Overview Analysis of the Voluntary Winding up of Solvent Companies under the Companies Act 71 of 2008

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Abstract: Winding up enables affected companies to be administered by the courts for the benefit of their members, creditors and other relevant persons. The available assets are divided amongst members, other relevant persons and creditors in accordance with their rights. The Companies Act 71 of 2008 (Companies Act 2008) regulates the winding up of solvent companies in South Africa while the winding up of insolvent companies is still regulated by sections 343, 344, 346 and 348–353 of the repealed Companies Act 61 of 1973 (Companies Act 1973). A solvent company may be dissolved through a voluntary winding up application initiated by the company members or shareholders and/or creditors in terms of the Companies Act 2008. Consequently, this article discusses the voluntary winding-up of solvent companies by its shareholders or creditors under the Companies Act 2008. Procedures, formalities and requirements that need to be followed to effect such voluntary winding up are also discussed.

Keywords: solvent companies; creditors; shareholders; voluntary winding up

1. Introductory Remarks

Winding up enables affected companies to be administered by the courts for the benefit of their members, creditors and other relevant persons (Mongalo, 2010, p. 478). Moreover, voluntary winding up of solvent companies legally terminates the life of such companies through a winding up application of either their shareholders and/or creditors. A winding up application is usually granted by the courts when it is just, equitable and/or beneficial to the company itself or its creditors and/or other relevant stakeholders. Notably, a liquidator is appointed to take control of the company and to, *inter alia*, collect its assets and realise them in order to pay its debts. Any surplus in respect thereof is divided among all the relevant persons in accordance with their rights. The Companies Act 71 of 2008

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(Companies Act 2008) regulates the winding up of solvent companies in South Africa while the winding up of insolvent companies is still regulated by sections 343, 344, 346 and 348–353 of the repealed Companies Act 61 of 1973 (Companies Act 1973). As stated above, a solvent company may be dissolved through a voluntary winding up application initiated by company members or its shareholders and/or creditors in accordance with the company's special resolution (s 79 read with s 80 of the Companies Act 2008).

The voluntary winding up of solvent companies is conducted for various purposes such as restructuring of the company, redundancy of the company due to deadlock of directors or shareholders, mergers and/or takeovers and completion of the initial objects of the company. Applications for voluntary winding up of solvent companies could also be granted by the courts when the applicant proves that it is just and equitable for the company (ss 79 & 80 read with s 81 of the Companies Act 2008). However, notwithstanding the fact that voluntary winding up of solvent companies is a practical useful tool for companies that want to lawfully terminate their businesses after achieving their intended outcomes (Brown, 1880, p. 575; Hannigan, 2018, p. 677; Saharay, 2008, pp. 596-602), it has been sometimes confusingly enforced by the courts in South Africa (*Standard Bank of South Africa Ltd v R-Bay Logistics CC* 2013 2 SA 295 (KZD); *First Rand Bank Ltd v Lodhi 5 Properties Investment CC* 2013 3 SA 212 (GNP) (*First Rand* case); *HBT Construction and Plant Hire CC v Uniplant Hire CC* 2012 5 SA 197 (FB) (*HBT Construction* case); *Herman v Set-Mak Civils CC* 2013 1 SA 386 (FB) (*Herman* case). For instance, *HBT Construction* case held, *inter alia*, that the applicant needs to prove factual insolvency before the winding up order is granted in terms of section 345 of the Companies Act 1973 (*HBT Construction* paras 6-7; see further Locke, 2015, pp. 153-154). This approach was also followed in *Herman* case (paras 28-29). On the other hand, *First Rand* case held that the term "solvent company" Companies Act 2008 (item 9(2) of Schedule 5 & ss 79–81), applies to both factually and commercially solvent companies (*First Rand* case 22–35. Likewise, the *First Rand* case held that sections 343-346 and 348–353 of the Companies Act 1973 were enacted to regulate factually or commercially insolvent companies (para 35). This approach was endorsed in *Scania Finance Southern Africa (Pty) Ltd v Thomi-Gee Road Carriers CC* 2013 2 SA 439 (FB), which held that sections 344 and 345 of the Companies Act 1973 do not expressly oblige the applicant to prove factual insolvency before a winding up order is granted (paras 12-21). *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* 2014 2 SA 518 (SCA) (*Boschpoort* case), held further that a company must be commercially solvent before it could be wound up under sections 80 and 81 of the Companies Act 2008 (*Boschpoort* case para 22). *Boschpoort* case held further that a commercially insolvent company must be wound up in terms of chapter 14 of Companies Act 1973 (see sub-item 9(i) of schedule 5 of the Companies Act 2008). This case correctly held that factual solvency of a company in itself, should not be rigidly considered when determining whether a company should be would up voluntarily or otherwise. *Boschpoort* case also held that attaching factual solvency to the meaning of 'solvent' under the Companies Act 2008 yields un-business-like outcomes (paras 19; 23-24). The author concurs that the terms "solvent" and "insolvent" should be interpreted sensibly in order to have business-like results.

The aforesaid challenges are exacerbated by the fact that the Companies Act 2008 only have provisions that expressly deal with the winding up of solvent companies. Nonetheless, the Companies Act 2008 has transitional measures that regulate the winding up of insolvent companies under chapter 14 of the Companies Act 1973 (item 9(1) of Schedule 5 of the Companies Act 2008; Swart & Lombard, 2015, pp. 356-362). Although the term "insolvent" is defined in section 2 of the Insolvency Act 24 of 1936 (Insolvency Act), it is not expressly defined in section 1 of both the Companies Act 2008 and the Companies Act 1973. Moreover, the term "solvent" is not expressly defined in the Companies Act 2008 and the Companies Act 1973. This status *quo* could have contributed to the ongoing challenges affecting the voluntary winding up of solvent companies under the Companies Act 2008 (ss 79-80; item 9(2) of Schedule 5; also see Locke, 2015, pp. 153-154; Roach, 2016, p.169). Consequently, this article discusses the voluntary winding-up of solvent companies by its shareholders or creditors under the Companies Act 2008 (Sealy & Milman, 2012, pp.1034-1036). Procedures, formalities and requirements that need to be followed to effect such voluntary winding up are also discussed (Maloka & Muthugulu-Ugoda, 2016, pp. 2-3). lastly, the advantages and disadvantages associated with voluntary winding-up of solvent companies are explored.

2. Background Aspects on Voluntary Winding up of Solvent Companies

The South African law of insolvency was influenced by Roman-Dutch law (see the Amsterdam Ordinance of 1777) and English law, especially, during the pre-union era (Burdette, 2003, pp. 592-593; Pretorius, Delport, Havenga & Vermaas, 1999, p. 585). However, no single unified insolvency legislation has been enacted in South Africa since the 1840s to date (Nichha, 2015, pp. 7-8 & 11-13). The Joint

Companies Limited Liability Act 23 of 1861 (ss XI; XII and XIII) was the first company law statute to be enacted in the Cape Colony province. This Act was largely influenced by the Joint Stock Companies Act of 1844 (7 & 8 Vict. c.110) and the Limited Liability Act of 1855 (18 & 19 Vict. c. 133) of the United Kingdom (Cilliers, *et al*., 2000, pp. 21 & 23). Thereafter, the Joint Stock Companies Limited Liability Law 10 of 1864 was enacted but was very similar to the Joint Companies Limited Liability Act 23 of 1861. The Special Partnerships Limited Liability Act 24 of 1861 (ss III & XIV) and the Special Partnerships Limited Liability Act 1 of 1865 also failed to provide for the winding up of solvent companies. Other provinces such as Natal, Transvaal and Orange Free State also enacted their own company law statutes that were influenced by the English law. For instance, the De Acte van Maatschappijen met Beperkte Verantwoordelijkheid 5 of 1874 was enacted in Transvaal but it did not clearly provide for the winding up of companies. Consequently, the Transvaal Wet op het Liquideeren van Maatschappijen Act 8 of 1891 became the first legislation to regulate the winding up of companies in the Transvaal. Thereafter, the Wet op het Liquideeren van Maatschappijen 1 of 1894 was enacted (ss 12 to 18). Nonetheless, the winding up of solvent companies was not regulated in all the aforesaid legislation (Burdette, 2003, pp. 592-607; Pretorius, Delport, Havenga & Vermaas, 1999, p. 585). The Winding Up Law 19 of 1866 and the Winding Up Act 12 of 1868 (ss II; XV; XXII; XVIII & XXIX) introduced some specific provisions for winding up of companies in Natal and the Cape Colony respectively. Nevertheless, none of these laws regulated winding up of solvent companies in South Africa. As a result, no adequate voluntary winding up procedures were provided in respect thereof. Moreover, the Joint Stock Companies Act 13 of 1888 merely empowered joint-stock companies to be treated as juristic persons and to own movable and immovable property. Thus, the voluntary winding up of solvent companies was not provided for in this Act.

It is submitted that the voluntary winding up of companies was first introduced into the Cape Colony by the Companies Act 25 of 1892 ('Companies Act 1892', ss 168; 201; 178 to 194; also see Cilliers, *et al.*, 2000, pp. 21 & 23; Burdette, 2003, pp. 595-597). The company could be wound up by the court through a special resolution under the Companies Act 1892. Nonetheless, the company itself was not allowed to approach the court through its members for a voluntary winding up order (s 145 read with ss 99; 146-148 of the Companies Act 1892). Furthermore, the Transvaal Companies Act 31 of 1909 did not provide adequate voluntary winding up procedures for solvent companies. It merely consolidated all other Acts on company law (see ss 180-183). The Orange Free State laws such as Hoofdstuk C van Wetboek: De Wet over Beperkte Verantwoordelijkheid van Naamlooze Vennootschappen and Winding-up of Joint Stock Companies Law 2 of 1892 (Van Naamlooze Vennootschapen om Voorziening te maken voor de Likwidasie van Naamlooze Vennootschappen) also failed to provide for voluntary winding up of solvent companies. Moreover, the Companies Amendment Ordinance 24 of 1904 did not have any winding up provisions (Burdette, 2003, pp. 592-607; Sealy & Milman, 2012, pp.1034-1036).

Aspects of insolvency and winding up of companies were regulated in different legislation since the early 1840s to date. This status *quo* has continued to date. For instance, insolvency for individuals is regulated by the Insolvency Act while the winding up of companies and/or corporate insolvency is regulated by the Companies Act 2008 and relevant sections of the repealed Companies Act 1973. Moreover, corporate insolvency, especially, the winding up of close corporations is also regulated in parts of the Close Corporations Act 69 of 1984 (ss 66-81). Likewise, aspects of cross-border insolvency of individuals and the winding up of transnational companies is covered by the Cross-border Insolvency Act 42 of 2000 (Cross-border Insolvency Act). Nonetheless, this Act is yet to come into force. Over and above, the voluntary winding up of solvent companies was not expressly provided in the relevant legislation till the enactment of the Companies Act 2008 (Stein & Evaringham, 2011, pp.1-2; Roach, 2016, p. 169).

Prior to 1926, only consumer insolvency was broadly regulated in the relevant legislation. The regulation of corporate insolvency and winding up of companies occurred thereafter (Burdette, 2003, pp. 592-593; Stein & Evaringham, 2011, pp.1-2). For instance, the Companies Act 46 of 1926 (ss 9; 182) consolidated most of the pre-union laws and provided for the winding up of companies. This Act was amended by the Companies Amendment Act 23 of 1939 and the Companies Amendment Act 46 of 1952. These Acts provided for the voluntary winding up of companies by the creditors. Nevertheless, the winding up of solvent companies was not expressly provided. Likewise, the Companies Act 1973 (see ss 337-426), did not expressly provide voluntary winding up procedures for solvent companies by members and creditors (Burdette, 2003, pp. 592-607; McQueen, 2016, p. 327). Such procedures are currently provided in the Companies Act 2008 (s 80 read with s 79(1)(a)).

3. Types of Voluntary Winding up of Solvent Companies

3.1. Members' Voluntary Winding up of a Solvent Company

The winding up of solvent companies may be instituted by the company itself through its members and shareholders (s 79(1)(a)(i) read with s 80(1) & (2) of the Companies Act 2008). This members' voluntary winding up of solvent companies may only be effected when the company concerned adopts a special resolution in respect thereof (s 80(1) read with (2) & (3) & s 79(1)(a)(i) of the Companies Act 2008; see further Govindjee, *et al*, 2007, pp. 75; 80). A special resolution must be supported by at least 75% majority of the shareholders with voting rights (s 80(1) & (2) read with s 79(1)(a)(i) of the Companies Act 2008; see further Tu, 2009, p. 21.). The applicant must provide sufficient security for the payment of the solvent company's debts within twelve months after the start of its winding up, to the satisfaction of the Master of the High Court or obtain the consent of the Master of the High Court to dispense with such security (s 80(3) of the Companies Act 2008). The Master of the High Court may only dispense with such security if the applicant or company members have submitted a sworn statement by a director authorised by the board of the solvent company in question indicating that it has no debts (s 80(3)(b)(i) of the Companies Act 2008). Furthermore, the Master of the High Court may dispense with the security if the applicant or company members have submitted a certificate by the company's auditor or related person appointed for that purpose, indicating that the company has no debts (s 80(3)(b)(ii) of the Companies Act 2008). This formal declaration of solvency is crucially important for the commencement of the member's voluntary winding up of a solvent company in South Africa. This declaration is usually made at a general meeting of the board of directors of the solvent company in question prior to its winding up (Stein & Evaringham, 2011, p. 456; Tu, 2009, p. 21). The declaration of solvency must be made by the majority of directors at least five weeks prior to the adoption of the special resolution for the voluntary winding up of the solvent company in question (Lowry & Dignam, 2014, pp. 457-482; Tu, 2009, p. 21). The directors and/or shareholders must adequately provide assurance that they made a full inquiry into the company's affairs and are satisfied that it is capable of paying up all its debts within twelve months after the commencement of the winding up proceedings (s 80(3) of the Companies Act 2008; also see Govindjee, *et al*, 2007, pp. 75; 80). Thereafter, the declaration of solvency must be lodged at the company's registry and/or at the Companies and Intellectual Property Commission (CIPC). It must be noted that the declaration of solvency must be objectively made by or on behalf of the company. Thus, any person that makes a declaration of solvency of the company without reasonable grounds commits a criminal offence (French, 2018, p. 674).

The aforesaid security costs may be paid by the solvent company concerned (s 80(4) of the Companies Act 2008). The special resolution for the voluntary winding up of a company must be filed in conjunction with a prescribed notice and filing fee (s 80(2) of the Companies Act 2008). Thus, the voluntary winding up of a solvent company is not free *per se* since a filing fee must be lodged with the Master of the High Court. Moreover, the special resolution for the voluntary winding up of a solvent company must be published in a prescribed format to all the relevant persons (s 80(2) of the Companies Act 2008; also see Fourie, 1994, pp. 148-175, for related comments on insolvent companies).

Once the special resolution has been formally adopted, the liquidator may be appointed to oversee the winding up process of the solvent company in question (s 80(5) of the Companies Act 2008). The liquidator is empowered to exercise all its powers enshrined in the Companies Act 2008 (s 80(5)). The liquidator is subject to the direction of the members and/or shareholders of the solvent company that is undergoing a members' voluntary winding up (s 80(5)(b)(i) of the Companies Act 2008). Notably, although the liquidator may get instructions from members and/or shareholders under a members' voluntary winding up of a solvent company, he or she is statutorily empowered to conduct his or her winding up duties without requiring any specific order of the court (s 80(5)(a) of the Companies Act 2008). A member's voluntary winding up applies only to solvent companies (Govindjee, *et al*, 2007, pp. 75; 80). The voluntary winding up of a company through its members and/or shareholders is only applicable to a solvent company. Insolvent companies are not statutorily empowered to engage in voluntary winding up to avoid prejudice on the part of the creditors (Tomasic, *et al*, 2002, p. 300). In other words, creditors are not involved in a member's voluntary winding up of a solvent company because it has the capacity to pay its creditors (Tomasic, *et al*, 2002, p. 300; French, 2018, pp. 532; 674). Creditors are normally protected by the security provided by the solvent company undergoing a members' voluntary winding up (Burdette, 2003, pp. 416; 592-607). Accordingly, it is submitted that a members' voluntary winding up of a solvent company should not be strictly regulated by the Master of the High Court (generally see s 43(2) of the Supreme Court Act 59 of 1959). Such duties must be conducted by the registrar of companies, the CIPC and/or any relevant person responsible for the incorporation of companies in South

Africa (Burdette, 2003, pp. 416; 592-607). The voluntary winding up of solvent companies must not adjudicated by persons who have no material interest in the affairs of such companies (Samad, 2013, p. 593).

Members of a solvent company will not be able to pass a special resolution for its winding up where it is clear that it cannot continue its business due to debts and liabilities (s 80(1) of the Companies Act 2008). Additionally, if it is later discovered that the company is not solvent after the special resolution for its voluntary winding up as a solvent company was passed or after an application has been made to a court for it to be wound up by court order, the company will be wound up as an insolvent company (ss 79(3); 80; 81 & item 9 of Schedule 5 of the Companies Act 2008).

3.2. Creditors' Voluntary Winding up of a Solvent Company

A creditors' voluntary winding up of solvent companies may be instituted by the directors and/or creditors of the company (s 79(1)(a)(ii) read with s 80(1) & (2) of the Companies Act 2008). This occurs when the solvent company in question passes a special resolution for its voluntary winding up (s 79(1)(a)(ii) read with s 80(1); (2) & (3) of the Companies Act 2008). The special resolution is usually preceded by a shareholders and/or creditors meeting (Godbole, 2013, p.16; Derek, *et al*, 2016-2017, p. 532). A creditors' voluntary winding up of a solvent company allows its creditors to appoint the liquidator to adjudicate its winding up proceedings (Jooste, 2011, p. 917; Godbole, 2013, p.16; Kuchhal & Kuchhal, 2014, p. 567). Moreover, the relevant solvent company's directors may nominate any insolvency practitioner to be appointed as the liquidator subject to the creditors' approval. Thus, both creditors and members of the company such as directors and shareholders may nominate a suitable person to be appointed as the liquidator. Once the creditors' proposal for the voluntary winding up of the solvent company is adopted, the liquidator is appointed after a special resolution is passed. Creditors are further empowered to remove the liquidator for non-performance, gross misconduct and other related illicit conduct. Accordingly, if there is a conflict on the nominated liquidator, the creditors' nomination overrides that of the members of the company (Leonard, 2009, pp. 79-86; Sime, 2010, p.119). Thereafter, a summary statement of the company's affairs, property and financial position must be provided by directors to the appointed liquidator.

Unlike a compulsory winding up for solvent and insolvent companies, a creditors' voluntary winding up is not forced upon the solvent companies through court orders (s 79(1)(a)(ii) read with s 80 of the Companies Act 2008; Godbole, 2013, p.16; Kuchhal & Kuchhal, 2014, p. 567). A creditors' voluntary winding up of a solvent company is usually proposed by company directors to creditors when it is likely to be unable to continue with its business in the near future (Luiz & Van der Linde, 1993, pp. 231–233; Boraine & Van Wyk, 2013, pp. 650–663; Deloitte & Touché, 2014, pp. 1–4). Despite this, creditors of the relevant solvent company are also empowered to directly order it to be voluntarily wound up (Gulshan & Kapoor, 2006, pp. 636-637). Nevertheless, if creditors have already applied for a court order to wind up a solvent company as contemplated in section 81 of the Companies Act 2008 and the court has already granted it or commenced the winding up proceedings, then such company will not be voluntarily wound up (Gulshan & Kapoor, 2006, pp. 636-637). The creditors' winding up proceedings for a solvent company commences as soon as the special resolution to do so is adopted by the creditors and directors of that company. It appears that if the majority of the solvent company's directors failed to provide a declaration of its solvency, the shareholders and creditors may still vote for its voluntary winding up (s 79(1)(a)(ii) read with s 80(3) of the Companies Act 2008; also see Leonard, 2009, pp. 79-86; Sime, 2010, p.119). It is not necessarily required that creditors should be given a notice of the directors and/or shareholders' meeting on the adoption of the special resolution to wind up a solvent company. Nonetheless, the affected solvent company is obliged to notify its employees that it is likely to be wound up (Leonard, 2009, p. 416; Bernitz & Ringe, 2010, p. 250). The applicant creditor or director is not obliged to provide security for the debts of the company because the appointed liquidator liquidates the company in accordance with the directives of the general body of creditors (Judge & Moore, 2014, pp. 172-193). Once the liquidation has commenced, all pending legal proceedings are suspended until the appointment of a liquidator (Burdette, 2003, pp. 416-417; 592-607; Koutsias & Dine, 2014, p. 250; Judge & Moore, 2014, pp. 173-193). The company's estate is frozen and no creditors may seek to obtain further preference after the liquidation has commenced (Burdette, 2003, pp. 416-417; 592-607). The liquidator takes control of the company's affairs and most of the powers of the directors are cancelled (Gullifer & Payne, 2015, p. 107). Put differently, after winding up proceedings have commenced, the solvent company must stop carrying on its business except to the extent required for the benefit of that company. All powers of the solvent company's directors cease, except to the extent specifically authorised by the liquidator and/or the creditors (s 80(8) read with s 79(1)(a)(ii) of the Companies Act 2008). The liquidator is obliged to realise all the company's assets and distribute any remaining money to the creditors after paying the liquidation costs. However, unless otherwise stipulated in the company's Memorandum of Incorporation (MOI), the solvent company remains a juristic person and retains all its powers while it is subjected to a creditor's voluntary winding up (s 80(8) read with s 79(1)(a)(ii) of the Companies Act 2008).

4. Requirements and Formalities for Voluntary Winding up of Solvent Companies

The company to be wound up must be solvent at the time of the commencement of such proceedings. Thus, a reasonable declaration of solvency should be provided by the majority of the directors of the solvent company facing liquidation (s 80(3)(b) of the Companies Act 2008). Any declaration of solvency without reasonable grounds could lead to penalties on the part of the directors. The declaration of solvency must be endorsed by majority shareholders. Put differently, these majority shareholders must objectively confirm that the company concerned is indeed solvent and able to pay its creditors within 12 months from the commencement of the voluntary winding up proceedings. If a company fails to pay its debts within 12 months, it is assumed that the declaration of solvency was false and/or did not have any reasonable grounds (Rayney, 2013, pp. 852-853; Cork & Weiss, 1984, pp. 43; 50-83). Thereafter, company members are obliged to adopt a special resolution in accordance with the Companies Act 2008 (s 80(1)-(3) read with s 79). This clearly shows that no solvent company may be voluntarily wound up if such resolution was not adopted and/or filed with the Master of the High Court. A prescribed notice and filing fee must be provided together with the winding up application by the solvent company itself, solvent company members and/or its creditors (s 80(1) & (2) of the Companies Act 2008; also see Cork & Weiss, 1984, p. 43). The voluntary winding up of a solvent company commences immediately after the aforesaid special resolution has been filed with the Master of the High Court (s 80(6) read with subsection (2) of the Companies Act 2008). The copies of the special resolution must also be provided to the registrar of companies, the CIPC and other relevant persons prior to the winding up of the solvent company (see further Rayney, 2013, pp. 852-853; Sime, 2010, p.119 & Cork & Weiss, 1984, p. 43).

Moreover, the special resolution must be published in all the relevant platforms by the directors and/or any other person duly authorised to do so by the board of the solvent company in question (Sime, 2010, p. 120; McLaughlin, 2013, p. 144). This enables all interested persons, especially, creditors to come up and prove their claims. Furthermore, the liquidator will be appointed by the Master of the High Court and such appointment must be published in the Government Gazette (s 80(5) of the Companies Act 2008; also see Genzberger, 1994, p. 194). A confirmation certificate and proof of publication of the special resolution in the Government Gazette are required before the liquidator is appointed by the Master of the High Court (Braatvedt, 2013, pp. 44-45; Genzberger, 1994, p. 194; Van der Merwe & du Plessis, 2004, pp. 353-357 & 397).

The appointed liquidator must wind up the solvent company in accordance with the Companies Act 2008 (s 80(5)). Such voluntary winding up of solvent companies is usually undertaken when the object or purpose for which the company was registered for has been fulfilled and/or when company members are no longer amicable (Sharrock, *et al*, 2012, p. 252; Govindjee, *et al*, 2007, pp. 75; 80). The liquidator is empowered to convene a meeting of creditors and/or to appoint a voluntary administrator whenever he or she determines that the solvent company in question will not be able to pay all its debts within 12 months from the initial commencement date of the winding up proceedings (s 80(1)-(3) & (6) of the Companies Act 2008; Sharrock, 2007, p. 604; Govindjee, *et al*, 2007, pp. 75; 80). This enables the company to be wound up by the court (s 81 of the Companies Act 2008; Havenga, 2000, pp. 103-110; George & Korobkin, 2012, p. 377). The liquidator may exercise all powers given by the Companies Act 2008, or any law contemplated in item 9 of Schedule 5 of the same Act without requiring a specific order or sanction of the court. Such powers are subject to any directions given by the shareholders of the company under a members' voluntary winding up or subject to the creditors' directives under a creditors' voluntary winding up (s 80(5) of the Companies Act 2008).

The liquidator is expected to finalise the solvent company's winding up proceedings and lodge final documents with the CIPC, registrar of companies and the Master of the High Court. The Master of the High Court must file a certificate for the winding up of the solvent company in the prescribed form when it is completely wound up (s 82(1) of the Companies Act 2008). Thereafter, upon receiving the certificate for the winding up, the CIPC must record the dissolution of the company in the prescribed manner. The CIPC must also remove the company's name from the companies register (s 82(2) & (3) of the Companies Act 2008; also see Beattie, *et al*, 2001, p. 216). Accordingly, the solvent company in question is dissolved from the date its name is removed from the companies register unless its registration was transferred to a foreign jurisdiction as contemplated in section 82(5) of the Companies Act 2008 (s 83(1)).

5. Advantages and Disadvantages of Voluntary Winding up of Solvent Companies

5.1. Advantages

There are various advantages for a solvent company that is voluntarily wound up either through a members' voluntary winding up or through a creditors' voluntary winding up. For instance, the appointment of a liquidator is simpler, quicker, less onerous and less complicated during the voluntary winding up proceedings of a solvent company. Moreover, members of the solvent company and/or its creditors are empowered to select a suitable person to be appointed as a liquidator (Campbell & Campbell, 2011, p. 520; Wood, 2018, p. 60). This allows such members and/or creditors to appoint a liquidator whom they are comfortable with in relation to the control and administration of company affairs. This privilege is not accorded to compulsory winding up proceedings of insolvent companies where a liquidator is appointed by the court.

Another advantage is that the voluntary winding up of solvent companies is simple and convenient. Thus, a solvent company that initiate to be wind up voluntarily is somewhat spared the embarrassment associated with a public compulsory wind up that is scrutinised by banks, creditors and other relevant persons (Witting, 2018, p. 218). Voluntary winding up proceedings protects solvent companies from any possible wrongful trading by such companies in insolvency circumstances in the future (Campbell & Campbell, 2011, p. 520; Wood, 2018, p. 60). This could suggest that there will be no more trading and no more debts for the solvent company after its liquidation. It is submitted that once a solvent company is voluntarily wound up its assets are distributed to creditors, any unsecured business liabilities that are not personally guaranteed are written off. This grants directors exemption from personal liability and repayment of such debts.

Voluntary winding up of solvent companies is also expedient and less costly. Apart from security and related costs, the voluntary winding up of solvent companies is generally fast and cheaper to administer than compulsory liquidation since all other costs are recovered from the sale of the company assets. Thus, the total costs for liquidating the solvent company is far lower than the total amount of costs and expenses involved in compulsory winding up.

It is also interesting to note that the employees of a liquidated solvent company can still claim redundancy pay in respect of such winding up proceedings. Put differently, although a liquidator makes the work of the employees of the solvent company in question redundant, such employees will still get paid. Where the assets of the solvent company do not cover all the costs of the winding up proceedings, employees are legally entitled to claim their salary arrears and/or redundancy pay in terms of the relevant legislation.

Voluntary winding up of solvent companies ends any legal action against such companies. This removes legal pressure on the part of the directors and improves the administration of the relevant solvent company's affairs, especially, with regard to contracts, employees' welfare and legal disputes (Witting, 2018, p. 218). Voluntary winding up of a solvent company also empowers its members to take appropriate steps to ensure that the company's best interests are met by all relevant stakeholders.

5.2. Disadvantages

Although the solvent company retains its juristic personality during voluntary winding up proceedings, it is prohibited from carrying on its business except insofar as it benefit that company (s 80(8)(b)(i) of the Companies Act 2008). In other words, the solvent company is generally obliged to stop conducting its business as soon as its winding up proceedings are commenced (Koutsias & Dine, 2014, p. 252). Thus, the liquidator may only continue trading the solvent company's business for a short period of time so as to finalise pending and/or current transactions (Worthington, 2016, pp. 834; 850-851). Furthermore, the solvent company's shareholders will not be able to transfer their shares in the company without the approval of the liquidator (Koutsias & Dine, 2014, p. 252). This could suggest that the voluntary winding up of a solvent company restricts the powers and functions of its shareholders.

Furthermore, once the liquidator is appointed, the directors' powers cease, unless if it is specifically provided otherwise or authorised by the liquidator and/or shareholders at a general meeting (Walker, 1992, p. 56). The liquidator takes over until the solvent company is dissolved and removed from the register of companies (ss 82 & 83(1) of the Companies Act 2008).

The voluntary winding up of a solvent company may eventually result in the loss of jobs for its employees. For instance, in *National Union of Leather Workers v Barnard and Perry NNO* 2001 4 SA 1261 (LAC) para 23, the court held, *inter alia*, that the passing of a resolution for the voluntary winding up of a solvent company by its members could give rise to the dismissal of the employees in terms of the Labour Relations Act 66 of 1995 (s 186). Accordingly, the winding up of a solvent company will give rise to the termination of service and employment contracts for its employees immediately after the company is wound up (s 38 of the Insolvency Act). All employees of the affected solvent company will be made redundant as soon as the liquidator takes over.

The assets of the solvent company are sold after its liquidation (ss 80 read with s 79 of the Companies Act 2008). Thus, all assets of the company are sold to pay its creditors. Another disadvantage is that such assets are usually sold at a lesser value than their true value. The liquidator is empowered to sell all of the solvent company's assets in order to raise sufficient money to settle all creditors' claims and related costs.

After the voluntary winding up of a solvent company, its directors will still be liable to pay their personal guarantees if they signed personal guarantee clauses in their employment contracts. Personal guarantee clauses are expressly aimed at piercing the corporate veil in order to hold directors accountable for their personal debts and/or illicit conduct. There is no indemnity for directors that engage themselves in such illicit conduct.

Despite the voluntary winding up of a solvent company, its directors will still be required to settle their company loan accounts. The liquidator is obliged to collect any money owed to the solvent company by its directors through loan accounts and related credit facilities of that company. The debt of a director is treated like any other debt of the company that must be settled in respect thereof.

The voluntary winding up of a solvent company could lead to potential liability for directors for their wrongful and illicit trading. The liquidator may investigate the conduct of the solvent company's directors in the period prior to its winding up. The directors will be liable for their illicit dealings once it is established that they knowingly concluded such dealings.

6. Concluding Remarks

Unlike the former position under the Companies Act 1973, voluntary wind up of solvent companies is currently regulated by the Companies Act 2008 (ss 79 & 80). As highlighted above, it is clear that a solvent company may be voluntarily wound up through a members' voluntary winding up or through a creditors' voluntary winding up (s 79(1)(a) of the Companies Act 2008). These two types of voluntary winding up for solvent companies are differently enforced under the Companies Act 2008 (see paragraphs 3.1. & 3.2. above). Despite this, the rationale for the voluntary winding up of a solvent company is generally to amicably pay its creditors and to avoid the possible negative effects of a compulsory winding up. There are various key requirements and formalities that must be satisfied before a solvent company may be voluntarily wound up. Accordingly, this article has usefully highlighted the pros and cons for each type of voluntary winding up for solvent companies in South Africa (see paragraphs 5.1. & 5.2. above). In this regard, the article has revealed several gaps and flaws that are associated with the the voluntarily winding up of solvent companies in South Africa. For instance, it was noted that the Companies Act 2008 does not expressly provide the position and/or procedures to be followed during voluntary winding up proceedings for solvent companies, in respect of such companies' own debtors. Moreover, the Companies Act 2008 is largely silent on the protection of the interests of the solvent company's employees during such proceedings. In light of this, it is submitted that the voluntary winding up of solvent companies must be carefully undertaken and enforced in accordance with the Companies Act 2008 to avoid possible flaws and disadvantages as indicated above. The Companies Act 2008 should be amended to enact provisions that expressly and adequately protect the interests and welfare of the employees of the affected solvent company during and after its voluntary winding up. It is further submitted that any voluntary winding up of a solvent company should be mainly regulated by the registrar of companies, the CIPC and/or any relevant person responsible for the incorporation of companies in South Africa instead of its overly strict and sometimes rigid regulation by the Master of the High Court. This approach to could encourage more solvent companies in South Africa to consider voluntary winding up whenever such proceedings are appropriately required.

7. Acknowledgement

This research article was supported in part by the National Research Foundation of South Africa (NRF), Grant Number: 106056. In this regard, the author wishes to thank the NRF for its valuable support

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