TO BE OR NOT TO BE? THE ROLE OF PRIVATE ENQUIRIES IN THE SOUTH AFRICAN INSOLVENCY LAW

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SUMMARY

This article analyses the role of the so-called private examinations in our South African insolvency law and deals with the question of whether or not section 417 of the Insolvency Act (Act 24 of 1936) is adequately and effectively framed in order to fulfil its intended purpose in South African law. The contribution also points out that although the scrutiny of private examinations is not novel; it is argued that further exploration of the subject is justified by virtue of the fact that robust and innovative legislative changes have been experienced in the South African corporate landscape. Although the section has already passed the test of lawfulness and constitutionality, the aim is to ascertain whether the section serves a legitimate purpose and is essential and relevant in a democratic society. This is done by considering the South African law relating to South African private examinations and includes academic texts and judicial interpretation. Both section 417 of the Companies Act (Act 61 of 1973) and the matter of *Kebble v Gainsford* in particular are discussed. A brief comparative analysis of a similar provision in the Insolvency Act of the United Kingdom (UK), namely section 236 of the Insolvency Act 1986 is also included.

Finally recommendations are made on aspects where the section may be enhanced by reform which in part relies on the premise that South African insolvency law *in toto* is desperately in need of an overhaul. The article concludes that it is vital that section 417 be retained in a new insolvency regime as there is a greater awareness of the interdependence between companies and the society in which they function, and it is submitted that there should be an increased responsibility in the insolvency

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process on the reasons why companies have failed. The accessibility of the section to practitioners, the inquisitorial nature of the proceedings, the wide scope of the section and the effective sanctions should examinees not comply together combine to make a formula that has over the years proved impervious to circumvention and it therefore fulfils its function with prudent efficiency.

KEYWORDS: Insolvency law; liquidation; section 417 of Companies Act 61 of 1973; private examinations; constitutional; constitutional court cases; balance of rights; abuse of process; *concursus creditorum;* oral or written interrogatories; Insolvency Act 1986; official receiver.