of Schedule B1 of the Insolvency Act 1986.

<sup>181</sup> Insolvency Rules 2016 Rule 15.34(1).

<sup>182</sup> Insolvency Rules 1986 of the Insolvency Act 1986. In *BTR (UK) Limited, Lavin v Swindell* [2012] EWHC 2398 (Ch) Cooke HHJ remarked that if there is no dispute regarding the administrator's proposals, neither the creditors nor the court need to approve them to enable the administrator to continue with its functions. The only proposal that does need actual approval by creditors or by the court is a proposal regarding the remuneration of the administrator. Rule 55(1) deals with the failure to obtain approval of proposals and Rule 55(2) regulates the court's discretionary powers in such a case.

<sup>183</sup> Par 54 of Schedule B1 of the Insolvency Act 1986.

<sup>184</sup> Fletcher *Law of Insolvency* 16-076, 535.

<sup>185</sup> Par 54 of Schedule B1 of the Insolvency Act 1986.

administrator's proposals becomes necessary, the administrator must call a creditors' meeting, send a statement of the proposed revisions with the notice of the meeting to all creditors, send a copy of the statement to each member of the company and present a copy of the statement at the creditors' meeting.<sup>186</sup>

The meeting has the power to approve the statement without any changes or with changes consented to by the administrator.<sup>187</sup> The creditors' meeting may approve the revised proposals with or without changes.<sup>188</sup>

Apart from an employee's right (and obligation) to provide the administrator with a statement of the company's affairs, no real participation rights are given to employees during administration in England. Employees in South Africa also play a limited role during the consultation in a business rescue proceeding.<sup>189</sup> In contrast, employees in Australia play an active role in committees of inspection which have influential power when it comes to monitoring, directing and advising the administrator during a company's voluntary administration.<sup>190</sup>

### **3.4 Employee's right to be present at meetings and vote during administration proceedings**

No specific mention is made of an employee's right to be present at meetings and to vote during administration proceedings. Only employees who qualify as creditors of the company will have the right to be present at meetings and to vote in their capacity as creditors.<sup>191</sup> The position in England and in Australia is very similar.

---

<sup>186</sup> Par 54(2) of Schedule B1 of the Insolvency Act 1986.

<sup>187</sup> Par 54(2)(d) and 54(5)(a) and (b) of Schedule B1 of the Insolvency Act 1986.

<sup>188</sup> Par 54(4) of Schedule B1 of the Insolvency Act 1986.

<sup>189</sup> See chapter 2 par 3.3

<sup>190</sup> See chapter 3 par 3.2.3. This improvement of the position in Australia was only recently introduced by the Insolvency Law Reform Act of 2016. Prior to that, employees in England and Australia were ignored when it came to the right to take part in consultations.

<sup>191</sup> Employees in South Africa do have a right to be present at meetings. They even have the right to make submissions before the creditors vote on the business rescue plan. These rights are extraordinary as they are conferred upon employees not in their capacity as creditors of the company, but in their capacity as employees. No equivalent right is to be found in either England or Australia. See chapter 2 par 3.5.



### 3.5 Effect of administration on employment contracts

#### 3.5.1 Role of the administrator

The effect of administration on employment contracts was a controversial issue in the United Kingdom that caused a lot of debate not only among writers but judges also struggled with the correct handling of the issue.<sup>192</sup>

One of the first important decisions that an administrator must make when a company enters administration is whether or not he will keep all the employees employed or only some of them.<sup>193</sup> An administrator has 14 days after his appointment to decide whether to adopt the employment contracts or to terminate them.<sup>194</sup> This means that the mere appointment of an administrator does not result in employment contracts being terminated automatically as in the case of liquidation. As the primary objective of administration is to keep the company in business as a going concern, it is a very important decision to make as the employees have the skills and experience to assist the company in achieving this aim.<sup>195</sup> However, the second important factor that the administrator must keep in mind are the costs of retaining employees as there will also be other running expenses.<sup>196</sup>

The administrator is an officer of the court.<sup>197</sup> The “statutory expenses” principle therefore is also imposed on the administrator.<sup>198</sup> This means that he or she is obliged to meet the claims that stem from services rendered by employees to the company while he or she holds office.<sup>199</sup> The liability referred to does not mean that the administrator is personally liable for

---

<sup>192</sup> This is discussed in par 3.5.2 and 3.5.3.

<sup>193</sup> See par 2.3 regarding the position of employment contracts in liquidation in England.

<sup>194</sup> Par 99(5)(a) of Schedule B1 of the Insolvency Act 1986.

<sup>195</sup> Pollard 2007 *II* 145.

<sup>196</sup> Pollard 1995 *ILJ* 141.

<sup>197</sup> Par 5 of Schedule B1 of the Insolvency Act 1986. This is a fact and it does not matter who appointed the administrator – he remains an officer of the court. See par 3.1 regarding the commencement of administration for the parties who may appoint the administrator. This position of officer of the court corresponds with the liquidator’s position in case of compulsory liquidation. See par 2.5 for reference to *ex Parte James* (1874) Ch App 609 which therefore will also be applicable to the administrator’s conduct.

<sup>198</sup> Pollard 1995 *ILJ* 142.

<sup>199</sup> Pollard 1995 *ILJ* 142.

these expenses.<sup>200</sup>

### 3.5.2 Development of the law

The Insolvency Act 1986 provided for administrators to be liable when they adopted employment contracts.<sup>201</sup> The appointment of an administrator does not normally affect the continuation of employment contracts unless the contracts stipulate differently.<sup>202</sup> Administrators had the option to adopt employment contracts within a grace period of 14 days. Such adoption made them liable for termination payments and continued wages payable to employees.<sup>203</sup> As a result, administrators started being creative in order to avoid the adoption of employment contracts. One such invention was the common practice whereby administrators sent disclaimer letters to employees with notice that their employment contracts would not be adopted despite the fact that they continued working for the company.<sup>204</sup> Although this practice was approved in *Re Specialised Mouldings*<sup>205</sup> it did not improve employees' status in administration.

This "universal practice" by administrators in an attempt to escape liability reached a point where the situation needed drastic attention. The eagerly awaited intervention came with the decision in *Powdrill v Watson*.<sup>206</sup> Briefly stated, the employees received a letter from the administrators that they would *inter alia* be paid during their employment but that the administrators would not adopt their employment contracts. This was the "universal practice" of administrators sending employees so-called disclaimer letters. The administrators, after failing to sell the business as a going concern, dismissed the employees without notice. The plaintiff argued that the administrators adopted his employment contract and claimed damages for breach of contract and on statutory grounds, including unfair dismissal. He

---

<sup>200</sup> S 19(6) of the Insolvency Act 1986 provides that debts payable in respect of contracts of employment adopted by him and services rendered while he was carrying out his functions as administrator will be paid out of any property of the company in priority to the administrator's remuneration. Lightman and Moss *Administrators and Receivers* 16-011, 454.

<sup>201</sup> S 19(4) and (5) of the Insolvency Act 1986.

<sup>202</sup> Fletcher *Law of Insolvency* 16-119, 556.

<sup>203</sup> S 19(6) of the Insolvency Act 1986.

<sup>204</sup> Villiers 1999 *CL* 225; also Pollard 1995 *ILJ* 143 who refers to this practice as being "universal"; Fletcher *Law of Insolvency* 16-121, 557.

<sup>205</sup> Unreported decision by Harman J of 13 February 1987; see also the critique against this decision in Villiers 1999 *CL* 225.

<sup>206</sup>[1994] 2 All ER 513; Rajak 1994-1995 *KCLJ* 184.

further alleged that his claim fell within the ambit of section 19(5) of the Insolvency Act 1986 because his employment contract had been adopted by the administrators.<sup>207</sup> The plaintiff succeeded at first instance and on appeal.

The administrators did not know how to deal with the claims of Mr Powdrill and the rest of the employees and turned to the court for direction. The employees were successful in the court *a quo* as well as in the Court of Appeal. The outcome and turning point of this case for employees and employment contracts in administration were that the so-called disclaimer letters were held to be ineffective.<sup>208</sup> Lord Browne-Wilkinson stated that employees remain employed by the company.<sup>209</sup>

He summarised the position regarding employment contracts in administration and emphasised the fact that the appointment of an administrator does not terminate employment contracts.<sup>210</sup> These contracts are only terminated if the administrator gives notice of termination or when the company fails to pay wages – this means that as long as the company remunerates employees for the services that they render to the company, they remain employed by the company.<sup>211</sup>

The crux of the matter was that by keeping the employees in their employment the administrator had indeed adopted their employment contracts and their claims were payable in priority to all other debts.<sup>212</sup> This decision created a threat to future administrations. Not only would administrators by retaining employees have to pay them in priority to the cost of administration which would have an impact on the claims of other creditors as well, but it was difficult to decide within the 14 days' grace period how to treat employment contracts.<sup>213</sup> A 14-

---

<sup>207</sup> Thus giving it so called “super priority”; see also Pollard 1995 *ILJ* 143.

<sup>208</sup> *Powdrill and another v Watson and another; Re Leyland DAF Ltd; Re Ferranti International plc* [1995] 2 All ER 65 86; see also Pollard (1995) 144; Lightman and Moss *Administrators and Receivers* 16-013, 455.

<sup>209</sup> *Powdrill v Watson* [1995] 2 AC 394 HL 440; also Pollard 2007 *II* 145.

<sup>210</sup> *Powdrill v Watson* [1995] 2 AC 394 HL 448; also Pollard 2007 *II* 146.

<sup>211</sup> *Powdrill v Watson* [1995] 2 AC 394 HL 448; also Pollard 2007 *II* 146.

<sup>212</sup> As the lower courts indicated, all liabilities in terms of the employment contract were given priority in accordance with s 19(5) on the basis that they were liabilities “incurred while the administrator was in office”. These claims, including claims for unfair dismissal or protective awards, were seen as statutory claims and therefore not included in the priority claims; Pollard 1995 *ILJ* 144; see also Lightman and Moss *Administrators and Receivers* 16-013, 455 who state that when a contract of employment is adopted, “it is adopted as a whole”. This was confirmed by Lord Browne-Wilkinson in *Powdrill v Watson* [1995] 2 AC 394 (HL) 448–450. This means that not only salaries will be paid in priority according to s 19(5) but all employee priorities except for statutory claims which include claims for unfair dismissal.

<sup>213</sup> Villiers 1999 *CL* 225.

day period to decide on the future of employment contracts is very short indeed. South Africa provides for a longer time in liquidation to enable the liquidator to decide on employment contracts and have consultations with employees and trade unions.<sup>214</sup> The 45-days grace seems more realistic than 14 days. In South Africa employment contracts continue to exist during business rescue and the only way in which the business rescue practitioner may change them is by following labour law procedures.<sup>215</sup> The position in South Africa is much more favourable for employees than the one in England. It also poses challenges which are addressed later.<sup>216</sup>

This turn of events threatened the rescue culture that was introduced in the United Kingdom by the Insolvency Act 1986. Because administrators feared the risk that they would have to pay employees according to the priorities in section 19(5) of the Insolvency Act 1986, the possibility arose that administrators would instead dismiss the employees within the 14-day period and not face liability in respect of employment contracts.<sup>217</sup> This is in direct contrast to the ideal of a rescue culture where jobs are retained and employees remain employed.

### 3.5.3 Legislative intervention

Something had to be done to the situation and Parliament passed the Insolvency Act 1994 in an effort to limit the scope of section 19 of the Insolvency Act 1986. This Act “remodelled” the provisions of section 19 and the way employment contracts are treated by administrators.<sup>218</sup> In terms of this Act so-called “adoption” of employee contracts by administrators would take place after 14 days of continued employment but the liability of the administrator for payments in terms of these contracts envisaged by section 19<sup>219</sup> would be limited.<sup>220</sup> To the extent that employment-related claims are regarded as “qualified liabilities” they will be paid out of

---

<sup>214</sup> A 45-day grace period is allowed in South Africa. See chapter 2 par 2.5.

<sup>215</sup> See chapter 2 par 3.6.

<sup>216</sup> See chapter 5.

<sup>217</sup> Pollard 1995 *ILJ* 144.

<sup>218</sup> Fletcher *Law of Insolvency* 16-129,561.

<sup>219</sup> See the discussion of s 19 above in par 4.3.5.2.

<sup>220</sup> S 19(6) of the Insolvency Act 1986 as amended by the 1994 Insolvency Act. The liability will be restricted to wages, salary and pension scheme contribution for services rendered after the adoption of the employment contract; see also Pollard 1995 *ILJ* 144.

property under control of the administrator<sup>221</sup> in priority to other costs.<sup>222</sup>

An employment contract is “adopted” for purposes of section 19 of the Insolvency Act 1986 if it continues for more than 14 days after the appointment of the administrator.<sup>223</sup> The conduct of the administrator therefore is crucial: if he continues to pay the employees 14 days after his appointment he is deemed to have adopted their contracts.<sup>224</sup>

However, the problems with administrators and employment contracts were not yet something of the past. Because the Insolvency Act 1994 only applied to employment contracts adopted on or after 15 March 1994 it was necessary to clarify the position regarding the adoption of employee contracts between 1986 and 1994.

#### 3.5.4 Solution and current position

In *Powdrill and another v Watson and another; Re Leyland DAF Ltd; Re Ferranti International plc*<sup>225</sup> the House of Lords ended the confusion by holding as follows:<sup>226</sup> firstly, employment contracts are deemed to be adopted if employees remain in continued employment for more than 14 days after the appointment of the administrator; secondly, an administrator cannot avoid this result by informing employees that he will not adopt their employment contracts; and thirdly, the consequence of adoption of employment contracts in administration is to give priority *only* to liabilities incurred by the administrator during his term of appointment.<sup>227</sup>

The position of employees’ employment contracts in administration can be summarised as follows: between 1986 and 1994 these contracts were not terminated automatically but could be adopted after the 14-day grace period. From 15 March 1994 until present employment contracts are not terminated automatically. They will be deemed to be adopted after 14 days if employees remain in continued employment after the appointment of the administrator.

---

<sup>221</sup> S 19(4) of the Insolvency Act 1986.

<sup>222</sup> S 19(5) of the Insolvency Act 1986.

<sup>223</sup> *Powdrill and another v Watson and another; Re Leyland DAF Ltd; Re Ferranti International plc* [1995] 2 All ER 65 86.

<sup>224</sup> Lightman and Moss *Administrators and Receivers* 16-013, 455. The 14-day period is the key. Nothing done by the administrator before the lapse of this period will have any effect; see Sealy and Milman *Annotated Guide* 69.

<sup>225</sup> [1995] 2 All ER 65.

<sup>226</sup> *Powdrill and another v Watson and another; Re Leyland DAF Ltd; Re Ferranti International plc* [1995] 2 All ER 65 86. Lord Browne-Wilkinson delivered the judgment with which all the other judges concurred.

<sup>227</sup> Own emphasis.

Despite the reform that took place and the improvement of the position regarding employment contracts during administration, England still lags far behind South Africa in this regard.<sup>228</sup>

### 3.5.5 Effect of a transfer or sale of a business as a going concern during administration

The so-called rescue of a company may take many forms. Apart from the objectives of administration contained in paragraph 3 of Schedule B1<sup>229</sup> it is submitted that if a business can be transferred to a new company, this may also be regarded as a rescue of the business. By doing so employees keep their jobs and expertise continues in a new company. The 2001 Directive did not apply to corporate rescue proceedings.<sup>230</sup> In addition to the 2001 Directive of Acquired Rights, Directive 2002 was adopted and had an influence on corporate rescue provisions.<sup>231</sup> Article 1 of the 2002 Directive stated that member states should establish a framework on how workers will be informed and participate in consultations when their continued employment is at risk. This directive applies to businesses with more than 50 employees. This is unfortunate. It is necessary to keep open communication channels with employees in any insolvency procedure, irrespective of the number of employees. It does not make sense why the minimum number of employees should be 50. It implies that if a company has less than 50 employees they do not have the right to be informed or consulted during a rescue procedure. South Africa's Chapter 6 business rescue procedure also applies to private companies and close corporations, which indicates that employees of smaller enterprises also benefit from the employee rights provided for in the chapter.

Gant submitted that social policies such as the Acquired Rights Directive are “arguably the greatest obstacle to promoting corporate rescue”.<sup>232</sup> She argues that policies such as the Acquired Rights Directive contribute to the existing conflict between company law and labour law and highlights the struggle to harmonise corporate rescue and employment protection regulation.<sup>233</sup> If one purely envisages the rescue of a company to enable it to continue doing business, the biggest stumbling block should not be concerns about how to comply with

---

<sup>228</sup> A comparative conclusion is made in chapter 5.

<sup>229</sup> Of the Insolvency Act 1986.

<sup>230</sup> Article 5(1) of the 2001 Directive; see also Joubert *et al* 2011 *IJCLLIR* 68 footnote 15.

<sup>231</sup> Directive 2002/14/EC; also Joubert *et al* 2011 *IJCLLIR* 69.

<sup>232</sup> Gant *LLD Thesis* iii.

<sup>233</sup> Gant *LLD Thesis* iii.

labour rules.

The conflict between rescue objectives and labour ideals is not unfamiliar to South Africa. However, social policies are not all bad when it comes to rescue procedures. The development of the one leads to the reform of the other, and *vice versa*. It remains a challenge to harmonise the different interests but with progressive corporate law that already balances the rights of many stakeholders, South Africa surprises with its outcomes.

### **3.6 Ranking of employee claims during administration**

Once a company is in administration, one of the first duties of an administrator is to inform employees about the possible claims that they may have against the company. It was held in *Ex Parte James*<sup>234</sup> that an administrator has a duty to act fairly during administration as he is acting in the capacity of an officer of the court.<sup>235</sup>

Various provisions deal with employee claims during administration in respect of the ranking of employee claims and the priorities afforded to employee entitlements in terms thereof.

#### **3.6.1 Administration expenses**

As officers of the court, administrators are obliged to pay expenses of the administration which were properly incurred by the administrator in the course of his appointment during administration.

The Insolvency Rules of 2016 provide for these expenses as well as the order of priority for the payment of thereof.<sup>236</sup> The expenses include all fees, costs, charges and other expenses incurred in the course of the administration.<sup>237</sup> The cost of security required for the proper performance of the duties of the administrator is also regarded as an expense of the

---

<sup>234</sup> (1874) Ch App 609.

<sup>235</sup> Pollard 1995 *ILJ* 142; 148.

<sup>236</sup> Chapter 10 of the Insolvency Rules of 2016 par 3.50 and 3.51.

<sup>237</sup> Rule 3.50(1) of the Insolvency Rules 2016.

administration.<sup>238</sup>

The expenses incurred in the course of the administration are paid in the following order of priority:<sup>239</sup>

- (a) expenses incurred by the administrator in performing his functions;
- (b) the cost of security provided by the administrator;
- (c) where an administration order was made, the cost associated with that;
- (d) where the administrator was appointed otherwise as by court order, the expenses associated with that;
- (e) any amount payable to a person who assisted the administrator in the preparation of a statement of affairs;
- (f) any allowance made a court order for release from obligation to submit a statement of affairs;
- (g) any necessary disbursements made by the administrator in the course of administration, for example expenses incurred by members of creditors' committees and allowed by the administrator;
- (h) *remuneration of persons employed by the administrator to render services to the company*;<sup>240</sup>
- (i) the remuneration of the administrator; and
- (j) corporation tax.

The only expense relevant to employees is contained in item (h) above. Rule 3.51(2)(h)<sup>241</sup> provides for the remuneration of persons employed by the administrator to perform services for the company as requested or authorised under the Act or the Rules. This is very vague. It is submitted that this cannot refer to salaries of employees who is in the continued

---

<sup>238</sup> Rule 3.50(3) of the Insolvency Rules 2016.

<sup>239</sup> Rule 3.51(2) of the Insolvency Rules 2016.

<sup>240</sup> Own emphasis. Rule 3.51(2)(h) of the Insolvency Rules 2016 provides for this remuneration of persons employed by the administrator to perform services for the company as requested or authorised under the Act or the Rules. This is very vague. It is submitted that this cannot refer to salaries of employees who is in the continued employment of the company after the administrator was appointed and whose employment contracts were adopted after 14 days. Those employment contracts are paid for as a preferential debt provided for by par 99(5) of Schedule B1 of the Insolvency Act 1986. It must refer to additional persons employed by the administrator above and beyond the original employees of the company.

<sup>241</sup> The Insolvency Rules 2016.



employment of the company after the administrator was appointed and whose employment contracts were adopted after 14 days. Those employment contracts are paid for as a preferential debt provided for by paragraph 99 (5) of Schedule B1 of the Insolvency Act 1986. It must refer to additional persons employed by the administrator above and beyond the original employees of the company.

### 3.6.2. Schedule B1 of the Insolvency Act 1986

Paragraph 99 of Schedule B1 of the Insolvency Act 1986 deals with charges and liabilities of administrators. Following the discussion of *Powdrill v Watson: Paramount Airways Ltd (No 3)*<sup>242</sup> above<sup>243</sup> an analysis of paragraph 99 is necessary as it basically followed after the uncertain position brought about by the *Powdrill* case and the reforms made by the Insolvency Act 1994.

Although the heading of paragraph 99 is “Vacation of office: charges and liabilities” the provisions contained in this paragraph play a significant role as far as payments during administration are concerned.<sup>244</sup>

Paragraph 99(4) applies to a debt or liability that arose from a contract and provides that such debt will be paid out of property that the administrator had under his control.<sup>245</sup> Paragraph 99(5) makes the liability created in paragraph 99(4) applicable to employment contracts. According to the interpretation of these paragraphs, a claim in terms of an employment contract during administration therefore will be paid in priority<sup>246</sup> to the administrator’s remuneration.<sup>247</sup> The priority created in paragraph 99(4) is limited to the payment of salary and wages<sup>248</sup> in terms of an employment contract that has been adopted by the administrator after the 14-day grace period.<sup>249</sup>

---

<sup>242</sup> [1994] 2 All ER 513; [1994] BCC 172.

<sup>243</sup> See par 3.5.

<sup>244</sup> Sealy and Milman *Annotated Guide* 580.

<sup>245</sup> Par 99(4)(a) of Schedule B1 of the Insolvency Act 1986.

<sup>246</sup> Par 99(4)(b) of Schedule B1 of the Insolvency Act 1986.

<sup>247</sup> Par 99(4)(b) of Schedule B1 of the Insolvency Act 1986.

<sup>248</sup> Par 99(6) of Schedule B1 of the Insolvency Act 1986 defined salary and wages which include accrued holiday leave; sick leave; payment in terms of social security; payment in lieu of holiday and a contribution to an occupational pension scheme.

<sup>249</sup> Par 99(5)(a) and (c) of Schedule B1 of the Insolvency Act 1986.

Statutory liabilities such as redundancy payments and claims for unfair dismissal are not included in the meaning of salary and wages that receive priority payment.<sup>250</sup> The question whether statutory payments are included in the priorities contained in paragraph 99 were addressed by the court in *Re Allders Department Stores Ltd*.<sup>251</sup>

The administrators in the *Allders* case needed direction as to the treatment of redundancy payments which would fall due if they terminated the employment contracts of some of the employees. In determining the status of redundancy payments Collins J referred to the many legislative provisions that apply in this regard. Firstly reference was made to section 8 of the Insolvency Act 1986 which makes Schedule B1 applicable in the case of administration of a company.<sup>252</sup> The relevance of making Schedule B1 applicable to the case brings *inter alia* paragraph 99 into play. Although the priority of claims are set out in this paragraph, redundancy payments are not mentioned.<sup>253</sup> The court also referred to Rule 2.76 of the Insolvency Rules.

The court ruled that redundancy payments do not have priority under paragraph 99 and that this position is not affected by Rule 2.67.<sup>254</sup> The only liabilities that have priority under paragraph 99 over the administrator's expenses are in respect of employment contracts that were adopted after 14 days of their appointment and those that qualify as "wages or salary".<sup>255</sup>

The original Rule 2.76(1) was replaced with Rule 3.51 of the Insolvency Rules 2016 that lists the priority in which expenses of the administration must be paid.<sup>256</sup>

---

<sup>250</sup> *Re Allders Department Stores Ltd* [2005] EWHC 172 (Ch); [2005] BCC 289; Toubé and Todd 2005 II 108. Redundancy payments and claims for unfair dismissal are regulated by the Employment Rights Act of 1996, hence "statutory" liabilities.

<sup>251</sup> [2005] EWHC 172 (Ch); [2005] BCC 289.

<sup>252</sup> *Re Allders Department Stores Ltd* [2005] EWHC 172 (Ch); [2005] BCC 289.

<sup>253</sup> Par 99(4)–99(6) of Schedule B1 of the Insolvency Act 1986.

<sup>254</sup> Of the Insolvency Rules 1986.

<sup>255</sup> Par 99(6) of Schedule B1 of the Insolvency Act 1986; see also *Re Allders Department Stores Ltd* [2005] EWHC 172 (Ch); [2005] BCC 289 21 and 22.

<sup>256</sup> Rule 3.51 was discussed above in par 3.6.2; Toubé and Todd 2005 II 109; s 115 of the Insolvency Act 1986 and par 4.2.6.2.

The first specific reference to employee priorities is contained in rule 3.51(2)(h) that refers to the remuneration of any person employed by the administrator to perform services for the company, “as required or authorised under the Act or the Rules”. Toube and Todd agree that the priority created in this rule only applies to employees actually employed by the employer and that statutory employment liabilities cannot fall under this provision.<sup>257</sup> The court has the power to alter the priority.<sup>258</sup> However, this order of priority may be changed by the court if the company’s assets are insufficient to satisfy its liabilities. In such a case the court may make an order for payment of the expenses incurred in the administration process in any order that it deems fit.<sup>259</sup>

Rule 3.51(2)(g) prioritises “any necessary disbursements by the administrator in the course of the administration”. However, statutory liabilities for redundancy payments and payments for unfair dismissal are not included in “necessary disbursements.”<sup>260</sup>

To conclude the position of employee claims in administration: for the period 1986 until 1994 employees enjoyed preferent creditor status for contractual payments on termination of administration and unsecured creditor status regarding all other claims. Between 15 March 1994 and the present their claims enjoyed “super-priority” for qualified liability<sup>261</sup> if the employment contracts were adopted after 14 days after the appointment of the administrator. Employees are unsecured creditors regarding all remaining claims.

### **3.7 Evaluation of employee rights in administration**

Despite the Cork Committee’s report that laid a strong foundation for the development of the rescue culture in England by specifically referring to the protection of employee rights,<sup>262</sup> England fails when the rights of employees are compared to the rights of employees in South Africa during business rescue.

When examining employee rights during administration it became evident that, in most

---

<sup>257</sup> Toube and Todd 2005 // 110.

<sup>258</sup> Insolvency Rules 2016, Rule 3.51(2).

<sup>259</sup> Insolvency Rules 1986, Rule 3.51(2).

<sup>260</sup> Toube and Todd 2005 // 109, 110.

<sup>261</sup> Wages, salary and pension contributions for services during administration.

<sup>262</sup> Par 3.

instances, rights were ultimately afforded to employees because they were also creditors of the company and not simply because they were employees. This was the situation when the right to apply for the commencement of administration was considered,<sup>263</sup> the right to be notified and informed regarding the administration process<sup>264</sup> was examined, and the right to be present at meetings and possibly vote<sup>265</sup> as well as limited rights in consultation were considered.<sup>266</sup> This is difficult to justify.

England must be commended for the improvement of the position of employment contracts during administration.<sup>267</sup> Although the non-adoption of these contracts after the 14-day grace period is still possible, adequate legislative changes<sup>268</sup> took place and with the clarification of the problems by the judiciary,<sup>269</sup> employees are in a safer position as far as their employment relationship with the company is concerned.

The priority of employee entitlements is adequately dealt with in England. Not only is remuneration and holiday pay regarded as priority payment in terms of Schedule 6 of the Insolvency Act 1986,<sup>270</sup> but Schedule B1 of the Act also protects unpaid salary and wages as a priority payment before, for instance, the payment of the administrator.<sup>271</sup> If employment contracts are adopted during administration, employees enjoy adequate protection of their entitlements.

#### 4 CONCLUSION

It appears that employees remain the “lost souls” in insolvency in England as stated by Finch.<sup>272</sup> Although reform took place and there was improvement in the position of employees, employees in England are still a long way from being adequately protected and treated as important stakeholders of a company in liquidation and administration.

---

<sup>263</sup> Par 3.1.

<sup>264</sup> Par 3.2.

<sup>265</sup> Par 3.4.

<sup>266</sup> Par 3.3.

<sup>267</sup> Par 3.5.

<sup>268</sup> Insolvency Act 1994.

<sup>269</sup> *Powdrill and another v Watson and another; Re Leyland DAF Ltd; Re Ferranti International plc* [1995] 2 All ER 65 86.

<sup>270</sup> Par 3.6.

<sup>271</sup> Par 3.6.

<sup>272</sup> Finch *Corporate Insolvency Law* 778.

It is understandable that employees have limited rights in liquidation. However, the fact that employment contracts are automatically terminated when a company enters liquidation is disturbing. Although employees may institute a claim for unlawful dismissal based on breach of contract, they do not have participation rights during the process of liquidation.

England definitely trumps South Africa when the different avenues for claiming unpaid remuneration in the event of liquidation are examined. The following factors distinguish the position regarding employee priorities in England from the position in South Africa: firstly, the State-guaranteed payments create a level of certainty for employees in England<sup>273</sup> while there is no such guarantee in South Africa; and secondly, the fact that England uses an objective measure, namely, the Retail Price Index to provide for changes in maximum amounts claimable which is reviewed on a yearly basis, sets England in a position which remains relevant to the economy and inflation.

With an existing rescue culture, England can easily improve employee participation in administration proceedings. The treatment of employment contracts during administration remains a concern as a 14-day grace period is very short for the administrator to foresee the direction that the rescue may take. The improvement in this regard was good but provision for the automatic adoption of all employment contracts will bring England closer to South Africa.

Employee entitlements are treated adequately in England although it is not as favourable for employees in England to enter administration as in the case of South Africa.

It remains a fact that employees in South Africa trump employees in England as far as their position regarding employment contracts and priority payments are concerned. I agree with Fletcher that the “qualities of a true rescue culture” are still “beyond the reach of English insolvency law in its present form”.<sup>274</sup>

---

<sup>273</sup> The same level of certainty is created in Australia by the Fair Entitlements Guarantee Act of 2012 discussed in chapter 3 par 2.6.3.

<sup>274</sup> Fletcher *Law of Insolvency* 16-164, 587.



## **CHAPTER 5      CONCLUSION**

### **1    INTRODUCTION**

The purpose of this thesis was to evaluate the position in South Africa regarding employee rights and to compare the treatment of employees where a company is put in liquidation with their treatment in case of business rescue in order to determine whether it is always better for employees if a company is placed in business rescue rather than in liquidation.

It further intended to establish whether Chapter 6 of the South African Companies Act of 2008 has gone too far in protecting employee rights and interests during business rescue which may result in business rescue failing as a business rescue model.

The position of employee rights and entitlements in liquidation and business rescue in South Africa was compared to the position in Australia and that in England.

Chapter 6 of the 2008 Companies Act introduced a business rescue procedure which had to be in line with the purpose of the Act and the balancing of the interests of all relevant stakeholders as envisaged in section 7(k) of the Act posed the real challenge. Not only do three legal disciplines intersect when employee rights in liquidation and business rescue come under scrutiny, but the harmonisation of company law, insolvency law and labour law holds its own challenges. The concurrent application of the individual fundamental principles of the above branches of the law, without one undermining the other, poses a challenge which is not an easy one. To make this challenge even more difficult, the socio-economic and political background in South Africa as well as the high unemployment rate made it inevitable that the focal point of this new business rescue procedure would be the treatment of employees during a company's business rescue. The focus on employee rights and employee entitlements initially caused many people to believe that the new business rescue mechanism was doomed to failure as too many rights were afforded to employees. The concern was justified due to the prominent role of labour organisations in the development of the legislation and the sympathy of government that lay with the trade unions and employee interests. This eagerly-awaited business rescue regime was treated with some scepticism and a substantial degree of pessimistic reluctance.

South Africa, which was recently downgraded to almost junk status, could not afford to lose

out on possible international investment opportunities due to a misaligned business rescue procedure. It therefore was a crucial matter to establish whether the procedures available for a viable business rescue process were strong and secure or whether the initial concerns were valid.

When a company enters liquidation or business rescue proceedings three possible ways were identified in which employee rights and employee entitlements may be treated:

- (a) Firstly, employee rights could be ignored as was the case in judicial management under the Companies Act of 1973.<sup>1</sup> The consequences of this option are that the procedure will be subject to the usual principles of labour law that apply to any (successful) company;
- (b) secondly, the rights of employees may be enhanced to offer them additional protection during the rescue process; or
- (c) legislation may curtail employee rights, for example, by making it easier for the company to retrench workers during business rescue and to reduce the costs of running the business, or by simply treating employees in the same way as in the event of liquidation.

Chapter 2 dealt with the position in South Africa. The Insolvency Act<sup>2</sup> laid the foundation for the study of employee rights during a company's liquidation and Chapter 6 of the Companies Act<sup>3</sup> served as basis for the research on employee rights in business rescue proceedings. Other relevant legislation was also considered where employee rights were concerned. These included mainly labour legislation, specifically the Basic Conditions of Employment Act of 1997 and especially the Labour Relations Act of 1995. It must be kept in mind that the Labour Relations Act takes preference when employee rights in Chapter 6 are under the spotlight: section 5(4) of the Companies Act 2008 clearly states that the provisions of the Labour Relations Act will prevail if a provision of the Companies Act 2008 is in conflict with the Labour Relations Act.

Chapter 3 examined and analysed Australia's Corporations Act 2001 in respect of the law applicable to employee rights in winding-up and voluntary administration.

---

<sup>1</sup> Companies Act 61 of 1973.

<sup>2</sup> 24 of 1936.

<sup>3</sup> 71 of 2008.



Chapter 4 dealt with the Insolvency Act of 1986 and the Insolvency Rules in England's law regarding liquidation and administration were examined.

## **2 COMPARATIVE CONCLUSION ON EMPLOYEE RIGHTS IN LIQUIDATION AND BUSINESS RESCUE**

### **2.1 Introduction**

It comes as no surprise that employees in all comparative countries enjoy limited rights in their capacity as employees when it comes to the liquidation of the company. The only specific rights that employees enjoy relate to two scenarios that directly impact on their rights as employees: firstly when their employment contract comes under the spotlight and secondly where due and arrear employee entitlements are treated as claims against the insolvent estate of the company.

Employees play a more active role during a company's business rescue process. This is understandable as business rescue is a procedure aimed at preventing a company from entering liquidation. Employees still have a role to play as the company remains in business and employees have the hope and prospect of continued employment with the company.

Because all three countries use different terminology when referring to their rescue processes, business rescue is used when reference is made to the general idea of restructuring and specifically when referring to South Africa. The individual country's specific terminology is used when that country is concluded on. The employee rights identified in chapter 1 are used when the conclusions are made.

### **2.2 Employee's right to commence proceedings**

The liquidation of a company usually results in the loss of jobs except perhaps where the business is sold as a running concern. It is impossible to think of a company being dissolved and employees retaining their employment at the same time. It therefore would not make sense to allow employees the right to commence winding-up procedures in their capacities as employees in any of the jurisdictions discussed.

The right given to employees to commence liquidation proceedings can only be exercised in

their capacity as creditors of the company. This is understandable because in many companies facing liquidation, financial distress has been a reality for a period of time which inevitably means that monies are owed to the employees.

A solid case was made that not only in the South African context,<sup>4</sup> but also in Australia<sup>5</sup> and England,<sup>6</sup> employees who are owed money are regarded as creditors of the company, even in the absence of a definition of “creditor” in any of the applicable Acts. This is a common law principle that stems from the relationship between the employer and his employees.

South Africa takes the lead when it comes to the right of an employee to commence business rescue proceedings.<sup>7</sup> As an affected person, a single employee has the right to commence business rescue proceedings by applying to court for a business rescue order irrespective of whether the employee also has any claim for unpaid remuneration against the company. This right was the reason many academics and practitioners initially doubted the success of business rescue due to the possible abuse to which it may have led. This right has been used by employees and trade unions and the courts have repeatedly emphasised the importance of the interests of employees in the rescue of a company. The initial scepticism proved to have been unnecessary. No evidence of abuse of this right by employees or trade unions was recorded in the past seven years. The fact that it must still be proved that the requirements for a business rescue order are met and the fact that a court has a discretion to grant the application or to deny it ultimately puts this right afforded to employees and trade unions to commence business rescue in the hands of the judiciary.

Employees in Australia do not have a direct right to commence voluntary administration.<sup>8</sup> In England employees also do not have the right to initiate administration procedures in their capacity as employees of the company.<sup>9</sup> In both these jurisdictions employees who have money owed to them will qualify as creditors and in that capacity be able to initiate rescue proceedings, much the same as creditors in South Africa.

---

<sup>4</sup> Chapter 2, par 2.1.

<sup>5</sup> Chapter 3, par 2.1.

<sup>6</sup> Chapter 4, par 2.1.

<sup>7</sup> Chapter 2, par 3.1.1.

<sup>8</sup> Chapter 3, par 3.2.1.

<sup>9</sup> Chapter 4, par 3.1.

The right of employees as affected persons in South Africa to suspend liquidation proceedings – even when they are far advanced and near completion – with an application for business rescue proceedings is unequalled in both Australia and England. This right puts employees in South Africa in a class of their own. Not only do employees in South Africa have the right to apply for commencement of business rescue in their capacities as employees, they may also suspend liquidation and replace it with business rescue. One must consider the impact of such a right and the effect it may have on the interests of other stakeholders should it be used by employees when liquidation proceedings have progressed significantly. Obviously if such application by employees has merit and it is made to rehabilitate the company to become successful again it serves a purpose to allow employees such a right. On the other hand, if it only serves the purpose of prolonging employment with no prospect of rescue, employees will jeopardise not only their own position but also that of all stakeholders with a hope of sharing in some residue of the company.

The mere fact that this is a right that employees in South Africa enjoy with no equal in Australia and England raises a caveat that it should be treated with caution.

### **2.3 Employee's right to be notified and informed about proceedings**

It is of vital importance that employees should be kept informed during the liquidation process.

The positions in South Africa, Australia and England reveal that all of these countries incorporated some form of notification procedure to keep their employees informed regarding the liquidation process.

South Africa takes the lead and provides employees with direct rights to receive information, not only when a company considers liquidation<sup>10</sup> but also after the process is initiated<sup>11</sup> and consistently during the process. This right of employees to receive information and be informed regarding winding-up proceedings is not only entrenched in legislation, but the judiciary supports the importance of protecting the interests of employees by providing them with actual information throughout the process.

---

<sup>10</sup> Chapter 2, par 2.2.

<sup>11</sup> Chapter 2, par 2.2.

Employees in Australia do not enjoy the right to receive notification of liquidation proceedings in their capacity as employees of the company.<sup>12</sup> The Corporations Act of 2001 confers rights to be informed on the creditors of the company and extends this right to another category of people with an interest in being kept informed. Employees clearly fall in this category of people with an interest to know what happens in the company. It is regrettable that there is only one direct reference to a right of employees to receive notice in a company's liquidation in that capacity and that is when a court grants a liquidation order because the publication of such order serves as a dismissal notification to employees.

England undoubtedly comes in last as far as notification rights of employees are concerned.<sup>13</sup> No mention is made of employees having to receive notice when liquidation proceedings are started. The only reference of notification rights is found where the petitioner must serve a copy of the petition to initiate liquidation on the company. No specific reference is made to creditors of the company either. Employees therefore may not even derive a right to be informed from their possible capacity as creditors of the company.

In Australia<sup>14</sup> and in England<sup>15</sup> employees have the right to receive notifications and be informed of the rescue proceedings only in their capacities as creditors of the company. No direct right is afforded to them in their capacity as employees.

In South Africa, on the other hand, since employees are per se classified as affected persons they have the right to receive notification and be informed during the business rescue process.<sup>16</sup> Employees must be informed about the commencement of voluntary business rescue after the resolution taken by the board has been filed with the Companies and Intellectual Property Commission and also about the appointment of the business rescue practitioner. If the board of directors decides not to start business rescue proceedings although the company is in financial distress, employees must be informed likewise.<sup>17</sup> They also receive notice when an application is made to court to place the company in compulsory business rescue as well as when the court

---

<sup>12</sup> Chapter 3, par 2.2.

<sup>13</sup> Chapter 4, par 2.2.

<sup>14</sup> Chapter 3, par 3.2.2.

<sup>15</sup> Chapter 4, par 3.2.

<sup>16</sup> Chapter 2, par 3.2.

<sup>17</sup> Chapter 2, par 3.2.1.

grants the order.<sup>18</sup>

Adding to the already extensive rights to be informed of the business rescue process, is their right to receive monthly updated reports if the business rescue is not completed after three months; to be informed if the business rescue practitioner is of the opinion that there is no reasonable prospect to rescue the company; and to be present at meetings with employee representatives ten business days after the practitioner's appointment where the practitioner has to report to the meeting whether he is of the opinion that a reasonable prospect to rescue the company exists or not.<sup>19</sup>

Undoubtedly South Africa goes to the other extreme by affording employees such widespread rights in this regard. As stated earlier<sup>20</sup> although it is plausible to include employees in every step of the business rescue, the burden on the company to comply with the numerous information rights may take up valuable time and resources that can be used more wisely. Recommendations on possible ways to ease the burden on the company are made below.<sup>21</sup>

## **2.4 Effect on employment contracts**

South Africa provides the best protection of employee rights when the effect of liquidation on employment contracts is compared to the other two jurisdictions.<sup>22</sup> However, there is definitely room for improvement.

In South Africa the consequences of liquidation on employment contracts are dominated by legislative provisions. The Insolvency Act of 1936 and the Companies Act of 1973 deal with the effect of liquidation on employment contracts. Labour legislation also plays a part in regulating dismissal based on operational requirements. In contrast to the position in Australia<sup>23</sup> and England<sup>24</sup> where the granting of the liquidation order basically serves as notice of immediate dismissal to the employees, the granting of the provisional order in South Africa suspends the employment contract for 45 days from the date of appointment of the final liquidator. During this

---

<sup>18</sup> Chapter 2, par 3.2.2.

<sup>19</sup> Chapter 2, par 3.2.3.

<sup>20</sup> Chapter 2, par 3.2.3.

<sup>21</sup> Chapter 5, par 3.1.2.

<sup>22</sup> Chapter 2, par 2.3.

<sup>23</sup> Chapter 3, par 2.3.

period the liquidator must decide how the contracts will be treated while employees do not have to tender their services and are not paid but do have the benefit of claiming unemployment benefits. In South Africa, Australia and England the liquidator has a choice whether to continue with employment contracts. A significant consideration is that should the liquidator decide to continue with the employment contracts, salaries will be regarded as costs of the liquidation and will have preferent payment status.

Although South Africa treats employment contracts with the necessary care and respect they deserve, it must be borne in mind that the liquidation of a company mostly leads to job losses unless the business is sold as a going concern.<sup>25</sup> In most cases employment contracts automatically terminate 45 days after the appointment of the final liquidator.

The situation regarding employment contracts during business rescue is a sensitive matter. All three jurisdictions are quite unique in the manner in which employment contracts are treated. This is due to the developments and reform on the socio-economic front in the individual countries. One common factor is that the position is regulated extensively by legislation.

Australia has the most basic arrangement regarding employment contracts.<sup>26</sup> Employees stay employed until the administrator is appointed in the voluntary administration and he then decides whether to retain them, in which case he will be liable for their costs, or to terminate their employment with the company and follow the provisions of the Fair Work Act of 2009 to ensure a legal redundancy.

The biggest reform took place in England with the Insolvency Act (No 2) of 1994 that had to address the problematic position that existed in administration proceedings largely created by case law and the uncertainty about the interpretation of the Insolvency Act of 1986.<sup>27</sup> The current position in England is that employment contracts are not terminated automatically once administration commences. The administrator must decide whether or not to continue with existing employment contracts. If he maintains the employment of the employees after a period of 14 days the employment contracts will be regarded as adopted by the administrator.

---

<sup>24</sup> Chapter 4, par 2.3.

<sup>25</sup> Chapter 2, par 2.3.

<sup>26</sup> Chapter 3, par 3.6.2.

<sup>27</sup> Chapter 4, par 3.5.

The position in South Africa correlates the most with the position in Australia, but employment contracts in South Africa<sup>28</sup> are entrenched even more than their Australian counterparts. The Companies Act of 2008 provides that employees stay employed by the company after business rescue proceedings have started on the same terms and conditions on which they were employed by the company. Neither the business rescue practitioner nor the court has any power to cancel an employment contract due to the fact that the company entered business rescue. Should the business rescue practitioner wish to terminate any employment contract the provisions of the Labour Relations Act of 1995 must be complied with. That means that the Companies Act 2008 does not have any authority regarding the termination of employment contracts during business rescue. The Labour Relations Act of 1995 prevails over the Companies Act and therefore needs to be followed to ensure that the dismissal is done legitimately. However, taking the short time span of business rescue into consideration it is clear that something needs to be done in order to deal with employment contracts faster during business rescue. Not only is following the Labour Relations Act of 1995 time consuming, it also creates the opportunity for employees to disagree during consultation processes which may result in strike action. Recommendations are made on a possible way to deal with the challenges South Africa faces.<sup>29</sup>

In conclusion, despite the fact that it might seem as if the South African position regarding employment contracts during business rescue is more favourable than liquidation due to the employees keeping their employment, they do not have access to any unemployment insurance because they are still employed even if the company is unable to pay them. As a result, employees in South Africa could be in a more favourable position in liquidation during their 45-day suspension period when unemployment benefits can be claimed than during business rescue where their claims are unlimited but are not paid until the business rescue practitioner is able to source post-commencement financing.

### **2.5 Employee's right to participate in consultations**

Employees in Australia enjoy the strongest rights to be included in the consultation process

---

<sup>28</sup> Chapter 2, par 3.6.

<sup>29</sup> Chapter 5, par 3.1.2.

during liquidation. Although their position was almost identical to the position of employees in South Africa<sup>30</sup> and England<sup>31</sup> where they could participate in their capacity as creditors, their position drastically improved in September 2017 when employees were given direct participation rights by being included in the constituency of committees of inspection.<sup>32</sup> Should an employee representative be included as a member of the committee of inspection many participation rights are afforded to him which may basically be attributed to the group of employees as their collective interests are served thereby. The liquidator has to consider any representations made by the employees and in the event where the liquidator deviates from directions given by the employees he will have to give reasons for the deviation. It is sufficient for employees to participate in consultations in their capacities as creditors of the company. Their interests as creditors are served then and no additional rights to be exercised in their capacities as employees are really justified. Such involvement will only hamper speedy finalisation of liquidation as their employment will be terminated by liquidation in any event.

Employees in all three jurisdictions have participation rights during consultations in the rescue process. All three jurisdictions make specific mention of employees and the role they play.

In South Africa<sup>33</sup> and in England<sup>34</sup> the right of employees to participate in consultations is recognised. South African employees have a right to participate in the hearing of the application for a compulsory business rescue order and the business rescue practitioner must consult with the employees before he prepares his business rescue plan. In England the employees are included in the definition of “relevant persons” who have a role to play in providing the administrator with a statement of company affairs. Employees further have rights in the process in their capacities as creditors of the company.

The position of employees in Australia has improved dramatically since the enactment of the Insolvency Law Reform Act in 2016.<sup>35</sup> Employees are now able to play an active role in the committees of inspection that have influential powers when it comes to monitoring, directing and advising the administrator during voluntary administration.

---

<sup>30</sup> Chapter 2, par 2.4.

<sup>31</sup> Chapter 4, par 2.4.

<sup>32</sup> Chapter 3, par 2.4.

<sup>33</sup> Chapter 2, par 3.4.

<sup>34</sup> Chapter 4, par 3.3.

<sup>35</sup> Chapter 3, par 3.2.3.



Participation rights are welcomed during the rescue process. However, it must be borne in mind that the more open access participation is allowed during rescue, the longer the process might take to have the business rescue plan approved. Time is of the essence as every delay in the process and re-negotiation of the proposals in terms of the business rescue plan may negatively affect the outcome of the rescue procedure. South Africa and Australia almost cross the line of too much open access which exposes their procedures to time abuse and the danger of negotiations never reaching a conclusion. Should this happen the prospect of success declines and is replaced by the possibility of liquidation.

### **2.6 Role of employees and their rights in respect of business rescue plan or deed of company arrangement**

Employees have no role to play in the process of liquidation of the company. This is trite in South Africa, Australia and England.

Employees do have a role to play in rescue procedures because there is an expectation that the company will be returned to solvency by continuing its business for which the employees are needed. Only the employees in South Africa and Australia have the right to take part in the development of the business rescue plan or the deed of company arrangement. English law does not confer any specific right on employees in this regard.<sup>36</sup> The role of employees in the developing of a deed of company arrangement during voluntary administration is limited to their capacity as creditors of the company.

South African law, on the other hand, confers numerous rights on employees in their capacity as employees during the development of the business rescue plan in business rescue.<sup>37</sup> These rights include the right to participate in any court proceedings during business rescue proceedings, to form a committee of employees' representatives to protect their interests and to be consulted by the business rescue practitioner during the development of the rescue plan. The Act specifically places a duty on the practitioner to give employees sufficient opportunity to review the business rescue plan before it is voted on so that they are able to prepare a submission for the meeting of creditors where voting will take place.

---

<sup>36</sup> Chapter 3, par 3.2.4.

<sup>37</sup> Chapter 2, par 3.4.

This role of employees in South Africa is clearly unequalled in any of the comparative jurisdictions. It is necessary to ask why only one country would allow employees to play such an active role in developing a plan. The same viewpoint and sentiments are expressed when evaluating this right that was illustrated when examining the right of employees to participate in the consultation process during rescue. Although it is a good idea to allow employees a voice in the development of a plan that may depend on their cooperation to succeed, boundaries are needed. Employees are given rights one would expect creditors to have and more rights than shareholders have although the latter stand to lose their investments in the company.

Employees as affected persons also have the right to apply to court to set aside the votes of creditors or shareholders who voted against the plan where the plan was rejected. Such rights given to employees go beyond all boundaries. Allowing employees to apply to court to set aside the votes that were cast by active stakeholders of the company who also stand to lose a lot if business rescue were to fail is unnecessary and allowing employees to do this may prejudice the business rescue process.

A further surprise is found in the fact that employees have the right to make a binding offer to acquire the voting rights of a person who voted against the plan. Neither Australia nor England allows employees to participate actively in the rescue process and such right will almost certainly never be considered for inclusion in the legislation of these jurisdictions. South Africa goes too far by allowing employees to become this actively involved in the rescue process. As mentioned above, allowing employees to get too closely involved by making binding offers to shareholders and creditors, poses the potential danger that the process will be dragged out unnecessarily and could hamper the success of the process.

### **2.7 Employee's right to be present at meetings and to vote during proceedings**

Employees in all three countries<sup>38</sup> are on equal footing regarding the right to be present at meetings and vote during liquidation proceedings. No separate right accrues to employees to be present and vote in their capacity as employees. However, as creditors of the company they will be able to attend and vote at the different meetings. This position is fair, their interests as

---

<sup>38</sup> See chapter 2, par 2.5 for the position in South Africa, chapter 3, par 2.5 for Australia and chapter 4, par 2.5 for England.

creditors will be served and no problems arise from this dispensation.

With regard to rescue procedures, South Africa, Australia and England all treat employees who are also creditors in a similar way when it comes to attending and voting at meetings. However, Australia<sup>39</sup> and England<sup>40</sup> limit this right of employees to their capacity as creditors of the company.

In South Africa employees are also given the explicit right to attend and vote at creditors' meetings in their capacity as creditors of the company. Should the original plan be rejected, they have the right to propose the development of an alternative plan or to make a binding offer to acquire the rights of a person who voted against the business rescue plan.

In addition, registered trade unions representing employees and employees who are not so represented have the right to be present at the meeting and to address and make submissions to the meeting before creditors vote on the business rescue plan. This right is conferred on them in their capacity as employees even if they have no claims against the company. Despite the fact that South Africa's employees enjoy more privileges during this process it is to be welcomed. No real threat to the process exists and because their employment contracts remain in place they are a part of the company and as stakeholders may be accommodated at meetings where they will also receive valuable information.

## **2.7 Ranking of employee claims**

### 2.7.1 Claims related to the termination of the employment contract

All three countries have legislation in place that provides employees with contractual claims for breach of contract against the insolvent company. In South Africa such employees have a concurrent claim for breach of contract as well as a preferent claim for severance benefits against the company.<sup>41</sup> Australia does not differ much from South Africa and also provides for a contractual claim based on breach of contract after the employee has proved the debt.<sup>42</sup>

---

<sup>39</sup> Chapter 3, par 3.2.5.

<sup>40</sup> Chapter 4, par 3.4.

<sup>41</sup> Chapter 2, par 2.6.1.

<sup>42</sup> Chapter 2, par 2.6.

Redundancy payments are further regulated by the Corporations Act of 2001 and are regarded as preferent claims.<sup>43</sup> England provides for compensation to be claimed due to a breach of contract.<sup>44</sup> A claim against the insolvent estate for redundancy payment is a preferent claim.

Where redundancy payment is provided for by the State, such as in the case of Australia and England, employees are sure to receive it although there are limitations on the amount claimable. Where the claim for redundancy is made against the insolvent estate of the company, the claim is preferent but depending on what is available in the free residue employees have no certainty that they will receive it or what amount will be recoverable. The position in South Africa is the same. Since South Africa does not have a State fund for claims such as this, employees only have preferent claims for as long as the free residue is sufficient to cover the payments and they often stand to lose if the free residue is depleted.

### 2.7.2 Claims for remuneration

Australia must be commended for treating employee entitlements during liquidation with the greatest certainty.<sup>45</sup> This certainty is derived from the government safety net provided by the Fair Entitlement Guarantee Act.<sup>46</sup> Australia has been using these government guarantee funds for the past 15 years and although employees first have to institute their claims against the insolvent estate and can only turn to this resource after 112 days of non-payment, it is accessible to employees.

England also relies on state-funded payment in the form of the Redundancy Payments Service.<sup>47</sup> Although this service is also government driven, there is no guarantee that a total payment will be made. Therefore, limitations exist in respect of almost all the possible claims under this scheme. Unpaid wages and holiday pay are limited as to the amount claimable and the period in which they may be claimed. Qualifications exist as to when redundancy payments may be claimed and the amounts are capped.<sup>48</sup> Her Majesty's Revenue and Customs Service

---

<sup>43</sup> Chapter 3, par 2.6.

<sup>44</sup> Chapter 4, par 2.6.

<sup>45</sup> Chapter 3, par 2.6.1.

<sup>46</sup> Chapter 3, par 2.6.3.

<sup>47</sup> Chapter 4, par 2.6.1.

<sup>48</sup> Chapter 4, par 2.6.1.

created statutory priorities for maternity, paternity, adoption and sick pay.<sup>49</sup> This statutory priority of these payments is unique to England.

Australia is the country with the least limitations on employee entitlements. Despite the fact that the Fair Entitlements Guarantee Act does contain limits as to the periods in which employees may claim unpaid wages, annual leave and redundancy payments,<sup>50</sup> there are no limits on the amount claimable or the period in which outstanding wages and superannuation, leave of absence or retrenchment payments may be claimed in terms of the Corporations Act of 2001.<sup>51</sup> The Fair Work Act that deals with redundancy payments also does not contain any limitations on the amount claimable.<sup>52</sup>

South Africa's treatment of employee entitlements during liquidation is the least favourable. Although employee entitlements are also treated as statutory preferent claims during liquidation the limits on amounts claimable are outdated and provide almost no consolation to redundant employees.<sup>53</sup> The fact that South Africa lacks a government-funded safety net contributes to the unfavourable situation employees are faced with when a company in South Africa is liquidated.

In all three jurisdictions employee claims during the rescue process enjoy some form of preference over other unsecured claims.

In England the position regarding employee claims during administration may be summarised as follows:<sup>54</sup>

- a) Any claim arising in the course of administration is payable as part of the expenses by the administrator;<sup>55</sup>

---

<sup>49</sup> Chapter 4, par 2.6.1.

<sup>50</sup> Chapter 3, par 2.6.3.

<sup>51</sup> Chapter 3, par 2.6.1.

<sup>52</sup> Chapter 3, par 2.6.2.

<sup>53</sup> Chapter 2, par 2.6.2.

<sup>54</sup> Chapter 4, par 3.6.

<sup>55</sup> Chapter 4, par 3.6.2.

- b) Schedule B1 of the Insolvency Act of 1986 provides for priority payments for wages and salaries and other liabilities flowing from the adoption of the employment contract after 14 days by the administrator. Redundancy payments are excluded from these priorities;<sup>56</sup> and
- c) rule 2.67 of the Insolvency Rules 1987 sets out where employee entitlements rank in the context of expenses of the administration and provides that remuneration or emoluments of any person who has been employed by the administrator to perform any services for the company, as required or authorised under the Act or the Rules, are included here.<sup>57</sup>

In Australia employees are regarded as priority creditors who will be paid after the cost of administration.<sup>58</sup> The deed of company arrangement must contain a provision that entitles employees to priorities in voluntary administration equal to the priority in liquidation. Employees are allowed to waive this priority contained in the deed of company arrangement if they know that they will receive more in liquidation.

South Africa includes employee claims in the section in the Companies Act of 2008 that deals with post-commencement financing.<sup>59</sup> A statutory preferent priority is created that provides for any employee remuneration, reimbursement for expenses and other employment-related amounts due and payable during business rescue to enjoy preference over any claims by lenders who provided actual post-commencement finance irrespective whether the loans are secured or not and preferential treatment of claims over all unsecured claims against the company. This priority created in Chapter 6 will also apply in the case when a business rescue fails and is superseded by a liquidation order. This almost certainly will make it even more difficult for the company to obtain post-commencement finance. The legislature erred by including their claims in the section that deals with post-commencement funders. The reality of business rescue is that the company is struggling financially. Should the rescue result in the company becoming successful again the employees will be happy to receive these payments that far exceed the outdated priorities contained in the Insolvency Act and are applicable during liquidation.

---

<sup>56</sup> Chapter 4, par 3.6.2.

<sup>57</sup> Chapter 4, par 3.6.2.

<sup>58</sup> Chapter 3, par 3.2.7.

<sup>59</sup> Chapter 2, par 3.2.7.

However, during the rescue process any possible post-commencement finance received should be applied to keep the company alive. Should the business rescue practitioner be faced with the choice of either paying rent to keep the business premises or paying salaries, he will certainly choose to keep the business in operation in its original form and to secure premises. The truth is, if the company in rescue does not have money to operate it also does not have money to pay employees' salaries. Employees do not have an option to claim unemployment insurance in such an instance as their employment is still in place. Employees' position in liquidation therefore seems more favourable.

Recommendations on how to change this as well as the priority that will be carried over when liquidation follows an unsuccessful rescue attempt, are made below.<sup>60</sup>

### **2.8 Transfer of the business as a going concern**

It is an option to transfer the business of the company to a new owner in both liquidation and rescue proceedings. The law distinguishes between the consequences of a transfer of a solvent business and the transfer of an insolvent business. When a business is transferred by the liquidator during liquidation the transfer is regarded as a transfer in insolvent circumstances and when such a transfer is done during business rescue, it is regarded as a transfer in solvent circumstances. Section 197 and section 197A of the Labour Relations Act of 1995 regulate South Africa's position when the business of the company is transferred. When the business is transferred in insolvent circumstances the new employer steps into the shoes of the old employer.<sup>61</sup> The same principle is applicable when a solvent business is transferred during business rescue.<sup>62</sup> Employment contracts which existed prior to the transfer therefore also transfer to the new employer. The only difference between these processes is that rights and duties that existed before the transfer in an insolvent company and conduct by the old employer remain the rights and obligations of the old employer and in the case of a solvent transfer they become the rights, obligations and conduct of the new owner. This means that the new owner of the business that was transferred under insolvent circumstances is not burdened with the liabilities which existed under the old owner. It

---

<sup>60</sup> Chapter 5, par 3.1.2.

<sup>61</sup> Chapter 2, par 2.3.

<sup>62</sup> Chapter 2, par 3.6.3.

definitely ensures that transfers of insolvent businesses may happen more frequently.

In England the Transfer of Undertakings (Protection of Employment) Regulations regulate the transfer of a business in insolvent circumstances<sup>63</sup> and the Acquired Rights Directive apply to the transfer of undertakings during administration procedures.<sup>64</sup> The gist of these regulations corresponds with the procedures applicable in South Africa. However, a big difference is that when in England an insolvent company is transferred to a new owner, all rights and liabilities that existed under the former employer will transfer to the new owner. This is a significant difference as a huge burden is placed upon the shoulders of a new buyer when old liabilities also transferred to him. The possibility of a new buyer agreeing to take over the liabilities of the old owner is slim and this might result in companies entering liquidation more easily.

In Australia, the Fair Work Act of 2009 deals with the transfer of businesses.<sup>65</sup> The position is complicated as specific definitions regulate the transfer of a business during administration. Only certain employees are protected and a specific meaning is given to the concept of “transfer of a business”. The general principle is that service with the old employer is regarded as service with the new employer, with some exceptions. Basically, the old employer and the new employer will have to reach agreement as to employee entitlements. The old employer has the duty to pay any outstanding wages and accrued leave to the employee when a transfer of business takes place. The new employer does not have any obligation to take over the old employees. The obligations of the old employer remain the obligations of the new employer. If the new employer does not recognise any employee entitlement, the old employer remains liable to pay out the entitlement to the employee. The position in Australia is therefore restricted and only provides limited protection to employees when a business is transferred to a new owner.

Employees’ interests in South Africa and England are well protected when the business of the company is sold as a going concern. However, the position in South Africa which provides for an insolvent business to transfer and for the former employer to remain liable for unpaid

---

<sup>63</sup> Chapter 4, par 2.3.2.

<sup>64</sup> Chapter 4, par 3.5.5.

<sup>65</sup> Chapter 3, par 3.2.6.1.



employee entitlements makes this position more attractive for a new owner to take over an insolvent company than for possible new owners in the other jurisdictions.

### **3 RECOMMENDATIONS**

#### **3.1 Employee rights in business rescue**

##### **3.1.1 Final finding**

It comes as no surprise that South Africa with its Chapter 6 business rescue procedure serves the interests of employees the best. Not only is South Africa the only country that confers all of the rights discussed on employees in their capacities as employees, extensive additional rights are given to them during business rescue with no equivalent to be found in either Australia or England.

Australia and England are in almost identical situations as employees do play a role in their rescue procedure but mainly in their capacity as creditors of the company. Limited rights are given to the employees in their capacities as such.

##### **3.1.2 Recommendations**

The following recommendations are made after the different employee rights in business rescue in South Africa were compared to the rights of employees in voluntary administration in Australia and in administration in England:

1. Because keeping all interested stakeholders updated on the process is of paramount importance and because all three jurisdictions face the same degree of difficulty to do this, it is important to find a workable solution which is easy to implement and uniform in nature. The Companies and Intellectual Property Commission is an established platform which already functions as disclosure platform for business registers. The Commission also deals with the registration of business rescue practitioners and all other formalities. The Commission should create another platform where every business rescue is registered. Once the rescue is registered the business rescue practitioner will be in

control of the procedure and must submit all information, notifications, important dates *et cetera* to the case under his control and all interested parties and affected persons will have direct access to the matter. Upon registration of the business rescue by the business rescue practitioner a unique reference number can be obtained, assigned to the specific rescue which can be used by the different stakeholders to obtain access to the documents in respect of the procedure. Because entry to the Commission's website may become a problem, a separate link could be made available to the registered rescue practitioner appointed in the matter and the website could be accessed through this link. This will ensure that the official website of the Commission remains uncluttered and streamlined and that access can be controlled by the rescue practitioner. By using platforms already in existence to one's advantage will save the company money, time and other resources and affected persons will receive email or telephonic notification should any new activities occur on the matter. These days many social media platforms use links created by the platforms which followers may click to obtain access. By following such practices the rescue practitioner will have control over the people to whom the link is made available.

2. Section 135 of the Companies Act 2008 should be amended as follows:

**135. Post-commencement finance.**—~~(1) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an employee during the company's business rescue proceedings, but is not paid to the employee —~~

—~~(a) the money is regarded to be post-commencement financing; and~~

—~~(b) will be paid in the order of preference set out in subsection (3) (a).~~

~~(2) During its a company's business rescue proceedings, the company may obtain financing other than as contemplated in subsection (1), and any such financing —~~

(a) may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered; and

(b) will be paid in ~~the~~ the order of preference as set out in subsection (32) (b).

(32) After payment of the practitioner's remuneration and expenses referred to in section 143, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated—

~~(a) in subsection (1) will be treated equally, but will have preference over—~~

~~(i) all claims contemplated in subsection (21), irrespective of whether or not they are secured; and~~

~~(ii) all unsecured claims against the company will have preference in the order in which they were incurred over all unsecured claims against the company.~~

Post-commencement finance is an important part of any restructuring. It is of critical importance to set out the section on post-commencement finance in any Act clearly to ensure that potential new lenders understand their position and priorities when they make money available to the company.

3. The current section 135(4) should be amended as follows:

(43) If business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claims arising out of the costs of liquidation and employment-related claims will be treated as claims under liquidation and will have the priorities conferred by s 98A of the Insolvency Act of 1936.

This amendment and inclusion will eliminate any possible controversy that may arise after a business rescue procedure is terminated and followed by liquidation. The rights conferred by one procedure should remain the rights applicable to that procedure. As long as the company

is in business rescue, Chapter 6's rights can be conferred on employees. The moment employees' situation is dealt with under the Insolvency Act and the 1973 Companies Act the rights given to them under these Acts should be applied. This means that only the statutory priorities conferred by section 98A of the Insolvency Act of 1936 will be applicable. With the recommended government-funded safety net and increased limits on claims employees will be treated the same way as in normal liquidation proceedings.

4. The legislature needs to include a separate section that deals with employee entitlements during business rescue to clarify the priority that they will enjoy during business rescue proceedings. The current section 135 that deals with post-commencement finance is not the correct place to deal with employee entitlements. It is recommended that this section be included in section 144 that currently sets out the specific rights that employees enjoy in business rescue. By incorporating the ranking of employee entitlements during business rescue in the section that already deals with the status of claims of employees that was owed to them before business rescue started, the rights of employees in business rescue is streamlined and grouped together in one section. The following amendment is proposed:

**144. Rights of employees.**—(1) During a company's business rescue proceedings any employees of the company who are—

- (a) represented by a registered trade union may exercise any rights set out in this Chapter—
  - (i) collectively through their trade union; and
  - (ii) in accordance with applicable labour law; or
- (b) not represented by a registered trade union may elect to exercise any rights set out in this Chapter either directly, or by proxy through an employee organisation or representative.

(2) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment became due and payable by a company to an employee at any time before the beginning of the company's business rescue proceedings and had not been

paid to that employee immediately before the beginning of those proceedings, the employee is a preferred unsecured creditor of the company for the purposes of this Chapter.

(3) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an employee during the company's business rescue proceedings, but is not paid to the employee, the money will be paid to the employee in accordance with subsection 4.

(4) After payment of the practitioner's remuneration and expenses referred to in section 143, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated—

(a) in subsection 3 will be treated equally, but will have preference over all unsecured claims against the company;

(b) If business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will lapse and will be subject to s 98A of the Insolvency Act of 1936.

5. It is important to allow the business rescue practitioner to deal with employment contracts in a way that will still adhere to the gist of the Labour Relations Act and the protection of employment contracts during a company's business rescue. A fair balance needs to be struck. As payroll is regarded as one of the biggest expenses of a company, a company needs a way to limit these claims. One of the possibilities is that the section 133 moratorium expressly limits or excludes employee claims during the rescue period. It means that the employment contracts continue as before but that employees receive a percentage of their salary during the period which could still be more than the amount for which they have a preferent claim under liquidation, but the company has the right to withhold the balance and pay it out after the rescue process has been terminated. This will ease the huge payroll burden on the company and bring the treatment of employment contracts in line with the way other contracts are treated during rescue.

6. The business rescue practitioner in South Africa should be given the right to choose not to continue with some employment contracts as the administrator is allowed to do in Australia and England. One could also incorporate a time limit in which he must make a decision to ensure the employee gets to know his fate as soon as possible. Once the practitioner decides not to continue with the employment contract the employee may claim unemployment benefits due to the fact that his employment relationship has now indeed been terminated. Although the termination of services might be bad news to the employee he will have certainty regarding his employment and will be able to look for new employment. Other employees retained by the practitioner during business rescue may be worse off as their unpaid entitlements may never be paid in accordance with section 144's priority and the possibility still exists that the rescue might end in liquidation.

#### **4 FINAL REMARKS**

South Africa is leading the way in which employees are protected during business rescue proceedings. Although some of these rights may seem excessive and although some writers see them as superfluous, they pose no current threat to the way business rescue operates in South Africa. Taking the above recommendations into consideration, business rescue deserves the way it is treated in South Africa. Apart from knowing their fate where their employment contracts are concerned and having the right to claim unemployment in liquidation, employees' position is best looked after during business rescue in South Africa.

It must be kept in mind that the objective of business rescue is not to save jobs. The saving of jobs is an obvious consequence should the company be rehabilitated and continue trading as a successful concern. If the saving of jobs were to be regarded as a third objective of business rescue the legislature would have included it in the section which sets out the objectives. The main objective of business rescue, namely, to rehabilitate the company back to financial ability, must always be kept in mind as the primary objective. Should the achievement of the primary goal include the saving of jobs it is an added bonus.

If there is no prospect of saving the business then liquidation must be resorted to. Not only does liquidation in South Africa acknowledge employee rights by treating employees the best when compared to Australia and England, but employees may rely on unemployment benefits

once their contracts have been suspended, they enjoy preferent claim status for a specific amount and have the option of claiming as concurrent creditors should the free residue be sufficient.

It is clear after this study that not one of the comparative countries, namely, South Africa, Australia or England deals with this research question according to the first option given above. No country completely ignores employee rights under liquidation proceedings. Employee rights under liquidation are recognised albeit in a very limited way. In all three jurisdictions employee rights are afforded and protected to a greater extent during the country's rescue procedure. One could say that employee rights are enhanced during the rescue process in all three countries, offering them additional protection during the process. In no country that was examined in this study were employee rights curtailed or restricted in the rescue procedure.





# BIBLIOGRAPHY

## 1 BOOKS AND CHAPTERS IN BOOKS

- Anderson *Employee Entitlements*
- Anderson H *The protection of employee entitlements in insolvency An Australian perspective* (MUP Academic 2014)
- Anderson and Morrison *Crutchfield's*
- Anderson C and Morrison D *Crutchfield's Voluntary Administration* (Thomson Reuters 2012)
- Broc and Parry *Corporate Rescue*
- Broc KG and Parry R (Editor) *Corporate rescue: An overview of recent developments from selected countries in Europe* (Kluwer Law International 2004)
- Cassim *Contemporary Company Law*
- Cassim FHI, Cassim MF, Cassim R, Jooste R, Shev J, Yeats J *Contemporary Company Law 2<sup>nd</sup> Edition* (Juta 2012)
- Cilliers and Benade *Corporate Law*
- Cilliers HS, Benade ML, Henning JJ, Du Plessis JJ, Delpont PA, De Koker L and Pretorius JT *Corporate Law 3<sup>rd</sup> Edition* (Butterworths Durban 2000)
- Delpont *Henochsberg*
- Delpont PA *Henochsberg on the Companies Act 71 of 2008* (LexisNexis Durban 2018)
- Du Plessis *et al* *Principles*
- Du Plessis JJ, Hargovan A and Bagaric M *Principles of contemporary Corporate Governance 2<sup>nd</sup> Edition* (Cambridge University Press 2011)
- Finch *Corporate Insolvency Law*
- Finch V *Corporate Insolvency Law Perspectives and Principles 2<sup>nd</sup> Ed* (Cambridge University Press 2009)
- Fletcher *Law of Insolvency*
- Fletcher IF *The law of Insolvency 5<sup>th</sup> Ed* (Thomson Reuters Sweet & Maxwell 2017)

- Levenstein *Business Rescue Procedure*
- Levenstein E *South African Business Rescue Procedure Issue 1* (LexisNexis 2017)
- Lightman and Moss *Administrators and Receivers*
- Lightman G and Moss G *The law of administrators and receivers of companies 5<sup>th</sup> Ed* (Thomson Reuters 2011)
- Loubser *Inappropriateness*
- Loubser A “The inappropriateness of setting aside a creditor’s vote against a business rescue plan” in Hugo, C and Kelly-Louw, M (eds) *Jopie: Jurist, Mentor, Supervisor and Friend – Essays on the Law of Banking, Companies and Suretyship* 225 – 236 (Juta & Co Ltd 2017)
- Meskin *et al* *Insolvency Law*
- Meskin PM; Galgut B; Magid PAM; Kunst JA; Boraine A; Burdette DA *Insolvency Law and its operation in winding-up* Chapter 18 (LexisNexis 2015)
- Mongalo *Modern Company Law*
- Mongalo TH (Editor) *Modern Company Law for a Competitive South African Economy* (Juta & Co Cape Town 2010)
- Murray and Harris *Keay’s Insolvency*
- Murray M and Harris J *Keay’s Insolvency Personal and Corporate Law and Practice* 9<sup>th</sup> Edition (Thomas Reuters 2016)
- Pollard *Corporate Insolvency*
- Pollard D *Corporate Insolvency: Employment and pension rights* (Bloomsbury 2009)
- Sealy and Milman *Annotated Guide*
- Sealy L and Milman D *Annotated Guide to the Insolvency legislation* 11<sup>th</sup> Ed Vol 1 (Thomson Reuters 2008)
- Sharrock *et al* *Hockley*
- Sharrock R, Van der Linde K, Smith A *Hockley’s Insolvency Law 9<sup>th</sup> Edition* (Juta 2012)
- Symes *Statutory Priorities*
- Symes CF *Statutory priorities in Corporate Insolvency law: An analysis of preferred creditor status* (Ashgate Publishers 2008)
- Symes and Duns *Australian Insolvency Law*
- Symes CF and Duns J *Australian Insolvency Law* 3<sup>rd</sup> Ed (LexisNexis Australia 2015)

- Van Jaarsveld *et al* *Principles and Practice of Labour Law*
- Van Jaarsveld SR; Fourie JD; Olivier MP *Principles and Practice of Labour Law* (LexisNexis 2002)
- Van Niekerk *et al* *Law@Work*
- Van Niekerk A; Christianson M; McGregor M; Smith E; van Eck BPS; Smit N (Editor) *Law@Work* 2014 3<sup>rd</sup> Ed (Lexis Nexis 2014)
- Westbrook *et al* *Business Insolvency Systems*
- Westbrook JL (ED), Booth CD, Paulus CG, Rajak H *A Global View of Business Insolvency Systems* The World Bank, Washington DC (Martinus Nijhoff Publishers 2010)
- Wood *International Insolvency*
- Wood PR *Principles of International Insolvency* 2<sup>nd</sup> Edition The Law of Practice of International Finance Series Vol 1 (Thomson Sweet & Maxwell 2007)

## 2 REPORTS AND STATEMENTS

### 2.1 South Africa

Companies Bill 2007 <i>Explanatory Memorandum</i>	<i>Explanatory Memorandum</i>
Department of Trade and Industry <i>South African Company Law for the 21<sup>st</sup> Century: Guidelines for Corporate Law Reform</i> (May 2004) Notice 1183 of 2004 in <i>Government Gazette</i> No 26493 of 23 June 2004	<i>SA Company Law for the 21<sup>st</sup> Century</i>
Institute of Directors of Southern Africa: <i>King I Report on Corporate Governance</i> 1994	<i>King I Report</i>
Institute of Directors of Southern Africa: <i>King II Report on Corporate Governance</i> 2002	<i>King II Report</i>
Institute of Directors of Southern Africa: <i>King III Report on Corporate Governance</i> 2009	<i>King III Report</i>
Institute of Directors of Southern Africa: <i>King IV Report on Corporate Governance</i> 2016	<i>King IV Report</i>
Pretorius M <i>Business Rescue Status Quo Report</i> 2015	<i>Business Rescue Status Quo Report</i>

### 2.2 Australia

Australia Government, Department of Employment "What assistance can FEG provide?" March 2016	"What assistance can FEG provide?"
Australian Law Reform Commission "General Insolvency Enquiry" Report No 45 (1988).	<i>Harmer Report</i>
Australian Securities and Investments Commission Information Sheet 46 "Liquidation: a guide for employees"	<i>ASIC Information Sheet 46</i>
Australian Securities and Investments Commission Information	<i>ASIC Information Sheet 45</i>

Sheet 45 "Liquidation: a guide to creditors"

Blazic MJ "In Search of a Corporate Rescue Culture: A Review of the Australian Part 5.3A Legislation" 2010 *HDR Student Conference* 2010 October Paper 8. Blazic 2010

Explanatory Memorandum for the Fair Entitlements Guarantee Act of 2012.

Mitchell R, O'Donnell A and Ramsey I "*Shareholder value and employee interests: Intersections between corporate governance, corporate law and labour law*" 2005 Research Report Centre for Corporate Law and Securities Regulation and Centre for Employment and Labour Relations Law, University of Melbourne. Mitchell et al 2005 *Intersections*

Parliamentary Joint Committee on Corporations and Financial Services "*Improving Australia's insolvency laws*" Issues Paper May 2003. *Improving Australia's insolvency laws*"

Parliamentary Joint Committee on Corporations and Financial Services *Corporate Insolvency Laws: A Stocktake*. *Corporate Insolvency Laws: A Stocktake*

Raper E "*The Impact of Insolvency and Bankruptcy Amendments to Employee Rights*" Paper delivered at 18<sup>th</sup> Annual Labour Law Conference 2010 Sydney. Raper 2010 "*The Impact of Insolvency and Bankruptcy Amendments to Employee Rights*"

The Auditor General *Australian National Audit Office Report No 32 2014-15*. *ANAO Report 2014-2015*

The Minister of Employment, Workplace Relations and Small Business, Honorable Peter Reith issued the discussion paper in August 1999: "The Protection of Employee Entitlements in the Event of Employer Insolvency." "The Protection of Employee Entitlements in the Event of Employer Insolvency."

### 2.3 England

Department of Trade, Insolvency law and Practice *Report of the Review Committee* (Cmnd 8558) 1982. *Cork Report*

Seely A House of Commons Library “National insurance contributions (NICs): an introduction” Briefing Paper 4517 17 July 2017

*Seely House of Commons Briefing Paper*

### 2.4 Other

*Convention on the Protection of Workers' Claims (Employer's Insolvency)* 1992 (C173) Article 3 International Labour Organisation

*Convention 1992 (C173) Article 3*

Johnson G “Insolvency systems in South Africa: Comparative review of employee claims treatment” Financial sector program *USAID* October 2011.

Johnson 2011 *USAID*

UNCITRAL Working Group V (Insolvency Law) *Legislative Guide on Insolvency Law* (2004)

*UNCITRAL Legislative Guide*

### 3 MASTERS AND DOCTORAL THESES

#### 3.1 Doctoral theses

- Botha *LLD Thesis*
- Botha MM “Employee participation and voice in companies: A legal perspective” (2015) degree Doctor Legum, North-West University
- Gant *LLD Thesis*
- Gant JL “Rescue before a fall: An Anglo-French analysis of the balance between corporate rescue and employment protection” (2016) Doctorate of Philosophy, Nottingham Trent University
- Levenstein *LLD Thesis*
- Levenstein E “An appraisal of the new South African business rescue procedure” (2015) Doctor Legum, University of Pretoria
- Loubser *LLD Thesis*
- Loubser A “Some Comparative Aspects of Corporate Rescue in South African Company Law” (2010) degree Doctor Legum, University of South Africa
- Smit *LLD Thesis*
- Smit N “Labour Law Implications on the Transfer of an Undertaking” (2001) degree Doctor Legum, Rand Afrikaanse Universiteit

#### 3.2 Masters theses

- Faul *LLM Thesis*
- Faul PM “The impact and origin of employee rights in Chapter 6 of the Companies Act 71 of 2008” (2015) Master of Laws, University of Kwazulu-Natal
- Kaplan *LLM Thesis*
- Kaplan FM “Stakeholder interests in the business rescue regime: The quest for a sustainable balance” (2017) Masters of Law, North-West University
- Martin *LLM Thesis*
- Martin KJ “Employee protection during business rescue proceedings in South Africa: A comparative perspective” (2013) Master of Laws University of Cape Town

#### 4 JOURNAL ARTICLES

- Anderson C “The Australian corporate rescue regime: Bold experiment or sensible policy?” 2001 *International Insolvency Review* Vol 10 81 Anderson 2001 *IIR*
- Anderson C “Viewing the proposed South African business rescue provisions from an Australian perspective” 2008 *Potchefstroom Electronic Law Journal* Vol 11 No 1, 104 Anderson 2008 *PER*
- Anderson H “Voluntary administration and the protection of employee entitlements” 2012 *Company and Securities Law Journal* 170 Anderson 2012 *CSLJ*
- Arjunan K “Locus standi of employees in companies winding up” 1993 *Company and Securities Law Journal* 141 Arjunan 1993 *CSLJ*
- Bagchi A “Who should talk? What counts as employee voice and who stands to gain” 2011 Vol 94 (3) *Marquette Law Review* 869 Bagchi 2011 *MLR*
- Boraine A and Van der Linde K “The draft Insolvency Bill – An exploration” (Part 1) 1998 *Tydskrif vir Suid-Afrikaanse Reg* 621 Boraine and Van der Linde (Part 1) 1998 *TSAR*
- Boraine A and Van der Linde K “The draft Insolvency Bill – An exploration” (Part 2) 1999 *Tydskrif vir Suid-Afrikaanse Reg* 38 Boraine and Van der Linde (Part 2) 1999 *TSAR*
- Boraine A and Van Eck BPS “The new insolvency and labour legislative package: How successful was the integration?” 2003 24 *Insolvency Law Journal* 1840 Boraine and Van Eck 2003 *ILJ*
- Botha MM “Responsibilities of companies toward employees” 2015 *Potchefstroom Electronic Law Journal* Vol 18 No 2, 2 Botha 2015 *PER*
- Botha MM “The different worlds of labour law and company law: truth or myth?” 2014 *Potchefstroom Electronic Law Journal* Vol 17 No 5, 2042 Botha 2014 *PER*
- Bradstreet RS “The meaning of ‘binding offer’ in the Kariba case: Did creditors need to be protected from an alien cram-down?” 2017 (1) *Journal of Corporate and Commercial Law & Practice* 72 Bradstreet 2017 *JCCL&P*
- Burdette DA “Some Initial Thoughts on the Development of a Modern and Effective Business Rescue Model for South Africa (Part 1) 2004 16 *South African Mercantile Law Journal* 241 Burdette (Part 1) 2004 *SAMLJ*
- Burdette DA “Some Initial Thoughts on the Development of a Modern and Effective Business



- Rescue Model for South Africa (Part 2) 2004 16 *South African Mercantile Law Journal* 409
- Carolus P, Tiemeni TG and Ziervogel K “Effects on the employment relationship of the insolvency of the employer: A worker perspective” 2007 *Law, Democracy and Development* Vol 11 Special Edition 109 Carolus *et al* 2007 *LDD*
- Darvas P “Employees’ rights and entitlements and insolvency: Regulatory rationale, legal issues and proposed solutions” 1999 *Companies and Securities Law Journal* Vol 17 103 Darvas 1999 *CSLJ*
- Esser IM “The Protection of Stakeholder Interests in terms of the South African *KING III Report on Corporate Governance: An Improvement on KING II?*” 2009 21 *South African Mercantile Law Journal* 188 Esser 2009 *SAMLJ*
- Etukakpan SE “The lost voice in insolvency: Theories of Insolvency law and their implication for the employees” 2014 *Nottingham Law Journal* 34. Etukakpan 2014 *NLJ*
- Evans R “Preferential treatment of employee creditors in insolvency law” 2004 16 *South African Mercantile Law Journal* 458 Evans 2004 *SAMLJ*
- Gentry L “Still a priority? Employee entitlements in insolvency” Jan – Mar 2013 *Australian Insolvency Journal* 8 Gentry 2013 *AIJ*
- Harmer RW “Comparison of Trends in National Law: The Pacific Rim” 1997 13 *Brooklyn Journal of International Law* 147 Harmer 1997 *BJIL*
- Harris J “Charting the Limits of Insolvency Reorganisations: Lehman Brothers Holdings Inc v City of Swan” 2010 *Sydney Law Review* Vol 32 141 Harris 2010 *SLR*
- Holding P “Who bears the risk? Protecting employee entitlements upon insolvency” 1995 *Law Institute Journal* 69 789 Holding 1995 *LIJ*
- Hunter M “The nature and functions of a rescue culture” 104 *Commercial Law Journal* 1999 4 426 Hunter 1999 *CLJ*
- Jacobs LM and Smit DM “Ondernemingsreëding en werknemers in die Suid-Afrikaanse reg: “Verlore siele” of nie? *Journal of Judicial Science* 2016 41(2) 123 Jacobs and Smit 2016 *JJS*
- Joubert EP and Loubser A “Executive directors in business rescue: employees or something else?” 2016 *De Jure* 95 Joubert and Loubser 2016 *De Jure*
- Joubert EP, Van Eck BPS and Burdette DA “Impact of Joubert *et al* 2011 *IJCLLIR*

Labour Law on South Africa's New Corporate Rescue Mechanism" 2011 *International Journal of Comparative Labour Law and Industrial Relations* Vol 27 (1) 65

Kimhi O and Doebert A "Bankruptcy law as a balancing system: lessons from a comparative analysis of the interaction between labor and bankruptcy laws" 2015 *American Bankruptcy Institute Law Review* Volume 23 491

Kimhi and Doebert 2015 *ABLR*

Kloppers P "Judicial management – a corporate rescue mechanism in need of reform?" 1999 10 *Stellenbosch Law Review* 417

Kloppers 1999 *Stell LR*

Lombard S and Joubert EP "The legislative response to the shareholder v stakeholder debate: a comparative overview" 2014 *Journal of Corporate Law Studies* Vol 14 No 1 211

Lombard and Joubert 2014 *JCLS*

Loubser A "Judicial Management as a Business Rescue Procedure in South African Corporate Law 2004 16 *SAMLJ* 137

Loubser 2004 *SAMLJ*

Loubser A "The Interaction between Corporate Rescue and Labour Legislation: Lessons to be Drawn from the South African Experience 2005 *International Insolvency Review* Vol 14 57

Loubser 2005 *IIR*

Loubser A "Business Rescue in South Africa: A Procedure in Search of a Home?" 2007 *Comparative and International Law Journal of Southern Africa* 152

Loubser 2007 *CILSA*

Loubser A "The Business Rescue Proceedings in the Companies Act of 2008: Concerns and Questions (Part 1) 2010 3 *Tydskrif vir Suid-Afrikaanse Reg* 501

Loubser (Part 1) 2010 *TSAR*

Loubser A "The Business Rescue Proceedings in the Companies Act of 2008: Concerns and Questions (Part 2) 2010 4 *Tydskrif vir Suid-Afrikaanse Reg* 689

Loubser (Part 2) 2010 *TSAR*

Loubser A "Tilting of windmills? The quest for an effective corporate rescue procedure in South African Law" 2013 *South African Mercantile Law Journal* 437

Loubser 2013 *SAMLJ*

Loubser A and Joubert EP "The role of trade unions and employees in South Africa's Business Rescue Proceedings" 2015 *Industrial Law Journal* 21

Loubser and Joubert 2015 *ILJ*

Milman D (Ed) "Day v Haine: protective awards to employee were provable in company's liquidation" 2008 *Company Law Newsletter* 233 7

Milman 2008 *CLN*

O'Donovan J "Corporate redundancy" 1976 4 *Australian Business Law Review* 257

O'Donovan 1976 *ABLR*

- O' Donovan J "Employees, voluntary administrations and deed of company arrangement" 1994 *Corporate Insolvency* October 457 O'Donovan 1994 *CI*
- Parr R & Bennett N "The rescue culture v collective employee rights" *Insolvency Intelligence* (2005) 18(10), 156 Parr and Bennett 2005 *II*
- Pollard D "Adopted employees in insolvency – orphans no more" 1995 24 *Industrial Law Journal* 141 Pollard 1995 *ILJ*
- Pollard D "Personal liability of an insolvency practitioner for employee discrimination claims: Part 1" 2007 *Insolvency Intelligence* 20(10) 145 Pollard 2007 *II*
- Rahim MM "The 'stakeholder approach' to corporate governance and regulation: An assessment" 2011 *Macquarie Journal of Business Law* 304 Rahim 2011 *MJBL*
- Rajak H "Insolvent companies and employee rights" *The King's College Law Journal* 1994-1995 5 184 Rajak 1994-1995 *KCLJ*
- Rajak H and Henning J "Business Rescue for South Africa" 1999 *South African Law Journal* 262 Rajak and Henning 1999 *SALJ*
- Riley J "Lessons from Ansett: Locating the employees' voice in corporate enterprise" 2002 *Alternative Law Journal* Vol 27(3) 112 Riley 2002 *ALJ*
- Riley J "Transfer of business under the Fair Work Act" 2009 *Commercial Law Quarterly* June – August 15 Riley 2009 *CLQ*
- Rushworth J "A Critical Analysis of the Business Rescue Regime in the Companies Act 71 of 2008" in Mongalo TH (ED) 2010 *Modern Company Law for a Competitive South African Economy* 375 Rushworth 2010 *MCLCSAE*
- Smits A "Corporate Administration: A Proposed Model" 1999 *De Jure* 80 Smits 1999 *De Jure*
- Smit D & Vergottini V "Die Invloed van 'n Werkgewer se Likwidasie en/of Boedelsekwestrasie op die Diensverhouding met die Werknemer, met die Oog op Ondernemingsredding as Moontlike Alternatief" Maart 2013 *Litnet Akademies Jaargang* 10 1 83 Smit and Vergottini 2013 *Litnet*
- Smit N "Labour is not a commodity: Social perspectives on flexibility and market requirements within a global world" (2006) *Tydskrif vir Suid-Afrikaanse Reg* 152 Smit 2006 *TSAR*
- Smith A and Boraine A "Crossing borders into South African Insolvency law: From the Roman-Dutch jurists to the UNCITRAL model law" 2002 *American Bankruptcy Institute Law Review* Vol 10, 135 Smith and Boraine 2002 *ABILR*

- Steenkamp A and Warrassaly D "The effect of insolvency on contracts of employment: The 2002 amendments to the Insolvency Act and the Labour Relations Act" 2002 *Law, Democracy and Development* Vol 6, Issue 1, 151
- Stoop H and Hutchison A "Post-Commencement finance – domiciled resident or uneasy foreign transplant?" 2017(20) *Potchefstroom Electronic Law Journal*
- Swart C "Business Rescue: Do employees have better (reasonable) prospects of success? Commentary on The Employees of Solar Spectrum v Afgri Operations Ltd and Another" 2014 2 *Obiter* 406
- Symes CF "A New Statutory Director's Duty for Australia – A 'Duty' to be Concerned about Employee Entitlements in the Insolvent Corporation" 2003 *International Insolvency Review* Vol 12 133
- Toube F and Todd G "The proper treatment of employees' claims in administration" 2005 *Insolvency Intelligence* 18(7) 108
- Van Eck BPS, Boraine A and Steyn L "Fair labour practices in South African insolvency law" 2004 *South African Law Journal* 902
- Villiers C "Employees as creditors: a challenge for justice in insolvency law" 1999 20(7) *Company Lawyer* 222
- Holding P "Who bears the risk? Protecting employee entitlements upon insolvency" 1995 *Law Institute Journal* 69 789
- Steenkamp and Warrassaly 2002 *LDD*
- Stoop and Hutchison 2017 *PER*
- Swart 2014 *Obiter*
- Symes 2003 *IIR*
- Toube and Todd 2005 *II*
- Van Eck *et al* 2004 *SALJ*
- Villiers 1999 *CL*
- Holding 1995 *LII*

## 5 LEGISLATION

### **Australia**

Bankruptcy Act of 1966  
Bankruptcy Act of 1986

Corporate Law Reform Act 1992  
Corporations Act 2001 (Cth).  
Corporations Amendment (Insolvency) Act 2007 (Cth).  
Corporations Amendment (Phoenixing and Other Measures) Act 2012 (Cth).  
Corporations Regulations 2001 (Cth).  
Corporations Law and the Bankruptcy Act 1966  
Fair Entitlements Guarantee Act 2012  
Fair Work Act 2009

Insolvency Law Reform Act 2016

Judicature Act 1875

Tax Priorities Legislation Amendment Act 1993

### **South Africa**

Basic Conditions of Employment Act 75 of 1997

Close Corporations Act 69 of 1984  
Companies Act 46 of 1926  
Companies Act 61 of 1973  
Companies Act 71 of 2008  
Companies Bill 2007  
Compensation for Occupational Injuries and Diseases Act 130 of 1993  
Constitution of the Republic of South Africa Act 106 of 1996

Employment Equity Act 55 of 1998

Insolvency Act 24 of 1936  
Insolvency Amendment Act 33 of 2002  
Insolvency Second Amendment Act 69 of 2002

Judicial Matters Second Amendment Act 122 of 1998

Labour Relations Act 66 of 1995  
Labour Relations Amendment Act 12 of 2002

Occupational Health and Safety Act 85 of 1993  
Skills Development Act 97 of 1998

Unemployment Insurance Act 63 of 2001

### **England**

#### **Statutes**

Companies Act 2006 (c 46)

Employment Relations Act 1999 (c 26)  
Employment Rights Act 1996 (c 18)

Enterprise Act 2002 (c 40)

Financial Services Management Act 2000 (c 8)

Insolvency Act 1986 (c 45)

Insolvency Act 1994 (c 7)

Pension Funds Act 2004 (c 35)

Pension Schemes Act 1993 (c 48)

Trade Union and Labour Relations (Consolidation) Act 1992 (c 52)

Unfair Dismissal Act 1977

Winding Up Act 1844

### **Statutory Instruments**

Employment Rights (Increase of Limits) Order 2017 (SI 2017/175)

Employment Rights (Increase of Limits) Order 2017

Insolvency Rules 1986 (SI 1986/1925)

Insolvency Rules 1986

Insolvency Rules 2016 (SI 2016/1024)

Insolvency Rules 2016

Statutory Maternity Pay (General) Regulations 1986 (SI 1986/1960)

Statutory Maternity Pay (General) Regulations 1986

Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002 (SI 2002/2822).

Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002

Statutory Sick Pay (General) Regulations 1982 (SI 1982/894)

Statutory Sick Pay (General) Regulations 1982

Transfer of Undertakings (Protection of Employment) Regulations 1981 (SI 1981/1794)

TUPE 1981

Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246)

TUPE 2006

### **EU Directives**

EU Directive 2008/94/EC

European Union's Acquired Rights Directive 77/187

*Acquired Rights Directive*

Directive 2001/23/EC

*2001 Directive*

Directive 2002/14/EC

*2002 Directive*

## 6 CASELAW

### Australia

*Brash Holdings v Katile Pty Ltd* (1994) 12 ACLC 472; 13 ACSR 504

*Daydream Island International Resort v Cushway Blackford* (1995) 13 ACLC 82

*Fitzgerald, in the matter of Advance Healthcare Group Ltd* [2008] FCA 1604

*Green v Giljohann* (1995) 17 ACSR 518

*McEvoy v Incat Tasmania Pty Ltd* [2003] FCA 810; (2003) 130 FCR 503; 21 ACLC 1,463; 1,473

*McGrath v Sturesteps; Sturesteps v HIH Overseas Holdings Ltd (in liquidation)* [2011] NSWCA

*Pasminco Ltd* [2003] FCA 265; (2003) 45 ACSR 1

*Re Ansett Australia; Rappas v Ansett Australia Ltd* [2001] FCA 1348; (2001) 39 ACSR 296

*Re Ansett Australia Ltd and Mentha* (2002) 188 ALR 186; [2002] FCA 2

*Re Associated Dominions Assurance Society Ltd* (1962) 109 CLR 516

*Re Association of Land Financiers* (1881) 16 Ch D 373

*Re General Rolling Stock Co* (1866) 1 Eq 346

*Re Galaxy Media Pty Ltd (in liq)* (2002) 20 ACLC 73

*Re Midland Coal, Coke and Iron Co* [1895] 1 Ch 267

*Re RS Newman Ltd* [1916] 2 Ch 309

*Re Kanedale Pty Ltd* (1987) 12 ACLR 449; (1988) 6 ACLC 359

*Svitzer Australia Pty Ltd v Maritime Union of Australia, The Northern New South Wales Branch* [2011] FWAFB 7947

*Sydney Land Corporation (Pty) Ltd v Kalon (Pty) Ltd* 1997 26 ACSR

*Walker and Sherman v Andrew* (2002) 20 ACLC 1476

### South Africa

*ABSA Bank Limited v Caine NO and Another, In Re; ABSA Bank Limited v Caine NO and Another* [2014] ZAFSHC 46

*Absa Bank Ltd v Golden Dividend 339 (Pty) Ltd and Others* 2015 (5) SA 272 (GP)

*Absa Bank Ltd v Naude NO and Others* 2016 (6) SA 540 (SCA)

*African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2015 (5) SA 192 (SCA)

*AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd* 2012 (5) 515 (GSJ)

*Botha v Botha* [2016] ZAFSHC 194

*BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others* 2017 (4) SA 592 (GJ)

*Booyesen v Jonkheer Boerewynmakery (Pty) Ltd (in Business Rescue) and Another* [2017] 1 All SA 862 (WCC)

*Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group* 2011 (5) SA 600 (WCC)

*Cardinet (Pty) Ltd v Wedgewood Golf and Country Estate (Pty) Ltd* (unreported case no 19599/2012 (WCC))

*Chetty t/a Nationwide Electrical v Hart and another NNO* [2015] 6 SA 424 (SCA)

*Cloete Murray and Another NNO v FirstRand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA)

*Coca Cola SABCO (Pty) Ltd v Van Wyk* LAC JA11/2013

*Collard v Jatara Connect (Pty) Ltd and Others* [2017] JOL 38032 (WCC)

*Commission of South African Revenue Services v Beginsel* 2013 (1) SA 307 (WCC)

*DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others* [2014] 1 All SA 173 (KZP)

*Diener NO v Minister of Justice and Others* 2018 (2) SA 399 (SCA)

*Diener NO v Minister of Justice and Others* (30123/2015) [2016] ZAGPPHC 1251 (2 March 2016)



- EB Steam Company (Pty) Ltd v Eskom Holdings SOC Ltd* [2014] 1 All SA 294 (SCA)
- Ellerine Furnishers (Pty) Ltd (in business rescue) and others v FGWU obo Cleopatra Somtsewu*  
Unreported case no JR1836/2015 LC (26 April 2016)
- Employees of Solar Spectrum Trading v Afgri Operations* [2012] ZAGPPHC 359
- Engen Petroleum Ltd v Multi Waste (Pty) Ltd and Others* 2012 (5) SA 596 (GSJ)
- Evrax Highveld Steel and Vanadium Ltd (in business rescue)* Registration number 1960/001900/06
- Golden Dividend v Absa Bank* (569/2015) [2016] ZASCA 78 (30 May 2016)
- Fabrizio Burda v Integcomm (Pty) Ltd* Unreported case no JS539/2012 LC (29 November 2013)
- FirstRand Bank Ltd v KJ Foods CC (In business rescue)* [2017] 3 All SA 1 (SCA)
- Firststrand Bank Limited v Normandie Restaurants Investments and Another* (189/2016) [2016] ZASCA 178 (25 November 2016)
- Hendor Mining Supplies (Pty) Ltd v NUMSA and another* LAC JA55/2014
- KJ Foods CC v First National Bank* (75627/2013) [2015] ZAGPPHC 221 (23 April 2015)
- Knipe v Kameelhoek (Pty) Ltd and Others* (2120/2016) [2017] ZAFSHC 116 (22 June 2017)
- Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd and Others* (624/2016) [2017] ZASCA 131
- Le Roux Hotel Managment (Pty) Ltd v E Rand (Pty) Ltd* [2001] 1 All SA 223 (C)
- Lidino Trading 580 CC v Cross Point Trading (Pty) Ltd* 2012 ZAFSHC 155
- Luthuli Power Corporation (Pty) Ltd and Others v Transfix Transformers SA (Pty) Ltd* Unreported case 1981/2016 HC of the Free State (22 December 2016)
- Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd and Another* 13/12406 [2013] ZAGPJHC 109 (10 May 2013)

- Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)
- National Union of Metal Workers of South Africa obo Hlongwane and Others v Wilro Supplies CC* (JS 207/12) [2015] ZALCJHB 96 (19 March 2015)
- Newcity Group v Allan David Pellow NO* Unreported case number (577/2013) [2014] ZASCA 162 (1 October 2014)
- Ngwato v Van der Merwe NO* Unreported Case (2014/28470) [2016] GJ (6 May 2016)
- NUMSA v Motheo Steel Engineering* (unreported case no J271/2014 LC (7 February 2014)
- Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2012] 2 All SA 433 (GSJ)
- Oakdene Square Properties v Farm Bothasfontein (Kyalami)* 2012 3 SA 273 (GSJ)
- Oakdene Square Properties v Farm Bothasfontein (Kyalami)* 2013 (4) SA 539 (SCA)
- Panamo Properties (Pty) Ltd and Another v Nel and Others NNO* 2015 (5) SA 63 (SCA)
- Pharmaceutical Manufacturers of South Africa: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC)
- Pilot Freight (Pty) Ltd v Von Landsberg Trading (Pty) Ltd* [2014] ZAGPJHC 203
- Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FS)
- Redpath Mining South Africa (Pty) Ltd v Marsden NO and Others* 18486/2013 [2013] ZAGPJHC 148 (14 June 2013)
- Richter v Absa Bank Limited* (20181/2014) [2015] ZASCA 100
- Richter v Bloempro CC and Others* 2014 (6) SA 38 (GP)
- Shoprite Checkers (Pty) Ltd v Berryplum and Others* 47327/2014 [2015] ZAGPPHC (9 March 2015)
- Solidarity v Vanchem Vanadium Products (Pty) Ltd and Others* Unreported case no J385/2016 and J393/2016 LC
- Sondamase and another v Ellerine Holdings Limited (in business rescue) and another* (unreported case C669/2014 LC (22 April 2016)
- Van der Merwe and Others v Zonnekus Mansion (Pty) Ltd (in liquidation) and Another (Commissioner for the South African Revenue Service and Another Intervening)* (17150/2016)

[2016] ZAWCHC 193 (19 December 2016)

*Welman v Marcelle Props 193 CC and Another* [2012] JOL 28714 (GSJ)

## England

*Bloom v Pensions Regulator* 2011 WL 4832401

*BTR (UK) Limited, Lavin v Swindell* [2012] EWHC 2398 (Ch)

*Commercial Finance Co Ltd v Ramsingh-Mahabir* (1994) 1 WLR 1297

*Day v Haine* [2008] EWCA Civ 626; [2008] BCC 845 (CA(Civ Div))

*Ex Parte James* (1874) Ch App Cas 609

*Fowler v Commercial Timber Co* [1930] 2 KB 1

*Gerard v Worth of Paris* [1936] 2 All ER 905

*London, Hamburg and Continental Exchange Bank, Re; sub nom. Emmerson's Case* (1865-1866) LR 1 Ch App 433 CA 231

*Measures Bros Ltd v Measures* [1910] 2 Ch 248

*Midland Counties District Bank Ltd v Attwood* [1905] 1 Ch 357

*Mr R Neufeld v A & N Communications in Print Ltd – In Liquidation, Secretary of State for Trade and Industry* 2008 WL 833727

*Powdrill v Watson* [1994] 2 All ER 513

*Powdrill v Watson* [1995] 2 AC 394 HL

*Powdrill and another v Watson and another; Re Leyland DAF Ltd; Re Ferranti International plc* [1995] 2 All ER 65

*Powdrill v Watson: Paramount Airways Ltd (No 3)* [1994] 2 All ER 513; [1994] BCC 172

*Re Alders Department Stores Ltd* [2005] EWHC 172 (Ch); [2005] BCC 289

*Re English Joint Stock Bank, ex Parte Harding* (1967) 3 Eq 341

*Re Foster Clark Ltd's Indenture Trusts, Loveland v Horscroft* [1966] 1 WLR 125

*Re General Rolling Stock Co* (1886) 33 Ch D 366

*Re Leyland DAF Ltd* [1995] 2 WLR 312

*Re Oriental Bank Corporation* (1886) 32 Ch D 366

*Re Specialised Mouldings* Unreported decision on 13 February 1987

*Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592 (CA) 606

*Salomon v Salomon* [1897] AC 22

*Secretary of State for Trade and Industry v Slater* [2007] IRLR 928

*Ward Brothers (Malton) Ltd v Middleton* UKEAT 0249/13

## **Other**

*Ferreira da Silva v Estado Português* [2015] ECJ C 160/14 CJEU

*National Labor Relations Board v Bildisco & Bildisco, Debtor-in-Possession et al* 465 US 513 (1983)

*Secretary of State for Trade and Industry v Slater* [2007] IRLR 928

*Ward Brothers (Malton) Ltd v Middleton* UKEAT 0249/13

## 7 INTERNET

Dickfos J and Anderson C “The sovereign voluntary administrator. Position of the voluntary administrator vis a vis the company stakeholders” <http://www98.griffith.edu.au/dspace/handle/10072/24030> (Date of use: 12 November 2017).

Feber MM “Employee entitlements in insolvency Comparison between Australia and German concepts” 10 October 2003 [http://www.cimejes.com/word\\_doc/Employee%20Entitlements%20in%20Insolvency.pdf](http://www.cimejes.com/word_doc/Employee%20Entitlements%20in%20Insolvency.pdf) (Date of use: 28 November 2017).

Harris J “Australian Insolvency Law” A blog discussing developments in insolvency and debt restructuring <https://australianinsolvencylaw.com/2017/03/01/insolvency-law-reform-act/> Harris (March 2017(1)) (Date of use: 1 December 2017).

Harris J “Australian Insolvency Law” A blog discussing developments in insolvency and debt restructuring <https://australianinsolvencylaw.com/2017/09/04/ilra-committees-of-inspection/> Harris (September 2017) (Date of use: 1 December 2017).

Migwalla M and Du Preez W “Are Directors’ Emotions Hampering Business Rescue?” MyBusiness Moneyweb (8 March 2013) <http://www.moneyweb.co.za/moneyweb-mybusiness/are-directors-emotions-hampering-business-rescue> (Date of use: 20 August 2013).

Rau-Foster “Employees are not disposable commodities” 2016 Workplace Issues <http://www.workplaceissues.com/aremp/> (Date of use: 19 May 2016).

Sewanyana J “Employees’ Rights and Business Rescue. Has the Legislature Gone Too Far?” Bowman Gilfillan <http://www.bowman.co.za/eZines/News-Letter-More.asp> (Date of use: 15 February 2013).

Saunders L “Business Rescue and Employees’ Rights” Webber Wentzel 11 November 2009 <http://www.polity.org.za/article/business-rescue-and-employee-rights-2009-11-11> (Date of use 15 February 2013).

Sellars P “Corporate voluntary administration in Australia” Forum for Asian Insolvency Reform 2001. <https://www.oecd.org/corporate/ca/corporategovernanceprinciples/1873984.pdf> (Date of use: 30 November 2017).

Steyn L “Numsa forces company into rescue” Mail and Guardian 10 July 2015 <https://mg.co.za/article/2015-07-09-numsa-forces-company-into-rescue> (Date of use: 19 November 2017).

Townsend J “Comparing UK and US Business Rescue Procedures: Are Administration and Chapter 11 Perceived to be Workable and Affordable?” 1 June 2007 Insolvency Law Forum <http://www.insolvencylawforum.co.uk> (Date of use: 15 February 2013).

Whelan S and Zwier L “Employee entitlements and corporate insolvency and reconstruction 2002” [http://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0015/1710015/95-Protectionofemployeeentitlements\\_final\\_12.pdf](http://law.unimelb.edu.au/_data/assets/pdf_file/0015/1710015/95-Protectionofemployeeentitlements_final_12.pdf) (Date of use: 28 November 2017).

ASIC’s Creditors – Liquidation. <http://asic.gov.au> (Date of use: 20 June 2016).

Australia Securities and Investment Commission (ASIC) “Voluntary Administration” <http://www.asic.gov.au/asic> (Date of use: 15 February 2013).

Companies and Intellectual Properties Commission, “Business Rescue” <http://www.cipc.co.za/BusinessRescue.aspx> (Date of use: 20 August 2013).

## BIBLIOGRAPHY

---

Australian Securities & Investment Commission (ASIC) Information Sheet 75: Voluntary Administration: A Guide to Employees (13 December 2010) <http://www.asic.gov.au> (Date of use: 10 September 2013).

Stats SA <http://www.statssa.gov.za/keyindicators/keyindicators.asp> (Date of use: 18 September 2013).  
House of Commons Library, Briefing Paper SN 00651, 9 June 2017 [www.parliament.uk/commons-library](http://www.parliament.uk/commons-library) (Date of use: 3 January 2018).  
<https://www.gov.uk/your-rights-if-your-employer-is-insolvent/claiming-money-owed-to-you> (Date of use: 3 January 2018).

Affinity Lawyers “Voluntary Administration: What about the Employee?” 3 May 2011  
<http://www.affinitylawyers.com.au/blog-view/voluntary-administration-what-about-the-employee> (Date of use: 15 February 2013).

Explanatory Memorandum for the Fair Entitlements Guarantee Act of 2012 available at <http://www.comlaw.gov.za/Details/C2012B00188/Explanatory%20Memorandum/Text> (Date of use: 14 July 2016).

Australian Government Fair Work Ombudsman <https://www.fairwork.gov.au> (Date of use: 29 November 2017).

Australian Bureau of Statistics, Labour Force, Australia, May 2016  
<http://www.abs.gov.au/ausstats/abs@.nsf/mf/6202.0> (Date of use: 23 June 2016).

Australian Government Department of Jobs and Small Business <https://www.jobs.gov.au/> (Date of use: 22 January 2018).

Australian Government Department of Jobs and Small Business <https://docs.jobs.gov.au/documents/what-assistance-can-feg-provide> (Date of use: 22 January 2018).

Australian Bureau of Statistics, Labour Force, Australia, October 2017  
<http://www.abs.gov.au/ausstats/abs@.nsf/mf/6202.0> (accessed on 30/11/2017).

Stats SA <http://www.statssa.gov.za/publications/P0141/CPIHistory.pdf> (Date of use: 5 February 2016).

<https://www.businessrescueexpert.co.uk/tupe-regulations-in-insolvency> 1 (Date of use: 30 January 2018).

<https://www.nidirect.gov.uk> (Date of use: 30 January 2018).

<http://www.inflation.eu/inflation-rates/south-africa/historic-inflation/cpi-inflation-south-africa.aspx> (Date of use: 18 December 2017).

[http://www.cipc.co.za/files/8114/9131/0792/Status\\_of\\_Business\\_Rescue\\_in\\_South\\_Africa\\_December\\_2016\\_version1\\_0.pdf](http://www.cipc.co.za/files/8114/9131/0792/Status_of_Business_Rescue_in_South_Africa_December_2016_version1_0.pdf) (Date of use: 10 April 2018).

“King report on corporate governance for South Africa 2002 – What it means to you”  
[http://www.mervynking.co.za/downloads/CD\\_King2.pdf](http://www.mervynking.co.za/downloads/CD_King2.pdf) (Date of use: 7 November 2017).

