An analysis of the law on employees' rights during the liquidation of companies in Botswana

OV Maphakwane

orcid.org/0000-0001-8187-5551

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Supervisor: Prof ML Mbao

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Student number: 28794729

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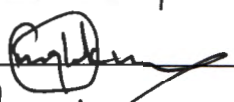
DECLARATION BY CANDIDATE

I, Ookeditse Vlandmir Maphakwane, hereby declare that this dissertation is my original work and has never been presented to any other institution. I further declare that any secondary information in this dissertation has been duly acknowledged.

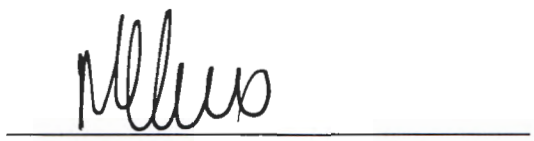
Student O V MAPHAKWANE

Signature 

Date 19/11/2019

DECLARATION BY SUPERVISOR

I, Professor Melvin L. M. Mbao, hereby declare that this dissertation by Mr. Ookeditse Vlandmir Maphakwane for the degree of Master of Laws (LLM) entitled "*An analysis of the law on employees' rights during the liquidation of companies in Botswana*" is ready for examination.



Prof Melvin L. M. Mbao

March 2019

DEDICATION

This dissertation is dedicated to all former employees of BCL Limited whose vulnerability and pain during the insolvency of their employer became a source of inspiration for this LLM dissertation.

ACKNOWLEDGEMENTS

First and foremost, I would like to thank Prof Melvin Mbao who became my supervisor when I was at the nadir of my research resulting from the change of a supervisor. Admittedly, this dissertation would not have been completed without his expert advice and incisive comments. My profound gratitude is therefore expressed to him for his invaluable tutelage and constructive criticism that enabled me to finally complete my research. His intervention at such a critical stage of my research was a source of inspiration which speaks volumes about his professorial reputation.

My gratitude also goes to a number of people without whom I would not have been able to complete this study. Firstly, my thanks go to the former executive secretary at the Maphakwane & Partners law firm, Ms Agnes Kebonyemotho, who diligently assisted me with the typing of the proposal while I was busy with court matters. To her I am truly indebted.

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ABSTRACT

This study discusses Botswana's legal framework in relation to the protection of employees' rights in the event of a company's liquidation. Its main focus is on the protection of employees as provided for under the corporate insolvency and labour laws of the country. The study drew its inspiration from the fact that, although there have been several studies conducted worldwide on the rights of workers, there is little research that has been conducted in Botswana on the rights of employees when a company is being liquidated. The main aim of this study was to examine whether Botswana's corporate insolvency law adequately protects employees' rights during the liquidation of a company. The study was motivated by the general concern that when a company is liquidated in Botswana, employees are the ones who suffer the most as their rights are not adequately protected by legal instruments, unlike employers and their creditors who can resort to legal recourse.

For data collection, the study relied on a qualitative research approach involving the scrutiny of both labour and corporate statutory frameworks in the protection of employees' rights in Botswana. The study started with a historical overview of Botswana's company law from the pre-independence era to post independence, focusing on a comparative analysis of the implications of international insolvency standards on domestic law.

The results show that Botswana's corporate insolvency law, in so far as the protection of employees' rights are concerned, fails to meet the international insolvency standard tests as enunciated by ILO Conventions, UNCITRAL insolvency legislative guide, as well as the World Bank principles. This finding is supported by the fact that Botswana's insolvency framework is fraught with weaknesses such as the lack of employees' claims guarantee fund, the absence of a unified insolvency legislation, the

existence of an elaborate and unnecessarily complex creditor claims procedure, a prolonged winding up procedure and the general lack of employees' recognition as a unique class of creditors deserving special protection in corporate insolvency proceedings.

In order to untangle the cumbersome legal complexities of liquidation, the study recommends that a reform of the corporate insolvency law in Botswana be made so that the rights of workers can be recognised. The need for law reform is spurred by lessons drawn from benchmarking approaches and corporate law perspectives of the unified insolvency legal framework of OHADA which has authoritatively established itself as a model of an insolvency framework to be adopted by developing countries such as Botswana.

Key words

Liquidation; insolvency; employees; employees' rights; corporate insolvency; insolvency proceedings; creditors; employees' protection; companies; workers.

LIST OF ABBREVIATIONS

BLR –	Botswana Law Reports
CEACR -	Committee of Experts on the Application of Conventions and Recommendations
CLB –	Commonwealth Law Bulletin
CA –	Court of Appeal
DJLJ –	De Jure Law Journal
HC –	High Court
ILO –	International Labour Organisation
JAL –	Journal of African Law
OHADA -	Organization for the Harmonization of Business Law in Africa
SADC –	Southern Africa Development Community
SADCC -	Southern African Development Coordination Conference
SADCLJ -	Southern Africa Development Community Law Journals
UBLJ –	University of Botswana Law Journals
UN –	United Nations
UNCITRAL -	United Nations Commission on International Trade Law
WB –	World Bank

CHAPTER ONE: INTRODUCTION

1.1 Background to the study

Botswana's insolvency laws on the protection of employees' rights and interests were put to test in March 2016 when the state-owned mining company, BCL Ltd, was put in provisional liquidation.[1] BCL limited was established by the Botswana Government in 1963, following the discovery of copper and nickel in the town of Selebi Phikwe.[2] This tripartite mining venture was seen as key to the diversification of the economy away from a reliance on the export of diamonds to increasing nickel exports which later sharply declined resulting in a serious cash flow deficit.[3]

In view of the grave financial problems faced by the company, rather than waiting for a creditor to initiate liquidation proceedings against the company, the Government filed a voluntary liquidation petition of BCL Ltd in terms of the *Companies Act* before the Botswana High Court.[4] The employees subsequently lost their employment, as well as their source of income, housing, loan guarantees, medical and funeral aid benefits which had been guaranteed by their liquidated employer.[5] This unprecedented insolvency quagmire exposed the inability of Botswana's corporate insolvency law to protect employees' rights in the event of a company being liquidated because the *Insolvency Act*[6] does not apply to corporate liquidation and cannot be invoked to protect corporate employees. Similarly, the *Companies Act*, which is the relevant and applicable statute, does not have substantive provisions for the protection of employees'

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1 Juma and Mosele 2016 http://www.weekendpost.co.bw.
2 Botswana Chamber of Mines 2018 www.bcm.org.bw.
3 Juma and Mosele 2016 http://www.weekendpost.co.bw.
4 *Ex parte petition* of *BCL Limited and others* 2017. Case No. UAHGB-000202-16
5 http:// www.botswanaguardian.co.bw.
6 Section 2 of *Insolvency Act Chapter 42:02.*

rights other than merely classifying them as part of general creditors.[7] As a result of this discrepancy, the *Employment Act*,[8] has been amended by introducing a provision that seeks to protect employees' wages during an employer's insolvency.[9] The amendment of the *Employment Act* has essentially introduced a legislative contradiction in that employees' wage claims during insolvency are dealt with differently as was observed in a 2008 study by Stefan and Boraine.[10] In Botswana, sadly, the minimum rights that require protection when a company is being liquidated are essentially the basic conditions of employment and employees' severance benefits as provided for under the *Employment Act.*[11]

The protection of the rights and interests of employees in Botswana during the liquidation of company is only limited to the application of two statutes: the *Companies Act*[12] and the *Employment Act.*[13] This is so because the *Insolvency Act*[14] does not apply to corporate insolvency; it only applies to natural persons and their estate. This has, therefore, limited the nature of employees' rights and the extent to which protection is offered under corporate insolvency laws. The *Companies Act* is the main statute that contains corporate insolvency provisions which are quite limited as the main objective is not about dealing with insolvency but company formation and its regulatory framework. This fuzzy situation has left corporate insolvency in Botswana without a substantive statute or core regulatory framework whose main focus is to regulate, manage and enforce corporate insolvency legislation.

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7 Section 409 (3) of *Companies Act* of 2003.
8 *Employment Act* Chapter 47:01.
9 *Employment Act* SI 71 of 2008.
10 Stefan and Borraine "A Plea for the Development of Coherent Labour and Insolvency Principles on a Regional basis in SADC Countries'" 291
11 *Employment Act* Chapter 47:01 Part VIII.
12 Section 384 of *Companies Act* of 2003.
13 Section 91A of *Employment Act Chapter 47:01.*
14 Section 2 of *Insolvency Act Chapter 42:02.*

The other legal issue that affects employees' rights in Botswana when a company is being liquidated is the country's non-compliance with its international obligations as enunciated in international legal frameworks of the ILO,[15] SADC,[16] World Bank and Creditor Rights Systems.[17] The country's failure to develop a uniform insolvency law, such as that of the Organisation for Harmonisation of Business Law in Africa (OHADA)[18] has left the workers without any legal protection when a company is being liquidated.

Both the ILO Conventions and the international insolvency standards of which Botswana is a signatory require the member countries to acknowledge the vulnerability of employees during the liquidation of a company.[19] This means that member countries should enact laws that guarantee the payment of wages in the event of a company being liquidated. Notwithstanding Botswana's membership and ratification of ILO Conventions, the country still lags behind in its domestication of international legal instruments into its statutory laws.[20] It is against this background that this study was undertaken in order to investigate how employees' rights can be protected under the Botswana legal framework during the liquidation of a company and to recommend a possible amendment of the law in order to be consistent with both ILO Conventions, international insolvency laws and even draw lessons from OHADA's insolvency framework.[21]

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15 www.ilo.org.
16 https://www.sadc.int/.
17 http://web.worldbank.org/gild.
18 www.ohada.org.
19 ILO 2009 Guide to the new Millennium Development Goals Employment Indicators.
20 http://www.mmegi.bw.
21 www.ohada.org.

1.2 Statement of the problem

The liquidation of BCL Limited in 2016 has exposed the inability of Botswana's legal system to protect the employees' rights and claims to be protected when a company is being liquidated. The lack of a substantive statutory provisions in the *Companies Act* concerning the employees' rights has necessitated the need for legislative reforms to provide for a corporate insolvency legal framework in Botswana. The lack of clear and effective statutory instruments for the protection of employees' labour rights including their claims for wages, severance benefits, employees' housing schemes, medical aid, funeral benefits and the non-protection of employees' loans has been the greatest weakness in Botswana's labour laws.

The case of BCL Ltd exposed the deficiencies in the country's insolvency laws when it comes to the protection and advancement of the welfare of corporate employees in the event of the untimely winding up of companies. The effect of this loophole is a catastrophic loss of income and benefits which are necessary for the sustenance of employees whose livelihood depends on the continued existence of the company. This study, therefore, aims at examining Botswana's corporate insolvency laws vis-à-vis the employees' rights as provided for under ILO Conventions ratified by Botswana.

1.3 Aims and Objectives of the study

1.3.1 Aims

a) The study aims at examining whether Botswana's corporate insolvency laws adequately protect employees' rights and benefits during the liquidation of a company.

b) The study further aims at drawing lessons from international insolvency legal models such as the ILO Conventions, the World Bank, UNCITRAL, SADC protocols and other international legal systems like OHADA, with a view to proposing their adoption by Botswana in order to protect employees' rights and interests during the liquidation of a company.

1.3.2 Objectives

In order to achieve the aims of this research, the study hopes to achieve the following objectives:

a) Examine the provisions contained in the *Employment Act* and other relevant statutes that deal with the employees' rights and interests.

b) Scrutinise the statutory provisions dealing with employees' rights under Botswana's corporate insolvency laws as contained in the *Companies Act* and other relevant statutes.

c) Examine the responsibility of government in ensuring that Botswana complies with its international obligations under ILO Conventions, World Bank principles, SADC labour protocols and OHADA in order to protect the employees' rights and interests during the liquidation of companies in Botswana.

d) Make recommendations for the reform of Botswana's labour and corporate insolvency laws in order to strengthen the legal protection of employees' rights when a company is winding up.

1.4 Rationale and justification for the study

1.4.1 Rationale for the study:

This study sought to improve the protection of employees' rights and interests during the liquidation of a company in Botswana. The rationale is that, since the workers' rights are violated willy-nilly by companies in

Botswana because the owners know that the corporate insolvency legal framework is not water tight, the study proposes to reform the labour laws so that there can be equity, justice and the rule of law which governs both employers and employees. Similarly, by making a comparative study of the international insolvency legal frameworks of the ILO and other international organisations, it is hoped that the research will establish a rational basis for recommending law reform in Botswana so that the country can adopt and adapt the best practices.

1.4.2 Justification for the study

A comparative study of Botswana and international insolvency legal frameworks of the ILO, SADC, UNCITRAL and the World Bank is predicated on the assumption that Botswana has not yet fully complied with its international labour obligations by domesticating international insolvency standards and laws. The study is precipitated by the recent exposure of the inadequacies of Botswana's legal framework in protecting employees' rights and interests during the insolvency of BCL Limited. Furthermore, Botswana as a member of the international community and especially of the ILO is supposed to align its laws with its ratified ILO Conventions. For instance, if compared to the uniform insolvency law of OHADA, Botswana patently lacks a coherent insolvency legislation which adequately protects both corporate and non-corporate employees. Botswana operates a dual insolvency law system which lacks legal cogency as the *Insolvency Act* does not apply to company employees. This means that corporate employees have limited protection under the *Companies Act* whose statutory objective does not offer employees' protection but company formation and its regulatory framework. The study, therefore, seeks to unpack these apparent contradictions so that Botswana can realign both its labour and corporate insolvency laws in

order to protect its employees' rights and interests when a company is liquidated.

1.5 Literature review

Botswana does not have an appreciable corpus of literature on the protection of employees' rights and interests as its labour laws have not yet been refined since the tentative labour reforms of 2004.[22] This study, therefore, is a ground breaking one in Botswana because very little or none at all has so far been done to study the protection of employees' rights and interests during the liquidation of companies. Botswana currently suffers from a paucity of literature on this subject especially as the country's labour laws are still in their infancy, which makes labour conflicts prone to litigation. Therefore, there is need to conduct a study of this nature that examines the existing literature with a view to extending our knowledge of the workers' rights and interests.

So far, there is only one published labour law book by Dingake on *Individual Labour Law in Botswana,*[23]. This book has serious shortcomings on labour law knowledge on this dissertation topic. Although it has a full chapter on the termination of a contract of employment, the chapter does not deal with the termination of employment when a company is being liquidated.[24] Whether by omission or commission, the chapter does not even discuss the effects of a company's liquidation on employees' rights, claims, social security benefits and wages, which are important when studying labour laws. Although the book has shortcomings on the subject matter of this dissertation, its practical value to our jurisprudential labour law *corpus* remains immense and fully acknowledged.

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22 Dingake *Collective labour law in Botswana* 13.
23 Dingake *Individual labour law in Botswana.*
24 Dingake *Individual labour law in Botswana* 60.

Mmopi, in her master's dissertation on judicial management in Botswana, decries the outdated and inadequate judicial management procedures which need law reform to be in line with modern insolvency systems.[25] Her dissertation examines the ineffectiveness of judicial management in comparison to business rescue procedures practised in South Africa; but does not relate such inadequacies to the protection of employees' rights and interests. She notes that judicial management in Botswana has shortcomings when compared to modern rescue practices. Since judicial management and company liquidation are two different aspects concerned with the insolvency of a company, Mmopi's dissertation does not examine the issue of company liquidation and its effects on employees. Furthermore, she does not discuss how employees' rights and entitlements can be protected during judicial management. Like Dingake, she too fails to offer a solution to the legal protection of employees' rights and interests during the liquidation of a company.

Kiggundu's book entitled *Mercantile Law in Botswana*: *Cases and Materials*.[26] is quite informative. As a leading Professor of mercantile and company law, Kiggundu's book is authoritative on insolvency relating to natural persons and their estates, which is otherwise called sequestration or bankruptcy. However, Professor Kiggundu does not specifically deal with workers' rights, particularly how corporate insolvency affects employees' rights and how such rights are protected during a company's liquidation. Since the book is about mercantile law, one would have expected some of its chapters to deal with the effect of a company's liquidation on employees' rights and to deal with issues pertaining to the winding up of companies. Although chapter six of the book is devoted to insolvency, the chapter mostly deals with the Insolvency Act which applies to natural persons and not companies. Most notably, the book does not

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25 Mmopi *Judicial Management in Botswana: is it a time for change?* 2.
26 Kiggundu *Mercantile law in Botswana*: *Cases and Materials*.

deal at all or refer to liquidation and the winding up of companies and its effects on employees' rights which leaves a vacuum in our knowledge of the rights of employees in Botswana.

Kiggundu has another book titled *Company and Partnership Law in Botswana*.[27] In this book, the author lucidly discusses the corporate insolvency law and procedures in Botswana under the chapter on the Dissolution of a Company.[28] However, the book does not deal with the effects of liquidation of a company on employees as fellow creditors. Where the book falls short is that it neither mentions nor discusses the ranking of employees' claims and what becomes of the status of employees' contracts during the liquidation process. However, despite its shortcomings the book has a monumental practical value to our legal knowledge on the evolution of corporate law in Botswana.

For the first time ever, Botswana's deficient corporate insolvency law and its inability to protect employees' rights was exposed in a comparative study by Dr. Sarra.[29] The study relied on the survey contributions of Professors Boraine and Stefan Van Eck, in which they correctly observed that Botswana was among the jurisdictions with legislative contradictions in their insolvency legislation.[30] Unfortunately, the study did not distinguish between corporate insolvency and the sequestration of individuals and their estates, rendering it substantially incomplete regarding employees' rights. This is so because in Botswana the liquidation of a company is administered under the *Companies Act*,[31] while

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27 Kiggundu *Company and partnership law in Botswana*.

28 Kiggundu *Company and partnership law in Botswana* 212

29 Sarra "Treatment of employee and pension claims during company insolvency" 17-18

30 Sarra "Treatment of employee and pension claims during company insolvency" 17-18

31 Section 364 of *Companies Act of* 2003.

the sequestration of individuals and their estates falls under the *Insolvency Act.*[32]

Another authoritative work that needs a review is a chapter entitled "*A plea for the Development of Coherent Labour and Insolvency Principles on a Regional Basis in SADC Countries*" by Borraine[33], which discusses the SADC campaign through its Protocol on Employment and Labour.[34] This SADC protocol seeks to provide member states with strategic directions and guidelines for the harmonisation of employment and labour, as well as social security policies and legislation. The chapter is relevant to Botswana which is also a member of SADC but has not yet fulfilled its obligations under the Protocol which requires the country to incorporate the Protocol guidelines in its domestic insolvency law.

Another work that needs a review is the survey published by USAID titled "*Insolvency Systems in South Africa: A Comparative Review of Employee Claims and Treatment.*"[35] Though it focused on comparing South Africa's employees' claims with the World Bank Systems, it provides an insight into the international insolvency framework of the ILO, UNCITRAL and the World Bank principles. This survey is essentially a compendium of recommendations and strategies on how to protect employees' rights and claims when a company is being liquidated. What distinguishes this survey is that It discusses lucidly four models on the treatment of employees' claims and makes suggestions on how each could be improved including the one used in Botswana. This researcher found the survey very informative in trying to understand the employees' claims and their treatment when a company is being liquidated.

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32 Section 2 of *Insolvency Act Chapter 42:02.*

33 Stefan and Borraine "A Plea for the Development of Coherent Labour and Insolvency Principles on a Regional basis in SADC Countries'" 267

34 SADC Protocol on Employment and Labour (2017).

35 USAID *Insolvency systems in South Africa: Comparative review of employee claims treatment* 2011.

Calitz, in her insightful journal article titled "*Some thoughts on the state regulation of South African insolvency law*"[36] has made some critical findings and recommendations which, though meant for South Africa, are equally applicable to Botswana's insolvency law situation. The article decries the deficiency of a court administered insolvency process which is costly, time consuming and inadequately regulated. Her reflections portray the insolvency situation law in Botswana, especially its lack of a regulatory framework, as a virtual paralysis of the office of the Master of the High Court. The greatest weakness is the maintenance of a dual insolvency system which is copied from South Africa but is ineffective in Botswana. Calitz's article is nevertheless thought provoking which the researcher found very useful in shaping his ideas on the workers' rights when a company is being liquidated.

In his doctoral thesis titled "*A framework for corporate insolvency law reform in South Africa*,"[37] Burdette investigates South Africa's dual insolvency legal system and proposes the use of a single insolvency statute in the country. Though the jurisdiction he was investigating is South Africa, the legislative issues and corporate insolvency law reform he recommended is relevant to Botswana which also operates a dual insolvency legal system that has been found to be ineffective in protecting the employees' rights when a company is being liquidated. This dissertation therefore attempts to give an alternative legal framework for the reform of Botswana's corporate insolvency laws.

On the relevance of OHADA's uniform insolvency law model and its lessons for Botswana, a journal article entitled "*Development of a Uniform Insolvency Law in SADC: Lessons from OHADA*,"[38] is insightful. In this

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36 Calitz 2011 *DJLJ.*
37 Burdette *A framework for corporate insolvency law reform in South Africa.*
38 Ngaundje 2013 *JAL.*

article Leno critically looks at the salient features of the OHADA insolvency law from which SADC countries can draw lessons to improve their insolvency legislations. Though the recommendations are meant for SADC as a whole, the article concludes by urging member states to enact uniform insolvency laws which are clear when dealing with insolvency legislation and the protection of workers.

In another seminal paper entitled "Out of Africa: The OHADA Uniform Insolvency Law,"[39] Omar anatomically discusses the OHADA uniform insolvency statute and critically looks at its modernisation process, which Botswana needs to benchmark on in order to improve her insolvency legislation.

A perusal of the international standards set by the ILO and the World Bank shows that they have a model insolvency framework for the protection of employees' rights during corporate insolvency. Through its Conventions the ILO protects workers' claims in the event of the insolvency of an employer and Botswana could do well by realigning its domestic insolvency framework to that of the ILO. What is disconcerting is that although Botswana is a signatory member of the ILO, it is lagging in its treatment and protection of employees' claims in the event of a company becoming insolvent[40] while other comparable jurisdictions have made great strides in their compliance.[41]

1.6 Methodology and data collection

This study uses a qualitative approach for making a comparative analysis of Botswana's legal framework vis-a-vis the international insolvency framework and labour standards of ILO, UNCITRAL, the World Bank and

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39 Omar "Out of Africa: The OHADA Uniform Insolvency Law."
40 A 3 of Protection of Workers' Claims (1992).
41 www.ilo.org.

OHADA. As in all qualitative studies, the nature of the data for this study is non-numeric and relies on what is sometimes referred to as "desktop research",[42] which dictates that the researcher uses one's intuition and knowledge to interpret the data. The qualitative research paradigm belongs to what Paton calls "naturalistic inquiry" which falls under the broad term phenomenological research,[43] a term that is used loosely to refer to research whose findings are not subject to quantification or quantitative analysis.[44] In this study the researcher essentially uses a blended method of qualitative comparative methodology which infuses the objectives of a qualitative investigation and a comparative legal method.

Data Collection

The following sources were used for this research:

(a) Primary and secondary sources

The materials used for this study were bifurcated into two broad categories: primary and secondary sources. Primary legal sources are substantive laws in the form of statutes, case law, administrative rules and regulations. On the other hand, secondary legal sources include sources that are used to locate primary sources of law which also define legal terms and phrases and facilitate legal research such as text books, journal articles, published works by jurists and other accomplished scholars.

(b) *Internet sources*

Internet websites were accessed to obtain information from online legal databases that helped enrich the study with the latest references on the subject. The significance of this is that internet sources provided an array of information from which the researcher could select relevant material.

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42 Patton *Qualitative Research and Evaluation Methods* 28.
43 Patton *Qualitative Research and Evaluation Methods* 28.
44 Patton *Qualitative Research and Evaluation Methods* 28.

1.7 Scope and Limitations of the study

This study is limited to an analysis of Botswana's legal framework on the protection of employees' rights and interests during the liquidation of a company. The insolvency of companies has been selected because there is an apparent paucity of literature on the protection of employees' rights when a company is being liquidated in Botswana.[45] The research focuses on corporate employees for the simple reason that they are the most vulnerable when a company is being liquidated as compared to other secured creditors. This vulnerability typified by the liquidation of BCL Limited in which about six thousand employees were laid off when the liquidation process commenced.[46]

The study also looks at the best practices of dealing with insolvency by the ILO Conventions, World Bank principles, SADC protocols, UNCITRAL legislative guide and considers the lessons that can be learned from OHADA as an advanced business legal system with a unified insolvency legislation which Botswana does not have.

As a member of the ILO, Botswana is obliged to enact laws that are consistent with her international obligations in accordance with the *pacta sunt servanda* principle.[47]

Also, the study was only limited to the liquidation of companies and did not cover natural persons or their estate sequestrations because the statutes applicable to these two legal entities in Botswana are quite different.[48] Although the researcher acknowledges that the liquidation of BCL Limited is an important case study, this study did not necessarily use it as a focal point for study due to lack of financial resources and the

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45 http://www.mmegi.bw.
46 http://www.mmegi.bw.
47 A 26 of Vienna Convention on Law of Treaties (1969).
48 Kiggundu *Mercantile law in Botswana: Cases and Materials* 332.

amount of time it would have taken to conduct a classic case study that requires the researcher to live with the subjects and to examine their experiences through their own eyes.

1.8 Organisation of the study

The dissertation consists of six chapters, outlined as follows:

Chapter One:

This is an introduction which contains the background to the study, the statement of the problem, the aims, objectives, the rationale, justification, the scope and limitation of the research, a brief literature review and the methodology used for data collection.

Chapter Two:

This chapter examines the history of Botswana's corporate insolvency and labour laws from pre-independence to the post-independence era, with an emphasis on the protection of employees' rights when a company is being liquidated.

Chapter Three:

This chapter discusses the existing labour and corporate insolvency legal framework on the protection of employees' rights during the liquidation of a company in Botswana.

Chapter Four:

Here, an analysis of the role of the judiciary in enhancing the protection of employees' rights in the liquidation of a company in Botswana is made.

Chapter Five:

This penultimate chapter analyses the employees' rights as envisaged in the ILO Conventions, UNCITRAL legislative guide, World Bank principles and OHADA's insolvency law model. The chapter compares the labour

laws of international organisations with those of Botswana and draws conclusions on the reforms that are necessary to align the labour laws of the country to those of international organisations.

Chapter Six:

The last chapter makes conclusions, discusses the implications of the findings and making recommendations on how the legislature and other stakeholders can reform Botswana's labour laws so that the country can protect the employees' rights and interests when companies and corporations are being dissolved.

1.9 Definition of Technical Terms

The technical terms used in this study are defined as follows:

Compulsory liquidation – This term describes the state of dissolving a company through a court order.

Court – This means the High Court of Botswana

Creditor – Is defined as a person or entity that is being owed some money by the company.

Debtor – This is a person or any entity that owes money to the company.

Insolvency – The term is used in this study to mean when a company cannot pay or cover its debts with assets or funds, which in simple terms means that a company's liabilities has exceeded its assets.

Insolvent company – refers to a company which fails to pass the solvency test or service its debts.

Liquidation – A legal process by which a company is ended or winds up and the assets are distributed to claimants.

Liquidator – This is an insolvency official appointed by the High Court to manage or act as an accounting officer in the liquidation process.

Master – This refers to the highest court official of the High Court who oversees or manages insolvent estate affairs.

Preferential creditor – is a creditor with the highest priority to be paid first before unsecured creditors.

Provisional liquidator – This is a interim court appointed official to secure company assets before finalisation of liquidation.

Secured creditor –This is a creditor who holds security such as a mortgage bond, a cession of book debts or any other form of security recognised in terms of the laws of insolvency.

Unsecured creditor - The term is used in Botswana to mean a concurrent creditor who does not hold any form of security and who is not a preferential creditor.

Voluntary liquidation – This is a method of liquidation not involving the courts. In the case of a solvent company, liquidation is initiated by way of members passing a resolution. In the case of an insolvent company, liquidation is commenced pursuant to a resolution passed by the creditors.

Winding up Order – this is the order effecting the liquidation of a company.

1.10 Summary

This chapter discussed the background of the study, the statement of the problem, the aims, objectives, the rationale for the study, the justification, the scope, limitations, organisation of the study and the definition of technical terms. In the next chapter, the historical perspective of

corporate insolvency laws and the labour legislation in Botswana is discussed.

CHAPTER TWO: HISTORICAL OVERVIEW OF CORPORATE INSOLVENCY LAW AND LABOUR LEGISLATION IN BOTSWANA

2.1 Introduction

In this chapter, the historical background of Botswana's corporate insolvency law and the labour legislation that protects the employees' rights when a company is liquidated are examined. The evolution of Botswana's company law is traced over a period of more than a century, from 1885 to 2003. The chapter further examines the enactment of the current *Companies Act* which contains corporate insolvency provisions. Furthermore, the protection of employees' rights during the pre-independence era is compared with the protection of those during the post-independence period. This historical overview shows how Botswana's company law evolved over a period of time to its current status which takes a leaf out of the company laws of New Zealand and England whose colonial legacy has been passed on to Botswana.[49]

2.2 Corporate insolvency legal framework from 1885 to 1966

The origins of Botswana's corporate insolvency law can be traced as far back as 1885 when Britain proclaimed Bechuanaland (now Botswana) a British Protectorate,[50] which was formally established in 1891.[51] The Protectorate, which was administered by the British High Commissioner resident in South Africa, applied the same laws as those of the Cape Colony.[52] The law was crafted along the lines of English company law, which included all the corporate insolvency law provisions. Since then, however, Botswana's insolvency law has evolved from being English and

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49 Kiggundu *Company and partnership law in Botswana* 47.

50 Kiggundu *Company and partnership law in Botswana* 47.

51 Bechuanaland Protectorate Order in Council of 9 May 1891; Kiggundu J *Company and partnership law in Botswana* 45.

52 Section 19 of the General Administration Proclamation of 1891; Kiggundu J *Company and partnership law in Botswana* 45.

Roman-Dutch in orientation to be the Bechuanaland company law which was drafted in 1934.[53]

This first company law, drafted by the crown prosecutor, was modelled on the Companies Act of the Union of South Africa, after it had been decided that it had to be replaced because it was out-dated.[54] It is worth noting that before the drafting of the first Bechuanaland company law, the Protectorate had inherited a statutory company law from the Cape Colony which included the security of shares in joint-stock companies ordinances,[55] the *Joint Stock Companies Limited Liability Act*,[56] the Winding Up Act,[57] the *Joint Stock Banking Companies Limited Liability Act*,[58] and the *Joint Stock Companies Act*.[59]

Of relevance to this dissertation is the *Companies and Associates Trustees Act* and the *Winding Up Act*, which deal with the management, regulation and winding up of companies. Despite the good intentions, these earlier statutes did not legally protect the employees' rights when a company was being wound up, nor did they specifically recognise the employees' rights and interests. The logical conclusion that can be drawn in an attempt to explain this anomaly is that it was part of the colonial system not to protect the rights of the colonised. Also, there was no organized labour in the form of trade unions until 1948 which could articulate the interests of workers.[60] Thus, as the law stood then, it did not provide any protection

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53 Kiggundu *Company and partnership law in Botswana* 45.
54 Kiggundu *Company and partnership law in Botswana* 45; The *Cape Companies Act* 25 of 1892.
55 Kiggundu *Company and partnership law in Botswana* 45.
56 *Joint Stock Companies Limited Liability Act* 23 of 1861.
57 *Winding Up Act* 12 of 1868.
58 *Joint Stock Banking Limited Liability Act* 11 of 1879.
59 *Joint Stock Companies Act* 13 of 1888.
60 Friedrich Ebert Stiftung *Trade union in Botswana: Country Report* 2003.

of employees' rights other than providing a legal framework for the liquidation of a company.[61]

It is this non-inclusive aspect of the law that prompted the then government of the Protectorate to initiate a reform process of the company law. Since the Union of South Africa's *Companies Act* had been modelled on the Companies Consolidation Act of the United Kingdom, Bechuanaland's law was modelled on the Union of South Africa's company law instead of the Cape Provincial Model.[62] Unfortunately, for some unknown reasons, the colonial government decided in 1934 to shelve the law reform process until 1958 when the reform process was revived.[63]

The main reason for reforming the Protectorate company law in Bechuanaland was its apparent inadequacy as compared to the Roman-Dutch company law[64] whose main focus was to have a law suited to the colonial territories based on the Roman-Dutch common law.[65] This legislative reform resulted in a draft proclamation based on the Southern Rhodesia[66] (present day Zimbabwe) *Companies Act*.[67] After some intense debate influenced by economic and trade relations championed by the Rhodesian Selection Trust Exploration Company which wanted to secure mining concessions in the Bechuanaland protectorate, a company law was ultimately passed.[68]

The 'new' company law was based on the English law model of 1948.[69] This resulted in the amendment of the existing companies' proclamation of

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61 *Winding Up Act* 12 of 1868.
62 Kiggundu *Company and partnership law in Botswana* 46.
63 Kiggundu *Company and partnership law in Botswana* 46.
64 Kiggundu *Company and partnership law in Botswana* 45.
65 Kiggundu *Company and partnership law in Botswana* 45.
66 Kiggundu *Company and partnership law in Botswana* 45.
67 Kiggundu *Company and partnership law in Botswana* 45.
68 Kiggundu *Company and partnership law in Botswana* 45.
69 Laws of Bechuanaland Protectorate Proclamation 71 of 1959; Kiggundu *Company and partnership law in Botswana* 47.

1961 which gave birth to the new companies (amendment) law.[70] It is this company's law, with its successive amendments until 1961, which culminated in the *Companies Act* when Botswana attained independence from Britain in 1966.[71] This company law, however, had no provision for the protection of employees' rights when a company was being wound as it only regulated the liquidation processes of a company and the judicial management thereof.

2.3 Corporate insolvency legal framework from 1966 to 1996

Botswana's attainment of independence from Britain in 1966 marked an end to an era of law-making by proclamations. The promulgation of laws became the exclusive preserve of the Legislative Assembly as an arm of government through statutory enactments as provided in the Botswana Constitution.[72] The *Companies Act* was therefore passed by the Botswana Legislative Assembly as *Act* No. 8 of 1966.[73] The aim of this *Act* was to amend the laws relating to the incorporation, registration, management, administration and winding up of companies and for other purposes incidental thereto.[74]

In relation to the winding up of companies, the *Act* had elaborate provisions to deal with the judicial management[75] and proof of claims by creditors[76] which included employees. However, the *Act* did not clearly spell out the workers' rights but made an indirect reference to the conventional company law by recognising employees as creditors. The *Act*

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70 Bechuanaland Protectorate Law 8 of 1961; Kiggundu *Company and partnership law in Botswana* 47.
71 *Companies Act* Chapter 42:01.
72 Section 86 of the *Constitution of Botswana*.
73 *Companies Act* Chapter 42:01.
74 Preamble to *Companies Act* Chapter 42:01.
75 Part IV of *Companies Act* Chapter 42:01.
76 Section 187 of *Companies Act* Chapter 42:01.

provided that all claims against a company that was winding up had to be proven at a creditors meeting which included employees' claims.[77]

Unfortunately, the *Act* did not recognise employees as a distinct creditor class and neither did it protect the employees' rights. In fact, employees were not given any special preference, except that the *Act* entitled every creditor to vote at the meetings of creditors of the company as soon as their claim had been proven.[78]

The *Act* subsequently underwent several amendments without specifically improving the employees' claims during the winding up of a company. In 1989, the *Act* was further reviewed in order to remove some of the out-dated provisions. The new amendments were frivolous resulting in their replacement by the *Companies Amendment Act* of 1995 which replaced the 1966 *Act*. However, this statute equally failed, like its predecessors, to define precisely who an employee or a creditor is when dealing with company and state employees' rights and entitlements during the winding up of a company. Consequently, employees in Botswana remained without any firm protection under the amended Act.

2.4 The current corporate insolvency legal framework from 1993 up to date

The current company law of Botswana is modelled on the New Zealand *Companies Act* of 1993.[79] This came about as a result of the government's engagement of a principal company law consultant, Prof Peter D MacKenzie, who was tasked to review the existing Botswana company law statute. The consultant succeeded in producing a final draft bill in 1999 and in 2001 the Companies' Bill was passed by parliament and published

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77 Section 187 of *Companies Act* Chapter 42:01.
78 Section 186 of *Companies Act* Chapter 42:01.
79 New Zealand *Companies Act* of 1993; Kiggundu *Company and partnership law in Botswana* 48.

in the government gazette. The President of the Republic of Botswana assented to the Bill in September 2004. However, the Bill did not immediately come into force due to a lack of the requisite companies' regulations which were subsequently drafted and published in 2007, thereby repealing the old *Companies Act* which had been based on the proclamation of 1959.[80]

The amendment of the new *Companies Act* consisted of five hundred and twenty-eight statutory sections excluding the regulations[81], which is more voluminous than its predecessor that had only three hundred and fourteen sections. This is the Act that embodies Botswana's corporate insolvency laws that regulate the winding up of companies.[82]

The Act stipulates how employees' claims and rights as creditors should be treated when a company is being liquidated. The innovative aspect of this Act is that the power of making rules and regulations on how a company should wind up is vested in the country's Chief Justice.[83] The *Companies Act* makes fundamental provisions,[84] that is, the Act does not apply to any company whose winding up proceedings had commenced prior to the coming into effect of the new *Companies Act*.[85] Also, the Act provides that the rules that were made under the repealed Act would continue to apply to companies that are already liquidated in terms of the new *Companies Act*.[86] The *Companies Act*, however, does not provide for the protection of employees' rights and interests other than referring to them under the umbrella term of creditors. In terms of the Act, employees are required to prove their claims without exception. Although the reform is laudable, it is

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80 Section 526 of *Companies Act* of 2003.
81 Section 528 of *Companies Act* of 2003.
82 Section 364 of *Companies Act* of 2003.
83 Section 523 of *Companies Act* of 2003.
84 Section 527 of *Companies Act* of 2003.
85 Section 527(7) of *Companies Act* of 2003.
86 Section 527(8) of *Companies Act* of 2003.

sad to note that, despite the fact that the Chief Justice is empowered to make the rules about the winding up of companies, none of the successive Chief Justices has ever exercised such power.

2.5 The pre-independence labour legislation

The colonial labour legislation that existed in 1963 in the Bechuanaland Protectorate, now Botswana, is derived from two labour statutes which applied in the Cape Colony.[87] These statutes were the *Masters and Servants Act,*[88] and the *Protection of African Labourers Proclamation.*[89] The fundamental reason for applying these Cape Colony statutes in the Protectorate was predicated on the British Order in Council,[90] made by the Queen of England in the exercise of powers conferred upon her under the *Foreign Jurisdictions Act,*[91] as Botswana was a British Protectorate then.[92] The administration of this proclamation as earlier stated was under the auspices of the various High Commissioners who were appointed for the Protectorate, but were based in Cape Town and later Pretoria.[93] These laws applied *mutatis mutandis* in the Protectorate as applied in the Cape Colony.[94]

The *Masters and Servants Act* applied to Bechuanaland, which was a Protectorate from 1909 to 1963. On the other hand, the *Protection of African Labourers Proclamation* which provided company employees with very limited protection of their rights and employment security also applied to Bechuanaland until 1963. The Act was notorious especially

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87 Proc 36 of 1909.
88 *Masters and Servants Act* of 1856.
89 *Protection of African Labourers Proclamation* 14 of 1936.
90 *Bechuanaland and Protectorate General Administration Order in Council* of 1891; Fombad *The Botswana Legal System* 51.
91 Fombad *The Botswana Legal System* 57.
92 Fombad *The Botswana Legal System* 57.
93 Fombad *The Botswana Legal System* 57.
94 Fombad *The Botswana Legal System* 57.

because the colonial government was insensitive to the plight of Africans and the employees' rights.[95]

These labour laws were untimely repealed in 1963 when Bechuanaland promulgated her first employment statutes, the Employment Law.[96] This employment law, however, failed to deal with workers' rights and claims during company insolvency, though it dealt with several basic labour relations issues. The employment law also failed to cater for trade unions and to put in place a clear labour dispute settlement system.[97] Another important piece of legislation, which equally provided limited employees' rights, was the *Trade Unions and Trade Disputes Proclamation*,[98] which provided a regulatory framework for trade unions registration and a limited protection of employees. Just like the modern Botswana *Trade Disputes Act of 1969*, there was no provision for corporate insolvency claims by employees. As a result, the same problems currently faced by employees in modern Botswana continued to prevail since the labour crisis of 1942.[99]

2.6 Post-independence labour legislation

In an endeavour to improve labour relations in the country and to secure industrial peace, the government of Botswana made some legislative initiatives immediately after independence.[100] These came through the passage of some labour statutes meant to review and revamp the *Trade*

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95 Kalonda *The Industrial Court in Botswana: An assessment of its contribution to Labour Relations* 37.

96 Kalonda *The Industrial Court in Botswana: An assessment of its contribution to Labour Relations* 37.

97 Kalonda *The Industrial Court in Botswana: An assessment of its contribution to Labour Relations* 37.

98 *Trade Unions and Trade Disputes Proclamation* of 1942.

99 Frimpong "The Protection of Security of Emplyment in Botswana" 7; Kalonda *The Industrial Court in Botswana: An assessment of its contribution to Labour Relations* 37.

100 Kalonda *The Industrial Court in Botswana: An assessment of its contribution to Labour Relations* 37.

Union and Trade Disputes Proclamation. In 1969, the government passed two new labour statutes in the form of the *Trade Disputes Act*[101] and *Trade Unions Act*.[102] However, these cosmetic statutes did not address the issue of the protection of employees' rights and claims during the liquidation of a company. Although belatedly, the government realised that these labour statutes did not tackle the fundamental problems facing the workers. Consequently, it tried to address the shortcomings of such legislations by making some statutory labour amendments in the period between 1982 and 1983. The original versions of these labour statutes in the form of the *Trade Disputes Act*, *Employment Act and Trade Unions and Employers Act*, set the foundation of the Botswana's current labour law framework, which was subsequently amended many times.

2.7 Summary

The evolution of a corporate insolvency law in Botswana as amended from time to time since the country was a Protectorate has not substantially protected employees' rights when a company is liquidated because there has never been any clearly defined legal instrument to protect employees' rights when a company is winding up. A close examination of the various labour statutes such as the Botswana Trade Unions and the Employers' Act indicates that once a company is liquidated, its employees lose all their entitlements such as medical aid, salary and accommodation that they had previously enjoyed. The only difference is that before independence, employees were under the mercy of the colonial masters while today they toil under a comprador bourgeoisie.

While the contradictions in the labour laws of Botswana still exist, after independence there has been an increasing awareness of the employees'

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101 *Trade Disputes Act* 28 of 1969.
102 *Trade Unions Act* 24 of 1969.

rights which has witnessed an intense activism by trade unions in order to protect the employees' rights during good and bad times. In chapter three, which follows, the relevant statutes dealing with labour and insolvency laws and how employees' rights and claims can be protected during the liquidation of a company are discussed.

CHAPTER THREE: BOTSWANA'S LABOUR AND CORPORATE INSOLVENCY FRAMEWORK ON THE PROTECTION OF EMPLOYEES' RIGHTS

3.1 Introduction

The previous chapter has examined the historical background of Botswana's corporate insolvency law and labour legislation. Chapter three discusses the existing labour and corporate insolvency laws and how it protects employees' rights when a company is liquidated. Since the 1980s, Botswana's labour legislation has sought to regulate the bargaining power of employers vis-à-vis that of the employees.[103] The labour legislation prescribes the basic rights and conditions of employment when a company undergoes liquidation or is wound up. However, because there are various statutes in Botswana that seek to protect the employees' rights, this chapter discusses in detail such laws in order to establish the extent to which they in fact advance the employees' rights during and after a company has been liquidated.

3.2 Employment Act 2010

In Botswana, the *Employment Act* is the foundation of all labour laws in the country and the primary source of employees' rights and the protection of their welfare.[104] The original version of the *Employment Act* was passed by Botswana's parliament in 1982 and was subsequently incorporated into the laws of Botswana. This was followed by various statutory amendments of the main statute culminating in the current *Employment Act* of 2010.

The purpose of the *Employment Act* is to regulate the employment

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103 Dingake *Individual labour law in Botswana* 33.
104 *Employment Act* Chapter 47:01.

relations between parties and employment contracts.[105] The Act strives to redress the power imbalance between the employer and employee whilst at the same time prescribing the minimum conditions of employment known as minimum floor rights.[106]

The *Employment Act* sets minimum standards for the protection of employees in the absence of other protective measures such as collective agreements.[107] This means that parties to an employment agreement are not at liberty to negotiate out of the minimum set standards.[108] This is ostensibly meant to protect employees from possible employer exploitation when employment negotiations are being made. The minimum standards of employment, as they are known, or basic conditions of employment apply to all employees save for those excluded from the definition of employees under the Act.[109] This provides a minimum threshold of rights below which it is not competent to contract out.[110]

The basic conditions of employment consist of rest periods, payment for work during rest periods, hours of work, task work, shift work, leave with pay, payment during public holidays and for sick leave.[111] In terms of the *Employment Act*, no employment contract is valid if it contracts out of the basic conditions of employment or a contract which provides less favourable conditions to the employee than the conditions of employment prescribed by the Act.[112] The payment of employees' severance benefits, mainly wages, is the one that is not guaranteed when a company is winding up.

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105 Preamble to *Employment Act* Chapter 47:01.
106 Dingake *Individual labour law in Botswana* 18-19.
107 Section 37 of *Employment Act* Chapter 47:01; Dingake *Individual labour law in Botswana* 19.
108 Section 39 of *Employment Act* Chapter 47:01.
109 Dingake *Individual labour law in Botswana* 19.
110 Section 37 of *Employment Act* Chapter 40:01; *Kgosiemang Mogopi v Nata Timber Industries (Pty) Ltd.*
111 Section 93-100 of *Employment Act* Chapter 47:01.
112 Section 37 of *Employment Act* Chapter 47:01.

In terms of the provisions under Part III of the *Employment Act*, an employee upon terminating a contract of employment either by reason of death or retirement or for any other reason which includes the winding up of a company, is entitled to be paid 60 months of continuous service as a severance benefit at the rate prescribed.[113] The *Employment Act* is somewhat confusing because it does not state quite categorically how employees' claims will be settled after a company has been liquidated. The only part of the *Employment Act* which seems to refer to the payment of severance benefits to the employees after a company has folded up is *Part VII*, which provides that the employee's claims shall be paid first before other non-privileged creditors are paid.[114]

In terms of the above provision, the protection occasioned deals with employees' wages for a specified period before the insolvency and even after it has been terminated and even payment claims for work done in holidays. It also deals with payments for absence period as specified before the liquidation or employment termination and the payment of due benefits.[115]

At a face value, the above provisions appear to empower the workers by giving priority to the payment of their wages under the *Act*. However, the *de facto* situation is that when a company is winding up, such a process is regulated by the *Companies Act*,[116] which prioritises claims and treats creditors differently.[117] The most discomforting thing is that the *Companies Act* takes precedence over the *Employment Act* in regulating the winding up of a company and the latter Act has little or no effect at

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113 Section 27 (I) of *Employment Act* Chapter 47:01.
114 Section 91A (I) of *Employment Act* Chapter 47:01.
115 Section 91A (2) of *Employment Act* Chapter 47:02.
116 Section 384 of *Companies Act* of 2003.
117 *Companies Act* of 2003.

all.[118]

Furthermore, scrutiny of the *Employment Act* shows that it does not provide specific guidelines as to how the employees' rights and entitlements can be protected in the event of a company winding up. This legislative discrepancy exposes employees to unmitigated risks of losing their severance benefits and entitlements. The main weakness of the Act is that there is no provision to a recourse to the legislative instruments in labour law except international labour Conventions which Botswana has not yet domesticated.[119]

3.3 Employment of Non-Citizens Act 1981

This Act of parliament is meant to regulate the employment of non-citizens in Botswana.[120] The statute was first promulgated by parliament in 1981 and came into effect on 1 June 1983. Its main objective is to regulate the employment and other business engagements for persons who are not citizens of Botswana.[121]

The statute stipulates the requirements for employment of non-citizens and the granting of residence permits.[122] It further provides for the formal terms and conditions to be attached to work permits.[123] Unfortunately, the Act is silent on matters of termination of non-citizens' employment either as a result of an ordinary dismissal or when a company has wound up. This leaves the task of such a regulation to other relevant statutes, which are nebulous in their specificity. This has resulted in a blatant exploitation of non-citizen employees when a company has folded

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118 Section 364 of *Companies Act* of 2003.
119 *Botswana Public Employees Union and Others v The Minister of Labour and Home Affairs* (unreported) case number MAHLO-000674-11 of 2011.
120 *Employment of Non-Citizens Act Chapter 47:02.*
121 Preamble to *Employment of Non-Citizens Act* Chapter 47:02.
122 Section 5 of *Employment of Non-Citizens Act* Chapter 47:02.
123 Section 6 of *Employment of Non-Citizens Act* Chapter 47:02.

up.

3.4 Trade Unions and Employer's Organisations Act 1983

This statute was promulgated by parliament for the registration and recognition of workers' trade unions and employers' organizations.[124] The act took effect on 1 September 1984 and has 15 sub-sections which stipulate the members' rights and interests, unlike unregistered trade unions which are prohibited from carrying out business as this constitutes an offence prohibited by law.[125]

In terms of the Act, trade unions whose applications have been submitted and are still pending registration, they are not entitled to enjoy rights, immunities and privileges of a registered union.[126] The same applies to its officers and members who are equally not entitled to any rights, immunities and privileges normally accorded those of registered unions.

The Act restricts the membership of a Trade Union or Employers' Organisations only to those employees who belong to the industry within which the Trade Union is registered. This provision is very critical in determining whether trade unions can represent members who are no longer employees of the company as a result of the liquidation of a company.[127]

Arguably, a trade union is not legally bound to represent employees whose employment has been terminated as a result of the dissolution of a company, except only when an employee is entitled to representation by the union for the purpose of any appeal against it in respect of the

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124 Preamble to *Trade Unions and Employers' Organisations Act.*
125 Sections 15 and 16 of *Trade Unions and Employers' Organisations Act.*
126 Section 16 of *Trade Unions and Employers' Organisations Act.*
127 Section 21 of *Trade Unions and Employers' Organisations Act.*

dismissal.[128] This presumes that the employees' interests cannot be taken care of by the liquidator of a company as appointed in terms of the Companies Act.[129] The Act specifically provides that a member of a trade union whose employment has ceased in the industry concerned also ceases to be a member of the union and hence not entitled to rights and privileges of employed union members.[130]

The issue about whether employees whose contract of employment has since been terminated can be represented by their former trade unions has generated legal controversy in the same way as to whether employees have *locus standi* to oppose legal proceedings when a company is winding up. In a High Court case of *Molefhi v Academy of Business Management (PTY) Ltd and Another,*[131] Justice Nganunu held that employees do not have a direct and substantive interest to give them *locus standi* in the proceedings of the liquidation of their corporate employer. However, the law has since evolved to the extent that employees are now deemed to be stakeholders who have *locus standi*. This evolution emerged in the subsequent High Court case involving *Radibe v Voltex Pty Ltd and Another,*[132] which declared that employees are interested parties with *locus standi* who can intervene to protect their interest in their financial benefits.

The legal position articulated in the *Molefhi* judgment above seems to conflict with the *Radibe* judgement which stated that employees may intervene since they have enough interest. *Radibe's* judgment went further by upholding the modern corporate law which recognises the

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128 Section of *Trade Unions and Employers' Organisations Act*.
129 Section 382 of *Companies Act* of 2003.
130 Section 21 (2) of *Trade Unions and Employers' Organisations Act*.
131 *Molefhi v Academy of Business Management (Pty) Ltd and Another* 1994 BLR 1 (HC).
132 *Radibe and others v Voltex (Pty) Ltd and Another* 2013 (2) BLR 212 (HC).

interests of employees as stakeholders.[133] In this regard, *Radibe* judgment is, therefore, commendable because it irrevocably protects employees' rights and interests when a company is winding up and echoes the progressive sentiments of modern corporate insolvency law.[134] Unfortunately, the *Molefhi* and *Radibe* judgments were only handed down by the High Court and there is yet to be a decision by the Court of appeal which can put the matter to rest.

Thus, it can be seen that the lack of clarity when a company is winding up is a slap in the face of employees whose right to unionise and to engage in an industrial action under the *Trade Unions and Employers' Organisations Act* is compromised when a company has been granted an order to liquidate.

3.5 Worker's Compensation Act 1988

The original version of this statute was promulgated in 1998 and its aim was to compensate workers whose injuries or occupational diseases were contracted in the course of their employment or when death occurred as a result of their work.[135]

The *Act* is divided into eleven parts and has limited provisions concerning the compensation of workers whose claims may not have been paid at the time of the liquidation of a company.[136] What the Act does not clearly spell out is whether a worker should file compensation claims when a company is being liquidated and whether a worker's dependant can file a claim when the worker dies at the time of liquidation.

A closer examination suggests that the *Act* is self-defeating as it provides

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133 *National Textiles Workers Union v PR Ramakrishna* 1983 AIR 75, 1983 SCR (1) 9.
134 *National Textiles Workers Union v PR Ramakrishna* 1983 AIR 75, 1983 SCR (1) 9.
135 *Workers' Compensation Act* Chapter 47:03.
136 Section 19 of *Workers' Compensation Act* Chapter 47:03.

that if a dependant dies before a claim is made, or a claim is made before an order for payment is made, such a dependant shall have no right to payment of compensation.[137] This means that if dependants die before payments are made and even after the death of the workers, such claims cannot be paid, which is a contravention of the workers' rights. Furthermore, there appears to be a poignant provision in the statute for stealthily limiting the compensation of workers in instances where the employer becomes bankrupt.[138] What is more disturbing is that the *Act* unfairly regulates the compensation by transferring the liabilities of an employer to an insurance policy in order to avoid being personally sued by the workers. A mitigating factor, however, is that if the liability of the company's insurers is less than that of the workers' claims, they are at liberty to claim from the balance after the liquidation.[139] Similarly, the *Act* further provides that where the bankrupt company has entered into a contract for compensation by insurers, such an agreement would exonerate the employer from liability.[140]

On the other hand, a section of the Act declares it null and void to have an agreement between an employee and employer which makes a worker relinquish the right of compensation from an employer.[141] This provision is of critical importance in protecting employees when they bargain with employers regarding their compensation claims under the Act.[142] The only exception when an agreement between the parties is made is in respect of compensation for payments for partial or permanent incapacity, which can only be sanctioned after being certified by the

137 Sections 19 and 21 of *Workers' Compensation Act* Chapter 47:03.
138 Section 44 of *Workers' Compensation Act* Chapter 47:03.
139 Section 44 (2) of *Workers' Compensation Act* Chapter 47:03.
140 Sections 44 (1), (2) and (3) of *Workers' Compensation Act* Chapter 47:03.
141 Section 45 of *Workers' Compensation Act* Chapter 47:03.
142 Section 45 of *Workers' Compensation Act* Chapter 47:03.

Commissioner of Labour.[143]

Here, one needs to concede that the Act is fair as it specifically acknowledges compensation for workers' claims for injuries and occupational diseases when a company is liquidated. The shortcoming of the *Act*, however, is its legal deficit in so far as it fails to prioritise such claims when a company is winding up.

3.6 Trade Disputes Act 2003

This *Act* which was assented to by the President of the Republic of Botswana on 20 September 2016[144] supersedes its predecessor, the *Trade Disputes Act*,[145] which had been used for 33 years. The new *Act* was introduced after the previous *Act* had been severely criticised for its regulatory inefficiency in several areas, including those highlighted by the Court of Appeal in the case of *Botswana Land Boards and Local Authorities Workers Union and Two Other cases against the Director of Public Service Management*[146]. The legal significance of this case is that for the first time in Botswana's labour law history, the highest court on the land had occasion to review and highlight the major shortcomings of the *Trade Disputes Act*. The facts of the case arose from the 2011 nationwide labour public service strike by public service unions and a mass of public officers for the improvement of wages. This strike according to the Court was a watershed event in the history of Botswana because never before had the operations of public service been disrupted in this way by strike action. Some public officers involved in the strike were involved in essential services provisions especially the health services. The strike was subsequently

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143 Section 45 of *Workers' Compensation Act* Chapter 47:03.

144 *Trade Disputes Act* of 2016.

145 *Trade Disputes Act* Chapter 48:02.

146 *Botswana Land Boards and Local Authorities Workers Union and Two Others v The Director of Public Service Management and Another* (unreported) civil appeal No. CACLB 043-11 CoA.

interdicted by the Industrial Court at the instance of the Attorney General as the continued participation of essential services workers was declared unlawful by the court. The matter was escalated to the Court of Appeal on appeal by the public service labour unions who became the appellants against the Director of Public Service Management and the Attorney General who were cited as respondents.

In concluding the matter, but dismissing the appeal that the public service unions, the Court noted that the case demonstrated that the *Trade Disputes Act* did contradictory and confusing provisions as follows

> That the sections of the Public Service Act dealing with industrial action are also not fully aligned with the TDA. It is important that law-makers should look urgently at this legislation and recast it to reflect unambiguously what it is that they intend to achieve. Unclear legislation on industrial relations is never conducive to peaceful and amicable settlements of trade disputes. It leads to misunderstandings which are exacerbated in the high emotions of strike action in particular, as happened in this case. It is in the interest of harmonious industrial relations in Botswana that prompt attention be given to rectifying the deficiencies and inconsistencies in the Acts in question.[147]

The objective of this *Trade Disputes Act* is to provide clarity on the settlement of trade union disputes by the Commissioner of Labour, mediators and arbitrators. It is the one under which the Industrial Court is established in order to provide equity. It further legalises trade unions and the protection of essential services and all other labour related disputes.[148]

The Act gives the Industrial Court jurisdictional power, among others, to settle trade disputes[149] which include disputes relating to compensation claims and severance benefits of employees of liquidated companies. The Industrial Court is given power because the definition of a trade

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147 *Botswana Land Boards and Local Authorities Workers Union and Two Others v The Director of Public Service Management and Another* (unreported) civil appeal No. CACLB 043-11 CoA. 72-73.

148 Preamble to *Trade Disputes Act*.

149 Section 20 of *Trade Disputes Act*.

dispute in the Act includes: "entitlement of any person or group of persons to any benefit under an existing collective agreement".[150]

The legal interpretation of the Act suggests that an Industrial Court may have jurisdiction over the settlement of employees' claims when a company is being liquidated. However, there is a contradiction in that the High Court is the only court that has exclusive jurisdiction in dealing with all creditor claims including those of employees.[151] Clarity is therefore required as to whether the Industrial Court should deal with workers' disputes or it should be the exclusive prerogative of the High Court or both courts have equal power to adjudicate on labour disputes.

Another contentious issue is whether employees of a liquidated or wound up company qualify to be regarded as employees under the *Trade Disputes Act*, especially as the Act has no special provisions regulating the affairs of employees of companies under liquidation. This is important for purposes of the Industrial Court's jurisdiction in disputes related to employee claims. This issue arises because as employees are technically no longer employees of a company being liquidated, the employer cannot be legally sued before any court.[152] This interpretation adversely restricts employees' constitutional rights to litigate in respect of equal protection under the law as compared to other creditors.

3.7 Companies Act 2004

In Botswana, the winding up of a company can only be carried out in terms of Part XXVI of the *Companies Act*,[153] which states that a company may be wound up in two ways: by the courts or voluntarily.[154] The

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150 Section 2 of *Trade Disputes Act*.
151 Section 422 (1) of *Companies Act* of 2003.
152 Section 376 of *Companies Act* of 2003.
153 Section 364 of *Companies Act* of 2003.
154 Section 364 of *Companies Act* of 2003.

winding up of a company by the courts is compulsory while the one done by the company on its own volition is regarded as a voluntary dissolution.[155]

3.7.1 Compulsory winding up

In terms of the Companies Act, a company may be wound up by the court if one or all of the prescribed circumstances prevail.[156] These circumstances are such as that initiated through a company resolution, where the company fails to pay its liabilities, where the board of director has breached the *Companies Act*, and also the company does not meet essential its essential requirement of incorporation, and also where the court would have made a finding that it was in the best interest of the company to be so liquidated.[157]

In terms of the above provision, a company may be wound up if it is unable to pay its debts.[158] Furthermore, in terms of the same Act, a company is deemed to be unable to pay its debts if it is proved, to the satisfaction of the court, that it is unable to do so[159]. The determination of this inability includes considering the liabilities,[160] which is done by the Botswana High Court which defines insolvency as the inability to pay its debts.[161]

3.7.2 Initiation of proceedings against a company

In terms of the *Act*, an application to the court for the winding up of a company can be in the form of a petition brought about by a company, creditors, shareholders or any of these parties acting jointly.[162] However, a

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155 Kiggundu *Company and Partnership Law in Botswana* 212.
156 Section 369 of *Companies Act* of 2003.
157 Section 19 (1) of *Companies Act* of 2003.
158 Section 369 of *Companies Act* of 2003.
159 Section 369 of *Companies Act* of 2003.
160 Section 368 (c) of *Companies Act* of 2003.
161 *Rann v Landla Safaris Botswana (Pty) Ltd and Another* 2007 (1) BLR 100 (HC).
162 Section 370 of *Companies Act* of 2003.

shareholder's right to bring a petition is only legally binding if allotted shares have been held and registered for at least 6 months during the 18 months before the commencement of the winding up.[163]

3.7.3 Powers of the court in a winding up petition

In a winding up petition, the court, which is referred to as the High Court of Botswana, is not to grant a petition for winding up by a prospective creditor until a *prima facie* case for winding up has been established to the satisfaction of the court.

In hearing a petition, the court has a wide discretion in determining the matter and may decide it in three ways. It can either dismiss the proceedings with or without costs, adjourn the proceedings conditionally or unconditionally make an interim order for winding up of the company or make any other order it deems just.[164]

3.7.4 Granting of stay or interdicts

In terms of the Act, after the submission of a petition for liquidation the high court has inherent power to intervene and suspend any suit against the company in any legal proceedings in Botswana.[165] This action may include proceedings to protect the workers' employment contracts.[166]

In relation to the attachment and execution of the company assets, the Act provides that such a process is null and void, including the disposition and transfer of shares in the company.[167] In view of this provision, it is difficult for employees to exercise their rights of recourse to courts of law because such processes are legally foreclosed, which leaves the

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163 Section 370 (2a) (ii) of *Companies Act* of 2003.
164 Section 371 of *Companies Act* of 2003.
165 Section 372 of *Companies Act* of 2003.
166 Section 376 of *Companies Act* of 2003.
167 Section 376 of *Companies Act* of 2003.

employees of liquidated companies without legal protection. The unpalatable thing is that the legal position of a court order is couched, more often than not, in favour of all creditors and shareholders.[168] This provision, therefore, makes it redundant for employees to pursue their own separate legal proceedings in order to protect their rights or vindicate their claims to their severance benefits.

3.7.5 Effect of winding up court order on employees' rights

The company law states that when a company is winding up, all employment contracts automatically become invalid.[169] This is so because the effect of a winding up order is to dissolve the company and to strip it of its legal capacity to contract[170] is carried out by the Master or Liquidator.[171] All employees' claims such as salaries, severance benefits and any other compensation are submitted to the liquidator at a meeting summoned for creditors and contributors.[172] At such a meeting, there is no special consideration for employees as they are all as treated equal to other creditors regardless of their plight.[173] This is consistent with the terms of the Act, which stipulates that the only preferential payment of claims shall take into account the costs, charges and expenses incurred in the process of winding up the company.[174]

3.7.6 Voluntary winding up of a company

In terms of the *Companies Act*, a company may be wound up voluntarily in two ways: at the will of the company or where its articles of association provide that the company will exist for a certain fixed

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168 Section 375 of *Companies Act* of 2003.
169 Section 91A of *Companies Act* of 2003.
170 Section 399 of *Companies Act* of 2003.
171 Section 399 of *Companies Act* of 2003.
172 Section 382 (1) of *Companies Act* of 2003.
173 Section 383 (1) of *Companies Act* of 2003.
174 Section 460 of *Companies Act* of 2003.

period.[175] At the expiry of such a fixed period, a resolution can be passed at a general meeting for the winding up the company voluntarily.

Another situation that might call for a voluntary winding up is where the company resolves by a special resolution that it should wind up.[176] In the event of a meeting being called for a winding up, the directors may furnish security to the satisfaction of the Master or Liquidator for the payment of debts within a period of 12 months from the commencement of the winding up.[177] However, the liquidator may use her/his discretion to disregard the furnishing of a security if the majority of the directors make a sworn statement supported by certificates from the company auditors that it has no liabilities.[178] However, the superfluous and linguistic gymnastics that is intended to bamboozle the workers so that they do not understand the process of liquidation is clear. The obtuse procedure to be followed is where security is furnished or dispensed with, the winding up is known as 'members' voluntary winding up';[179] but where security is neither furnished nor dispensed with, it is known as 'creditors' voluntary winding up'.[180]

The terms go on to state that in the event of a members' voluntary winding up, the company is required to appoint a liquidator for purposes of winding up the affairs of the company and the distribution of its assets. The consequences of a voluntary winding up against the will of the employees are tantamount to their dismissal. What is even more sinister is that the voluntary winding up is deemed to have taken effect from the time of passing of the resolution, which does not consider extraneous factors that may work in favour or against the resolution. This means that

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175 Section 405 (a) of *Companies Act* of 2003.
176 Section 405 (b) of *Companies Act* of 2003.
177 Section 409 (1) of *Companies Act* of 2003.
178 Section 409 (1) proviso of *Companies Act* of 2003.
179 Section 409 (2) of *Companies Act* of 2003.
180 Section 409 (3) of *Companies Act* of 2003.

the business and operations of the company would equally cease from the time a resolution was passed to wind up, a process which clearly undermines the employees' rights and interests.[181] This is where the *Companies Act* is blatantly disingenuous by favouring the rights of the "haves" against those of the "have-nots".[182]

3.8 Summary

In wrapping up this chapter, it is clear that the Botswana Constitution and the various pieces of legislation do not adequately protect the employees' rights and interests.

Although we have seen that the *Employment Act* of Botswana sets the minimum standards for the protection of employees' basic conditions of employment, the inherent weakness of the Act is that it is fuzzy and rough on the edges which makes it difficult to determine what exactly constitutes employees' rights as distinct from their basic conditions of employment. The other intractable issue is the role of trade unions in assisting their members to get a justifiable deal with former employers when their company is liquidated. It has been shown that, to all intents and purposes, the trade unions are largely toothless, which puts into question whether there is any need for joining a trade union which is unable to protect and defend the rights of the workers.

Ultimately, the loss of employment as a result of the winding up of a company basically means that it is useless to unionise because once a company is liquidated, the workers will automatically lose their legal right to litigate against their former company or to engage in any industrial action against it. The failure of the labour law to define precisely the employees' rights inevitably calls for the reform of all the labour statutes

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181 Section 419 of *Companies Act* of 2003.
182 Section 419 of *Companies Act* of 2003.

in Botswana so that we can bring them in line with the laws of the International Labour Organisation or with those of progressive and liberal laws of countries such as South Africa whose labour laws are a cut above others in terms of entrenching the rights of workers and their labour unions. The next chapter deals with the role of the judiciary in enhancing the protection of employees' rights in company liquidation.

CHAPTER FOUR: THE ROLE OF THE JUDICIARY IN ENHANCING THE PROTECTION OF EMPLOYEES' RIGHTS IN COMPANY LIQUIDATION

4.1 Introduction

The previous chapter discussed Botswana's labour and corporate insolvency laws which protect the employees' rights. In this chapter, the role of the judiciary in enhancing the protection of employees' rights when a company is being liquidated is analysed. Botswana, like all other Anglophone legal systems, administers its insolvency law through the courts.[183] The effectiveness of the country's corporate insolvency system is therefore dependent on the efficiency of judges who are responsible for the adjudication of insolvency.[184] In this regard, it is critically important to examine the insolvency laws within the context of the UNCITRAL insolvency guidelines.

In this chapter, the effectiveness of Botswana's High Court and the Industrial Court in advancing the employees' rights during the process of liquidating a company is discussed. Whether or not the Industrial Court has the power to assist corporate employees in matters involving insolvency[185] is further investigated because the judiciary is the most benign of the three branches of government.[186] At the heart of labour adjudication is the Industrial Court which has the jurisdiction on all labour matter and yet it plays second fiddle when it comes to its jurisdiction on the liquidation of companies.[187] Gordon Steward maintains that a just

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183 Section 370 of *Companies Act* of 2003.
184 www.UNCITRAL.org.
185 Section 2 of *Companies Act* of 2003.
186 Nsereko *Constitutional law in Botswana* 190.
187 Section 2 of *Companies Act* of 2003.

insolvency system is anchored on four principles such as the country's practitioner, national courts, culture and the domestic law.[188]

4.2 The Intricacy of winding up court procedures

4.2.1 Petition proceedings

In Botswana, the procedures of liquidating and winding up of a company are initiated through the High Court.[189] This procedure requires a special process involving a petition as distinguished from ordinary motion proceedings.[190] This is so because failure to comply with these requirements will render the proceedings illegal in the eyes of the court.[191]

The proper procedure in terms of the *Companies Act* requires that a petition be accompanied by a certificate of the Master or an administrative officer indicating that all the necessary fees and charges have been made before proceedings can take place and the appointment of the liquidator.[192] In the case of *Road Corp*,[193] the court noted that the language of the Act required strict compliance and that the petitioner had failed[194] to do so. The facts of the case involved argument on the requirements of a company liquidation petition to be met by the petitioner and touched on the question of employees' *locus standi* to intervene in the petition of their corporate employer. The petitioner had previously obtained a rule nisi which on the return date had to be discharged because the petitioner had failed to meet the strict requirements of Section 173 (1) of the *Companies Act* and the petition had other serious defects. These defects which militated against the included a defective

188 www.UNCITRAL.org.
189 Section 2 of *Companies Act* of 2003.
190 Section 370 of *Companies Act* of 2003; *Road Corp Ltd (in liquidation) v Road Prop Botswana Pty Ltd* 2002 (1) BLR 482 HC.
191 *Road Corp Ltd (in liquidation) v Road Prop Botswana Pty Ltd* 2002 (1) BLR 482 HC.
192 Section 370 (1e) of *Companies Act* of 2003.
193 *Road Corp Ltd (in liquidation) v Road Prop Botswana Pty Ltd* 2002 (1) BLR 482 HC.
194 *Road Corp Ltd (in liquidation) v Road Prop Botswana Pty Ltd* 2002 (1) BLR 482 HC.

resolution, lack of a prerequisite certificate from the Master or Administrative Officer of the High Court that due security had been found for payment of fees and charges. On the return date, the Court held that the provisional winding up order was improperly granted and the rule nisi had to be discharged.

4.2.2 Grounds for liquidation

The winding up petition must contain grounds for liquidation and essential averments as required in terms of the *Companies Act,* such as whether the winding up was by special resolution,[195] or the company was unable to pay its debts,[196] and whether the company or the board had persistently failed to comply with the *Companies Act.*[197] Also, the grounds for petition should include whether the company has not complied with Section 19 (1) of the *Companies Act,*[198] and in the case of an external company whether the company has been dissolved in its country of incorporation[199] and if the court is of the opinion that it is just and equitable for the company to be wound up.[200] In the *Road Corp* case, the court declined an application for the postponement of the hearing of the winding up petition as it was of the view that the flaws in the petition were so fundamental that a postponement would be manifestly prejudicial to, among others, creditors of the company.[201] In dismissing the case, Walia, J. states that

> The required information should have been incorporated in the Founding Affidavit and the petition should have complied with the strict but very simple to follow provisions of the Companies Act. The

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195 Section 369 (a) of *Companies Act* of 2003.
196 Section 369 (b) of *Companies Act* of 2003.
197 Section 369 (c) of *Companies Act* of 2003.
198 Section 369 (d) of *Companies Act* of 2003.
199 Section 369 (e) of *Companies Act* of 2003.
200 Section 369 (f) of *Companies Act* of 2003.
201 *Road Corp Ltd (in liquidation) v Road Prop Botswana Pty Ltd* 2002 (1) BLR 482 HC 488.

> provisional liquidation on 23 March 2001 is therefore discharged in its entirety.[202]

The above quotation demonstrates the strict requirements to be complied with in initiating the winding up processes in the High Court. This begs the question as to whether the rigidity is really necessary. If we view it from the perspective of employees who seek the protection of their rights during the winding up of a company, it may be unjustified. However, one can argue that only deserving cases of companies in real financial distress can be heard and orders granted by courts to avoid the abuse of such processes by unscrupulous corporate employers who may be selfishly exploiting the loopholes of the procedures in order to cover up their financial mismanagement or malpractices. The acid test should be whether it is just and equitable for the court to grant the winding up order against the concerned company.[203] It would seem that the strict process is an advantage to employees which demands that only legitimate insolvencies are granted.

4.2.3 Locus standi of employees in winding up proceedings

There is a contradictory legal positions as to whether employees of a company can intervene in the winding up proceedings or can petition the High Court if their employer is obstinate.[204] This contraction arises from the three High Court judgments of *Molefi v Academy of Business Management (PTY) Ltd and Another*,[205] decided in 1994 in which Justice Nganunu held as follows:

> On the proposed intervention by some employees in the proceedings, they were not cited as parties to the suit and had to show direct and substantive interest of legal interest as opposed to more commercial and

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202 *Road Corp Ltd (in liquidation) v Road Prop Botswana Pty Ltd* 2002 (1) BLR 482 HC 488.

203 *Rann v Landela Safaris Botswana and Another* 2007 (1) BLR 100 (HC).

204 *Molefhi v Academy of Business Management Pty Ltd and Another* 1994 BLR 1 (HC).

205 *Molefhi v Academy of Business Management Pty Ltd and Another* 1994 BLR 1 (HC).

> financial interest in order to establish *locus standi*. They faulted in this respect and the proposed intervention was not permitted.[206]

The second case involved a High Court decision in 2002 *Road Corp Ltd (in liquidation) v Road Prop Botswana Pty Ltd* where Justice Walia relying on the above judgment of *Molefi v Academy of Business Management (PTY) Ltd and Another*, dismissed a similar employees' intervention application and held that employees failed to show that they had sufficient direct and substantive interest of a legal interest as opposed to a mere commercial and financial interest in order to establish *locus standi*. The refusal to acknowledge that employees have a *locus standi* in the above liquidation proceedings of their corporate employer has been interpreted in other jurisdictions as a denial of access to justice and the application of the rule of law to employees.[207]

The third case gave employees reprieve when the High Court ruled that employees had a *locus standi* in the liquidation proceedings of their corporate employer.[208] Justice Dingake ruled in the case of *Radibe v Voltex (PTY) Ltd and Another* that employees had the necessary *locus standi* to intervene as an interested party in the liquidation proceedings of their corporate employer concluding that:

> On a consideration of the evolution of a company as simply regarded as the property of the shareholders, to a company as a social institution in some respects, it follows that in winding up proceedings, the court should not turn a deaf ear to the cry of employees who painfully contemplate the prospects of loss of employment caused by the employer.[209]

These rulings suggest that there is a contradiction between the two High Court judgments as shown by the cases of *Molefhi*[210] and *Radibe*[211] on the

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206 *Molefhi v Academy of Business Management Pty Ltd and Another* 1994 BLR 1. (HC)
207 *National Textiles Workers Union v PR Ramakrishna* 1983 AIR 75, 1983 SCR (1) 9.
208 *Radibe and others v Voltex Pty Ltd and Another* 2013 (2) BLR 212 (HC).
209 *Radibe and others v Voltex Pty Ltd and Another* 2013 (2) BLR 212 (HC).
210 *Molefhi v Academy of Business Management Pty Ltd and Another* 1994 BLR 1. (HC)
211 *Radibe and others v Voltex Pty Ltd and Another* 2013 (2) BLR 212 (HC).

treatment of employees' *locus standi* during company liquidation proceedings. However, since the Court of Appeal has not yet pronounced itself on the matter, the debate is still going on as to whether employees have *locus standi* to intervene in the liquidation proceedings of their corporate employer. Amid this raging debate, a persuasive view is presented by Justice Dingake in the *Radibe's case*,[212] who maintains that its *ratio dicidendi* is consistent with the entrenched employees' rights which ensure that their severance claims are protected by the due process of the law.

What must be noted is that the granting of a winding up order undermines the employees' rights to work and earn an income to sustain their livelihood. Also, it violates natural justice and fair play for the court to make a winding up order which has the potential to terminate employees' services without giving them the opportunity to be heard.[213] In the absence of such an expressly prohibitive provision in the *Companies Act*, employees must be allowed to make representations during the winding up proceedings.

4.2.4 Discretion of the court

In the determination of a liquidation petition, the court has a wide range of powers [214] which must be exercised judicially,[215] such as dismissing with costs a submitted application, adjourning the hearing conditionally or unconditionally and making an interim order or any other order it may deem fit.[216] Ordinarily the court does not immediately make a final order and depending on whether the applicant has established a *prima facie*

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212 *Radibe and others v Voltex Pty Ltd and Another* 2013 (2) BLR 212 (HC).
213 *National Textiles Workers Union v PR Ramakrishna* 1983 AIR 75, 1983 SCR (1) 9.
214 *Rann v Landela Safaris Botswana and Another* 2007 (1) BLR 100 (HC).
215 *Agri Operations Ltd v Hauba Fleet Management Pty Ltd* (542/16) [2007] ZASCA 24 (24 March 2017).
216 Section 371 (1) of *Companies Act* of 2003.

case, it would, as a matter of interim relief, grant a rule *nisi*[217] giving directions to all affected parties to show cause why the order *nisi* should not be confirmed on the return date.[218]

However, the court is not limited in the exercise of its powers to make a final order, particularly in circumstances where all issues have been canvassed and substantively addressed by all interested parties. The jurisdictional basis of the court's powers means that irrespective of the grounds advanced in the winding up of a company, the court retains the final decision whether the order should be granted or not.[219] Where the power of the court is properly exercised, the court will not allow the winding up of a company if liquidation is involuntary as a result of the indebtedness of the petitioning creditor.[220] This is so because courts should not be used as an indirect way of exerting pressure on companies that genuinely dispute indebtedness with a *bona fide* defence.[221] This approach is based on *Badenhorst's* rule which ordered that the winding up proceedings should not be used to enforce the payment of debt which is disputed by the company on reasonable grounds. Part of the ruling was that the procedure for winding up is not designed for the resolution of disputes as to the existence or non-existence of a debt.[222] It is a discretionary exercise of power by the court in order to protect the employees' rights when a company is being liquidated.

In dissolving a company, the court should not be influenced by the need to save jobs or preserve income for affected employees. Its primary concern is to determine whether a *prima facie* case exists for unmitigated

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217 Sharrock *et al. Hockly's Insovency Law* 250.
218 Sharrock *et al. Hockly's Insovency Law* 250.
219 *Rann v Landela Safaris Botswana and Another* 2007 (1) BLR 100 (HC).
220 Sharrock *et al. Hockly's Insovency Law* 251.
221 *Kalil v Decotex Pty Ltd and Another* 1988 (1) SA 943 at 980 D.
222 *Badenhost v Nothern Contruction Enterprises Pty Ltd* 1956 2 SA 346 at 347-348; *Kalil v Decotex Pty Ltd and Another* 1988 (1) SA 943 at 980 D; Meskin *et al. Henochberg on the Companies Act* 693-694.

indebtedness by the applicant. The advantage to the employees is that in refusing to grant the order, their jobs and the much-needed income is saved. In all this, the court retains the power it deems is appropriate,[223] of making an order to wind up after an application has been made by the liquidator or creditor.

4.2.5 Enforcement of rights and claims by employees' as preferred creditors

Under the corporate insolvency law, employees fall into the category of preferred creditors[224] because they are entitled to receiving their severance benefits before other creditors.[225] They are not secured creditors who are above concurrent creditors.[226]

In Botswana, the *Employment Act* provides that employees' claims which arise from the insolvency of their employer are to be paid first before non-privileged creditors.[227] This provision makes employees unsecured creditors but bestows on them a higher rank than non-privileged creditors when an employer's property is being executed, which entitles them to be paid first.[228] As creditors, employees in Botswana are entitled to attend the first meeting of creditors and contributors convened by the Master so that they can prove their claims.[229] The purpose of the meeting is not to distinguish between the claims of employees and those of the creditors.[230] At this preliminary meeting, the employees' proof of their claims is similar to that of other creditors which requires that all claims be made at a

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223 Section 390 of *Companies Act* of 2003.
224 Sharrock *et al Hockly's Insovency Law* 183.
225 Sharrock *et al Hockly's Insovency Law* 183.
226 Sharrock *et al Hockly's Insovency Law* 184.
227 Section 91 of *Employment Act* Chapter 47:01.
228 Section 91 of *Employment Act* Chapter 47:01.
229 Section 382 (1a) of *Companies Act* of 2003.
230 Section 382 (2) of *Companies Act* of 2003.

meeting of creditors.[231] However, what is not clear is the method of proving such claims by company employees in the form of affidavits or submitted statements of claims. The weakness of this process is that the law does not categorically state whether the employees should submit their claims as individuals or as a group. The provisions of the *Companies Act* do not make it explicit as to whether unionized employees can be represented by their respective trade unions or the trade union is disqualified as it is expressly stated in the *Employers and Trade Union Organisations Act.*[232] In the latter Act, once employees' contracts of employment have been terminated, they automatically lose their membership and representation by the unions.[233]

This confusing state of affairs has exposed employees to the jaws of the law thereby rendering them vulnerable to exploitation by not being able to file and prove their claims alongside other rich creditors[234] who hire lawyers.

4.3 Lack of jurisdiction by the Industrial Court

In the case of Botswana, it would not be entirely correct to say that the Industrial Court[235] lacks legal authority to adjudicate on matters involving employees' claims during the liquidation of company.[236] This view is supported by the fact that the Industrial Court was established primarily for settling trade disputes in order to enhance harmonious industrial relations in the country.[237] According to the *Companies Act,*[238] the court

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231 Section 383 (1) of *Companies Act* of 2003.
232 Section 21 (2) of *Trade Unions and Employers Organisations Act.*
233 Section 21 (2) of *Trade Unions and Employers Organisations Act.*
234 *Commissioner South Africa Revenue Service v Pieters and others* (1026/17) [2018] ZASCA 128 (27 September 2018); Cassim et al. *Contemporary Company Law* 862.
235 *Mbayi v Wade Adams (Botswana) Pty Ltd* case number IC 35/94; *Kekgosi v Clover Botswana Pty Ltd* case number IC 1142 of 2008.
236 Section 15 (2) of the *Trade Disputes Act* Chapter 48: 02; Section 2 of *Companies Act* of 2003.
237 Section 15 (2) of the *Trade Disputes Act* Chapter 48: 02.

that has the jurisdiction in the liquidation of companies is the High Court. Even under the *Trade Disputes Act*,[239] there is no provision for the Industrial Court to adjudicate on matters involving the liquidation of companies. The labour issues affecting company employees in corporate insolvency, such as claims for outstanding wages, severance benefits and others are matters over which the Industrial Court has jurisdiction; but this does not necessarily make the Industrial Court qualified to be involved in issues of liquidation. Its primary function is to offer a quick and inexpensive forum for processing employees' claims when a company is being liquidated or wound up. The researcher's view is that such an arrangement is likely to make the Industrial Court fail unless the *Trade Disputes Act*, under which the Industrial Court is established, is amended to add the aspect of jurisdictional competency like the High Court which enjoys[240] unlimited power.

4.4 Lack of judges' insolvency specialist skills and expert training

The judiciary is undoubtedly the most important arbiter in the adjudication of insolvency cases[241] in Botswana. What is common knowledge is that the legal system can only function properly if it has people with specialist knowledge of the functions of insolvency law.[242] The members of the judiciary in Botswana must therefore be given specialized training in insolvency adjudication since it is the main cog in the wheels of justice.[243] Generally the judiciary in Botswana does not have specialized insolvency judges because it is assumed that judges know the law.[244] This is why some insolvency cases have dragged on for too long without being

238 Section 2 of the *Companies Act* of 2003.
239 Section 15 (2) of the *Trade Disputes Act* Chapter 48: 02.
240 Section 15 (2) of the *Trade Disputes Act* Chapter 48: 02; *Tshukudu v Southern Africa Media Development Trust* 2012 BLR 54 IC.
241 Bwembya *Pitfalls of Insolvency Provisions under the Zambian Companies Act* 55.
242 Bwembya *Pitfalls of Insolvency Provisions under the Zambian Companies Act* 55.
243 Bwembya *Pitfalls of Insolvency Provisions under the Zambian Companies Act* 55.
244 Bwembya *Pitfalls of Insolvency Provisions under the Zambian Companies Act* 55.

resolved because presiding judges are not trained to handle corporate insolvency litigation.

The critical issue regarding the welfare of workers when a company is being liquidated is that the protection of employees' rights is essentially a human rights issue which can only be presided over by specialist judges.[245] In Botswana, the lack of judges specialised in insolvency laws has affected the efficiency of the judiciary in enhancing and protecting the employees' rights. The need to train judges in insolvency laws is an aspect that needs immediate attention so that the High Court and the Industrial Court can effectively and expeditiously dispense justice.

4.5 Summary

This chapter analysed the role of the judiciary in enhancing the protection of employees' rights when a company is being liquidated in Botswana. It has demonstrated that the judiciary plays a significant role in the protection of employees' rights in corporate insolvency proceedings. The dispensing of justice is wholly dependent on the wisdom, efficiency, fairness and impartiality of the judiciary, as well as their sensitivity to the rights of creditors such as employees. The ability of the judiciary to resolve insolvency claims reflects the efficacy of the legal system and the trust that ordinary citizens place on judges who are seen as the 'custodians' of the law. The next chapter deals with a comparative analysis of the labour instruments of the ILO conventions, UNCITRAL legislative guide, World Bank principles and OHADA's uniform insolvency law model. The chapter compares the international conventions with Botswana's corporate insolvency framework and draws conclusions on what is required to reform the domestic laws.

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[245] Omar 2009 *ICRJ* 369.

CHAPTER FIVE: A COMPARATIVE ANALYSIS OF INTERNATIONAL LABOUR LAWS OF ILO, OHADA, UNCITRAL, SADC AND THE WORLD BANK WITH THOSE OF BOTSWANA

5.1 Introduction

Chapter four has dealt with the role of the judiciary in enhancing the protection of employees' rights during the liquidation of a company. Chapter five goes further to examine the labour laws of international organisations such as the UN, ILO and SADC to which Botswana is a member state.[246] Botswana as one of the countries that has ratified the ILO conventions on employees' rights, is obliged to make laws that are consistent with the principles for effective insolvency and Creditor Rights Systems,[247] as enunciated in the guidelines of the United Nations Commission for International Trade Law (UNCITRAL),[248] which requires the country to domesticate the conventions such as the protection of workers' claims during insolvency.[249]

In this chapter, the corporate insolvency laws developed by the international community in order to protect employees' rights and claims are examined. The chapter further discusses Botswana's compliance with international protocols, particularly its ratification and domestication record after it has been severely criticised for a poor compliance record.[250] Furthermore, the chapter looks at whether the insolvency law of Botswana needs reform in order to realign it with the UNCITRAL insolvency law guidelines. The thrust of this chapter is that it makes a legal audit in order to see where Botswana needs to improve its labour laws so that it can meet its international obligations.

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246 www.ilo.org.
247 Principles for Effective Insolvency and Creditor Rights Systems (Rvsd 2005).
248 www.UNCITRAL.org.
249 Protection of Workers' Claims c.173 (1992).
250 www.ilo.org.

5.2 ILO's Employees' Protection Conventions

As far back as 1992, the International Labour Organisation adopted a Convention to be ratified by member states on the protection of workers' claims in the event of an employer's insolvency.[251] This Convention came into effect in 1995 and was ratified by Botswana in 1997.[252] In terms of its provisions, a member state that has ratified the Convention can accept the obligations of part (ii), which provide for the protection of workers' claims as stated in part (iii), which protect the workers' claims by a guarantee institution.[253] Further, the member state is required to indicate its choice in a declaration accompanying its ratification.[254] This Convention provides for the prioritisation of workers' claims against the creditors in the event of an employer becoming insolvent or the company is liquidated.[255] The important thing about the Convention is that it protects workers' claims to the extent that they be paid three months' wages[256] after a company has been declared insolvent

The Convention obliges member states to ensure that their municipal or national laws give workers' claims a higher priority than other privileged claims.[257] However, the workers' claims may be given a lower priority as compared to state claims of social security systems.[258] What is laudable about the Convention is that it makes clear which rights and privileges to be protected.[259] However, when Botswana's labour laws are compared with the ILO Convention, it fails to meet all the prescriptions of the

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251 Protection of Workers' Claims c.173 (1992).
252 www.ilo.org.
253 A 1 (1) of Protection of Workers' Claims c.173 (1992)
254 A 1 (1) of Protection of Workers' Claims c.173 (1992).
255 A 3 of Protection of Workers' Claims c.173 (1992).
256 A 6 of Protection of Workers' Claims c.173 (1992).
257 A 8 of Protection of Workers' Claims c.173 (1992).
258 A 8 of Protection of Workers' Claims c.173 (1992).
259 Part (II) and Part (III) of Protection of Workers' Claims c.173 (1992).

Convention such as the prioritisation of the workers' claims.[260] Botswana's *Employment Act*, provides that employees' claims in the event of the insolvency of the employer be paid after other privileged creditors[261] which is against the ILO Convention that binds member states upon their ratification[262] of the convention. In relation to this aspect Botswana's *Employment Act* is exposed as non-compliant and Botswana has an obligation to fully domesticate this Convention so that it brings its legislation in conformity with the Convention to make employees a priority during company winding up or make employees privileged creditors as required by the wording of the Convention.

Another relevant ILO convention is the protection of workers' wages[263] which Botswana ratified in 1997.[264] This Convention addresses the issue of workers' protection during the bankruptcy of an employer by protecting workers' wages against deductions.[265] The Convection acknowledges the fact that national laws and regulations may be used to determine the relative priority of wages during an employer's liquidation.[266] However, this convection has been revised under Article 3 of the Wages Convention.[267] Under this article, member states that ratify the Workers' Claims Convention are exempted from ratifying the protection of wages if they wish to do so because the objectives of the two conventions are similar.[268]

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260 Section 91A of *Employment Act Chapter 47:01*.
261 Section 91A (1) of *Employment Act Chapter 47:01*.
262 A 16 of Protection of Workers' Claims c.173 (1992).
263 Protection of Wages Convention c.95 (1949)
264 www.ilo.org.
265 A 11 (1) of Protection of Wages Convention c.95 (1949).
266 A 11 (3) of Protection of Wages Convention c.95 (1949).
267 A 14 of Protection of Workers' Claims c.173 (1992).
268 A 21 of Protection of Workers' Claims c.173 (1992).

A similar Convention with an international legislative effect on employees' rights is the termination of employment adopted by the ILO in 1982[269] which came into effect in 1985. The objective of this Convection is to regulate the minimum level of job security in member states after the termination of employment.[270] The unintended effect of this Convention, however, is that it has accorded member states the discretion to exclude certain categories of employees such as those under a fixed term contract,[271] workers serving a probationary period[272] and casual workers.[273]

What is clear about this Convention is that it discriminates against some workers and indirectly undermines the workers' security by justifying their termination of employment.[274] Under this Convention, it would appear that the only valid reasons for the termination of employment is the conduct of the worker or the operational requirements of the employer.[275] Despite these shortcomings, there is an entrenched provision for the payment of severance allowances to employees upon the termination of their employment.[276] This article provides that a worker is entitled to severance benefits whose calculation is dependent on the length of service and the level of wages.[277] The Convention also stipulates the method of its implementation, such as collective agreements and arbitration through courts.[278]

The bright side of the Convention is that it protects employees' rights when their employment is being terminated, especially as it recognises the

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269 Termination of Employment Convention c.58 (1982).
270 A 3 of Termination of Employment Convention c.58 (1982).
271 A 2 (2) (a) of Termination of Employment Convention c.58 (1982).
272 A 2 (2) (b) of Termination of Employment Convention c.58 (1982).
273 A 2 (2) (c) of Termination of Employment Convention c.58 (1982).
274 A 4 of Termination of Employment Convention c.58 (1982).
275 A 4 of Termination of Employment Convention c.58 (1982).
276 A 12 (1) of Termination of Employment Convention c.58 (1982).
277 A 12 (1) (a) of Termination of Employment Convention c.58 (1982).
278 A 1 of Termination of Employment Convention c.58 (1982).

protection of workers through legal processes. Research into case law by the ILO indicates that national courts in member states have either referred to or invoked the convection directly when making judgments on the termination of employment.[279] This Convection has been used as a yardstick for the interpretation of municipal laws and for strengthening national laws. In some instances, the convention has been used as a means for bringing about equity while in other circumstances it has been used as a norm for resolving labour disputes in those countries which have not yet ratified the Convention.[280] For instance, the Industrial Court of Botswana once referred to the Convection when there was a dispute regarding the dismissal of workers,[281] despite the fact that the country has not yet ratified the Convention.[282] The Industrial Court applied Article 4 of the Convection on the dismissal of an employee and proclaimed that it had done so consistently in order to meet the requirement that an employee can only be dismissed if the employer has a valid reason to do so.[283]

5.3 International insolvency standards and best practices

The international community through the collaborative effort of the World Bank and the United Nations Commission on International Trade Law (UNCITRAL) in concert with the International Monetary Fund, developed some international insolvency standards. These standards are based on the principles of effective insolvency and Creditors' Rights Systems[284] of

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279 ILO-ITC "Use of international law by Domestic Courts-compendium of court decisions" (2006).

280 ILO-ITC "Use of international law by Domestic Courts-compendium of court decisions" (2006).

281 *Sebako and Another v Shona Gas* (IC665/04).

282 *Sebako and Another v Shona Gas* (IC665/04).

283 *Sebako and Another v Shona Gas* (IC665/04).

284 http://web.worldbank.org/gild.; USAID *Insolvency systems in South Africa: Comparative review of employee claims treatment* 2011.

the World Bank and UNCITRAL legislative guide on insolvency law.[285] Also, the World Bank, UNCITRAL and the International Monetary Fund have developed a joint insolvency and creditor rights standards in a single document that now codifies international insolvency standards to be implemented by states in making their national insolvency laws.

5.3.1 UNCITRAL insolvency legislative guide

The UNCITRAL legislative guide provides an international insolvency law framework which is used when making national insolvency laws by different member states.[286] It is an embodiment of the objectives and principles of international insolvency laws as promulgated by UNCITRAL to help individual countries when reforming their insolvency laws.

It is also meant to be used by law-making bodies and review commissions around the world in determining the clarity of the existing insolvency laws. Countries such as Botswana and other comparable jurisdictions may initiate their insolvency law reform processes by referring to UNCITRAL labour laws as a standard measure. The formulation of part I and part II of this guide which contains the key objectives of the insolvency law[287] was completed in 2004. Part III of the guide which deals with the treatment of insolvency at both municipal and national level has also been completed;[288] but it was not until 2013 that part IV of the guide was completed to deal with the obligations of decision makers when a company is being liquidated.[289]

What should be noted is that all the insolvency laws are mere recommendations that may be adopted or reviewed in member countries.

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285 http://www.UNCITRAL.org.; USAID *Insolvency systems in South Africa: Comparative review of employee claims treatment* 2011.
286 http://UNCITRAL.org/pdf/english/texts/insolvent.
287 http://UNCITRAL.org/pdf/english/texts/insolvent.
288 http://UNCITRAL.org/pdf/english/texts/insolvent.
289 http://UNCITRAL.org/pdf/english/texts/insolvent.

Notwithstanding this, the insolvency law guide serves as a reference point to be adopted by member states in their domestic laws. What is astounding, though, is that there is no evidence in Botswana that the country has incorporated the recommendations of UNCITRAL into its municipal law. This, therefore, calls for law reform in order to align the country's corporate insolvency law with the legislative guide of UNCITRAL in order to protect employees' rights when a company is being liquidated.

5.3.2 World Bank Principles

As a reaction to the global financial crisis of the 1990's, the international community pressurised the World Bank in 2001 to develop principles for an effective insolvency and creditors/debtors regime.[290] These principles constituted the first internationally recognised set of laws to be used for the evaluation of the effectiveness of national insolvency laws over creditor/debtor rights.[291] However, after extensive consultations, the original World Bank principles were revised in 2015 resulting in a streamlined approach being adopted to reflect best international practices. It should to be noted that the changes to part A and B of the World Bank principles were made to reflect the causal relationship between the cost and flow of credit and the institutional laws that enforce credit arrangements. This is turn has had a trickledown effect on the duties and responsibilities of company directors when a company is being liquidated with the result that directors would be liable for company liabilities where their culpability in management or investment decisions is proven. In this regard, Botswana is still lagging in the implementation of the World Bank Principles on insolvency laws.

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290 http://web.worldbank.org/gild.; USAID *Insolvency systems in South Africa: Comparative review of employee claims treatment* 2011.

291 http://web.worldbank.org/gild.; USAID *Insolvency systems in South Africa: Comparative review of employee claims treatment* 2011.

5.4 SADC insolvency framework and protection of employees' rights

The Southern African Development Community (SADC) is a regional organisation that was formed in 1980 by the then frontline states as the Southern African Development Coordination Conference (SADCC)[292] and Botswana is one of the founding members. This community was reformed through the Windhoek Treaty in 1992 to replace the former SADCC, when the member states resolved that the previous charter had been overtaken by events as apartheid in South Africa was on the brink of being dismantled.[293]

SADC's aim, as provided in its founding treaty, is to strive towards regional integration.[294] Within this context of regional integration, it has adopted certain norms and standards through its Charter on Fundamental Social Rights[295] and protocols on employment and labour.[296] These protocols are used as a tool to facilitate both transnational labour rights and regional labour standards in countries such as Botswana.[297] SADC's labour protocols have since gathered momentum, especially after the planned harmonisation of employment and labour laws as well as social security policies and legislation in member states.[298] SADC has identified eight areas of cooperation which are administered through protocols.[299] These protocols only bind member states which have ratified them and can only

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292 Ngaudje 2013 *JAL* 2.
293 Ngongola 2012 *SADCLJ* 123.
294 A 5 of SADC treaty (1992).
295 SADC Charter on Fundamental Social Rights of 2003.
296 SADC Protocol on Employment and Labour of 2014.
297 Ngongola 2012 *SADCLJ* 123.
298 Smith 2015 *JGS* 14-29.
299 Ngongola 2012 *SADCLJ* 123.

come into force once they are approved by at least two thirds of the member states.[300]

Through its protocol on employment and labour,[301] SADC has committed its member states to the achievement of minimum labour standards, social protection and sustainable dialogue.[302] The main objective is to establish social security schemes in member states, to set minimum wages and to facilitate integration of the labour market.[303] In spite of these efforts, it is doubtful that the objectives of the protocols have a legal basis to support them in the various member states. Comparatively speaking, Botswana as the headquarters of SADC's Secretariat, has not set a good example for the protection of workers' rights as it has failed to legislate for minimum wage although it has enacted several labour laws which still have a negligible impact on the workers' welfare.[304]

Even though there may be weaknesses when it comes to the implementation of the protocols, there are legal obligations both in their general[305] and specific[306] terms which oblige member states to develop mechanisms to achieve the set objectives. This therefore calls for Botswana as a member state to implement the protocols so that the employees' rights can be protected consistent with the ILO conventions on insolvency laws and SADC's treaty obligations.

This is necessary because the SADC protocols have a direct relationship with the ILO's Conventions.[307] In terms of the Protocol on Employment and Labour, SADC member states are obliged to take appropriate steps to

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300 Ngongola 2012 *SADCLJ* 123.
301 SADC Protocol on Employment and Labour of 2014.
302 A 3 (d) of SADC Protocol on Employment and Labour of 2014.
303 A 3 (h) of SADC Protocol on Employment and Labour of 2014.
304 http://www.sundaystandard.info/minimum-wage-could-get-another-twist-q12019.
305 A 3 of SADC Protocol on Employment and Labour of 2014.
306 A 4 of SADC Protocol on Employment and Labour of 2014.
307 A 5 of SADC Protocol on Employment and Labour of 2014.

ratify and implement all the ILO Conventions.[308] Member states are further obliged to ensure that they comply with the monitoring systems of the ILO and other international and regional organisations.[309] This obligation has set Botswana on a collision course with the ILO because on several occasions, the country has failed to report on scheduled sittings on specific labour areas.[310] The failure by Botswana to comply with the ILO labour Conventions has dented the country' image as the objectives of the SADC protocols directly require member states to be accountable to their ILO Convention obligations.

Furthermore, the Protocol on Employment and Labour protects workers in the SADC member states[311] and requires member states to ensure that workers have a right to adequate social protection regardless of the status and kind of employment they are engaged in.[312] SADC member states are obliged by the Protocol to establish, maintain and progressively raise its system of social security to the level required by ILO Conventions.[313] This obliges individual states to develop a comprehensive social protection system which can mitigate risks during the liquidation of a company.[314] Here, the intention is to ensure that employees are protected against collective and individual risks at work, such as political conflicts and national disasters.[315]

For employees who lose employment in foreseen and unforeseen circumstances, the SADC Protocol obliges members to provide unemployment benefits to every worker through a compulsory insurance

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308 A 5 (2) of SADC Protocol on Employment and Labour of 2014.
309 A 5 (3) (h) of SADC Protocol on Employment and Labour of 2014.
310 www.ilo.org.
311 A 11 of SADC Protocol on Employment and Labour of 2014.
312 A 11 (a) of SADC Protocol on Employment and Labour of 2014.
313 Social Security c.102 (1952).
314 A 11 (3) (a) of SADC Protocol on Employment and Labour of 2014.
315 A 11 (3) (b) of SADC Protocol on Employment and Labour of 2014.

system.[316] Unfortunately, Botswana does not have any legislation for unemployment insurance, which is contrary to the SADC Protocol. The insurance is intended to help those who are not covered by a compulsory social insurance scheme in the event of a company being liquidated. The critical question that arises is whether SADC has a mechanism to ensure that such Protocol provisions can be complied with to achieve the organisation's noble objectives. Unfortunately, SADC has no enforcement mechanism which can compel members to abide by their obligations as evidenced by the SADC Tribunal which has long been disbanded.[317]

The SADC Charter on Fundamental Social Rights,[318] among its other aims, obliges member states to create a conducive environment for the implementation of the ILO core Conventions. This Charter seeks to create a legal framework for a regional regulatory labour mechanism which enables member states to harmonise their legal, social and economic policies. The Charter plays a critical role in the establishment of a harmonised regional labour framework within the SADC region; but Botswana's corporate insolvency system has failed to meet this regional standard due to a lack of political will. The current government, however, seems to have committed itself to changing the situation.[319]

5.5 Botswana's compliance and implementation profile of its ILO and SADC obligations

Botswana has a chequered history of non-compliance with its ILO obligations as recorded in the ILO reports.[320] Recently it was heavily criticised by the local trade unions and ILO Committee of Experts (CEACR)

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316 A 15 (1) of SADC Protocol on Employment and Labour of 2014.

317 Smith 2015 *JGS* 14-29.; *Campbell and Another v Republic of Zimbabwe* (SADC (T) 03/2009 [2009] SADCT 1 (5 June 2009).

318 Smith 2015 *JGS* 14-29.

319 http://www.botswanaguardian.co.bw/news/item/3919-masisi-assures-workers-of-salary-increase-on-april-1.html

320 www.ilo.org.

for an alleged violation of ILO's Conventions.[321] This criticism was directed at the violation of employees' rights to freedom of association and the right to collective bargaining.[322] The violation, it would seem, was of a technical nature regarding the protection of employees' rights in a company that had become insolvent. A survey was conducted to determine how Botswana fares on its compliance obligations to important ILO Conventions on employees' protection on insolvency, such as the convention on the protection of workers' claims,[323] the Convention on wages protection[324] and the Convention on the termination of employment.[325] The findings suggest that although Botswana has ratified the ILO Conventions, it has not yet fully domesticated the Conventions as illustrated by the ambiguous *Employment Act*[326] which does not accord employees' claims a privilege higher than other claimants as required by the Convention.

With regard to Botswana's SADC compliance profile, the country has not yet created an unemployment insurance fund, contrary to the Protocol on Employment and Labour which requires the establishment of a compulsory insurance.[327] The Protocol requires member states to establish, maintain and progressively raise its system of social security to levels required by ILO Conventions and regional instruments. On the contrary, Botswana has lagged in enacting laws to ensure that employees are well protected. This audit on Botswana's compliance record with its SADC and ILO obligations reveals that the country's national insolvency and labour laws are not yet on par with both the regional and international insolvency standards which is an indictment on its treatment of workers.

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321 www.ilo.org.
322 www.mmegi.bw.
323 Protection of Workers' Claims c.173 (1992).
324 Protection of Wages Convention c.95 (1949).
325 Termination of Employment Convention c.58 (1982).
326 Section 91A of the *Employment Act* Chapter 47: 01.
327 A 5 of SADC Protocol on Employment and Labour.

5.6 OHADA insolvency framework and its lessons for Botswana

Global challenges have inevitably compelled both developed and developing countries to benchmark their insolvency legal systems.[328] This has resulted in some countries to come together in order to form regional organisations such as OHADA, which has since become the most successful Central and West African organisation.[329] OHADA is a French acronym for the Organisation for the Harmonization of Business Law in Africa.[330] The body was created by a treaty which opened membership to all states particularly those of the African Union or any other country which is invited to join the current membership.[331] Botswana, by virtue of being a member of the African Union,[332] qualifies to join OHADA whose current membership stands at seventeen dominated by former French colonies.[333] The primary objective of OHADA is to reform and harmonize labour laws in member states,[334] and to create a common and simplified code of procedural and substantive rules for the promotion of economic and regional integration.[335] This aim has so far been achieved through the promulgation of a uniform insolvency laws within member states.[336]

OHADA operates through a Council of Ministers whose role is to harmonize laws and measures[337] through the secretariat in Cameroon.[338] The enforcement and adjudication process is done through a court of justice and arbitration situated in the Ivory Coast[339] while the training of judges

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328 Mimiko *et al Globalisation and the Creative Space in Africa: Implications for Governance and Development* 39.
329 Houanye and Shen 2013 *BLR* 1-7.
330 Omar "Out of Africa: The OHADA Uniform Insolvency Law".
331 Omar "Out of Africa: The OHADA Uniform Insolvency Law".
332 https://au.int/.
333 Omar "Out of Africa: The OHADA Uniform Insolvency Law".
334 Omar "Out of Africa: The OHADA Uniform Insolvency Law".
335 Omar "Out of Africa: The OHADA Uniform Insolvency Law".
336 Omar "Out of Africa: The OHADA Uniform Insolvency Law".
337 Omar "Out of Africa: The OHADA Uniform Insolvency Law".
338 Omar "Out of Africa: The OHADA Uniform Insolvency Law".
339 Omar "Out of Africa: The OHADA Uniform Insolvency Law".

and their monitoring to ensure consistency in the interpretation and implementation of its laws is done in Benin.[340]

5.6.1 OHADA's uniform insolvency law

In order to deal with the legislative processes of enforcement, recovery and the determination of insolvency, OHADA has adopted uniform insolvency laws,[341] pursuant to its treaty[342] which has substituted the laws of all its member states.[343] The insolvency laws, however, have a French flavour, which other scholars have argued may discourage non-French speaking countries from joining the organisation.[344] The uniform insolvency law was subsequently revised on 24 December 2015 to take into account the reforms.[345]

The revised Uniform Insolvency Act,[346] like its predecessor and all other Acts, is applicable to all OHADA member states and takes precedence over national laws.[347] The objective of the new legislation is to modernise and simplify OHADA's insolvency proceedings by improving the efficiency of liquidation.[348] The revised objective of the law is to protect the viability of companies, to safeguard employment as well as to ensure that creditors are paid.[349]

The improvement of the insolvency proceedings has focused on simplifying proceedings, the initiation of conciliation, introducing a new money privilege and a new legal framework for receivers, stipulating

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340 Omar "Out of Africa: The OHADA Uniform Insolvency Law."
341 www.ohada.org.
342 www.ohada.org.
343 Omar "Out of Africa: The OHADA Uniform Insolvency Law."
344 Omar "Out of Africa: The OHADA Uniform Insolvency Law."
345 https://globalrestructuringreviw.com.
346 https://globalrestructuringreviw.com.
347 https://globalrestructuringreviw.com.
348 https://globalrestructuringreviw.com.
349 https://globalrestructuringreviw.com.

mandatory deadlines for the implementation of proceedings and the introduction of a new cross-border insolvency regime.[350] These revised OHADA insolvency procedures are bifurcated between preventative and curative proceedings. Under preventative proceedings, there is a confidential conciliation settlement procedure[351] which occurs where a debtor experiences business difficulty. The debtor is required to engage with the main creditors through an amicable settlement designed to make them find a common understanding. This process can be at the debtor's request or at the instance of joint creditors who may file their requests with a competent court.

5.6.2 OHADA's lessons for Botswana

Though OHADA is an organization consisting of French speaking countries in Africa, Botswana can learn some valuable lessons from the organisation on how to reform its corporate insolvency legal framework whose main objective is to create a pro-employee insolvency protection legislation which focuses on processing employees' claims with greater efficiency than the current legal framework.

OHADA has a *Uniform insolvency Act* which regulates the winding up of companies in member states and Botswana can learn a lot on how to draft a unified insolvency legislation from OHADA. This can help Botswana in developing a single insolvency legislation for both natural and juristic persons modelled on the OHADA Uniform Insolvency Act. This OHADA Act is very elaborate and neatly arranged with substantive provisions that ensures that insolvency proceedings are cost-effective, flexible, time-framed and professionally regulated. The summary of lessons that Botswana can learn from OHADA Uniform Insolvency Legislation is to

350 https://globalrestructuringreviw.com.
351 https://globalrestructuringreviw.com.

enact a law which is unitary in purpose by bringing the legal framework of corporate framework and individual sequestration under one Act. Thus, Botswana can learn the harmonization technique that OHADA used to reconcile conflicting provisions of corporate insolvency legislation and those of the individual sequestration law. Botswana can learn how to develop a regulatory framework for its insolvency practitioners and liquidators and how to ensure that there is accountability in insolvency proceedings which do not expose employees to further vulnerability after company liquidation. Furthermore, it is apparent from the OHADA Uniform Insolvency Act, that it strives to strike a balancing exercise between the interests of all affected creditors including company employees who have rights and interests to be protected in liquidation.

The pre-insolvency rescue procedures contained in the OHADA insolvency law affords companies an opportunity to reorganise their financial affairs when they are facing economic hardships.[352] This aspect needs to be included in the Botswana insolvency legislation to avoid insolvency which, in the end, will benefit employees. The time limit for insolvency proceedings in the OHADA Act is about three months, which is probably enough to enable employees determine the future of their employment. Such a time frame is also needed in Botswana when a company is being liquidated by professionals who are charged with the responsibility of managing insolvency proceedings. In total the OHADA Insolvency Act provides Botswana with a model law for its law reform in corporate insolvency to effectively and adequately protect employees' rights and interests in company liquidation.

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352 Omar "Out of Africa: The OHADA Uniform Insolvency Law" 3.

5.7 Deficiencies in Botswana's insolvency and labour law framework

5.7.1 Deficiencies of Botswana's labour law framework

A comparative assessment of Botswana's labour laws reveals that the Employment Act is outdated,[353] as it is not in keeping with modern legal trends espoused by the ILO to which Botswana is a member. Botswana's Employment Act has no provision that entrenches employees' rights in order to give them precedence when there is a labour dispute. The *Employment Act* and other pieces legislations such as the *Companies Act* are vague and rough on the edges. Reform is necessary in Botswana in order to protect employees' rights and to give them priority when debtors are making claims.

What makes it imperative to amend the labour laws in Botswana is that not only are the labour laws ambiguous, there is also a tendency to ignore employees' rights because the *Employment Act*[354] skirts around the workers' rights to be protected as per the ILO Convention. It is therefore necessary to reform the laws so that both employees and employers can understand exactly what they are supposed to do when a company is being liquidated. What needs to be clarified in the Companies Act is the efficacy of employment contracts, shareholding agreements or how a court order is executed in the event of a company being liquidated.

The aspect of entrenching employees' rights needs an urgent attention before the country is embarrassed further by the ILO. There is one provision dealing with the payment of employees' claims which is contentious because it refers to claims without any mention of rights. This may be interpreted adversely to disempower employees by arguing that

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353 Omar "Out of Africa: The OHADA Uniform Insolvency Law" 288.
354 *Employment Act* Chapter 47:01.

employees have no entitlements until they have lodged claims to be proven. The priority of employees' claims is also not clearly spelt out in that employees' claims in terms of the ILO Convention on the Protection of Worker's claims must be protected by way of a guarantee institution. The Botswana Employment Act implicitly states that employees' claims take second precedence to those of other non-privileged claims.[355] This is unjust as it prevents employees from enjoying the privileges enshrined by the ILO. These loopholes in the Botswana labour laws suggest that the country has not yet succeeded in complying with the ILO Convention and therefore needs to step up the reformation of its labour laws so that equity and justice can be bestowed to the workers.

The Botswana labour laws do not provide for an unemployment insurance fund as espoused by the ILO Convention[356] unlike in South Africa and the United Kingdom where employees' wages are protected in the event of a company being liquidated. The good thing about the protection of workers' wages is that they can claim their wages from such funds whilst the liquidation proceedings are going on, which cushions them against the hardships of liquidation. The sad thing is that Botswana has not yet ratified the ILO Convention on the Termination of Employment to the extent that its provisions and obligations are not reflected in its *Employment Act.*[357]

Regarding the transfer of business to another owner in terms of Botswana's *Employment Act*, there is no explicit obligation on the new owner to take over the employees' liabilities or to inherit their contracts of employment from the former employer.[358] There is also nothing in the Act that prohibits the mass dismissal of all the employees by either the former

355 Section 91A of *Employment Act* Chapter 47:01.
356 A 1 of Protection of Workers' Claims c.173 (1949).
357 *Sebako and Another v Shona Gas* (IC665/04).
358 Section 28 of *Employment Act* Chapter 47:01.

or the new employer during the transfer process. This situation is statutorily bad for employees in Botswana as it exposes them to the risk of losing their employment unlike in South Africa where workers are protected.[359] It would seem that what is protected by the Botswana *Employment Act* is the tenure of service in that the years of service will be recognised and the new employer is obliged to consider the period of service were employees to be laid off on account of redundancy by the new employer.[360] This discrepancy needs to be reviewed to include a provision that will state that the new employer must take over all contracts of employment.[361]

5.7.2 Deficiencies of Botswana's corporate insolvency law

Botswana's *Companies Act* which governs the liquidation of companies does not protect employees' rights in the event of a company being liquidated. As a starting point, there is no chapter that deals specifically with the safeguarding of employees' rights or the payment of their claims. The Act does not even define the employees' rights to be protected beyond those they may have in terms of the *Employment Act* and neither are they treated as a distinct group from other creditors.[362] This is contrary to what other comparable jurisdictions such as South Africa have done which has a specific law to protect employees' rights.[363] In terms of the Botswana *Companies Act*,[364] employees like other creditors, are to prove their claims to the satisfaction of the liquidator by filing affidavits.[365] The failure to stipulate employees' rights in the Botswana insolvency laws has been reinforced by the High Court which ruled that during the

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359 Omar "Out of Africa: The OHADA Uniform Insolvency Law" 289.
360 Section 27 of the *Employment Act Chapter 47:01*.
361 Omar "Out of Africa: The OHADA Uniform Insolvency Law" 289.
362 Section 409 (3) of *Companies Act* of 2003.
363 Section 144 of South Africa's *Companies Act* of 2008.
364 Section 383 (1) of *Companies Act* of 2003.
365 Section 383 (1) of *Companies Act* of 2003.

liquidation proceedings of an employer's company, employees had no *locus standi* to intervene.[366] This ruling was later contradicted by another High Court which maintained that employees had *locus standi* as their employment contracts and welfare were at stake.[367]

These two conflicting legal positions on the *locus standi* of employees during the liquidation of a company remain unresolved until the Court of Appeal has made an authoritative pronouncement on the matter. This legal wrangling can only be resolved by introducing a specific statutory provision which clearly states the legal position of employees and their rights during the liquidation of a company. Needless to say, the lack of a legal provision to protect employees' rights has undermined the protection of employees' claims and entitlements. It may well be argued that a provision similar to that of South Africa's Companies Act allowing for the establishment of a committee of representatives may be justified as an alternative.

Another loophole in the Botswana's *Companies Act* is that there is no clear protection of past and present employees' medical and pension schemes. The *Companies Act* in Botswana uses the lose term "claims" without regard to specific claims such as medical or pension because once a company is liquidated, the employees' medical and pension schemes would immediately terminate which would imperil the social welfare of the workers.

The *Companies Act* of Botswana could be better if it had a provision that outlines employees' rights in detail, such as having an independent insolvency regulator who can manage the liquidation process without mixing it up with administration processes. This insolvency regulator is

366 *Molefhi v Academy of Business Management Pty Ltd and Another* 1994 BLR 1 (HC).
367 *Radibe and Others v Voltex Pty and Another* 2013 (2) BLR 212 (HC).

required especially as the Act has no provision for the protection of workers' wages while the liquidation process is being affected. This fund is important as there is no guarantee that employees will be paid their claims.

5.8 The effect of international labour treaties and insolvency best practices on Botswana's legal framework

Although Botswana is a signatory to a number of ILO Conventions[368] that are concerned with the employees' protection when an employer is insolvent, such Conventions do not automatically become law in Botswana.[369] This situation is exacerbated by the fact that Botswana is not a signatory to the Vienna Convention on the Law of Treaties,[370] which obliges state parties to a treaty to fully observe its provisions and act in good faith.[371] However, most provisions of the Vienna Convention on the Law of Treaties have metamorphosed into rules of customary international law, which are binding even to non-signatories such as Botswana.[372] The answer to the question of when does a treaty or convention become law in Botswana was delivered by the Court of Appeal in the case of *Kenneth Good v Attorney General*, when the court stated that:

> It is trite and well recognized that signing such a treaty does not give it the power of law in Botswana and its provisions do not form part of the domestic law of this country until they are passed into law by parliament. Those treaties do not confer enforceable rights on individuals within a state.[373]

The above ruling mirrors Botswana's legal position as a dualist state in that international instruments such as Conventions or Treaties do not

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368 Protection of Workers Claims c.173 (1992); Protection of Wages Convention c.95 (1949); Termination of Employment Convention c.58 (1982).
369 *Kenneth Good v Attorney General* 2005 (2) BLR 337 (CA).
370 *Kasikili/Sedudu Island case (Botswana/Namibia)* 2000 49 ICLQ 967-8
371 Law of Treaties (1969).
372 *Kasikili/Sedudu Island case (Botswana/Namibia)* 2000 49 ICLQ 967-8.
373 *Kenneth Good v Attorney General* 2005 (2) BLR 337 (CA).

automatically become law in Botswana until they have been domesticated into municipal law by Act of parliament which is the object of dualism under international law.[374]

5.8.1 The effect of ratification of treaties in Botswana

In the international law of treaties, ratification is the process by which states indicate their consent to be bound by a treaty through the exchange of instruments of ratification.[375] The Court of Appeal's decision in the case of the *Republic of Angola v Springbok Investments Pty Ltd*[376] reiterated the principle of the law of treaties in the *Attorney General and Others v Tapela and Others*:

> The position in Botswana has been made clear by this court, namely that treaties and conventions entered into or ratified by Botswana, do not have the force of law in this country unless they have been incorporated (as many have) in domestic legislation. Domestic laws will however, be interpreted where the language so permits, so as to give effect to Botswana's international obligations under such treaties and conventions.[377]

In view of this case law, it is clear that what is legally effective for the ratified ILO Conventions is not necessarily binding in Botswana. This dilemma requires the intervention of Botswana's parliament or some authority thereof to speed up the process of compliance.[378] The unfortunate thing is that in Botswana, unlike other countries, there is no statutory or formal recognition of the status of international laws.[379] In this regard, the status of international law versus the domestic law of

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374 *Attorney General v Dow 1992* BLR 119 (CA).
375 A 2 (1) (b) and 16 of Vienna Convention on Law of Treaties (1969).
376 *Republic of Angola v Springbok Investments Pty Ltd* 2005 (2) BLR 159.
377 Tapela and Others, Court of Appeal Civil Case No. CACGB-096-14.
378 *Attorney General v Dow 1992* BLR 119 (CA).
379 Fombad *Botswana Introductory Notes* 31.

Botswana, is predicated on the principles of Roman-Dutch/English law[380] which is different from that used in relation to international treaties.[381]

5.8.2 Implications of pacta sunt servanda principle for Botswana

The principle of *pacta sunt servanda* has long been recognized as part of Botswana's law,[382] which is now universally recognised.[383] The essence of this principle is that the sanctity of international treaties and their observance should be applied in good faith by state parties.[384] The principle of *pacta sunt servanda*, a Latin derivative, is a cornerstone of international relations which implies that agreements entered into by free will should be kept.[385] The value of this principle is that once treaties are concluded between states or with state parties, they are binding on such parties and must be implemented in good faith.[386] This principle is enshrined in the Preamble to the Vienna Convention on the Law of Treaties[387] which, unfortunately, Botswana is not a signatory to but is nevertheless bound by the principle which has now evolved into a rule of customary international law.[388]

Since the *pacta sunt servanda* is now a principle of international law, each state is expected to act in good faith and to be equally obliged to observe its ILO obligations on the protection of employees' rights during insolvency without referring to its domestic laws in defence of non-compliance.[389] In

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380 Fombad *Botswana Introductory Notes* 31.
381 Fombad *Botswana Introductory Notes* 31.
382 *Sinohydro Botswana Pty Ltd v Botswana Insurance Company Ltd* 2012 1 BLR 527 HC.
383 Preamble to Vienna Convention on Law of Treaties (1969).
384 A 26 of Vienna Convention on Law of Treaties (1969).
385 www.judicialmonitor.org.
386 A 26 of Vienna Convention on Law of Treaties (1969).
387 Preamble to Law of Treaties (1969).
388 *Kasikili/Sedudu Island case (Botswana/Namibia)* 2000 49 ICLQ 967-8.
389 A 27 of Vienna Convention on Law of Treaties (1969).

the case of the *Republic of Angola v Springbok Investment Pty Ltd*, the court had this to say:

> I have no doubt that the rules of international law form part of the laws of Botswana, as a member of the wider family of nations, save in so far as they conflict with Botswana legislation or the common laws, and it is the duty of the court to apply them.[390]

The above ruling sounds confusing in that it is not clear whether by international law the court was referring to the rules of customary international law or to the substantive treaty law. In a subsequent case, *Attorney General and Others v Tapela and Others*,[391] the court stated that it did not make a general proposition on international law to be part of Botswana's law but only referred to a narrow part of the customary international law.

On this issue, the researcher submits that in relation to the Protection of Workers' Claims Convention,[392] which Botswana has ratified and partially incorporated in its *Employment Act*,[393] the country is obliged to observe all its obligations under the Convention firstly because of the effect of *pacta sunt servanda* principle,[394] and secondly by virtue of the doctrine of incorporation.[395] In the light of Botswana's international obligations, the country needs to fully domesticate this Convention, it ought to do so in order to comply with its obligations in good faith.[396]

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390 *Republic of Angola v Springbok Investments Pty Ltd* 2005 (2) BLR 159.
391 *Attorney General and Others v Tapela and Others* CACGB-096-14 (CA).
392 Protection of Workers Claims c.173 (1992).
393 Section 91 A of the *Employment Act* Chapter 47:01.
394 A 26 of Vienna Convention on Law of Treaties (1969).
395 Fombad *Botswana Introductory Notes* 33.
396 A 26 of Vienna Convention on Law of Treaties (1969).

5.8.3 Doctrine of incorporation

Treaties in Botswana are governed by a dualistic instead of a monolithic theory.[397] This in essence means that for a treaty to form part of Botswana's law, such a treaty requires parliamentary assent to make it part of the municipal law.[398] On the other hand, there is the law of incorporation through which customary international law becomes part of Botswana's law without any specific legislation being promulgated. Both approaches are called incorporation but are different in nature.[399]

Through the doctrine of incorporation, customary international law has the force of law in Botswana unless excluded by a statute.[400] This was upheld in the case of the *Republic of Angola v Springbok Investments Pty Ltd*,[401] where it was noted that in the absence of any provision to the contrary, diplomatic immunity in customary international law does not extend to disputes arising from the commercial activities of diplomats.

The other form of incorporation required is the process of legislative transformation which in essence requires government to take positive steps to incorporate a treaty into its domestic law, such that the provisions of the treaty are legislated for by parliament.[402] This process is important as it demonstrates the good faith of government in domesticating an international treaty into its own national laws. This process can only be possible if the country's executive has the will to ensure that Bills incorporating international Conventions or Treaties are brought to parliament for legislative processing into domestic laws.

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397 Tshosa "The Status and Role of International Law in the National Law of Botswana" 237

398 *Kenneth Good v Attorney General* 2005 (2) BLR 337 (CA); Fombad *Botswana Introductory Notes* 31.

399 Fombad *Botswana Introductory Notes* 31.

400 *Republic of Angola v Springbok Investments Pty Ltd* 2005 (2) BLR 159.

401 *Republic of Angola v Springbok Investments Pty Ltd* 2005 (2) BLR 159.

402 *Kenneth Good v Attorney General* 2005 (2) BLR 337 (CA).

5.8.4 The effect of international best practices on Botswana's domestic law

The international community through the efforts of the World Bank's principles for Effective Insolvency and Creditor Rights Systems[403] and the UNCITRAL Guide on Insolvency,[404] has since developed international insolvency standards and international best practices to be adopted by different countries when they are developing their domestic insolvency legislations.[405] This has resulted in a codified document of joint Insolvency and Creditor Rights Standards, now known as the World Bank Principles.[406] These international standards and best practice are neither treaties nor conventions and Botswana is not necessarily a party to them. The question that arises is the status they have in relation to Botswana's domestic law and their binding effect, if any.

It is now settled as a trite legal position that unless a treaty or convention has been domesticated it has no force of law in Botswana.[407] The pronouncement by the Court of Appeal in the case of *Attorney General v Marie Iragi and Others* is instructive.[408] In stating the position of international best practices, the court stated that:

> In the course of his judgment, Moroka J. referred to other instruments to which Botswana is not a party, and declared that "international best practices dictate that (illegal foreign nationals) should be kept apart from the general prison population". That may be so, but in Botswana the law makes specific provision for illegal immigrants to be "detained in the nearest convenient prison" where they will certainly come into contact at least with awaiting trial prisoners, and probably, on occasion, with convicts as well. The "international best practice" to which the

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403 http://web.worldbank.org/gild.
404 http://www.UNCITRAL.org.
405 http://web.worldbank.org/gild.
406 USAID *Insolvency systems in South Africa: Comparative review of employee claims treatment* 2011.
407 *Kenneth Good v Attorney General* 2005 (2) BLR 337 (CA).
408 *Attorney General v Marie Iragi and Others.* CACGB 000141/17

> Judge refers, is not part of the law of Botswana and cannot be relied upon as a factor entitling detained immigrants to their release.[409]

Consistent with the above judgment, this researcher submits that it is only when such best practices have been incorporated into Botswana's domestic law by an Act of parliament or when the laws have evolved into rules of customary international law can they have the force of law.[410] However, it must be noted that the responsibility of domestication rests with both policy makers and the legislature to ensure that these best practices are domesticated to protect employees' rights when a company is being liquidated.

5.8.5 Using international treaties in the interpretation of domestic law

It would be missing the point if it were to be argued that an international treaty can only be valid in a member state if it is incorporated into the domestic laws of the country. In many ways international treaties serve as models for the enactment and interpretation of domestic laws in Botswana.[411] The *Interpretation Act* enjoins the courts to invoke international conventions and treaties in order to ascertain the meaning of their domestic statutes[412] by having recourse to the rules of international law.[413]

This does not however make international treaties part of Botswana's municipal law until such international treaties have been domesticated into municipal law.[414] This interpretation of the domestic law versus international conventions and treaties is used only where the domestic law

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409 *Attorney General v Marie Iragi and Others.* CACGB 000141/17
410 *Attorney General v Marie Iragi and Others.* CACGB 000141/17
411 *Attorney General v Dow* 1992 BLR 119 (CA): Section 24 (1) of the *Interpretation Act.*
412 Section 24 (1) of the *Interpretation Act.*
413 Fombad *Botswana Introductory Notes* 34.
414 Fombad *Botswana Introductory Notes* 34; Tshosa "The Status and Role of International Law in the National Law of Botswana" 239.

is either vague, unclear or unreasonable.[415] This method of interpretation was used in the case of *Attorney General v Unity Dow*.[416] The Industrial Court also used the same approach in the case of *Sebako and Another v Shona Gas*,[417] though in the latter case the court went overboard by applying the international convention on the termination of employment.[418]

5.9 Summary

The comparative analysis in this chapter showed that Botswana's labour and insolvency laws are not compliant and in many ways contravene ILO principles and those of the UNCITRAL legislative guide on insolvency. The ILO Conventions, in particular, provide corporate insolvency law models to emulate for countries such as Botswana, which has not yet domesticated the international Conventions. This is necessary in order to protect the employees when a company is being liquidated. Sadly, the country continues to dilly-dally and fudge instead of removing the ambiguities by reforming its domestic corporate insolvency law framework so that workers can be recognised as important creditors who must be given priority when a company is being liquidated. In the last chapter that follows, conclusions and recommendations are drawn and the implications of the study are discussed. In wrapping up the dissertation, some suggestions on how Botswana can harmonise its insolvency laws are offered so that they can be in harmony with those of international organisations such as ILO, UNCITRAL, the World Bank, SADCC and OHADA which are quite comprehensive in their protection of workers' rights and their welfare.

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415 Fombad *Botswana Introductory Notes* 34; Section 24 (1) of the *Interpretation Act.*
416 *Attorney General v Dow* 1992 BLR 119 (CA); Dinokopila 2017 *UBLJ* 3.
417 *Sebako and Another v Shona Gas* (IC665/04).
418 *Sebako and Another v Shona Gas* (IC665/04).

CHAPTER SIX: MAJOR FINDINGS, IMPLICATIONS, CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

The previous chapter has made a comparative analysis of the international corporate insolvency laws of the ILO Conventions, UNCITRAL legislative guide, World Bank principles, SADC and OHADA's insolvency laws. It was found out that Botswana's labour laws are not consistent with the laws of these international organisations and therefore need to be realigned so that workers can be fully protected when a company is being dissolved. In this last chapter, the findings are summarised, their implications pointed out and conclusions and recommendations are made.

6.2 Major Findings

In this dissertation, the analysis of Botswana's labour and corporate insolvency laws, the evaluation of the role of the judiciary in enhancing employees' rights when a company is being liquidated and an analysis of international labour laws has shown that Botswana's labour laws do not adequately protect the rights and interests of the workers. Furthermore, the country's insolvency procedure is ambiguous and tedious. The findings also show that Botswana's institutional frameworks in regulating insolvency proceedings do not fully protect employees' rights and interests during the liquidation proceedings of a company.

The findings also suggest that Botswana's dual insolvency law system with two distinct statutes, the *Companies Act* and the *Insolvency Act* do not complement each other. The *Companies Act* is the statute under which the winding up of proceedings is instituted and all corporate insolvency affairs, including the payment of creditor claims such as employees' wages, severance interests and benefits are determined. What the researcher has discovered is that the *Companies Act* does not adequately

protect employees' rights and interests such as severance benefits. This finding has led to the conclusion that Botswana's corporate insolvency laws need to be overhauled in order to remove the contradictions that impede the protection of workers' rights and interests.

It is evident from the analysis of the *Companies Act* that when a company is folding up, employees in Botswana do not have a statutorily guaranteed *locus standi* or legal standing to intervene in the insolvency proceedings of their employer. This is despite the fact that employees are a unique class of creditors with deep seated financial interests in the corporate future of their employer in the form of wages, insurance policies and severance packages. As a result of their unique position, any insolvency legislation in Botswana needs to recognise that employees are an integral part of a company who need to be treated fairly and justly.

The findings have further shown that while the ILO Convention on the Protection of Workers' Claims during insolvency treats workers as a special class, the Botswana corporate insolvency provisions under the *Companies Act* do not similarly treat employees as a privileged class of creditors. Worse still is he *Employment Act* which pays lip service to the privileged creditor status of employees.

Another finding is that in Botswana employees' entitlements and interests have not been statutorily prioritised for protection under the *Companies Act*. Because employees are not treated as a special class, they bear the burden of submitting and proving their claims like any other secured creditors. Due to the ambiguity of the *Companies Act*, there is no wages guarantee fund or insurance against which employees can lodge claims for their unpaid wages and severance benefits, which is contrary to the system recommended by the ILO Convention on the Protection of Workers' Claims when a company has become insolvent.

Furthermore, the study has revealed that the Botswana corporate insolvency framework has no dedicated regulator or insolvency administrator other than being under the office of the registrar and master of the High Court of Botswana. This lack of a specialised regulatory framework has led to a weak regulation, uncoordinated winding up and lack of accountability. The study has also revealed that corporate insolvency legislation does not have any effective and adequate protection for employees' rights and interests because there is no institutional framework to regulate and monitor insolvency proceedings. To complicate the matter, there is no regulatory system or professional body which registers and supervises the practices of liquidators. This means that liquidators may prolong insolvency proceedings because there do not owe accountability to any regulatory body in terms of ethics.

As a whole, an analysis of Botswana's labour and corporate insolvency laws has shown that the root cause for the lack of protection of employees' rights and interests is that Botswana has not yet fully domesticated the ILO Conventions. The domesticated parts of the Conventions exclude the wage guarantee fund and the payment of social welfare benefits. The net result is that workers in Botswana are vulnerable, especially as the country incorporated the conventions into its national labour laws.

6.3 Implications

The findings of this study have considerable implications on the insolvency laws of Botswana. The study has shown that the domestic labour laws of Botswana are not consistent with those of the ILO and other international organisations. Quite often, Botswana has been criticised for dragging its feet on the protection of workers' rights due to the fact that the country has not yet harmonised its labour laws with those of the ILO. The implication of this is that Botswana is viewed as a country that tramples

upon the rights of workers, a perception which is echoed by Botswana's trade unions which have persistently lambasted the government for not protecting the workers resulting in the labour case of *Botswana Land Boards and Local Authorities Workers Union and Two Others v The Director of Public Service Management and Another* (unreported) civil appeal No. CACLB 043-11 CoA.[419] The effect of this criticism is that the country's labour laws are seen as exploitative which protect those of the business class and other owners of the means of production. Because Botswana's labour laws are ambiguous when it comes to the protection of the rights of workers, the researcher suggests that the *Employment Act* and the *Companies Act* of Botswana should be reformed so that they comply with those of the ILO Convention.

Another implication is that since Botswana does not have specialist lawyers and judges who can deal with insolvency, the country is likely to continue to have adverse reports by ILO insolvency committees, which will eventually tarnish the image of the country as a poor investment destination. One way of solving this problem is to train judges who can handle efficiently insolvency matters. This may also mean that the Law Faculty of the University of Botswana should introduce specialist courses on insolvency so that those who graduate from the University can handle insolvency cases more efficiently. In the meantime, officers who are charged with the responsibility of presiding over insolvency cases should receive training on the job so that they can efficiently carry out their duties. Above all, the dual insolvency system in Botswana should be dissolved in order to have a uniform insolvency legislation similar to that of OHADA.

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[419] *Botswana Land Boards and Local Authorities Workers Union and Two Others v The Director of Public Service Management and Another* (unreported) civil appeal No. CACLB 043-11 CoA.

6.4 Conclusion

This study critically examined Botswana's corporate insolvency laws which protect employees' rights when a company is being liquidated. The study showed that the employees' rights and their claims are not sufficiently protected by the *Employment Act* and *Companies Act* when a company is winding up. It was also found out that the Insolvency Act in Botswana is feeble and does not apply to corporate insolvency. It is merely concerned with the sequestration and bankruptcy of individuals and their estates, which is a discrepancy that needs to be resolved.

The main finding of this study is that Botswana's insolvency laws as compared to international insolvency laws and international best practices do not protect the rights of workers. It is therefore necessary to reform the insolvency laws of the country so that they can be consistent with those of the ILO's Conventions. In reforming the laws, the legislative drafting process should be guided by UNCITRAL whose laws clearly lay out the ranking of claims. The findings also show that the uniform insolvency legal framework of OHADA is simple, modest and cost effective which can be borrowed by Botswana in order to protect employees while also protecting businesses.

While one may hesitatingly recommend Botswana to apply for membership to OHADA because of the French language barrier and the incompatibility of OHADA's legal system with that of Botswana which uses the Roman-Dutch law, the country should however consider adopting useful aspects of OHADA's insolvency laws. The focus should be to adopt and adapt OHADA's insolvency procedures which contain certainty and predictability when winding up processes are being concluded.

A disturbing observation is that employees' claims and entitlements in Botswana are regarded as a privilege and not as a right, as provided for in

the *Employment Act*. This protection by privilege has proven to be detrimental to the workers' rights. An option that can be followed which Botswana has previously disregarded is to have a provident fund that is guaranteed by the state. These efforts, which have been rejected by the state, cast Botswana in a bad light because the country unwittingly refuses to protect the workers' rights as enunciated in the Conventions of the ILO and the World Bank.

The findings of this study allowed certain recommendations to be made in order to recognise employees as a special class of creditors with a *loci standi.* One such recommendation is that the insolvency laws should be reformed in order to have formal insolvency practitioners with specific qualifications. This institutionalized profession of insolvency practitioners is necessary to ensure that only competent people are appointed to manage liquidation proceedings. In the final analysis, the study raises a red flag about the need to embark on an insolvency law reform agenda driven by both the legislature and the business community so that Botswana's insolvency laws can be consistent with those of international organisations such as the ILO and the World Bank principles The envisaged law reform agenda is inspired by the lapidary remarks of Coleman J in the South African case of *Woodley v Guardian Assurance Co SA Ltd*,[420] in which he advises:

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

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420 *Woodley v Guardian Assurance Co SA Ltd* 1976 1 SA 758 (W) at 786; Burdette *A Framework for Corporate Insolvency Law Reform in South Africa.*

procedural rules, but also the substantive rules and consequences, to be the same in both cases.[421]

6.5 Recommendations

6.5.1 The legislature

In recent years there have been persistent calls for the reform of the insolvency laws of Botswana prompted by the insolvency crisis of BCL Limited[422] which led to the laying off of thousands of workers without receiving terminal benefits, pensions, life insurances, medical or funeral policies. This was a violation of the ILO fundamental Conventions that Botswana has ratified on both wages and workers' claims protection.[423] It is this researcher's considered opinion that the process of law reform in Botswana should unambiguously define employees' rights as stated in the employment law and the Companies Act. Above all, the reform of the labour laws needs to be spear-headed by the executive through its relevant ministries dealing with labour and trade under which companies regulation fall.

One thing that emerges from this study is that Botswana's parliament does not seem to be proactive when it comes to the rights of workers. To deal with the labour problems affecting the country, it is recommended that both the Ministry of Employment, Labour and Productivity and the Ministry of Trade and Investment should jointly initiate promulgation of a *Unified Insolvency Act* which regulates the winding up of companies and sequestration of natural persons and their estates under a single statutory framework. The effect of this is that the entire section XXVI on the winding up and judicial management of insolvency should be removed from the *Companies Act* in order to create a new *Unified Insolvency Act*.

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421 *Woodley v Guardian Assurance Co SA Ltd* 1976 1 SA 758 (W) at 786; Burdette *A Framework for Corporate Insolvency Law Reform in South Africa*

422 www.patriot.co.bw.

423 www.allafrica.com.

Additionally, the Unified Insolvency Act should introduce institutions of insolvency practitioners and set up a regulatory body to oversee the processes of insolvency.

Furthermore, the proposed unified *Insolvency Act* should have a provision that recognizes employees as a special class of creditors and the officials should have the right to intervene in order to protect the workers' rights when an employer is filing for bankruptcy. This provision is necessary to give the employees the *locus standi* in the liquidation process of their employer in order to avoid the confusion caused by two conflicting High Court judgments of *Radibe* and *Molefi* which have not yet resolved the issue of employees' *locus standi* who are important stakeholders in the affairs of companies and are entitled to an audience when adverse decisions affecting their special rights to claims and severance benefits are taken during court hearings on the liquidation of a company.

It is also recommended that the Unified Insolvency Act should adopt in part some useful provisions of the OHADA Uniform Insolvency Act, especially its preventive and curative procedures. These procedures are very useful and cost effective as they give both the debtor and creditor an opportunity to engage each other with the help of a conciliator on the possible ways of handling liabilities. Currently this procedure is not available in Botswana, resulting in the insolvency process being cumbersome, slow and arduous.

As pointed out earlier in previous chapters, a critical aspect of the law that needs to be reformed in Botswana is the insolvency legislation. Without further delay, the country should domesticate the ILO Conventions which it has ratified, particularly the Convention on the Protection of Workers' Claims. The country should similarly adopt the UNCITRAL legislative guide on the law of insolvency and the World Bank's principles, as they are

useful models of insolvency laws used in the developed world. The reforms are necessary in order to insulate the workers from the vagaries of retrenchment.

Using BCL as an example where workers lost everything because they had not been protected by the Botswana *Employment Act* and the *Company Act,* the researcher would like to suggest that a wage guarantee fund similar to the one recommended by ILO should be created through a parliamentary legislation in order to avoid a catastrophe of a similar magnitude. This will serve to provide security to workers when a company has become insolvent. Also, there must be a definite timeframe within which all liquidation and winding up processes are completed. A modest period in such a lengthy and vexatious process should be six months taking into consideration the vested interests of the competing parties. The *Employment Act* equally needs to be overhauled to provide a clause that spells out employees' incidental entitlements other than the three months' salary. It should include the continuation of staff housing benefits, medical and funeral cover benefits until the severance benefits have been paid in full.

6.5.2 Employers, Employer organisations and Insurance Schemes

Perhaps a more important recommendation is the need to review the *Employment Act* to include an obligation for corporate employers to take insurance policies for their workers to ensure that their entitlements and rights are guaranteed. The introduction of insurance schemes requires the collaborative efforts of all stakeholders such as trade unions, business organisations, insurance companies and the government. The concept of insurance is widely used in many developed countries, where the burden of paying out unemployment benefits is shared. The advantage of an

insurance fund is that it cushions employees against the loss of severance benefits when a company is liquidated.

In order to make it effective, a compulsory insurance scheme can be underwritten by businesses with a high profit margin in order to inspire confidence among the workers. When an insurance scheme is introduced, there is need to determine whether such a scheme will allow a prompt payment of all outstanding workers' entitlements including pension funds or it will be limited only to severance benefits. These issues require the involvement of all the stakeholders such as the government, the business community and the trade unions so that there can be consensus. Also, collective bargaining about employees' entitlements when a company is being liquidated is necessary as an additional measure to protect the employees' rights and claims.

However, this researcher is aware that an insurance fund is not on its own a panacea for all the labour problems associated with corporate insolvency. The employees' vulnerability is often subtle and takes different dimensions which require a judicious approach. Notwithstanding this, the insurance scheme, if properly founded, can significantly enhance the employees' chances of getting their severance benefits and entitlements.

Based on the above recommendations and guided by the logic of apposition, there are at least four areas that require further investigation. Firstly, there is need to investigate the company shareholders' rights as opposed to those of employees when a company is being liquidated so that natural justice can be achieved which is eloquently expressed by the Latin phrase '***nemo judex in causa sua***'. This will make us fully understand the rights of all the major creditors when a company is being liquidated. To focus on the protection of employees only during insolvency is like protecting Peter without protecting Paul.

Secondly, there is need to carry out a separate study on the rights of women workers who usually sit on the bottom of the ladder in our societies. It is generally suggested that women employees are the worst hit when a company is being liquidated because women are perceived to be a vulnerable and marginalised group.

Thirdly, it is necessary to investigate the role of trade unions when a company is being dissolved, especially the role they play in hiring legal representatives to defend the workers, what their establishing statute says regarding the protection of workers and how they support their members when they are redundant. This is so because by operation of law a Trade Union can only competently represent its members and members whose contracts of employment have been terminated by company liquidation automatically have their membership to unions terminated.[424]

The fourth area that requires due attention is a comparative study that deals with the legal value and advantages of introducing corporate rescue reforms into Botswana company law as an alternative to company liquidation. Corporate rescue has gained considerable popularity in insolvency legislation in neighbouring countries such as South Africa where it is known as business rescue. Where it has been practised, coupled with its pre-pack approach which incorporates the aspects of both informal (being out of court) and formal (being judicial proceedings) it has proved to be a valuable insolvency law model which fairly takes on board creditor participation more seriously. In Botswana, there is no business rescue procedures and a study on the possibility of introducing such will be highly commendable. These issues and many others that affect workers during the liquidation of companies need to be investigated in order to have a holistic view of the workers' rights.

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[424] Section 21 of *Trade Unions and Employers' Organisations Act.*

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