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

Tapiwa Givemore Kasuso*
Zimbabwe Open University
kasusot@zou.ac.zw

Kudakwashe Sithole**
Zimbabwe Open University
sitholek@zou.ac.zw

Abstract

Until recently, Zimbabwean insolvency law was unconcerned with rights of employees on insolvency of the employer. The new Insolvency Act points in a different direction. It guarantees limited rights of workers in their capacity as creditors and as employees. There is a convergence of insolvency law and labour law. These are legal disciplines with contradictory philosophies. This contribution analyses the rights of employees on insolvency in Zimbabwe. 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.

Keywords

Employees, labour, rights, protection, liquidation, insolvency, Zimbabwe

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

* Lecturer, Department of Law, Faculty of Commerce and Law, Zimbabwe Open University, Harare.
** Senior Lecturer, Department of Business Management, Faculty of Commerce and Law, Zimbabwe Open University, Harare, Zimbabwe.

1 L Madhuku "Insolvency and the corporate debtor: Some legal aspects of creditors rights under corporate insolvency" (1995) *Zimbabwe Law Review* 89 at 90.

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 common law definition is codified in section 3(1) of the Insolvency Act (cap 6:07) which provides 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.[3] 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[4] and the right to claim terminal benefits.[5] It is within this context that insolvency becomes 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 (cap 28:01). At this juncture the branches of insolvency law and labour law intertwine and apply concurrently to the same situation.[6] This convergence of legal disciplines with contradictory philosophies results in conflict of interest.

Until recently, Zimbabwean insolvency law remained largely unconcerned with employees' rights. Added to this, the Companies Act (cap 24:03), was largely silent on the position and status of employees on liquidation.[7] This

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

3 M Brassey "The effect of supervening impossibility on a contract of employment" (1990) *Acta Juridica* 22 at 24; S Lombard and A Boraine "Insolvency and employees: An overview of statutory provisions" (1999) *De Jure* 300 at 301; A Steenkamp and D Warrassaly "The effect of insolvency on contracts of employment" (2002) 6/1 *Law, Democracy and Development* 151 at 152; P Carolus et al "Effects on the employment relationship of the insolvency of the employer: A worker perspective" (2007) 11 *Law, Democracy and Development* 109.

4 Insolvency Act, sec 40(2).

5 Id, sec 40(3).

6 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.

7 As a result of this lack of consideration of employees' rights, 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 in research in

contribution, therefore, 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 selected foreign jurisdictions. The first part of the article gives an overview of employee protection under international law. These standards provide a benchmark and guidelines for interpreting domestic legislation. The second part 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 of Zimbabwe (the Constitution). 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 maximizing the value of the firm for the benefit of other creditors.

RIGHTS OF EMPLOYEES IN INTERNATIONAL INSOLVENCY LAW

One of the purposes of insolvency law is to balance the competing interests of all company constituents in the event of corporate failure.[8] Employees are important stakeholders deserving protection.[9] It is trite to say 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.[10] 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

contd
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." See 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.

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

9 Art 17 of the *King IV Report on Corporate Governance for South Africa*, 2016 defines the term "stakeholder" as follows: "Those groups of individuals that can reasonably be expected to be significantly affected by an organization's business activities, outputs or outcomes, or whose actions can reasonably be expected to significantly affect the ability of the organization to create value."

10 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.

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security.[11] 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 more deserving of protection than other creditors who are better placed to assist and protect themselves.[12] Therefore, from a labour law perspective, the purpose of insolvency law is to protect employees against the consequences of insolvency.[13] This protective nature is recognized 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 recognizes 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.[14] Section 326 of the Constitution recognizes 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 Organization (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.

The Protection of Workers' Claims (Employer's Insolvency) Convention 173 of 1992

The principal international labour standard that protects rights of employees on insolvency is the ILO's Protection of Workers' Claims (Employers

11 M Bhadily and 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 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 and 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.

13 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, maximizing 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; 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* (1st ed, 2017, Oxford University Press).

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

Insolvency) Convention 173 of 1992 (C 173/92) (the Convention).[15] 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".[16] It also covers situations in which workers' claims cannot be paid by reason of the financial situation of the employer.[17] 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.[18] The privilege covers arrear salaries and benefits, cash in lieu of vacation leave and compensation for loss of employment.[19] Impliedly, the Convention guarantees employees 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 recognized 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.[20] In other words, member states are encouraged to establish employee protection schemes.[21]

UNCITRAL Model Law on Cross-Border Insolvency 1997

The Model Law on Cross-Border Insolvency (Model Law) is a legislative guideline adopted by the United Nations Commission on International Trade Law (the UNCITRAL) in 1997. The Model Law gives special regard to cross-border transactions related to insolvency in light of globalization 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.[22] However, the Model Law does not make provision for any meaningful employee rights. It must therefore be read with the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes, 2001. These principles were adopted by the World Bank in 2001 and subsequently revised in 2005, 2011 and 2016. They are concerned with cross-border insolvency. In respect of employees, the principles provide that workers are a vital cog in

15 The Convention is supplemented by the ILO Protection of Workers' Claims (Employer's Insolvency) Recommendation 180 of 1992.
16 The Convention, art 1.
17 Id, art 1 (1).
18 Id, art 5.
19 Id, art 6.
20 Id, art 9.
21 For a detailed discussion of C 173/92, 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).
22 Model Law, art 15.

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an organization, and careful consideration must be given to balancing their rights and those of other creditors.[23] 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 Model Law and the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes. Zimbabwe has since domesticated the Model Law in part XXV of the new Insolvency Act, which is dedicated to cross-border insolvencies.

OHADA Insolvency Act 1999

The Organization for the Harmonization of Business Law in Africa (OHADA) was established by the signing of the Port Louis Treaty on the Harmonization of Business Law in Africa in October 1993. It strives for the harmonization of business law in Africa and has since adopted several legislative guides aimed at fostering regional integration and development of member states.[24] 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 Model Law.[25] In principle, the OHADA Insolvency Act advocates for the adoption of uniform insolvency laws for regional blocs and Africa as a whole.[26] In respect of employees' rights, the OHADA Insolvency Act gives workers' claims priority over other creditors on liquidation.[27] 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.

THE CONSTITUTIONAL RIGHT TO FAIR LABOUR PRACTICES

The 2013 Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the

23 Principle C12.4.

24 OHADA Treaty, art 3.

25 Related regional instruments include the European Union Council Directives, the European Convention on Insolvency Proceedings, 2000 and the European Union Regulation on Insolvency Law, 2000. These legislative guidelines make provision for the protection of employees in the event of employers' insolvency. For instance, they impose an obligation on employers to establish guarantee institutions to secure employees' entitlements on insolvency. In addition, they authorize member states to set limits on the liability for outstanding claims and an obligation is imposed on employers to consult workers' representatives before termination of employment on account of insolvency.

26 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.

27 OHADA Insolvency Act, arts 95–96.

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inconsistency.[28] 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 Meikles Stores & Another v The Minister of Public Service, Labour and Social Welfare & Another*,[29] 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.
> (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."[30]

The Constitutional Court has since adopted a narrow view of the concept of fair labour practices that is limited to the exhaustive list of unfair labour practices in the Labour Act. This narrow view does not find any support in the

28 The Constitution sec 2(1).
29 CCZ 2/18.
30 Ibid.

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purpose of section 65(1) of the Constitution, which is the protection of employees.[31] 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 only limited to those prescribed in the Labour Act but also 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."[32] 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 constitutionalizing 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, in *National Entitled Workers Union v CCMA*,[33] 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:
>
> > '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 constitutionalizing of the right to fair labour practices does not only impact on labour legislation but also on insolvency law. It has far-reaching

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

32 L Madhuku *Labour Law in Zimbabwe* (2015, Weaver Press) at 78.

33 (2003) 24 *ILJ* 2335 (LC) at 2339.

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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.[34] 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 that 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 and labour law are highlighted.[35] Critical is the need to balance the employer's commercial interests on one hand, and the general right of employees to social protection, on the other hand.[36]

RIGHTS OF EMPLOYEES UNDER THE INSOLVENCY ACT

On 25 June 2018, Zimbabwe enacted the Insolvency Act (cap 6:07),[37] which repealed the Insolvency Act (cap 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.[38] The needs of insolvency practice, rather than labour movement, drove the insolvency law reform processes that 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 common law, an individual contract of employment is automatically terminated upon supervening impossibility of performance as a result of insolvency.[39] Common law is retained in section 40(1) of the Insolvency Act. The termination of 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 contracts of employment.[40] A termination occurs where an employer or employee brings the employment relationship to an

34 Van Eck et al "Fair labour practices", above at note 6.

35 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. Id at 907.

36 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.

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

38 See preamble to the Act.

39 M Brassey "The effect of supervening", above at note 3, at 24.

40 See *Nyamande & Another v Zuva Petroleum (Pvt) Ltd* SC 43/15.

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end by giving the agreed notice. As long as notice has been given, the employee does not have any legal remedy because common law recognizes that a contract of employment can be terminated by either party on notice.[41] 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", in section 12B(2) it enumerates and signposts instances in which termination of a contract of employment amounts to an unfair dismissal. 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 in which an employee had a legitimate expectation of re-engagement but 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).[42]

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. 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.[43] The Zimbabwean position is different from that of South Africa's. 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, it must agree with them on the terms of the continued employment. In the absence of such an agreement, contracts of employment of the employees concerned terminate at the end of the 45-day period. Therefore, the automatic termination of employment contracts upon liquidation is postponed.[44]

41 J Grogan *Dismissal, Discrimination and Unfair Labour Practices* (3rd ed, 2007, Juta & Co) at 180.

42 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.

43 Van Eck et al "Fair labour practices", above at note 6 at 909.

44 For a commentary on the South African position see PM Meskin et al *Insolvency Law* (2015, LexisNexis) chap 18.

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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.

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 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.[45]

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 proven claims have the right to vote on whether a creditors' committee, consisting of proven unsecured creditors should be appointed.[46] 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.[47]

Right of employees to be paid compensation and 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

45 See PA Delport et al *Henochsberg on the Companies Act 71 of 2008* (2012, LexisNexis) at 446; R Evans "Preferential treatment of employee creditors in insolvency law" (2004) 16 *South African Mercantile Law Journal* 458 at 465.

46 Insolvency Act, sec 52(1).

47 Joubert "A comparative study", above at note 36 at 96–98.

the estate of the insolvent employer in accordance with the Labour Act.[48] These are the only explicit employee rights recognized 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.[49] 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 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."

48 Wages and benefits payable on termination of employment for whatever reason are prescribed in sec 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 sec 12C(2) of the Labour Act as amended.

49 Insolvency Act, sec 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. Sec 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.

Section 89(2) of the Insolvency Act protects an employee's 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 by 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.[50] Cash in lieu of leave payable may not exceed ZWL$250,[51] whilst claims in section 89(2)(b) may not exceed ZWL $740.[52] 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.[53] Similarly, section 98A of the South African Insolvency Act sets out the position of salary and wages owed to employees on insolvency. The preferred employee entitlements are as follows: salary or wages due to an employee,[54] cash in lieu of leave or holiday,[55] payment due in respect of any other form of paid absence for a period not exceeding three months,[56] any severance or retrenchment pay[57] and any contributions to medical aid, provident fund and pension fund.[58] 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 preferential creditors have been paid.[59]

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.[60] 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 for workers to get nothing at all if there is no free residue or the free residue is little, as 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 employee's years of service. The amounts are unrealistic and out of touch with the hyperinflationary environment in Zimbabwe. There is no well-

50 See Insolvency Act, sec 89(3)(a).
51 See id, sec 89(3)(b).
52 See id, sec 89(3)(a).
53 See id, sec 89(6).
54 South African Insolvency Act, sec 98A(1)(a)(i) puts a cap of ZAR12,000 on this entitlement.
55 Id, sec 98A(1)(a)(ii) prescribes a maximum amount of ZAR4,000.
56 Id, sec 98A(1)(a)(iii) limits this claim to a maximum amount of ZAR4,000.
57 Id, sec 98A(1)(a)(iv) caps this claim at ZAR12,000.
58 This preference is capped at ZAR12,000. See id, sec 98A(1)(b).
59 Joubert "A comparative study", above at note 36 at 45.
60 Insolvency Act, sec 89(5).

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founded explanation or reason for the restriction placed on amounts claimable and the period for which it can be claimed. Worse still, the Insolvency Act does not state what happens in the event of an insolvent employer failing to pay workers' entitlements. There is no guaranteed institution or insurance fund provided for in the Insolvency Act as a way of ensuring payment of employee entitlements.[61] The current insolvency regime has the potential to leave 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[62] and the United Kingdom,[63] where there are government-funded safety nets that are used to pay employee entitlements. It is therefore necessary to consider provisions in the Labour Act that 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.

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 for those whose conditions of employment are otherwise provided for in the Constitution.[64] 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.[65] 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 precedent.[66] 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

61 This is a common characteristic of a jurisdiction which follows the "model two: bankruptcy reference approach". A similar situation obtains in South Africa. There is no guarantee fund for employee entitlements.

62 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.

63 In terms of sec 182 of the Employment Rights Act, 1996, the secretary of state pays employees' entitlements from the National Insurance Fund.

64 Labour Act, sec 3(1).

65 Id, sec 3(2)–(3).

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

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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". In section 2 it defines the term "retrench" as "terminate the employee's employment for the purpose of reducing expenditure or costs, adapting to technological changes, reorganizing 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,[67] but it does not follow that on liquidation an employer has to adhere to the procedures for retrenchment prescribed in sections 12C and 12D of the Labour Act. Termination of employees' contracts of employment on liquidation is defined in terms of section 40 (1) of the Insolvency Act, which is termination by operation of law,[68] even if the termination involves large numbers of employees. Notwithstanding, sections 12C and 12D of the Labour Act, which prescribe retrenchment procedures, apply 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.[69] A detailed discussion of the retrenchment procedures is beyond the scope of this contribution.[70] However, employees of an insolvent employer can also benefit from a motley collection 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 section 2A(3) of the Labour Act, labour rights can be extended to insolvency situations.

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. Unfortunately, the Insolvency Act does not have a consultative philosophy. It simply gives the liquidator the right to terminate contracts of employment of employees without affording

67 M Gwisai *Labour and Employment Law in Zimbabwe: Relations of Work under Neo-Colonial Capitalism* (2006, Zimbabwe Labour Centre) at 182.

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

69 *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).

70 For further reading, see L Madhuku *Labour Law in Zimbabwe* above at note 68 at 231–73.

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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 sub-section (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 sub-section (5)."

The Labour Act enhances workers' participation in decisions affecting their interests[71] 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 authorize 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).[72]

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.[73] Consultations are aimed at saving the business. This is the reason why section 244(2)(b)(iv) of the

71 See also Labour Act, sec 2A(1)(e).
72 *Chemco Holdings (Pvt) Ltd v Tenderere & 24 Others* SC 14/17.
73 The Labour Court has no jurisdiction to grant interdicts in terms of sec 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.

Companies Act permits 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."[74]

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 that 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.[75]

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).[76] 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.[77] 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.[78]

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74 Van Eck et al "Fair labour practices", above at note 6 at 914.

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

76 Labour Act, sec 13.

77 Insolvency Act, sec 89(3).

78 Labour Act, sec 13(1). See also *Nyanzara v Mbada Diamonds (Pvt) Ltd* HH 63/15.

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 ZWL$750.00.[79] It is reiterated that this limitation defeats the purpose of 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.

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.[80] An employer can make an application to the relevant employment council, or in its absence, to the retrenchment board, requesting an 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 there is no special fund to guarantee payment of employees' claims in the event of inability of the employer to pay.

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

79 See Insolvency Act, sec 89(2)(b).

80 Labour Act, sec 12C(3), as amended by Labour (Amendment) Act 5 of 2015.

to liquidation, the employer may adopt various strategies designed to make the business more profitable. The survivalist strategies include sale of the business, mergers, acquisitions and takeovers. Changes brought about by business restructuring in the workplace have significant implications on labour relations and employment law. Under 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.[81] 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 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 former employer to the new employer. It specifically provides that:

> "(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 transferor 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 to 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 their employment contract transferred with a business that is sold as a going concern.[82] 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 former 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 former employer and the employees are included in the basket of what is transferred.[83] The transfer does not interrupt employees' continuity of employment and, as a general rule, employees shall not be offered less favourable conditions.

It must be emphasized that section 16 can only be invoked if the business of the insolvent employer is sold prior to the final 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

81 A Rycroft and B Jordaan *A Guide to South African Labour Law* (2nd ed, 1992, Juta & Co) at 240.

82 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.

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

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 the sale of that business prior to liquidation or a sequestration order. Since modern insolvency law is now moving towards a business rescue philosophy,[84] the provisions of section 16 of the Labour Act must also be incorporated 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.[85]

EMPLOYEE RIGHTS UNDER THE COMPANIES ACT

Employees are also afforded protection in section 244 of the Companies Act (cap 24:03) in cases of voluntary winding up of a company. If there is reasonable suspicion by the minister that voluntary liquidation is designed to avoid an employer's obligation to pay terminal benefits or compensation for loss of employment, the minister may appoint an investigator.[86] 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 of their entitlements on termination. Where appropriate, the investigator may recommend, amongst other relief, the takeover of the insolvent company by employees.[87] This enhances the protection of employees in the face of fraudulent applications for liquidation. However, it is worth noting that the Companies Act (cap 24:03) has since been repealed by the Companies and Other Business Entities Act (cap 24:31), which was gazetted on 15 November 2019 and will be effective on 13 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.

CONCLUSION

This contribution sought to evaluate rights of employees on insolvency of the employer in Zimbabwe. In doing so, reference was made to international standards and, where necessary, foreign jurisdictions such as Australia, South Africa and the United Kingdom. It was established that workers enjoyed limited rights in their capacity as both employees and creditors of an insolvent company. The study revealed that as creditors, workers are indirectly entitled to the following rights: the right to commence liquidation proceedings and the right to participate and to be consulted during the liquidation. As

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

85 Van Eck et al "Fair labour practices", above at note 6 at 922.

86 Companies Act, sec 244(2).

87 See id, sec 244(2)(b)(iv).

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employees, it was established 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 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, however, is the express right of employees to be consulted by the employer prior to the liquidation.

It is argued that the Zimbabwean framework 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. 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.[88] 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. 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 45 days following the appointment of the final liquidator.[89] 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 ranked first. The current position has the potential for exposing workers to the risk of going home empty-handed if

88 A van Niekerk et al *Law@Work* (2nd ed, 2012, LexisNexis) at 23.

89 Insolvency Act of South Africa, sec 38(1).

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 that 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 employees. In addition, employees' participation rights during liquidation must be expressly recognized by the Insolvency Act.

Lastly, Zimbabwe must establish an employee protection scheme that guarantees payment of workers' entitlements on insolvency. Although viability of the fund in the Zimbabwean context was not examined, comparative jurisdictions such as Australia and the United Kingdom have established funds which are used to pay out workers' entitlements. The advantages of a state-funded guarantee institution cannot be overemphasized. It removes the burden of paying employees' entitlements from financially distressed employers. This in turn increases the free residue available for the benefit of other creditors.[90] Added to this, employees are guaranteed payment of their dues, which cushions them from the effects of losing employment and also ensures a decent living for the employees and their families.[91] 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 priority-guarantee fund approach". This also requires amending the Insolvency Act and incorporation of a specific chapter that comprehensively deals with rights of employees on insolvency.

CONFLICTS OF INTEREST

None

90 JL Westbrook et al *A Global View of Business Insolvency Systems* (2010, Martinus Nijhoff Publishers) at 187.

91 To the contrary, others argue that guarantee funds are expensive to run, and also that 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 GW 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.