INSOL International

Formalities for the Transfer of Insolvent Businesses: The Obligatory Transfer of Employees in South Africa and the United Kingdom

November 2007

Technical Series Issue No. 3.

Formalities for the Transfer of Insolvent Businesses: The Obligatory Transfer of Employees in South Africa and the United Kingdom

Contents

INSOL International
2-3 Philpot Lane, London EC3M 8AQ, UK
Tel: +44 (0)207 929 6679 Fax: +44 (0)207 929 6678
www.insol.org

Acknowledgement

INSOL is pleased to introduce another excellent technical paper by Prof. David Burdette, INSOL Scholar for the year 2006-2007.

The topic of this paper titled “Formalities for the Transfer of Insolvent Businesses: The Obligatory Transfer of Employees in South Africa and the United Kingdom” explores many issues that are significant to both employers and employees of insolvent entities. In addition, insolvency practitioners have to bear in mind many important issues when transferring businesses from insolvent entities including legislative formalities and time frames (if any); transfer and registration of names of businesses, possible tax implications and many other relevant issues that may come to light during an investigation.

South Africa, a country that has very rigid and inflexible labour laws is used as one case example. The second example is the United Kingdom and the implications of The Transfer of Undertakings (Protection of Employment) Regulations 2006. (TUPE Regulations.) The paper also provides an over view of the position in Europe and discusses the EEC Directive on “Transfer of Undertakings Directive” of 1977.

INSOL would like to thank Professor Burdette for writing this excellent paper on this very interesting topic. We hope our members will find this paper a useful research tool.

Formalities for the Transfer of Insolvent Businesses: The Obligatory Transfer of Employees in South Africa and the United Kingdom

By Professor David Burdette[1]

1. INTRODUCTION

Considering the emphasis on corporate rescue as opposed to traditional liquidation in most jurisdictions today, it is important that insolvency practitioners the world over acquaint themselves with the many aspects affecting the rescue or restructuring of business enterprises. While traditional liquidation has the demise of the business entity as a result, together with the concomitant result of distributing the available assets amongst the creditors on an equitable basis, corporate rescue brings with it new challenges and skills in order to preserve the business as a going concern. Maintaining the life of a business enterprise, while noble in its intent, brings with it a number of problems and challenges as the enterprise itself continues in existence. A number of aspects arise in corporate rescue that would not be an issue under traditional liquidation procedures, for example possible legislative formalities and time frames associated with the transfer of a business, the obligatory transfer of the employees when an insolvent business is sold as a going concern, name changes and transfers, and possible tax implications.

A discussion of all these aspects cannot be included in a paper of this nature and length. Consequently it has been decided to focus on the position of employees when businesses are sold and transferred out of insolvent estates. The position of employees in insolvent businesses is of particular concern, especially considering that more and more countries are implementing legislation or directives that regulate this situation. In this paper the position surrounding employees in the transfers of businesses out of insolvency in South Africa and the United Kingdom will be the main focus point. Both countries recently adopted amendments to legislation that regulate the position of employees in the transfer of businesses, and this paper will investigate the possible common elements contained in the legislative provisions of these two counties.

[1] Department of Mercantile Law, University of Pretoria, Republic of South Africa. From 1 September 2007 Professor of Law at Nottingham Law School, Nottingham Trent University, United Kingdom. 2006-2007 INSOL International Scholar: Europe, Middle East and Africa Region.

2. EMPLOYEES AND THE TRANSFER OF AN INSOLVENT BUSINESS

2.1 The Position in South Africa[2]

2.1.1 Historical development

After South Africa became a democracy in 1994, one of the focus areas of government was to provide more adequate protection for employees from the exploitation that had been so rife under the old *apartheid* regime. Considering the political alliance[3] that ensured victory for the African National Congress (ANC) at the polls in April 1994, it was hardly surprising that employee rights were thereafter entrenched in the South African Constitution.[4] One of the most important pieces of legislation that emerged from these entrenched rights was the Labour Relations Act (LRA). This Act currently regulates labour law in South Africa, and has been amended several times in order to ensure protection for (mainly) employees in a society that is still in a process of transformation.

One of the most important changes brought about by the LRA was the introduction of section 197, which ensures that when a business is transferred, for whatever reason, the contracts of employment follow the business and the new employer is obliged to accept them. Prior to the introduction of section 197, the transfer of a business normally resulted in the termination of the contracts of employment of the employees that previously worked for that business.[5] The fact that this could be done with impunity by the new owners of the business also resulted in widespread abuse, as it was relatively easy for a business to rid itself of excess workers or workers that were using their legal right to bargain collectively.[6]

Section 197 has quite a convoluted history,[7] but it is fair to state that it developed from the principle of unfair labour practices developed in the 1980s under the old Labour Relations Act.[8] While some protection was afforded to employees in that consultations had to take place between the seller of the business, the buyer and the employees, and reasonable efforts had to be made

[2] As regards the position in South Africa, extensive use has been made of Todd, Darcy and Bosch *Business Transfers and Employment Rights in South Africa* (LexisNexis Butterworths 2004), hereinafter referred to as Todd *et al*.

[3] This is often referred to as the 'tripartite alliance', and consists of the African National Congress (ANC), the South African Communist Party (SACP) and the Confederation of South African Trade Unions (Cosatu).

[4] S 23(1) of the South African Constitution provides that every person has the right to fair labour practices. It must be borne in mind that one of the purposes of the Labour Relations Act 66 of 1995 (hereinafter referred to as the LRA) is to give effect to this entrenched constitutional right.

[5] Todd *et al* para 1.4 10.

[6] See Todd *et al* para 1.5 12 where numerous examples of this type of exploitation are enumerated.

[7] See Todd *et al* para 1.5 10-11 and para 1.7 13-14 for a full discussion of developments leading to the introduction of s 197.

[8] Act 28 of 1956.

by the seller to ensure the protection of the employees' interests, if the seller had valid economic reasons to do so it could 'fairly' retrench employees. In turn the retrenched employees became entitled to severance pay. The crux of this attitude was that the right to fair labour practices did not necessarily mean that the new employer was obliged or compelled to take on the workers of the old employer.[9]

When section 197 was implemented on 11 November 1996, it resulted in conflicting views on its meaning and effect.[10] While one view was that it resulted in the automatic transfer of the employment contracts to the new buyer,[11] others felt that it did not change the common law position that prevailed at the time, namely that the buyer of a business as a going concern could not be compelled to take over the employees of the old employer.[12] The Constitutional Court[13] disagreed with the view that a buyer was not obliged to take over the employees of the old employer as expressed by the Labour Appeal Court, and found that section 197 was not only designed to facilitate commercial transactions, but also to simultaneously protect employees against the unfair loss of work. Consequently, the Constitutional Court found that section 197 gives rise to an automatic transfer of employment contracts from the seller of a business as a going concern to the buyer of that concern.[14]

Section 197 was amended in 2002 and now unequivocally states that employment contracts are automatically transferred when there is a change of ownership of the going concern.[15] More importantly though, sections 197A and 197B were introduced by the 2002 amendments, making a clear distinction between the transfer of solvent and insolvent businesses. Section 197A now makes provision for the transfer of insolvent businesses, while section 197 deals with the transfer of businesses in solvent circumstances.

It is also important to note that, prior to 1 January 2003, the insolvency of the employer resulted in the immediate termination of all contracts of employment.[16] The relevant section has since been

[9] Todd *et al* para 1.7 13.

[10] *Idem* 1.7 14.

[11] See e.g. *Schutte and Others v Powerplus Performance (Pty) Ltd and Another* [1999] 2 BLLR 169 (LC) and *Foodgro (A Division of Leisurenet Ltd) v Keil* [1999] 9 BLLR 875 (LAC).

[12] *NEHAWU v University of Cape Town* [2002] 4 BLLR 311 (LAC) (this case was overruled by the Constitutional Court on appeal).

[13] In *NEHAWU v University of Cape Town* (2003) 24 ILJ 95 (CC).

[14] For a discussion of the *NEHAWU v University of Cape Town* decision see Todd *et al* para 1.8 14-16.

[15] For practical and other difficulties encountered with this approach, see Todd *et al* para 1.9 16-17.

[16] S 38 of the Insolvency Act 24 of 1936 (hereinafter referred to as the Insolvency Act), prior to its amendment on 1 January 2003.

amended, and from 1 January 2003 the insolvency of the employer merely results in the suspension of the contracts of employment.[17] The main reason for this amendment was to ensure that the employment contracts could follow the new employer (purchaser) where businesses are sold as going concerns out of insolvent estates.

2.1.2 Sections 197A and 197B of the LRA

Due to the fundamental differences between the transfer of a business that is solvent as opposed to the transfer of a business that is insolvent, sections 197A and 197B were introduced in order to accommodate these differences, and cater for the transfers of businesses that are insolvent or on the brink of insolvency. It would appear that the main objective of these provisions is to encourage the rescue of imminently insolvent or insolvent businesses.[18] The two main differences between section 197, dealing with solvent transfers, and sections 197A and 197B, dealing with insolvent transfers, appear to be the following:

- In terms of section 197 all the rights and obligations between the old employer and the employee at the time of the transfer continue in force as if these were rights and obligations between the new employer and the employee. In terms of section 197A such rights and obligations are not transferred to the new employer, but remain rights and obligations between the original employer and the employee.[19]

- The second difference relates to the possible termination of employees' contracts of employment under insolvency. Because the contracts of employment may indeed be terminated under insolvency in terms of the provisions of section 38 of the Insolvency Act, a different cut-off date is identified in determining which contracts of employment will pass to the new purchaser. In the case of solvent transfers all contracts of employment *in force immediately prior to the date of transfer* are automatically transferred, but in the case of insolvent transfers all the contracts of employment that were in force *immediately prior to the old employer's liquidation or sequestration* are transferred.[20]

[17] It is, however, possible for these contracts to be terminated. E.g., if the trustee has failed to sell the business as a going concern within 45 days of his final appointment, then all contracts of employment will be terminated. The purpose of the amendment was to allow the trustee some time to find a buyer for the insolvent business, and consequently for the employment contracts to pass to the purchaser of the insolvent business. For a useful discussion of the amendments to the LRA and the Insolvency Act, see Boraine and Van Eck, 'The New Insolvency and Labour Legislative Package: How successful was the integration?' (2003) 24 *ILJ* 1840.

[18] Todd *et al* 5.2 128.

[19] *Idem* 128-129.

[20] *Ibid*. The section has been drafted in this way in order to avoid the problems that may arise in the revival of the contracts after they may already have terminated in terms of section 38 of the Insolvency Act.

From the wording of section 197A it is clear that its provisions apply in two situations, namely i) if the employer is insolvent[21] and ii) if a scheme of arrangement or a compromise is being entered into to avoid winding-up or sequestration for reasons of insolvency.[22]

It is submitted that the term 'insolvent', as used to denote the first situation, would include any of the following situations:

- Companies and close corporations that have been wound up by the court due to their inability to pay their debts;
- The estates of employers that have been sequestrated as a compulsory sequestration or a voluntary surrender;
- Companies and close corporations being wound up as a voluntary winding-up by creditors, or that have been wound up voluntarily by the court.

As far as the second situation is concerned, namely where a scheme of arrangement or compromise is being entered into in order to avoid winding-up or sequestration, the provisions would appear to only apply to schemes of arrangement or compromises being entered into outside of insolvency.[23] This would exclude, for example, compositions being entered into in terms of the provisions of section 119 of the Insolvency Act, or in terms of section 72 of the Close Corporations Act,[24] since these compositions can only be entered into if the estate in question has already been sequestrated or liquidated.[25]

One question that does arise is whether the provisions of section 197A will apply to companies that have been placed under judicial management. Judicial management is the current corporate rescue mechanism in South Africa, and *inter alia* requires insolvency before a court will grant the order. However, a company that is placed under judicial management is not in liquidation – the purpose of the procedure is to restore it to profitability – and it would be illogical to exclude from the provisions of section 197A(1)(b). It also needs to be borne in mind that under judicial management the contracts of employment are not terminated, but will be maintained throughout

[21] S 197A(1)(a) of the LRA.

[22] S 197A(1)(b) of the LRA.

[23] See Todd *et al* para 5.4.2 131

[24] Act 69 of 1984.

[25] In which case, it is submitted, the provisions relating to insolvent entities in section 197A(1)(a) will apply as the person or entity would be 'insolvent'.

the procedure. Whether or not section 197A applies to companies under judicial management is probably not that important, as the alternative is that section 197 will apply.

In addition to the above developments, South Africa is on the verge of introducing a new corporate rescue procedure. The new procedure will be known as 'business rescue' and has been proposed as Chapter 6 of the new Companies Bill that was published for comment in February 2007. This procedure will serve much the same purpose as judicial management, although it is a vast improvement on the latter.[26] The question arises as to whether section 197A will apply to this new business rescue procedure, especially since the procedure itself has intricate provisions relating to the maintenance of employment contracts[27] and the involvement of employees in the proposal and acceptance of a business rescue plan.[28] In addition, the new business rescue procedure makes provision for the employees to buy out the claims of creditors in order to take over the business as part of a business rescue plan.[29] These are bold new innovations in a procedure that is yet to be tested in practice.[30] It will be interesting to see how practitioners will approach the differing provisions contained in section 197 and 197A, as opposed to those contained in the new business rescue procedure.[31]

2.1.3 Section 38 of the Insolvency Act

As already stated elsewhere above, section 38 of the Insolvency Act makes provision for the suspension of employees' contracts of employment upon the formal liquidation or sequestration of an employer's estate. Prior to 1 January 2003, this section provided for the immediate termination of the contracts of employment upon the liquidation or sequestration of the employer's estate.

The purpose of the amended section 38 is to suspend the contracts of employment for a determined period of time, during which the trustee or liquidator can attempt to sell the business

[26] This new procedure has in fact been designed to replace judicial management.

[27] Cl 139 of the draft Companies Bill.

[28] Cl 147 of the draft Companies Bill.

[29] *Ibid*.

[30] There has been substantial opposition to the business rescue procedure in its current draft form. One of the aspects that is worrisome is the fact that the employment contracts have to be fully maintained during the corporate rescue procedure. In practical terms this may hamper the introduction of a successful business rescue plan, and serve as an Achilles heel for the procedure as a whole. See also Todd *et al* para 5.5 134 where reference is made to this problem in the United Kingdom.

[31] It is worth noting that although the new business rescue procedure requires insolvency or imminent insolvency, there is no formal liquidation of a company that is subjected to the business rescue procedure and it cannot therefore be said to be 'insolvent' as required by the provisions of s 197A(1)(a) of the LRA. In fact, the whole idea behind the business rescue procedure is to avoid the formal winding-up of the company.

as a going concern. During the time that employees' contracts of employment are suspended, they are not paid and they are also not required to work.[32] The trustee or liquidator is empowered to terminate the contracts of service of the employees, but this is subject to a duty to consult with employee organisations, or the employees themselves, with a view to either selling the business or a part thereof as going concern, or by attempting to save the business, for example with the use of a compromise and arrangement in terms of the provisions of the Companies Act.[33] If the trustee or liquidator is not able to sell the business as a going concern, or is not able to find an arrangement whereby the employees' contracts of employment are transferred or extended, the contracts of employment will terminate 45 days after the final appointment of the trustee or liquidator.[34]

2.1.4 Section 34 of the Insolvency Act[35]

In terms of section 34(1) of the Insolvency Act, any 'trader' who transfers a business belonging to him by way of contract must give the required notice as required by the Insolvency Act.[36] If the seller fails to comply with this requirement, and the business is sequestrated or liquidated within six months of the transfer, then the transfer will be void as against the trustee or liquidator. In such a case the purchaser would have to try and negotiate a new contract for the sale of the business with the trustee or liquidator.

2.1.5 Conclusion

As far as the transfer of a business out of an insolvent estate is concerned, the general effect of section 197A is firstly to transfer to the new employer (the purchaser of the business) the contracts of employment of the employees that were in the old employer's service prior to insolvency, and secondly to exclude all rights and obligations that may have accrued between the parties prior to the transfer of the business.[37]

---

[32] S 38(2) of the Insolvency Act.

[33] S 38(4), (5) and (7) of the Insolvency Act.

[34] S 38(9) of the Insolvency Act.

[35] See generally Todd *et al* para 5.8 150.

[36] The required notice is a formal notice in the *Government Gazette* and in two English and two Afrikaans newspapers circulating in the area where that business is carried on. The notice must be placed between 30 and 60 days prior to the date of the transfer.

[37] Todd *et al* para 5.5 134. For a full discussion of the transfer of the contracts of employment and the problems associated therewith, see Todd *et al* para 5.5.1 135. For a full discussion of the exclusion of the rights and obligations between the old employer and the employees and the issues that arise from this, see Todd *et al* para 5.5.2 141.

It should be clear that the employees of a solvent company being transferred in terms of section 197 are far better off than the employees of an insolvent company being transferred in terms of section 197A of the LRA. For example, under section 197A the employees' only remedy in respect of claims arising prior to the transfer will be against the old employer, who will either be insolvent or trying to avoid insolvency by entering into some kind of compromise or arrangement with its creditors.[38]

Sections 34 and 38 of the Insolvency Act are also important in that these sections contain specific provisions dealing with the alienation of a business and the effect of sequestration or liquidation on contracts of employment respectively. Finally, section 98A contains detailed provisions relating to statutory preferences (priorities) for employees in insolvency proceedings. These benefits include statutory preferent claims for arrear salary, leave pay, retrenchment (redundancy) benefits, and contributions to certain funds. All these statutory preferent claims are subject to maximum amounts that are revised from time to time.

2.2 The position in Europe[39]

2.2.1 Brief historical overview

The ongoing economic integration of the European Community and its member states, which gave considerable rise to the restructuring of business enterprises at the time, was a cause for concern for the European Council in the 1970s.[40] The main concern was the social consequences for employees of this economic integration.[41] In order to increase the involvement of employees in the life of business enterprises in the European Community, the European Council adopted a resolution[42] that could address this.[43] This resolution was followed by various other directives and legislative enactments.[44] It is worth noting that these directives had both an economic and a social

[38] See Todd *et al* para 5.6 148, where the constitutionality of this unequal treatment is also discussed in relative detail.

[39] For a useful summary of the rules applicable to the transfer of undertakings in various (mostly European) countries, see *ius laboris* (International Employment Law, Pensions and Employee Benefits Alliance), *Transfer of Undertakings*, dated March 2007 (this booklet is available for download from the following website: http://www.iuslaboris.com/pdf/TofUMarch2007.pdf.

[40] Todd *et al* para 1.6 13.

[41] *Ibid*.

[42] Council Resolution, 21 January 1974 (74/C13/01).

[43] Todd *et al* para 1.6 13.

[44] In 1975 the Directive on Collective Redundancies was the first legislative step to be taken (Todd *et al* para 1.6 13). This was followed by the adoption of the 'Transfer of Undertakings Directive' of 1977 (Directive 77/187/EEC) and the Insolvency Directive of 1980 (see Todd *et al* para 1.6 13 and the authority cited by them in fn 47).

purpose.[45] The current Directive regulating the safeguarding of employees' rights in the event of transfers of undertakings or parts thereof, is contained in Council Directive 2001/23/EC.[46]
The Acquired Rights Directive, promulgated in 1977, did not make any specific reference to business transfers arising from insolvency. The amendments to the Acquired Rights Directive introduced in 1998,[47] and which were subsequently consolidated in the Directive of 2001,[48] expressly *excluded* transfers of insolvent entities from the provisions,[49] except insofar as member states have provided otherwise.[50] If member states have in fact 'provided otherwise', the Directive then sets out provisions that such member states may apply.[51]

While the provisions of section 197A of the LRA appear to be consistent with the broader scheme of the European Acquired Rights Directive, it must be borne in mind that there is no coherent set of rules that apply throughout Europe regarding the transfer of insolvent undertakings. Due to the haphazard manner in which member states can make their own rules regarding the transfer of insolvent businesses, there is no rule of thumb that can be applied across the board. Due to the fact that there are still many similarities between insolvency law in South Africa and insolvency law in the United Kingdom, the latest Transfer of Undertakings (Protection of Employment) Regulations[52] (TUPE) will be used on a comparative basis.

2.3 The position in the United Kingdom

2.3.1 Introduction

The revised TUPE Regulations that apply in the United Kingdom came into force on 6 April 2006,[53] replacing the earlier 1981 amended version.[54] The TUPE Regulations implement the

[45] See Todd *et al* para 1.6 13.

[46] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the members states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. According to Todd *et al* para 1.6 13 each European country has given effect to the provisions of the Directive by appropriate amendments to their national laws. See also Todd *et al* para 5.1 126.

[47] Directive 98/50 EC.

[48] Council Directive 2001/23/EC.

[49] The statutory protection provided to employees in terms of European Community law has been criticised due to the fact that it undermines insolvency proceedings by interfering with possible rescue procedures. For a useful analysis of this approach see Armour and Deakin "Insolvency and employment protection: The mixed effects of the Acquired Rights Directive" *International Review of Law and Economics* (Dec 2002), accessed via Westlaw.
[50] Art 5(1) of the Directive. See also Todd *et al* para 5.1 126; Blanpain *European Labour Law* (Kluwer 6th Ed 1999) para 571 348 and para 586 357.

[51] For a brief summary of these provisions, see Todd *et al* para 5.1 126.

[52] Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI n) (hereinafter referred to as the 2006 TUPE Regulations).

[53] *Ibid*.

European Community Acquired Rights Directive already referred to above. Prior to the introduction of the 2006 TUPE Regulations, the applicability of the Regulations to insolvent business transfers appear to have been uncertain.[55] Although these Regulations were applicable to corporate rescue situations, the 1981 TUPE Regulations made provision for the exclusion of the application of the Regulations to insolvent business transfers.[56]

According to the Department of Trade and Industry's (DTI) guide on the new 2006 TUPE Regulations,[57] one of the main changes brought about by the new Regulations is the introduction of 'special provisions making it easier for insolvent businesses to be transferred to new employers'.[58] The DTI's guide is at pains to point out that the rights and obligations in the 1981 Regulations remain in place, although the 2006 Regulations contains revised wording to clarify certain aspects and to reflect developments in case law since the 1981 Regulations were implemented.[59]

In Part 1 of the 2006 TUPE Guide a general overview of the revised TUPE Regulations is provided, where it is clearly stated that the effect of the Regulations is to 'preserve the continuity of employment and terms and conditions' of employees when a 'relevant transfer'[60] of a business takes place.[61] Another important aspect of the new Regulations is that there is now a duty upon the transferring employer (the old employer) to provide specific information to the new employer regarding the workforce that is being transferred.[62] Finally, the new Regulations make specific provision for cases where the old employer is insolvent 'by increasing, for example, the ability of the parties . . . to vary contracts of employment, thereby ensuring that jobs can be preserved . . .'.[63] The Regulations apply regardless of the size of the business concerned.[64]

---

[54] Transfer of Undertakings (Protection of Employment) Regulations 1981 (SI 1794) (hereinafter referred to as the 1981 TUPE Regulations).

[55] Todd *et al* para 5.1 127 and the authority quoted in fn 30.

[56] Todd *et al* para 5.1 127.

[57] *Employment Rights on the Transfer of an Undertaking: A Guide to the 2006 TUPE Regulations for Employees, Employers and Representatives*, dated March 2007 and published by the Department of Trade and Industry (hereinafter referred to as the 2006 TUPE Guide). This document was accessed via the Internet at www.dti.gov.uk.

[58] 2006 TUPE Guide 6.

[59] *Ibid*.

[60] A 'relevant transfer' is described as i) the situation when a business or part of a business is transferred to a new employer, and ii) when a service provision change takes place – 2006 TUPE Guide 7.

[61] 2006 TUPE Guide 7.

[62] *Ibid*.

[63] *Idem* 8.

[64] *Ibid*.

2.3.2 The transfer of insolvent businesses

The 2006 TUPE Guide highlights two main aspects relating to the transfer of insolvent businesses. The first aspect that is highlighted is the fact that some of the old employer's pre-existing debts relating to the employees are not transferred to the new employer.[65] The debts referred to relate to any obligation by the old employer to pay the employees 'statutory redundancy pay or sums representing various debts to them, such as arrears of pay, payment in lieu of notice, holiday pay or a basic award of compensation for unfair dismissal'.[66] These claims will be met by the National Insurance Fund.[67] The only amounts that will pass to the new employer will be the amounts over and above those met by the Secretary of State through the National Insurance Fund.[68] It is interesting to note the similarity between these provisions and the provisions relating to section 197A of the Labour Relations Act in South Africa.[69]

The second aspect of the 2006 TUPE Regulations that has been highlighted by the DTI is the scope for the new employer to vary the terms and conditions of employment after the transfer of an insolvent business has taken place.[70] This is an important variation if one considers that the purpose of the TUPE Regulations is to place restrictions on new employers when varying contracts of employment because of the transfer of a business, or for a reason connected to the transfer of a business. The effect of the new Regulations relating to the transfer of insolvent businesses means that these restrictions are in effect waived, allowing the old employer, insolvency practitioner or new the new employer to 'reduce pay and to establish other inferior terms and conditions after the transfer' of the business.[71] However, there are strict requirements that must be met before inferior terms and conditions of employment can be enforced on employees in the transfer of an insolvent business. In brief these requirements entail the following:[72]

- Any variation of the terms and conditions of employment must be agreed with employee representatives;

[65] *Idem* 33.

[66] *Ibid*.

[67] *Ibid*.

[68] *Ibid*.

[69] See para 2.1.2 above.

[70] 2006 TUPE Guide 33.

[71] *Ibid*.

[72] *Idem* 33-34.

- Employee representatives must be union representatives where an independent trade union is recognised for the purposes of collective bargaining;

- In cases where there is no independent trade union recognised for the purposes of collective bargaining, non-union representatives are allowed to agree to the variation. However, where non-union representatives agree to any variations in the terms and conditions of employment, two additional requirements must be met, namely i) the variation must be agreed in writing and signed by each of the non-union representatives, and ii) before the agreement is signed all affected employees must be provided with a copy of the agreement and any additional information that will make the agreement understandable to the employees;

- The varied terms and conditions of employment may not be in conflict with any other statutory entitlements that may apply; and

- The variation of the terms and conditions of employment 'must be made with the intention of safeguarding employment opportunities by ensuring the survival' of the business or part thereof.[73]

The question that arises under this part of the Regulations is what is meant by 'insolvency proceedings'.[74] This aspect is dealt with in Regulations 8[75] and 9 of the 2006 TUPE Regulations, although no attempt is made in these regulations to list all the different types of proceedings individually. In answering the question as to which proceedings are included under the Regulations, the 2006 TUPE Guide by the DTI states the following:

> "[Regulations 8 and 9] apply where the transferor is subject to 'relevant insolvency proceedings' which are insolvency proceedings commenced in relation to him but not with a view to the liquidation of his assets . . . It is the Department's view that 'relevant insolvency proceedings' mean any collective insolvency proceedings in which the whole or part of the business or undertaking is transferred to another entity as a going concern. That is to say, it covers an insolvency proceeding in which all creditors of the debtor may participate, and in relation to which the insolvency office-holder owes a duty to all creditors. The Department considers that 'relevant insolvency proceedings' does <u>not</u> cover winding-up by either creditors or members where there is no such transfer.'

[73] This requirement is further subject to the fact that 'the sole or principal reason for the variation must be the transfer itself or a reason connected with the transfer which is not an economic, technical or organisational reason' – see 2006 TUPE Guide 34 fn 13.

[74] This is a problem similar to the one highlighted in paragraph 2.1.2 above regarding section 197A of the South African Labour Relations Act.

It would therefore appear that the 2006 TUPE Regulations will apply to any transfer of a business as a going concern from an insolvent estate, irrespective of the type of proceeding that is envisaged. It would further appear that if the only purpose of the insolvency proceeding is the liquidation of the insolvent entity's assets with a view to distribution amongst its creditors, then the 2006 TUPE Regulations will not apply. Considering the problems that have been encountered in determining which insolvency procedures are covered by the provisions of section 197A of the South African Labour Relations Act, the 2006 TUPE Regulations appear to be a far more sensible option in regard to covering all types of insolvency proceeding where the contracts of employment will have to be transferred. The purpose of having such provisions is, after all, to preserve the jobs of the employees where a business or part thereof is being transferred out of an insolvent estate.

3. CONCLUSION

From a comparison between the provisions in South Africa and the United Kingdom relating to the transfer of employees of insolvent businesses that are sold as going concerns, it is clear that there is a common approach in that the employees do enjoy some form of protection. It is also clear that both jurisdictions recognise the need to distinguish between the transfer of solvent as opposed to insolvent businesses. While the employees do not enjoy quite as much protection under the provisions, in both jurisdictions, relating to the transfer of an insolvent business, this is justified by the fact that special rules need to apply when businesses have the added burden of insolvency thrust upon them. Some form of flexibility is required in order to assist the seller, insolvency practitioner or purchaser in making the transfer of the business a viable exercise for everyone concerned.

As far as South Africa is concerned there is still some confusion as to when the provisions of section 197A of the Labour Relations Act, relating to the transfer of an insolvent business, will apply. It is clear that any special provisions relating to the transfer of an insolvent business should apply in any proceeding where a business or a part of a business will be transferred to a new employer as a going concern, irrespective of the type of insolvency or corporate rescue proceeding that is employed. The only point at which one really needs to exclude the protective provisions that protect employees is where the assets of a business are being sold with a view to its final liquidation. In this regard the provisions of Regulation 8 of the 2006 TUPE Regulations in

[75] Reg 8(6) states "[i]n this regulation 'relevant insolvency proceedings' means insolvency proceedings which have been opened in relation to the transferor not with a view to the liquidation of the assets of the transferor and which are under the supervision of an insolvency practitioner."

the United Kingdom can be of valuable assistance in further developing South Africa's own provisions in this regard.