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PRO-CREDITORS, ANTI-DEBTORS?" A CRITICAL ASSESSMENT OF THE EXTENT TO WHICH ZIMBABWEAN INSOLVENCY LAWS PROTECT INTEREST OF CREDITORS AND DEBTORS.

APPROVAL

The undersigned certify that they have read, signed and recommended to the University of Zimbabwe for acceptance, a research project entitled: "**PRO-CREDITORS, ANTI-DEBTORS?" A CRITICAL ASSESSMENT OF THE EXTENT TO WHICH ZIMBABWEAN INSOLVENCY LAWS PROTECT INTEREST OF CREDITORS AND DEBTORS."** The project was submitted by **TATENDA KERINA ZVOBGO,** Student Registration Number **R1814217,** in partial fullfillment of the requirements of a Master of Law (LL.M) Degree in the Faculty of Law at the University of Zimbabwe.

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DECLARATION

I, **TATENDA KERINA ZVOBGO,** do hereby declare that this dissertation entitled: "**Pro-Creditor, Anti-debtor?" A Critical Assessment of the Extent to which Zimbabwean Insolvency Laws Protect the Interests of Creditors and Debtors** is the result of my own work and the result of my own investigation and research, save to the extent indicated in my references included in the body of the research, and that to the best of my knowledge, it has not been submitted either wholly or in part thereof for any other degree or examination at any other University.

…….. ……/……/……..

STUDENT'S SIGNATURE DATE

DEDICATION

This dissertation is dedicated to my maternal grandmother Deliah Garande. A woman with a kind heart and a fierce tenacity. She loved me with no limitation and taught me to always be my best self. I hold close to my heart all those conversations with her telling me her wishes for my life and willing me to focus and dream big. Her prayers over my life protected me and kept me spirited. She will not be able to attend this graduation or read this dissertation, but her memory will live on in me.

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CHAPTER 1: INTRODUCTON

1.1. BACKGROUND AND INFORMATION

Throughout the course of history, there has always been recourse for a creditor when a debtor is unable to pay their debt. Under the Twelve Tables, where our Insolvency law is said to have originated from, the debtor would be sold in slavery by the creditor in what was known as *manus intectio.* The creditor, using the *legis actio per manus iniectionem*[1]*,* could enforce the judgment on the debtor. The debtor was given a thirty-day grace period to comply and if the debtor failed, the debtor would be brought before the praetor. The debt owing had to be a liquidated amount and if it was, the judicial process would then commence. At this time a *vindex*[2] would be permitted to intervene although this would be a great risk and so it was not a usual occurrence that there would be interference. Where the amount remained unpaid and there was no interference, the debtor would then be committed to the creditor by an *addictio*[3]. This allowed the creditor to hold the debtor prisoner for sixty days, however, the debtor remained the owner of his property. At this time, the debtor could try and negotiate an agreement with the creditor. While this was taking place, the creditor had to take the debtor to the marketplace, place him before the praetor, and announce in public the amount that was owed by the debtor. If the debt remained unpaid and no agreement was entered, on the third day, the creditor was permitted to sell the debtor into slavery or kill him. Where there was more than one debtor, it seems the creditor was even permitted to cut the debtors bodies into pieces.

After that, between 326 and 313 BC, the *Lex Poetelia* was introduced. It replaced the barbaric practice of selling of debtors into slavery, with imprisonment. Where a debtor did not comply with a *condemnation*[4] within a period of thirty days, the creditor could invoke

[1] D Burdette 'A framework for corporate Insolvency Law reform in South Africa' (Unpublished LLD Thesis, University of Pretoria, 2002) 22.
[2] Burdette (n 1 above) 23.
[3] Ibid.
[4] Burdette (n 1 above) 24.

what was known as *actio iudicati*[5] against the *iudicatus.* Once the creditor was awarded the *iudicatus*, the debtor would be bound to working off the debt owed to the creditor. All this time, the execution of a debt was directed at the person. However, during this time, the innovation arose that made it possible for the execution of a judgment to be made against the property of debtor through the use of a process named *mission in possessionem*[6]*.* This was around 167 BC. These laws allowed for "creditors to take possession of (*rei servandae causa*[7]), protect and advertise for sale ALL the assets of the debtor[8]" During the passage of time these laws were then modified allowing for the creditors to appoint a curator to sell the property for their benefit.

The procedure discussed above was mainly aimed at protecting the creditors and there was no provision that allowed the debtor to avoid the strict consequences of inability to pay his debts. This was addressed by the *Lex Julia de Bonis cedendis*[9], of 17AD, which permitted the debtor to seek relief by surrendering their estate to their creditors. This is known as *cessio bonorum*[10]*.* The surrender then exempted the debtor from arrest, imprisonment, or slavery. Any property later bought by the debtor would then be used to repay his debts, but the debtor would be permitted to keep enough for their subsistence. *Cessio Bonorum* was introduced in Dutch law in the later fifteenth century. Being granted a *cessio* was deemed a privilege which the court could bestow if they saw it fit. The court usually only granted the cession when the insolvency was caused by misfortune. After the granting of the cessio by the court, a trustee was appointed and the debtor's property sold in public auction and the proceeds of the estate were shared amongst the creditors on a pro rata basis.[11] During this time, there was a movement from having the magistrate administer the insolvent estate to offices, known as "Desolate Boedelkamers", being set up in order to administer the estate of Insolvents.

It appears that Roman-Dutch law did not however, fully develop enough to cover situations of corporate Insolvency. This is because separate juristic personality was not

[5] Burdette (n 1 above) 24.
[6] Burdette (n 1 above) 25.
[7] Burdette (n 1 above) 25.
[8] R. Sharrock et al, *Hockly's Insolvency* Law, 6ed, Juta Law, 1997. 9.
[9] Burdette (n 1 above) 26.
[10] Ibid.
[11] J Voet, *Commentarius Ad Pandectas,* 10ed, Juta, 1902. 45.

known and came from English law. It was only introduced to South Africa in the nineteenth century. All legislation concerning Companies and their Insolvency in the Cape, where merely duplicates of English law. English law therefore plays a vital role in South African law[12]. Due to Zimbabwean law being based on the law at the Cape of Good Hope as at 10 June 1891[13], all these legal developments are important to Zimbabwean Law. Zimbabwean law is therefore, like South African law a hybrid between Roman Dutch and English law.

Throughout history, the main objective of Insolvency law, since its inception, was to ensure that there was recourse for a creditor when a debtor was unable to pay their debts. Due to this objective, it followed that the creditors were given preference by the law. It is however of importance that the debtor also be discharged of their debts. Our Insolvency law, prima facie, appears to be concerned with the debtor and the discharge of debts. Although this is a product of Insolvency law, Thomas H. Jackson states the following, “although discharge of the debtor (and such related issues as "exemptions" that enable an individual debtor to keep assets out of the bankruptcy pool) may well be the motivating cause of a majority of bankruptcy cases, most of the bankruptcy process is in fact concerned with creditor-distribution questions.” Early Insolvency cases clearly state that “the object of the Insolvency Ordinance is to ensure a due distribution of assets among Creditors in order of their preference”.[14] Insolvency Law’s objective has therefore not changed and it is mainly for the benefit of the Creditor with the little benefit the debtor receives, being a mere side-effect and not a primary motivation of the law. In Ex Parte Pillay[15] , Holmes J blatantly states that “the law of Insolvency exists primarily to protect Creditors of the Debtor: it is not there to alleviate the position of the debtor.”

The pro-creditor stance taken by the law may be beneficial for business and the economy, law is based on the principles of equity and justice and therefore it must not aim to protect the rights of one group over another. This applies to Insolvency law. The interest of

[12]W De Villiers, ‘Die Ou-Hollandse Insolvensiereg en die Eerste Vaste Insolvensiereg van de Kaap De Goede Hoop’ (published LLD Thesis, Leiden University, 1923) Also See eg Copestake v Alexander 1883 SC 137 and Evans & Co v Silbert 1911 WLD 216

[13] Constitution of Zimbabwe Ammendment (No. 20) Act, 2013, Section 89.

[14] R. Sharrock et al, *Hockly’s Insolvency Law Casebook*, Juta & Co Ltd, 1999.1.

[15] 1955 (2) SA309 (N) 311.

creditors must of course be protected in order to preserve the role of credit in society and ensure thriving businesses and economies, however, there must also be some sort of protection for the interest of the debtors and society at large. Many jurisdictions are moving in the direction of implementing a balanced Insolvency regime that protects both sides, while achieving the objectives of the law. As Prof Madhuku succinctly states that "Insolvency law is not merely a question of settling creditors' claims-it is a matter of striking a balance among the interest of the debtor, the creditor and society." Loubser[16] shares the same sentiments as Professor L. Madhuku as he states that "any process which follows Insolvency must of necessity entail a delicate balancing act between the interests of the various: being the unpaid creditors, the insolvent debtor and the general public"[17].

Professor Goode[18] points out he views as the philosophical foundations of corporate insolvency. He states that the four overriding principles are as follows:

"(a) To restore a debtor company to profitable trading where this is possible;

(b) To maximise the return to creditors as a whole in cases where the company cannot be
saved;

(c) To establish a fair system for the ranking of claims and the equitable distribution of assets
amongst creditors; and

(d) To provide a mechanism by which the causes of the failure of the company can be identified, those guilty of mismanagement be brought to book and, in appropriate circumstances, deprived of the right to be involved in the management of other companies."

[16] A Loubser, Ensuring Advantage to Everyone in a Modern South African Insolvency Law, 1997 *SA Merc LJ* 326.
[17] L. Madhuku, Insolvency and the Corporate Debtor: Some Legal Aspects of Creditor's Rights Under Corporate Insolvency in Zimbabwe, 1995 *ZLR* (12) 85.
[18] R Goode, *Principles of Corporate Insolvency Law*, 2ed, Sweet & Maxwell, 1997. (hereinafter referred to as Goode).

An analysis of Goode's overriding principles demonstrate clearly that there are more rights and interests that need to be considered other than the creditors. Effective creditor/debtor rights within corporate insolvency systems are an important element of financial stability and so in pursuit of Zimbabwe's economic stability and in order to align the law with the "Zimbabwe is open for business mantra", it is essential that our law protect and promote the rights of both creditors and debtors. This is also important for the development of our law. We must therefore, analyse our new law and evaluate how the law will affect our desire for economic stability and growth.

In this thesis, I will argue that the new Zimbabwean Insolvency law is mainly pro-creditor, as it has been throughout history, and although the Act has consolidated the law around insolvency and offered many new elements, those elements continue to be to the benefit of mainly one part of society-the creditors. The only thing in the act that aims to fully consider the interest of the debtors and preserve the enterprise, in a country that badly needs it, is the new corporate rescue measures that are part of the new Insolvency Act. The law in Zimbabwe is therefore not balanced and although this creditor protection is done in order to act as an incentive or protection so that more creditors feel comfortable leaving their money in Zimbabwe, it does not benefit the country as the ending of companies does not ensure long-term economic stability. It also does not benefit the people by ensuring that employees keep their jobs.

It is essential not only for our country's development that the law strike a balance in protecting the rights of creditors and debtors but also it is essential for our law to develop in this direction in order to be more fair and just.

1.2. JUSTIFICATION FOR STUDY

'Greater access to finance for firms and individuals plays a critical role in promoting inclusive development. If finance is the circulatory system of an economy, credit is the lifeblood that flows through that circulatory system, ensuring that businesses can

innovate, develop, and grow. Indeed, businesses that have greater access to finance are more likely to retain and hire employees.'[19]

With the change in Presidency came a shift in Zimbabwe's foreign policy. Zimbabwe began to focus more on the economy with the mantra of a 'new dispensation' and the "Zimbabwe is open for business" doctrine. Zimbabwe's foreign policy has shifted drastically from a belligerent isolationist policy to a policy of re-engagement. It has been said that "the country's new foreign policy has been designed in such a way that aids Zimbabwe's economic recovery, facilitates economic growth, creates employment and encourages a climate conducive to attracting investors into the country."[20] In order for economic prosperity to ensue, the laws of the country must also be aligned with the foreign policy objectives. The laws regulating the commercial sector must, therefore, be advantageous to Investors and ensure a stable economy that is conducive to business growth and expansion. Credit facilities and the ability to be able to borrow money are deemed to be of utmost importance in a thriving economy. One author states that, "The payment of debts is necessary for social order. The non-payment is quite equally necessary for social order. For centuries humanity oscillates, serenely, unaware, between these two contradictory necessities."[21]

Credit facilities are a key player in facilitating the smooth running and expansion of activities of individuals and corporates. It is essential for businesses and individuals alike to be able to borrow money in order to fund their endeavors. Insolvency law, therefore, is an important aspect of a thriving economy because it can act as an incentive for investors to lend money. Investors are more likely to lend money in countries where the law offers adequate protection in the instance that a debtor cannot pay back the money that was borrowed. As Mike Falke states "insolvency issues become more and more decisive in the ongoing globalisation of capital and financial markets. Transition economies, in this context commonly referred to as emerging markets, are in favour of many investors. The attraction of foreign capital is often crucial to the sustainable development of those

[19] World Bank, "Principles and Guidelines for Building Effective Insolvency Systems and Debtor-Creditor Regimes." World Bank Insolvency Initiative. Accessed on 3 march 2020< www.worldbank.org/legal/insolvency_ini.html>.
[20] J. Ndimande and K. G. Moyo, Zimbabwe is Open for Business: Zimbabwe's foreign Policy Trajectory under Emmerson Mnangagwa ,2018. Vol 9. *The Afro Asian Journal of Social Sciences* 1.
[21] R Bell, *Simone Weil: The Way of Justice as Compassion*, Rowman and Littlefield, 1998.59.

countries. The insolvency regime provides the investor with predictability and transparency in order to allocate the risk of his investment decision. The absence of an effective insolvency regime will have an adverse impact on the future availability of credit and foreign capital." It therefore follows, that a country's Insolvency law must be one that promotes and protects adequately to increase investment and economic prosperity in a country.

The new Act has jettisoned the outmoded insolvency regime introduced in the 1970's and provides for, inter alia, the consolidation of insolvency legislation in Zimbabwe. The Insolvency Act has introduced fundamental changes to the Insolvency law landscape in Zimbabwe and has addressed a notable legal lacuna that was apparent in the old insolvency legal framework. In our bid to become an emerging market and restore our position in the world, it is a necessity that our claim for a 'desire for freedom, justice and equality' be truthful and that we aim to develop our justice system to protect the rights of all.

1.3. RESEARCH QUESTIONS

This thesis aims to answer the following research questions:

1. What is the current Corporate Insolvency law in Zimbabwe according to the new Act [Chapter 6:07] and is pro-creditor and anti-debtor?
2. What are other jurisdictions, Insolvency regimes like, in comparison to Zimbabwe, namely France and South Africa?
3. What are the lessons that can be learnt from these other jurisdictions?

1.4. RESEARCH QUESTION AND SCOPE

This thesis looks to analyse the new Insolvency Act [Chapter 6:07] promulgated in 2018 and assess where it stands in terms of being pro-creditor or Anti-debtor, in comparison to the previous legal framework: the Insolvency Act and the Companies Act [Chapter 24:03]. It aims to assess whether this new law is aligned with Zimbabwean foreign policy. The

writer will also look at other Jurisdictions, namely, South Africa and the France, and assess the objects of their Insolvency laws and if they have achieved the perfect balance among the interests of all the parties involved in Insolvency.

After the comparison with the two named jurisdictions, this thesis will offer recommendations on what changes should be made to Zimbabwean Corporate Insolvency Law, if any.

Insolvency law itself is a large area of law, filled many complexities. This thesis does not claim to be an all exhaustive assessment of the whole Insolvency Act. Instead, I will mainly focus on Corporate Insolvency rather than individual Insolvency or Insolvency of the Natural person. This is because it is usually companies and Corporations that have the power to shake or destabilize an economy rather than small businesses and individuals. Even the provisions regulating Corporate Insolvency in the Act are far too numerous for me to go through extensively and so I have chosen key provisions that I think tip the balance in the scale of pro-creditor or pro-debtor. The procedures of liquidation of a company or business entity are more or less the same throughout the world. This dissertation will therefore focus on the substantive law and will leave the procedure out.

This thesis in no ways sets out to argue that all debtor companies, especially those that have become insolvent due to mismanagement and malfeasance be let off the hook and receive protection from the law. It is essential in those instances to draw a line between the juristic entity and those that represent the company and have acted recklessly. Those members must be rightly punished; however, it is essential that we find a way to ensure preservation of the enterprise is considered with as much veracity as repayment of creditors.

1.5. REASON FOR COMPARING ZIMBABWE WITH SOUTH AFRICA AND FRANCE

The primary reason for comparing the Zimbabwean law with the South African law is because Zimbabwean and South African law are both based on Roman-Dutch law and some areas are sourced from British law. In terms of case law, the Zimbabwean judiciary

heavily relies on the South African courts for judicial precedents.[22] And many parts of different acts in Zimbabwe are imported from South African Acts. In fact, it has been said that the current Zimbabwean Companies Act is a carbon copy of the former South African Companies Act of 1973.

It is not a surprise to find that both Zimbabwe and South Africa have historically had pro-creditor insolvency law systems. South Africa is however moving towards shedding this label and trying to protect debtors more and the new Companies Act of 2008 is now largely based on Chapter 11 of the American Bankruptcy Act.[23] Because of the fact that our law began in the same place, It will be interesting to see the changes that South Africa is making and compare them to the changes that are taking place within our own jurisdiction in order to assess if we are on the right and what more we could be doing to improve our situation.

France on the other hand is completely different. It is a civil law jurisdiction which has developed a reputation for being extremely pro-debtor, although now, it is trying to balance out the scales and protect the interests of creditors a little more. In order to assess our true position, it is essential that we look at both ends of the spectrum to assess whether we have achieved the art of perfect balance and if not which side the scale is tipped towards and how we can right those wrongs. Therefore, I have chosen France. It offers a glimpse of what pro-debtor insolvency law regime looks like and my hope is that somewhere between our old system and France's old system lies a master piece of an Insolvency regime that is based on Goode's over ridding principles and achieves the balance that Madhuku speaks of.

1.6. RESEARCH METHODOLOGY

The primary source of information will be the Acts that govern Insolvency law in the different jurisdictions. The dissertation will analyse the provisions of certain provisions and their effect on debtors and creditors, to discern the position of the law and favored party. Research methods will be collection of data through study of available

[22] L Madhuku *An Introduction to Zimbabwean Law* Weaver Press Harare ,2010. 17.
[23] J Rushworth, A critical analysis of the Business Rescue regime in the Companies Act 71 of 2008, 2010, Part III, *Acta Juridica* 6.

secondary documents such as relevant case laws report and statutes; published texts such as books and journal articles will be used in this desk study.

1.7. CHAPTER SYNOPSIS

Chapter one lays out the scope of this dissertation and sets the context as to why this topic has been chosen. It sets out how the rest of the dissertation will be structured.

Chapter Two will highlight the key provisions of the Zimbabwean Insolvency Act and assess their effect on debtors and creditors. It will establish whether the new Insolvency Act is pro-creditor and anti-debtor.

Chapter Three will delve into the Insolvency laws of South Africa and will offer a comparative between these laws and the Zimbabwean Act. It aims to unveil whether Zimbabwe's law is transformative in that it is moving in the new and progressive direction or whether it still aims to protect Creditors at all cost.

Chapter Four will do the same as the third chapter, but in relation to France.

Chapter Five will look at the lessons that can be learnt from the above-mentioned jurisdictions and offer recommendations on what Zimbabwe can do to make its laws more balanced. This is also where the writer will conclude.

CHAPTER TWO

2.1. THE NEW LEGAL DISPENSATION

In 2018, a new Insolvency Act [Chapter 6:07] came into operation and repealed the Insolvency Act [Chapter 6:04]. This new Act provides for both Individual and corporate Insolvency as opposed to the previous outmoded "patchwork" of Insolvency law that was introduced in the 1970's, where the Insolvency Act only covered Individual Insolvency and left Corporate Insolvency to the Companies Act [Chapter 24:03]. The Companies Act has not yet been repealed and so it applies concurrently with the new Insolvency Act. However, the greater design of the new legal system is that the Companies Act will be repealed by the current companies and other entities bill. Once this occurs, the Insolvency Act will be the only piece of legislation for both Corporate and individual Insolvency. In our bid to assess the new law and understand whether it is pro-creditor or pro-debtor, it is vital that we understand what a pro-creditor or pro-debtor insolvency system is. It is defined as follows: "A pro-creditor jurisdiction allows a creditor to protect himself against an insolvency, *e.g.,* by security or set-off. A pro-debtor jurisdiction aims to maximise the defaulter's assets so as to increase the assets available for distribution."[24] Wood also defines the third category known as the neutral but which he describes as "not interested." He states that "these are mainly former communist states, fundamentalist Muslim states and states without a commercial tradition."[25]Shalke gives examples of the different categories when he states "an insolvency regime, favouring the principles of equity or pro rata sharing over a rescue policy and closely connected interference with several creditor rights is commonly seen as pro-creditor. Jurisdictions which prohibit or limit set-off rights of creditors in insolvency proceedings, are generally viewed as pro-debtor."[26]In addition to these definitions, I would like to add that pro-creditor jurisdictions may also be jurisdictions that allow the creditor to be protected and receive maximum amount of

[24] P Wood, Principles of International Insolvency (Part 1), 1995.Vol 4. *International Insolvency Review* 96.
[25] Ibid.
[26] M Shalke, 'Insolvency Law Reform in Transition Economies' (unpublished LLD thesis, Goethe University,2003)39.

benefit throughout the process. A pro-debtor jurisdiction would aim to aid and support the creditor and ensure their long-lasting existence through different legal mechanisms.

The inability to pay debts does not equal insolvency, it is mere evidence of insolvency. Insolvency only takes place once there has been sequestration through a court order. There are two ways in which a company may go into liquidation. The first way is through voluntary sequestration, where the Company itself resolves to liquidate its estate. This is provided for in section 5 of the Insolvency Act. The second way that a company or other business entity may be liquidated is through compulsory liquidation. This is envisaged in section 6 of the Insolvency Act. Section 9 of the act provides for the voluntary liquidation of foreign or external companies. A company that is solvent may also apply for voluntary liquidation through section 10 of the Act. In the old legal framework, the ways in which a company could go into sequestration where similar. It was either voluntarily or through an order by the court as specified in section 199 of the Companies Act.

When an application is made to the court there are various things that the applicant must prove in order to be granted a provisional or final order of liquidation. Section 14 provides for the factor that must be proved for a provisional liquidation order, while section 15 provides for the factors to be proved for a final order of liquidation. Whether it be a voluntary or a compulsory application, or the order sought is provisional or final, the court must be satisfied that the order of liquidation will be to the benefit of creditors. The reason that the focus lies mainly on the financial interest is because in deciding whether the sequestration will be to the benefit of the creditors, the court compares the position of the creditors if there is no sequestration with their position if there is sequestration. It follows that sequestration will only be to the advantage of creditors if it will result in a greater dividend to them than would otherwise be the case. Under the old legal framework, section 206 of the Companies Act detailed the circumstances in which the court could order the winding up of a company. Unlike the new Act, the requirement of the liquidation process being beneficial to creditors is not included in the legislation. It was however a part of our law as it was set out in case law. The Act instead includes the catch all phrase in section 206(g) which permits the courts to grant a liquidation order ‘if in the opinion of

the court it is just and equitable that the company be wound up.' This is also where the benefit to creditors was considered.

The onus of proving that the liquidation of the company is beneficial to the creditors, rests on the applicant. This requirement is more stringent in cases of voluntary sequestration as the court desires to ensure that the debtor is not attempting to escape their debts and cheat their creditors by using the insolvency mechanisms. The requirement of an advantage to creditors is a recurring theme or motif in Insolvency law with much importance being placed on it. In Shagelok Chemicals (Pvt) Ltd. v International Finance Corporation and Others[27] the court continually considers the benefit that the creditors will face and in the end upholds the provisional liquidation order as Gwaunza JA highlights that the Appellant owe large sums of money and to put the company into judicial management would see the creditors having to wait a long period of time before they would be repaid. The honorable judge states **"**Nor, in my view would it have been fair and equitable to place the appellant under judicial management when the effect would have been to make its creditors wait longer than they had already done for their money. The debts owed continued to mount due to interest and other charges."

It is clear from this requirement, that the courts place the interests of the creditors in the highest regard. The inability to prove and satisfy this requirement will see the court refusing to grant the sequestration or judicial management (now corporate rescue) order even if it has been successfully proven that the debtor is in fact insolvent as per section 3 of the of the Act. Ultimately, this means that a debtor company will not be 'rescued' and preserved if the sequestration or corporate rescue does not benefit the creditors. Zimbabwe law, in this aspect maintains a very pro-creditor and anti-debtor stance.

2.2. CONTINGENT AND PROSPECTIVE LIABILITIES

In the Insolvency Act [Chapter 6:07], a debtor is defined as "any person or entity that is able to incur debt. This widens the acts reach to both individuals and entities as opposed to the previous Insolvency Act [Chapter 6: 04] that applied to individuals only. Insolvency

[27] SC 124/02.

has been defined as a situation that is triggered by the inability to pay debts. In the Hockly's Insolvency law textbook it is stated that "in common parlance, a person may be said to be insolvent when he is unable to pay his debts."[28]Section 3(1) of the Insolvency Act stipulates that "a debtor is deemed to be unable to pay his or her debts upon proof that the debtor is generally unable to pay debts which are due and payable or proof, that the debtor's liabilities exceed the value of the debtor's assets." Section 3(4) then goes on to state that "In determining whether a debtor is unable to pay his or her debts, the Court must also take into account the contingent and prospective liabilities of the debtor."

The exact same phrase was used in the Companies Act [Chapter 24:03] which in the old legal framework governed Corporate Insolvency. Section 178, where this phrase is found, provides three circumstances in which a company was deemed unable to pay their debts. One of these circumstances as detailed in subsection (c) highlights a situation "where there is proof that the company is unable to meet its present, contingent and prospective liabilities." The addition of phrase "contingent an prospective liabilities" to section 3 of the new Insolvency Act, *prima facie* seems to be a positive addition as it appears to help and assist in the determination of whether a debtor is insolvent or not. This would seem beneficial for debtors and creditors alike as it makes the determination of insolvency easier and their burden of proof is lightened as they know what to look for when attempting to prove one's insolvency. Professor L. Madhuku however validly points out the skewed nature of this addition and its pro-creditor nature. A contingent liability is a liability which may arise out of an existing legal commitment but is dependent on the happening of a future event which may or may not occur (Re William Hoddy Ltd). [29] A prospective liability was defined in Stonegate Securities Ltd v Gregory[30] as follows: "a debt which will certainly become due in the future either on some debts which has already been determined or on some on debts determinable by reference to future events."

Taking into consideration a business entity's contingent or prospective liabilities is to over-estimate that entity's liabilities and this will, consequently, always leave the company's balance sheet looking as if its liabilities exceed its assets. As Professor Madhuku puts it

[28] Burdette (n 1 above) 3.
[29] [1962] 2 AUER 11.
[30] 1980 (1) CH 576.

"contingent and prospective liabilities unnecessarily and unrealistically increase the company's liabilities over the assets easily making it look insolvent."[31] In the case of Barclays Bank (DC & O) Ltd and Another v Riverside Dried Fruit Co (Pty) Ltd, [32] it was held that however, that the court considering an application for liquidation of a company must not regard contingent and prospective liabilities as if they were due and payable, it is succinctly argued by Professor Madhuku[33] that to consider them at all is it treat them as if they are due and payable. In Shagelok Chemicals (Pvt) Ltd v International Finance Corporation and 2 others, we see how the courts apply their duty to take into consideration the contingent liabilities. In this case, the appellant sought that the provisional liquidation order against it be nullified and replaced with an order for judicial management. In considering whether to do this, the court looked at whether the company was in fact insolvent. It looks at all the debts due to creditors and then considers a contingent liability and concludes that "other substantial amounts would have to be applied towards refurbishment of the plant, not to mention the generation of fresh working capital. KGPM Chartered Accountants indicate in their report that $50 million would be required for this purpose. Taken together, these contingent and prospective liabilities of the appellant are a strong indication of its inability to pay its debts."[34] The consideration of contingent and prospective liabilities is therefore pro-creditor as it makes it easier for the creditor to prove a company's insolvency even when the company is not actually insolvent. It aides' creditors who are seeking to recover their debts from business entities.

2.3. SET IT OFF

A set off in Insolvency law, allows for a situation where the creditor is also a debtor to their debtor and vice versa. An adequate illustration of this is when "Dealer **A** and dealer B owe each other 100. Dealer B becomes bankrupt. If dealer **A** could set off the 100 against the 100, his exposure is zero. If he cannot set off, his exposure is 100- because

[31] Sharrock (n 8 above) 88.
[32] 1949 (1) SA 937 (C).
[33] Sharrock (n 8 above) 88.
[34] Bell (n 21 above) 59.

he must pay in 100 to dealer B's insolvent estate and prove for 100 on which he will very likely receive a trifling dividend as an unsecured creditor."[35]

Setting of is regarded as a form of payment[36] and it operates *pro-tanto* as if payment was made[37]. Post Insolvency setting off is a pro-creditor mechanism as it allows for creditors to retrieve their money quickly and without hassle without regard to their rank in insolvency. It enables the reciprocal unsecured creditor to be paid ahead of other unsecure creditors. In the example above, if Dealer A is permitted to set off the 100 he is owed and owes dealer A then Dealer A will not have to prove their claim against the estate of Dealer B and pay money into dealer B's estate so that the money can be used for the collective creditors. It is therefore the individual creditor that benefits. The new Insolvency Act makes provision for set-offs in section 31 which states as follows:

"Where-

a) two persons have entered into a transaction the result whereof is a set off, wholly or in part, of debts which they owe one another and the estate of one of them is liquidated within a period of six months after the taking place of the set off; or
b) a person who had a claim against another person (hereinafter in this section referred to as the debtor) has ceded that claim to a third person against whom the debtor had a claim at the time of the cession, with the result that the one claim has been set off, wholly or in part, against the other, and within a period of one year after the cession the estate of the debtor is liquidated;

then the liquidator of the insolvent estate may in either case abide by the set off or may, if the set off was not effected in the ordinary course of business, disregard it and call upon the person in question to pay to the estate the debt which he or she would have owed it but for the set off, and thereupon that person is obliged to pay that debt and may prove a claim against the estate as if no set off had taken place."

[35] De Villiers (n 12 above) 97.
[36] Faatz v Estate Maiwald 1933 SWA 73 87; Joint Municipal Pension Fund (Transvaal) v Pretoria Municipal Pension Fund 1969 2 SA 78 (T) 86A)
[37] Schierhout v Union Government (Minister of Justice) 1926 AD 286 289.

This section permits for setting off on the condition that it is effected in the ordinary course of business. Permitting setting-off, propels the pro-creditor agenda as it allows for certain creditors to benefit and avoid insolvency proceedings. It can be argued that setting off may be deemed as pro-debtor as it allows, he debtor to discharge of debts in an easier manner without having to actually pay money. This mechanism is a breach of the pari passu principle as it allows for payments to be set off against each other and money that belongs to the estate to be set off without entering estate for the collective creditors. Section 31 does however, grant the liquidator a discretion as to whether to uphold the set-off or to completely disregard it. Although this section appears to attempt to balance the rights of both creditors and debtors by placing the decision in the hands of the liquidator, thereby adding a human element to the process, the truth is that the liquidator will always aim to advance the interest of the creditors and will only make decisions that are to the advantage of creditors. Common law and legislation have set a recurring theme that decisions must be to the advantage of creditors thereby swaying any discretion and ensuring that the mindset displayed by all people involved is pro-creditor.

The Companies Act and the Old insolvency legal framework as it was, made no mention of set-offs.

2.4. SWOLLEN ASSETS

The swelling of assets is the exercise of returning assets that were previously disposed of to the estate. This exercise enables the assets to be reclaimed and to be added to the estate that will be distributed to the creditors. It therefore enlarges the debtor's estate, enabling more to be available for creditors. This process is also known as the "recapture of assets". Due to its nature and the assistance it provides to debtors it is deemed pro-debtor. It protects the debtor from facing unnecessary harassment from the creditors in the twilight of Insolvency in hopes that they will acquire an asset or receive their payment. It cannot be ignored however, that although these provisions provide assistance to the debtor, they are also for the creditors benefit as the assets recovered will be added to the estate and increase the amount that each creditor will eventually receive. The more assets recovered, the more each creditor will receive. The principle aim of insolvency law is to ensure that there is a fair and equal distribution between all the creditors, if the law

were to disregard dispositions made improperly, it would not be affording the creditors full protection in accordance with its objective. As Evans[38] states "To achieve the goal of effective collective debt collection for the creditors as a group, insolvency legislation must provide for the most effective means by which to identify and collect as much property of the insolvent estate as possible, and to administer and distribute that property or the proceeds thereof to the creditors, in accordance with the provisions of the relevant legislation." It can therefore be argued that the legal provisions that assist in swelling the assets are merely for the benefit of the creditors and are, therefore, pro-creditor. Referring to these clauses as 'clawback' clauses correctly captures their essence .P. J. Omar and A. Soresen[39] capture this line of argument well when they state that "By definition and from experience, there are rarely enough assets in insolvency to meet the expectations of all creditors that debts owed them will be met in full. For that reason, insolvency law offers the insolvency practitioner, and hence by extension the creditors, the opportunity to swell the assets of the insolvent company by clawing back assets and funds which have been transferred out of the insolvent's estate."

The recovery of assets improperly disposed of from the estate is provided for in sections 24, 26 and 27. The different sections provide for different types of dispositions or transactions that the liquidator may set aside. All three sections, however, have the same effect as they give the liquidator the power to set aside any dispositions that can be seen as "objectionable". These assets are then returned to the estate of the liquidated company and swell the assets available for disposition. The assets returned would have been disposed before the winding up of the estate.

Section 24 provides for dispositions not made for value and allows the liquidator to set aside every disposition of property that was not made for value. The disposition must have been made within two years before the application for liquidation. The period is extended to three years if the disposition was made for the benefit of an associate. An associate is defined as follows:

[38] R Evans, 'A critical analysis of problem areas in respect of assets of insolvent estates of individuals'(unpublished LLM Thesis, University of Pretoria,2008) 7.
[39] P. J Omar and A. Sorensen, "Clawback Provision in French Insolvency law" 1999. Accessed March 4, 2020. https://www.iiiglobal.org/sites/default/files/clawbackprovisions.pdf

“(a) in relation to a natural person-

(i) the spouse of such person; or

(ii) any person who is by consanguinity related to such first mentioned person or to his or her spouse, in the first, second or third degree of relationship as determined in accordance with the law on intestate succession; or

(iii) the business partner of such person or the spouse of such partner or any person who is related to such partner or spouse in a degree contemplated in subparagraph (ii); or

(iv) a beneficiary of a trust, or a trust of which such person or associate of such person is a trustee or beneficiary; or

(v) a company of which such person is a director or any juristic person of whom such person is a manager or of which he or she has control.

(b) in relation to a juristic person-

(i) any natural person who is a director of that juristic person or who has control of that juristic person, either alone or together with his or her associate contemplated in subparagraph (a): or

(ii) any other juristic person which is controlled by the person who controls the first-mentioned juristic person;

(c) in relation to another person a person who has control of an undertaking of the other person, and that person is regarded as having control of an undertaking if the person who manages the undertaking is accustomed to act in accordance with that person's directions or instructions, unless that person gives advice in a professional capacity only;

(d) a natural person or juristic person who was an associate of another natural person or juristic person at the time of the disposition in question or at the date of the liquidation of the estate or liquidation of one of the parties;”

In order for the liquidator to succeed in setting aside a disposition not made for value, the liquidator must prove that there was a disposition, which was not made for value, within the stated period of time. The Act gives a wide definition of a disposition and it was held in S v Trust Bank[40] that an agreement to be a surety is itself a disposition. In relation to the requirement of the disposition "not made for value" there has been much difficulty. The Zimbabwean courts have made up their minds to follow the rulings made in South African cases. This is clearly seen in Huizenga v Zvinoira.[41]South African cases themselves have held that a disposition "not made for value" is one where there is no value at received at all or where the value is inadequate. This was held in Estate Jager v Whitaker[42]**.** In this case, it has also been held that value is not restricted to monetary value so that a material benefit such as financial stability for a company may be regarded as value. Each case is however, determined on a case by case basis.

Section 26 provides for voidable preferences. This section allows the liquidator to set aside any dispositions made that have the effect of preferring one creditor over another. This applies where the creditor would not have been entitled to the benefit/disposition it received had the liquidation been underway at the time the disposition was made. The disposition may be voided if it was made six months before the presentation of the liquidation application or within 12months for dispositions made to associates. Section 27 then deals with collusive dealings. This allows for and disposition made by the debtor in collusion with another party with the intention prejudicing the creditors or preferring a creditor over the others to be set aside. Any person who is part of the collusion may be held liable on any loss suffered. This section does not operate in a specific time period. The act does not define collusion however in the South African case of Baldachin Trustees v Slomer and Slomer[43] it was held that collusion means the intention to defraud the company.

In the previous legal framework, The Companies Act made provision, in section 310 for voidable and undue preferences. The new legal framework has therefore widened the

[40] 1986 (2) SA 850(A).
[41] 1987 (2) ZLR 276.
[42] 1944 AD 246 at 250.
[43] 1944 SR 55.

claims that can be used to swell assets. This allows for more assets to be recaptured for the benefit of the creditors if the requisite requirements for the different claims are met. The interests of the creditors are therefore being prioritised ahead of all others.

2.5. CORPORATE RESCUE

We cannot argue with the fact that brutal side effects for all interested parties when a company that was once a successful concern fails. As Cassim[44] states, "the chain reaction consequences upon any given failure can potentially be so disastrous to creditors, employees and the community, that it must not be overlooked". Although it is clear that the winding-up of a company negatively affects creditors, employees, shareholders and society at large, creditors are affected to a lesser extent as insolvency law ensures that they receive some sort of payment and that the proceedings are advantageous to creditors. It is mainly the other parties that suffer. It is essential that the law ensure preservation of the enterprise. Corporate Rescue addresses this need.

Before the inclusion of corporate rescue within our law, the old Insolvency Act provided for judicial management. Judicial management did not however, adequately assist in the preservation of the enterprise and in fact many companies placed under judicial management ended up being liquidated. Judicial management is a process whereby the principles of company law regarding the management of a normal company, as well as the principles appertaining to the liquidation of a company are combine to ensure the optimum benefit of creditors and members.[45] The object of judicial management is to help a struggling company get back on its feet and avoid liquidation, through management of the company, where there is a reasonable probability that the company will be able to surmount its financial difficulties as they are caused by mismanagement or some other cause[46].

Sections 299 and 300 of the Companies Act provided for the granting of interim and final orders for judicial management and the requirements that needed to be met in both cases.

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[44] F Cassim, *Contemporary Company Law, 2*ed, Juta, 2012. 862.
[45] H Cilliers et al, *Corporate Law,* 3ed, Butterworths, 2000.479.
[46] RH Christie, *Business Law in Zimbabwe,* 2ed, Juta, 1998. 422.

Substantially, the requirements for a final order for Judicial Management and an order for corporate rescue are the same. In both cases, the applicant is required to show that the company cannot pay debts(is in financial distress) due to mismanagement and that there are prospects that if the company is placed under judicial management or corporate rescue it will become a successful concern and that it is just and equitable for the court to grant the order.

Through case law[47], the courts held that judicial management was an extra ordinary procedure and its purpose was to prevent a company from being placed in liquidation by ensuring proper management or proper conservation of its resources so that it will be able to meet its obligations and so remove any occasion for winding up and become a successful concern. The onus rested with the Applicant and it must be discharged to get the requested order from the court. In *Le Roux Hotel Management (Pty) Ltd*[48] judicial management was referred to as a system which has barely worked since its initiation in 1926. Academics in South Africa have labelled it a "dismal failure"[49] with other legal commentators going as far as calling it a "spectacular failure"[50]. There have been many concerns raised about the judicial management model with many speaking to the shortcomings of the model. One such shortcoming being its "failure to provide a lasting solution to the entity's problems"[51]. Despite the good intentions behind judicial management, the courts' assessment in Le Roux has been held to be true in Zimbabwe. In Bulawayo, in 2013, High Court records showed that eight companies were placed under judicial management and by the end of the year seven of those eight, were liquidated[52].

In the last few years, we have seen many countries like England, Australia and Germany adopt the business rescue procedures in their insolvency law. It is seen by many as an effective and well-functioning tool to assist businesses in financial distress. It is especially

[47] Silverman v Doornhoek Mines Ltd 1935 TPD 353.
[48] 2000 (1) SA 223 (C).
[49] D Burdette, Some Initial Thought on The Development of a Modern and Effective Business Rescue Model for South Africa (Part 2), 2004, Vol 16, *South African Mercantile Law Journal* 409.
[50] J Smits, Corporate Administration: A proposed Model, 1999, Vol *32 De Jure* 85.
[51] K Hofisi, Company Performance Under Judicial Management, Presentation at Wits University, 2011.2.
[52] R Dzvimbo, 'Should the Zimbabwean Companies Act move away from Judicial Management and adopt business rescue', (Unpublished LLM Thesis, University of Cape Town,2013) 4.

useful in countries with developing economies as preservation of jobs is a main concern[53]. The process aims to protect both the interest of employees and creditors as opposed to the judicial management procedure that focused on the interest of creditors only.

Part XXIII of the Insolvency act addresses Corporate Rescue. Section 121 (1)(b) of the act defines corporate rescue as "proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for (i) the temporary supervision of the company, and of the management of its affairs, business and property, (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession: and lastly, (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

The Insolvency Act provides that corporate rescue may be entered into voluntarily through a resolution by the company or an interested party may apply to the court to get a court order to commence these proceedings. It is important to highlight that the definition of an "affected party[54]" in the act includes employees, shareholders, and creditors. Once one of the above has been done, a business rescue practitioner is appointed to manage the company and compile a business rescue arrangement. Proceedings end when the company has been liquidated or the court sets aside the order for business rescue proceedings or the business rescue practitioner has filed with the Master a notice of termination of corporate rescue proceedings.

During business rescue proceedings there is a moratorium on legal proceedings against the company with exception to the proceedings detailed in section 126 of the Act. It is interesting to note that legal proceedings as a claim for set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings

[53] A Loubser, T Joubert, The Role of Trade Unions and Employees in South Africa's Business Rescue proceedings, 2015, Vol 36 *Industrial Law Journal* 21.
[54] Section 121 Insolvency Act [Chapter 6:07].

commenced before or after the corporate rescue proceedings began are part of the exceptions. Any property disposed of during this time must be disposed of with permission from the business rescue practitioner and must be a bona fide disposal done in the ordinary course of business. All employment contracts remain the same during these proceedings unless, the employee and the company agree to variations. All retrenchments are subject to the Labour Act [28:01].

The business rescue practitioner is given a wide range of powers in order to be able to come up with a business rescue plan and ensure that it is implemented as it was agreed with the affected parties. These powers include replacing the existing management and board of directors as the management of the company[55]. The pre-existing management is dissolved in accordance with section 130 of the act. The corporate rescue practitioner's powers can be delegated to any person he sees fit and he also has the power to appoint any person as part of the management, whether there is a vacancy or not. The practitioner must hold investigations into the financial and business affairs and the property of the company as soon as is practicable and must consider whether there is a reasonable probability that the company can be rescued[56]. The business rescue practitioner must consult all interested parties and then formulate a business rescue plan. Once it has been published, a meeting[57] must be held for the affected parties to vote and address the floor on any issues or suggestions they may have.

Corporate Rescue is in line with International business standards and in the last years there has been a global trend to restructure and re-organise companies that are in financial distress.

The move to the corporate rescue of companies is progressive as it includes employees, creditors, and the shareholders of the company within all decisions. It ensures that the ailing company is given a chance to survive if there is a possibility of it being restored to a successful financial concern. This will be beneficial to society as there will be a continuation of service delivery from the company and the country will also benefit from

[55] Insolvency Act (n 54 above) section 133.
[56] Insolvency Act (n 54 above) section 134.
[57] Insolvency Act (n 54 above) section 143.

the continuation of the company and the employment of its citizens. As stated by R. Dzvimbo, “if a country’s company law legislation lacks proper mechanisms for company rescue, the economy of that state will deteriorate due to loss of tax payments that viable companies contribute towards the economy as a whole.”[58] The business rescue procedure does not focus on the rights of one sector but instead balances the rights of all parties involved to ensure that all their interests are protected. It creates a win-win situation. The procedure is, therefore, pro-creditor and pro-debtor and in fact pro-Zimbabwe.

[58] n 52 above, 23.

CHAPTER THREE

3.1. WHAT ABOUT SOUTH AFRICA?

South Africa, like Zimbabwe's previous Insolvency legal framework, has a fragmented system that involves many Acts and a lot of cross-referencing between all the different acts. The main piece of legislation is the Insolvency Act 24 of 1936 (hereinafter referred to as the Insolvency Act). This piece of legislation is supplemented by common law as contained in Roman Dutch and English sources and also the judgments of courts[59]. The Insolvency Act defines a debtor as a "person or partnership or the estate of a person or partnership". It does not therefore include companies or bodies corporate. Insolvency of these bodies is covered by the Companies Act 71 of 2008 (hereinafter referred to as the Companies Act) and the Close Corporation Act 69 of 1984. The previous Companies Act 61 of 1973, (hereinafter referred to as the old Companies Act) is also still applicable when it comes to the winding up of Insolvent companies as the current Companies Act only make provision for the winding up of solvent companies or bodies corporate. There is also a myriad of other acts which provide for the winding up of other entities. These Acts then cross-reference the Insolvency Act by means of connecting provisions in order to make insolvency law applicable to them. Together these pieces of legislation regulate Corporate Insolvency and one must search through all pieces to find answers to any questions.

There has been many legal scholars and Judges advocating for the unification of the acts, so that the myriad of acts are compiled into one Act that provides for the Insolvency of Individuals, Corporate Bodies and close corporations. The South African Law Commission has admitted that a unified Act would be beneficial and stated that "A unified Act is more user friendly, especially for foreigners like prospective foreign investors"[60]. Coleman J in the case of Woodley v Guardian Assurance Co of SA Ltd[61] stated the following, "I ... suggest that it is socially desirable that, as far as is practicable, all the consequences of the liquidation of an insolvent company should be similar to those [of]

[59] Fairlee v Raubenheimer 1935 AD 135 at 136; Swadif (Pty) Ltd v Dyke 1978 1 SA 928 (A) at 938; Millman v Twiggs 1995 3 SA 674 (A) at 679-680.
[60] SA Law Commission, Project 63 Commission Paper 582 in Vol 1. 18-19.
[61] 1976 1 SA 758 (W) at 763

the insolvency of an individual ... The winding-up of a company unable to pay its debts is something closely akin to the winding-up of the estate of an insolvent individual. There are some different requirements which flow from the fundamental difference between a company and an individual: those are specifically provided for in the Companies Act. In respects other than those so provided for I cannot see why the Legislature should not have desired, not merely the procedural rules, but also the substantive rules and consequences, to be the same in both cases." Although there has been some criticism of the unification of the South African Insolvency legislation, scholars are more inclined to the unified system and as Keay states "on the balance, the enactment of a unified statute is to be preferred to a dual system.[62]"

South African Insolvency law is similar to Zimbabwean insolvency law. An estate can be sequestrated through voluntary of compulsory sequestration and the law makes provision for this. It is also a requirement in this jurisdiction that the sequestration be to the advantage of the creditors. Case law has held that the benefits to creditors must be substantial benefits. In the Stainer v Estate Bukes[63] it was held that the main question is "not whether the majority in number or value will derive advantage from sequestration, but whether creditors, taken as a single entity will benefit from sequestration, but whether creditors, taken as a single entity, will benefit by it."[64] In some cases, it has been held that the advantage is not only in the direct financial interest but also in the "indirect advantages such as the superior legal machinery which the creditors acquire by the sequestration, their rights of control and investigation"[65], among others. The interpretation by most court has however focused on the financial interest. In Trust Wholesalers and Woollens (pty) Ltd v Mackan[66], Selke J held that in order to be to the advantage of creditors, sequestration must "yield at least, a not negligible dividend." In London Estates (Pty) Ltd v Nair[67] it was held that if after all the costs of sequestration are paid, there is no money left for payment to creditors or the payment is negligible, then there is no advantage. In

[62] Keay, To Unify or not to Unify Insolvency Legislation: International Experience and the Latest South African Proposals, presentation given at a symposium on Corporate Insolvency Law Reform on 23 October 1998. 64.
[63] 1933 OPD 86
[64] Burdette (n 1 above)31.
[65] Pelunsky's case 1908 TS 370.
[66] 1954 (2) SA 109 (N) 111
[67] 1957 (3) SA 591 (D)

Botha v Botha[68] a dividend of 1.6 cents in the rand was held to be insufficient to justify sequestration. This requirement is extremely pro-creditor and it has the effect of ensuring that the creditor's interests are protected and treated as the only priority at all times. The law must make provision for other interests to be considered when determining whether to grant a sequestration order.

Some authors have argued that this pro-creditor stance is not only unfair but also unconstitutional. Lesenyeho argues "the advantage to creditors principle, in fact causes unequal treatment of debtors that are left without proper relief in the form of statutory discharge[69]" While others, like Evans go further and argue the that not only is there a preference for creditors through this requirement, but that, when it comes to the debtors, this requirement prefers "rich debtors" as they can prove an advantage to creditors as opposed to "poor debtors" who cannot. Bertelsmann J succinctly put it in In Ex Parte Ogunlaja[70] where he held:

"Unless and until the Insolvency Act is amended, the South African Insolvency Law requires an advantage to creditors before the estate of an individual can be sequestrated. Much as the troubled economic times might engender sympathy for debtors whose financial burden has become too much to bear, the Insolvency law seeks to protect the interests of creditors at least to the extent that a minimum advantage must be ensured for the concurrent creditor when the hand of the law is laid on the insolvent estate."

3.2. CONTINGENT ASSEST AND LIABILITIES

The Companies Act set out what it calls the "Solvency and Liquidity test" in section 4. This test is similar to the balance sheet and cash flow tests provided for in the Insolvency Act in Zimbabwe. Both set out that the tests for solvency are:

A. Whether the assets of the company fairly valued exceed the liabilities of the company, fairly valued and

[68] 1990 (4) SA 580 (W)
[69] N Lesenyeho, 'Constitutionality of the Advantage to Creditors Requirement and a Comparative Investigation in Insolvency Law' (unpublished LLM Thesis, University of Pretoria, 2017)12.
[70] 2001 JOL 27023 (GNP).

B. Whether the company can pay its debts when they become due and enforceable.

Subsection (2) (b) of the act goes on to state the following:

> "subject to paragraph *(c)*, the board or any other person applying the solvency and liquidity test to a company—
>
> (i) must consider a fair valuation of the company's assets and liabilities, including any reasonably foreseeable contingent assets and liabilities, irrespective of whether or not arising as a result of the proposed distribution, or otherwise; and
>
> (ii) may consider any other valuation of the company's assets and liabilities that is reasonable in the circumstances;"

Both Zimbabwe and South Africa, therefore, make provision for Contingent liabilities to be considered in the determination of whether a company is solvent or insolvent. As stated earlier, this has the effect of favouring creditors as it overstates the company's liabilities and will almost always make a company appear insolvent. The South African Companies Act however, includes assets as opposed to the Zimbabwean Insolvency Act that merely states that it is only contingent liabilities that may be considered. This therefore balances out the pro-creditor approach adopted by Zimbabwean legislation as the consideration of contingent assets is beneficial to debtors also. The Companies act further states that the contingent liabilities that can be considered must be reasonably foreseeable. This qualification is necessary in the legislation as it will prevent the courts applying a narrow interpretation of the section. The courts narrow interpretation can sway either in the direction of pro-creditor or pro-debtor and the inclusion of the phrase 'reasonably foreseeable' allows for the consideration of contingent assets and liabilities to be done in a balanced, well-thought out manner. It appears that South Africa is a neutral country in the aspect of contingent liabilities it does not favour creditors nor debtors.

3.3. SET IT OFF

Generally, how set-off in Insolvency operates is that where a creditor of an insolvent who is simultaneously indebted to the insolvent will be able to rely on set-off where all the requirements of set off where met before *concursus creditorum*[71]. Now, set off is regulated in section 46 of the South African Insolvency Act. This section provides for situations of a set-off. It is a carbon copy of section 31 of the Zimbabwean Insolvency Act and therefore allows the trustee/liquidator to "elect" whether to abide by the set-off or set it aside, provided that sequestration of the estate has occurred within six months of the transaction which involves the set-off. In order for the trustee to uphold and honour the set-off, it must have been effected within the ordinary course of business. It is also clear that upon insolvency, the insolvent estate rests in the hands of the trustee/liquidator, with no set-off being possible between the Insolvent estate and any creditor.

There is, however, an exception to the general prohibition. The exception lies in section 35B which allows for post Insolvency set-off in respect of certain "agreements". The definition of agreement in this section has been the cause of much debate and "can hardly be accepted as having a clear and accepted meaning[72]". Due to the uncertainty caused by the interpretation of this definition, there is a desire to amend it through the Judicial Matters Second Amendment Bill.

The effect of this section, like the one found in the Zimbabwean Insolvency Act, is that the creditor is saved from having to compete for their claim during *concursus creditorum* and instead are paid back hastily, regardless of what type of creditor they are. This benefits the creditor greatly. It has been highlighted by South African writers that there seem to be logical policy reasons for allowing post insolvency set-off. It is highlighted that

[71] Siltek Holdings (Pty) Ltd (in liquidation) t/a Workgroup v Business Connexion 2009 1 All SA 571 (SCA).
[72] C Van Loggerenberg, S Barnett, "South Africa: Post Insolvency Set-Off: South Africa Moves towards International Best Practice", Mondaq. Accessed 4 February 2020.
<https://www.mondaq.com/southafrica/x/23497/Insolvency+Bankruptcy/PostInsolvency+SetOff+South+Africa+Moves+Towards+International+Best+Practice>

“it might be seen as unfair to expect him to repay the whole of his debt towards the estate where he only receives a dividend on the debt owed to him.[73]”

3.4. SWOLLEN ASSETS

The current South African Companies Act, promulgated in 2008, only makes provision for the winding up of solvent companies. Item 9 of Schedule five of this Act stipulates that the provisions of the previous Companies Act 61 of 1973 will apply in relation to the winding up of insolvent companies. Item 9 (2) clearly specifies the section of the old Act that are not to apply and subsection (3) makes it clear that where there is a conflict between the current Companies Act and the Old one, the current one will apply. The legal provision that covers swelling of assets is therefore found in the previous companies Act in section 340. This section, titled voidable and undue preferences, states that any disposition that may be set aside in individual insolvency cases, if made by a company, may also apply. The provisions in the Insolvency act therefor apply *mutatis mutandis* to dispositions made by Companies.

Section 26 of the Insolvency act makes provision for dispositions made without value. This section grants the trustee the authority to set aside a disposition not made for value two years before the sequestration if it can be shown that immediately after the disposition, the value liabilities of the insolvent exceeded the value of the assets. This section operates in a wider scope as it allows dispositions to be set aside if the beneficiary fails to prove that the insolvents assets exceeded their liabilities, after the disposition was made. This allows for the setting aside of dispositions not only where there was indeed a disposition not made for value that prejudice the estate of the insolvent but also where there is merely no proof that the disposition was not prejudicial. Subsection (2) of section 26 goes further than its Zimbabwean counter-part to

Section 29 of the Insolvency Act makes provision for voidable preferences. This section grants the court the power to set aside a disposition made within six months of

[73] S Van Deventer, ‘Set- Off in South Africa Law: Challenges and Opportunities’ (unpublished LLM Thesis, Stellenbosch University,2016) 55.

sequestration of the estate, where such disposition had the effect of preferring one creditor above all the others and after such disposition, the liabilities of the insolvent exceeded the assets.

Section 30 then provides further for undue preferences made to creditors and it states that if a debtor **at any time when their liabilities exceeded their assets**, made a disposition that had the effect of preferring one creditor over another, then the court may set aside that disposition. This section, widens the power of the court, allowing it to not only set aside dispositions made six months prior to sequestration but to dispositions made at any time as long as the debtors liabilities exceeded their assets at the time.

Section 31 then makes provision for collusive dealings made before sequestration. Here, the court may set aside a disposition made before sequestration, where the debtor, in collusion with another party disposed of an asset in a manner which had the effect of prejudicing his creditors or of preferring one of his creditors above another. This section allows the estate to recover money from the any person who was part of the collusion and the amount of their benefit will be paid to the estate as a penalty.

3.5. CORPORATE RESCUE

South Africa, like Zimbabwe also used to follow the judicial management model. Many academics, employees and legal commentators expressed their disappointment with judicial management, and it became clear that "judicial management was never regarded as an effective rescue measures for companies in financial distress"[74]. Due to its short-comings and failures, the legislation then adopted the Business Rescue procedure.

Business rescue is provided for in section 128 (1) (b) (i) (ii) of the 2008 Companies Act as "proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for the temporary supervision of that company and the management of its affairs, business and property as well as a temporary moratorium on the right of claimants against the company or in respect of the

[74] A Loubser, 'Some Comparative Aspects of Corporate Rescue in South African Company Law' (unpublished LLD Dissertation, University of South Africa, 2010)3.

property in its possession. The provisions for business rescue in the 2008 Companies act are identical to those in the new Insolvency Act in Zimbabwe. One could almost say that the business rescue section was merely copied and pasted from the companies act into our Insolvency Act.

A recurring theme in the South African Companies Act is creating "a corporate rescue appropriate to the needs of a modern South African economy."[75] This is already a game-changing mentality. The idea of learning from the International stage and applying those lessons and trends in South Africa, in a manner that will work for the country allows the focus to be on the needs of the country at the time. Having noted that the Corporate rescue measures adopted in the Insolvency Act in Zimbabwe are exactly the same as those in the South African Act, one cannot help but question whether the needs of the country and the effect of implementation in the country were considered or whether it was a matter of noting the success that the corporate rescue procedure has had in South Africa and noting the fact that International Standards were changing to favour corporate rescue.

The South Africa concept of Business rescue is largely based on Chapter 11 of the American Bankruptcy Code, Bankruptcy Reform Act 1978, whose aim was to help financially distressed companies through monetary aid and a moratorium on the company.[76] In the case of *NLRB v Bilisco* 465 US 513 (1983) 528, the court held that the purpose of business rescue is to prevent a company from going into liquidation with an attendant loss of jobs and possible misuse of economic resources. It is intended to balance the interests of debtors and creditors[77].

Section 129 of the Companies Act provides for the voluntary commencement of business rescue procedures. It allows the board of the company to resolve to place the company under business rescue. Similarly, to the Zimbabwean Insolvency act, the legal requirement is that the board must show that they have reasonable grounds to believe that the company is financially distressed and that there appears to be a reasonable

[75] The Department of Trade and Industry policy paper *'South African Company Law for the 21st Century: Guidelines for Corporate Law Reform'* GN 1183 of 23 June 2004.
[76] Cassim (n 50 above) 861.
[77] Rushworth (n 23 above) 376.

prospect of rescuing the company. Section 131 provides for an affected person to make an application to the court for the court to order that the business be placed under business rescue proceedings. The affected person must prove that the company is in financial distress, it is unable to meet its obligations and that it would be just and equitable for the company to be so placed under business rescue. They must also prove that there are reasonable prospects of the business's recovery.

When a business a placed under business rescue either voluntarily or through court order, business rescue practitioner, that meets the requirements specified in section…… of the act, is then voted in or is appointed by the court, with the approval of the majority shareholding.

Business rescue in accordance with the Companies Act has a similar effect as those conducted in accordance with the Insolvency Act. The Business rescue practitioner must investigate the company and its affairs and financials and base on that investigation, if he concludes that there is a reasonable prospect of recovery, must create a business rescue plan. The plan must be presented to all affected parties and if it is accepted, must be implemented. In the meantime, the company is placed under moratorium and all legal proceedings, including enforcement action, against the company or in relation to any property belonging to the company or lawfully in its possession may be commenced or proceeded with in any forum. No property may be disposed of without the permission of the business rescue practitioner and it must be shown that the disposal is in the ordinary course of business and is a bona fide disposal.

All employee contracts remain the same unless there has been a mutual agreement as to the variation of these contracts and any contemplated retrenchment is done subject to the labour laws. The management of the company is dissolved and replaced with the business rescue practitioner and anybody he delegates to or appoints as management.

CHAPTER 4

4.1. WHAT ABOUT FRANCE?

In Wood's[78] article, he formulates a list. This list ranks the countries according to whether their law is pro-creditor or pro-debtor, with 1 being extremely pro- creditor and 10 being extremely pro-debtor. In this list France comes in at number 10, naming it the most pro-debtor country in all the countries on the list. In the 1980's, French Insolvency law went through a major overhaul. In 1985[79] a law was passed, and that law effectively set the tone for of bankruptcy laws in France. This law set out the objectives of the French bankruptcy law as follows "(1) saving the enterprise, (2) the preservation of jobs, and (3) the payment of creditors' claims." S. Muro states that the present law, enacted in 1985 was created "to prevent the event when reorganization procedures won't succeed by intervening before this situation arrived. In so doing, the objective of the law is to consider the interest of everybody who has relation with the procedure."[80] This is true. French Insolvency law, like all other insolvency law aims to ensure that the interests of all the parties concerned are protected. Koral and Sardino[81] however argue that article 1 should be interpreted in descending order of importance, thereby making the protection of the enterprise the most important objective with creditors being though of last.

Article one explains why France is listed as an extreme pro-debtor country on Wood's scale. The country sets out to protect the enterprise and its employees first before thinking about creditors repayments as highlighted by F Baumgartner and A Dupuis[82], "French insolvency law favours the continuation of business and the preservation of employment over the interests of the creditors." The payment of creditors only becomes a priority in judicial liquidation proceedings where the "prospects of pursuing the business have

[78] De Villiers (n12 above)
[79] Law No. 84-148 of March 1, 1984, effective March 1, 1985; Law Nos. 85-88 and 85-89 of January 25, 1985, effective January 1, 1986, subject to Decree Nos. 85-1388 and 85-1389 of December 27, 1985 [hereinafter the 1985 Law].
[80] Sergio Muro, Deciding on an Efficient Involuntary Filing Petition Rule, presentation at the Cornell LL.M. Seminar on March 10,2005.
< http://lsr.nellco.org/cornell/lps/papers/6/>
[81] R Koral and M Sordino, New Bankruptcy Reorganization Law in France: Ten. Years Later, 1996. *American Bankruptcy Law Journal* 442.
[82] F Baumgartner, A Dupuis, France: Insolvency Law, Policy and Procedure, 2019, Vol 7, *The Insolvency law Review* 103.

vanished"[83]. This is very different to the legal frameworks in countries like Zimbabwe and South Africa whose main aim is to ensure that the creditors are paid their claims.

French insolvency law states that a debtor is insolvent when they are unable to pay debts when they fall due. The legal determination of *cessation de paiements*[84] *(*insolvency as it is known in France) is based on the cash flow test and completely excludes and disregards, the balance sheet test. This is unlike the current Insolvency Act in Zimbabwe that includes both tests for the determination of Insolvency. The law places a mandatory obligation on the debtor to file for bankruptcy within 45 days of the inability to pay debts, as stipulated in Article 3[85]. The law places liability on the management and directors that fail to file and "shirk away from this duty".[86]

French bankruptcy courts have developed a jurisprudence which details what constitutes *cessation de paiements*. This jurisprudence gives prospective notice to managers in struggling firms as to when the end has come, and bankruptcy must be filed. Establishing the date for *cessation de paiements* is crucial in a French bankruptcy case since transactions will be examined and can be declared void insofar as they affect the firm. The Supreme Court through case law, somewhat changed the philosophy behind the definition.[87] In this instance, the court considered that the creditor's failure to demand payment of a debt, which was already due, until a later date meant that the later date alone had to be used in calculating the moment at which cessation of payments occurred.[88] In practice, a court will consider matters on a case by case basis, taking into account the special circumstances of each case. In general, the fact that debts which were certain, quantifiable and payable were not paid may be sufficient evidence that a debtor was in a state of having ceased to make payments.[89] Some examples include

[83] H Bourboloux, A Peres, France Insolvency Law, 2013, vol 1, *International Insolvency Review* chapter 11 France,148.
[84] "Cessation de paiements" is defined as "the impossibility of paying debts due from available assets." H Lafont, *'the French Bankruptcy System'* Corporate Bankruptcy and Reorganisation Procedures in OECD and Central and Eastern European Countries, 1994, 15.
[85] Section 3 of the 1985 Law (n 79 above). .
[86]R Weber, Can the Sauvegarde Reform Save French Bankruptcy Law?: A Comparative Look at Chapter 11 and F e Look at Chapter 11 and French Bankruptcy Law fr ench Bankruptcy Law from an Agency Cost Perspective, 2005, Vol 27, Michigan Journal of International Law, 285. *See* Judgment of the Cour de Cassation (Commercial Chamber) in *Blanchetcontre Cosme Rogeau, in* Dalloz Affaires No. 42/1996 (Fr.)
[87] Cassation Commerciale, 28 April 1998 (Appeal no. S95-21.969).
[88] This is on the principle that the creditor is free to waive or postpone payment at his discretion.
[89] Cassation Commerciale, 27 June 1989, Bull. Civ. IV No. 952.

cases where there was a failure to pay employees and where there were considerable outstanding tax liabilities[90]. Experiencing mere cash flow difficulties however, does not always signal a firm's irreparable insolvency, and French law provides for the appointment of a "mediator" *(conciliateur)* under the Act of 1 March 1984[91] to draft a plan for a firm's return to viability pending acceptance by the firm and its creditors. Full-blown bankruptcy proceedings, however, impose an automatic stay, which conciliation does not do and so, conciliation does not provide strong incentives for creditors to comply.

French insolvency law provides for both pre-insolvency and insolvency procedures. The pre-insolvency procedures known as *mandate ad hoc* and *conciliation* basically entail the court appointing a mediator to facilitate negotiations between the company and its creditors to reach an agreement that allows the reduction or rescheduling of the debtor's indebtedness. The pre- insolvency proceedings are largely pro-debtor as they allow the debtor freedom to decide which of their creditors will be involved in the mediation and it encourages creditors to give more money and be lenient towards the debtor by stating that creditors who do so will enjoy a priority of payment over all pre-petition and post-petition claims in the event of subsequent insolvency proceedings. *Mandat ad hoc* has no duration while conciliation cannot exceed 5 months.

Insolvency procedures are also known as secondary insolvency procedures and include safeguard proceedings which are available when a debtor is not in cessation of payments, that is, it is unable to pay debts when they are due and payable and the debtor is experiencing difficulties that it cannot overcome. Judicial liquidation is also a secondary insolvency procedure and is available when a debtor's recovery is manifestly impossible. They are commenced however, by judgment of the court upon the debtor filing for insolvency, or upon petition of an unpaid creditor or of the public prosecutor. In order for the creditor to be able to issue out a summons, the creditor must establish that the debt is unquestionable, due, enforceable and backed by title and has been uncollectible in previous events.[92] The Judgments commencing safeguard or judicial liquidation

[90] CA Amiens, 28 April 1988, Juris-Data no. 047676; CA Grenoble, 26 November 1986, RPC 1988-1, p.37.
[91] adopted in response to the financial crises of the 1980s and amended by an Act of **10** June 1994.
[92] Christie (n 46 above)17.

proceedings or refusing to open such proceedings can be appealed by any interested party. The appeal of the judgment of the *court a quo* does not however, stay such proceedings. It is not possible to obtain a stay of insolvency proceedings except for secondary proceedings, in which case the court that opened the proceedings must stay the process of realisation of assets if requested by the insolvency practitioner in the main insolvency proceedings.

4.2. CONTINGENT ASSETS AND LIABILITIES

As stated earlier, France, unlike main other countries, relies on one test as the basis of its insolvency. France uses the cash flow test: the cessation of payments, to determine whether one is insolvent and on the cessation of payments, the debtor must file for insolvency proceedings to be triggered. This is different from both Zimbabwe and South Africa who historically began basing their insolvency proceedings on the balance sheet test. Zimbabwe and South African insolvency laws have developed from mere reliance on the Balance sheet test to use of both the balance sheet tests and the cash flow test in their determination of insolvency. The use of both tests may make insolvency law in these countries appear more sophisticated and developed however, the crux of the matter is that using both tests is beneficial to the creditor. By using both tests, the creditor's grounds for insolvency are widened allowing for corporate entities to be caught out by either test.

The use of the Balance sheet test as is highlighted above also makes way for contingent assets and liabilities to be considered in the determination of insolvency. This is because the balance sheet test asks and focuses its attention on assets and liabilities. With the cash flow test the only question is whether there has been a cessation of payments. It leaves no room for the question of contingent assets or liabilities. The Supreme Court in the United Kingdom, in the case of BNY Corporate Trustee Services Limited v Eurosail-UK[93], made a ruling in which they stated that the cash flow test is useful when looking at the present and the "reasonably near future". When attempting to look beyond that, the cash flow test becomes speculative and the balance sheet tests should be used.

[93] 2007-3BL PLC [2013] UKSC 28.

The use of a single test is helpful to the debtor as there is only one ground for insolvency. Corporate bodies whose assets are exceeded by their liabilities but who are still able to pay their debts when they are due and enforceable will therefore be able to continue trading. The fact that in the determination of Insolvency, contingent or prospective assets and liabilities are not considered makes the whole process slightly better for the debtors who will not have to worry about the future debts but can focus on current, real time problems, like not being able to pay their debts.

4.3. SET OFF

P. J .Omar states that "the rules governing set-off in French insolvency may appear to be complex".[94] He argues that this is due to the 'gradual evolution' of the principles of insolvency through the Supreme Court decisions, which need to deal with the commercial reality as well as protect the rights of all interested parties in the greater scheme of Insolvency. Set-off are provided for in the French insolvency legal framework in the Civil Code[95] and the case law of the commercial courts has also developed the principles of set- off.

The law provides that set-offs may only occur when either debts are expressed in monetary terms or in amounts of bulk good that are the same. It is also a further requirement that s\the debt must be capable of being expressed in a liquid sum and that sum must be due at the time the set-off operates[96]. A grace period being granted for the payments of the debts does not prohibit setting- off from taking place.[97] Set-off can occur in two ways: either by agreement between the parties or by order of the court. The basic principle of set-off in insolvency cases is that following the opening judgment no debts that arose prior to this may be paid.[98] An exception is made however, for connected debts which may be set off regardless of when they arose.[99] The legal practitioner F. Grillo, L.

[94] P. J Omar, "Set-Off in French Insolvency Law "Accessed 15 August 2020. < https://www.iiiglobal.org/sites/default/files/setoffinfrenchinsolvencylaw.pdf>
[95] Section 1289-1299 of the 1985 law (n 79 above).
[96] Section 1291 of the 1985 law (n 79 above).
[97] Section 1292 of the 1985 law (n 79 above).
[98] Section 33 of the 1985 law n 79 above).
[99] Cassation commerciale, 2 March 1993, BRDA 93-10 p14.

Mabilat and S. Corbiere[100] elaborate on this exception and what constitutes a connected debt. They state that the "two receivables must be proved to be unquestionable, of a fixed amount, due and connected. Receivables are deemed to be connected when they share a high degree of 'commonality'. Such 'commonality' can result from the following situations: the debts arise from a single contractual relationship; or the debts do not arise from a single contractual relationship but share a sufficient economic 'link." Needless to say, a set-off may not be applied in cases where one of the debts arose before the opening judgment and the other one became due following this event.[101]Set-off may also be used by the creditor as a defence to being sued by the estate for any debts that the creditor owes.

The law permits that a set-off may operate where the debt has not yet been ascertained and the final amount that will be due has not been determined in its entirety, as long as the debtor was notified of the debt before the opening of insolvency proceedings.[102] Generally, a set-off may not occur where a creditor has failed to declare its claim in insolvency proceedings.[103] This does not apply where the set-off occurs in time before the date of the opening judgment. Where two companies jointly established a contra account in which transactions between the companies were registered, a claim by the administrator to recover sums due under an invoice following the insolvency of one of these companies was rejected by the Supreme Court, which held that a legal set-off could be raised where transactions occurred which would in the ordinary course of events be treated as giving rise to a right of set-off without it being necessary for a supposed creditor to declare the set-off in the insolvency.[104]

Nevertheless, the nature of the debt may be important to determine whether it may be properly the subject of a set-off. Thus, the transfer of a debt held on the Treasury to a bank, where the insolvent company held an account, was held not to authorise the bank to apply this sum towards extinguishing the company's liabilities to the bank. The

[100] F. Grillo, L. Mabilat and S. Corbiere, "Insolvency and Restructuring" Accessed on 4 March 2020. https://gettingthedealthrough.com/area/35/jurisdiction/28/restructuring-insolvency-2020-france/
[101] CA Paris, 30 September 1991, JCP 1992 éd E.I.136.9
[102] Cassation commerciale, 7 July 1992, RJDA 8-9/92 No. 867
[103] Cassation commerciale, 15 October 1991, Bull. Civ. IV No. 290
[104] Cassation commerciale, 5 December 1995, Sommaires de Jurisprudence 1996.9.6.

administrator in this case was allowed to pursue his action for the recovery of the debt and the case was remitted for further hearing.[105] Banks are, however, in a different position to other creditors and some care needs to be taken in cases involving set-offs being asserted by banks. The rights of banks as holders of subrogated rights or debt transfers is also quite complex, the case-law not being entirely clear. Thus, in the situation of a bill of exchange discounted by a bank in favour of suppliers of its clients, where the suppliers subsequently became insolvent, was held not to entitle the clients to raise a right of set-off on debts owed by the suppliers so as to avoid an action for payment of the bill.[106] A set-off may not occur even if there are mutual debts existing between the debtor and creditor, where these debts occurred as a result of transactions under separate contracts. What constitutes a series of separate contracts as opposed to a series of transactions giving a right of set-off is a matter of interpretation for the relevant court. Where the transactions are for the sale and delivery of individual apartment blocks, defined in individual sale of land agreements, a court has held that the transactions between the parties were not part of an overall agreement but had to be taken individually[107]

The law in France allows for set-offs making it on surface level appear to be pro-creditor. The set off however, is heavily regulated to ensure that the creditor cannot take advantage of this provision. The requirements for set offs are very narrow, closing down the claim to very specific circumstances. This effectively neutralizes the pro-creditor effect therefore, unsurprisingly taking a pro-debtor stance.

4.4. SWOLLEN ASSETS

As is seen in Zimbabwe and South Africa and other jurisdictions, clawback provisions have a prescribed time limit. This is done in order to promote certainty of business. France is no different. France refers to the period of time in which transactions may be reviewed by the court as “relation- back period” or *periode suspecte*. French insolvency law does

[105] Cassation commerciale, 17 October 1995, RJDA 1/96 No. 119.
[106] Cassation commerciale, 22 February 1994, Les Petites Affiches 1994.116.23.
[107] Cassation civile, 18 July 1995, Les Petites Affiches 1996.14.20

not set an automatic or fixed relation-back period, as is done in South Africa and Zimbabwe, instead, it is up to the parties to request that the court set a relation-back period. This means that if no request is made by the parties and therefore no court order made, no relation- back period will be set and therefore any transaction may be reversed using a claw back provision. Where a relation- back period is set, the maximum it can be set for is 18 months before the date of the opening judgment and in the cases of gifts and or free transfers of assets unsupported by consideration, the maximum is 24 months. The fact that there is no definite relation-back period means that it can easily be overlooked allowing more transactions to be set aside regardless of when they took place. This is helpful to the large body of creditors as this allows for more assets to be recaptured for the estate and for them to receive greater returns.

French law makes provision for void and voidable transactions if they take place after the date of cessation. Article 107[108]includes a list of actions that are subject to strict liability are therefore void, while Article 108[109] includes a list of actions that are subject to the courts discretionary power and therefore voidable. The law is clear that its main objective is the restoration of the debtor's assets. Many courts have been guided by this overarching objective and have stretched the scope of some of the provisions and the operation of the law in order to ensure that this main objective was met. Good faith on the part of third parties entering transactions with the debtor is disregarded for the acts in Article 107 as they are subject to strict liability. A contracting party that was not aware that the debtor was in a state of cessation of payments is irrelevant and disregarded.[110] The interests of the business and of its creditors taken as a whole are deemed to take precedence over those of third parties caught by these provisions.[111]

As stated, Article 107 mentions acts that are subject to strict liability and are therefore void. In order to fully understand the section, I will go through the mentioned acts. The first one is free transfer or Gifts of property; this is similar to dispositions not made for value in Zimbabwe. All disposition of property that are not made for value are therefore

[108] Section 107 of the 1985 law (n 79 above).
[109] Section 108 of the 1985 law (n 79 above).
[110] CA Bordeaux, 28 April 1989, RPC 1989-2, p. 223, no. 8; CA Pau, 7 September 1989, RPC 1990-4, p. 388, No. 7
[111] Le Cannu et al., Entreprises en Difficulté (GLN-Joly Editions, Paris 1995)278.

void in French Insolvency law. The idea behind this is the same in the three jurisdictions we have looked at. The debtor cannot afford to be making dispositions for no value at a time when they cannot be paid due and payable debts, or their liabilities exceed their assets. It is highly detrimental to the creditors and therefore it cannot be allowed. The courts in France has taken an expansive view of the definition of property and have he that shares, bonds and debts are property for the purposes of Insolvency.[112] Examples of transfers of property by the debtor which have been held void include a waiver of debts,[113] the payment of life insurance premiums considered excessive given the financial capacity of the party to be insured,[114] the granting of security by the debtor unsupported by consideration,[115] as well as a unilateral promise to sell certain assets where consideration was patently inadequate.[116]Courts have also held that where a payment has been made or the disposition but the payment is inadequate, the transaction is void as it will lead to a reduction in the assets of the debtor.[117] When a transaction is voided, the effect is that the property is returned to the estate for insolvency proceedings.

The second action listed is onerous contracts. The Civil Code, in Art 1101 defines a contract as an agreement between parties in which they agree to tender reciprocal obligations that are equivalent to each other. The contracts that will be voided as being onerous are contracts, entered into after the date of cessation, in which the obligations of one of the party exceeds that of the other.[118] It is usually difficult to determine whether one party's obligation did in fact exceed the other parties and in court proceedings, an expert is usually consulted in order to bring this to light. P. J Omar and A. Soresen state that "this is especially so in the case of the disposal of real property"[119]. In one instance, the assignment of a claim by a debtor in favour of a bank in exchange for a credit line was held void as wanting for equivalency.[120] Case- law in the French commercial courts have established that the court has an absolute discretion in determining whether obligations

[112] V Bourgninaud, *Droit des Entreprises en Difficulté*, Economica.109.
[113] Cassation Commerciale, 12 March 1963, D.1963.500.
[114] Loubser (n 74 above) 279.
[115] Cassation Commerciale, 13 May 1981, Bull. Civ. IV No. 228.
[116] Cassation Commerciale, 28 November 1989, RPC 1990-4, p.387, no.6.
[117] Ibid. Also see Compare Agricultural Mortgage Corporation plc v Woodward [1994] BCC 188.
[118] Section 107 of the 1985 law (n 79 above).
[119] Sharrock (n 33 above) 5.
[120] CA Rouen, 20 April 1989, Juris-Data no. 48146.

of parties in a contract are indeed disproportionate.[121] The effect of the contract being voided is that the parties will be put in the position that they would've have been in if the contract was never entered into.[122] It is unclear whether the courts have the power to modify the obligations in the contract and order that they be made more equal.

The next action is suspicious payments. The law states that all payments made by the debtor after the cessation of payments, regardless of the payment method, are void if the payment is not actually due on the date it was made.[123] In this respect, an assignment of receivables, in relation to a debt which had not yet fallen due, was declared void.[124] The rationale behind this law is that any payments made after cessation of payments constitutes an unfair preference of one creditor over the others thereby undermining the *pari passu* principle. This is why, law provides that after the judgment opening the proceedings, no payments may be made except by order of the court.

The law also catches payments for debts which have fallen due but where the payments are not made in a manner commonly used in business relationships or authorised by law.[125] Payments made in unorthodox ways are suspected of being irregular payments.[126] The law excludes certain methods of payments that are commonly used in normal business relationships as they will not be deemed irregular. These include payments in kind, by negotiable instruments and bills of exchange, as well as cheques and bank transfers. There is no exhaustive list of the approved methods of payments that are not caught by the law and the Supreme court has ruled that in deciding whether a payment is irregular or not, the method of payment will be looked at in the context of the business and what is common in that professional sector.[127] Creditors should therefore err on the side of caution when receiving payments from their debtors because if it is deemed to be suspicious, the payment will be declared void. If a payment is declared void, the creditor will have to refund the payment received along with interest.[128]

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[121] Cassation Commerciale, 15 May 1990, Juris-Data no. 2269.
[122] Soinne, Traité des Procédures Collectives (2nd edition) (Litec, Paris 1995) p.1541.
[123] Section 107 of the 1985 law (n 79 above).
[124] CA Montpellier, 23 February 1989, RPC 1990-4, p.388, no. 9.
[125] Section 107 of the 1985 law (n 79 above).
[126] Loubser (n 74 above)281.
[127] Cassation Commerciale, 30 March 1993, RPC 1994-2, p.250.
[128] Cassation Commerciale, 12 June 1990, Juris-Data no. 1797.

The next action on the list is securities and mortgages. The law basically provides that all mortgages and pledges, that is to say all “security”, granted over assets during the relation-back period to guarantee debts which arose prior to that time, are void.[129] The beneficiary’s knowledge or lack of it, over the fact that its debtor cessation of payments is irrelevant. The critical date for determining if a security is void is the date on which the security was granted, which must fall within the relation-back period. The courts have held that this date is that of the formation of the security, which does not take place until the documentation evidencing the security has been prepared and properly authenticated by a notary.[130] The law also provides that all enforcement of securities are void unless these action were implemented before the date of the cessation of payments.

Article 108 then provides for voidable transactions as they are subject to discretionary liability. In the actions listed in section 107, which are subject to strict liability, the third party’s knowledge of the debtor’s cessation of payments was irrelevant. With this list of actions, the third party must have a knowledge of the debtor’s cessation of payments in order for the transactions to be voidable. The onus is on the administrator, the creditors‟ representative, the liquidator or the rescue plan supervisor, whose right it is to bring an action for avoidance, to provide evidence of the requisite knowledge[131] Nevertheless, the courts have complete discretion in deciding whether there was in fact requisite knowledge that will deem the transaction voidable. The courts have deemed knowledge to exist in a number of different cases. Examples include where a bank enforced a number of securities granted to it by a debtor company following the loss of the benefit of a security from the debtor’s holding company, [132]where a bank accepted payments from a debtor in the form of payments on current account in circumstances where the bank had dishonoured cheques and subsequently rejected overdraft facilities, [133]where the bank kept a company artificially alive to allow it to conclude a sale of its main assets even though the sale would have a negative impact on the ability of the company to pursue its

[129] Section 107 of the 1985 law (n 79 above).
[130] Cassation Commerciale, 3 May 1988, RPC 1989-1, p.73.
[131] Section 110 of the 1985 law (n 79 above).
[132] CA Rouen, 4 February 1993, RPC 1994-2, p.254.
[133] CA Metz, 2 April 1992, RPC 1994-2, p.254.

activities,[134] and even where a debtor banked with a financial institution, leading to the presumption that the bank could not have been unaware of the financial situation of the debtor.[135]

4.5. CORPORATE RESCUE

French law provides for a mechanism almost like corporate rescue that is known as safeguard (Sauvegarde) proceedings. Safeguard proceedings are commenced by judgment of the court upon the debtor's, creditor's or the public prosecutor's petition. The proceeding is available when there is no cessation of payments, but the debtor is experiencing difficulties it cannot overcome. This is very much the opposite of the requirement in Zimbabwean and South African law. The latter jurisdictions look at whether there is a possibility of overcoming the difficulties and if there is, corporate rescue will commence. The French however focus on the company NOT being able to overcome those difficulties, in order for Sauvegarde to be commenced. Despite this difference, the French still have to prove that even though they are effacing difficulties they cannot overcome, the company's recovery is manifestly possible.

After the judgment to commence proceedings has been granted, an administrator is appointed from a nationwide list of administrators and all administrators are personally liable, without limit, for any faulty administration of the estate.[136]Administrators are however, also expected to maintain civil liability insurance[137]. The administrator in this case, "is primarily concerned with resolving the economic and employment problems plaguing the enterprise, elaborating a proposed plan, and managing the debtor's enterprise."[138]This is highly similar to the role of a business rescue practitioner and the job that they perform in the proceedings. The administrator must complete a report for the court outlining the "origin, importance and nature of the debtor's financial distress"[139].This

[134] CA Pau, 7 April 1993, RPC 1994-2, p.254.
[135] CA Paris, 26 May 1994, Juris-Data no. 23113.
[136] Rushworth (n 77 above)184.
[137] Department of Trade and Industry policy Paper (n 75 above) 18.
[138] Weber (n 86 above) 287.
[139] Weber (n 86 above).

report is meant to analyze and observe the debtor's prospects of success. When an administrator is appointed, following the commencement of the proceedings, a representative for the creditors is also appointed. The creditors are, therefore, not participating directly in the rehabilitation or filing motions with the court. The creditors' representative will be appointed from a list of certified liquidators in the region where the proceedings take place. If at any point the court determines rehabilitation is impracticable or the insolvent firm is not meeting its obligations in the rehabilitation phase, the creditors' representative will become the firm's liquidator.[140]

Once a report has been compiled by the administrator, they will communicate it to the creditors' representative, the employees' representative and the debtor. If in the report, the administrator has held that recovery is 'manifestly impossible', and the court agrees, the proceedings will be turned into liquidation proceedings. If the recovery is held to be manifestly possible then the report must also detail a plan for recovery (*Plan de redressement).* In order for the plan for the recovery to become legally binding, it must be endorsed and approve by the court.[141] When the creditor's representative receives the plan, they must send it to every creditor who has filed a claim with the court. A creditor who does not respond to the proposed plan is deemed to have accepted it 'which as a practical matter, but not a legal matter, increases the likelihood that the court will accept it[142]. Sometimes, the court accepts the plan on the condition that one or more members of the management of the company are replaced. The court may also require that voting rights received from shares held by members of management be exercised by a court-appointed attorney[143].In all cases, management is prohibited from transferring shares in the company[144].It appears that the burden of proof required to prove that recovering is manifestly possible is high and many companies find themselves being directed to liquidation proceedings after the initial report by the administrator. It has been held that "between 90 and 95 percent of French firms filing for *redressment* are channeled to

[140] Ibid.
[141] Rushworth (n 77 above)190.
[142] Ibid.
[143] Ibid.
[144] Ibid.

liquidation proceedings during this preliminary "observation" period.'[145] In 2005 it was held that 40 000 firms were liquidated in converted liquidation judiciare proceedings[146] Some estimates put the percentage of firms filing for redressement which end up being liquidated as high as 95 percent. [147]

During the Insolvency proceedings, the debtor remains in control of the operational and business affairs of the company. The administrator merely, creates a business rescue plan and after that their role is to supervise the debtor and ensure that the "overarching goals of the bankruptcy regime"[148] are met. Weil states that, "the administrator is, essentially, a functional instrument of the proceedings. The administrator pursues the stated objectives of the French bankruptcy regime: protecting the company and its business activities, protecting employment, and clearing the deficit."[149] The pre-existing management continue to focus on the company's commercial activities. This is distinctly different from the South African and Zimbabwe systems of corporate rescue where the management of the company is dissolved, and the power divested from it and placed in the lap of the Business rescue practitioner. The debtor retains power and control over all its assets, as is done in the Zimbabwean and South African jurisdictions, however, the power of the debtor is subject to the limitless power of the court to dictate the debtor's control authority. The operation of the stay against the collection of the debts owe to creditors, is contingent upon the debtor's compliance with the plan. The court has the power to rescind the plan *ex officio* or at the petition of an unhappy creditor.[150]

Corporate rescue of safeguard proceedings in France have a few distinct differences from the proceedings in Zimbabwe and South Africa. The aim and objectives of all proceedings are the same and that is to avoid liquidation and assist the company in recovery. The interest of all the concerned parties are balanced out in a bid to ensure a win-win situation.

[145] Van Loggenberg (n 72 above)448.
[146] Weber (n 86 above) 288
[147] Fedration Bancaire Franqaise, "Sauvegarde des entreprises: mieux associer les creanciers au redressement des entreprises en difficulti" accessed on 2 February 2020.
<http://www.fbf.fr/Web/intemet/contentpresse.nsf/0/7a8e61d51897f3fac1256dea0052cOab?OpenDocument.>
[148] C. Weil, "*Bankruptcy and JudicialLiquidation"* Bankruptcy and Judicial Liquidation (1996) 43.
[149] Ibid, 45
[150] Rushworth (n 77 above)190.

CHAPTER 5

5.1. LESSONS

As stated in the first chapter, the main objective of insolvency law, whether individual or corporate, is to ensure that creditors who lend their money have a recourse in the circumstance where the debtor is unable to pay their debts. Insolvency law ensures that a system is put into place that enables that the creditors recover as much as they possibly can from the debtor. The nature of insolvency law is therefore pro-creditor as it aims to ensure that the creditor's interests, which are being undermined by the debtor, are protected. This thesis aims in no way to state that this must be changed and that the wrong-doer, I, e- the debtor, must be protected by the law and allowed to go scot free. Value must however be placed on the fact that " a company is an integral part of the community in which it does business, and it has a direct impact on the economic and social well-being of that community through its employees, suppliers and distributors, to mention a few. Consequently, the failure of the company affects more people than merely its employees and its creditors".[151] This thesis, aims to highlight the necessity of considering the interest of all involved instead of the one-side creditor based approach that was used. The law of insolvency must aim to achieve its objective, in a way that is not oppressive to the debtor and in a way that ensures that the best interests of the debtor, the creditor and society are all respected and promoted.

In most cases, to consider the debtor's interest is to also consider the interests of the society at large. When the debtor is given time to try and rehabilitate the business and a moratorium placed on all other activities, this will benefit not only the business, but the employees and the community and the country. The life of a company and its long-term viability is essential for growth. This is all the truer in developing countries. "A developing economy cannot lightly permit companies which help to comprise its industries and commercial enterprises to be dissipated by winding up and dissolution due to temporary

[151] Cassim (n 44 above) 862.

setbacks, where, if granted a moratorium, they would be able to overcome their difficulties, discharge their debts and become successful concerns. [152]

In chapter 1 of the cork report[153], it is stated that "In England, as elsewhere, changes in the society and in the commercial life of the community since the Nineteenth Century require the law of Insolvency to be reviewed and refashioned to meet the needs of our own time." This still applies to many Insolvency law systems all over the world. Zimbabwe has made an effort to "review and refashion" the law in accordance with the times and with the commercial life of Zimbabwe. In a time where the world is progressing towards a more balanced approach with all laws, Insolvency law regimes all around the world are changing in order to take account of the debtor and to protect them.

Insolvency law by nature is created however, to right a wrong. Its main objective is to ensure that the creditor who gave his money to the debtor with the understanding that he will be paid back, will actually get paid back regardless of the debtor's situation. As the debtor is the wrong doer, the defaulting party, it is clear cut that the law must ensure that the situation is made right, and the creditor is paid what they are owed. Failure to do so, will disincentivise all creditors and the much-needed role played by credit in society will be diminished, if not completely ended. As stated in the Cork report, "credit is the lifeblood of the modern industrialised economy" and so in order for Zimbabwe to develop its economy and honour its open for business mantra, it is essential that the role of credit and all it comes with be maintained and protected.

In recent years, there has been a large shift in the realisation that insolvency law must not only protect creditors and the role of credit in society, but it must also ensure that throughout the insolvency proceedings the interests of debtors are considered along with the interests of society as well. We see in the analysis of France's Insolvency system, in chapter 4, that France has moved progressively in their insolvency law and aims to preserve the enterprise an protect employees first before considering the benefit to creditors. Countries like South Africa and Zimbabwe, through the different mechanisms, however, are still focused on the interests of creditors. This as stated in my introductory

[152] Cilliers (n 45 above) 478.
[153] K Cork, *Report of the Review Committee- Insolvency Law*, London H.M.S.O,1982.

chapter, puts corporate bodies at risk of being wound up merely because it benefits the creditor. This approach is opposed to France's approach. The preservation of the enterprise will not only benefit the creditor as they will eventually get paid the debt owed to them, but it also benefits the employee as well as the economy of the country and therefore society at large.

Zimbabwe's new Insolvency regime is largely pro-creditor. The new regime is not as staunchly pro-creditor as the previous one was, and a few changes have been made that attempt to balance out the law and offer some sort of protection and consideration of debtors. One such example, is the introduction of corporate rescue. Corporate rescue is deemed as pro-debtor as its main focus is the rehabilitation of the whole or part pf the business. It considers the interest of the employees and others on par with those of the creditors. Despite these changes, the law cannot be qualified as pro-debtor. After looking at France's Insolvency system, it is clear what a pro-debtor nation looks like and Zimbabwe is far from there.

As shown above, France has set one clear and concise test for insolvency. This test does not include contingent or prospective liabilities. This makes the test for insolvency simpler and clearer therefore making it more difficult for the creditor to have a winding up order granted on the basis of imaginary things like future debts. If anything, Zimbabwe could have merely neutralised the effect of the contingent and prospective liability phrase as was done in South Africa by including that only 'reasonably foreseeable' contingent and prospective liabilities may be included.

Zimbabwe could also learn from the limitation of set-offs as seen in France. The narrower the clause, the more difficult it will be for creditors to beat *concursus creditorum* and seek their debts be set off. All Countries have transitioned into the use of Corporate rescue measures rather than judicial management. This move is a success for the debtors, the employees, and the society at large as the focus on rehabilitating the business is made a priority and measures like a moratorium on legal proceedings put in place. Employees are also protected throughout corporate rescue and are given a chance to participate in the whole process as 'affected persons. This move is a success for business and human

rights advocates who endeavor to ensure that human rights are protected within and by the Corporate world.

It must also be highlighted, that the courts approach to the law will also have a large factor in determining whether the law pro-creditor or pro-debtor. Some provisions of both the old insolvency framework granted the courts discretion. That discretion was more likely than not used to the benefit of the creditor. This is due to the view of insolvency law being a means to right a wrong. The debtor is usually seen as a wrong doer. Like the old framework, the new insolvency Act also gives the court discretion, stating that they must do what is just and equitable. If we are not careful, history will repeat itself, with old precedents being cited as reasons for judgements and no change being made.

The interest of the creditors being a main priority for the new Zimbabwean legal regime, will, to some extent, be beneficial. It will entice foreign investment and lines of credit as lenders will be sure that their interest will be prioritised if the company they lend to experiences a set-back and is unable to pay debts. Creditors are therefore reassured that no matter what happens they will receive some sort of payment. In addition to this, the inclusion of the business rescue proceedings ensures that at some point, other interests other than those of the creditors are also considered. This helps strengthen the President Mnangagwa's 'Zimbabwe is open for Business' mantra as the law largely protects lenders.

In my view, the transition to the use of Corporate Rescue was a major one and it will assist substantially in levelling out the playing field with the other pro-creditor provisions of the Act. It is true that the Act is not perfect and there could be some things that were changed and added, however, I believe that where it is important the Act has considered what is necessary and has maintained a balance between maintaining the protection for creditors while also ensuring that the Company and the employees are protected in the process of corporate rescue

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