The application of the law of insolvency to the winding-up of insolvent companies and close corporations*

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1 INTRODUCTION

The main Act that regulates insolvency law in South Africa is the Insolvency Act 24 of 1936.[1] This came about mainly because of the separate development of insolvency law as opposed to winding-up law, the latter always having been contained in separate legislation.[2] Insolvency law has shown immense growth over the past century, mirroring the growth in trade in industrialised nations. This has especially been the case in respect of international commerce, a community that South Africa recently rejoined. This growth has exposed South African insolvency law to be out of step with the rest of the industrialised world, and it has now become necessary to modernise our legislation.

The purpose of this article is to provide an exposition of the manner in which companies and close corporations are currently wound up under South African law. This is necessary in order to determine the need for a single insolvency statute in South Africa. In light of the fragmented nature of South African insolvency law, particular attention will be paid to:

(a) The "connecting provisions" in section 339 of the Companies Act 61 of 1973[3] and section 66 of the Close Corporations Act 69 of 1984.[4] These provisions make the law of insolvency applicable to companies and close corporations that are unable to pay their debts, and require the law of insolvency to be applied where the Companies Act or Close Corporations Act does not contain a provision dealing with a specific matter. It will be shown that the root of the problems experienced with dual insolvency

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* This article is based on a chapter from the author's unpublished doctoral thesis *A framework for corporate insolvency law reform in South Africa* (UP 2002).

1 Hereinafter referred to as the Insolvency Act.

2 It is interesting to note that although a hybrid of Roman-Dutch law and English law forms the basis of the South African insolvency law, and English law forms the basis of winding-up law, the "marriage" of the two systems has not yielded insurmountable problems in practice. This can also be attributed to the fact that English common law has a strong Roman law flavour.

3 Hereinafter referred to as the Companies Act.

4 Hereinafter referred to as the Close Corporations Act.

statutes in South Africa can, in the main, be attributed to these connecting provisions.[5]

(b) Provisions contained in the Companies Act and Close Corporations Act that are similar to those contained in the Insolvency Act, and cross-referencing between Acts. Although section 339 of the Companies Act makes the law of insolvency applicable to companies that are being wound up and that are unable to pay their debts, the legislature thought it prudent to include in the Companies Act:

(i) Specific provisions relating to specific aspects, for example the appointment, powers and duties of liquidators[6] and provisions relating to interrogations;[7]

(ii) Specific references to sections of the Insolvency Act, in addition to the general connecting provision contained in section 339 of the Companies Act. Examples of these are the provisions relating to meetings[8] and the provisions relating to contribution by creditors;[9] and

(iii) Specific provisions that only apply to companies or close corporations. An example of this is to be found in section 419 of the Companies Act which provides for the dissolution of a company once it has been completely wound up.[10]

In regard to the problem identified in paragraph (a), it will be shown that the introduction of a unified insolvency statute will remove the current problems being experienced with the use of the connecting provisions in section 339 of the Companies Act and section 66 of the Close Corporations Act.

Likewise, the problems encountered in paragraph (b) will be analysed and it will be shown that the introduction of a unified statute will obviate the need for cross-referencing between Acts in addition to the general connecting provisions contained in section 339 of the Companies Act and section 66 of the Close Corporations Act. The possible manner in which the problems in paragraphs (a) and (b) can be addressed, will be discussed in the conclusion.

2 THE APPLICATION OF INSOLVENCY LAW TO THE WINDING-UP OF COMPANIES

Chapter XIV of the Companies Act, consisting of sections 337 to 426, provides for the winding-up of a company. Nearly all the provisions dealing with winding-up in the Companies Act relate to procedural aspects, with the substantive law of

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5 However, it must be pointed out that these connecting provisions are necessary in light of the fact that the provisions relating to insolvency have not been duplicated in the Companies Act and the Close Corporations Act. England and Australia do not require these connecting provisions as the insolvency rules have been duplicated in the relevant legislation.

6 Ss 367 to 411 of the Companies Act.

7 Ss 415 to 418 of the Companies Act.

8 S 412 of the Companies Act.

9 S 342(2) of the Companies Act.

10 These unique provisions that relate only to corporate entities with legal personality will not be discussed here. However, these existing provisions that are found in the Companies Act and the Close Corporations Act have been included in the draft unified insolvency statute currently being drafted by the State Law Advisers.

insolvency being regulated by the law of insolvency as contained in the Insolvency Act and the common law. Many of the provisions of the Companies Act deal with the alignment of the provisions of the Companies Act with those of the Insolvency Act,[11] some relate to the fundamental differences between natural and juristic persons, for example the dissolution of a company once the winding-up process has been completed[12] and others with the personal liability of directors in respect of fraudulent trading.[13]

However, the winding-up provisions of the Companies Act cannot on their own be applied in the total administration of an insolvent company. Instead of including the provisions of substantive insolvency law in the Companies Act,[14] the legislature saw fit to make the "law relating to insolvency" applicable also to the winding-up of companies. This was achieved by including a general connecting provision that is contained in section 339 of the Companies Act. In addition to this general connecting provision, certain sections in the Companies Act make specific provisions of the Insolvency Act applicable also to companies that are being wound up and are unable to pay their debts.

3 THE APPLICATION OF INSOLVENCY LAW TO THE WINDING-UP OF CLOSE CORPORATIONS

As in the case of the Companies Act, the Close Corporations Act also contains provisions relating to winding-up.[15] The Close Corporations Act contains considerably less provisions for winding-up than the Companies Act, but there are nonetheless provisions which, again, are nearly identical to those contained in the Companies Act. Being a more recent Act, however, the Close Corporations Act does contain some innovations which are not to be found in either the Insolvency Act or the Companies Act.[16] The winding-up provisions in the Close Corporations Act are mainly procedural in nature, and make provision for the unique situation that a close corporation finds itself in under South African law.

In the same way that section 339 of the Companies Act makes the law of insolvency applicable to companies that are being wound up and that are unable to pay their debts, so too does section 66 of the Close Corporations Act apply in the case of a close corporation that is unable to pay its debts. Section 66 makes the Companies Act applicable to close corporations, which in turn makes section 339 of the Companies Act applicable. In other words, the law relating to insolvency will apply to a close corporation (that is unable to pay its debts) by virtue of section 339 of the Companies Act read with section 66 of the Close Corporations Act.

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11 Eg s 340 provides for the application of the Insolvency Act's provisions dealing with impeachable transactions, and sets out the events in respect of the winding-up of a company that will correspond to the sequestration order in the case of individuals or partnerships.

12 See s 419 of the Companies Act.

13 See s 424 of the Companies Act.

14 This is the position in Australia and England.

15 See part IX, ss 66 to 81 of the Close Corporations Act.

16 Eg the Master may immediately upon the granting of a provisional winding-up order appoint a final liquidator (s 74 of the Close Corporations Act). This is not possible under the provisions of the Insolvency Act or the Companies Act.

4 THE APPLICATION OF INSOLVENCY LAW TO THE WINDING-UP OF SPECIALISED INSTITUTIONS

It has already been stated that there are various other statutes that contain their own provisions in respect of winding-up.[17] The provisions contained in these Acts are mainly procedural in nature, and relate to the powers conferred on the governing bodies to intervene in winding-up proceedings, or to initiate such proceedings. However, the winding-up of these specialised institutions will not be dealt with in this article.

5 THE CONNECTING PROVISIONS IN SECTION 339 OF THE COMPANIES ACT AND SECTION 66 OF THE CLOSE CORPORATIONS ACT, DUPLICATION AND CROSS-REFERENCING

5 1 Introduction

It is a well-accepted fact that the Insolvency Act is the central insolvency legislation in South Africa.[18] All other Acts which provide for winding-up, liquidation and the like, are ancillary to the Insolvency Act. In effect this means that the administration of insolvent estates takes place under the provisions contained in the Insolvency Act, and that all other Acts which make provision for corporate insolvency are designed to slot into this process. However, the Insolvency Act only applies once winding-up has been effected under the separate legislation which governs such a corporation, for example the Companies Act or the Close Corporations Act.

In terms of the definition of "debtor" in the Insolvency Act,[19] only the estates of natural persons and partnerships may be sequestrated.[20] The liquidation of corporations, such as companies or other bodies corporate, is specifically excluded by the definition. This means that the procedure for bringing about a winding-up order is contained in separate legislation, such as the Companies Act or Close Corporations Act. Only once this procedure has been successfully implemented can the provisions of the Insolvency Act apply, and then not in all cases, as the enabling legislation often contains its own provisions in respect of certain procedures.[21]

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17 See part VI of the Long Term Insurance Act 52 of 1998; part VI of the Short Term Insurance Act 53 of 1998; s 29 of the Pension Funds Act 24 of 1956; s 35 of the Friendly Societies Act 25 of 1956; s 18C of the Medical Schemes Act 72 of 1967; ss 27, 28 and 39 of the Unit Trusts Control Act 54 of 1981; ch X of the Co-Operatives Act 91 of 1981; s 33 of the Financial Markets Control Act 55 of 1989; s 68 of the Banks Act 94 of 1990; and ch VIII of the Mutual Banks Act 124 of 1993.

18 See *Woodley v Guardian Assurance Co of SA Ltd* 1976 1 SA 758 (W). The Van Wyk de Vries Commission (*Kommissie van Ondersoek na die Maatskappywet* (*Hoofverslag* RP 45/1970) and *(Aanvullende Verslag en Konsepwetsontwerp* RP 31/1972) – hereinafter referred to as the Van Wyk de Vries Commission) stated it thus at ch XIX par 50.02(b): "Ons beskou die Insolvensiewet as die heersende Wet."

19 See the definition of "debtor" in s 2 of the Insolvency Act.

20 However, trusts, clubs and other associations of persons may also be sequestrated under the Insolvency Act – see eg *Magnum Financial Holdings (Pty) Ltd (in liquidation) v Summerly* 1984 1 SA 160 (W) which dealt with the question as to whether a trust should be liquidated or sequestrated.

21 Eg the Companies Act contains its own provisions for the appointment of liquidators, which are nearly identical to the provisions for the appointment of trustees in the Insolvency Act – see ss 367 to 385 of the Companies Act.

5 2 Connecting provisions under earlier legislation

Section 339 has a brief but interesting history, and the provision itself has often been the subject of scrutiny by our courts. It is an interesting fact that section 339 has recently been considered judicially in a number of decisions.[22]

The Transvaal Companies Act 31 of 1909[23] was the first consolidated Act whereby the creation of a company with limited liability and its consequent winding-up were included in the same Act. Up to this time the provisions for the creation of a company with limited liability and its subsequent winding-up had been provided for in separate legislation. This Act was the precursor to the Companies Act 46 of 1926,[24] and was the last pre-Union legislation dealing with company law and winding-up.

In this Act winding-up was dealt with in a separate chapter, namely chapter IV.[25] This Act was modelled on the English Companies (Consolidation) Act of 1908.[26] The current Companies Act follows more or less the same division (into chapters) as the 1926 Companies Act.

In distinction to previous legislation, the 1909 Transvaal Companies Act was a lot clearer as regards the law that applied when winding-up companies that were insolvent. Section 180 of this Act provided as follows:

> "In the winding-up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law relating to insolvency, with respect to the estates of persons sequestrated; and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding-up, and make such claims against the company as they respectively are entitled to do by virtue of this section."

In addition, section 183 provided as follows:

> "In the case of a winding-up of any insolvent company, the provisions of the law for the time being relating to insolvency shall *mutatis mutandis* be applied in respect of any matter not specially provided for in this Act."

This section was the precursor to the present section 339 of the Companies Act.[27] The applicable insolvency law at the time was Law 13 of 1895, which had repealed Ordinance 21 of 1880. From court decisions at the time, it is evident that these connecting provisions created problems of interpretation. For example, in *Standard Bank v Liquidator of the B & C Syndicate Ltd*[28] the court had to decide whether the rules pertaining to liquidation and distribution accounts in insolvent estates, and especially the rules pertaining to contribution by creditors, also applied to a company in liquidation. In this case the court found it

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22 These decisions are discussed in detail below.

23 Hereinafter referred to as the 1909 Transvaal Companies Act.

24 Hereinafter referred to as the 1926 Companies Act.

25 Ss 106–197.

26 See De la Rey "Aspekte van die Vroeë Maatskappyereg: 'n Vergelykende Oorsig (Slot)" 1986 *Codicillus* Vol 27 No 2 24.

27 However, the court still had the authority to confer on the liquidator certain powers – see *Provisional Liquidators of Edwards, Ltd v Goldstein and Engelstein* 1911 WLD 152. See also *Ex parte Liquidators of the De Deur Estates* (1908) TS 960; *Ex parte Grahamstown Brickmaking Co Ltd (in liquidation)* 17 EDC 75.

28 1918 TPD 470.

unnecessary to refer to the provisions of sections 180 and 183 of the 1909 Companies Act, finding its solution instead in the provisions of section 133 of that Act. Section 133 provided that a liquidator was obliged to draft the liquidation and distribution account in the same manner as a trustee in an insolvent estate. This case illustrates the fact that, despite the general provisions of sections 180 and 183, there were also other provisions dealing with specific issues; in this case the rules pertaining to the drafting of liquidation and distribution accounts.

Section 182 of the 1926 Companies Act provided for the law of insolvency to apply to the winding-up of companies that were unable to pay their debts:[29]

> "Insolvency Law to be Applied Mutatis Mutandis. – In the case of every winding-up of a company unable to pay its debts the provisions of the law relating to insolvent estates shall, in so far as they are applicable, be applied *mutatis mutandis* in respect of any matter not specially provided for in this Act or the rules framed under section *two hundred and twenty*."

In *R v Schreuder*[30] and *R v RSI (Pty) Ltd*[31] the court found that a company could not be found guilty of contravening the provisions of the Insolvency Act by virtue of the connecting provision found in section 182 of the 1926 Companies Act. This problematic situation was well illustrated by the comments of Wynne J in the *RSI (Pty) Ltd* case at 416C-D:

> "So far, however, as insolvency is concerned, the '*nexus*' between the Companies Act and the Insolvency Act is to be found in two sections only of the Companies Act, viz sec 182 and sec 185 . . . Sec 182 is an administrative section which applied the provisions of the law relating to insolvent estates *mutatis mutandis* to the winding-up of a company unable to pay its debts in respect of all matters not specially provided for in the Companies Act . . . Nowhere in the Companies Act . . . is any section to be found which renders the company itself liable for the commission of offences provided for in the Insolvency Act."

The comment made at 29E of the *Schreuder* case is also apt:

> "It seems to me, however, that sec 182 of the Companies Act, 1926, is merely administrative and does not incorporate into that Act the penal provisions of the Insolvency Act, 1936."[32]

In both the above decisions the court found that section 182 was purely administrative.[33] However, in *S v Yousuf*[34] the court found that the directors of a

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29 For an early decision dealing with the application of this section in practice, see *Rivoy Investments (Pty) Ltd v Wemmer Trust (Pty) Ltd* 1939 WLD 151.

30 1957 4 SA 27 (O).

31 1959 1 SA 414 (E).

32 See also *Cooper and Cooper v Ebrahim* 1959 4 SA 27 (T) where the court confirmed the approach taken by the court in the *Schreuder* case *supra*. Cf the decision of the court in *S v Gani* 1965 1 SA 222 (T) at 223D where the court reached the same conclusion that was reached in the *Schreuder*, *RSI (Pty) Ltd* and *Ebrahim* cases above, but did not refer to either. However, the court did refer to the Griqualand West decision of *R v City Silk Emporium (Pty) Ltd and Meer* 1950 1 SA 825 (GW), in deciding that s 182 of the 1926 Companies Act was merely administrative in nature. For other decisions dealing with the possible application and interpretation of s 182 of the 1926 Companies Act, see also *F & C Building Construction Co (Pty) Ltd v Macsheil Investments (Pty) Ltd* 1959 3 SA 841 (D) at 845F-G and *Parity Insurance Co Ltd (in liquidation) v Hill* 1967 2 SA 551 (A).

33 In regard to s 182 only being administrative in nature, see also *Ex parte Mallac: In re de Marigny (Pty) Ltd (in liquidation): de Charmoy Estates (Pty) Ltd Intervening* 1960 2 SA

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company had been properly charged under section 134(1) of the Insolvency Act, but referred to the provisions of section 185[35] of the 1926 Companies Act and not section 182. This illustrates the difficulties encountered where there are additional connecting provisions in the Companies Act, such as section 185 that was found to be applicable in this case, other than the general connecting provision such as the one found in section 182.

However, the most important decision regarding section 182 of the 1926 Companies Act is undoubtedly to be found in *Woodley v Guardian Assurance Co of SA Ltd*[36] where Colman J made the following remark regarding this connection provision:

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

From the above decisions it is evident that the court had in the past grappled with the connecting provisions contained in both the 1909 Transvaal Companies Act as well as similar provisions contained in the 1926 Companies Act.

5 3 The fragmentation of current South African insolvency law and the resultant connecting provisions

5 3 1 Introduction

The fragmentation, or duality, of current South African insolvency law creates a number of interesting interpretational and practical problems. There are many facets to this fragmentation, ranging from the commencement of the insolvency proceeding to the duplication of provisions in various Acts. Under this heading the problems caused by the current fragmentation of South African insolvency law will be discussed. Because many of these aspects overlap each other, it is necessary to first outline the various identifiable facets of the problems caused by the fragmentation of our insolvency law.

(a) In the first place, there are currently different statutes that govern the commencement of the insolvency proceeding itself.

(b) In the second place, there are numerous difficulties involved in determining which provisions that are contained in a variety of statutes, actually govern the winding-up process.

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187 (N). However, the part of the *Mallac* case that dealt with the application of s 182 to leases and s 37 of the Insolvency Act, was overruled by the Appellate Division in *Durban City Council v Liquidator, Durban Icedromes Ltd* 1965 1 SA 600 (A).

34 1965 3 SA 259 (T).

35 S 185 of the 1926 Companies Act made the criminal provisions relating to insolvency law also applicable to certain officers of a company.

36 1976 1 SA 758 (W).

(c) Thirdly, there may be different winding-up rules that apply to the same type of debtor due to the mode of winding-up that has been followed.

(d) Fourthly, the fragmentation of our insolvency law may lead to different conclusions being reached in respect of similar disputes.[37]

(e) Lastly, there are other statutes that are interpreted to override the provisions of the Insolvency Act.[38]

The ensuing discussion will concentrate on paragraphs (b) and (c) above, with only a brief reference to paragraph (a). However, what is stated in this article must be seen against the background of the sum total of all these issues, as they are all symptomatic of the same thing, namely the fragmentation or duality of South African insolvency law.

5 3 2 Different statutes governing the commencement of the insolvency proceeding

Due to the wide ambit of the issues surrounding liquidation applications, only a brief reference to this problem will be made here, and then only with reference to three specific cases that presented themselves recently.

The first case is *In re: Body Corporate of Caroline Court*[39] where the Supreme Court of Appeal had to decide whether the body corporate of a sectional title scheme could be wound up in terms of the provisions of the Sectional Titles Act 95 of 1986.[40] Without going into any detail, the court dismissed the application brought in terms of section 48 of the Sectional Titles Act, but without really providing any answers to the questions that the court itself had raised. One of the problems in this case was the fact that section 36(5) of the Sectional Titles Act expressly excludes the application of the provisions of the Companies Act, meaning that the application could not be brought in terms of the provisions of the Companies Act. As a result of this decision one is left wondering how one should in fact go about winding-up the body corporate of a sectional title scheme, or if it is in fact possible.[41]

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37 Reference can be made here to two decisions, namely *Klerk v SA Metal and Machinery Company (Pty) Ltd* [2001] 2 All SA 276 (E) and *Waste-Tech (Pty) Ltd v Van Zyl and Glanville* 2002 1 SA 841 (E). In both these cases the liquidators were compelled to provide security for litigation costs in terms of the provisions of the Companies Act and the Close Corporations Act. The point that needs to made here is that these rules (regarding the provision of security) do not apply to trustees in estates that have been sequestrated in terms of the Insolvency Act, which results in different rules being applied to the same situation.

38 An example of this is to be found in the provisions of the Sectional Titles Act 95 of 1986, where the arrear levies have to be paid before a sectional title unit can be transferred. In *Nel v Body Corporate of the Seaways Building* 1996 1 SA 131 (A) and *Barnard v Regspersoon van Aminie* 2001 3 SA 973 (SCA) the Appellate Division of the Supreme Court, as it was then known, and the Supreme Court of Appeal respectively found that the provisions of the Sectional Titles Act override the provisions of s 89 of the Insolvency Act, which provide for a limitation of two years in respect of the payment of arrear taxes out of the proceeds of the property. Consequently arrear levies have to be paid in full from the proceeds before a sectional title unit will issue a levy clearance certificate, effectively allowing the property to be transferred out of the insolvent estate.

39 [2002] 1 All SA 49 (SCA).

40 Hereinafter referred to as the Sectional Titles Act.

41 It is submitted that this can in fact be done in a similar fashion as the method used by the premier of the Eastern Cape in *Sunny South Canners (Pty) Ltd v Mbangxa* 2001 2 SA 49

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It was not long before this question was answered by the Durban and Coast Local Division of the High Court in *Reddy v Croftdene Body Corporate*.[42] In dismissing an unopposed application for the winding-up or sequestration of the Croftdene Body Corporate, the court found that the body corporate could not be wound up under the provisions of the Sectional Titles Act or sequestrated under the provisions of the Insolvency Act.[43]

The third case that is relevant here is the decision in *Fairleigh v Whitehead*[44] which dealt with the administration of an insolvent deceased estate in terms of section 34 of the Administration of Estates Act 66 of 1965. Section 34 of the Administration of Estates Act provides for two possible alternative procedures, one being in terms of the Administration of Estates Act and the other in terms of the Insolvency Act. The question that the court had to answer, was whether or not the informal procedure created in terms of section 34 of the Administration of Estates Act was one in terms of which the executor deals with an estate that has been sequestrated. Although the court answered this question in the affirmative, litigation could probably have been avoided if it were not for the fragmentation of our insolvency law.

5 3 3 The connecting provisions in current legislation, the duplication of provisions and cross-referencing between Acts

With the promulgation of the current Companies Act, the wording of section 182 of the 1926 Companies Act was amended to the wording currently contained in section 339 of the Companies Act, which reads as follows:

> "In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied *mutatis mutandis* in respect of any matter not specifically provided for by this Act."

The Van Wyk de Vries Commission of Enquiry into the Companies Act was directly responsible for the promulgation of the 1973 Companies Act in its revised form, but the Commission's report itself does not shed much light on the reasons for the Commission changing the wording of this section from its previous form in section 182 of the 1926 Act.[45] The only reference in the report that has any relevance, is the following statement made at paragraph 50.02 of the Main Report (*Hoofverslag*):

> "Wat die algemene benadering van die Kommissie tot hierdie onderwerp betref, was ons gelei deur –
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> (a) . . .
>
> (b) die wenslikheid daarvan om die Maatskappywet met betrekking tot likwidasie te laat strook met die Insolvensiewet ten aansien van sowel beginsels as prosedure. Ons beskou die Insolvensiewet as die heersende Wet . . ."

(SCA), namely by listing the powers of the liquidators with specific reference to the provisions of the Companies Act.

42 2002 CLR 157 (D).

43 For a critical discussion of this case, see Boraine and O'Brien "Winding-up or sequestration as a means to enforce payment of debts due by a body corporate established in terms of the Sectional Titles Act" 2002 SAILR 136–165.

44 2001 2 SA 1197 (SCA).

45 See also De la Rey "Creditors' Voluntary Liquidation: Theoretical Analysis and Practical Guide" 1980 DJ 47, where she agrees with the view that the Van Wyk de Vries Commission did not always provide explanations for the changes that they proposed.

From this statement by the commission it is evident that the new wording contained in section 339 was designed to improve upon the previous connecting provision contained in section 182 of the 1926 Companies Act, by making it clearer that both the principles and procedures relating to the law of insolvency should apply also to companies in winding-up. That the modification of the section was not entirely successful, is evident from the decisions discussed below.

A matter that complicates the application of the "the law relating to insolvency" when applied to winding-up, is that in addition to the general connecting provision there are also specific provisions in the Companies Act that make specific provisions of the Insolvency Act applicable to companies being wound up. An example of this can be found in *Dally v Galaxie Melodies (Pty) Ltd*[46] where the court found that section 340(1)[47] renders the provisions of section 34 of the Insolvency Act applicable to the alienation by a company of its business.[48] Because section 340(1) makes specific provision for certain sections of the Insolvency Act to apply, it of course becomes unnecessary to apply section 339. However, such specific references to the provisions of the Insolvency Act create confusion as to why there are, in addition to section 339, sections of the Companies Act that find it necessary to make reference to specific sections of the Insolvency Act. The question that could be asked is why there is a general connecting provision *in addition to* the specific references to sections in the Insolvency Act.

One of the earliest problems encountered with the applicability of the provisions of the Insolvency Act to a company in liquidation by virtue of the provisions of section 339, can be found in *Herrigel v Bon Roads Construction Co (Pty) Ltd*.[49] In this case Lichtenberg J found that section 339 of the Companies Act did not envisage that the procedure and orders provided for in section 32 of the Insolvency Act[50] applied to a claim based on section 341 of the Companies Act.[51]

On the other hand, the court in *Hubert Davies Water Engineering (Pty) Ltd v The Body Corporate of "The Village"*[52] found that section 84(1)[53] of the Insolvency Act applied to companies in liquidation by virtue of the provisions of section 339 of the Companies Act. In *Venter v Avfin (Pty) Ltd*[54] the Supreme Court of Appeal had to determine whether sections 84 and 83 of the Insolvency Act also applied to close corporations in liquidation, by virtue of the provision of section 66 of the Close Corporations Act read with section 339 of the Companies

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46 1975 2 SA 337 (C).
47 S 181(1) of the 1926 Companies Act.
48 Cf *Scott-Hayward v Habibworths (Pty) Ltd* 1959 1 SA 202 (T); *Castleden v Volks Furniture Stores (Pty) Ltd* 1967 3 SA 733 (D); *Garzonis v Tokwe Ranches (Pvt) Ltd* 1969 1 SA 349 (R) dealing with similar cases under s 182 of the 1926 Companies Act.
49 1980 4 SA 669 (SWA). See also *Trakman v Livschitz: In re Livschitz v Trakman* 1996 2 SA 384 (W) which dealt with security for costs where a liquidator commences proceedings to set aside impeachable dispositions in terms of the Insolvency Act.
50 S 32 of the Insolvency Act deals with proceedings to set aside improper dispositions.
51 S 341 of the Companies Act deals with dispositions and share transfers that are void if made after winding-up.
52 1981 3 SA 97 (D).
53 S 84(1) deals with the effect of insolvency on instalment sale transactions.
54 1996 1 SA 826 (A) (also reported under [1996] 1 All SA 173 (A)).

Act. In finding that the provisions do apply, the court referred to the *Hubert Davies* decision with approval.[55] However, in another case dealing with section 84(1) of the Insolvency Act and its application to the winding-up of a close corporation by virtue of the provisions of section 66 of the Close Corporations Act read with section 339 of the Companies Act, there is an interesting twist when applying the provisions of section 339. In *ABSA Bank Ltd v Cooper*[56] it was contended that before section 339 of the Companies Act could be applied, the inability of the corporation to pay its debts had to be determined. It was further contended that the relevant stage for determining such inability was the time at which the section was invoked. It was also contended that the inability to pay debts did not only involve a consideration of commercial insolvency, but reference to all the corporation's assets and liabilities. In its decision the court found, *inter alia*, that the time to determine whether the corporation was unable to pay its debts, and therefore to answer the question as to whether section 339 did in fact find application, was at the time the section was invoked. The court also found that mere commercial insolvency was not sufficient, holding that the inability of a corporation to pay its debts had to be measured in the context of its winding-up, that is in a weighing-up of its assets and liabilities. Without considering the correctness of the *ABSA Bank* case, or for that matter any of the cases dealing with the connecting provisions, it is evident that section 339 of the Companies Act and section 66 of the Close Corporations Act[57] cause various interpretational difficulties.

The words *mutatis mutandis* that appear in section 339 of the Companies Act came to be interpreted by the court in *Smith v Mann*.[58] Although the case dealt with a section 311 compromise in terms of the Companies Act, the question that had to be answered was whether the provisions of sections 130[59] and 141[60] of the Insolvency Act found application by virtue of section 339 of the Companies Act. Flemming J (as he then was) discussed the meaning of *mutatis mutandis* in section 339 as follows:[61]

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55 Cf *Morgan v Wessels* 1990 3 SA 57 (O); *Van Zyl v Bolton* 1994 4 SA 648 (C); *UDC Bank Ltd v Seacat Leasing and Finance Co (Pty) Ltd* 1979 4 SA 682 (T), the latter of which was not followed in the *Venter* case. See also *Avfin Industrial Finance (Pty) Ltd v Interjet Maintenance (Pty) Ltd* 1997 1 SA 807 (T) which was decided before the *Venter* case.

56 2001 4 SA 876 (T). It should be noted that the court in *Taylor and Steyn v Koekemoer* 1982 1 SA 374 (T) had already pointed out that the time to determine whether or not the company or corporation was unable to pay its debts, is the time at which the section is invoked.

57 There are many examples of where s 66 of the Close Corporations Act has been applied, often creating huge interpretational problems: *Spendiff v JAJ Distributors (Pty) Ltd* 1989 4 SA 126 (C) 135; *Du Plessis v Oosthuizen* 1995 3 SA 604 (O); *Syfrets Bank Ltd v Sheriff of the Supreme Court, Durban Central; Schoerie v Syfrets Bank Ltd* 1997 1 SA 764 (D); *Nathaniël & Efthymakis Properties v Hartebeestspruit Landgoed CC* [1996] 2 All SA 317 (T); *Townsend v Barlows Tractor Co (Pty) Ltd* 1995 1 SA 159 (W) and *Barlows Tractor Co (Pty) Ltd v Townsend* 1996 2 SA 869 (A) 881.

58 1984 1 SA 719 (W).

59 S 130 of the Insolvency Act deals with illegal inducements to vote for a composition, or not to oppose the rehabilitation of a debtor.

60 S 141 of the Insolvency Act deals with the consequences of the acceptance of consideration for certain illegal acts or omissions.

61 At 722C-E. See also *SA Fabrics v Millman* 1972 4 SA 592 (A) 600 where the Appellate Division held that *mutatis mutandis* means with the *necessary* alterations.

> "Section 339 does not create a power on the part of the court to apply a law passed for certain circumstances to other circumstances. It purports to carry the limits of the applicability which it prescribes in itself. Concededly, the applicability '*mutatis mutandis*' is not capable of firm delineation. The provisions which become applicable may range over a wide field or a narrow one. The 'changes' in wording to adjust to the exotic circumstances may be minor or major. What remains constant is that no leeway is created to decide rather than to conclude that a statute which according to its own terms is not applicable to the present situation, should apply to a different situation. It can only follow if the Legislature, even be it in general terms, has so decreed."

In *Bryant & Flanagan (Pty) Ltd v Muller*[62] the Appellate Division found that a liquidator, as in the case of a trustee, was vested with a discretion to abide by or terminate an executory contract not specifically provided for in the Insolvency Act. The common law being applicable in such a case, the court found that the liquidator was vested with the same rights as a trustee under the common law by virtue of section 339 of the Companies Act.

One of the most important cases dealing with the applicability of insolvency law to the winding-up of a company by virtue of section 339 of the Companies Act, is *Kalil v Decotex (Pty) Ltd*.[63] In this decision of the Appellate Division[64] the words "in the winding-up of a company" that are used in section 339, were interpreted by the court to refer to the *process of liquidation* that commences *once an order of winding-up has been granted*. The court found that the provisions of section 339 do not apply to proceedings giving rise to a liquidation order or the refusal thereof. In this specific case the provisions of section 150 of the Insolvency Act[65] were found not to apply to a company where the court had refused to grant a provisional winding-up order. The court referred with approval to the decision in *Lawclaims (Pty) Ltd v Rea Shipping Co SA: Schiffcommerz Aussenhandelsbetrieb Der VVB Schiffsbau Intervening*[66] where it was stated that section 339 only applies in the winding-up of a company, that stage only being reached when an order to wind up a company has been made in terms of the Companies Act.[67]

In *Choice Holdings Ltd v Yabeng Investment Holding Co Ltd*[68] the court also had to decide whether or not section 150 of the Insolvency Act would apply to a company by virtue of section 339 of the Companies Act, where the directors of a company had appealed against the granting of a liquidation order by the court. The court found that section 150(3) of the Insolvency Act did in fact apply, allowing the winding-up process of the company to continue despite the pending appeal.[69] This case can be distinguished from the *Kalil* decision in that the

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62 1978 2 SA 807 (A).
63 1988 1 SA 943 (A).
64 As it was then known. The name of this court has since been changed to the Supreme Court of Appeal.
65 S 150 of the Insolvency Act deals with appeals.
66 1979 4 SA 745 (N).
67 750B-C of the *Lawclaims* case, *supra*.
68 2001 2 SA 768 (W).
69 It was contended by the applicants that r 49(11) of the Uniform Rules of Court applied, having as a result that the appeal stayed all proceedings, including the winding-up process, relating to the company. S 150(3) of the Insolvency Act, on the other hand, provides that the administration process of an insolvent estate is not stayed, but continues subject to certain provisos relating to the sale of property.

Choice Holdings case dealt with a liquidation order that had in fact been granted, allowing the provisions of section 339 of the Companies Act to apply. In the *Kalil* case the court had refused to grant a liquidation order and, due to the fact that the company was not in liquidation, section 339, and consequently section 150(3) of the Insolvency Act, could not be applied.[70]

There are three cases that highlight the difficulties encountered where the Companies Act does in fact contain a provision relating to the problem at hand, begging the question as to whether or not the Insolvency Act's provisions should apply by virtue of the provisions of section 339 of the Companies Act. The first case is *Townsend v Barlows Tractor Co (Pty) Ltd*,[71] where the court held that the proviso to section 104(1)[72] of the Insolvency Act could find no application to a company in liquidation, despite the provisions of section 339 of the Companies Act. In arriving at his conclusion Cloete J expressed himself as follows:[73]

> "I find no room for the operation of the proviso in s 104(1) of the Insolvency Act to liquidations of companies or close corporations. The omission of such a proviso from s 366(2) of the Companies Act of 1973 . . . is in my view inconsistent with an intention on the part of the Legislature that such a proviso would be applicable in the case of liquidations. The Companies Act having in s 366(2) dealt with the consequences of late proof of claims, there is no room for the proviso in s 104 of the Insolvency Act to be incorporated under the general provisions of s 339 of the Companies Act."

The other two cases are *Syfrets Bank Ltd v Sheriff of the Supreme Court, Durban Central* and *Schoerie v Syfrets Bank Ltd*,[74] where the court held that section 20 of the Insolvency Act[75] was not one of the provisions that applied to a company or close corporation in liquidation by virtue of the provisions of section 339 of the Companies Act.[76] The court arrived at this conclusion because of the fact that section 361(1) of the Companies Act specifically provides for the assets of a company to be deemed to be under the custody and control of first the Master and then the liquidator.

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70 However, an appeal against a liquidation order must be distinguished from an application to have the proceedings relating to the winding-up of a company set aside completely. In this regard see the decision of the court in *Storti v Nugent* 2001 3 SA 783 (W), where the court gave a detailed historical account of s 354 of the Companies Act. S 339 is also referred to in this case, although no direct decision regarding its operation was made. See also *Ward v Smit: In re Gurr v Zambia Airways Corporation Ltd* 1998 3 SA 175 (SCA).

71 1995 1 SA 159 (W).

72 This provision deals with the late proof of claims. In *Swaanswyk Investments (Pty) Ltd v The Master* 1978 2 SA 267 (C) it was held that the proof of creditors' claims must be both procedurally and substantively the same as in the case of insolvency. However, in regard to the possible application of s 45 of the Insolvency Act to a company being wound up under the provisions of the 1926 Companies Act, and the application of s 182 of that Act, see *Wynn and Godlonton v Mitchell* 1973 1 SA 283 (E).

73 At 165C–D.

74 1997 1 SA 764 (D). These cases were decided simultaneously.

75 S 20 deals with the vesting of estate property in the Master and the trustee in the case of sequestration.

76 Cf *Pols v R Pols – Bouers en Ingenieurs (Edms) Bpk* 1953 3 SA 107 (T) at 111G–H and *Secretary for Customs and Excise v Millman* 1975 3 SA 544 (A) at 552F–H.

In *National Union of Leather Workers v Barnard and Perry*[77] the Labour Appeal Court, per Davis AJA, found that section 38 of the Insolvency Act[78] applied to a company that was wound up voluntarily as a voluntary winding-up by creditors, by virtue of the provisions of section 339 of the Companies Act. This in turn led the court to rule that the decision to wind up the company by passing a special resolution amounted to an act by the employer in bringing the contract of employment to an end in a manner recognised by law, and therefore amounting to a dismissal in terms of section 186(a) of the Labour Relations Act 66 of 1995. Once again this case illustrates the tremendous impact that section 339 can have when applying the principles of insolvency to companies that are being wound up.

In addition to the sections and case law that have been discussed above, the Companies Act also contains an interesting hybrid of provisions from the Insolvency Act and additional provisions contained in the Companies Act. Although many of these provisions do not create many problems in practice, they nevertheless unnecessarily complicate the administration of companies that are being wound up.

Section 340 of the Companies Act makes the provisions relating to impeachable dispositions in the Insolvency Act applicable also to companies that are being wound up and that are unable to pay their debts. Many of the problems associated with this section, especially in regard to the application of section 34 of the Insolvency Act, have already been discussed above.

Despite the connecting provision contained in section 339 of the Companies Act, section 342 provides that the rules relating to the application of a company's assets and the costs of winding-up must be applied in the same way as they would be in the case of a sequestrated estate. Section 342 reads as follows:

> "Application of assets and costs of winding-up. – (1) In every winding-up of a company the assets shall be applied in payment of the costs, charges and expenses incurred in the winding-up and, subject to the provisions of sections 435(1)(b), the claims of creditors as nearly as possible as they would be applied in payment of the costs of sequestration and the claims of creditors under the law relating to insolvency and, unless the memorandum or articles otherwise provide, shall be distributed among the members according to their rights and interests in the company.
>
> (2) The provisions of the law relating to insolvency in respect of contributions by creditors towards any costs shall apply to every winding-up of a company."

The practical effect of this section is that the rules pertaining to the sale of assets and the subsequent application of the proceeds in the payment of administration expenses and claims, are the same as would be the case in the estate of an individual. This necessarily entails the application of various sections of the Insolvency Act. For example, if the asset is subject to the rights of a secured creditor then sections 2,[79] 83,[80] 89[81] and 95[82] of the Insolvency Act will find application to the proceeds of such an asset.

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77 2001 4 SA 1261 (LAC).

78 S 38 of the Insolvency Act deals with the termination of service contracts upon the sequestration (or liquidation) of the employer.

79 Definition of "security" and "preference".

80 This section deals with the sale of an asset that is subject to the secured rights of creditors.

However, the greatest irony contained in the application of section 342 of the Companies Act, lies in the application of the proceeds of free residue assets to the claims of statutory preferent creditors.[83] Although the preferences for which provision is made in sections 96 to 102 of the Insolvency Act do find application in the case of a partnership, and may in fact apply to the estate of an individual, they more often find application in the case of companies and partnerships. For example, section 98A of the Insolvency Act provides for the payment of arrear salaries and other employee claims to be paid as a preference out of the free residue assets. These claims will of course arise in the case of partnerships, hardly ever in the estate of an individual, but most often in the case of a company or close corporation. It is submitted that it would have been more sensible for provisions of this nature to be included in the winding-up provisions of the Companies Act and Close Corporations Act. In addition to section 98A, section 38 of the Insolvency Act provides for the termination of contracts of employment where the employer's estate is sequestrated. These provisions would also be better suited to companies and corporations that are being wound up, even though the provisions would find application in the case of a partnership being sequestrated in terms of the provisions of the Insolvency Act. The same principle applies to claims by the South African Revenue Service for value-added tax in terms of section 99 of the Insolvency Act.

The Companies Act also contains some specific references to the Insolvency Act relating to the convening of meetings,[84] voting at meetings[85] and interrogations.[86] Although the provisions in the Insolvency Act relating to the convening of meetings and voting at meetings do not appear to create any practical problems, the application of section 65, and other sections relating to interrogations held under the provisions of the Insolvency Act, do appear to have raised some questions. The problem with section 416 of the Companies Act referring to the provisions of section 65 of the Insolvency Act, is the question whether all the provisions of this section must be applied or only aspects thereof. Henochsberg[87] states the following in regard to the scope of application of section 65 of the Insolvency Act to section 415 interrogations under the Companies Act:

> "As to the provisions of s 65 of the Insolvency Act, which apply in relation to the interrogation of a witness under s 415, see the General Note on s 415. Apart from these provisions, it is submitted that, in view of the fact that effectively all the matters for which s 65 of the Insolvency Act provides are *mutatis mutandis* already provided for by s 415, there is in fact no scope for the application of s 65 in the winding-up (s 339)."

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81 This section deals with the costs that must be paid from the proceeds of a security before the creditor becomes entitled to the balance of the proceeds.

82 This section deals with the distribution of the balance of the proceeds of a security once the costs referred to in s 89 have been paid.

83 For a comprehensive discussion of statutory preferences in corporate insolvency in South Africa and the United Kingdom, see Keay, Boraine and Burdette "Statutory Preferences in Corporate Insolvency: A Comparative Analysis" 2001 *International Insolvency Review* 1.

84 Ss 364(2) and 412(1)(a) of the Companies Act refers to the manner in which meetings must be convened. It is not clear why it was considered necessary to make provision for the convening of meetings in both these sections.

85 S 365(2)(a) of the Companies Act.

86 S 416 of the Companies Act.

87 Kunst (gen ed) *Meskin, Henochsberg on the Companies Act* (1994) 883 (hereinafter referred to as Henochsberg).

However, in *Vize v Wilmans*[88] the court did in fact find that the provisions of sections 64 and 65 of the Insolvency are applicable to a company in liquidation by virtue of section 339 of the Companies Act. It is submitted that this decision is clearly incorrect as the provisions find application by virtue of section 416 of the Companies Act.[89] From this it is evident that the extent of application of these fragmented provisions is not always clear. This creates confusion and uncertainty, something that could be prevented by having uniform provisions in a unified insolvency statute.

Other sections of the Companies Act that refer to the provisions or application of the Insolvency Act are sections 386(1)(e),[90] 386(4)(g)[91] and 425.[92] Since no real practical problems have been experienced with these provisions in the past, they will not be discussed here.

The final aspect that needs to be discussed here is the term that effectively makes the law of insolvency applicable to winding-up, namely the term "unable to pay debts". If one looks at the various provisions of the Insolvency Act that apply to companies and close corporations in liquidation, it is evident that the legislature only wanted the provisions to apply in cases where the company was insolvent and, consequently, wanted to protect the interests of creditors. Because the winding-up provisions in the Companies and Close Corporations Act also regulate the winding-up process of solvent companies, it was necessary to make a distinction that could determine to which companies and corporations the law of insolvency must be applied. The term "unable to pay debts" has been problematic in a number of respects, but especially in regard to the time at which this inability must be determined.[93] Whether this inability to pay debts is based on factual or commercial insolvency has also become a bone of contention.[94]

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88 2001 4 SA 1114 (NC).

89 One may pose the question as to whether it makes any difference whether the provisions of ss 64 and 65 of the Insolvency Act are made applicable by virtue of s 339 or s 416. However, the wording of ss 339 and 416 are not identical: in s 339 the words used are "in the winding-up of a company unable to pay its debts", while the wording used in s 416 refers to a company "which is being wound up and is unable to pay its debts". In the *Vize* case the court found that the difference in wording between ss 339 and 416 did not amount to anything substantial. Although these phrases seem to imply the same thing, it was argued in *Hudson v The Master* 2002 1 SA 862 (T), that they do not have the same meaning. Although the court rejected this argument, another court may well have come to a different conclusion.

90 This section deals with general powers and duties of liquidators.

91 This section deals with the liquidator's powers in regard to contracts for the purchase of immovable property (s 35 of the Insolvency Act) and a liquidator's powers in regard to contracts of lease (s 37 of the Insolvency Act).

92 This section provides for the application of the criminal provisions relating to the law of insolvency. Parts of this aspect have been discussed above under the discussion of s 339 of the Companies Act.

93 See eg *Taylor and Steyn v Koekemoer* 1982 1 SA 374 (T) where it was held that the time by reference to which it must be determined whether the company is in fact unable to pay its debts, is the time when it is sought to invoke such section. See also *ABSA Bank Ltd v Cooper* 2001 4 SA 876 (T), *Vize v Wilmans* 2001 4 SA 1114 (NC) and *Hudson v The Master* 2002 1 SA 862 (T), where this approach was also followed.

94 *ABSA Bank Ltd v Cooper* 2001 4 SA 876 (T). See also *Hudson v The Master* 2002 1 SA 862 (T), where the court indicated that the liquidator must have regard to both liquidated and unliquidated claims.

Then there are also provisions that do not refer to an inability to pay debts, but instead refer to a court order, in circumstances where it is clear that the legislature intended that the provisions should also apply to the winding-up of such a company. One such provision is contained in section 417 of the Companies Act which deals with interrogations. Section 417 states that "[i]n any winding-up of a company unable to pay its debts, the Master or the Court may, at any time after a *winding-up order* has been made" summon any director or other officer in order that they may provide information. In *Janse van Rensburg v Master of the High Court*[95] the court held that the provisions of section 417 of the Companies Act do not apply to a company that has been wound up as a voluntary winding-up by creditors. The court arrived at this conclusion due to the wording of the section requiring a court order to have been issued before the provisions will apply. This was decided despite the words "in any winding-up of a company unable to pay its debts". It is submitted that it was the intention of the legislature for these provisions to apply to insolvent companies irrespective of the mode of winding-up, as one of the main aims of an interrogation is to recover assets for the benefit of the creditors. Due to the manner in which the provision has been drafted, the court found that it does not apply to a voluntary winding-up. With respect, it is illogical to conclude that an interrogation cannot apply merely because the section refers to a "winding-up order". However, the *Janse van Rensburg* and *South African Phillips* cases do illustrate the difficulties that are involved when the court has to interpret the content of sections in order to determine their applicability in the case of insolvency.

6 CONCLUSION

From the above exposition of the cases dealing with the interpretation of section 339 of the Companies Act and section 66 of the Close Corporations Act, it is clear that the connecting provisions contained in these sections are, to say the least, problematic. While there is no doubt that the current system of winding-up companies and close corporations is workable, it is obvious that the dual system of insolvency employed in South Africa creates substantial problems. It is submitted that the problems underlying the shortcomings of the present system are twofold:

(a) In the first place section 339 of the Companies Act and section 66 of the Close Corporations Act create unnecessary problems of interpretation when trying to apply the law of insolvency to the winding up of companies and close corporations. This was illustrated with reference to the court judgments in the preceding paragraph.

(b) In the second place, and this aspect is related to the first, the fact that both the Companies Act and the Close Corporations Act contain provisions relating to winding-up in addition to the connecting provisions contained in section 339 of the Companies Act and section 66 of the Close Corporations Act, creates confusion. In other words, one cannot merely refer to the law relating to insolvency by virtue of the provisions of sections 339 and 66 – one first has to consult the provisions of the Companies Act or Close

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95 2001 3 SA 519 (W) (also reported under [2001] 2 All SA 551 (W)). See also *South African Phillips (Pty) Ltd v The Master* 2000 2 SA 841 (W) where the court gave the same interpretation to s 417 as was the case in the *Janse van Rensburg* case.

Corporations Act in order to determine whether or not there is not already a provision dealing with the subject. If there is a provision in the Companies Act or Close Corporations Act, the further question arises as to what extent, if any, similar or any provisions of the Insolvency Act will also find application.

While the winding-up provisions of the Companies Act and the Close Corporations Act are admittedly not flawed to the extent that it has become impossible to wind up companies and close corporations with expedience and effectiveness, it is submitted that some very important aspects deserve consideration:

(a) If one looks at the number of decisions that have been discussed in this chapter that deal with the interpretational problems encountered with sections 339 and 66,[96] it is apparent that these connecting provisions have caused a plethora of expensive litigation, a fact that can only be to the detriment of creditors who have in any event suffered financial loss due to the financial failure of the company or corporation.

(b) In addition to the expense involved in litigation, one of the main aims of insolvency law is to ensure the speedy administration of insolvent estates, thereby allowing the creditors that have suffered losses to be paid expediently. Litigation involving the interpretation of these provisions is a lengthy and time-consuming process, which is in direct conflict with one of the most important and entrenched principles of our insolvency law.

(c) The last aspect that plays a role here, is the confusion that is created by the use of a dual system. The fact that there has been so much litigation regarding the abovementioned provisions clearly illustrates the uncertainty surrounding the application of the various Acts, something one would assume sections 339 and 66 was intended to avoid.

Having identified what is believed to be the underlying problems surrounding the application of a dual system of insolvency, the question now is how one could possibly effectively address this shortcoming. It is submitted that there are two possible manners in which this problem can be addressed:

(a) The first (and, it is submitted, the best) manner in which this problem can be addressed is by the introduction of a unified insolvency statute. If all the provisions relating to insolvency were contained in one Act none of the interpretational problems that have been discussed above would have arisen. One Act implies one set of rules applicable to all (insolvent) debtors, with exceptions to some rules being clearly spelt out in the relevant provisions.

(b) The second manner in which this problem can be addressed is by repeating all the provisions relating to insolvency in the relevant Acts dealing with winding-up. For example, all the provisions relating to insolvency that apply to companies can be included in the relevant chapter of the Companies Act. In this way it becomes unnecessary to refer to other Acts in order to achieve the desired effect. This is the *modus operandi* in England and Australia and, while not the most desirable solution, seems to work reasonably well.[97]

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96 This was merely a selection of cases and does not include all the reported and unreported decisions.

97 However well this system may appear to work in practice, there are some problems that can be associated with this system as well. For example, duplicating the provisions in

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For the following reasons the option set out in paragraph (b) above is, in my opinion, not a viable one:

(a) In the first place, amendments will be complicated if the relevant provisions are scattered amongst a number of Acts. For example, an amendment to a relevant provision of the Insolvency Act will necessitate an amendment to the same or similar provision of the Companies Act and the Close Corporations Act. Since the relevant legislation does not fall under the auspices of a single ministry,[98] it will require the co-operation of a number of government departments in order to bring about the amendments in question.

(b) In the second place the duplication of clauses in various Acts opens up the possibility that the courts may attach differing interpretations to what is in essence the same provision. Although one would assume that the courts would be consistent, the mere fact that the provision on the one hand refers to an individual, and on the other to a company or corporation, may contribute towards the court interpreting the provision in a different manner.

Consequently it is submitted that the creation of a single insolvency statute would be the better option. In addition to removing unnecessary duplication and the need to interpret identical provisions in different Acts, a single statute is also relatively simple to amend should the need arise. It is also good administration to have a single statute, since it can be used to promote the uniformity and harmonisation of insolvency as a legal discipline, and does not create confusion for the persons that are required to apply it in practice. [99]

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various Acts, or even in the same Act but under separate chapters, can cause problems when amending the such legislation. Another possible problem that can arise is where the courts give differing interpretations to the same principles that are contained in different Acts. For this reason it would be preferable to have only one Act with one set of principles that apply to all debtors; consequently the introduction a unified Insolvency Act is preferable to duplicating all the insolvency provisions in the various Acts.

98 The Insolvency Act falls under the auspices of the Department of Justice and Constitutional Development, while the Companies Act and the Close Corporations Act fall under the auspices of the Department of Trade and Industry.

99 Since writing this article a draft unified Insolvency and Business Recovery Bill has been approved by cabinet, and has since entered the legislative process. This proposed new Act is unified in the true sense of the word in that a single insolvency statute is proposed whereby all insolvent entities will be dealt with in precisely the same manner, thereby lending credence to the suggestions made in this article.