

The application of “repealed”* sections of the Companies Act 61 of 1973 to liquidation proceedings of insolvent companies

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OPSOMMING

Die Toepassing van “Herroepe” Artikels van die Maatskappywet 61 van 1973 op Likwidasieverrigtinge van Insolvente Maatskappye

Die Maatskappywet 71 van 2008 het op 1 Mei 2011 in werking getree en die Maatskappywet 61 van 1973 herroep. Nietemin is die bepalings in die 1973-Wet insake korporatiewe insolvensieverrigtinge in wese behou deur artikel 224 en item 9 van skedule 5 by die 2008-Wet. Die 2008-Wet bevat bepalings om die likwidasië van solvente maatskappye in werking te stel maar geen prosedures om dit deur te voer nie, soos wat die 1973-Wet wel bevat. Geen substantiewe bepalings in verband met die gronde en prosedures vir die likwidasië van insolvente maatskappye is ontwikkel en geïnkorporeer in die 2008-Wet nie. In plaas daarvan, en met spesifieke verwysing na die likwidasië van ’n maatskappy wat insolvent is, is die bepalings van hoofstuk 14 van die 1973-Wet van toepassing “asof hierdie bepalings nie herroep is nie”. In lig van die voormelde en in die konteks van die likwidasië van insolvente maatskappye, oorweeg hierdie artikel drie vrae. Eerstens word die vraag gevra of ’n interpretasie van item 9 van skedule 5 by die 2008-Wet ’n ruim benadering ondersteun waarvolgens daar gesteun mag word op bepalings van die 1973-Wet wat buite die grense van hoofstuk 14 van die Wet val. Tweedens word eksperimentele oorweging verleen aan die toepassing van die bovermelde benadering om sodoende te kan steun op die bepalings van artikels 12 en 13 van die 1973-Wet. Die saak van *Botha NO v Van den Heever NO* word in hierdie verband bespreek. Derdens word die vraag gevra of die inhoud van die bepalings insake jurisdiksie (artikel 12) en sekuriteit vir kostes (artikel 13) waarde toevoeg tot die uitvoering van likwidasië prosedures, dus in effek of daar ’n behoefte is om hierdie bepalings te behou binne die konteks van die toepassing van hoofstuk 14 en die likwidasië-prosedures vervat in die 1973-Wet. In afwagting van omvattende wetgewing om insolvensie prosedures te reguleer, word daar voorgestel dat die bepalings van die

* The setting of the word *repealed* in inverted commas is gleaned from the use by Delpont & Vorster *Henochsberg on the Companies Act, 71 of 2008 Vol 2* (1994) (Looseleaf, update December 2012, Service Issue 4) (available <http://0-www.mylexixnexus.co.za/innopac.up.ac.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=mylnb:10.1048/enu>, (accessed 2013-04-10)) APPI-3 *et seq.*

1973-Wet in soverre dit betrekking het op die likwidasië van insolvente maatskappye, selfs waar hierdie bepalings nie binne die grense van hoofstuk 14 vervat is nie, steeds aangewend mag word in sekere gevalle.

1 Introduction

On 1 May 2011 the Companies Act¹ 71 of 2008 (the 2008 Act), as amended by the Companies Amendment Act 3 of 2011,² became operational.³ In terms of section 224 of the 2008 Act, it repealed the Companies Act⁴ (the 1973 Act). The 2008 Act was a result of *inter alia* a comprehensive corporate law review which culminated in a draft policy framework.⁵ The policy framework was intended to serve as a preliminary basis for further consultation and ultimately for the envisaged legislation.⁶ In essence, corporate reform was needed for the following reasons:⁷

The weaknesses in current company law and the changes to the nature of the global and domestic economy together with the constitutionally mandated process of transformation of South African society compel a comprehensive review of South African company law.

Guidelines for corporate reform were drafted as part of the reform process.⁸ These were intended to be the foundation of the directives to be forwarded to the chief drafter of the new company law legislation.⁹ The following six core categories were isolated as the focus of the reform: “Corporate formation; corporate finance; corporate governance; business rescue and mergers and takeovers; not-for-profit companies; and administration and enforcement”.¹⁰ Although the review did refer to

1 71 of 2008.

2 3 of 2011.

3 S 225 2008 Act; GN R32 GG 34239 of 2011-04-26.

4 61 of 1973.

5 Department of Trade and Industry *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform May 2004* (2004) 4-5, 52-53 (available <http://0-discover.sabinet.co.za.innopac.up.ac.za/webx/access/policydocuments/policies04/DD078362.pdf> (accessed 2013-03-05)) (the *DTI Guidelines*).

6 *Ibid.*

7 *Idem* 19.

8 Mongalo “An overview of company law reform in South Africa: From the Guidelines to the Companies Act 2008” 2010 *Acta Juridica* xiii xv-xvi. The transformation of the South African “social, political and economic scene” precipitated the reformative process, a process that was last done in the field of corporate law prior to the introduction of the 1973 Act – see Luiz “Company Law (including Close Corporations)” 2008 *Annual Survey of SA Law* 144.

9 Mongalo 2010 *Acta Juridica* xiii xv-xvi.

10 *Idem* xvi.

close corporations to some extent, reference will primarily be made to companies for purposes of this discussion.¹¹

Notwithstanding a particular focus on the principles and legislation regulating companies in South Africa,¹² the provisions pertaining to corporate insolvency procedures in the 1973 Act were retained.¹³ The motivation, as can be ascertained from the 2004 policy framework, was that these provisions would be incorporated into comprehensive legislation regulating insolvency and business rescue.¹⁴ Nevertheless, the provisions relating to business rescue were not excluded from the ambit of the 2008 Act and chapter 6 of the 2008 Act deals with these proceedings.¹⁵ No substantive provisions relating to the grounds and procedure for the liquidation of insolvent companies were developed and

11 See Luiz 2008 *Annual Survey of SA Law* 144 145 for a short discussion on the effect of the 2008 Act (which was still a Bill that time) on the Close Corporations Act 69 of 1984 (the Close Corporations Act). See also Delpont & Vorster *Vol 1* 314 on the use of sources pertaining to close corporations in order to assist with the interpretation of aspects relating to companies – the authors argue that identical principles would be applicable in light of the amendment effected to s 66 Close Corporations Act.

12 *DTI Guidelines* 10.

13 See s 224, it 9 sch 5 2008 Act.

14 *DTI Guidelines* 44. Note in the *DTI Guidelines* 43 that, initially, the submission was to keep winding-up procedures within the ambit of corporate law. See also Department of Trade and Industry *The Companies Act No. 71 of 2008 An Explanatory Guide Replacing the Companies Act, No 61 of 1973* (2010) (available <http://www.thedti.gov.za/DownloadFileAction?id=548>, (accessed 2013-04-03); <http://www.thedti.gov.za/publications.jsp?year=2011&subthemeid=> (accessed 2013-05-30) 12 (the *DTI Explanatory Guide*): “The Department of Justice and Constitutional Development has informed the DTI of proposals to develop uniform insolvency legislation. If brought to use, this legislation would overlap and may conflict with the regime set out in the Companies Act, 1973 for dealing with and winding up insolvent companies. The Act therefore provides for transitional arrangements that will retain part of the current regime for the interim, until any new uniform insolvency law is introduced”. See also Blackman *et al Commentary on the Companies Act Vol 1* (2002) (Looseleaf, Revision Service 6, 2009) Overview-3. For a prospective view of potential legislation purported to “consolidate, unify and amend the law relating to the insolvency of natural persons, companies, close corporations, trusts, partnerships and other legal entities, with or without legal personality”, see the draft Insolvency and Business Recovery Bill, 2003 (available http://www.justice.gov.za/master/m_docs/insolve-unified-insolvency-bill-july2003.pdf, (accessed 2013-05-14)) as well as the unofficial working draft of 2010 on file with authors. These versions still provide for judicial management and the indications on the working draft ss 122, 123 are that these provisions should be adapted to align it with the 2008 Act.

15 See Loubser “Business rescue in South Africa: a procedure in search of a home?” 2007 *CILSA* 152 153 *et seq*, where the author discusses whether business rescue proceedings resort under insolvency law, company law or whether it is a *sui generis* procedure under commercial law. Loubser ultimately argues (169-171) for the segregation of business rescue to a single, comprehensive and separate statute. In the context of insolvency law, she notes (169) that business rescue is perceived as the “beginning of the end” or “merely another route to liquidation”, which detracts from its purpose (154) to “[rescue] a failing business”. Note (171) that this was

incorporated into the 2008 Act.¹⁶ Instead, should a company that is insolvent be liquidated, the provisions of chapter 14 of the 1973 Act finds application “as if these have not been repealed”.¹⁷

The critical question that we address in this paper is the interpretation of item 9 of schedule 5 to the 2008 Act. This is of particular importance when considering the scope of the application of the 1973 Act within the context of the liquidation of insolvent companies, as item 9 provides for the following:

9. Continued application of previous Act to winding-up and liquidation. —
 - (1) Despite the repeal of the previous Act, until the date determined in terms of subitem (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to subitems (2) and (3).
 - (2) Despite subitem (1), sections 343, 344, 346, and 348 to 353 do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2.
 - (3) If there is a conflict between a provision of the previous Act that continues to apply in terms of subitem (1), and a provision of Part G of Chapter 2 of this Act with respect to a solvent company, the provision of this Act prevails.
 - (4) The Minister, by notice in the *Gazette*, may —
 - (a) determine a date on which this item ceases to have effect, but no such notice may be given until the Minister is satisfied that alternative legislation has been brought into force adequately providing for the winding-up and liquidation of insolvent companies; and
 - (b) prescribe ancillary rules as may be necessary to provide for the efficient transition from the provisions of the repealed Act, to the provisions of the alternative legislation contemplated in paragraph (a).

2 Orientation

Against this broad background, the research question that we will consider in the discussion below is whether an interpretation of item 9 of schedule 5 to the 2008 Act supports a broad approach whereby recourse may be had to provisions relating to the winding-up of an insolvent company that fall outside of the ambit of chapter 14 of the 1973 Act due

argued a time when the Companies Draft Bill of 2007 had been published in February 2007 for comment.

16 The 2008 Act does set out the grounds for liquidation of a solvent company, which incorporates some of the grounds set out in the 1973 Act – see ss 79-81 2008 Act. The 2008 Act also incorporates the procedures set out in the 1973 Act for the liquidation of the solvent company – see s 79(2) 2008 Act. In the *DTI Guidelines* 43, it was stated “that provisions relating to the winding-up of companies [should be] retained in company law” although reference is often made to the draft Insolvency and Business Rescue Bill in the document. See also Loubser 2007 *CILSA* 152 159.

17 It 9(1) sch 5 2008 Act. See also *HBT Construction and Plant Hire CC v Uniplant Hire CC* 2012 5 SA 197 (FSB) par 3.

to the very wording of this item. This question will be considered in view of the judgment of *Botha NO v Van den Heever NO*¹⁸ as a case in point which related to the special resolution required for voluntary winding-up in terms of the 1973 Act, and with reference to some other scenarios that may call for a consideration of the research question. In particular, the provisions relating to jurisdiction (section 12) and security for costs (section 13) of the 1973 Act have not been repeated in the 2008 Act and experimental consideration will be given to these. The decisions to reflect on sections 12 and 13 were made in the light of the practical proximity of these two sections to winding-up proceedings: Whilst the jurisdictional directions of section 12 may be directly applicable and central to companies and liquidation proceedings,¹⁹ the same cannot be said for section 13 in the sense that it provides recourse to a litigant that does not necessarily need to be a party to the liquidation proceedings.²⁰ On the other hand, the address of the company for jurisdictional purposes is potentially applicable to all litigating companies,²¹ whether these are solvent or insolvent whilst security for costs within the ambit of section 13, is only relevant to an impecunious or insolvent company.

18 Unreported case no 40406/2012 (NGP), delivered on 2012-07-23.

19 See Horn "Die 'woonplek' van 'n binnelandse maatskappy" 1990 *De Jure* 363 363 *et seq*; Van der Linde & Van der Merwe "Company residence and jurisdiction" 1994 *SALJ* 780 in respect of residence and jurisdiction; Theophilopoulos *et al Fundamental Principles of Civil Procedure* (2012) 43-44. In comparison, see GN R667 GG 35618 of 2012-08-24: Interpretation and application of s 23 of the Act & Regulation 43 of the Companies Regulations, 2011: *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf and Country Estate (Pty) Ltd*: Practice Note 2 of 2012 (Government gazette No. 35618) (Department of Trade and Industry: Practice Note 2 of 2012 in terms of Regulation 4 of the Companies Regulations, 2011) (DTI Practise Note 2) where the implications of the judgment of *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country and Others* 2013 1 SA 191 (WCC) relating to jurisdiction is brought to the attention of companies "whether existing or still to be formed".

20 See *Kemp NO and another; Trustees for the time being of Erf 591 Riversbend Trust v Ralbern Properties (Pty) Ltd* [1999] 3 All SA 154 (SE) 169 (for contextual purposes, the full paragraph is included): "On my reading of s 13 of the Companies Act I find nothing that indicates that the legislature did not envisage that a party could be both plaintiff and defendant in the same lawsuit. *All that the s refers to is 'plaintiff or applicant in any legal proceedings' and to 'defendant or respondent'*. A plaintiff is a litigant who seeks satisfaction of a claim, which he contends he has against another, by way of action. A counterclaim is such an action. This does not make a plaintiff in reconvention any less a plaintiff than a plaintiff in convention. I am unable to think of any valid reason why, if the requirements of s 13 of the Companies Act are satisfied, a court should not be empowered to order a company, which is a plaintiff in reconvention, to furnish security for costs. If this was the position it would mean that a Court would have no power to order security for costs in respect of a claim in reconvention in the event of the claim in convention for some reason or other not being proceeded with. No reason comes to mind why this should be so." (Own emphasis.)

21 In this regard, see Horn 1990 *De Jure* 363 in general where the author argues the "residence" of a company in a context not specifically related to liquidation ie s 12 1973 Act and removed from the context of service. Where no general provision is made similar to s 12, determination of

Delport and Vorster state as a point of departure to their commentary on the 2008 Act, that the wording of item 9 of schedule 5, “as if [the 1973 Act] had not been repealed”, designates “that the ‘repealed’ sections of the 1973 Act apply to the extent that it is necessary to give effect to Chapter XIV of the 1973 Act”.²² However, they do not elaborate on their commentary. On the other hand, the wording of the 2008 Act and 2004 guidelines indicate that the drafters of the 2008 Act as well as the researchers undertaking the corporate law reform project seemed to have been under the impression that chapter 14 of the 1973 Act and the provisions of the Insolvency Act of 1936,²³ were solely prescriptive of the liquidation provisions for insolvent companies.²⁴ Chapter 14 and the provisions of the Insolvency Act are the primary sources for the provisions relating to the liquidation proceedings pertaining to companies not able to pay their debts,²⁵ but it must be kept in mind that these provisions functioned within the broader framework of the 1973 Act.²⁶

At present it is submitted that the parameters of the scope of section 224 of the 2008 Act, that is the repealing provision read with item 9 of schedule 5, is not set. Some authors²⁷ as well as the presiding officer in *Botha NO v Van den Heever NO*²⁸ acknowledge the need for the extension of the scope to include non-chapter 14 provisions. Delport and Vorster proceed in their analyses of the provisions of the 1973 Act in respect of winding-up proceedings, to refer, for example, to the provisions of section 12 of the 1973 Act.²⁹ However, the judiciary has, more often than not, viewed provisions set out in other chapters of the 1973 Act as having been repealed, specifically within the context of sections 12 and 13 of the 1973 Act.³⁰

21 jurisdiction for all procedural purposes falls to the interpretation of the applicable courts’ act and common law principles – see Horn 1990 *De Jure* 363–364. The author (363) further notes the distinction between “service” and “jurisdiction” within the context of the 1973 Act and the Supreme Court Act 59 of 1959. Contra – see eg DTI Practice Note 2.

22 Delport & Vorster *Vol 2 APPI-3 et seq.*

23 Act 24 of 1936 (the Insolvency Act).

24 *DTI Guidelines* 43; it 9 of sch 5 2008 Act.

25 *DTI Guidelines* 43.

See eg the approach of Hiemstra AJ in *Botha v Van den Heever op cit.*

27 Delport & Vorster *Vol 2 APPI-3.*

28 *Op cit.*

29 Delport & Vorster *Vol 2 APPI-42.*

30 See eg *Ngwenda Gold (Pty) Ltd v Precious Prospect Trading 80 (Pty) Ltd* [2012] JOL 28599 (GSJ); *Haitas v Port Wild Props 12 (Pty) Ltd* 2011 5 SA 562 (GSJ); *Argentarius No 1 (Pty) Ltd v South African Financial Exchange* [2012] ZAGPJHC 136 (available <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAGPJHC/2012/136.html&query=argentarius> (accessed 2013-05-13)); *Genesis on Fairmount Joint Venture v KNS Construction (Pty) Ltd* [2012] ZAGPJHC 264 (available <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAGPJHC/2012/264.html&query=genesis> (accessed 2013-05-30)); *Sibakulu Construction v Wedgewood Village Golf Country op cit*; *Vienings v Paint*

In the premises, we submit that the provisions of chapter 14 of the 1973 Act cannot be read in isolation where liquidation proceedings in respect of an insolvent company are undertaken. It is argued that a contextual approach should be taken whereby reliance may be placed on provisions in the 1973 Act that fall outside of the scope of chapter 14 but directly relate to the winding-up proceedings of insolvent companies. This is of particular importance where the practical application of the provisions of chapter 14 incorporates the use of these *other* sections of the 1973 Act. Against this background, the judgment in the *Botha*-case and sections 12 and 13 will thus be considered. It is finally submitted that a contextual interpretation implies that sections, such as section 13, which have been “repealed”, may still be utilised during the liquidation of an insolvent company. The scope of this part of the paper is limited to a *reading or interpretation* of the manner in which the provisions of the 2008 and 1973 Acts interrelate at present.

It is submitted, contrary to authors such as Van Loggerenberg and Malan,³¹ that the absence of a provision similar to section 13 is not necessarily an oversight but a based on an ascertainable policy decision.³² However, whether the policy decision is correct, stands to be debated. In the second part of the paper, we discuss whether the need for sections similar to section 12 and 13 necessitates that these provisions should be drafted into legislation as procedural mechanisms.³³

3 Current Position

The critical question that this discussion highlights is whether provisions of the 1973 Act that do not fall within the scope of chapter 14 of that Act can still be utilised when liquidating an insolvent company. In order to contextualise the discussion and lay the foundation for the arguments to follow, it is necessary to consider the following:

and Ladders (Pty) Ltd [2012] ZAKZDHC 61 (available <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAKZDHC/2012/61.html&query=vienings> (accessed 2013-08-12)); *Firststrand Bank Ltd, Wesbank Division v PMG Motors Alberton (Pty) Ltd* [2013] ZAGPJHC 203 (available <http://www.saflii.org.za/za/cases/ZAGPJHC/2013/203.html> (accessed 2013-08-31)).

31 “Security for costs by local companies: back to 1909 in the Transvaal or not?” 2012 *THRHR* 609 621. According to Willis J in *Genesis v KNS Construction op cit* par 9 “there is a debate that is raging [as] to whether this omission from the new Companies Act, No 71 of 2008, as amended, was a *lacuna* or not”.

32 See *Ngwenda Gold v Precious Prospect Trading op cit* par 12-13. Van der Merwe AJ argues that the exclusion of a similar provision is not an oversight and that the legislator had constitutional considerations in mind. See also the discussion *supra* regarding suitable legislation for the regulation of winding-up procedures.

33 See Van Loggerenberg & Malan 2012 *THRHR* 609 620, 621 *re* amending the relevant legislation to provide for a s 13-procedure in the light of the authors’ contention that this was a legislative oversight.

- (a) The correlation between the 2008 and 1973 Acts including the relevant policy considerations;
- (b) The provisions that guide the interpretation of the linkage between the two Acts;
- (c) The judicial interpretation of the relevant provisions;
- (d) Whether a principled-based approach can be developed and structured within a set framework; and
- (e) Whether the application of such approach can be applied to sustain an argument to allow for a litigant to rely on provisions of the 1973 Act that do not fall within the borders of chapter 14, but outside of it.

The first three aspects will form the framework referred to as the “external” framework, that is the framework conducive to developing the principle-based approach. After the principle is developed, it is set to function within an “internal” framework in order to be applied logistically.

A brief overview of the external framework follows.

Section 224 of the 2008 Act provides for the repeal of the 1973 Act. Schedule 5 to the 2008 Act contains the transitional provisions with relation to the 1973 Act. At first glance, the wording of this section indicates that this is a complete and comprehensive repeal subject to certain transitional provisions. However, on a textual interpretation,³⁴ the transitional provisions set out in schedule 5 specifically item 9, segregate the application of these provisions to chapter 14 of the 1973 Act.³⁵

At present, the courts have consistently indicated that the repeal of the 1973 Act via the 2008 Act, is strictly adhered to in the sense that only the provisions contained in Chapter 14 is still of consequence under the 2008 Act.³⁶ In general, chapter 14 first and foremost applies fully in the winding-up proceedings where insolvent companies are liquidated. The section relating to the provisions of security for costs by an applicant or

³⁴ See Botha *Statutory Interpretation: An introduction for students* (2012) 97 par 5.3.2 for a discussion of the text-in-context approach.

³⁵ It is interesting to note the wording of the amended s 66 Close Corporations Act as referred to by King AJ in *Standard Bank of South Africa Limited v R-Bay Logistics CC (Registration No 2003/010632/23)* [2013] 1 All SA 364 (KZN) par 9: “The respondent in this action is a close corporation and one must look the provisions of the Close Corporations Act 69 of 1984 ... to find what it provides about applications to wind-up close corporations. S 66(1) thereof has been amended and not reads as follows: ‘The laws mentioned or contemplated in it 9 of sch 5 of the Companies Act, *read with the changes required by the context*, apply to the liquidation of a corporation in respect of any matter not specifically provided for in this Part or in any other provision of this Act.’” (Own emphasis.) See also the case of *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2013 4 SA 539 (SCA).

³⁶ See eg *Ngwenda Gold v Precious Prospect Trading op cit* referring to *Haitas v Port Wild Props*. See also Kamdar & Foster “Security for costs: An oversight or overkill?” (2012-09-28) *Legalbrief Today*.

plaintiff company serves as a case in point.³⁷ The court in *Ngwenda Gold v Precious Prospect Trading*³⁸ indicated that, as a result of the repeal of section 13 and the fact that the 2008 Act did not contain an equivalent provision; reference has to be made to the common law provisions when deciding on whether a company should be obliged to provide security for costs. Van der Merwe AJ duly noted that rule 47 of the Uniform Rules of Court regulated the procedural aspects of security for costs but that the principles of the common law governed the specific instances when security could be sought in the absence of legislative stipulations.³⁹

In *Haitas v Port Wild Props*⁴⁰ the court developed the common law to allow for an order directing a plaintiff insolvent company to provide security for costs for the action instituted by it. Therefore, at present the judiciary considers section 13 (which falls outside of the borders of chapter 14) to have been repealed, security for costs can still be demanded from an insolvent company in terms of rule 47 of the Uniform Rules of Court and based on the criteria created through the development of the common law principles.⁴¹ This does not reinstitute the provisions of section 13,⁴² but allows for the court to consider whether the interest of justice, the risk of vexatious litigation, the risk of non-payment of an adverse cost order and general prejudice would prefer the provision of security for costs⁴³

However, in the matter of *Botha NO v Van den Heever NO*⁴⁴ the court relied on provisions that do not fall within the scope of chapter 14 in order to decide whether proper liquidation proceedings had been initiated. This case is distinguished from the above-mentioned cases as the former were directly concerned with either section 12 (re jurisdiction for liquidation proceedings) or section 13 (re request for security for costs), whilst the *Botha* case was concerned with the process of liquidating an insolvent company (re in strict dependence on the provisions of chapter 14 relating to the winding-up and administration of companies in liquidation). Within the framework of the initial policy document,⁴⁵ respective provisions of the 2008 Act and the approach of the judiciary in the cases under consideration, a principle is developed to underlie a specific approach and same is tested on two sections namely section 12 and 13. The crux of the matter therefore does not lie with the substantive findings of the judiciary (what the definition of a resolution is), but the approach followed (reliance on the provisions of chapters in

37 Van Loggierenberg & Malan 2012 *THRHR* 609 609 *et seq* discuss the prospects for provision of security for costs by *incola* companies in the light of the 2008 Act and the decisions of *Haitas v Port Wild Props* and *Ngwenda Gold v Precious Prospect Trading*.

38 *Op cit* par 8-10.

39 *Idem* par 10.

40 *Op cit*.

41 *Idem* specifically par 13-15.

42 *Ngwenda Gold v Precious Prospect Trading op cit* par 9.

43 *Haitas v Port Wild Props op cit* par 13-15.

44 *Op cit*.

45 *DTI Guidelines*.

the 1973 Act other than chapter 14 provisions) to reach the outcome that the presiding officer did.

The principle, as will be seen below, is then further delineated to presume the “internal” framework, which will limit the scope of the principle-based approach to liquidation proceedings in respect of insolvent companies. The primary reason for this is the expectation of “alternative legislation” as per subitem 9(3) of schedule 5 and the subsequent deduction that the 2008 Act was not intended to deal with the insolvency of companies, as will be noted throughout this discussion.

3 1 Delineation of the Scope of the Application of the 1973 Act *re* Insolvency

3 1 1 Introduction

The failures of companies are economic realities.⁴⁶ The winding-up of a solvent company *vis-a-vis* an insolvent company has different outcomes in the sense that there are rights and interests⁴⁷ (including public, economic and societal) to protect where an insolvent company is liquidated, especially as not all financial interests in the company can be protected. A clear need therefore exists for an effective and comprehensive process to deal with insolvent companies when it comes to their liquidation.⁴⁸

The 2008 Act does not provide for this,⁴⁹ as a case in point the “COR 40.1” pertains to solvent companies.⁵⁰ The 1973 Act does make extensive provision for administrative and subsequent protective legislative functions to deal with an insolvent company.⁵¹ Whilst the 2008 Act provides a link (“bridge”) to the provisions of the 1973 Act, it would not make sense to pick and choose processes “piece meal” by choosing between 2008 Act and 1973 Act as and when needed,

46 See eg the published statistics for liquidations where “[l]iquidation refers to the winding-up of the affairs of a company or close corporation when liabilities exceed assets and it can be resolved by voluntary action or by an order of the court” (available <http://www.statssa.gov.za/Publications/P0043/P0043June2013.pdf> (accessed 2013-08-23)).

47 *DTI Guidelines* 43-44. See also Cassim *et al Contemporary Company Law* (2012) 67-68.

48 *Idem* 43.

49 Parr 1, 2. See also Henning *et al Close Corporations and Companies Service Volume 2: Close Companies* (1990) (looseleaf, update April 2013, Service Issue 40) Part 1 16-5; Cassim *et al* 913-914.

50 *Botha v Van den Heever op cit* parr 15, 17. Of ancillary importance is the choice of wording of it 9(3) sch 5 in respect of conflicting legislation, enforcing that the part of the 2008 Act that relates directly to the winding-up of companies, does so within the strict borders of the concept of “solvent”: “If there is conflict between a provision of the previous Act that continues to apply in terms of subitem (1), and a provision of Part G of Chapter 2 of this Act with respect to a solvent company, the provision of this Act prevails”. (Own emphasis.)

51 See the comment of Cassim *et al* 913-914.

especially where a proper, comprehensive, tested and coherent procedure is available within the legal framework of the 1973 Act.⁵²

The transitional provisions of the 2008 Act are clear in that the provisions of chapter 14 of the 1973 Act are only applicable where the winding-up of a company is involved.⁵³ The whole chapter 14 applies in a broad fashion to the liquidation of insolvent (or not solvent) companies although the procedure set out in chapter 14, subject to provisions such as section 79 of the 2008 Act, is also applicable to the winding-up of solvent companies.⁵⁴ It is therefore of particular importance for the purposes of discussing the applicability of Chapter 14 that the concept of insolvency be properly defined where relevant to activate the provisions of the 1973 Act.⁵⁵

In the recently reported case of *Standard Bank v R-Bay Logistics CC*,⁵⁶ King AJ was concerned with deciding whether states of actual or commercial insolvency were relevant to initiate the process set out in chapter 14 of the 1973 Act. Although the subject of the matter was a close corporation, the process to be followed was in essence the same.⁵⁷ The conflict in this matter revolved around the failure of the applicant to

52 See the comment in the *DTI Guidelines* 28-29: "Hand in hand with the need for simplicity is the need for comprehensiveness. Although the importance of the courts in developing the law cannot be gainsaid, the Act should not leave matters of fundamental importance to its schedules or to common law. Furthermore, the Act and its regulations should as far as possible combine all legislation relevant to the formation and management of companies, so that one reference is provided to business people".

53 It 9 sch 5 2008 Act.

54 *Ibid.* See also ch 2 part G 2008 Act.

55 Delpont & Vorster *Vol 1* 312: "The position is that for the provisions of Chapter XIV of the 1973 Act to come into operation (by virtue of item 9 of schedule 5 of the 2008 Act ...), the company must not be solvent ... However, the question as to what 'solvency' is, is not clear ... [I]t is submitted that in the context of Part G of Chapter 2 of the Act (and also in respect of Chapter XIV of the 1973 Companies Act), i.e. whether a company is to be wound-up as being solvent or not, the test should be if the solvency (or lack thereof) would be a reason or ground for winding-up, i.e. necessitating the application of Chapter XIV of the 1973 Companies Act. If it is the case the company is not solvent (i.e. insolvent and liable to be wound-up for that reason). This interpretation, which in accordance with the meaning of 'solvent' as would appear from item 9 of Schedule 5, should then cover both the factual and commercial solvency situations, depending on the circumstances. The use of s 345(1) of the 1973 Companies Act would, it is respectfully submitted, least be *prima facie* evidence that the company is not, least, commercially solvent, possibly also not factually solvent as the inability to pay a debt is surely *prima facie* evidence also that the company is not factually solvent ... The issue of commercial and factual (in)solvency was also addressed in respect of ss 311 and 312 of the 1973 Act (ss 114 and 115 of the 2008 Act), the principles which, it is submitted, remain relevant". See also *Edge Geo LLC v Geothermal Energy Systems (Pty) Ltd* [2012] ZAWCHC 391 par 21 (available <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAWCHC/2012/391.html&query=edge%20geo%20llc> (accessed 2013-08-20)).

56 *Op cit.*

57 *Idem* par 10. The court further noted that "at present, no alternative

allege the insolvency of the respondent,⁵⁸ that is the respective meanings of “solvent” and “insolvent” within the scope of item 9 and Part G of the 2008 Act.⁵⁹ Counsel for the respondent, as summarised by the court, alleged that:⁶⁰

Because the application is based upon the ground that R-Bay is alleged to be unable to pay its debts, the application must be treated as one which has been brought under the provisions of Chapter 14 of the old Companies Act which relates only to insolvent companies.

Standard Bank has failed to make any allegations in its papers as to whether R-Bay is solvent or not. In the absence of evidence to establish that R-Bay is insolvent, Standard Bank cannot rely upon the provisions of the old Companies Act, bringing its application.

The court set out the position in South African Law and acknowledged that there was a difference, duly acknowledged by the legislator,⁶¹ between “actual or literal insolvency” and “commercial insolvency”.⁶² Both financial states resonated under the general term of “insolvency”.⁶³ Whilst actual insolvency (or factual insolvency as it is also known)⁶⁴ indicates a state where the subject’s assets are of a lesser value than its liabilities, commercial insolvency signals an impaired cash-flow that results in the inability of the subject to satisfy its financial obligations as and when these become legally due and payable.⁶⁵ Different tests apply in order to establish the different forms of insolvency noted above.⁶⁶

The 1973 Act allowed for commercial insolvency as contemplated in the provisions of sections 344(f) and 345, which provided that a company could be wound-up if it was unable to pay its debts.⁶⁷ On the strength of the court's consideration of section 344 of the 1973 Act, it decided that it was needless to require the applicant to confirm that the

legislation exists for the winding-up and liquidation of insolvent companies”.

58 *Idem* par 12.

59 *Idem* parr 14, 16.

60 *Idem* par 12. The court duly noted (par 18) that the 2008 Act does not define either of these concepts.

61 *Idem* par 33.

62 *Idem* parr 14-15.

63 *Ibid.*

64 *Idem* par 31. See also *Absa Bank Ltd v Scharrighuisen* [2000] 1 All SA 318 (C).

65 *Standard Bank v R-Bay Logistics CC supra* n 33 parr 14-15. See also *Ex parte De Villiers NNO: In re Carbon Developments (Pty) Ltd (in liquidation)* [1999] 1 All SA 441 (A) 444.

66 *Standard Bank v R-Bay Logistics CC op cit* par 25.

67 *Ibid.* This discussion is primarily focused on a very basic differentiation between the use of the 1973 and 2008 Acts and not on the debate whether ss 344, 345 allow for factual insolvency as a basis for winding-up by court order – see *Ex parte De Villiers NNO op cit* as well as the cases referred to in *Standard Bank v R-Bay Logistics CC op cit* for commentary relating to the insolvency thresholds applicable. See also the discussion in Faris (ed) LAWSA 4(3) 123; Delpont & Vorster *Vol 1* 314 submit that there is still not clarity on the matter.

company it sought to have wound-up was both commercially and factually insolvent.⁶⁸ In the premises, evidence of commercial insolvency is sufficient to activate the provisions of the 1973 Act.⁶⁹ Where this is established, the provisions of the 2008 Act would no longer be of consequence.⁷⁰ Consequently, King AJ decided that a company need only establish commercial solvency for the provisions of the 2008 Act relating to the winding-up of solvent companies, to be applicable.⁷¹ *Contra* thereto, Delport and Vorster submit that an interpretation of “solvent” within the context of item 9 of schedule 5 could encompass both commercial and actual states of solvency where the facts allow for the interpretation of the respective states.⁷²

It therefore seems that commercial insolvency will be sufficient cause to aver that the issue before the court arises under the 1973 Act⁷³ within the context of the grounds for liquidation of an insolvent company.⁷⁴ Proof of commercial solvency will, whilst disallowing the use of the 1973 Act’s provisions unless the company is later found to be insolvent as contemplated in section 79(3), allow the use of the provisions of the 2008 Act regarding the grounds for winding-up.⁷⁵ However, Delport and Vorster submit, within the context of section 79(3) of the 2008 Act

68 *Standard Bank v R-Bay Logistics CC op cit* parr 25-27, 29.

69 *Idem* par 36. See also *Ex parte De Villiers NNO op cit* 444-445. See also *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) op cit* par 33: “My problem with the proposal that the business rescue practitioner, rather than the liquidator, should sell the property as a whole, is that it offers no more than an alternative, informal kind of winding-up of the company, outside the liquidation provisions of the 1973 Companies Act which had, incidentally, been preserved, for the time being, by item 9 of schedule 5 of the 2008 Act ... A fortiori, I do not believe that business rescue was intended to achieve a winding-up of a company to avoid the consequences of liquidation proceedings, which is what the applicants apparently seek to achieve.”

70 *Standard Bank v R-Bay Logistics CC op cit* parr 6, 11, 26, 28. See also it 9(1) sch 5 2008 Act.

71 *Standard Bank v R-Bay Logistics CC op cit* parr 29 & 32 *et seq.* The court differed in par 38 of its judgment from a previous decision of its division namely *Business Partners Limited v Yellow Star Properties 1061 (Pty) Ltd* (unreported case number 7188/2011 (available [http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAKZDHC/2012/96.html&query=Business%20Partners%20Limited%20v%20Yellow%20Star%20Properties%201061%20\(Pty\)%20Ltd](http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAKZDHC/2012/96.html&query=Business%20Partners%20Limited%20v%20Yellow%20Star%20Properties%201061%20(Pty)%20Ltd) (accessed 20130803)), which suggested that factual solvency is needed for the provisions of the 2008 Act to be applicable to winding-up procedures. In a similar fashion, the court differed in par 37 from *HBT Construction v Uniplant Hire op cit* as it was of the opinion that the court in *HBT* did not consider the contexts of “solvent” and “insolvent” and simply accepted that reference was made to factual insolvency. See also it 9(2) sch 5 2008 Act.

72 Delport & Vorster *Vol 1* 312. The authors also reiterate (312) that the 2008 Act relies on the term “not solvent” and not “insolvent” and that the application of the 1973 Act is dependent on the company being “not solvent”. See also the discussion 314 *et seq.*

73 See the expression used by Binns-Ward J in *Sibakhulu Construction v Wedgewood Village op cit* par 11 “matters arising under the 2008 Act”.

74 *Standard Bank v R-Bay Logistics CC op cit* 36.

75 *Idem* parr 26, 28.

relating to winding-up and liquidation by order of court, that the “ordinary meaning” should be given to the phrase “may be insolvent”, which refers to factual insolvency.⁷⁶

In the light of the judgment of *Standard Bank v R-Bay Logistics CC* it seems, therefore, that the winding-up of a company that is factually solvent but commercially insolvent will be dealt with under the 1973 Act as the liquidation of an insolvent company and not as a solvent company under the 2008 Act. If the scope and policies underlying the 2008 Act is considered and argued to exclude the regulation of proceedings relating to the winding-up of insolvent companies,⁷⁷ this approach is of particular importance when considering a potential extended scope of the provisions available under the 1973 Act.⁷⁸

3 2 *Botha NO v Van den Heever NO*⁷⁹

The conflict in *Botha v Van den Heever* arose from the appointments of two sets of provisional liquidators to a company in liquidation by the North and South Gauteng Masters of the High Court respectively.⁸⁰ Botha, Van Tonder and Maenetja (the applicants) were appointed by the South Gauteng Master after the company had, ostensibly, initiated voluntary winding-up proceedings by way of a special resolution and the registration thereof.⁸¹ Van den Heever and Parbhoo (the first and second respondents) were appointed by the North Gauteng Master in accordance with a provisional winding-up order made by the North Gauteng High Court.⁸² Both appointments were made on the 10th of April 2012.⁸³

Although the parties’ primary dispute related to the procurement of jurisdiction by the respective Masters, it was not related to the sequential appointments of the provisional liquidators, but argued to be assumption

76 *Vol 1* 310.

77 *Op cit.*

78 On an ancillary note, see the comment of Mayat J in *Firststrand Bank Ltd, Wesbank Division v PMG Motors Alberton (Pty) Ltd op cit* par 43, 44: “This is particularly so as it is my view that the principles underlying companies having more than one ‘residence’ within the framework of the 1973 Act can potentially still apply in relation to joint liquidators if central control and/or joint administration of the liquidated company for the benefit of creditors is conducted by more than one joint liquidator from more than one jurisdiction ... This is particularly so as the new provisions of the 2008 Act relating to the registered office of a company being the same location as the principal office of a company, obviously do not apply once a company is liquidated”. Although this matter related to jurisdiction *vis-à-vis* joint liquidators which were ultimately sought to be decided upon common law grounds, the considerations of the court and comments on *Sibakhulu* deserve mentioning.

79 *Op cit.*

80 *Idem* par 1, 3.

81 *Idem* par 1.

82 *Ibid.*

83 *Ibid.*

of jurisdiction.⁸⁴ The court proceeded to evaluate the authenticity of the winding-up proceedings undertaken within the jurisdiction of the South Gauteng Master of the High Court.⁸⁵ Counsel for the first respondents disputed the applicant's appointments on the basis of the invalidity of the resolution passed to initiate the voluntary winding-up proceedings and its subsequent registration.⁸⁶ In terms of the 1973 Act, a special resolution passed by the members of the company and its proper registration is needed for voluntary winding-up of an insolvent company.⁸⁷

The court referred to the definition of a special resolution set out in chapter 1 of the 1973 Act, as well as the definition in the 2008 Act in order to determine whether the special resolution for the liquidation of the company was correctly passed.⁸⁸ It found that the contents of the document presented as a special resolution did not comply with the requirements as it was not passed by the members, as required by both the 1973 and 2008 Acts.⁸⁹ Furthermore, the document was titled "resolution" instead of "special resolution", which the court found to be peculiar under these circumstances where a special resolution was explicitly required by the 1973 Act.⁹⁰ In essence, the document did not pass the criteria set out in section 349 of the 1973 Act.⁹¹

The second aspect that the court considered was the registration of the resolution.⁹² Although, by the court's own account later in the judgement, the second tier of the court's consideration was unnecessary as the court had already decided that the resolution did not comply with section 349 of the 1973 Act, the court's deliberation is of particular importance for the discussion hereafter.⁹³ The court applied the provisions of sections 351(1) and 200 of the 1973 Act to the actual procedure implemented when the resolution was purportedly registered.⁹⁴

The applicants made use of form CoR 40.1 in terms of section 80 of the 2008 Act and regulation 40(f) of the 2011 Companies regulations.⁹⁵ In terms of chapter 7, the court indicated that correct form to be used where a section 200 resolution is registered is CM 26.⁹⁶ The reasoning behind the use of the 1973 Act instead of the provisions of the 2008 Act

84 *Idem* par 1 *et seq.*

85 *Idem* par 7 *et seq.*

86 *Idem* par 5.

87 *Idem* parr 22, 23.

88 *Idem* parr 8, 11. As this article relates to the principle of the approach in *Botha v Van den Heever* and not the outcome of the decision, a discussion of other provisions relating to the concept of "resolution" (see eg item 7(5)(c)) is beyond the overall scope of the discussion.

89 *Idem* parr 8, 11.

90 *Idem* par 10.

91 *Idem* par 11.

92 *Botha NO v Van den Heever NO op cit* parr 12-21.

93 *Idem* parr 17, 18.

94 *Idem* parr 12-17

95 *Idem* par 15.

96 *Idem* parr 15-16.

was that the form prescribed necessitated information and notification requirements that the 2008 Act did not require.⁹⁷ In particular, recourse to the incorrect legislation wrongly signalled the liquidation of a solvent company instead of an insolvent one.⁹⁸ In light of the above, the substantive and procedural requirements for the voluntary winding-up of the insolvent company, insofar as these related to the resolution, were not met.⁹⁹ The applicants' appointments as provisional liquidators were therefore declared to be unfounded by virtue of the invalidity of the voluntary winding-up proceedings.¹⁰⁰

The approach of the court, by referring to provisions that fall outside of the ambit of chapter 14, is not unique. Delpont and Vorster for instance suggest that recourse should be had to the provisions of section 1 of the 1973 Act pertaining to "liquidator" and "winding-up order", and subsequently the calculation of time periods and aspects relating to special resolutions for the winding-up of companies.¹⁰¹ The authors rationalise the approach towards the definitions contained in section 1 and the provisions relating to a special resolution, by referring to the absence of comparable definitions in the 2008 Act.¹⁰²

4 The Liaison Between the 2008 and 1973 Acts

4.1 Legislative Interpretation

The first aspect to consider is whether an interpretation of the 2008 Act supports a comprehensively inclusive approach to the winding-up procedures of the 1973 Act relating to insolvent companies. The principles relevant to the interpretation of statutes create a presumption that legislation only purports to modify the current legal position in so far as are required.¹⁰³ The concept of the prevailing legal position ("existing law") is deemed to refer to common law as well as statute law in respect

97 *Idem* parr 13-17 specifically par 15.

98 *Idem* par 17.

99 *Idem* parr 22, 23.

100 *Idem* parr 21, 23.

101 Delpont & Vorster *Vol 2* APPI-4.

102 *Ibid.* At various occasions, with the exception of *Botha v Van den Heever*, mentioned throughout this article, the judiciary relied on the common law provisions to deal with matters that were initially dealt with in the 1973 Act but omitted in the 2008 Act. It must be noted that the facts in cases such as *Sibakhulu Construction v Wedgewood Village Golf Country op cit* and *Firststrand Bank Ltd, Wesbank Division v PMG Motors Alberton (Pty) Ltd op cit* relate to the insolvency of the company.

103 Du Plessis "Interpretation of Statutes and the Constitution" in *Bill of Rights Compendium* par 2C24 (last updated June 2012) (available <http://but.terworths.up.ac.za/nxt/gateway.dll/2b/zc/tna/fcy3/1cy3/9cy3?f=templates&fn=document-frameset.htm&q=%20interpretation%20of%20statutes%20%20&x=Advanced#LPHit1> (accessed 2013-03-08))

of relevance to the presumption referred to above.¹⁰⁴ One of the purposes advanced in support of this presumption is the preservation of legal certainty as “it discourages an undue destabilisation or unsettling of the law as it stands”.¹⁰⁵ In *Twani v Special Investigating Unit and Another*,¹⁰⁶ the court indicated the following:

The interpretation of a provision of a statute should always be in contextual harmony with both the letter and spirit of the whole body of law, statutory and common. Regard must be had therefore not only to the pervasive presumption – (that the legislature does not intend to alter or modify the existing law more than is necessary and any intention to do so must be declared in clear and unequivocal language; or the inference must be such that the inevitable conclusion is that the legislature did have such an intention) but *to the Act as a whole, to its preamble and general framework*.

In *Stellenbosch Farmers Winery Ltd v Distillers Corporation (SA) Ltd and another* 1962 (1) SA 458 (A) Wessels MA warned at 476E-F that:

... it is the duty of the Court to read the section of the Act which requires interpretation sensibly, i.e. with due regard, on the one hand, to the meaning or meanings which permitted grammatical usage assigns to the words used in the section in question and, on the other hand, to the *contextual scene*, which involves consideration of the language of the rest of the statute as well as the ‘*matter of the statute, its apparent scope and purpose, and, within limits, its background*.’ In the ultimate result the Court strikes a proper balance between these various considerations and thereby ascertains the will of the Legislature and states its legal effect with reference to the facts of the particular case which is before it.

The above extracts highlight the importance of considering factors other than only the obvious words of a statutory provision, as is done in this discussion. Notwithstanding the above substantive reasoning as to the practicalities of following the approach in *Botha v Van den Heever supra*, perhaps the more direct approach of section 11 of the Interpretation Act¹⁰⁷ deserves to be mentioned. Firstly, a distinction should be drawn between scenarios where the facts support a section 11 approach as to when the facts support a section 12 approach.¹⁰⁸ The confusion between reading the relevant provisions semantically as opposed to contextually is created by the reference worded to refer to chapter 14 of the 1973 Act.

In terms of section 11 of the Interpretation Act, which deals with “[r]epeal and substitution”, “[w]hen a law repeals wholly or partially any former law and substitutes provisions for the law so repealed, the repealed law shall remain in force until the substituted provisions come into operation”. Section 12(1) of the Interpretation Act, provides for the “[e]ffect of repeal of a law” as follows:

104 *Ibid*. See also *Bestuursliggaam van Gene Louw Laerskool v Roodman* [2003] 2 All SA 87 (C) 95.

105 *Ibid*.

106 [2001] JOL 9009 (E) par 16. *Own emphasis*.

107 33 of 1957 (the Interpretation Act).

108 See *Botha* 69-76.

Where a law repeals and re-enacts with or without modifications, any provision of a former law, references in any other law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provision so re-enacted.¹⁰⁹

Section 12 of the Interpretation Act is not relevant in all respects since the 2008 Act did keep chapter 14 of the 1973 Act “alive” – in effect it can be argued that the 2008 Act did, in practice, not constitute a complete repeal of the 1973 Act by virtue of the phrasing of section 224 and schedule 5 to the 2008 Act as noted above and discussed hereafter.

4 2 The 2008 Act

As indicated above, the 2008 Act is not in principle concerned with the initiation of winding-up proceedings of *insolvent* companies as this was intended to be regulated by comprehensive insolvency legislation.¹¹⁰ The preamble to the 2008 Act furthermore does not refer to the regulation of corporate insolvency or winding-up of insolvent companies as it indicates that the legislation primarily relates to the general regulation of companies in South Africa. In particular, item 9(4) of schedule 5 to the 2008 Act, provides that:

9. Continued application of previous Act to winding-up and liquidation. —
 - (1) Despite the repeal of the previous Act, until the date determined in terms of sub-item (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to sub-items (2) and (3).
 - (4) The Minister, by notice in the Gazette, may —
 - (a) determine a date on which this item ceases to have effect, but no such notice may be given until the Minister is satisfied that alternative legislation has been brought into force adequately providing for the *winding-up and liquidation of insolvent companies*; and
 - (b) prescribe ancillary rules as may be necessary to provide for the efficient transition from the provisions of the repealed Act, to the provisions of the alternative legislation contemplated in paragraph (a). (Own emphasis).

¹⁰⁹ *Vienings v Paint and Ladders (Pty) Ltd op cit* parr 14-16. See also Botha 69-76.

¹¹⁰ Par 1 *supra*. See also *Standard Bank v R-Bay Logistics CC op cit* parr 21, 22: “To answer, I think it is first necessary to consider the apparent intention behind the transitional provisions encapsulated in item 9. It seems clear that the Legislature’s ultimate objective is to replace the provisions of Chapter 14 of the old Companies Act, dealing with the winding-up of companies, with new legislation which would deal, separately, with ‘solvent’ companies and ‘insolvent’ companies. However, the time the new Act came into force, the Legislature had not got round to creating any new legislation to deal with the winding-up of ‘insolvent’ companies. It is, therefore, clear that item 9 is intended to serve only as a stopgap, until such new legislation is passed. Item 9(4)(a) specifies that Chapter 14 of the old Companies Act must continue in force until such new legislation, dealing with ‘insolvent’ companies, is actually in place.”

It is clear that the 2008 Act does not regulate the insolvency of companies but that this function, although the importance thereof has been recognised,¹¹¹ has been put on hold in favour and in anticipation of effective substitute legislation.¹¹² In the matter of *Mthembu v Letsela and Another*,¹¹³ the court indicated that:

A law (which includes subordinate or delegated legislation) may be impliedly repealed 'by a later repugnant law of the same or a superior legislature' (*R v Sutherland* 1961 (2) SA 806 (A) 815A; *New Modderfontein Gold Mining Co v Transvaal Provincial Administration* 1919 AD 367 at 397). If the later law 'professes, or manifestly intends, to regulate the whole subject to which it relates, it necessarily supersedes and repeals all former acts, so far as it differs from them in its prescriptions' (*New Modderfontein Gold Mining Co v Transvaal Provincial Administration* (*supra*) at 397). What is necessary, then, is to ascertain the 'true interpretation' of the Intestate Succession Act, so as to establish its ambit.

In the premises, it is submitted that chapter 14 of the 1973 Act (and by virtue of section 339, the Insolvency Act) cannot be seen as a strict delineation of the applicability of the provisions of the 1973 Act insofar as it applies to corporate insolvency.¹¹⁴ Mongalo indicates that the purpose of the corporate review undertaken in 2003 was not focused solely on amending legislation that had not been reviewed in three decades.¹¹⁵ It was intended to solicit a profound overhaul of the South African legislation pertaining to corporate law.¹¹⁶ A strict approach does not correlate with the report of the review committee, who emphasised that corporate legislation should be comprehensive.¹¹⁷ The drafted guidelines/policy framework recognised that whilst "the importance of the courts in developing the law cannot be gainsaid, the Act should not leave matters of fundamental importance to its schedules or to common law".¹¹⁸

It would be imprudent to interpret the limited provisions of schedule 5 to the 2008 Act in a narrow manner. This would result in the abolishment of important measures (including procedural measures such as jurisdictional guidance) in place to address matters relating to corporate insolvency in the absence of comprehensive legislation that can be viewed as an improvement on the present situation. It is expected that the legislator would at least retain the necessary provisions for orderly liquidation of insolvent companies instead of repealing the legislation and obliging recourse to the common law prior to the

111 *DTI Guidelines* 43-44.

112 It 9(4) sch 5 2008 Act. See also *DTI Guidelines* 43-44.

113 [2000] 3 All SA 219 (A) par 28.

114 As indicated above, this submission is supported by the approaches of Hiemstra AJ in *Botha v Van den Heever op cit*; Delpont & Vorster Vol 2 APPI-3-APPI-4.

115 2010 *Acta Juridica* xiii xv.

116 *Ibid.*

117 *DTI Guidelines* 28.

118 *Ibid.*

introduction of the expected new insolvency legislation, as had been observed in the case law referred to throughout this article. In *R v Sutherland*,¹¹⁹ the court stated that:

It must be conceded that a law which expires automatically by effluxion of time or, equally automatically, upon the happening of a prescribed event, other than an act of repeal, cannot be said to have been repealed by another law within the meaning of that expression in sec[ti]on 12(2) of the Interpretation Act. The repeal of a law, which is a matter of substance and not of form, can be effected, apart from an expressed repeal, in more than one way. So, for instance, is subordinate legislation regarded as impliedly repealed upon the repeal of the enabling statute (*Lockhat Bros. & Co. Ltd. v. Minister of Finance*, 1932 N.P.D. 469 at pp. 475-6 and *Hatch v. Koopoomal*, 1936 A.D. 190 at p[age] 197), and there is an implied repeal of a law by a later repugnant law of the same or a superior legislature. (*Leges posteriores priores contrarias abrogant.*)

Sec[ti]on 12(2) of the Interpretation Act is not limited to expressed as opposed to implied repeals, and if a law is totally done away with by legislative act in any manner, that law is, in my opinion, repealed within the meaning of that expression in sec[ti]on 12(2).

4 3 Discussion

As mentioned above, the revoking of legislation is concerned with substantive considerations.¹²⁰ The court's deliberations in *Botha v Van den Heever*¹²¹ were not undertaken in the absence of recognition that the 1973 Act had in principle been repealed by the 2008 Act but that the provisions of chapter 14 were still applicable. Item 9(1) of schedule 5 to the 2008 Act specifically indicates that the provisions of chapter 14 apply "as if the [1973] Act has not been repealed".¹²² The subsequent reference that subjects this subitem to subitems (2) and (3), the promulgation of comprehensive legislation to regulate insolvency proceedings, creates

119 [1961] 3 All SA 50 (A) 54, 55.

120 *Ibid.* In our opinion the Interpretation Act (specifically ss 11, 12) is not of particular assistance to deal with this matter in light of the transitional provisions invoking the provisions of the 1973 Act and the approach of the court in *Botha v Van den Heever*. In *Vienings v Paint and Ladders op cit* par 13 *et seq* the court did rely on the provisions of s 12(2)(c) of the Interpretation Act in order to ascertain whether the 1973 or 2008 Act was applicable. However, the point of departure was similarly the fixed notion that s13 had been repealed and could not be utilised. Our discussion precedes the point of departure.

121 *Op cit* par 2.

122 Own emphasis. The further question is: how wide should the term "still applicable" be interpreted ie how literal (each word has its ordinary meaning and is there for a reason) or practical (in order to work properly, other ss through the gateway of chapter 14 is needed). See *Botha* in general for a discussion of these principles.

the impression that these sections will only be factually repealed upon the realisation of the future prospective statute.¹²³

However, Hiemstra AJ had recourse, in our view correctly, to the provisions in the 1973 Act that were incorporated into other chapters of the statute.¹²⁴ In particular, reference was made to the definition in chapter 1, section 200 pertaining to resolutions in chapter 7 as well as the general liquidation proceedings in terms of chapter 14.¹²⁵ In each instance, the section referred to, that fell outside of the ambit of chapter 14, was clearly linked to a section that formed part of chapter 14. The use of the term “special resolution” in section 349 in chapter 14 was directly applicable to the definition of “special resolution” in section 1 in chapter 1 of the 1973 Act.¹²⁶

In a similar fashion, the incorporation of the provisions of section 200 in chapter 7 of the 1973 Act was a natural consequence of the reference to section 200 in section 351 in chapter 14.¹²⁷ It is of particular relevance that the court distinguished between a solvent and insolvent company, specifically within the context of the contents of the forms used to register a resolution and the notification requirements.¹²⁸ In the premises, the court’s treatment of sections 1 and 200 was “as if that Act [the 1973 Act] had not been repealed”,¹²⁹ notwithstanding the reference in item 9(1) of schedule 5 to the 2008 Act to chapter 14 of the 1973 Act. It is therefore questionable whether the 1973 Act had been “totally done away with”¹³⁰ or whether it is reliant on the “happening of a prescribed event”.¹³¹

The formalities preferred by the court, in this context, the use of prescribed forms set out in the appendixes to the 1973 Act, deserves special mention as this is a relevant area where the court distinguishes between solvent and insolvent companies.¹³² The use of a form set out in an appendix to the 1973 Act, specifically created for the purpose

123 Botha 69-70. The author notes, with illustrative reference to it 9 sch 5 2008 Act, that “[w]hen a lawmaker substitutes (repeals and replaces) legislation with another enactment, there might be a possibility that the replacing law is not in force when the other legislation departs from the scene. In order to prevent this type of ‘legislative short circuit’ or gap in the law, the repealing legislation could expressly provide for a suitable transitional measure”.

124 *Op cit.*

125 *Ibid.*

126 *Botha v Van den Heever op cit* parr 7-11.

127 *Idem* parr 12-16.

128 *Idem* parr 15, 17.

129 It 9(1) sch 5 2008 Act.

130 *R v Sutherland op cit* 55: “Sec. 12 (2) of the Interpretation Act is not limited to expressed as opposed to implied repeals, and if a law is totally done away with by legislative act in any manner, that law is, in my opinion, repealed within the meaning of that expression in sec. 12 (2)”.

131 *Idem* 54.

132 *Botha v Van den Heever op cit* par 15.

related to section 200, can be referred to the provisions of section 351.¹³³

5 Preliminary Review

In this regard is submitted that, where a section of the 1973 Act which has been repealed, is directly applicable to an aspect relating to the liquidation of an insolvent company, the provisions of that section can be invoked in principle, bar a clear indication to the contrary.¹³⁴ The approach of Hiemstra AJ in the North Gauteng High Court in *Botha v Van den Heever*,¹³⁵ was analysed as a case in point, illustrating the use of sections not included within the parameters of chapter 2 (such as section 1) to assist in deciding the validity of a resolution for purposes of liquidating an insolvent company. In the light of *Botha v Van den Heever*,¹³⁶ it seems as if the provisions of chapter 14, being the main concise body of provisions relating to the winding-up and liquidation proceedings of insolvent companies, is the point of departure for these proceedings.¹³⁷ Where a section in chapter 14 that makes specific reference to an action, function or partaker in respect of which another section of the 1973 Act which falls outside of the ambit of chapter 14 is applicable for its proper execution, the section may be used even if it is not included in chapter 14.¹³⁸ It is submitted that this is allowable as the authorising section falls within the scope of chapter 14 of the 1973 Act and thus item 9 of schedule 5 to the 2008 Act.¹³⁹

In the second part of this article, the effect of the analyses on the practical application of two procedural aspects set out in sections outside of the ambit of chapter 14 is discussed. In particular, reliance on the jurisdictional provisions of section 12 and the provisions relating to security for costs in terms of section 13 is argued.

The discussion in the second part serves to illustrate the necessary use of “repealed” sections of the 1973 Act in order to facilitate the proper conduct of winding-up proceedings of insolvent companies.¹⁴⁰

6 The 1973 Act

Sections 12 and 13 were incorporated into chapter 2 of the 1973 Act. In this regard, these provisions have, on an interpretation of section 224

¹³³ *Idem* par 12, 15.

¹³⁴ See *inter alia* par 1 *supra*.

¹³⁵ See par 3 *supra*.

¹³⁶ See par 3 *supra*.

¹³⁷ Par 4 *supra*.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ This is, however, evident from the continuous reliance on common law provisions to deal with matters previously regulated by the 1973 Act in the context of winding-up of companies as referred to throughout this article.

and schedule 5 to the 2008 Act, been repealed. This was confirmed by the respective presiding officers in *Haitas v Port Wild Props*¹⁴¹ and *Sibakhulu Construction v Wedgewood Village*.¹⁴²

However, sections 12 and 13 are of particular importance for the execution of proper winding-up proceedings in respect of an insolvent company. The scope of section 12 is of such a nature that it finds application to the election of the court competent to decide liquidation applications and grant subsequent provisional and/or final winding-up orders for insolvent companies. Section 13 deals with the provision of security for costs where a company instigates legal proceedings and, although not necessarily formally in liquidation, is likely to be incapable of satisfying an adverse cost order subsequent to unsuccessful litigation.

6 1 Section 13

6 1 1 General

Section 13 of the 1973 Act, set out in its chapter 2, reads as follows:

13. Security for costs in legal proceedings by companies and bodies corporate.— Where a company or other body corporate is *plaintiff or applicant in any legal proceedings*, the Court may at any stage, if it appears by credible testimony that there is reason to believe that the company or body corporate or, *if it is being wound up, the liquidator thereof*, will be unable to pay the costs of the defendant or respondent if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings till the security is given. (Own emphasis.)

Subsections 386(3) and (4)(a) of the 1973 Act, set out in its chapter 14, reads as follows:

(3) The liquidator of a company [has the power] —

...

(4)(a) to *bring* or defend in the name and on behalf of the company any action or other *legal proceeding of a civil nature*, and, subject to the provisions of any law relating to criminal procedure, any criminal proceedings: Provided that immediately upon the appointment of a liquidator and in the absence of the authority referred to in subsection (3), the Master may authorize, upon such terms as he thinks fit, any urgent legal proceedings for the recovery of outstanding accounts. (Own emphasis.)

6 1 2 Commentary

In *Haitas v Port Wild Props*¹⁴³ the applicants requested the respondents to furnish security for costs in terms of rule 47 of the Uniform Rules of Court. The respondent company had been liquidated as it was insolvent

141 *Op cit.*

142 *Op cit.*

143 *Op cit.*

and did not have realisable property or money readily available.¹⁴⁴ It had instituted action against the applicant three years prior to its final liquidation, but the matter had since not been brought to its logical conclusion.¹⁴⁵ It would in all probability have been incapable of payment of the legal costs of the applicants/defendants where the litigation was unsuccessful and a subsequent adverse cost order was made against the respondent/plaintiff.¹⁴⁶ Tsoka J reiterated that section 13 of the 1973 Act had been repealed by the 2008 Act and that this section could not be utilised in the present case.¹⁴⁷ In the absence of a corresponding section in the 2008 Act, the court elected to avail itself of its inherent jurisdiction in terms of section 173 of the Constitution.¹⁴⁸ The court further decided that the lack of a similar provision in the 2008 Act does not restrict the judiciary from exercising its inherent power to set its own process and to develop the common law.¹⁴⁹

In the premises, the court ruled that the common law principle, that an *incola* insolvent company is not obliged to provide security for costs for actions brought by it, should be developed in the interests of justice.¹⁵⁰ The deciding considerations centred on the prevention of unscrupulous and unfounded litigation by litigants that would in reality not bear the risks and consequences of their conduct.¹⁵¹

Delpont and Vorster¹⁵² as well as Van Loggerenberg and Malan¹⁵³ indicate that the absence of a provision for obtaining an order for security for costs from an insolvent company is not unknown of as a similar position reigned prior to section 216 of the Companies Act.¹⁵⁴ Although not arguing substantive reasons for the retaining of a section 13 provision relating to security for costs, Van Loggerenberg and Malan do seem to favour a legal dispensation that mirrors that of the 1973 Act.¹⁵⁵

144 *Idem* par 2.

145 *Idem* par 10.

146 *Idem* par 2.

147 *Ibid.*

148 *Idem* parr 7-8, 13-15. The reference to the Constitution is to the Constitution of the Republic of South Africa, 1996.

149 *Op cit* par 13.

150 *Idem* parr 13-15.

151 *Idem* par 13.

152 *Vol 1* 106.

153 *Op cit* 609. Van Loggerenberg & Malan 2012 *THRHR* 609 further indicate (609) that the inclusion and exclusion of a s 13 position has reigned since the common law ie with the Companies Act 25 of 1892 (Cape), Companies Act 46 of 1926 and the 1973 Act had this or a similar provision whilst the common law, Companies Act 31 of 1909 (Transvaal) and Companies Act 71 of 2008 did and does not have a similar provision.

154 46 of 1926.

155 2012 *THRHR* 609 620, 621 ie specified legislative provision for the provision of security for costs by insolvent companies. In this regard, although the method of the courts is criticised, the authors ultimately concur with the outcome that the presiding officers intended in *Haitas v Port Wild Props* and *Ngwenda Gold v Precious Prospect Trading* namely that an *incola* company may be requested and obliged to provide security for costs.

The authors provide various alternatives, substantiated by the position in foreign jurisdictions, to obtain this outcome, namely amendments to the relevant legislation.¹⁵⁶ (It is submitted that these alternatives will be useful to consider in future.)

In the matter of *Ngwenda Gold v Precious Prospect Trading*,¹⁵⁷ the court was of the opinion that the omission of an equivalent to section 13 of the 1973 Act in the 2008 Act could not be considered as unintentional or blamed on carelessness on the part of the Legislator. The court noted that the purpose of section 13 was to sanction a definite departure from the South African common law principle that an impoverished or insolvent *incola* company is not obliged to provide security for costs to the respondent or defendant where the company is the applicant or plaintiff in legal proceedings.¹⁵⁸ It was further submitted that this approach, which was in effect a policy decision, necessitated a consideration of the intentional omission of a section or sections analogous to section 13 of the 1973 Act along with the rights encompassed in section 34 of the Constitution.¹⁵⁹ The court finally decided that the considered aspects indicated that the legislator allocated more significance to a litigant's ability to access the judiciary than the protection afforded by section 13, which may reduce that ability.¹⁶⁰

A proper consideration of the potential applicability of section 13 is of importance, as aptly illustrated by Pillemer AJ in *Vienings v Paint and Ladders (Pty) Ltd*.¹⁶¹ The course of events extended over the period time in which the 1973 Act was repealed and the 2008 came into operation.¹⁶² The summons in the matter was served whilst the 1973 Act was still in full effect but the application for security for costs was only brought after the 2008 Act had become operational.¹⁶³ This sequence of facts allowed the learned judge to compare the 1973 and 2008 Acts, although with respect to the repeal and lack of substitution of section 13, this judgment does not depart from the generic approach followed by courts such as *Haitas* and *Ngwenda* discussed earlier.¹⁶⁴ However, the distinction of the requirements for section 13 and a common law application for security of costs within the course and scope of events involving a company that is seemingly experiencing financial strain,¹⁶⁵ is of value for further discussion. The court stated that:¹⁶⁶

156 *Ibid.*

157 *Op cit* par 11-14.

158 *Idem* par 11-13.

159 *Ibid.*

160 *Idem* par 14.

161 *Op cit* 28.

162 *Idem inter alia* par 11.

163 *Idem* par 11.

164 *Op cit. Vienings v Paint and Ladders op cit* par 11.

165 *Vienings v Paint and Ladders op cit* eg par 10.

166 *Idem* par 11. As this article relates to the principle of the approach in *Botha v Van den Heever*, a discussion of other provisions relating to the concept of "resolution" (see eg item 7(5)(c)) or comparable provisions (see eg item

S13 is the section that confers the right to seek security for costs against a company or corporation. The bar that has to be achieved by the party seeking security is much more easily met under s13, than under the common law under which the test is much more stringent. The court has an inherent power to order security in relation to unnecessary and vexatious proceedings by impecunious plaintiffs. It has also been held to have the power if it is in the interests of justice to make such an order in relation to vexatious, reckless and unmeritorious litigation bearing in mind the right of every litigant to have any dispute settled in a court of law (see *Haitas & Others v Port Wild Props 12 (Pty) Ltd* 2011 (5) SA 562 (ESJ) at 533H). It is therefore important to decide whether s13 applies to these proceedings or not to determine the appropriate test to be applied in exercising the discretion to grant or refuse an order for security for costs. It is clear that if section 13 is not of application, a case under the common law has not been made out.

6 1 3 Discussion

On an interpretation of *Botha v Van den Heever*,¹⁶⁷ a clear distinction needs to be drawn between the actions taken in respect of an insolvent company and that of a solvent company. The provisions of Part G of Chapter 2 of the 2008 Act, dealing with the winding-up of companies, relate to solvent companies. The reference in item 9 of schedule 5 to chapter 14 does not distinguish between solvent and insolvent companies apart from setting out the circumstances under which the provisions of the 2008 Act, incidentally always in respect of *solvent* companies, will prevail. Further, subitem 9(4) relates to alternative legislation *re insolvent* companies. This distinction, introduced by the legislation itself, is the foundation when deciding whether to use the provisions of the 1973 Act or that of the 2008 Act,¹⁶⁸ and this has been

5(11)) is beyond the overall scope of the discussion. The court's reference to par 13 sch 5(11) *re* comparable provisions, is of further interest: "Schedule 5(11) of the 2008 Companies Act preserves any right or entitlement enjoyed by or obligation imposed on any person in terms of any provision of the 1973 Act which is a valid right or entitlement of or any obligation imposed on that person in terms of any comparable provision of the 2008 Act as from the date that right or entitlement first arose subject to the provisions of the 2008 Act. As mentioned earlier, s13 does not have a comparable provision in the 2008 Act. The schedule is therefore of no assistance in determining whether s13 relief is available after the repeal of the 1973 Act since there is no comparable provision in the 2008 Act". Our reasoning as set out above (see eg par 1, 2 *supra*) is that the 2008 Act was not intended to regulate circumstances where companies were insolvent or experiencing financial difficulty (apart from the business rescue provisions) and as such, it is to be expected that no comparable provision was drafted for inclusion into the 2008 Act. See also the comment of Mayat J in *Firststrand Bank Ltd, Wesbank Division v PMG Motors Alberton (Pty) Ltd op cit* par 33: "It is well known in this regard that business rescue proceedings relating to financially distressed companies were not contemplated in terms of the 1973 Act, and accordingly constitutes an innovation introduced by the 2008 Act".

¹⁶⁷ *Op cit* par 15, 17.

¹⁶⁸ It 9 sch 5 2008 Act.

confirmed by case law. Utilising the provisions of the 2008 Act may result in the related activities being null and void.¹⁶⁹

It is submitted that, where the core issues are related to an insolvent company, the provisions of the 1973 Act should be exclusively used to resolve the matter.¹⁷⁰ Sections 386 and 13 are cases in point, the latter especially as it applied to companies in financial distress – “impecunious or insolvent”. It is argued that, under circumstances where the provisions of the 2008 Act are applicable, that is proceedings relating to companies that are considered solvent (even where the latter can be seen as *impecunious*), an equivalent to section 13 of the 1973 Act does not exist. Under these circumstances, the developed version of the common law used in conjunction with rule 47 of the Uniform Rules of Court, is applicable.¹⁷¹

Section 386(4)(a) refers to the power of a liquidator to litigate for and on behalf of a company in liquidation. This includes both the initiation and defence of civil proceedings.¹⁷² As quoted above, the wording of section 13 indicates its specific applicability to litigation where companies in liquidation, though the appointed liquidator, are *dominus litis*. It is submitted that there are two direct jurisdictional connections between the provisions of the two sections under consideration being *liquidation* and *litigation*, which have direct bearing on the wording of the provisions of section 13. It is further submitted that section 13 is related to the winding-up and liquidation of companies as referred to in item 9(1) of schedule 5 to the 2008 Act. As section 386, set out in chapter 14, authorises litigation within the context of liquidation proceedings, section 13, even though it is contained in chapter 2 of the 1973 act, continues to apply “as if [the 1973 Act] had not been repealed”.¹⁷³

Van Loggerenberg and Malan are of the opinion that the judgments of *Haitas v Port Wild Props* and *Ngwenda Gold v Precious Prospect Trading* are unfounded.¹⁷⁴ It is important for purposes of this discussion to note that the authors’ criticism is not levelled at the consistent decisions of the respective courts that section 13 of the 1973 Act has been repealed.¹⁷⁵ The dissent is based in the grounds for the sanctioning of security for costs through the mechanisms of Uniform Rule 47, the court’s inherent power to regulate and protect its own process and the development of the common law.¹⁷⁶ However, it is submitted that a view other than their assumptions on this point can be advanced. Their first assumption is that the courts are correct in their interpretation of the interrelation of the

169 *Botha v Van den Heever op cit* par 22-23.

170 See *inter alia* Cassim *et al* 913-914.

171 See eg *Haitas v Port Wild Props* and *Ngwenda Gold v Precious Prospect Trading op cit*.

172 S 386(4)(a).

173 It 9(1) sch 5 2008 Act read with the approach of the court in *Botha v Van den Heever op cit*.

174 Van Loggerenberg & Malan 2012 *THRHR* 609 610.

175 *Idem* 610, 612.

176 *Idem* 614-615, 617-619.

2008 and 1973 Acts, namely that section 13 has been repealed and is no longer a usable tool available to a defendant.¹⁷⁷ Our view of this matter was discussed in detail above.

Their second assumption that the discussion below diverge from, is that the lack of a provision similar to that of section 13 of the 1973 Act is a legislative oversight.¹⁷⁸ In particular they argue that the failure to amend, repeal or address section 8 of the Close Corporations Act¹⁷⁹ supports the contention that the lack of incorporation of section 13 in any form in the 2008 Act, was unintended.¹⁸⁰

In the Department of Trade and Industry's explanatory guide on the 2008 Act, it is stated:

All existing close corporations will retain their current status until such time as their members decide that it is in their interest to convert to a company. Therefore, the Act provides for the *indefinite continued existence of the Close Corporations Act*. However, it also provides for the closing of that Act as an avenue for the incorporation of new entities, or for the conversion of any existing companies into close corporations, as of the effective date of the Companies Act.¹⁸¹

It may therefore be asked if the lack of amendment of an act which was not intended to be extensively amended is grounds for substantiating a claim of legislative oversight.

The second ground for stating that the lack of a security provision is an oversight addresses the assumption of the court that the Legislator preferred the utmost adherence to section 34 of the 1996 Constitution over a position that allowed for interference with a litigants right of access to courts.¹⁸² The authors contend that section 13 of the 1973 Act and section 34 of the 1996 Constitution could co-exist and that the contention of the court was not sustainable.¹⁸³ In *Giddey NO v JC Barnard and Partners*,¹⁸⁴ a Constitutional Court case referred to by Van Loggerenberg and Malan,¹⁸⁵ the court stated that “[t]he sharp commercial reality of such an order is that at times where the plaintiff or

177 See eg *Haitas v Port Wild Props* and *Ngwenda Gold v Precious Prospect Trading op cit*.

178 *Idem* 619, 621. Contra *Ngwenda Gold v Precious Prospect Trading op cit* par 12.

179 69 of 1984.

180 Van Loggerenberg & Malan 2012 *THRHR* 609 619.

181 *DTI Explanatory Guide* 12. (Own emphasis.) See also *DTI Guidelines* 43-44. See also Blackman *et al Vol 1 Overview-2–Overview-3*.

182 Van Loggerenberg & Malan 2012 *THRHR* 609 617-619.

183 *Idem* 619.

184 2007 5 SA 525 (CC) par 29. See also Brickhill & Friedman “Access to courts” in *Constitutional Law of South Africa Vol 4* (eds Woolman *et al*) (2002) (last revised Service 4, 2012) 59-64.

185 2012 *THRHR* 609 618. The authors also aver that, whilst the constitutionality of s 13 has not been addressed by the two highest courts in the country, none of these courts have referred to the unconstitutionality or potential unconstitutionality of this section.

applicant cannot find security for costs it will not be able to pursue its action. This seems an inevitable and intended result of section 13". It is quite plausible that the Legislator is aware of the practical outcome of section 13 which (as per *Giddey v Barnard*), although it has not been found to be unconstitutional,¹⁸⁶ is still contra-indicatory when considered in the light of section 34 of the Constitution.¹⁸⁷ Whether this is indeed the considerations of the legislator can, however, only be purposefully argued once the legislation which governs the context within which this section is purported to function, that is corporate insolvency, is comprehensively drafted and incorporated into law and either contains or lacks a provision such as section 13.

From a practical point of view it can be argued that section 13 was a rather convenient process that could be used by a solvent litigant to request security for costs against a company litigant being unable to pay such costs.¹⁸⁸ Presently, it is submitted that section 13, as a "procedural matter incidental to civil proceedings",¹⁸⁹ should still find application within a spectrum clearly delineated by the insolvent state of a company, especially as the 2008 Act was not intended to regulate proceedings relating to insolvent companies.¹⁹⁰ It is contended that the lack of a provision such as section 13 was not an oversight on the part of the Legislator in relation to insolvent companies as the latter was not called upon to consider security for costs within this ambit.¹⁹¹ At present, the provision relating to the provision of security for costs in the unofficial 2010 working draft of the Insolvency and Business Recovery Bill is a hybrid version of section 13 and the developed version of the common law by the courts in *Haitas* etcetera.¹⁹² Clause 174(6) of the unofficial working draft stipulates that

[t]he liquidator or administrator need not give security for the costs of any such proceedings, unless the court on application of the defendant or respondent is satisfied that the proceedings are frivolous or vexatious.

186 *Idem* 618.

187 *Giddey v Barnard op cit* par 4, 27, 29-30.

188 See *Vienings v Paint and Ladders (Pty) Ltd op cit*. See also *Giddey v Barnard op cit inter alia* par 7: "A salutary effect of the ordinary rule of costs – that unsuccessful litigants must pay the costs of their opponents – is to deter would-be plaintiffs from instituting proceedings vexatiously or in circumstances where their prospects of success are poor. Where a limited liability company will be unable to pay its debts, that salutary effect may well be attenuated. Thus the main purpose of s 13 is to ensure that companies, who are unlikely to be able to pay costs and therefore not effectively risk an adverse costs order if unsuccessful, do not institute litigation vexatiously or in circumstances where they have no prospects of success thus causing their opponents unnecessary and irrecoverable legal expense."

189 *Giddey v Barnard op cit* par 22.

190 See par 4 2, 4 3 *supra*.

191 See par 4 3 *supra*.

192 *Op cit*.

The provision is limited to chapter 7 and chapter 21 proceedings, which are proceedings pertaining to “impeachable dispositions” and “personal liability for fraudulent, reckless or insolvent trading” respectively.¹⁹³

The Draft Bill purports to regulate both judicial and non-judicial persons.¹⁹⁴ In this regard, it may be that this general section, which closely resembles the current developments pertaining to security for costs as per *Haitas v Port Wild Props*, does not account for the differences between natural and corporate persons. In this regard, the following *dictum* by Brand JA aptly summarises this point:¹⁹⁵

[15] To my way of thinking this line of approach is indicative of a fundamental misdirection, because it fails to recognise the crucial dissimilarity in the legal substructures on which the two different applications are based. Against an insolvent natural person, who is an *incola*, so it has been held, security will only be granted if his or her action can be found to be reckless and vexatious (see *Ecker v Dean* 1938 AD 102 at 110). The reason for this limitation, so it was explained in *Ecker* (at 111), is that the court’s power to order security against an *incola* is derived from its inherent jurisdiction to prevent abuse of its own process in certain circumstances. And this jurisdiction, said Solomon JA in *Western Assurance Co v Caldwell’s Trustee* 1918 AD 262 at 274, ‘is a power which ... ought to be sparingly exercised and only in very exceptional circumstances’. (See also e.g. *Ramsamy NO v Maarman NO* 2002 (6) SA 159 (C) 173F-1.)

[16] In the exercise of its discretion under s 13 of the Companies Act, on the other hand, there is no reason why the court should order security only in the exceptional case. On the contrary, as was stated in *Shepstone & Wylie (supra)* 1045I-J, since the section presents the court with an unfettered discretion, there is no reason to lean towards either granting or refusing a security order. It follows, in my view, that although *bona fides* of the company’s claim is a consideration that may legitimately be taken into account in the exercise of the court’s discretion, as one of many factors, mere *bona fides* in itself cannot serve as a basis to refuse security when applied for under s 13.

[20] One of the very mischiefs s 13 is intended to curb, is that those who stand to benefit from successful litigation by a plaintiff company will be prepared to finance the company’s own litigation, but will shield behind its corporate identity when it is ordered to pay the successful defendant’s costs. A plaintiff company that seeks to rely on the probability that a security order will exclude it from the court, must therefore adduce evidence that it will be unable to furnish security; not only from its own resources, but also from outside sources such as shareholders or creditors (see e.g. *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No 1)* 1997 (4) SA 908 (W) 920G-

¹⁹³ s 174. The reference to the applicable chapters in the arrangement of sections differs from the actual wording of the sections. The arrangement refers to the applicability of s 174 to chrs 7, 24 whilst the actual s 174 refers to chrs 7, 21. The wording of the actual chapters was relied on for this discussion.

¹⁹⁴ *Op cit.*

¹⁹⁵ *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 6 SA 620 (SCA) parr 15, 16, 20.

J; *Keary Developments* at 540f-j; *Shepstone & Wylie* at 1047A-B; *Giddey NO* at paras 30, 33 and 34).

Although this aspect was not researched further, it also seems odd that the legislator would retain the rights and privileges of insolvent companies and their liquidators but not that of third parties who may be directly affected by the insolvency of the company where they are not party to the insolvency proceedings itself. It is however conceded that to argue for the applicability of section 13 in the circumstances may be a bridge too far.

6 2 Section 12

6 2 1 General

Section 12(1) of the 1973 Act reads as follows:

12. Jurisdiction of Court under this Act and review of decisions of Registrar.–
(1) *The Court which has jurisdiction under this Act in respect of any company or other body corporate, shall be any provincial or local division of the High Court of South Africa within the area of the jurisdiction whereof the registered office of the company or other body corporate or the main place of business of the company or other body corporate is situated.* (Own emphasis.)

It is trite that an insolvent company may be liquidated by virtue of an order of court and that the court is provided with specific authority when deciding said application.¹⁹⁶ In *Sibakhulu Construction v Wedgewood Village*,¹⁹⁷ the court indicated that section 12(1) of the 1973 Act had been repealed and that the 2008 Act did not make provision for a similar jurisdictional determination. In the premises, the court ruled that the common law would define the jurisdictional parameters for matters arising from the 2008 Act.¹⁹⁸

The court specifically indicated that “[j]urisdiction in respect of matters arising under the 2008 Act therefore falls to be determined on common-law grounds unless it can be said that a proper reading of the Act reflects a different intention”.¹⁹⁹ Delpont and Vorster, however, argue that

¹⁹⁶ Ss 343, 346, 347 1973 Act.

¹⁹⁷ *Op cit* par 11. In this case, the court was confronted with two proceedings instituted in different jurisdictions. The business rescue proceedings were instituted in the Port Elizabeth High Court and the liquidation (winding-up) proceedings were instituted in the Western Cape High Court. The court’s decision was concerned with the correct *ratio jurisdictionis* and Binns-Ward J had to interpret ss 23, 131(6) 2008 Act in the absence of an equivalent to s 12 1973 Act.

¹⁹⁸ *Ibid.* See contra Magid *et al* (ed) *Meskin Insolvency Law and its operation in winding-up* (1990) (November 2012, Service Issue 39) 15-22–15-23. The authors submit that, notwithstanding the repeal of the definition in s 1(1), the courts within which the main place of business or registered office is situated has jurisdiction “since these courts ordinarily have jurisdiction over the company”.

¹⁹⁹ *Op cit* par 11. Own emphasis.

section 12 of the 1973 Act had been replaced by section 23 of the 2008 Act.²⁰⁰ The relevant parts of section 23 read as follows:

- (3) Each company or external company must —
- (a) continuously maintain at least one office in the Republic; and
 - (b) register the address of its office, or its principal office if it has more than one office —
 - (i) initially in the case of —
 - (aa) a company, by providing the required information on its Notice of Incorporation;
 - or
 - (bb) an external company, by providing the required information when filing its registration in terms of subsection (1); and
 - (ii) subsequently, by filing a notice of change of registered office, together with the prescribed fee.

6 2 2 Discussion

It is doubtful that the court had item 9 of schedule 5 to the 2008 Act specifically, in relation to insolvent companies, in mind when this provision was made.²⁰¹ As indicated above, it can be argued that procedural matters relating to the winding-up and liquidation proceedings of insolvent companies do not arise from the 2008 Act.²⁰² It arises from the provisions of chapter 14 of the 1973 Act as sanctioned by the 2008 Act.²⁰³ Ostensibly, the method of the court in *Botha v Van den Heever* is easily applicable to this scenario. In a similar fashion as the court's reflection on the provisions of sections 1 and 200 in deciding

²⁰⁰ *Vol 1* 104.

²⁰¹ In par 20 the judge noted, albeit in general and not in relation to insolvent companies, as follows: "The transitional provisions in terms of s 224 and Schedule 5 of the 2008 Companies Act make no reference to the issue of a pre-existing company's registered office. The result of this must be that a pre-existing company is obliged to change its registered office in terms of s 23(3)(b) of the Act if the address of the office does not coincide with that of its principal place of business. The requirement that a company register the address of its principal office is plainly intended for the benefit of third parties who might wish to obtain information about it, communicate with it, or in any manner formally transact with or in connection with it." Furthermore, see par 11: "The 2008 Companies Act, which in large measure repealed the 1973 Act, contains no equivalent provision to s 12(1) of the earlier Act. Jurisdiction in respect of matters arising under the 2008 Act therefore falls to be determined on common-law grounds unless it can be said that a proper reading of the Act reflects a different intention. The provision in the previous Companies Acts which expressly provided that the place of a company's principal place of business has jurisdiction was consistent with the *actor sequitur forum rei* principle of common law. According to that principle it is residence within the territory of the court's remit that determines whether a court has jurisdiction over a person."

²⁰² *Standard Bank of South Africa Limited v R-Bay Logistics CC op cit* par 11, 12, 23, 24. See also *Sibakhulu Construction v Wedgewood Village op cit* par 11.

²⁰³ *Standard Bank of South Africa Limited v R-Bay Logistics CC op cit* par 23, 24.

whether the document before the court complied with the requirements for a special resolution and its proper registration, it is submitted that a court could consider the provisions of section 12 when deciding whether it has jurisdiction to hear a matter relating to the winding-up and liquidation of an insolvent company.

Reference to the concept of “court” is found in *inter alia* sections 343 to 347. Section 1 of the 1973 Act defines “Court” as “in relation to any company or other body corporate, means the Court which has jurisdiction under this Act in respect of that company or other body corporate, and, in relation to any offence under this Act, includes a magistrate’s court having jurisdiction in respect of that offence”. Of particular importance to this discussion, is the use of the phrase “the Court which has jurisdiction under this Act in respect of that company”, which is echoed in section 12(1). Further to the above, a definition of “court” is not provided in the general definitions of the 2008 Act, but in section 128 finding application only to the chapter 6 rescue procedure. Section 128(e) provides as follows:

- ‘court’, depending on the context, means either —
- (i) the High Court that has jurisdiction over the matter; or
 - (ii) either —
 - (aa) a designated judge of the High Court that has jurisdiction over the matter, if the Judge President has designated any judges in terms of subsection (3); or
 - (bb) a judge of the High Court that has jurisdiction over the matter, as assigned by the Judge President to hear the particular matter, if the Judge President has not designated any judges in terms of subsection (3).

However, as it has been noted above on multiple occasions, the factual setting for the implementation of all the provisions of the 1973 Act is insolvency, more particularly, commercial insolvency.²⁰⁴ The wording of section 13 clearly states that its scope of application is reserved for “impecunious” or “insolvent” companies. It is submitted above that, where a company is insolvent, the litigant involved in proceedings instituted by the liquidator of the insolvent company, should still be able to revert to the protective measures of section 13 and existing case law.²⁰⁵

Regarding the ascertainment of jurisdiction in relation to liquidation matters to which chapter 14 of the 1973 Act applies, it is submitted that the approach of Delpont and Vorster can be questioned as section 23 of the 2008 Act deals with the registration of the company’s address, whilst

204 See par 3 2 *supra*.

205 See par 4 3 *supra*.

section 12 of the 1973 Act dealt with jurisdictional issues directly.²⁰⁶ Section 12 can also be distinguished from section 13 in scope and application as the wording of section 12 of the 1973 Act makes it clear that the provision was not specifically reserved for proceedings relating to corporate insolvency. Under the 1973 Act, a section with similar provisions regarding the registration of an office, as contemplated in section 23, would have been section 170.²⁰⁷ The approach of the court in *Sibakhulu Construction v Wedgewood Village* is therefore correct insofar as the court acknowledges that the 2008 Act does not contain a similar section to section 12.²⁰⁸ The court's approach is further correct in reverting to the common law for purposes of ascertaining "jurisdiction in respect of matters arising under the 2008 Act".²⁰⁹

The questions are however, based on the analysis of *Botha v Van den Heever*, whether section 12 would still find application in liquidation proceedings and whether it would have any practical effect in light of the decision in *Sibakhulu Construction v Wedgewood Village* and as explained below.²¹⁰

In *Sibakhulu Construction v Wedgewood Village*, a clear distinction was made between the approach of the 1973 and 2008 Acts respectively with regard to geographical indicators for jurisdictional determination.²¹¹ The 2008 Act regulates the registration of companies' registered addresses, a prescription relevant to all companies notwithstanding their solvency status.²¹² In the premises, companies registered under the 1973 Act²¹³ have to adapt to the provisions of the 2008 Act and amend their

206 Delpont & Vorster Vol 1 104, *Sibakhulu Construction v Wedgewood Village op cit* par 10. See also Horn 1990 *De Jure* 363 363 on die differentiation between jurisdiction and service.

207 See also *Sibakhulu Construction v Wedgewood Village op cit* par 17. See also par 16, where the court stated that "[i]t falls to be considered whether the provisions of s 23(3) of the 2008 Companies Act, which had no equivalent in the legislation in force when *Dairy Board* and *Bisonboard* were decided alter the position determined in those cases". These cases were reported in 1976 and 1991 respectively.

208 *Sibakhulu Construction v Wedgewood Village op cit* par 10.

209 *Idem* par 11.

210 See also: DTI Practice Note 2.

211 *Sibakhulu Construction v Wedgewood Village op cit* par 19: "A material distinction between a 'registered office' under the 2008 Act and its predecessors, however, is that under the current Act the registered office must be the company's only office, alternatively, if it has more than one office, its 'principal office' ... Thus, where the 1973 Companies Act expressly acknowledged the possibility of a distinction between a company's registered office and its 'main place of business', the 2008 Act requires the registered office and the principal place of business for jurisdictional purposes to be one and the same address." See also par 21.

212 One of the purposes of the 2008 Act set out in its long title and echoed in s 7 is to provide for the "incorporation, registration, organisation and management of companies". See also *Sibakhulu Construction v Wedgewood Village op cit* par 22.

213 *Contra* to this statement, see the (in our opinion *obiter*) comment of Mayat J in *Firststrand Bank Ltd, Wesbank Division v PMG Motors Alberton (Pty) Ltd and*

registered offices where the latter are not the same as the principal places of business.²¹⁴ In the light of the involvement of the court on various levels such as ordinary litigation, business rescue proceedings, applications for the winding-up of both solvent and insolvent companies, etcetera, the court's reasoning that the 2008 Act sought to introduce a regime in terms of which one High Court has the authority to preside over matters relating to the company, is sound.²¹⁵

The court duly noted that there are various *rationes jurisdictionis* that apply when jurisdiction is determined.²¹⁶ Whilst the nature of the matter determines whether a higher or lower court can adjudicate on the matter pertaining to the application for the winding-up of the insolvent company, the address ("residence") of the company determines the geographical location of the court that must hear the matter.²¹⁷ Van der Linde and Van der Merwe argue that corporate "residence" relates to both the *ratio jurisdictionis* and the principle of effectiveness.²¹⁸

In determining whether the *Botha v Van den Heever* approach is relevant to section 12, the following considerations are merited. Firstly,

Others op cit par 45 (par 46 is included for contextual purposes): "Furthermore, if it is assumed on the basis of the provisions of s 23(3) of the 2008 Act that a company incorporated prior to the 2008 Act is compelled to take steps to have its registered office and its principal office in the same location, and if it is further assumed that PMG Alberton and PMG Kyalami had not been liquidated, then both these companies would have been compelled to change their registered office from KZN to Gauteng where their principal offices were located. In addition, it is my view that as s 23(3) of the 2008 Act does not have any bearing in relation to the appointment of liquidators, fairness dictates that there is a legal presumption in these circumstances that the new principles underlying the said s do not apply retrospectively to liquidators of companies, which were already incorporated prior to the 2008 Act coming into effect. As already indicated, it is also my view that in the absence of anything to the contrary in both the 1973 Act as well as the 2008 Act, the conceptual notion of "residence" of joint liquidators with administrative offices having a registered office and a principal place of business in different locations in terms of the 1973 statutory framework."

214 *Sibakhulu Construction v Wedgewood Village op cit* par 20: "The transitional provisions in terms of s 224 and Schedule 5 of the 2008 Companies Act make no reference to the issue of a pre-existing company's registered office. The result of this must be that a pre-existing company is obliged to change its registered office in terms of s 23(3)(b) of the Act if the address of the office does not coincide with that of its principal place of business". See also DTI Practice Note 2.

215 *Sibakhulu Construction v Wedgewood Village op cit* eg parr 9, 14, 19, 23. See specifically par 23: "Furthermore, winding-up and business rescue are also matters which are interlinked in such a manner by the provisions of the 2008 Act that it is undesirable for reasons of comity between courts of equal status, efficiency, commercial convenience and certainty that they be amenable to proceedings in concurrent jurisdictions".

216 *Idem* par 11. See also Van der Linde & Van der Merwe 1994 *SALJ* 780.

217 Theophilopoulos *et al* 43, 49-50.

218 Van der Linde & Van der Merwe 1994 *SALJ* 780 780, 787. The authors note (780) that "[r]esidence of the defendant has been held to 'entrench' the jurisdiction of the court".

whether the focus is on the merits of the matter, that is the insolvency and liquidation of the company or whether the focus is on the proceedings in the court which would centre on the address of the company. The first is a substantive question which is determined by the meaning of “insolvency”²¹⁹ and the application of either the 1973 Act or the 2008 Act. If this is the primary consideration, then section 12 should still be applicable where an insolvent company is liquidated in terms of the provisions of the 1973 Act. The second is a procedural question governed by common law principles and legislative provisions and rules of court such as the Supreme Court Act and Uniform Rules of Court relating to civil procedure.²²⁰ It is submitted that the court in *Sibakhulu Construction v Wedgewood Village*,²²¹ preferred the latter approach:

I consider that it would give effect to the purposes set out in section 7(k) and (l) to interpret section 23 of the Act to the effect that a company can reside only at the place of its registered office (which, as mentioned, must also be the place of its only or principal office). The result would be that there would in respect of every company be only a single court in South Africa with jurisdiction in respect of winding-up and business rescue matters. I think it admits of no doubt that winding-up and supervision for business rescue purposes are both matters going to the status of the subject company; and that the power to make a determination on a question of status involves a *ratio jurisdictionis* exercisable only by the court within whose jurisdiction the company “resides” or is domiciled. (I do not perceive there to be scope for any distinction within South Africa between a local company’s residence and its domicile.) Furthermore, winding-up and business rescue are also matters which are interlinked in such a manner by the provisions of the 2008 Act that it is undesirable for reasons of comity between courts of equal status, efficiency, commercial convenience and certainty that they be amenable to proceedings in concurrent jurisdictions. These are considerations militating in favour of the recognition of a regime that recognises a company only to be resident in one place rather than two thereby assuring that only one court will have jurisdiction.

The court clearly noted that this aspect is governed by the 2008 Act and proceeded to focus on the administrative aspect of the company *re* its address²²² rather than the liquidation thereof.²²³ The court also reiterated that the 2008 dispensation allowed for only one address as a “jurisdictional connecting factor”, effectively eliminating the preceding position where a company was allowed to have “dual residenc[y]” and

219 See 2 2.

220 *Sibakhulu Construction v Wedgewood Village op cit* par 11. See also Theophilopoulos *et al* chrs 4, 5; Horn 1990 *De Jure* 363.

221 *Sibakhulu Construction v Wedgewood Village op cit* par 23. (Own emphasis.) It must be noted that the term “winding-up” is not used specifically within the context of an insolvent company although, from the facts of the case, it would seem that the company under consideration was experiencing financial difficulties.

222 See also Van der Linde & Van der Merwe 1994 *SALJ* 780.

223 *Sibakhulu Construction v Wedgewood Village op cit* par 23.

permitting concurrent jurisdiction.²²⁴ It is further submitted that the decision of the court and practical effect thereof was, although inspired through a lack of a similar provision to section 12, not primarily based on the repeal of the section. The decision was informed by the altered dispensation under the 2008 Act relating to the registered office of a company and the correlation thereof with the company's main place of business.²²⁵

Notwithstanding the *dictum* of the court in *Sibakhulu Construction v Wedgewood Village* regarding one address for insolvency and business rescue proceedings, it is important to consider the situation where a company has not aligned its main place of business and its registered address. The critical question in this regard is whether a company can still have different addresses as its registered address and main place of business respectively and what the legal ramifications, if any, will be.²²⁶ It is submitted that, in the absence of a definite sanction to incentivise companies to change their addresses formally, it is doubtful whether these changes will be effected on own accord.²²⁷ Liquidation and business rescue proceedings may simply be brought in a court that has jurisdiction as per *Sibakhulu Construction v Wedgewood Village* without incurring the inconvenience of changing an established address. Furthermore, other statutes, such as section 65A of the Magistrates' Courts Act 32 of 1944 provide for a notice to be sent to a debtor who has failed to perform in terms of judgment for payment of money. The legislation makes provision for the notice to be

issued ... if the judgment debtor is a juristic person, from the court of the district in which the registered office or main place of business of the juristic person is situate[d], ... calling upon the judgment debtor or, if the judgment debtor is a juristic person, a director or officer of the juristic person as representative of the juristic person and in his or her personal capacity, to appear before the court in chambers on a date specified in such notice in order to enable the court to inquire into the financial position of the judgment debtor and to make such order as the court may deem just and equitable.

Similarly, the rules regulating the proceedings in the magistrates' courts provide for service at a company's "registered address or its principal place of business within the court's jurisdiction" in terms of rule 9(3)(e). In the premises, retaining potential concurrent jurisdiction²²⁸ for purposes of liquidation is not unique in the post-2008 Act era alternatively there is a clear need for alignment of provisions of the different statutes/provisions if the position in *Sibakhulu Construction v*

224 *Idem* parr 19, 23, 25. See also Van der Linde & Van der Merwe 1994 SALJ 780 783.

225 *Sibakhulu Construction v Wedgewood Village op cit inter alia* parr 21, 23, 32.

226 See in general Horn 1990 *De Jure* 363; Theophilopoulos *et al* chrs 4, 5.

227 See eg DTI Practice Note 2 where the CIPC commissioner indicates "that the other High Courts may support and follow this judgment".

228 S 29(1)(fA) Magistrates' Courts Act 32 of 1944 makes provision for this court to have jurisdiction where a close corporation is liquidated.

Wedgewood Village is to become the prevailing legal position in South African Law.²²⁹

A further aspect that needs to be considered is whether the applicant in liquidation proceedings would have a legal ground for instituting insolvency proceedings in the court where the company's main place of business is situated or, *vice versa*, whether the respondent, if any, would be able to aver lack of jurisdiction on a legally sustainable ground.²³⁰ Apart from the above reasoning pertaining to the *Botha v Van den Heever* matter, limiting jurisdictional options decreases the applicability of basic jurisdictional principles such as effectiveness, convenience, consent and common sense.²³¹ In the matter of *Firststrand Bank Ltd, Wesbank Division v PMG Motors Alberton (Pty) Ltd*,²³² albeit within the context of the jurisdiction of joint liquidators, to a dual residency approach as initially contemplated by the 1973 Act.

7 Conclusion

The above discussion set out the framework for the rationale, nature and scope of the 2008 Act.²³³ The 2008 Act repealed the 1973 Act but retained the provisions relating to the liquidation of solvent and insolvent companies.²³⁴ It was argued that the purpose of the 2008 Act was not to regulate the winding-up of insolvent companies.²³⁵ However, the judiciary strictly adhered to the delineation of the applicable provisions *re* chapter 14 of the 1973 Act and, with the exception of Hiemstra AJ in *Botha v Van den Heever* consistently proceeded to deal with matters relating to *inter alia* security for costs and jurisdiction in respect of

229 See eg DTI Practice Note 2 where the CIPC commissioner indicates that “service of legal documents and process on the company (at the very least in respect of business rescue and winding up applications) should be its registered office and not alternatively its principal place of business, as currently provided for by Rule 4 of the Uniform Rules of Court”. The CIPC Commissioner further alerts companies that notification of change of registered office address can be effected through the relevant forms in terms of s 23(3)(b).

230 Theophilopoulos *et al* 43-44, 49-50.

231 *Idem* 44-46. Also see *Rostami Beleggings CC & Others v Nedbank Ltd* unreported case number 2008/020459 (SGJ) (available at <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAGPJHC/2012/197.html&query=rostami%20beleggings> (accessed 2013-05-14)).

232 *Op cit* par 43: “This is particularly so as it is my view that the principles underlying companies having more than one ‘residence’ within the framework of the 1973 Act can potentially still apply in relation to joint liquidators if central control and/or joint administration of the of the liquidated company for the benefit of creditors is conducted by more than one joint liquidator from more than one jurisdiction.” The presiding officer distinguished this case from *Sibakhulu* as the latter referred to s 23 2008 Act and the facts of the matter involved both an application for liquidation due to insolvency and an application for business rescue – see par 44.

233 See par 1, 2 *supra*

234 See par 1 *supra*.

235 See eg par 1, 3 *supra*.

liquidation proceedings, from the point of view that sections 12 and 13 had been repealed.²³⁶

The wording of item 9 of schedule 5 that the legislation continues to apply “as if it had not been repealed” precedes the query on whether provisions in other chapters of the 1973 Act may still be applicable under certain circumstances.²³⁷ In the light of the above, a principle-based approach was formulated. In terms of this approach, reliance may be placed on provisions of the 1973 Act that do not fall within the boundaries of chapter 14 of the 1973 Act, but which is directly related to proceedings contemplated in chapter 14.

The contextual approach of Hiemstra AJ in *Botha v Van den Heever* indicates the importance of interpreting the provisions of the 1973 Act relating to the winding-up of insolvent companies in the light of provisions that do not fall within the ambit of chapter 14.²³⁸ The court relied on provisions not contained in chapter 14 of the 1973 Act but which could be directly linked through recurring concepts and phrasing for its evaluation of the facts of the matter.²³⁹ The court therefore utilised the definition of “special resolution” in chapter 1 to ascertain whether the provisions of chapter 14 had been complied with.²⁴⁰

The learned judge's approach is supported by the policy framework, explanatory booklet and preamble of the 2008 Act which determines that the scope of the 2008 Act was not purported to include the regulation of liquidation proceedings relating to insolvent companies.²⁴¹ In anticipation of comprehensive legislation regulating insolvent proceedings, it is submitted that the provisions of the 1973 Act relating to the liquidations of insolvent companies, even where these do not fall within the “physical” boundaries of chapter 14, may still find application.²⁴² In this regard it is further submitted, with respect, that the various courts' recourse to the common law and its subsequent development within the scope of the authority bestowed in accordance with section 173 was unnecessary.²⁴³

Within the context of litigation with and liquidation of insolvent companies, provisions in the 1973 Act that were repealed, were not mirrored in the 2008 Act, although these provisions were of cardinal procedural importance.²⁴⁴ In this regard, the approach was tested against sections 12 and 13.²⁴⁵ The aforementioned sections, relating to the determination of the jurisdiction of the court and security for costs

²³⁶ See eg par 4 *supra*.

²³⁷ See par 2 *supra*.

²³⁸ See parr 2-4.

²³⁹ See par 3 *supra*.

²⁴⁰ *Ibid*.

²⁴¹ See *inter alia* parr 2, 3 *supra*.

²⁴² See *inter alia* parr 1, 3, 4 *supra*.

²⁴³ See *inter alia* parr 3, 4, 6 *supra*.

²⁴⁴ See par 6 *supra*.

²⁴⁵ *Ibid*.

when litigating against an insolvent company were repealed but not replaced by the 2008 Act.²⁴⁶ The authors submit that there is a need for sections 12 and 13 to be retained in its current form as can be ascertained by the ensued litigation and case law set out above. However, we submit that the approach of the court in *Botha v Van den Heever* can be applied to incorporate the provisions of sections 12 and 13 where there is a factual basis, where the matter relates to the liquidation of an insolvent company or litigation against a liquidator of an insolvent company in liquidation.

²⁴⁶ *Ibid.*