
**UNIVERSITY OF ZIMBABWE**

**FACULTY OF LAW**

# The new Insolvency Act [Chapter 6:07] and The Protection of the Right of Employees: Gloom or Glory for the Zimbabwean Employee?

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## DEDICATION

TO my late father **ROBERT MARWA (Snr)** who could not live beyond 18 October

2019 to see me graduate *cum laude*

**REST EASY DAD...**

## ABSTRACT

The new Insolvency Act (Chapter 6:07) guarantees limited rights of workers in their capacity as creditors and as employees. In doing so, there is a convergence of insolvency law and labour law. These are legal disciplines with contradictory philosophies. The interests of creditors and those of employees' conflict. This study ascertains the rights of employees on insolvency of the employer in Zimbabwe. It attempts to balance the competing interests of employees and creditors. The review is informed by international best practices. The article establishes that Zimbabwe follows the Model Two: Bankruptcy Preference Approach. It brings to the fore fundamental weaknesses inherent with this approach in the Zimbabwean context. The article argues that the protection of employees' rights on insolvency can be enhanced if Zimbabwe follows the Pro-Employee Approach and the Bankruptcy Priority-Guarantee Fund Approach. It concludes by advocating for the alignment of the Insolvency Act with international best practices, the Constitution and labour legislation.

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# CHAPTER 1

# INTRODUCTION AND CONCEPTUAL OVERVIEW OF THE STUDY

## 1.1 INTRODUCTION

On the 25th of June 2018, Zimbabwe enacted a new Insolvency Act (Chapter 6:07),[1] which repealed the Insolvency Act (Chapter 6:04). The purpose of the new Insolvency Act is to provide for the administration of insolvency and assigned estates and the consolidation of insolvency legislation in Zimbabwe which was perceived to be fragmented.[2] The new Insolvency Act is Zimbabwe's first ever stand-alone insolvency legislation ushering a more comprehensive regulatory framework than previously. The reason for a lack of this kind of insolvency legislation is not clear, especially in view of regional and international trends that justified the significance of such a law. Now that such a law now occupies the Zimbabwean statute books, new debates and discourses have arisen. An interesting angle not given much discussion prior to the enactment of the new Insolvency Act relates to the protection of rights of employees in circumstances of insolvency. At this stage, the fundamental ideologies of insolvency law and labour law converge creating conflict. In light of the foregoing, this study analyses the protection of employee rights on a company's insolvency. The fundamental ideologies of insolvency law and labour law are examined in an attempt to harmonise two legal disciplines with contradictory philosophies. The study is informed by international standards and a comparative study of employee rights on insolvency is done with the South African jurisdiction.

## 1.2 JUSTIFICATION FOR EMPLOYEE PROTECTION

In principle, insolvency can be seen as an inevitable aspect of business activity and arises when a company is unable to pay its debts.[3] Others have defined the concept as the "debtor's ultimate inability to meet his financial commitments, upon a balance of liabilities and assets, the former exceed the latter with the consequence that it is impossible for any of the liabilities to be discharged in full at the time of falling due."[4] Section 3(1) of the Insolvency Act codifies this definition and provides as follows: "a

[1] Act No. 7 of 2018 gazetted in Government Gazette GN 413/18.
[2] See preamble to the Insolvency Act.
[3] L. Madhuku "Insolvency and the corporate debtor: Some Legal aspects of creditors rights under corporate insolvency" (1995) *Zimbabwe Law Review* 89 at 90.
[4] I. F. Fletcher *The Law of Insolvency* (2017) at 1.

debtor is deemed to be unable to pay his or her debts if the debtor is unable to pay debts which are due and payable, or the debtor's liabilities exceed the value of the debtor's assets."

At common law, contracts of employment of employees are automatically terminated upon insolvency of the employer and the subsequent sequestration or liquidation.[5] Section 40(1) of the Insolvency Act captures the common law position and states that all contracts of employment between an insolvent employer and its employees automatically terminate on the date of liquidation, subject to the right of employees to claim compensation for loss of employment[6] and the right to claim terminal benefits.[7] It is within this context that insolvency law gets linked to labour law and specifically the protection of employee's rights. The Insolvency Act protects employee's entitlements in cases of employer insolvency and defers issues to do with payment of compensation for loss of employment and terminal benefits to the Labour Act (Chapter 28:01). In an instant, insolvency law and labour law intertwine and apply concurrently to the same situation. The situation is elegantly described by Van Eck in the following terms:

> *The juncture at which insolvency law and labour law meet is an area of legal regulation where the tension between commercial interests, on the one hand, and the general right of employees to social protection, on the other, is arguably at its greatest.*[8]

This convergence of legal disciplines with seemingly contradictory philosophies results in conflict of interest. Therefore, insolvency law balances the competing interests of all stakeholders of a company in the event of corporate failure.[9] Employees are an important constituent of a company deserving protection, especially upon liquidation of a company. It is common cause that employees are unsecured creditors. They do render their services in advance and are only paid remuneration after performing work.

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[5] M. Brassey "The effect of supervising impossibility on a contract of employment" (1990) *ActaJuridica* 22 at 24; S. Lombard & A. Boraine "Insolvency and employees: An overview of statutory provisions" (1999) *De Jure* 300 at 301; Carolus P. *et al* "Effects on the employment relationship of the insolvency of the employer: A worker perspective" (2007) 11 *Law, Democracy and Development* 105.
[6] Section 40(2) of the Insolvency Act.
[7] Section 40(3) of the Insolvency Act.
[8] S. Van Eck *et al* "Fair labour practices in South African insolvency law" (2004) 121 *The South African Law Journal* 902 at 907.
[9] F. I. Finch "The measures of insolvency law" (1997) 17 *Oxford Journal of Legal Studies* 221 at 227.

Remuneration has characteristics comparable to alimony since a worker depends on it for survival.[10]

Unfortunately, employees cannot insure themselves against employer insolvency. They do not have secured rights in the event of company failures. This is different with secured creditors such as banks who have a first call on assets of the employer over which they would have obtained security.[11] Therefore, employees are in most cases vulnerable to corporate collapses as these inevitably result in job losses and unmet employee entitlements. In light of the foregoing, employees are considered to deserve more protection than other creditors of a company who are better placed to assist and protect themselves upon the insolvency of the company.[12] From a labour law perspective, the purpose of insolvency is to protect employees against the consequences of insolvency. In addition, insolvency law has other related purposes depending on the perspectives of the legal system involved and these include the following: to prevent self-help for a collective process of creditors, maximising returns for creditors, restoring the insolvent to stability or profitable trading and to identify the causes of insolvency and impose appropriate remedial action and sanctions.[13]

This study analyses the effects in Zimbabwean law on the rights of employees resulting from a company's insolvency. It reconciles the protections afforded by insolvency legislation and those available to employees in the Labour Act. It also compares these effects to the rights of employees on insolvency in South Africa and international standards.

### 1.3 STATEMENT OF THE PROBLEM

Until recently, Zimbabwean insolvency law remained largely unconcerned with employee's rights. Added to this, the old Companies Act [Chapter 24:03][14] was largely

[10] A. S. Bramstein "The protection of workers claims in the event of the insolvency of the employer: From civil law to social security" (1987) 126 *International Labour Review* 715 at 717.
[11] M. Bhadily & P. Husie "Australian employee entitlements in the event of insolvency: Is an insurance scheme an effective protective measure" (2016) 37 *Adelaide Law Review* 247
[12] J. P. Sarra "Widening the insolvency less: The treatment of employees claims" in J Omar (ed.) *International Insolvency Law: Themes and Perspectives* (2008) 295.
[13] T. H. Jackson "Bankruptcy, non-bankruptcy entitlements and the creditors' bargain" (1982) 91/5 *Yale Law Journal* 857; C. Nyombi "The objectives of corporate insolvency law: Lessons for Uganda" (2018) 60/1 *International Journal of Law and Management* 2, A. Hamish "*The Framework of Corporate Insolvency Law"* (2017).
[14] Repealed on the 13th of February 2020 by the enactment of the Companies and Other Business Entities Act [Chapter 24:31]

silent on the position and status of employees on liquidation. For this reason, employees were generally referred to as the 'lost souls of insolvency law.'[15] Very little attention was bestowed on the interests of employees. This resulted in a vacuum in research in this field. Employees are a vulnerable group which deserves protection on liquidation of a company. The new Insolvency Act has since introduced specific rights of employees on insolvency. Thus, this study seeks to ascertain the nature of employee rights guaranteed by the Insolvency Act.

It must also be noted that labour legislation also affords employees certain specific protections. The Labour Act has always been in existence prior to the enactment of the Insolvency Act with the effect that some of the rights in the Insolvency Act are a restatement of labour rights in the Labour Act. Such a development necessarily carries with it the attendant difficulties of reconciling rights in the Labour Act and those in the Insolvency Act. As if that is not enough, these two legal disciplines appear to have contradictory philosophies. The challenge one is faced with, in such an area of the law that encompasses a variety of interests, is to marry them in a manner that will be fair and just for all stakeholders or in manner that enhances the rights and interests for all stakeholders with little compromise.

In light of the foregoing, the research raises the following questions:

a) What is the exact scope and nature of employee rights protected in insolvency law and labour legislation in Zimbabwe?
b) What is the relationship between employee protections in the Insolvency Act and the Labour Act?
c) Are the protections of employees on the insolvency of a corporate employer in Zimbabwe consistent with international best practices?
d) Are employee rights on the insolvency of a corporate employer overprotected in Zimbabwe at the expense of other stakeholders?

## 1.4 OBJECTIVES OF STUDY

The main objective of this study is to analyse the effects in Zimbabwean law on the rights of employees resulting from a company's liquidation. Put differently, it seeks to

[15] F. I. Finch *Corporate Insolvency: Perspectives and Principles* (2017) 778.

ascertain the scope of the rights of employees on insolvency of a company. The study is informed by international standards and also undertakes a comparative analysis with South Africa. The purpose of the comparative study is to evaluate whether Zimbabwean law is in line with international best practices and other jurisdictions as far as the treatment of employees and employee rights on the insolvency of a corporate employer is concerned. The scope of employee protection is investigated in order to establish whether employee rights are overprotected in Zimbabwe because if they are this may defeat the purpose of insolvency law.

## 1.5 SCOPE OF STUDY

This contribution reviews the effects in Zimbabwean law on the rights of employees resulting from a company's insolvency. The study commences with an overview of employee protection under international law. These standards provide a benchmark and guidelines for interpreting domestic legislation. This is followed by an analysis of the extent to which employees of an insolvent corporate employer are protected under the broad right to fair labour practices in the Constitution of Zimbabwe, the Insolvency Act [Chapter 6:07] and the Labour Act [Chapter 28:01].

The following specific employee rights are analysed:

1.5.1 The broad right to fair labour practices,

1.5.2 The right to commence liquidation,

1.5.3 The right to participate in consultations during liquidation,

1.5.4 The right to compensation for loss of employment,

1.5.5 The right to be paid terminal benefits and rights on transfer of an undertaking.

To put the study in its proper context, a comparative analysis is undertaken with the jurisdiction of South Africa. The new Insolvency Act also regulates corporate rescue procedures and rights of employees on corporate rescue.[16] Due to logistical constraints the study does not deal with protection of employee rights during corporate rescue.

[16] See Part XXIII Sub Part A and E of the Insolvency Act.

## 1.6 METHODOLOGY

The research adopts a doctrinal approach in analysing the position of employee rights on insolvency of a company in Zimbabwe. This is done by employing a descriptive and analytical approach to desk, electronic and other materials available on the subject matter. This legal approach calls for an in-depth illustration, discussion and analysis of relevant legislation, the common law, international standards and authoritative texts.

The study also adopts a comparative approach by examining employee protections on insolvency in South Africa. The South African legal system has been chosen because Zimbabwe and South Africa share the same legal system which is based on Roman Dutch common law with an English law influence. Other jurisdictions such as the United Kingdom and Australia are referred to in passing.

## 1.7 FRAMEWORK OF THE STUDY

This study consists of the following five chapters.

**1.7.1 Chapter 1** introduced the study by highlighting preliminary aspects such as the introduction, the rationale for employee protection in insolvency proceedings, statement of the problem, research objectives, scope of study, methodology and a framework of the research.

**1.7.2 Chapter 2** gives an overview of the protection of employee rights in international law and the Constitution of Zimbabwe. The following standards are analysed, the International Labour Organisation (ILO) Protection of Workers Claims (Employer's Insolvency) Convention 173 of 1992, Protection of Workers Claims (Employer's Insolvency) Recommendation 180 of 1992, ILO Protection of Wages Convention, UNCITRAL Model Law on Cross Border Insolvency, 1997 and the OHADA Insolvency Act, 1999.

**1.7.3 Chapter 3** analyses the domestic framework protecting employee rights on insolvency. It commences with a discussion of the Insolvency Act, followed by an analysis of the Labour Act.

**1.7.4 Chapter 4** gives a comparative analysis and considers the position of employees in South Africa.

**1.7.5 Chapter 5** concludes the study and contains recommendations regarding amendments to existing legislation that may be necessary to provide adequate protection to the rights of employees.

# CHAPTER 2

# INTERNATIONAL INSOLVENCY LAW AND INTERNATIONAL LABOUR LAWS

## 2.1 INTRODUCTION

International trends provide guidance and a framework that serves as a point of departure in ensuring that Zimbabwe is on track and making progress towards aligning its laws with international best practices. In international insolvency law it is a well-known principle that employees must be protected in the event of corporate failure. This protection is also recognised domestically in the 2013 Constitution which guarantees the broad right to fair labour practices in section 65(1). This Chapter reviews the protection of employee rights on insolvency in international law and the Constitution. This is critical in assessing whether the Zimbabwean domestic framework is consistent with international law and fully gives effect to constitutional labour rights.

## 2.2 THE ROLE OF INTERNATIONAL LAW

International law is an important source of law in Zimbabwe. The Constitution of Zimbabwe recognises the importance of international law. For example, section 46 (1) (c) of the Constitution states that courts must take into account international law and all treaties and conventions to which Zimbabwe is a party when interpreting legislation.[17] Section 326 of the Constitution recognises that customary international law is part of Zimbabwean law, unless it is inconsistent with the Constitution or an Act of Parliament. In addition, one of the purposes of the Labour Act, which is the principal labour legislation in Zimbabwe, is to give effect to the international obligations of Zimbabwe as a member State of the International Labour Organisation (the ILO). Therefore, the Zimbabwean framework on protection of rights of employees in cases of insolvency must be analysed against international standards, especially those made under the auspices of the ILO.

Madhuku identifies five main roles of international law in the Zimbabwean context.[18] Firstly, where international law is incorporated into law by an Act of Parliament it

[17]Section 327(6) of the Constitution also requires courts to promote consistency with international treaties binding on Zimbabwe.
[18]L. Madhuku *Labour Law in Zimbabwe* (2015) 519.

becomes a direct source of law. Secondly, it can be used directly to resolve legal disputes by virtue of section 326 of the Constitution. Thirdly, it can be used as a guide to interpreting unclear domestic law in terms of section 46(1)(c), 326(2) and 327(6) of the Constitution. Fourthly, international law can also be used as a basis of developing the common law in terms of section 46(2) or section 176 of the Constitution. In these circumstances it is used as a basis of either the interests of justice or the spirit of the Constitution. Lastly, international law can be invoked to strengthen a decision based on domestic law. It gives content to domestic law.

## 2.3 SPECIFIC INTERNATIONAL STANDARDS

### *2.3.1 The Protection of Workers Claims (Employers Insolvency) Convention 173 of 1992*

The principal international labour standard that protects rights of employees on insolvency is the ILO, Protection of Workers Claims (Employers Insolvency) Convention 173 of 1992 (C 173/92).[19] It defines insolvency as 'situations in which proceedings have been opened relating to an employer's assets with a view to the collective reimbursement of its creditors.'[20] In addition, it covers situations in which workers claims cannot be paid by reason of the financial situation of the employer.[21] Part II of the Convention protects workers claims by means of a privilege. In essence, in the event of insolvency workers claims are paid out of the assets of the insolvent employer before other creditors are paid.[22] The privilege covers arrear salaries and benefits, cash in *lieu* of vacation leave and compensation for loss of employment.[23] Impliedly, the Convention guarantees employees the right to receive terminal benefits and compensation for loss of employment. These entitlements are given preferential treatment and must be paid on termination of the contract of employment. This privilege is also recognised in Article 11 of the ILO Protection of Wages Convention, 1949. Lastly, the payment of workers claims against their employer arising out of their employment must be guaranteed through a guarantee institution when payment

[19]The Convention is supplemented by the Protection of Workers Claims (Employer's Insolvency) Recommendation 180 of 1992.
[20]Article 1.
[21]Article 1 (1).
[22]Article 5.
[23]Article 6.

cannot be made by the employer because of the insolvency.[24] In other words, member States are encouraged to establish employee protection schemes.[25]

### *2.3.2 United Nations Commission on International Trade Law [UNCITRAL] Model Law on Cross Border Insolvency 1997*

The Model Law on Cross Border Insolvency is a legislative guideline adopted in 1997 by the United Nations Commission on International Trade Law (the UNCITRAL). The Model Law gives special regard to cross border transactions on insolvency in light of globalisation of international business. The protection of employment is established as one of the broad goals of an insolvency regime. In order to maintain stability in any legal regime the insolvency law of a State must strive to balance its economic, social and political goals.[26] However, the Model law does not make provision for any meaningful employee rights on insolvency. It must therefore be read with the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes, 2001. These were adopted by the World Bank in 2001 and subsequently revised in 2005, 2011 and 2016. The principles are also concerned with cross border insolvency. In respect of employees the Principles state that workers are a vital cog in an organisation and careful consideration must be given to balancing their rights and those of other creditors.[27]

Recently, the World Bank and the UNCITRAL, in consultation with the International Monetary Fund designed the Insolvency and Creditor Rights Standard (the ICRS) to represent the international consensus on best practices for evaluating and strengthening national insolvency and creditor systems. The ICRS combines the UNCITRAL Model law on Cross Border Insolvency and the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes. Zimbabwe has since domesticated the UNCITRAL Model law in Part XXV of the new Insolvency Act which is dedicated to cross border insolvencies.

[24]Article 9.
[25]For a detailed discussion of C173/92 see J. Omar (ed.) *International Insolvency Law: Themes and Perspectives* (2008, Ashgate Publishing); B. Bartolomei *Employees Claims in the event of Employer Insolvency in Romania: A Comparative Review of National and International Regulations* (2011, ILO Publications).
[26]Article 15 of the Model law.
[27]Principle C12.4.

### *2.3.3 Organisation for the Harmonisation of Business Law in Africa [OHADA] Insolvency Act 1999*

The Organisation for the Harmonisation of Business Law in Africa (OHADA) was established by the signing of the Port Louis Treaty on the Harmonisation of Business Law in Africa in October 1993. It strives for the harmonisation of business law in Africa and has since adopted several legislative guides aimed at fostering regional integration and development of member States.[28] Relevant to this discourse is the OHADA Insolvency Act adopted in January 1999. Its provisions are inspired by the European Convention on Certain Aspects of Bankruptcy, 1990 and the UNCITRAL Model law on Cross Border Insolvency, 1997.[29] In principle the OHADA Insolvency Act advocates for the adoption of uniform insolvency laws for regional blocs and Africa as a whole.[30] In respect of employees' rights, the OHADA Insolvency Act gives workers claims for any outstanding wages priority over other creditors on liquidation.[31] However, the amount payable should be determined by domestic laws of member States.

Remarkably, the Act does not impose any obligation on member States to establish a State guarantee fund or employee protection scheme for the payment of employees' entitlements on insolvency. This is obviously on the consideration of the paucity of resources that plague many African states. It is submitted, however, that the failure of the Act to make such a provision is a diminution of employee rights upon the insolvency of a corporate employer in member states. Even those states that have the wherewithal to make an attempt do not feel obliged to do so on account of this statutory inadequacy.

## 2.4 THE ROLE OF THE CONSTITUTION

On the 22nd of May 2013, Zimbabwe enacted a new Constitution entitled Constitution of Zimbabwe Amendment (No. 20 of 2013) (the 2013 Constitution). This Constitution was a product of the efforts made by the Government of National Unity (the GNU)

[28]Article 3 of the OHADA Treaty.
[29]Related regional instruments include the European Convention on Insolvency Proceedings, 2000 and the European Union Regulation on Insolvency Law, 2000.
[30]For a detailed discussion of the OHADA Insolvency Act see N. D. Leno "Development of a uniform insolvency law in SADC: Lessons from OHADA" (2013) 57/2 *Journal of African Law* 259-282.
[31]Article 95-96 of the OHADA Insolvency Act.

established in February 2009 after the disputed 2008 general elections[32] and it replaced the Constitution of Zimbabwe, 1980 (the 1980 Constitution). The 1980 Constitution was chiefly a document crafted to transfer power from colonial Rhodesia to the people of Zimbabwe on independence in April 1980.[33] The 1980 Constitution had become outdated, bulky, unclear and inaccessible given that it had been amended a record nineteen times during its three decades of existence. Thus, it was accepted that there was a need for a home grown Constitution which was people driven, inclusive and democratic.[34]

The 2013 Constitution is a marked departure from the typical Westminster model Constitution of 1980. For instance, Chapter 1 of the 2013 Constitution is dedicated to founding provisions amongst which features the supremacy of the Constitution[35] as well as other founding values and principles.[36] Chapter 2 sets out the national objectives[37] which establish principles of State policy.[38] One of the fundamental policies embedded in section 24 of the 2013 Constitution is that of work and labour relations. In order to give effect to the national objectives, Chapter 4 of the Constitution contains a Declaration of Rights, which entrenches fundamental human rights and freedoms. By virtue of the supremacy of the Constitution apparent in section 2, these rights and freedoms are protected from being encroached upon by the legislative and executive organs of government. Unlike the 1980 Constitution, which was restricted to basic civil and political rights, the 2013 Constitution has not only broadened these rights, but it has also been progressive in guaranteeing socio-economic rights, cultural rights and solidarity rights.[39] For the first time in the history of Zimbabwe, the 2013

[32] The GNU was created by the three political parties in Parliament, namely ZANU (PF), MDC-T and MDC-M. The GNU was ushered by the Global Political Agreement (the GPA) signed on 15 September 2008. Article 6 of the GPA facilitated the establishment of a Select Committee of Parliament known as COPAC which spearheaded the Constitution making process.
[33] See Article 6 of the GPA.
[34]Manyatera G. 'The Constitution of the Republic of Zimbabwe – Commentary' in Wolfram R., Grate R. and de Wet E. (eds.) *Constitutions of the countries of the world* (New York, Oxford University Press 2014) 8; Madebwe T. 'Constitutionalism and the new Zimbabwean Constitution' (2014) (1) *MSU Law Rev* 6-19.
[35] Doctrine of constitutional supremacy is embedded in s 2(1) of the 2013 Constitution which provides that the Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.
[36] See s 3 of the 2013 Constitution.
[37] In terms of s 8 of the Constitution these objectives must guide the State and all institutions and agencies of government in formulating and implementing laws. In addition, regard must be had to these objectives when interpreting the obligations of the State under the Constitution.
[38] It must be noted that that these objectives are not justiciable but this does not mean that they are of a lesser value. Courts must breathe life into these principles of State policy. See Mosito Kananedo E. K. C. 'The constitutionalisation of Labour Law in Lesotho' (2014) (21) *Lesotho Law Journal* 33-58.
[39]Manyatera G. 'The Constitution of Republic of Zimbabwe – Commentary' (2014) 15-18.

Constitution entrenches socio-economic rights which include labour rights.[40] The framework for the regulation of labour law and employment rights is established in section 65 of the 2013 Constitution, which provides as follows:

> **Labour rights**
>
> (1) Every person has the right to fair and safe labour practices and standards and to be paid a fair and reasonable wage.

### *2.4.1 The Constitutional Right to Fair Labour Practices*

The constitutional right to fair labour practices is available to every person including employees of an insolvent company and the insolvent employer. However, the term *'fair labour practices and standards'* is not defined in the Constitution. In *Greatermans Stores (1979) (Pvt) Ltd t/a Thomas Meikles Stores & Another v The Minister of Public Service, Labour and Social Welfare & Another,*[41] it was held that for a person to allege an unfair labour practice as a violation of section 65 (1) of the Constitution, the conduct complained of must constitute one of the acts or omissions listed by the Labour Act as unfair labour practices. The following requirements must be satisfied before conduct, positive or otherwise, can be held to fall within the definition of unfair labour practice:

> (i) The "act or omission" must constitute a "labour practice". An "act" or "omission" may refer to either a single act or a single inaction which may not have lasting consequences, and having occurred during the subsistence of the employment relationship, that is, in the period between the conclusion of the contract of employment and its termination. The word "practice" suggests that the employer must have actually done something or declined to do something.
>
> (ii) The unfair labour practice can arise only if the employer does something or refrains from doing something ("act or omission"). In Zimbabwe, the employer must have actually done something listed in Part III of the Act, which act or omission the employee claims the employer should have done or should have refrained from doing.

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[40] The 1980 Constitution did not guarantee any labour rights. It only had a vertical application in that its application was restricted to the State and its citizens. It was not applicable to private contractual relationships such as the employment relationship. Its Declaration of Rights impacted on labour law and employment rights indirectly through the following provisions, s 14 – protection from slavery and forced labour; s 15 – protection from degrading and inhuman treatment; s 16 – provisions to secure protection of law; s 21- protection of freedom of assembly and association and s 23 – protection from discrimination. For a detailed discussion of the impact of these rights on labour and employment rights see Gwisai M., *Labour and employment law in Zimbabwe: Relations of work under neo-colonial capitalism* (Harare, Zimbabwe Labour Centre 2006) 37-39.

[41] CCZ 2/18.

(iii) The unfair labour practice must be between an employer and an employee. In Zimbabwe, however, the unfair labour practice may be between the employee and a trade union, a workers' committee or any other person or sexual conduct amounting to an unfair labour practice.

(iv) The unfair labour practice must involve one of the practices specified, for our purposes listed in Part III of the Act or declared to be so in terms of any other provision of the Act, and

(v) The act or omission complained of must be unfair.[42]

It appears the Constitutional Court has adopted a narrow view of the concept of fair labour practices which is limited to the exhaustive list of unfair labour practices in the Labour Act. This narrow view, it is respectfully submitted, does not find any support in the purpose of section 65 (1) of the Constitution, which is the protection of employees.[43] The constitutional right to fair labour practices must be viewed as a general unfair labour practice. A purposive interpretation of section 65 (1) demands the adoption of a broad view regarding the scope of labour practices. They are not limited to those prescribed in the Labour Act but to all practices related to and emanating from the employment relationship. In this regard Madhuku argues that, 'if a practice is not specified as unfair in the Labour Act, it cannot be raised as an 'unfair labour practice' under the Act, but it may be an infringement of the right to fair labour practices protected by the Constitution.'[44] The Labour Act cannot anticipate, and therefore prescribe, the boundaries of fairness or unfairness of labour practices. The complex nature of labour practices viewed in light of the purpose underlying constitutionalising labour rights does not create room for a narrow approach. The right to fair labour practices is a fluid and comprehensive concept capable of covering any aspect of the employment relationship.

Commenting on a similar right in section 23 (1) of the Constitution of South Africa, in *National Entitled Workers Union v CCMA*,[45] the concept of the right to fair labour practices was explained as follows:

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[42] n30 above.
[43] J. Tsabora & T. G. Kasuso "Reflections on constitutionalising of individual labour law and labour rights in Zimbabwe" (2017) 38 *Industrial Law Journal* 43 at 45.
[44] L. Madhuku *Labour Law in Zimbabwe* (2015) at 78.
[45](2003) 24 *ILJ* 2335 (LC).

The concept of a fair labour practice recognises the rightful place of equity and fairness in the workplace. In particular, the concept recognises that what is lawful may be unfair. T. Poolman neatly summarises the strength and nature of the concept. He says in Principles of Unfair Labour Practice (Juta) at 11:

> 'The concept "unfair labour practice" is an expression of the consciousness of modern society of the value for the rights, welfare, security and dignity of the individual and groups of individuals in labour practices. The protection envisaged by the legislature in prohibiting unfair labour practices underpins the reality that human conduct cannot be legislated in precise terms. The law cannot anticipate the boundaries of fairness or unfairness of labour practices. The complex nature of labour practices does not allow for such rigid regulation of what is fair or unfair in any particular circumstance.'

Labour practices draw their strength from the inherent flexibility of the concept 'fair'. This flexibility provides a means of giving effect to the demands of modern industrial society for the development of an equitable, systematized body of labour law. The flexibility of 'fairness' will amplify existing labour law in satisfying the needs for which the law itself is too rigid."

The constitutionalising of the right to fair labour practices does not only impact on labour legislation but also insolvency law. It has far reaching consequences on the interpretation of rights of employees in Zimbabwean insolvency law. For instance, the right to fair labour practices may potentially conflict with, or restrict, other fundamental rights that underpin the insolvency regime such as, for example, the right of creditors to be treated equally, as reflected in the *pari passu* principle, and also the property based rights of secured creditors.[46] In addition, it can be argued that the right to fair labour practices encourages the placement of employees in a separate category of creditors with preferential claims. It is therefore necessary to analyse employees' rights which fit under the overarching right to fair labour practices which are relevant when an employer becomes insolvent. In doing so, the difficulties occasioned by the conflict between the different philosophies underlying insolvency law, company law

[46] S. Van Eck *et al* "Fair labour practices in South African insolvency law" (2004) 121 *The South African Law Journal* 902- 925.

and labour law are highlighted.[47] Critical is the need to balance the employers' commercial interests on one hand, and the general right of employees to social protection, on the other hand.[48]

## 2.5 CONCLUSION

This Chapter discussed employee protection on insolvency in international law and the Constitution. The first part reviewed several international standards. It was established that the protection of employees on insolvency in international law is an issue for concern. It was demonstrated that employees are guaranteed the right to payment of compensation for loss of employment, terminal benefits and arrear salaries in terms of international insolvency law. These are protected by way of privilege. Furthermore, it was ascertained that member States are encouraged to establish guarantee funds for the payment of employee entitlements on insolvency. The second part of the Chapter dealt with the protection of employees on insolvency in terms of the Constitution. The broad right to fair labour practices in section 65(1) of the Constitution compels the placement of employees of an insolvent employer in a separate category of creditors with preferential claims. This is consistent with the treatment of such employees in international law. Therefore, Chapter 3 will analyse the domestic framework against international insolvency law and the Constitution.

[47]For example, whilst labour law seeks to protect the interests of employees by promoting job security and continuity of employment, insolvency law focuses on the closing down of business, its liquidation and the equitable distribution of liquidated assets amongst creditors. See Van Eck S. *et al* n35 above at 907.

[48] B. Jordaan "Transfer, closure and insolvency of undertakings" (1991) 12 *Industrial Law Journal* 935 at 935; E. P. Joubert "A comparative study of the effects of liquidation or business rescue proceedings on the rights of the employees of a company" (2018) Unpublished LLD Thesis *University of South Africa* at 15.

# CHAPTER 3

# THE STATUTORY FRAMEWORK OF EMPLOYEE RIGHTS ON INSOLVENCY

## 3.1 INTRODUCTION

Prior to the adoption of the new Insolvency Act, the protection of employee rights in the event of corporate failure was not given much attention. In other jurisdictions, employees and their rights in insolvency law were referred to as the "lost souls" of insolvency law.[49] Zimbabwe was not an exception to this reality. Employees would play an important role in the success of a company but on its demise the law would do little to protect them. It was against this background that the legislature in its wisdom saw it fit to enact the new Insolvency Act with enhanced provisions on protection of employees' rights in liquidation. The old Act was regarded as outdated when compared to the insolvency law regimes of other jurisdictions and international law. It did not protect employees of an insolvent employer in any meaningful manner such that employees had to rely on labour legislation for protection. The new Insolvency Act signifies a paradigm shift as it affords employees of an insolvent company specific protections. This Chapter analyses domestic legislation which protects employees' rights in insolvency namely, the Insolvency Act and the Labour Act. There is a general perception that the Insolvency Act is insensitive to labour rights and is misaligned with the Labour Act. This Chapter attempts to reconcile these statutes.

## 3.2 RIGHTS OF EMPLOYEES UNDER THE INSOLVENCY ACT

On the 25th of June 2018 Zimbabwe enacted the Insolvency Act [Chapter 6:07][50] which repealed the Insolvency Act [Chapter 6:04]. Its purpose is to provide for the administration of insolvent and assigned estates and the consolidation of insolvency legislation in Zimbabwe which was perceived to be fragmented.[51] The needs of insolvency practice rather than labour movement drove the insolvency law reform processes which led to the enactment of the new Insolvency Act. Nevertheless, the Insolvency Act makes provision for the protection of limited rights of employees in cases of insolvency. Under the common law an individual contract of employment is automatically terminated upon supervening impossibility of performance as a result of

[49]F. I. Finch *Corporate Insolvency Law* at 778.
[50]Act No. 7 of 2018.
[51]See preamble to the Act.

insolvency.[52] The common law is retained and codified in section 40 (1) of the Insolvency Act which provides that 'contracts of service of employees whose employer has been liquidated are terminated with effect from the date of liquidation.' The termination of the contracts of employment is by operation of law and a *fait accompli* upon liquidation. This termination is not a dismissal.

In Zimbabwe dismissal is a much broader concept than the common law concept of termination of contract of employment.[53] A termination occurs where an employer or employee brings the employment relationship to an end by giving the agreed notice. As long as notice has been given, the employee does not have any legal remedy, because the common law recognises that a contract of employment can be terminated by either party on notice.[54] Section 12 (4) of the Labour Act as amended by section 12(4a) of the Labour (Amendment) Act 5 of 2015, prescribes notice periods applicable in the event of termination of a contract of employment. Section 12B (1) of the Labour Act guarantees every employee the right not to be unfairly dismissed. Although it does not define the term dismissal, it enumerates and signposts instances in which termination of a contract of employment amounts to an unfair dismissal in section 12B (2). The three instances include the following: dismissal for misconduct in terms of a registered code of conduct or the model code, constructive dismissal and failure to renew a fixed term contract in circumstances where an employee had a legitimate expectation of re-engagement and someone else was employed. With dismissal, there must be a fair reason for dismissal (substantive fairness) which must be effected in accordance with a fair procedure (procedural fairness).[55]

Section 40 (1) of the Insolvency Act provides that liquidation terminates contracts of employment by operation of law. This form of termination is not one of the instances of unfair dismissal prescribed in the Labour Act. By not using the term "dismissal" it follows that employees of an insolvent employer are not entitled to the right to substantive and procedural fairness on termination of their contracts of employment

[52] M. Brassey "The effect of supervening impossibility of performance on a contract of employment" (1990) *ActaJuridica*22.
[53]See *Nyamande & Another v Zuva Petroleum (Pvt) Ltd* SC 43/15.
[54]Grogan J. *Dismissal, Discrimination and Unfair Labour Practices* (3rd ed.), 2007, Juta & Co) at 180.
[55]See *Chirasasa & Others v Nhamo N. O. & Another* 2003 (2) ZLR 206 (S); *Colcom Foods v Kabasa* S. C. 12/04; *Samuriwo v Zimbabwe United Passenger Company* 1999 (1) ZLR 385 (H); *Diamond Mining Corporation v Tafa & Others* SC 70/15.

as they would in any other case. However, it is submitted that under the broad right to fair labour practices in section 65 (1) of the Constitution, it can be argued that every employee has the right not to have his or her contract of employment unfairly terminated. This includes employees of an insolvent employer. The termination of their contracts of employment must be both substantively and procedurally fair. Otherwise, it would be anathema to modern labour law for contracts of employment to terminate upon the occurrence of a particular event.

### *3.2.1 Employees right to commence liquidation*

Section 6(1) of the Insolvency Act gives a creditor who has a liquidated claim of not less than ZWL$200[56], the right to institute winding up or liquidation proceedings against a company. This provision does not make direct reference to employees but refers to creditors. Employees who are owed wages and benefits by a company have personal rights against the company for the payment of arrear remuneration. The employees become creditors of the company with the right to initiate liquidation proceedings. The right is bestowed on them not in their capacity as employees but as creditors of the company.

### *3.2.2 Employees right to participate in consultations during liquidation*

The Insolvency Act does not expressly give employees the right to participate in the winding up of an insolvent company. However, participation rights can be implied from section 52 of the Insolvency Act. Ten or more unsecured creditors with proved claims have the right to vote on whether a creditors committee, consisting of proved unsecured creditors should be appointed.[57] Once the committee has been appointed, its members will represent the interests of the unsecured creditors and play an active role in monitoring, advising and directing the liquidator. Therefore, these participation rights are only available to employees in their capacity as unsecured creditors. It is only through this provision that employees who would have been elected to the creditors committee have the right to attend creditors meetings. In contrast, employees in Australia have an express right to nominate one of them to represent

[56] With the exponential fall in the value of the Zimbabwe Dollar a method of assigning a value of a claim for this purpose must be devised.
[57] Section 52(1) of the Insolvency Act.

their interests on a committee of inspection and play an active role in the committee by monitoring and directing the liquidator.[58]

### *3.2.3 Right of employees to compensation and payment of terminal benefits*

Employees have long been considered worthy of special protection if a company becomes insolvent. This protection is usually achieved through guaranteeing employees' right to compensation and terminal benefits on insolvency and priority credit status conferred on these employee entitlements. In Zimbabwe section 40(2) of the Insolvency Act protects employees' right to compensation for loss of employment. Section 40 (3) of the Insolvency Act makes provision for the payment of terminal benefits from the estate of the insolvent employer in accordance with the Labour Act.[59] These are the only employee rights recognised by the Act. In terms of section 89(1) of the Insolvency Act, costs and expenses properly incurred in the process of liquidation are the top rank priority and must be paid first in the event of liquidation. The costs and expenses include remuneration of the liquidator, Sheriff of the High Court charges, fees payable to the Master in connection with the liquidation and any other costs of administering the liquidation.[60] The second priority debts are wages and salaries of employees of the insolvent company. Section (89) 2(a) and (b) of the Insolvency Act provides as follows:

> (2) In the second place the balance of the free residue must be applied to pay –
>
> (a) to an employee who was employed by the debtor –
>
> (i) any salary or wages, for a period not exceeding three months, due to an employee;
>
> (ii) any payment in respect of any period of leave or holiday due to the employee which has accrued as a result of his or her employment by the debtor in the year in which liquidation

[58]E. P. Joubert "A comparative study of the effects of liquidation or business rescue proceedings on the rights of the employees of a company" (2018) Unpublished LLD Thesis *University of South Africa* at 96-98.

[59] Wages and benefits payable on termination of employment for whatever reason are prescribed in section 13(1) of the Labour Act and include: wages and benefits due up to the time of termination, cash in lieu of vacation leave and notice period, medical aid, social security and any pension. Compensation for loss of employment is provided in section 12C (2) of the Labour Act as amended.

[60]Section 88 (1) (a) – (i) of the Insolvency Act. Zimbabwe follows the "Model Two: Bankruptcy Approach" in that it provides a general preference for employee-related entitlements that rank below costs of administering the liquidation. See G Johnson "Insolvency systems in South Africa: Comparative review of employee claims treatment" (2011, Financial Sector Program, USAID). A similar position obtains in South Africa. Section 98A of the South African Insolvency Act as amended provides for a general preference for employee-related entitlements that rank below a company's secured creditors and administration costs.

occurred and the previous year, whether or not payment thereof is due at the date of liquidation;

(iii) any severance or retrenchment pay due to the employee in terms of any law, agreement, contract, wage regulating measure or as a result of termination in terms of section 40, and

(b) any contributions that were payable by the debtor, including contributions which were payable in respect of any of his or her employees, and which were, immediately prior to the liquidation of the estate, owing by the debtor, in his or her capacity as employer, to any pension, provident, medical aid, sick pay, holiday, unemployment or training scheme or fund, or any similar scheme or fund under any law or to such a fund administered by a bargaining or statutory council recognised in terms of the Labour Act (Chapter 28:01) and which does not exceed $750 in respect of any individual employee.

Section 89 (2) of the Insolvency Act protects an employees' entitlement to compensation for loss of employment or severance payment and the following terminal benefits: arrear salaries not exceeding three months, cash in *lieu* of leave, medical aid, sick pay and pension. These are also guaranteed under the Labour Act. However, unlike the Labour Act which does not limit an employee's entitlements on termination, the Insolvency Act heavily curtails these payments. For instance, arrear salaries payable must not exceed three months and the amount payable is pegged at ZWL$750.[61] Cash in lieu of leave payable may not exceed ZWL$250.[62] Whilst claims in section 89 (2) (b) may not exceed $740.[63] In terms of section 89 (4) of the Insolvency Act, the Minister may amend any of the amounts prescribed in section 89(3). The claim for salaries and wages excludes benefits and allowances.[64]. It is important to pose and mention that the limitations of the extent of claims an employee may make, though, it would appear, is designed to give effect to the major aim of insolvency law of catering for the collective interests of the creditors, is problematic. It offers little

[61]See section 89(3) (a) of the Insolvency Act.
[62]See section 89(3) (b) of the Insolvency Act.
[63]See section 89(3) (a) of the Insolvency Act.
[64]See section 89(6) of the Insolvency Act.

solace to the employee who, all too often in Zimbabwe, would have endured many months if not years without proper remuneration in the period before the employer's insolvency.

In terms of ranking, salary and wages must be paid first, followed by severance pay, then cash in lieu of leave and lastly contributions for medical aid, pension and social security.[65] What is apparent from the foregoing is that although workers claims are protected by privilege, they are not ranked first but second. There is a potential of workers getting nothing if there is no free residue or the free residue is little. It will all go towards the costs of liquidation which are ranked first. As if that is not enough, the Insolvency Act prescribes maximum amounts payable to employees. It ignores the years of service by the employee and are meagre. The amounts are unrealistic and out of touch with the hyperinflationary environment in Zimbabwe. There is no well-founded explanation or reason for the restriction placed on amount claimable and the period for which it can be claimed. Worst still, the Insolvency Act does not state what happens in the event of an insolvent employer failing to pay workers entitlements. There is no guarantee institution or insurance fund provided for in the Insolvency Act as a way of ensuring the payment of employee entitlement.[66] The current insolvency regime has the potential of leaving employees and their families destitute in the event that there is no free residue from the insolvent estate. There is inadequate protection of workers' statutory entitlements. Useful lessons can be drawn from Australia[67] and England[68] where there are Government funded safety nets that are used to pay employee entitlements. It is therefore necessary to consider provisions under the Labour Act which impact on insolvency. Of concern is whether the Insolvency Act is consistent with the Labour Act. In addition, it is also necessary to determine whether the shortfalls in the Insolvency Act can be supplemented by the Labour Act.

[65]Section 89(5) of the Insolvency Act.
[66]This is a common characteristic of a jurisdiction which follows the Model Two: Bankruptcy Preference Approach. A similar situation obtains in South Africa. There is no guarantee fund for employee entitlements.
[67]In Australia, The Fair Entitlements Guarantee Act 2012, establishes a public fund that is used to pay out employee entitlements in the event of insolvency.
[68]In terms of section 182 of the Employment Rights Act 1996, the Secretary of State pays employees' entitlements from the National Insurance Fund.

### 3.3 RIGHTS OF EMPLOYEES UNDER LABOUR LEGISLATION

The principal legislation governing labour and the employment relationship in Zimbabwe is the Labour Act. It applies to all employers and employees except those whose conditions of employment are otherwise provided for in the Constitution.[69] Section 3 of the Labour Act sets the tone for the establishment of a two tier labour system in Zimbabwe. The Labour Act applies to all employers and employees in the private sector including parastatals, local authorities and State universities. Excluded from application of the Labour Act are members of the Civil service, disciplined forces and any other employees designated by the President in a statutory instrument.[70] Section 2A (3) of the Labour Act affirms the supremacy of the Labour Act and provides that 'the Act shall prevail over any other enactment inconsistent with it.' Therefore, in the event of any conflict between the Labour Act and any other statutory provision, the Labour Act will take precedence.[71] For example, if provisions of the Insolvency Act are inconsistent with the Labour Act, the Labour Act will prevail over these provisions. This does not by implication repeal provisions of the Insolvency Act inconsistent with the Labour Act. Its provisions remain valid and applicable in all circumstances not subject to application of the Labour Act.

Furthermore, the Labour Act regulates the termination of employment for operational reasons and makes provision for compensation for loss of employment. Insolvency ultimately results in the closure of a business. The Labour Act does not define the term insolvency. However, in section 2 it defines the term retrench as 'terminate the employees' employment for the purpose of reducing expenditure or costs, adapting to technological changes, reorganising the undertaking in which the employee is employed, or for similar reasons, and includes the termination of employment on account of the closure of the enterprise in which the employee is employed.' Insolvency qualifies as a retrenchment as defined in the Labour Act.[72] However, it does not follow that on liquidation an employer has to follow the procedures for retrenchment which are prescribed in section 12(C) and 12D of the Labour Act. Termination of employees' contracts of employment on liquidation is in terms of

[69]Section 3(1) of the Labour Act.
[70]Section 3(2)-(3) of the Labour Act.
[71]See *Mombeshora v Institute of Administration and Commerce* SC 72/17; *City of Gweru v Masinire* SC 56/18.
[72] M. Gwisai *Labour and Employment Law in Zimbabwe* (2006, Zimbabwe Labour Centre) at 182.

section 40(1) of the Insolvency Act, which is termination by operation of law,[73] even if the termination involves large numbers of employees. Notwithstanding section 12C and 12D of the Labour Act which prescribe retrenchment procedures applies where an employer wishes to retrench employees prior to sequestration or liquidation. These procedural requirements are peremptory, such that any purported retrenchment not in compliance with the Labour Act is null and void.[74]

In brief, the retrenchment procedure starts with consultations on special measures to avoid retrenchments which are prescribed in section 12D of the Labour Act. This is followed by the issuance of a written notice to the Works Council (or Employment Council) with details of the employees to be retrenched, reasons for the retrenchment and proposed retrenchment package among other issues. This will signify the commencement of retrenchment negotiations at Works Council or Employment Council level. Parties will attempt to secure agreement as to whether or not the employees should be retrenched and the retrenchment package payable. If the parties fail to secure agreement at Works Council level, the matter escalates to the Employment Council level followed by the Retrenchment Board. The final decision in a retrenchment lies with the Minister and his decision is not appealable.[75] Employees of an insolvent employer can also benefit from a potpourri of labour rights available to employees before, during and after retrenchment. This is so given that the statutory definition of retrenchment encompasses insolvency. In any event these rights are not available to employees under the Insolvency Act and on the basis of s2A (3) of the Labour Act, labour rights can be extended to insolvency situations.

### *3.3.1 Right of employees to be consulted*

The right to fair labour practices in section 65(1) of the Constitution embodies fundamental notions of procedural fairness. As far as insolvency is concerned, procedural fairness demands that employees or their representatives must be notified and informed of the liquidation. Regrettably, the Insolvency Act does not have any consultative philosophy. It simply gives the liquidator the right to terminate contracts

[73] L. Madhuku *Labour Law in Zimbabwe* (2015, Weaver Press) at 204; *Merlin Ex-Workers v Merlin Ltd* SC 4/01.
[74]*Chidziva & Others v ZISCO* 1997 (2) ZLR 368 (S); *Kadir & Sons (Pvt) Ltd v Panganai* 1996 (1) ZLR 593 (S); *Stanbic v Charamba* 2006 (1) ZLR 96(S).
[75]A detailed discussion of the procedural requirements for a retrenchment is beyond the scope of this article. However, for further reading see L. Madhuku *Labour Law in Zimbabwe* (2015, Weaver Press) (231- 273).

of employment of employees without affording them an opportunity to be heard. The right of employees to be consulted prior to termination of contracts of employment can be located in the Labour Act. It imposes an obligation on an insolvent employer, to afford members of the Works Council representing employees, an opportunity to make representations and advance alternative proposals. Section 25A (5) (c) and (f) of the Labour Act is clear that a Works Council shall be entitled to be consulted by the employer about proposals relating to closure of business and retrenchment Section 25A (6) of the Labour Act then provides as follows:

> (6) Before an employer may implement a proposal relating to any matter referred to in subsection (5); the employer shall-
>
> (a) afford the members of the works council representing the workers' committee a reasonable opportunity to make representations and to advance alternative proposals;
>
> (b) consider and respond to the representations and alternative proposals, if any, made under paragraph (a), if the employer does not agree with them, state the reasons for disagreeing,
>
> (c) generally attempt to reach consensus with the members of the works council representing the workers' committee on any matter referred to in subsection (5).

The Labour Act enhances workers participation in decisions affecting their interests[76] as it gives them an opportunity to make representations and advance alternative proposals to the insolvency proceedings. In addition, section 25A (5) and (6) is worded in peremptory terms. Although the Labour Act places an obligation on the employer to consult members of the Works Council representing employees, an employer is under no obligation to accept the alternative proposals. It simply has to give reasons for disagreeing with employee representatives. Neither does the Labour Act authorise the Works Council or employee representatives to stop any impending insolvency proceedings. Furthermore, the Labour Act does not nullify any liquidation done without consultation of employees. It does not impose any sanction for non-compliance with section 25A (5) and (6).[77]

It is submitted that this defeats the whole purpose underlying the consultations, which is a joint consensus seeking process. It is therefore suggested that employees of an

[76]See also section 2A (1) (e) of the Labour Act.
[77]*Chemco Holdings (Pvt) Ltd v Tenderere & 24 Others* SC 14/17.

insolvent employee who intends to terminate contracts of employment without consultations can approach the High Court for an interdict, to halt the process and to order consultations.[78] Consultations are aimed at saving the business. This is the reason why section 244 (2) (b) (iv) of the Companies Act (now repealed) permitted the employees of an insolvent company to take over its business. Employees are a special interest group, a special class of creditors within the broader insolvency regime. Van Eck *et al* state as follows regarding their *sui generis* status:

> *Apart from the fact that they may attend the various creditors meetings in their capacity as creditors, they also obtain the right to assist in the formulation of a decision to sell the insolvent's business as a going concern. Although it is questionable whether this accords with the rest of the process of the administration of insolvent estates, it is submitted that this does signify a step in the right direction in so far as it focuses on the rescue of whole, or parts of, business.*

Since the Insolvency Act does not impose an obligation on insolvent employers to consult employees, this duty is implied from the Labour Act. Workers are a vulnerable group which deserves protection even under the insolvency regime. This view resonates with the constitutional right to fair labour practices and standards.

### *3.3.2 Right to payment of terminal benefits*

Section 40(3) of the Insolvency Act protects the employees' right to receive terminal benefits from the estate of the insolvent employer in accordance with the Labour Act. The Labour Act provides for the following terminal benefits, and these must be paid whenever employment is terminated, regardless of the reason or cause of the termination: wages and benefits upon termination, outstanding vacation leave, cash in lieu of notice (where applicable) outstanding medical aid and any pension (where applicable).[79] These terminal benefits are also protected in section 89 (2) of the Insolvency Act. Inconsistently, the Insolvency Act limits the amount of terminal benefits payable.[80]. It appears a paradox that insolvency is an inability to pay debts, including

[78]The Labour Court has no jurisdiction to grant interdicts in terms of section 89 of the Labour Act. See *Agribank v Machingaifa & Another* 2008 (1) ZLR 244 (S); *Mushoriwa v Zimbank* 2008 (1) ZLR 125 (H); *Mazarire v Old Mutual Shared Services (Pvt) Ltd* HH 187/14.
[79]Section 13 of the Labour Act.
[80]Section 89(3) of the Insolvency Act.

salaries and terminal benefits, but the Insolvency Act enacts that the employer can and should pay them to a certain extent. when they fall due. There is no such limitation under the Labour Act. Terminal benefits must be paid in full. A failure by an insolvent employer to pay within a reasonable time post termination of employment wages and other benefits as set out in section 13 of the Labour Act is an unfair labour practice.[81]

### *3.3.3 The right to compensation for loss of employment*

Section 40(2) of the Insolvency Act protects the right of employees to compensation for loss of employment. It has since been established that insolvency falls under the definition of retrench provided for in the Labour Act. Section 12C (2) of the Labour Act as amended by the Labour (Amendment) Act provides that 'unless better terms are agreed between the employer and employees concerned or their representatives, a package (hereinafter called "the minimum retrenchment package) of not less than one month's salary or wages for every two years of service as an employee (or the equivalent lesser proportion of one month's salary or wages for a lesser period of service) shall be paid by the employer as compensation for loss of employment.' The Labour Act makes it clear in section 12C (2) that the compensation for loss of employment is due to an employee whose contract of employment was terminated by virtue of a retrenchment or termination pursuant to section 12(4a) (a) – (c). Termination on account of insolvency is a retrenchment. In any event, section 40(2) of the Insolvency Act states that employees are entitled to compensation for loss of employment upon the automatic termination of their contracts on insolvency. Therefore, employees have a right to compensation for loss of employment calculated at a rate of one month's salary for every two years served. However, the Insolvency Act limits the quantum payable for loss of employment to $750.00.[82] It is reiterated that this limitation defeats the purpose of a severance pay or compensation for loss of employment. Not only does it cushion an employee against the adverse effects of losing a job but it also rewards an employee for the years served. The limitation *prima facie* violates the fundamental right to fair labour practices as set out in section 65(1) of the Constitution. Furthermore, it is inconsistent with section 12C (2) of the Labour Act as amended which provides a formula for calculating the compensation payable but does not limit the quantum payable.

[81]Section 13(1) of the LA. See also *Nyanzara v Mbada Diamonds (Pvt) Ltd* HH 63/15.
[82]See section 89(2) (b) of the Insolvency Act.

Another disquieting aspect in the Labour Act is that the employer can plead lack of financial capacity and inability to pay the compensation for loss of employment.[83] An employer can make an application to the relevant Employment Council, or in its absence, to the Retrenchment Board requesting for exemption from paying the compensation. Once such an application is granted employees get nothing. This provision violates the constitutional right to fair labour practices as it advances the insolvent employer's interest at the expense of employees. The situation is made worse by the fact that in Zimbabwe there is no a special fund to guarantee payment of employee's claims in the event of inability of the employer to pay.

### *3.3.4 Rights of employees on transfer of an undertaking*

It has been established that all contracts of employment of employees of an insolvent employer automatically terminate on the date of liquidation. Prior to liquidation the employer may adopt various strategies designed at making the business more profitable. The survivalist strategies include sale of the business, mergers, acquisitions and takeovers. Changes brought about by business restructuring to the workplace have significant implications to labour relations and employment law. Under the common law, the sale of a business by an insolvent employer, does not, in the absence of a specific agreement to that effect, impose a duty on the purchaser to enter into contracts of employment with the employees of the seller.[84] Put differently, in the absence of consent of the parties involved, when a business is disposed of for whatever reason, the employment relationship comes to an end. Labour legislation has since modified the common law. Section 16 of the Labour Act provides that when a business is transferred as a going concern, all contracts of employment are transferred from the old employer to the new employer. It specifically provides that:

> 16(1) Subject to this section whenever any undertaking in which any persons are employed is alienated or transferred in any way whatsoever, the employment of such persons shall unless otherwise lawfully terminated be deemed to be transferred to the transferee of the undertaking on terms and conditions which are not less favourable than those which applied immediately before the transfer and the continuity of employment of such employees shall be deemed not have been interrupted.

[83]Section 12C (3) of the Labour Act as amended by Labour (Amendment) Act 5 of 2015.
[84] A. Rycroft & B. Jordaan *A Guide to South African Labour Law* (2nded, 1992, Juta & Co) at 240.

Employees have an interest in job security. In recognition of this interest, section 16 of the Labour Act gives employees the right to have one's employment contract transferred with a business sold as a going concern.[85] The purpose of section 16 is to protect employees against loss of employment in the event of transfer of a business. The new employer is automatically substituted for the older employer in respect of all contracts of employment in existence immediately before the date of transfer, unless such contracts have been lawfully terminated. All rights and obligations between the old employer and the employees are included in the basket of what is transferred.[86] The transfer does not interrupt employees' continuity of employment and as a general rule employees shall not be offered less favourable conditions.

However, section 16 can only be invoked if the business of the insolvent employer is sold prior to the liquidation or sequestration of the employer. This is so given that liquidation terminates the contracts of employment. Therefore, once a business is sold after liquidation there are no contracts of employment to transfer since all of them would have been automatically terminated by operation of law. Section 16 of the Labour Act only applies to the transfer of a business of an insolvent employer in the event of sale of business prior to liquidation or sequestration order. Since modern insolvency law is now moving towards a business rescue philosophy,[87] provisions of section 16 of the Labour Act must also be included in the Insolvency Act. In addition, an obligation must be placed on liquidators to consider the rescue of a business before termination of employment contracts.[88]

### 3.4 CONCLUSION

This Chapter sought to evaluate the domestic legal framework which protects rights of employees on insolvency in Zimbabwe. It was established that workers enjoyed limited rights in their capacity as both employees and creditors of an insolvent company. The Chapter revealed that as creditors, workers are indirectly entitled to the following rights: the right to commence liquidation proceedings and the right to

[85] T. G. Kasuso "Transfer of undertaking under section 16 of the Zimbabwean Labour Act (Chapter 28:01)" (2014) 1 *Midlands State University Law Review* 20 at 21.
[86] *Mutare RDC v Chikwena* 2000 (1) ZLR 534 (S).
[87] A. Flessner "Philosophies of business bankruptcy law: An international overview" in Ziegel J. (ed.) *Current Development in International and Comparative Insolvency Law* (1994, Oxford University Press) at 19.
[88] Van Eck S. *et al* "Fair labour practices in South African insolvency law" (2004) 121 *The South African Law Journal* at 922.

participate and to be consulted during the liquidation. As employees, the point was made that insolvency and labour legislation directly affords workers the following rights: the right to compensation for loss of employment and payment of terminal benefits, the right to be notified and informed of any impending liquidation and the right to continuity of employment in the event of transfer of the insolvent business before final liquidation or sequestration. It was therefore concluded that Zimbabwe follows the Model Two: Bankruptcy Preference Approach when dealing with employee protections on insolvency.

Furthermore, the study unravelled several unsatisfactory aspects bedevilling the Zimbabwean framework on the protection of rights of employees on insolvency. It was shown that employees of an insolvent employer are not entitled to the right not to be unfairly dismissed. Their contracts of employment are automatically terminated on insolvency of the employer. Turning to employee entitlements, it was demonstrated that these are ranked second. As if that is not enough, the amounts prescribed in the Insolvency Act are meagre and inconsistent with provisions of the Labour Act. It was also shown that an employer can plead financial incapacity and apply for an exemption to pay compensation for loss of employment. In that event, employees are left with nothing since there is no a guarantee fund for employee claims in Zimbabwe. Finally, it was established that there is no express right of employees to participate in liquidation of a company. What is available is the express right of employees to be consulted by the employer prior the liquidation.

## CHAPTER 4

## PROTECTION OF EMPLOYEE RIGHTS IN SOUTH AFRICAN INSOLVENCY LAW

### 4.1 INTRODUCTION

Developments in other jurisdictions, especially those in the Southern African Development Community (SADC) play a significant role in the development of Zimbabwean law.[89] Not only do they provide a benchmark for the evaluation of Zimbabwean law, but the Constitution of Zimbabwe also recognises foreign law as relevant in interpreting domestic law.[90] A comparative analysis 'enables us to know ourselves better, to dispel myths and question our assumptions, and to recognise the relevance of particular rules in shaping our system.'[91] In considering the importance of comparative perspectives Watson states as follows:

> Law shows us many paradoxes. Perhaps the strongest of all is that, on the one hand, a people's law, can be regarded as being special to it, indeed a sign of that people's identity, and it is in fact remarkable how different in important detail even two closely related systems might be, on the other hand, legal transplants – the moving of a rule or a system of law from one country to another, or from one people to another – have been common since the earliest recorded history.[92]

In light of the above assertion, this Chapter considers the position of employees on insolvency of the employer in South Africa. Various considerations were taken into account before settling for South Africa. Firstly, it must be noted that Zimbabwe and South Africa share the same legal system, that is; Roman-Dutch law with an English law influence. They do share a commonwealth heritage which was influenced by the British. Secondly, Zimbabwe and South Africa do share common features with regard to their constitutional provisions on labour rights. Both jurisdictions have since constitutionalised the right to fair labour practices. Thirdly, the Zimbabwean new Insolvency Act was heavily borrowed from the South African regime. South Africa's insolvency law, including its corporate rescue procedures are sophisticated and well

[89] T. G. Kasuso 'Enforcement of Labour Court judgements in Zimbabwe: Lessons and perspectives from Southern Africa' (2018) 39 *ILJ* 1415.
[90] See section 46(1) (e) of the Constitution.
[91] C. W. Summers 'Comparisons in Labour Law: Sweden and the United States' (1985) 7 *Indus Rev LJ*1.
[92] A. Watson *Legal transplants: An approach to comparative law* (1974) 3-4.

established. They have been in place for decades. In light of the foregoing, this Chapter discusses employee rights on insolvency of the employer in South Africa. The following pieces of legislation relevant to this discourse are reviewed: The Companies Act 2008, Insolvency Act, 1936 as amended and the Labour Relations Act, 1995.

## 4.2 ROLE OF THE SOUTH AFRICAN CONSTITUTION

Section 23(1) of the Constitution of South Africa, 1996 provides that 'everyone has the right to fair labour practices.' The Constitutional Court of South Africa explained the right to fair labour practices in *National Education Health and Allied Workers Union v University of Cape Town*,[93] in the following terms:

> Our Constitution is unique in constitutionalising the right to fair labour practices. But the concept is not defined in the Constitution. The concept is incapable of precise definition. This problem is compounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgement. It is therefore neither necessary nor desirable to define this concept.

In South Africa, the right to fair labour practices derives its content from labour legislation and decisions of the courts.[94] The principal labour legislation which gives effect to the constitutional right to fair labour practices is the Labour Relations Act, 1995 (the LRA, 1995). It gives expression to the right by guaranteeing employee rights such as: the right not to be unfairly dismissed, the right to payment of severance pay and protection of employees rights on transfer of a business as a going concern. In addition, the LRA, 1995 creates a minimum floor of rights designed to protect employees. These rights directly impact upon other fields of law, such as insolvency law, in which the rights of employees are involved.

The relevance of the Constitution and its influence on protection of employee rights on insolvency in South African law can be seen particularly in section 23(1) of the Constitution and legislation giving effect to the right to fair labour practices. Van Eck

[93] (2003) 24 *ILJ* 95 (CC)
[94] S. Van Eck *et al* 'Fair labour practices in South African insolvency law' (2004) *The South African Law Journal* 905.

supra argues that the right to fair labour practices 'may potentially conflict with, or restrict, other fundamental rights that underpin the insolvency regime such as, for example, the right of creditors to be treated equally, as reflected in the *pari passu* principle, and also the property-based rights of secured creditors.'[95] On the other hand, the right to fair labour practices demands the placement of employees in a separate category of creditors of the employer's insolvent estate. From a constitutional perspective it is clear that two distinct branches of the law, that is insolvency law and labour law meet in the determination of employee rights during a company's liquidation process. Therefore, the following discussion of the South African domestic framework is informed by the Constitution.

## 4.3 EMPLOYEE RIGHST ON EMPLOYER INSOLVENCY

South African insolvency law and labour legislation affords employees the following rights: right to commence liquidation, right to be notified and informed of liquidation, right to participate in consultation during liquidation, right to be present at a meeting and vote during liquidation, right not to be unfairly dismissed, right to compensation for loss of employment and payment of terminal benefits, and protection of employee rights on the transfer of a business as a going concern. These rights are discussed in detail herein below.

### *4.3.1 Right of employees to commence liquidation*

South African law indirectly gives employees the right to commence liquidation proceedings against an insolvent company. Section 346 of the Companies Act gives one or more creditors of a company or a shareholder the right to make an application for the winding up or liquidation of an insolvent company. Section 346 does not directly or expressly refer to employees but creditors. The Companies Act and the Insolvency Act do not define the term creditor. However, authorities have since accepted that the term creditors include employees. Delport argues that once an employee is owed his or her remuneration, the employee has a personal right against the company for the payment of arrear remuneration.[96] In these circumstances an employee qualifies as a creditor of the company. It is on this basis that employees derive the right to initiate liquidation proceedings against the insolvent employer. The right accrues to them

[95]S. Van Eck *et al* above at 902-903.
[96] P. Delport *Henochberg on the Companies Act 71 of 2008* (2011) 446.

indirectly in their capacity as employees and not creditors in the strict sense. This position of employees in South Africa correspond with the right of employees to commence liquidation proceedings in Zimbabwe.

### *4.3.2 Right of employees to be notified and informed of liquidation*

The right of employees to be notified and informed of liquidation in South Africa is guaranteed in the Companies Act, Labour Relations Act and the Insolvency Act. The Companies Act provides that when an applicant applies for the winding up of a company he or she must, at the time his application is presented to the court in terms of section 346, furnish a copy of such application to every registered trade union that represents any employee of the company and to the employees of the insolvent employer.[97] A more detailed consultative framework is then provided for in the Labour Relations Act, 1995. Section 197B of the Labour Relations Act, 1995 is dedicated to obligations of the insolvent employer to disclose information concerning insolvency of the company to employees. Specifically, section 197B (1) of the Labour Relations Act provides that when a company is having financial problems that might "reasonably" result in the company's liquidation, consulting parties must be advised. The Labour Relations Act identifies the consulting parties and these include: employees, workplace forum and registered trade unions.[98] In addition, an insolvent employer who has applied for liquidation must furnish employees with a copy of the application within two days from date of filing of the application or within twelve (12) hours in urgent matters.[99]

Other protections afforded by the Labour Relations Act in this regard include the following. An employer must consult employees and engage them in negotiations regarding the details of any possible terminations likely to arise from the liquidation process.[100] An employer is obliged to issue a written notice stating reasons for the proposed terminations, employees to be affected and how they have been selected, when the termination will become effective, severance pay payable and the likelihood of future employment assistance.[101] The Companies Act and the Labour Relations

[97] Section 346 (4A) (a) (i) – (ii).
[98] See section 189 (1) (a) of the Labour Relations Act, 1995.
[99] Section 197B (2) (a) of the Labour Relations Act, 1995.
[100] Section 189(2) of the Labour Relations Act, 1995.
[101] Section 189(3) of the Labour Relations Act, 1995.

Act are complemented by the Insolvency Act. It makes provision for improved notification provisions which include a requirement that a copy of the liquidation order must be served on all creditors including every registered trade union and employees.[102] It is submitted that employees have a right to know what is happening within a company and any possible changes to their employment. Therefore, employees in South Africa are treated fairly in this regard and Zimbabwe can draw useful lessons from South Africa.

### *4.3.3 Employees right not to be unfairly dismissed*

In the preceding Chapter it was established that the common law position is that employment contracts automatically terminate on liquidation of the employer. This common law position has since been codified in the Insolvency Act of Zimbabwe. The South African position points in a different direction. Earlier on it was shown that section 23(1) of the South African Constitution entrenches the broad right to fair labour practices. A key element of this broad right is the right of employees not to be unfairly dismissed.[103] This implies that the termination of contracts of employment of employees of an insolvent employer must be both substantively and procedurally fair.

In this regard section 38 of the Insolvency Act provides that liquidation of a company results in the contracts of employment being suspended for a maximum period of 45 days after appointment of the final liquidator. During this window period the liquidator has to make a decision on whether to retain the employees or terminate their contracts of employment.[104] In the absence of an agreement on continued employment, the employment contracts of employees will automatically terminate on expiration of the 45 day period.[105] During the 45 day period, employees are not required to render services and are not entitled to any remuneration.[106] Although it may be argued that insolvency law in South Africa affords employees the right not to be unfairly dismissed this is doubtful. What the Act does is to delay the inevitable for a 45-day period and nothing else. During this period, employees are worse off as they are not entitled to any remuneration. The South African position is a good mirror reflection on the

[102] Section 4(2) and 9(4A) of the Insolvency Act.
[103] E. J. Joubert 'A comparative study of the effects of liquidation or business rescue proceedings on the rights of the employees of a company' (2018) Unpublished LLD Thesis, Unisa 36.
[104] Section 38 (1) of the Insolvency Act.
[105] For a detailed discussion of this position see P. M. Meskin*et al Insolvency* law at 5.21.
[106] Section 38 (2) (a) of the Insolvency Act.

treatment of employee rights than in Zimbabwe where contracts automatically terminate upon liquidation.

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

Section 38(5) of the Insolvency Act provides that a liquidator may not terminate any employment contracts unless he has consulted with the affected employees; a registered trade union or persons in terms of a collective agreement. Furthermore, section 189 and 189A of the Labour Relations Act gives employees the express right to be consulted if the employer wishes to dismiss them prior to liquidation. In terms of both insolvency legislation and labour legislation there is no express right of employees to participate in consultations during the liquidation of an insolvent company. The consultations are only limited to termination of contracts of employment and they do not have participation rights at creditors meetings. Jourbert submits that employees are creditors of the company as they are owed arrears salaries.[107] Therefore, they have a right to participate as creditors in consultations with the liquidator. This she argues, finds support in section 38(8) of the Insolvency Act.

### *4.3.5 Right of employees to be present and vote during liquidation*

South African legislation does not expressly provide for the right of employees to be present or vote at creditors meetings. The reason why this right is not available to employees is because of the automatic suspension and eventual termination of their contracts of employment.[108] However, it is submitted that since it has been accepted that employees are also creditors if they are owed remuneration, they have a right to be present and vote at meetings. The right is available to them in their capacity as creditors and not employees.

### *4.3.6 Employee entitlements on liquidation*

Just like Zimbabwe, South Africa follows the Model Two: Bankruptcy Preference Approach. This system provides for a general preference for employee-related entitlements that rank below a company's secured creditors and administration costs. Added to this, there is no guarantee fund for employee claims. In South Africa, employee entitlements are divided into two. The first category deals with claims where

[107] E. J. Joubert 'A comparative study of the effects of liquidation or business rescue proceedings on the rights of the employees of a company' (2018) Unpublished LLD Thesis, Unisa 41.
[108] E. J. Joubert above at 42.

the employment contract is suspended or terminated in terms of section 38(10) of the Insolvency Act. The second category is concerned with the type of claim and ranking of such claim for remuneration and other entitlements owing on account of section 98A of the Insolvency Act.

In circumstances where an employment contract has been suspended or terminated in terms of section 38(10) of the Insolvency Act, an employee is entitled to claim compensation for loss arising from the suspension or termination. Apart from a concurrent claim for breach of contract because of the premature termination, employees have a concurrent claim for severance benefits. However, the concurrent claim is an unsecured claim payable after statutory preferment claims have been paid.[109] The ranking of employee claims on liquidation is an issue covered in section 98A of the Insolvency Act. Employee entitlements in liquidation enjoy statutory preference status. Section 98A of the Insolvency Act sets out the ranking and amounts payable in respect of salary and wages owed to employees. These are set out as follows:

(i) Salary and wages due to an employee. These are restricted to a period of three months and capped at an amount of ZAR 12 000.00.[110]

(ii) Leave or holiday payment due to an employee and accrued in the year of insolvency or the preceding year and the amount is set at a maximum of ZAR 4000.00.[111]

(iii) Payment due in respect of any form of absence for a period of not more than three months prior to the date of liquidation with a maximum claim of ZAR 4 000.00.

(iv) Any severance or retrenchment pay due to the employee in terms of any law applicable or as a result of termination in terms of section 38, capped at ZAR 12 000.00.[112]

(v) Any due contributions by the company to a medical aid, provident fund, pension fund, among other entitlements. The maximum is prescribed at ZAR12 000.00 in respect of each fund or scheme.[113]

[109] Section 38(10) of the Insolvency Act. See also *Botha v Botha* (2016) ZAFSHC 194 (30).
[110] See Section 98A (1) (a) (ii).
[111] See section 98A (1) (a) (ii).
[112] Section 98A (1) (a) (iv).
[113] Section 98A (1) (b).

It must be noted that the Minister has the power to adjust the maximum amounts prescribed in the Act. Claims relating to salary, leave and entitlements in section 98A are payable without proving them.[114] If an employee elects to claim anything above the prescribed amount or other benefits outside section 98A then these must be proved. In addition, they are claimable by the employee as a concurrent creditor from the free residue after all statutory preferent creditors have been paid.

### *4.3.7 Protection of employees on transfer of undertakings*

Previously, the South African position was that the Insolvency of the employer would terminate contracts of employment, irrespective of whether the business of the insolvent employer was transferred to a new owner during the course of the liquidation process.[115] This is no longer the position. Section 197A (1) of the Labour Relations Act makes provision for the transfer of a business if the old employer is insolvent or where a scheme of arrangement or compromise is entered into to avoid the winding up or sequestration of the employer on account of insolvency. The consequences of the transfer of a business as a going concern will be that 'despite the Insolvency Act, 1936,' and 'unless otherwise agreed in terms of section 197(6) of the Labour Relations Act:

(a) The new employer is automatically substituted in the place of the old employer in all contracts of employment in existence immediately before the old employer's provisional winding-up or sequestration.
(b) All the rights and obligations between the old employer and each employee at the time of the transfer remain rights and obligations between the old employer and each employee.
(c) Anything done before the transfer by the old employer in respect of each employee is considered to have been done by the old employer; and
(d) The transfer does not interrupt the employees' continuity of employment and the employee's contract of employment continues with the new employer as if with the old employer.[116]

[114] Section 44 of the Insolvency Act.
[115] Section 38 of the old Insolvency Act.
[116] Section 197(A) (2) of the Labour Relations Act. For a detailed commentary on this section see P. A. K. Le Roux 'Consequences arising out of the sale or transfer of a business: Implications of the Labour Relations Amendment Act' (2002) 11 *Contemporary Labour Law* 61; C. Bosch 'Operational requirements dismissal and section 197 of the Labour Relations Act: Problems and possibilities' (2002) 23 *ILJ* 641.

Furthermore, section 187(1) (g) of the LRA strengthens the protection of employees. It provides that a dismissal is automatically unfair if the reason for the dismissal is a transfer, or a reason related to a transfer, contemplated in section 197 or 197A of the Labour Relations Act. In essence, this provision proscribes the dismissal of employees by the old or the new employer before or after a transfer of a business, upon the grounds of such transfer.[117]

## 4.4 CONCLUSION

This Chapter set out to review the protection of employee rights on insolvency of the employer in South Africa. It commenced with an overview of the constitutional right to fair labour are guaranteed by the Insolvency Act, the Companies Act and the Labour Relations Act were discussed. It was established that most of the employee rights in South African legislation are mainly based on the status of employees as creditors of the company. Only three direct rights are available to them in their capacity as employees. These include: the right to be informed when liquidation has commenced, the right against unfair dismissal which is based on the right to remain in employment for 45 days after appointment for final liquidator and the right to employee entitlements. It is submitted that South African employees have sufficient participation rights and protection in the liquidation of a company. Its position is by far more favourable than the Zimbabwean position. However, one disquieting aspect is the lack of a guarantee fund for employee entitlements. This remains the Achilles heel of South African insolvency law.

[117] S. Van Eck *et al* 'Fair labour practices in South African insolvency law' (2004) *The South African Law Journal* 922.

# CHAPTER 5

# SUMMARY, RECOMMENDATIONS AND FINAL REMARKS

## 5.1 INTRODUCTION

The purpose of this study was to evaluate the protections afforded employees in the event of employer insolvency in Zimbabwe. The study sought to ascertain the exact nature and scope of the labour rights afforded to employees in insolvency and labour legislation. It intended to establish whether employees were sufficiently protected. The study was informed by international standards made under the auspices of organisations such as the ILO and the OHADA. Furthermore, the research determined whether Zimbabwean law was consistent with that of comparable jurisdictions. For this purpose, the position of employee rights and entitlements on liquidation in Zimbabwe was compared with that of South Africa and where necessary Australia and England.

In view of these research threads, this Chapter provides the major conclusions on employee rights and entitlements on insolvency of the employer in Zimbabwe. It commences with a summary of the main arguments and issues addressed in all the preceding chapters, alongside the major findings. Several recommendations are proposed in the next part. The final part of this Chapter concludes this research.

## 5.2 SUMMARY

The study commenced with a justification for employee protection in the event of employer insolvency in Chapter 1. It was established that employees were vulnerable stakeholders in that they did not have secured rights in the event of company failures. It is in light of this development that employees deserve protection. Chapter 1 also provided the statement of the problem, research questions, and objectives of the study and scope of study. It also briefly highlighted the research methodology whose approaches included the legal and comparative approaches. The Chapter concluded with an outline of the study.

Chapter 2 of the research gave an overview of employee protection in the event of insolvency of the employer from an international and constitutional perspective. It was

demonstrated that international trends provide guidance and a framework that serves as a point of departure in ensuring that Zimbabwean laws are consistent with international best practices. The role of international law in the Zimbabwean context was discussed. The specific international standards relevant to employees on insolvency of the employer which were reviewed included the following: ILO Protection of Workers Claims (Employer's Insolvency) Convention 173 of 1992, the Protection of Workers Claims (Employer's Insolvency) Recommendation 180 of 1992, the ILO Protection of Wages Convention, 1949, the UNCITRAL Model Law on Cross Border Insolvency, 1997 and the OHADA Insolvency Act, 1999. A review of these international instruments established that under international law employees of an insolvent employer are entitled to the following rights: right to payment of compensation for loss of employment and terminal benefits. These entitlements are protected by way of privilege. In addition, it was also ascertained that member States are encouraged to establish guarantee funds for the payment of employee claims on insolvency. The second part of Chapter 2 dealt with the protection of employees in terms of the 2013 Constitution. It was demonstrated that the broad right to fair labour practices and standards in section 65(1) of the Constitution compels a purposive interpretation of rights of employees and the placement of employees of an insolvent employer in a separate category of creditors with preferential claims.

Chapter 3 of the study sought to evaluate rights of employees on insolvency of the employer in Zimbabwe as provided for in domestic legislation. The Insolvency Act laid the foundation for the study of employee rights during a company's liquidation. The other relevant legislation which was considered is the Labour Act. It must be kept in mind that the Labour Act takes precedence when employee rights in the Insolvency Act are in conflict with provisions of the Labour Act. Chapter 3 established that workers enjoyed limited rights in their capacity as both employees and creditors of an insolvent company. As employees, the point was made that insolvency and labour legislation directly afford workers the following rights: the right to compensation for loss of employment, right to payment of terminal benefits, the right to be notified and informed of impending liquidations, right to be consulted and the right to continuing of employment in the event of transfer of a business before final liquidation.

In addition, Chapter 3 revealed that as creditors, employees were indirectly entitled to the following rights: the right to commence liquidation proceedings and the right to participate and to be consulted during liquidation. It was concluded that Zimbabwe follows the Model Two: Bankruptcy Preference Approach in dealing with employees on insolvency. The weaknesses of this approach were also identified. It was shown that employee entitlements are ranked second and workers are not preferent creditors. Significantly, it was established that there is no guarantee fund for the payment of employee claims. As if that is not enough, the following unsatisfactory aspects bedevilling the Zimbabwean legal framework on protection of rights of employees were also identified. Firstly, it was demonstrated that Zimbabwean employees are not entitled to the right against unfair dismissal on liquidation of the employer. Contracts of employment are automatically terminated. Secondly, it was established that the employee entitlements prescribed in the Insolvency Act are limited, meagre and inconsistent with the Labour Act. Thirdly, employers can plead financial incapacity and seek exemption from paying compensation for loss of employment. Finally, it was also shown that there is no express right of employees to participate in the liquidation of a company.

Chapter 3 was followed by a comparative analysis in Chapter 4. It was shown that developments in SADC play a significant role in the development of Zimbabwean law. Therefore, Chapter 4 examined and analysed the protection of employee rights in South Africa's insolvency law. The role of the South African Constitution which also entrenches the right to fair labour standards in section 23(1) in insolvency law was discussed. This was followed by a review of relevant South African legislation such as the Insolvency Act, the Companies Act and the Labour Relations Act. It was established that employee rights recognised in the Zimbabwean framework were also recognised in South Africa. However, unlike Zimbabwe, South Africa guarantees employees of an insolvent employer additional rights which include the following: the right against unfair dismissal which is based on the right to remain in employment for forty-five (45) days after appointment of a final liquidation. It was also demonstrated that the South African position is more favourable to employees in that it has sufficient participation rights and the amounts payable to employees although limited are high. Just like Zimbabwe, South Africa also follows the Model Two: Bankruptcy Preference

Approach in that employee entitlements are ranked second and there is no State guarantee fund in place.

In light of the above summary, it is critical at this juncture to address specific recommendations pertaining to the identified important aspects for the protection of employee rights on insolvency in Zimbabwe.

## 5.3 RECOMMENDATIONS

The preceding summary canvassed the critical sources of employee protections on insolvency of the employer in Zimbabwe. Given this contextual background, it is necessary at this juncture to proffer recommendations which address the identified weaknesses and gaps in the domestic framework. These recommendations are important as they give guidance to the judiciary on how to interpret employee rights and inform policy makers on critical issues for law reform.

It is argued that the Zimbabwean framework is premised on the creditor wealth maximisation and creditors' bargain theories. The objective of its insolvency law is to maximise the return of creditors by providing a collective debt recovery process that ensures an orderly and equitable distribution of the debtor's assets. It ignores the fact that insolvency affects other stakeholders such as employees, whose interests may conflict with that of creditors. It does not adequately protect fundamental rights of employees. It fails in several respects to treat workers fairly and falls short in striking a balance between the competing interests inherent on insolvency of a company. Therefore, a number of recommendations are necessary in order to enhance protection of the rights of employees in cases of employer insolvency whilst at the same time ensuring that objectives of insolvency are fulfilled.

Firstly, Zimbabwe must ratify and domesticate relevant international instruments on insolvency. This gives rise to an obligation to implement terms of international standards in national law and practice.[118] Secondly, the right not to be unfairly dismissed must be extended to employees of an insolvent employer. Termination of contracts of employment on insolvency must be substantively and procedurally fair.

[118] A. van Niekerk *et al Law @ work* (2nd ed.), 2012, Lexis Nexis) at 23.

In this regard useful lessons can be drawn from South Africa. The liquidation of a company in South Africa results in suspension of contracts of employment for a maximum period of forty-five (45) days after the appointment of the final liquidator.[119] This is a good reflection on the treatment of employees and resonates with the constitutional right to fair labour practices. Thirdly, the legislature must clearly express its intention of protecting workers' entitlements by privilege. These must be given preference. The current position has the potential of exposing workers to the risk of going home empty handed if there is no free residue. This would also require the removal of the unjustified limitations on the amount claimable and the restriction placed on the period for which it can be claimed. Fourthly, provisions in the Labour Act which give employers the right to apply for exemption to pay compensation for loss of employment on the basis of financial incapacity must be repealed. They are retrogressive, unfair and advance employer interests at the expense of those of employees. In addition, employees' participation rights during liquidation must be expressly recognised by the insolvency Act.

Lastly, Zimbabwe must establish an employee protection scheme which guarantees payment of workers' entitlements on insolvency. Although the viability of the fund in the Zimbabwean context was not examined, comparative jurisdictions such as Australia and United Kingdom have established funds which are used to pay out workers' entitlements. The advantages of a State funded guarantee institution cannot be overemphasised. It removes the burden of paying employees entitlements from financially distressed employers. This in turn increases the free residue available for the benefit of their creditors.[120] Added to this, employees are guaranteed payment of their dues which cushions them from the effects of losing employment and ensures a decent living for the employees and their families.[121] In light of the foregoing, it is concluded that there is an urgent need to revisit the Insolvency Act and reconcile it with international trends, the Constitution and the Labour Act. The reform agenda must be informed by a combination of the Pro-Employee Approach and the Bankruptcy

[119] Section 38(1) of the Insolvency Act of South Africa.
[120] J. L. Westbrook et al *A Global View of business Insolvency Systems* (2010), Martinus Nijhoff Publishers) at 187.
[121] To the contrary, others argue that guarantee funds are expensive to run, they punish successful companies and benefit a limited class of employees. With due respect, these allegations are difficult to substantiate as guarantee institutions have been successful in Western jurisdictions and parts of Asia. See G. W. Johnson "Insolvency and social protection: Employee entitlements in the event of employer insolvency" (paper presented at the Fifth Forum for Asian Insolvency reform, Beijing, China, 27-28 April 2006) at 7.

Priority-Guarantee Fund Approach. This also requires amendment of the Insolvency Act and incorporation of a specific Chapter that comprehensively deals with rights of employees on insolvency.

## 5.4 FINAL REMARKS

Zimbabwean legislation recognises limited rights of employees on insolvency of the employer. This acknowledgment of rights of employees is designed to protect employees from the harsh effects of liquidation. With employees it results in job losses and deprivation of an income. It is only through work that an individual can secure decent living for his or her family. Unfortunately, Zimbabwean employees do not enjoy preferent claim status and there is no State guarantee fund for payment of employee entitlements. To enable employees to fully enjoy protections on insolvency of the employer, Zimbabwe must align its laws with international best practices. Finally, insolvency legislation must be reconciled with labour laws.

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