Protection of the Rights of Employees in Insolvency Law: A Zimbabwean Perspective

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ABSTRACT

Insolvency law in Zimbabwe has undergone a legal metamorphosis from the colonial period to post independence. The evolution of insolvency law in Zimbabwe has been largely driven by socio-economic and political forces. Suffice to underscore that before the enactment of the comprehensive Insolvency Act by the Parliament of Zimbabwe in 2018, legislation dealing with insolvency was scanty if not piecemeal. One ubiquitous gap that was characteristic of the old insolvency law was the absence of clear-cut legal provisions for the protection of employees as there was a deafening silence in the law. The lacuna that existed in the law is what prompted the legislature to come with a comprehensive Insolvency Act which plugs yawning gaps that were axiomatically evident in the old law. The cardinal importance of the legal protection of employees during crisis times like insolvency cannot be overemphasised because any raw deal for employees militates against the dictates of labour rights deeply rooted in social justice and equity in society. Thus the new insolvency legislation ring-fences employees by giving them some special priority consideration during times of insolvency, making this legislative intervention highly commendable.

1. INTRODUCTION

Insolvency is an inevitable aspect of business activity and arises when a company is unable to pay its debts.[1] Fletcher defines the concept as a '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.'[2] This

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1 L Madhuku, Insolvency and The Corporate Debtor: Some Legal Aspects of Creditors Rights under Corporate Insolvency, (1995) *Zimbabwe Law Review* 89 at 90.

2 IF Fletcher, *The Law of Insolvency* (5th ed, 2017, Sweet & Maxwell)1; C Smith *The Law of Insolvency* (3rd ed, 1988, Butterworth) at 1.

common law definition is codified in section 3 (1) of the Insolvency Act (Chapter 6:07)[3] which states that a 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.[4] This is replicated in section 40 (1) of the Insolvency Act which provides 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[5] and the right to claim terminal benefits.[6] It is within this context that insolvency gets linked to labour law and specifically the protection of employees' rights. The Insolvency Act protects employees' 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).[7] At this juncture the branches of company law, insolvency law and labour law intertwine and apply concurrently to the same situation.[8] This convergence of legal disciplines with contradictory philosophies results in conflict of interest.

Zimbabwean insolvency law have been largely unconcerned with employee's rights. Added to this, the Companies Act (Chapter 24:03),[9]was largely silent on the position and status of employees on liquidation.[10] Therefore,

3 Act No. 7 of 2018 gazetted in Government Gazette GN 413/18 on the 25th of June 2018.

4 M Brassey, "The effect of supervening impossibility on a contract of employment, (1990) *Acta Juridica* 22 at 24; S Lombard & A Boraine, INSOLVENCY AND EMPLOYEES: AN OVERVIEW OF STATUTORY PROVISIONS (1999) *De Jure* 300 at 301; A Steenkamp & D Warrassaly "The effect of insolvency on contracts of employment" (2002) 6/1 *Law, Democracy and Development* 151 at 152; Carolus P *et al* "Effects on the employment relationship of the insolvency of the employer: A worker perspective" (2007) 11 *Law, Democracy and Development* 109.

5 Insolvency Act. section 40(2)

6 section 40 (3)

7 Labour Relations Act [Chapter 28:01] gazetted in 1985

8 This intersection is described by Van Eck *et al* in the following words, '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.' See S Van Eck *et al* "Fair labour practices in South African insolvency law" (2004) 121 *The South African Law Journal* 902 at 907.

9 Companies Act [Chapter 24:03]

10 As a result of this lack of consideration of employees' rights in insolvency law, Finch refers to employees as 'lost souls of insolvency law.' See FI Finch *Corporate Insolvency: Perspectives and Principles* (3rd ed, 2017, Cambridge University Press) at 778. Added to this are Smit's remarks to the following effect: "Company law regulates the actions of companies in the market. Unfortunately, very little attention is bestowed on the interests of the employees in company law, either nationally or internationally. As far as insolvency law is concerned, the position is not much different. There would thus seem to be a vacuum

this contribution seeks to review the effects in Zimbabwean law on the rights of employees resulting from a company's insolvency. Where necessary a comparative analysis is given with the foreign jurisdictions. The first part of the article gives an overview of employee protection under some international legal instruments. These standards provide a benchmark and guidelines for interpreting domestic legislation. Part two is dedicated to an analysis of the extent to which employees of an insolvent employer are protected under the broad right to fair labour practices in section 65(1) of the Constitution.[11] The third part analyses domestic legislation which protects employees' rights in insolvency such as the Insolvency Act, the Labour Act and the Companies Act. There is a general perception that the Insolvency Act is insensitive to labour rights and is misaligned with the Labour Act. The article attempts to reconcile these statutes. It concludes by proffering recommendations on how the Zimbabwean insolvency framework can be enhanced in the interests of employees whilst at the same time maximising the value of the firm for the benefit of other creditors.

2. RIGHTS OF EMPLOYEES UNDER CERTAIN INTERNATIONAL INSOLVENCY LEGAL INSTRUMENTS

One of the purpose of insolvency law is to balance the competing interests of all company constituents in the event of corporate failure.[12] Employees are important stakeholders deserving protection.[13] It is trite that employees of a company are unsecured creditors. They do render their services in advance and are only paid remuneration after performing work. Remuneration has characteristics comparable to alimony since a worker depends on it for survival.[14]

in research in this field, since it certainly cannot be argued that employees are not closely connected to the companies they work for and on which their livelihoods depend. Employees deserve to have more attention paid to their often precarious position." N Smit "Labour is not a commodity: Social perspectives on flexibility and market requirements within a global world" (2006) *TSAR* 152 at 153; MM Botha "Responsibilities of companies towards employees" (2015) 18/2 *Potchefstroom Electronic Law Journal* 2044 at 2045.

11 The 2013 Constitution of Zimbabwe Amendment No. 20 Act

12 FI Finch "The measures of insolvency law" (1997) 17 *Oxford Journal of Legal Studies* 221 at 227.

13 Ansie Ramalho, *KING IV REPORT ON CORPORATE GOVERNANCE FOR SOUTH AFRICA,* 2016, 1 November 2016, page 17 the term stakeholder is defined as follows: "Those groups of individuals that can be reasonably be expected to be significantly affected by an organisation's business activities, outputs or outcomes, or whose actions can be reasonably be expected to significantly affect the ability of the organisation to create value."

14 AS 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.

Regrettably, employees cannot insure themselves against employer insolvency. They do not have any secured rights in the event of a failure of business. This is different with secured creditors such as banks who have a first call on assets of the employer over which they have obtained security.[15] Therefore, employees are vulnerable to corporate collapses as they result in job losses and unmet employee entitlements. In light of the foregoing, employees are considered to be deserving protection than other creditors who are better placed to assist and protect themselves.[16] Therefore, from a labour law perspective, the purpose of insolvency law is to protect employees against the consequences of insolvency.[17] This protective nature is recognised in international law.

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 any event, 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.[18] 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 purpose 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 (ILO). Therefore, the Zimbabwean framework on protection of rights of employees in cases of insolvency must be analysed against international standards, especially those

15 M Bhadily & P Husie "Australian employee entitlements in the event of insolvency: Is an insurance scheme an effective protective measure" (2016) 37 *Adelaide Law Rev* 247.

16 C Nyombi "The objectives of corporate insolvency law: Lessons for Uganda" (2018) 60/1 *International Journal of Law and Management* 2 at 6; MP Olivier & O Potgieter "The legal regulation of employment claims in insolvency and rescue proceedings: A comparative inquiry" (1995) 16 *Industrial Law Journal* 1295 at 1296; JP Sarra "Widening the insolvency lens: The treatment of employees claims" in J Omar (ed) *International Insolvency Law: Themes and Perspectives* (2008, Ashgate Publishing) at 295.

17 In addition, insolvency law has other 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 to creditors, restoring the insolvent to stability or profitable trading and to identify the causes of insolvency and impose appropriate sanctions. For a detailed discussion of the objectives of insolvency law see TH Jackson "Bankruptcy, non-bankruptcy entitlements and the creditors' bargain" (1982) 91/5 *Yale Law Journal* 857-907; C Nyombi "The objectives of corporate insolvency law: Lessons for Uganda" (2018) 60/1 *International Journal of Law and Management* 2-18; A Hamish *The Framework of Corporate Insolvency Law* (1st ed, 2017, Oxford University Press).

18 Section 327(6) of the Constitution also requires courts to promote consistency with international treaties binding on Zimbabwe.

made under the auspices of the ILO.

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

2.2 UNCITRAL Model Law on Cross Border Insolvency 1997

The UNCITRAL Model Law on Cross Border Insolvency is a legislative

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

guideline adopted by the United Nations Commission on International Trade Law (the UNCITRAL) in 1997. The Model Law gives special regard to cross border 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.[27] These were adopted by the World Bank in 2001 and subsequently revised in 2005, 2011 and 2016.[28] 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.[29] Recently, the World Bank and the UNCITRAL, in consultation with the International Monetary Fund (IMF) 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.[30] 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.

2.3 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

26 Article 15 of the Model law.
27 World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes, 2001, © 2016 International Bank for Reconstruction and Development / The World Bank 1818 H Street NW Washington DC 20433 Telephone: 202-473-1000 Internet: www.worldbank.org
28 Ibid
29 Principle C12.4.
30 (n 28 above)

at fostering regional integration and development of member States.[31] 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.[32] In principle the OHADA Insolvency Act advocates for the adoption of uniform insolvency laws for regional blocs and Africa as a whole.[33] In respect of employees' rights, the OHADA Insolvency Act gives workers claims for any outstanding wages priority over other creditors on liquidation.[34] However, the amount payable should be determined by domestic laws of member States. Finally, 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.

3. THE CONSTITUTIONAL RIGHT TO FAIR LABOUR PRACTICES

The 2013 Constitution[35] 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] In addition to the commonly accepted socio-economic rights contained in a codified Constitution, the 2013 Constitution entrenches employee rights. Section 65 (1) of the Constitution specifically entrenches the right of every person to fair and safe labour practices and standards and to be paid a fair and reasonable wage. The constitutional right to fair labour practices is given effect to by labour legislation, such as the Labour Act. The term 'fair labour practices and standards' is not defined in the Constitution. In *Greatermans Stores (1979) (Pvt) Ltd t/a Thomas Miekles Stores & Another v The Minister of Public Service, Labour and Social Welfare & Another,*[37] 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

31 OHADA Treaty, article 3

32 Related regional instruments include the European Convention on Insolvency Proceedings, 2000 and the European Union Regulation on Insolvency Law, 2000.

33 For a detailed discussion of the OHADA Insolvency Act see ND Leno "Development of a uniform insolvency law in SADC: Lessons from OHADA" (2013) 57/2 *Journal of African Law* 259-282.

34 Article 95-96 of the OHADA Insolvency Act.

35 The 2013 Constitution of Zimbabwe Amendment No. 20 Act

36 Constitution, Section 2(1)

37 CCZ 2/18. [Reported case]

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.
>
> (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.[38]

The Constitutional Court has since 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 does not find any support in the purpose of section 65 (1) of the Constitution, which is the protection of employees.[39] 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,

38 The Constitution (n30 above)

39 J Tsabora & TG Kasuso "Reflections on constitutionalising of individual labour law and labour rights in Zimbabwe" (2017) 38 *Industrial Law Journal* 43 pg 45.

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.'[40] The Labour Act cannot anticipate 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 flexible 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[41], in *National Entitled Workers Union v CCMA*,[42] the concept of the right to fair labour practices was explained as follows:

> 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:[43]
>
> > '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

40 L Madhuku *Labour Law in Zimbabwe* (2015) pg 78.
41 The Constitution of South Africa Seventeenth Amendment Act of 2012
42 (2003) 24 *ILJ* 2335 (LC).
43 Principles of Unfair Labour Practice (Juta) pg 11

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.[44] 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 and labour law are highlighted.[45] 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.[46]

4. RIGHTS OF EMPLOYEES UNDER THE INSOLVENCY ACT

On the 25th of June 2018 Zimbabwe enacted the Insolvency Act (Chapter 6:07)[47] which repealed the Insolvency Act (Chapter 6:04).[48] 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.[49] 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

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

45 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.

46 B Jordaan "Transfer, closure and insolvency of undertakings" (1991) 12 *Industrial Law Journal* 935 at 935; EP 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.

47 Act No. 7 of 2018.

48 Insolvency Act (Chapter 6:04)

49 Ibid, see Preamble to the Act

upon supervening impossibility of performance as a result of insolvency.[50] The common law is retained 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.' It is a *fait accompli* upon liquidation, however 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.[51] 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.[52] 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. It does not, however define the term dismissal. It is rather, under section 12B (2), which enumerates and signposts instances in which termination of a contract of employment amounts to an unfair dismissal. The three instances include the following:

(a) dismissal for misconduct in terms of a registered code of conduct or the model code,
(b) constructive dismissal, and
(c) failure to renew a fixed term contract in circumstances where an employee had a legitimate expectation of re-engagement and someone else was employed.

It should be noted that there must be a fair reason for dismissal (substantive fairness) which must be effected in accordance with a fair procedure (procedural fairness).[53]

Section 40 (1) of the Insolvency Act provides that liquidation terminates contracts of employment by operation of law. This form of termination is not

50 M Brassey "The effect of supervening impossibility of performance on a contract of employment" (1990) *Acta Juridica* 22.
51 See *Nyamande & Another v Zuva Petroleum (Pvt) Ltd* SC 43/15.
52 Grogan J, Dismissal, Discrimination and Unfair Labour Practices (3rd ed, 2007, Juta & Co) at 180.
53 See *Chirasasa & Others v Nhamo NO & Another* 2003 (2) ZLR 206 (S); *Colcom Foods v Kabasa* SC 12/04; *Samuriwo v Zimbabwe United Passenger Company* 1999 (1) ZLR 385 (H); *Diamond Mining Corporation v Tafa & Others* SC 70/15.

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. However, it is submitted that under the broad right to fair labour practices in section 65 (1) of the Constitution, set out as follows:

> ***65 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) Except for members of the security services, every person has the right to form and join trade unions and employee or employers' organisations of their choice, and to participate in the lawful activities of those unions and organisations.*
>
> *(3) Except for members of the security services, every employee has the right to participate in collective job action, including the right to strike, sit in, withdraw their labour and to take other similar concerted action, but a law may restrict the exercise of this right in order to maintain essential services.*
>
> *(4) Every employee is entitled to just, equitable and satisfactory conditions of work.*
>
> *(5) Except for members of the security services, every employee, employer, trade union, and employee or employer's organisation has the right to— (a) engage in collective bargaining; (b) organize; and (c) form and join federations of such unions and organisations.*
>
> *(6) Women and men have a right to equal remuneration for similar work.*
>
> *(7) Women employees have a right to fully paid maternity leave for a period of at least three months.*

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. The Zimbabwean position is different from that of South

Africa. In terms of section 38 of the Insolvency Act, 2002, the liquidation of a company results in the suspension of employment contracts for a maximum period of 45 days. If the liquidator intends to retain the employees, he must agree with them on the continued employment. In the absence of such an agreement contracts of employment of the concerned employees terminate at the end of the 45 days' period. Therefore, the automatic termination of employment contracts upon liquidation is postponed.[54] During this period employees are entitled to the right not to be unfairly dismissed as provided for in the South African Labour Relations Act, 1995.[55]

4.1 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, 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. This position of employees in Zimbabwe corresponds with the right of employees to commence liquidation in South Africa.[56]

4.2 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]

54 PM Meskin *and others Insolvency Law* (2015, LexisNexis) Chapter 18.For a commentary on the South African position

55 South African Labour Relations Act, 1995

56 PA Delport *et al* Heno*chsberg on the Companies Act 71 of 2008* (2012, LexisNexis) at 44 ; R Evans "Preferential treatment of employee creditors in insolvency law" (2004) 16 *South African Mercantile Law Journal* 458 at 465.

57 Insolvent Act, Section 52(1)

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

4.3 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[59] protects employees' right to compensation for loss of employment. Section 40 (3) of the Insolvency Act[60] makes provision for the payment of terminal benefits from the estate of the insolvent employer in accordance with the Labour Act.[61] These are the only employee rights recognised by the Act. In terms of section 89(1) of the Insolvency Act,[62] 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.[63] The second priority debts are wages and

58 EP 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 Insolvency Act, section 40(2)

60 Insolvency Act, section 40(3)

61 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.

62 Insolvency Act, section 89(1)

63 Insolvency Act Section 88 (1) (a) – (i) 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.

salaries of employees of the insolvent company. Section (89) 2(a) and (b) of the Insolvency Act[64] 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 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

64 Insolvency Act, section 89(2)(a)(b)

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.[65] Cash in lieu of leave payable may not exceed ZWL$250.[66] Whilst claims in section 89 (2) (b) may not exceed $740.[67] 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.[68] Similarly, section 98A of the South African Insolvency Act sets out the position of salary and wages owed to employees on insolvency. The preferences of employee entitlements are as follows: salary or wages due to an employee,[69] cash in *lieu* of leave or holiday,[70] payment due in respect of any other form of paid absence for a period not exceeding three months,[71] any severance or retrenchment pay[72] and any contributions to medical aid, provident fund and pension fund.[73] Section 44 of the South African Insolvency Act provides that an employee is entitled to be paid his or her claims in terms of section 98A without the need to prove the claims. Should the employee claim anything above the prescribed amounts then that employee can only do so by claiming and proving the remaining balance as a concurrent creditor from the remainder of the free residue once statutory preferent creditors have been paid.[74]

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.[75] 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

65 Insolvency Act, section 89(2)(a)
66 Insolvency Act, section 89(3)(b)
67 Insolvency Act, section 89(3)(a)
68 Insolvency Act, section 89(6)
69 Insolvency Act, section 98A(1)(a)(i) puts a cap of ZAR12 000 on this entitlement.
70 Insolvency Act, section 98A(1)(a)(ii) prescribes a maximum amount of ZAR4 000.
71 Insolvency Act, section 98A(1)(a)(iii) limits this claim to a maximum amount of ZAR4 000.
72 Insolvency Act, section 98A(1)(a)(iv) caps this claim at ZAR12 000.
73 Insolvency Act, see section 98A(1)(b). This preference is capped at ZAR12 000.
74 EP 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 45.
75 Section 89(5) of the Insolvency Act.

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.[76] 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[77] and England[78] 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.

5. 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.[79] 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.[80] Section 2A (3) of the Labour Act affirms the supremacy of the Labour Act and provides that 'the Act shall prevail

76 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.

77 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.

78 In terms of section 182 of the Employment Rights Act 1996, the Secretary of State pays employees' entitlements from the National Insurance Fund.

79 Section 3(1) of the Labour Act and section 65 of the Constitution

80 Labour Act section 3(2)-(3)

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.[81] 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 ultimaltely invites consequent results of the closure of a business. The Labour Act does not define the term insolvency. However, in section 2 of the Insolvency Act, 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.[82] However, this 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[83]. Termination of employees' contracts of employment on liquidation is in terms of section 40(1) of the Insolvency Act, which is termination by operation of law,[84] even if the termination involves large numbers of employees. Notwithstanding, section 12C and 12D of the Labour Act[85] which prescribes 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.[86]

In brief, the retrenchment procedure starts with consultations on special measures to avoid retrenchment which are prescribed in section 12D

81 See *Mombeshora v Institute of Administration and Commerce* SC 72/17; *City of Gweru v Masinire* SC 56/18.

82 M Gwisai *Labour and Employment Law in Zimbabwe* (2006, Zimbabwe Labour Centre) at 182.

83 Labour Act [Chapter 28:01]

84 L Madhuku *Labour Law in Zimbabwe* (2015, Weaver Press) at 204; *Merlin Ex-Workers v Merlin Ltd* SC 4/01.

85 Ibid (n 79 above)

86 *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).

of the Labour Act.[87] 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.[88] 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.

5.1 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 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

87 Ibid (n 79 above)

88 L Madhuku L *Labour Law in Zimbabwe* (2015, Weaver Press) 231- 273). A detailed discussion of the procedural requirements for a retrenchment is beyond the scope of this article.

(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[89] 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).[90]

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 insolvent employer 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.[91] Consultations are aimed at saving the business. This is the reason why section 244 (2) (b) (iv) of the Companies Act permits the employees of an insolvent company to take over

89 See also Labour Act, section 2A (1) (e)

90 *Chemco Holdings (Pvt) Ltd v Tenderere & 24 Others* SC 14/17.

91 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 Mutal Shared Services (Pvt) Ltd* HH 187/14.

its business. Employees are a special interest group, a special class of creditors within the broader insolvency regime. Van Eck *and others* states 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. The position of employees in Zimbabwe on this aspect corresponds with the right of employees to be notified and informed of liquidation in South Africa. Section 197B of the South African Labour Relations Act provides for the disclosure of information concerning insolvency to workers.[92]

5.2 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).[93] 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.[94] There is no such limitation under the

92 Consulting parties such as workplace forums, trade unions and employees must be advised when a company is experiencing financial distress. See section 189(1) of the Labour Relations Act.

93 Labour Act, Section 13

94 Insolvency Act section 89(3)

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.[95]

5.3 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.[96] 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.

95 Labour Act, section 13(1) see also *Nyanzara v Mbada Diamonds (Pvt) Ltd* HH 63/15.
96 Insolvency Act, section 89(2) (b)

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.[97] An employer can make an application to the relevant Employment Council, or in its absence, to the Retrenchment Board requesting for exemption to pay 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.

5.4 Rights of employees on transfer of an undertaking

It has been established that all contracts of employment with an insolvent employer automatically terminates 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.[98] 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, under section 6(1) that:

> 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 transferor of the undertaking on terms

97 Labour Act as amended by Labour (Amendment) Act 5 of 2015, Section 12 (C) (3)

98 A Rycroft A & B Jordaan, A GUIDE TO SOUTH AFRICAN LABOUR LAW (2nd ed, 1992, Juta & Co) at 240.

> 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.

Employees have an interest in job security and 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.[99] 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.[100] 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,[101] 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.[102]

99 TG 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.

100 *Mutare RDC v Chikwena* 2000 (1) ZLR 534 (S).

101 A Flessner A, "Philosophies of business bankruptcy law: An international overview" in Ziegel J (ed) *Current Development in International and Comparative Insolvency Law* (OUP 1994) 19.

102 Van Eck S *and others* "Fair labour practices in South African insolvency law" (2004) 121 *The South African Law Journal* at 922.

6. EMPLOYEES' RIGHTS UNDER THE COMPANIES ACT

Employees are also afforded protection in section 244 of the Companies Act (Chapter 24:03)[103] in cases of voluntary winding up of a company. If there is reasonable suspicion by the Minister that voluntary liquidation is designed to avoid obligations of an employer to pay terminal benefits or compensation for loss of employment, the Minister may appoint an investigator.[104] The investigator shall conduct an investigation into the affairs of the company and report to the Minister if the voluntary liquidation would deprive employees unfairly their entitlements on termination. Where appropriate, the investigator may recommend, amongst other relief, the takeover of the insolvent company by employees.[105] This enhances protection of employees in the face of fraudulent applications for liquidation. However, it is worth to note that the Companies Act (Chapter 24:03) has since been repealed by the Companies and Other Business Entities Act (Chapter 24:31) which was gazetted on the 15th of November 2019[106] and will be effective on the 13th of February 2020. The new Act has nothing on corporate insolvency, leaving the Insolvency Act and Labour Act as the primary legislation that regulates employee rights on insolvency.

7. CONCLUSION

The legal framework governing insolvency in Zimbabwe seeks to strike a balance between the competing interests of the employer and employees. Despite Zimbabwe being a signatory to ILO conventions governing fair labour practices and enshrining in its constitution the fundamental rights of employees. In subsequent legislation governing companies and labour matters, the current insolvency legal regime does not adequately protect the fundamental rights of employees. In order to enhance the protection of rights of employees in cases of insolvency, the following recommendations are set out:

Firstly, the Insolvency Act must be aligned with international labour standards, the Constitution and the Labour Act. This entails giving employees of an insolvent employer the right to be heard before termination of their contracts

103 Companies Act (Chapter 24:03), section 244
104 Companies Act, Section 244 (2)
105 See ibid section 244 (2) (b) (iv)
106 Companies and Other Business Entities Act [Chapter 24:31]

of employment and ensuring that any termination is done in a manner that is substantively and procedurally fair. This would also require a clear statement by the legislature on applicability of retrenchment procedures to cases of insolvency.

Secondly, the legislature must clearly express its intention of protecting workers claims by privilege. Currently, employees' entitlements are ranked second. There is a risk of workers getting nothing if there is no free residue or the free residue is little.

Thirdly, the maximum amounts prescribed by the Insolvency Act as workers entitlements are meagre. The Labour Act does not limit claims payable to workers. It is submitted that the limitation on workers claims in the Insolvency Act is unjustified and must be removed. Employees have a lot to lose in the event of insolvency. Their livelihood and that of their families depends upon their wages and benefits for services rendered. Therefore, removing the limits will ensure the realisation of a decent living by employees who would have been left unemployed as a result of insolvency of an employer. Alternatively, the quantum payable can be increased periodically in line with the rate of inflation. In addition, the Insolvency Act must focus attention on business rescue rather than liquidation. This calls for more participation in liquidation proceedings by employees who have a right to be consulted.

Lastly, the Insolvency Act must make provision for the establishment of a guarantee institution or insurance fund which will pay employees' entitlements in the event of failure to do so by employers.

In conclusion, these protection schemes ensure the full realisation of workers' rights in cases of insolvency. The current framework has the potential of leaving workers destitute if there is no free residue from the estate of the insolvent employer.