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# 4:3:2:1... Fair Distribution of Appointments or Countdown to Catastrophe? <sup>†</sup> South Africa's Ministerial Policy for the Appointment of Liquidators under the Spotlight

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## Foreword

1 It is both an honour and a privilege for us to contribute this paper to the *festschrift* dedicated to Professor Ian Fletcher QC. Insolvency law and practice around the world owes a huge debt of gratitude to Ian's scholarship and vision which helped develop insolvency law and ensure that it is a discipline that can be regarded as critical in the commercial world across the globe. It is largely due to Professor Fletcher's influence that we both entered the world of insolvency in academia, so it is fitting that this paper should be dedicated to him.

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<sup>†</sup> The ratio of 4:3:2:1 referred to in the title is a reference to the ratio in which appointments are to be made in terms of the approved Ministerial Policy for the appointment of insolvency practitioners, and which has since been challenged on constitutional grounds in *SA Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development and Others, and Another Application* 2015 (2) SA 430 (WCC). This case and the Ministerial Policy are discussed in this paper.

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## Introduction

2 Over the years a spirited debate has taken place regarding the reform of the insolvency laws in South Africa in general.<sup>1</sup> In the South African context the transformation theme remains a complex and controversial subject, and as such it is imperative that law reform takes place on the basis of a rational, structured policy approach. It has been argued that globalisation is a development that is having a profound impact on the subject of economics as a whole - to such an extent that it has become the defining process of the present age.<sup>2</sup> This development raises questions concerning the value to be obtained from conformity to such global standards, balanced against a distinctive and unique national path that reflects the peculiarities of national historical, cultural and legal developments.<sup>3</sup> Any attempt to regulate the insolvency profession should be done within the context of generally accepted social, political and economic goals, but nonetheless also produce a system where practitioners would be required to have the skills, knowledge and experience so as to maintain the integrity of the insolvency system and the insolvency profession. The challenge will therefore lie in translating internationally identified standards and norms into the South African national context.

3 A secondary theme has been the establishment of a democratic constitutional dispensation in South Africa since the first democratic elections in 1994. The Constitution<sup>4</sup> provides the context and outline within which any government policy should be developed and formulated and legislation giving effect to that policy can be enacted and interpreted.<sup>5</sup> The basis of constitutionalism is that the power of the state is defined and confined by law to protect the interests of society.<sup>6</sup> Any law reform process should thus aspire to comply with the underlying values of the Constitution.<sup>7</sup> This sentiment is echoed by Evans:

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<sup>1</sup> See A. Loubser, "An International Perspective on the Regulation of Insolvency Practitioners" (2007) *SA Mercantile Law Journal* 123; J. Calitz and A. Boraine, "The Role of the Master of the High Court as Regulator in a Changing Liquidation Environment: A South African Perspective" (2005) (4) *Journal of South African Law* 728, at 734; J. Calitz and D. Burdette, "The Appointment of Insolvency Practitioners in South Africa: Time for Change?" (2006) (4) *Journal of South African Law* 721.

<sup>2</sup> E. Loots, "Globalisation, Emerging Markets and the South African Economy" (2005) 70(2) *South African Journal of Economics* 123.

<sup>3</sup> T.C. Halliday, "Lawmaking and Institution Building in Asian Insolvency Reforms: Between Global Norms and National Circumstances", Chapter 1 in Organisation for Economic Co-operation and Development, *Organisation for Economic Co-operation and Development Asian Insolvency Systems Closing the Implementation Gap* (2007, OECD Publishing, Paris), at 17.

<sup>4</sup> The Constitution of South Africa Act of 1996 (hereinafter referred to as "the Constitution").

<sup>5</sup> C. Hoexter, *Administrative Law in South Africa* (2nd ed) (2012, Juta & Co, Cape Town), at 22.

<sup>6</sup> Y. Burns and M. Beukes, *Administrative Law under the 1996 Constitution* (3rd ed) (2006, LexisNexis Butterworths, Durban), at 28.

<sup>7</sup> See *S v Makwanyane* 1995 6 BCLR 665 (CC); 1995 3 SA 391 (CC) at 262. See also J. Calitz, "A Reformatory Approach to State Regulation of Insolvency Law in South Africa" (unpublished LLD thesis, University of Pretoria, 2009), in Chapter 4.

“In formulating new legislation the question is not whether constitutional requirements, underpinned by human rights interests, must form an integral part thereof, but rather to what extent policy changes should occur in order to align such legislation with the required constitutional principles and expectations, and how to achieve this while maintaining or balancing the interests of creditors, debtors, society and the state.”<sup>8</sup>

4 In a previous article published nine years ago,<sup>9</sup> we discussed in some detail the appointment of insolvency practitioners in South Africa. At the time we were of the opinion that it was time for the largely unregulated insolvency profession in South Africa to be properly regulated, and called for change. In that article we traced the history of the appointment of insolvency practitioners in South Africa,<sup>10</sup> discussed the manner in which appointments were made at the time, and also discussed the various Ministerial Policy documents that had been published up to that point.<sup>11</sup> We also argued very strongly for the statutory regulation of insolvency practitioners, the abolition of the requisition system that is used for making provisional appointments, and for proper qualification and other entry-level requirements.<sup>12</sup> None of our calls have been heeded, however, and the situation now seems to be at its lowest point ever.

5 A recent decision in the Western Cape High Court,<sup>13</sup> dealing with the duly published Ministerial Policy in relation to the appointment of insolvency practitioners, gave us pause for thought and an opportunity to revisit this topic, especially since there appears to have been no real positive change since we published our article in 2006. While we do not intend regurgitating everything stated in our previous article, for the sake of completeness, and in order to fully understand the issues raised here, there will be some repetition. The points already raised and that are repeated here, are to reinforce our stance that South Africa is heading the wrong way regarding the implementation of its latest Ministerial Policy for the appointment of insolvency practitioners.

6 It also needs to be stated that there have been some legislative changes in South Africa since our article appeared in 2006. In 2011 South Africa introduced a new Companies Act<sup>14</sup> to replace the previous 1973 Act,<sup>15</sup> and by so doing has replaced the out-dated corporate rescue mechanism of judicial management with the more modern procedure known as “business rescue”. The further effect of this change is

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<sup>8</sup> R. Evans, *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* (unpublished LLD thesis, University of Pretoria, 2009), at 428.

<sup>9</sup> Calitz and Burdette, above note 1, at 721-751.

<sup>10</sup> *Ibid*, at 722-728.

<sup>11</sup> *Ibid*, at 729-736.

<sup>12</sup> *Ibid*, at 749-750.

<sup>13</sup> *SA Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development and Others, and Another Application* 2015 (2) SA 430 (WCC).

<sup>14</sup> Companies Act 71 of 2008 (hereinafter referred to as “the 2008 Companies Act”). Although the Act was passed in 2008, it only came into operation on 1 May 2011 - Proc. No. R32, Gazette No. 34239, dated 26 April 2011.

<sup>15</sup> Companies Act 61 of 1973 (hereinafter referred to as “the 1973 Companies Act”).

that it has given rise to the birth of a new profession related to insolvency, namely the business rescue practitioner profession. This new profession is regulated by Chapter 6 of the 2008 Companies Act, and seeks to clearly segregate it from that of the insolvency profession.

7 The main objectives of this paper are to briefly analyse the Ministerial Policy for the appointment of insolvency practitioners in South Africa against the backdrop of international best practice regarding the regulation of insolvency practitioners, to have a brief look at the case in which the Ministerial Policy was struck down as being unconstitutional, and to make some observations regarding a possible way forward for South Africa.

### **The Appointments Process Prior to the Ministerial Policy<sup>16</sup>**

#### *Introduction*

8 As a starting point it is important to take note of the fact that the provisions contained in the Insolvency Act<sup>17</sup> and the 1973 Companies Act are completely out of step with what actually takes place in practice when it comes to the appointment of insolvency practitioners (trustees and liquidators respectively) in South Africa.

9 Since South Africa has a creditor-friendly insolvency system, the wishes of creditors carry a lot of weight in the administration of insolvent estates. This can be seen from many of the provisions contained in both the Insolvency Act and the 1973 Companies Act.<sup>18</sup> South African insolvency law does however not provide for so called creditors' committees as is often the case in other creditor-friendly jurisdictions and instead applies the principle of creditors' meetings to afford creditors the opportunity to protect their interests and participating in the general administration of the estate.<sup>19</sup>

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<sup>16</sup> For a discussion of the historical context of the appointment of insolvency practitioners in South Africa, see Calitz and Burdette, above note 1, at 722-728.

<sup>17</sup> Insolvency Act, Act 24 of 1936 (hereinafter referred to as "the Insolvency Act").

<sup>18</sup> The whole purpose, for example, of convening creditors' meetings is for the trustee or liquidator to obtain instructions from the creditors regarding the manner in which the estate in question must be wound up.

<sup>19</sup> A. Boraine and J. Calitz, "Some Consequences of the National Credit Act 34 of 2005 on the Proof of Claims in Insolvency Law" (2010) (4) *Journal of South African Law* at 798. See also section 40(1) of the Insolvency Act.

### Statutory Provisions Relating to Appointments

#### Appointments under the Insolvency Act

10 As a starting point, and in the absence of a properly regulated insolvency profession, it is worth making a brief reference to some of the case law that explains the role of the insolvency practitioner under South African insolvency law. In *Standard Bank of South Africa v The Master of the High Court*,<sup>20</sup> the court stated that the practitioner occupies a position of trust towards creditors and companies in liquidation, and is required to be independent and to regard equally the interest of all creditors. The insolvency practitioner is also expected to carry out his duties without fear, favour or prejudice.<sup>21</sup> In *Ex parte: Master of the High Court of South Africa (North Gauteng)*,<sup>22</sup> it was also confirmed that there can be no doubt that the office of trustee or liquidator is one of trust toward creditors and the insolvent debtor, and also toward the Master and the Court.<sup>23</sup> A trustee or liquidator can also be held personally liable for negligence causing loss to others arising out of the performance of his duties.<sup>24</sup>

11 Section 18(1) of the Insolvency Act makes provision for the appointment of a provisional trustee by the Master of the High Court. Section 18(1) reads as follows (emphasis provided):

“As soon as an estate has been sequestrated (whether provisionally or finally) or when a person appointed as trustee ceases to be trustee or to function as such, the master *may*, in accordance with policy determined by the Minister, appoint a provisional trustee to the estate in question who shall give security to the satisfaction of the master for the proper performance of his or her duties as provisional trustee and shall hold office until the appointment of a trustee.”<sup>25</sup>

12 When interpreting this subsection it is clear that the legislature intended that the appointment of a provisional trustee should be an extraordinary appointment, the word “may” signifying that it was not the intention that such an appointment should be made in respect of all estates.<sup>26</sup> Unfortunately the legislature did not elaborate on the relevant criteria the Master should apply when making the appointment, and as a result the making of provisional appointments falls solely within his discretion.<sup>27</sup> In this vein it has been stated that the Master has an unfettered and

<sup>20</sup> (Eastern Cape Division) [2010] ZASCA 4; 2010 (4) SA 405 (SCA); 2010 3 All SA 135 (SCA) (19 February 2010).

<sup>21</sup> *Ibid.*, at paragraph 97.

<sup>22</sup> 2011 (5) SA 311 (GNP); [2011] ZAGPPHC 105; 28042/11 (27 June 2011).

<sup>23</sup> *Ibid.*, at paragraph 16.

<sup>24</sup> *Kerbels Flooring and Carpeting (Pty) Ltd v Shrosbree* 1994 (1) SA 655 (SEC).

<sup>25</sup> As amended by section 3, Judicial Matters Amendment Act 16 of 2003 (emphasis added).

<sup>26</sup> Calitz and Burdette, above note 1, at 729. See also J. Kunst *et al.*, Meskin, *Insolvency Law and its Operation in Winding-up* (LexisNexis, loose-leaf ed issue 44), at paragraph 4.1 (hereinafter referred to as “Meskin”).

<sup>27</sup> Calitz and Burdette, above note 1, at 730.

exclusive administrative discretion to appoint a provisional trustee of his choice.<sup>28</sup> In regard to the question as to why it is necessary for the Master to have such a discretion, the Court in *Ex Parte the Master of the High Court South Africa (North Gauteng)*<sup>29</sup> held that the Master is the only functionary entitled to appoint provisional trustees, liquidators and judicial managers, taking into account creditors' directives. In so doing the Court stated the following in regard to the rationale for the wide discretion granted to the Master:

“An organisation of this nature has the institutional knowledge and expertise to apply policy, and to assess the ability and integrity of trustees and liquidators, and is therefore able to judge whether or not individuals are duly qualified to be appointed, either at all or to a specific estate.”<sup>30</sup>

13 A court may order the Master to exercise his discretion properly, but will only in exceptional circumstances substitute its own decision for that of the Master.<sup>31</sup>

14 Section 54 of the Insolvency Act contains the rules for the election of a final trustee at the first meeting of creditors. In terms of section 54(2) of the Insolvency Act, any person who has obtained a majority in number and in value of the votes of the creditors entitled to vote, and who voted at such meeting, is elected as the trustee of that estate. It bears mentioning that section 54(1) states that the creditors may elect one or two trustees at the first meeting of creditors.<sup>32</sup> Considering the rather detailed provisions relating to the appointment of a final trustee, it is rather surprising to find an absolute lack of legislative rules relating to the appointment of provisional trustees.<sup>33</sup> This further entrenches the view that the appointment of a provisional trustee was meant to be an extraordinary appointment by the Master.

15 It is also worth mentioning the provisions of section 18(4) of the Insolvency Act, which provide for the appointment of the provisional trustee as final trustee when no person has been elected as the final trustee at the first meeting of creditors. The relevant section reads as follows:

“When a meeting of creditors for the election of a trustee has been held in terms of section

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<sup>28</sup> *Lipschitz v Watrus* 1980 1 SA 662 (T) 671. See also Meskin, above note 26, at paragraph 4.1. As to whether the Master still has an unfettered discretion, see Calitz and Burdette, above note 1, at footnote 93 as well as *Master of the High Court Northern Gauteng High Court, Pretoria v Motala* (172/11) [2011] ZASCA 238; 2012 (3) SA 325 (SCA) (1 December 2011), at paragraph 14.

<sup>29</sup> Above note 22, at paragraph 33.

<sup>30</sup> *Ibid.*, at paragraph 26.

<sup>31</sup> *Cf UWC v MEC for Health and Social Services* 1998 (3) SA 124 (C), at 130F.

<sup>32</sup> The reason for this is that the voting rules in section 54, Insolvency Act are taken a step further due to the fact that it may transpire that no one person has the majority of the votes in both number and value. It frequently occurs that one person obtains the majority of the votes in value, while another person obtains the majority of the votes in number. In such a case both persons will be elected as (co-) trustees of the estate in question.

<sup>33</sup> Although there are no legislative rules for the appointment of provisional trustees, the Master has developed a set of criteria for this purpose – this is dealt with in more detail below.

forty and no trustee has been elected, and the Master has appointed a provisional trustee in the estate in question, the Master shall appoint him as trustee on his finding such additional security as the master may have required.”

16 Finally, it is to be noted that the Master has the discretion to appoint a co-trustee at any time if he or she deems it appropriate in the circumstances.<sup>34</sup> This brings to three the total number of trustees that may be appointed in estates under sequestration.<sup>35</sup>

#### Appointments under the 1973 Companies Act<sup>36</sup>

17 Section 368 of the 1973 Companies Act makes provision for the appointment of a provisional liquidator in the case of a company being wound up by the court or by resolution.<sup>37</sup> Section 368 reads as follows:

“As soon as a winding-up order has been made in relation to a company, or a special resolution for a voluntary winding-up of a company has been registered in terms of section 200, the Master *may*, in accordance with policy determined by the Minister, appoint any suitable person as provisional liquidator of the company concerned, who shall give security to the satisfaction of the master for the proper performance of his or her duties as provisional liquidator and who shall hold office until the appointment of a liquidator.”<sup>38</sup>

18 Even though the section is similarly worded to section 18(1) of the Insolvency Act, Meskin<sup>39</sup> is of the opinion, with reference to section 361(1) of the 1973 Companies Act, that section 368 intends that the Master should ordinarily make such an appointment. This is probably due to the fact that the section provides for the property of the company to fall under the custody and control of the Master until the appointment of a provisional liquidator. Despite the wording of section 361(1), it is nevertheless submitted that provisional liquidators are also supposed to be appointed as extraordinary appointments, although a far more cogent case can be made for the appointment of a provisional liquidator than for the appointment of a provisional trustee.

19 One important difference between the wording of section 368 of the 1973 Companies Act and section 18(1) of the Insolvency Act, is that section 368 requires the appointment of a “suitable” person as provisional liquidator. By “suitable” is

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<sup>34</sup> Section 57(5), Insolvency Act.

<sup>35</sup> This is of interest considering that the Master has on occasion appointed more than three trustees to administer the estate in question.

<sup>36</sup> The winding-up provisions contained in Chapter XIV of the 1973 Companies Act continue to apply pursuant to the provisions of item 9 of Schedule 5 of the 2008 Companies Act, notwithstanding the repeal of the 1973 Companies Act with effect from 1 May 2011.

<sup>37</sup> This paper only deals with appointments made by the Master in the case of a company being wound up by the court, although similar rules apply in the case of a company being wound up voluntarily by resolution.

<sup>38</sup> As amended by section 16, Judicial Matters Amendment Act 16 of 2003 (emphasis provided).

<sup>39</sup> Meskin, above note 26.

meant an independent person who is able to discharge the responsibilities of such office competently, honestly and impartially.<sup>40</sup> It should be noted that as far back as 1998 Flemming, DJP confirmed the view that some liquidators acted dishonestly when he stated that liquidators and trustees were regarded by many as ineffective and “even sometimes disrespected in regard to integrity”.<sup>41</sup>

20 As far as the election of a final liquidator is concerned, the rules for the election of such a person are the same as those provided for in the Insolvency Act,<sup>42</sup> although there is one significant difference in that the separate meetings of members (shareholders) and creditors may nominate and elect different persons for appointment as final liquidator, and in such a case the Master must appoint both such persons.<sup>43</sup> The Master also has the authority to appoint a co-liquidator at any time should he or she deem it “desirable”.<sup>44</sup>

#### *Non-Statutory Criteria Relating to Appointments*

##### The Master’s “Panel” of Trustees and Liquidators

21 Although the Insolvency Act sets out certain disqualification criteria for the appointment of trustees,<sup>45</sup> it does not categorically state who should be appointed by the Master as a provisional or final trustee. By contrast, the 1973 Companies Act requires that a “suitable person” should be appointed by the Master as provisional or final liquidator,<sup>46</sup> although this Act also contains a list of disqualifications.<sup>47</sup>

22 It is quite alarming that nothing has ever been done to regulate the insolvency profession by establishing certain minimum criteria that aspirant trustees and liquidators have to comply with prior to being appointed as an insolvency practitioner. However, the Master, of his own accord, commenced the use of a register to which he could add the names of persons who, in his view, qualified for appointment as an insolvency practitioner. In time this became known as the “Master’s Panel” of trustees and liquidators. To this day no person whose name does not appear in the register may be appointed as a trustee or a liquidator in an

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<sup>40</sup> See e.g. *Murray v Edendale Estates Ltd* 1908 TS 17 22; *In re Greatrex Footwear (Pty) Ltd (II)* 1936 NPD 536 537-539; *Wolstenholme v Hartley Farmers Agricultural Co-operative Co Ltd* 1965 4 SA 73 (SR); *Ex parte Clifford Homes Construction (Pty) Ltd* 1989 4 SA 610 (W), at 614; *Krumm v The Master* 1989 3 SA 944 (D).

<sup>41</sup> *Beinash & Co v Nathan (Standard Bank of SA Ltd Intervening)* 1998 3 SA 540 (W), at paragraph 545D. See also J. Calitz, “Some Thoughts on State Regulation of South African Insolvency Law” (2011) 44(2) *De Jure* 290; A. Loubser, above note 1, at 123.

<sup>42</sup> Section 364(2), 1973 Companies Act.

<sup>43</sup> *Ibid.*, section 369(2).

<sup>44</sup> *Ibid.*, section 374.

<sup>45</sup> See section 55, Insolvency Act for a list of these disqualifications.

<sup>46</sup> Section 368, 1973 Companies Act.

<sup>47</sup> *Ibid.*, section 372.

insolvent estate. In order for a practitioner's name to be added to the register, prospective trustees and liquidators have to submit an application to the relevant Master's office.

23 Although each Master's office has a different *modus operandi* when it comes to the addition of prospective trustees' and liquidators' names on the panel, the procedure usually consists of the submission of certain documentation to the Master, followed by an interview of the candidate by a panel consisting of personnel from the relevant Master's office.<sup>48</sup> The required documentation was usually submitted in terms of a checklist dealing *inter alia* with the following aspects of the administration of estates: the applicant's experience in the field of insolvency;<sup>49</sup> the applicant's infrastructure, such as office space, telephone and facsimile facilities, personnel, etc.; the applicant's ability to provide short-term insurance (security); and the applicant's formal and other qualifications, if any. The purpose of the interview is to determine whether or not the person has the requisite knowledge and infrastructure, and to determine whether or not the person is "fit and proper", to act as an insolvency practitioner.<sup>50</sup>

24 A Master's Directive was recently issued with the aim of ensuring that all Masters implement the process of appointing insolvency practitioners in a consistent and transparent manner. The directive provides for the integration of all active practitioners on to a national list, ensuring that only practitioners who have indicated that they have sufficient infrastructure and are willing to take appointments in specific centres are now included on the so-called national list. The directive still provides for the discretionary appointment of "BEE/PDI" (black economic empowerment/previously disadvantaged individual) appointments in alphabetical order from a provincial list kept at each office.<sup>51</sup>

25 While this directive no doubt goes a long way towards ensuring consistency amongst the various offices, it is far from perfect and the main point of concern remains that the Master's so-called "panel" does not have any legal status.<sup>52</sup>

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<sup>48</sup> In the past the interview panel would also consist of one or more practicing liquidators representing either SARIPA (South African Restructuring and Insolvency Practitioners Association) - or its predecessor AIPSA (Association of Insolvency Practitioners of Southern Africa) - or AABIP (Association for the Advancement of Black Insolvency Practitioners), or both. This practice has apparently been discontinued, although it is unclear when it was discontinued.

<sup>49</sup> Usually contained in a *curriculum vitae* submitted by the applicant.

<sup>50</sup> Completion of the SARIPA programme in Insolvency Law and Practice also used to be regarded as an additional recommendation for any prospective insolvency practitioner seeking to be placed on the panel, although this is no longer the case. While it is not clear when the SARIPA programme was discontinued as an additional recommendation, the current additional recommendation is a bachelors or masters degree in law or commerce.

<sup>51</sup> See Chief Master's Directive 1 of 2015 dated 30 March 2015, available at:

<[http://www.justice.gov.za/master/m\\_docs/2015-01\\_chm-directive.pdf](http://www.justice.gov.za/master/m_docs/2015-01_chm-directive.pdf)> [last viewed 30 August 2015].

<sup>52</sup> Calitz, above note 41, at 301.

### The “Requisition System”

26 In terms of section 20(1)(a) of the Insolvency Act, the estate of an insolvent vests first in the Master and then in the trustee once one has been appointed. In terms of section 361(1) of the Companies Act, the assets of a company in liquidation fall under the custody and control first of the Master and then of the liquidator once one has been appointed. This is important in the context of the making of provisional appointments by the Master in insolvent estates.

27 In 1977, the then Master of the Supreme Court issued a directive<sup>53</sup> stating that due to the fact that insolvent estates vested in the Master, or fell under his custody and control, and due to the fact that the Master could not sufficiently protect the interests of creditors until such time as a trustee or liquidator had been appointed at the first meeting of creditors, the Master was implementing a system whereby a provisional trustee or liquidator would be appointed, as far as possible, in all insolvent estates. By making such an appointment the Master would be divested of the estate and the appointee could take the necessary steps to protect the interests of creditors in that particular estate.<sup>54</sup>

28 However, the Master obviously also wanted to avoid the situation where one person is appointed as the provisional trustee or liquidator, and another as the final trustee or liquidator at the first meeting of creditors. It is of course desirable, as far as possible, to have some form of continuity in the persons that are appointed as both provisional and final trustee or liquidator. In order to assist the Master in appointing a person as the provisional trustee or liquidator who would in all probability also be elected as the final trustee or liquidator, the Master introduced what is today known as the “requisition system”.<sup>55</sup> It is worth noting that in the unreported decision of *Prosch v Standard Bank of South Africa*<sup>56</sup> Roux J stated that he simply could not accept that the Master applied a practice to appoint the person recommended by the majority in value of creditors as the provisional trustee or liquidator, as this was at odds with the Master’s unfettered discretion to appoint a suitable person.<sup>57</sup>

29 The requisition system entails the submission of nominations by the creditors of the estate as to who should be appointed as the provisional trustee or liquidator. In

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<sup>53</sup> The “directive” was sent to all insolvency practitioners by the Master in the form of a letter, informing them that the Master would in future ask for nominations from creditors prior to making a provisional appointment.

<sup>54</sup> The appointment of an insolvency practitioner is the most effective means of protecting the interests of creditors, which of course is what the legislature intended. See Meskin, above note 26, at paragraph 4.1 and the authority quoted therein.

<sup>55</sup> For a discussion of the reasons for the introduction of the requisition system, see Meskin, above note 26, at paragraph 4.1.

<sup>56</sup> Case number 14279/90, Witwatersrand Local Division of the High Court.

<sup>57</sup> *Lipschitz v Watrus* 1980 (1) SA 662 (T), at 671G.

order to allow the creditors sufficient time to lodge their nominations, the Master usually does not make a provisional appointment until 48 hours have elapsed from the moment of the granting of the sequestration or liquidation order by the court.<sup>58</sup>

30 One of the problematic aspects proffered in regard to this system is that the Master is supposed to have an unfettered discretion as to who is appointed as the provisional trustee or liquidator.<sup>59</sup> It has always been the Master's view that the requisitions are used as a guide only, and that appointments are not issued as a matter of course to the person who has received the majority of the support in number and value by virtue of the nominations of creditors. It has occurred frequently in the past that the Master is accused of acting mechanically when making provisional appointments in terms of the nominations made by creditors.<sup>60</sup> When the Department of Justice issued a policy document relating to the appointment of previously disadvantaged individuals,<sup>61</sup> which effectively obliged the Master to appoint certain persons as trustees and liquidators in estates above a certain value, further problems arose as regards the Master exercising an "unfettered discretion" when making provisional appointments.

31 Over the years there have unfortunately been continuous allegations of irregularities regarding the application of the requisition system in practice, for example the submission of false requisitions and the duplication of requisitions in various estates. It is clear that the application of the requisition system in practice is flawed, and the following aspects can be pointed out as inherent weaknesses of the system:

- requisitions are not made under oath,<sup>62</sup> which makes the content of many of them questionable;
- the requisition system encourages active touting amongst insolvency practitioners, in that

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<sup>58</sup> This is the practice in the office of the Master of the High Court in Pretoria. Other offices of the Master do not necessarily follow this *modus operandi*, e.g. the Cape Town Master's office will make an appointment as soon as possible after the granting of a sequestration or liquidation order. In an attempt to centralise the list of names of persons suitable for appointment, the Chief Master recently published a national list of active insolvency practitioners, although it is not clear if a uniform procedure is now also applied in making provisional appointments.

<sup>59</sup> See Meskin, above note 26, at paragraph 4.1.

<sup>60</sup> It should be clear that the Master can hardly be said to be exercising his or her discretion when appointments are made mechanically in terms of a system whereby the creditors nominate a provisional trustee or liquidator. However, it has to be emphasised that all the Master wished to achieve was the appointment of a person as trustee or liquidator who would in all probability be elected by the creditors at the first meeting of creditors.

<sup>61</sup> This issue is dealt with in more detail below.

<sup>62</sup> The importance of this is that creditors may only vote for the appointment of a trustee or liquidator at the first meeting of creditors if they have proved their claims. Claims are proved under oath in terms of section 44, Insolvency Act. By appointing a person on the basis of the requisition system, the nominating creditors have not yet proved formal claims under oath, and in many instances the nominating creditors do not prove claims at all. This in effect means that the provisional trustee or liquidator, who is eventually appointed as the final trustee or liquidator, does not necessarily have the majority support of the creditors who do eventually prove their claims.

creditors are actively canvassed for their support in the 48 hours following the granting of a sequestration or liquidation order;

- there is no credible system at the Master's office for the monitoring of the submission of requisitions, which often results in submitted requisitions being "lost" in the system;
- there is no way of verifying the requisitions that are submitted in the 48-hour period, which allegedly results in false requisitions being submitted;
- the requisition system has no legal status.<sup>63</sup>

### The Various Policy Documents issued by the Minister of Justice and Constitutional Development

32 In the late 1990s, the Department of Justice and Constitutional Development realised that the insolvency industry had not transformed since democratic elections in 1994, and set about finding a manner in which transformation could be brought about swiftly and effectively. Before statutory provision was made in 2003 for the Minister to determine a policy on the making of provisional appointments, a document entitled *Policy: Strategy on Procedures for Appointment of Liquidators and Trustees*, dated June 2001 (referred to as the 2001 Policy), was issued by the Department of Justice and Constitutional Development.<sup>64</sup> Several further draft policy documents were circulated between 2004 and 2007. In essence the 2001 Policy document stated that in all estates above ZAR 5 million the Master would be obliged to appoint a "previously disadvantaged individual" (PDI) as co-trustee or co-liquidator, even if such person did not have the support of the creditors. The policy document also described who qualified as a PDI, which essentially amounted to the designated groups as set out in the Employment Equity Act of 1998.<sup>65</sup> The idea behind the policy document was to ensure that previously disadvantaged individuals be co-appointed with experienced practitioners who could in turn train the PDI co-appointment in the art of administering insolvent estates. Once the PDI had gained sufficient experience, he or she could then take appointments on his or her own. To this end, the Master of the High Court created a special panel for PDI appointments.

33 While the objectives of the various policy documents were certainly noble in their intent, they did not have much success in transferring the required skills set to PDIs. The simple truth of the matter was that experienced practitioners resented the fact that they were obliged to train inexperienced practitioners, and also that they had to share their fees with their previously disadvantaged co-appointees. Besides the fact that the exercise has to a large extent been a failure in practice, allegations of fronting by established practitioners in order to obtain appointments *via* the PDI

<sup>63</sup> See Meskin, above note 26, at paragraph 4.1.

<sup>64</sup> This is an unsigned document, and there is doubt whether the Minister ever approved it. The document was amended on 8 September 2003 by a document signed by a Mr Lategan, who at the time was the Director: Insolvency Appointments and Interrogations. The so-called "Lategan document" was later revoked by Chief Master's Directive 5/2007, issued on 20 August 2007.

<sup>65</sup> Act 55 of 1998.

panel, also became rife.<sup>66</sup>

34 An additional issue that surfaced as a result of the implementation of the policy document was the fact that it limited the Master's discretion to make provisional appointments. The argument was that the Master could hardly be said to exercising an "unfettered discretion" when he or she was obliged to appoint certain persons as co-provisional trustee or liquidator in terms of a Departmental policy document. This problem was eventually resolved by introducing a number of amendments to the provisions of the Insolvency Act and the 1973 Companies Act that provide for the Master to apply the policy document when exercising his discretion in the making of appointments.<sup>67</sup>

35 A concern over the years regarding the policy document was that the legislative amendments provided for the application of a policy document that had been accepted and approved by Parliament; up until the end of January 2014 this had never been done, the "official" policy only having been published on 7 February 2014. The official policy was due to be implemented on 31 March 2014, but as discussed below this has not been possible due to the policy being challenged on constitutional grounds. In the meantime the Master continues to apply a policy document making provision for the appointment of PDIs in all estates (not only those in excess of ZAR 5 million), and which does not recognise white women as previously disadvantaged individuals.

### **The Published or "Official" Ministerial Policy**

36 Although the amendment to section 18(1) and the introduction of section 158(2) of the Insolvency Act, making provision for the introduction of a Ministerial Policy, were introduced on 9 July 2004, the policy itself was only published for the first time on 7 February 2014.<sup>68</sup> The policy was due to become effective on 31 March 2014,<sup>69</sup> but an application to review the policy on constitutional grounds in the Western Cape High Court resulted in an interdict against the implementation of the policy until the matter had been adjudicated upon.<sup>70</sup> In an attempt to address at

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<sup>66</sup> The Deputy Minister of Justice confirmed the allegation of irregularities in a speech to the Association for the Advancement of Black Insolvency Practitioners. The speech was initially available at:

<[http://www.doj.gov.za/2004dojsite/m\\_speeches/sp2005/2005\\_10\\_28\\_assoc\\_black\\_insolvency.htm](http://www.doj.gov.za/2004dojsite/m_speeches/sp2005/2005_10_28_assoc_black_insolvency.htm)> (link no longer active).

<sup>67</sup> Section 368 was amended, and section 15(1A) inserted, by sections 16 and 15 (respectively), Judicial Matters Amendment Act 16 of 2003. The amendments make provision for the Minister to determine the policy for the appointment of, *inter alia*, provisional liquidators and trustees.

<sup>68</sup> *Government Gazette* No 37287, dated 7 February 2014.

<sup>69</sup> Ministerial Policy, at paragraph 8.

<sup>70</sup> The Western Cape High Court has since ruled on the review application in *SA Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development and Others; and Another Application*, above note 13. This case is dealt with in more detail below.

least one of the issues being considered by the Court in the review of the policy, the Minister published an amended policy on 17 October 2014.<sup>71</sup>

37 The policy replaces all previous policies and guidelines relating to the appointment of insolvency practitioners and is intended to form the basis of the transformation of the insolvency industry.<sup>72</sup> The objective of the policy is stated to be:

“to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination.”<sup>73</sup>

38 In terms of paragraph 4 of the policy, the Minister is stated to be committed to:

- addressing the imbalances of the past and transforming the insolvency industry;
- establishing uniform procedures for the appointment of insolvency practitioners;
- making the insolvency industry accessible to individuals from previously disadvantaged communities;
- promoting the objectives of the Broad-Based Black Economic Empowerment Act, 2003, by empowering insolvency practitioners who are previously disadvantaged individuals; and
- preventing corruption and fronting; and
- promoting transparency and accountability.

39 A noticeable omission from the policy document is any mention of the transfer of the necessary skills in order to act as an insolvency practitioner. In terms of paragraph 3.2.1, the policy only applies to:

- (i) the appointment of a *curator bonis*;<sup>74</sup>
- (ii) the appointment of a provisional trustee by the Master;<sup>75</sup>
- (iii) the appointment of a trustee where one has not been elected by the creditors and no provisional trustee is in office;<sup>76</sup>
- (iv) where the Master declines to appoint an elected trustee;<sup>77</sup>
- (v) where the Master considers it desirable to appoint a co-trustee;<sup>78</sup>
- (vi) the appointment of a provisional trustee pending the election of a trustee to fill a vacancy;<sup>79</sup> and
- (vii) the appointment of a trustee where there is no trustee to distribute proceeds due to a secured creditor who did not previously prove a claim.<sup>80</sup>

40 Under the 1973 Companies Act the policy applies only to:<sup>81</sup>

<sup>71</sup> Notice 798 in *Government Gazette* No 38088 dated 17 October 2014.

<sup>72</sup> Ministerial Policy, at paragraph 3.1.

<sup>73</sup> *Ibid.*, at paragraph 2.

<sup>74</sup> Section 5(2), Insolvency Act 1936.

<sup>75</sup> *Ibid.*, section 18(1).

<sup>76</sup> *Ibid.*, section 54(5).

<sup>77</sup> *Ibid.*, section 57(4).

<sup>78</sup> *Ibid.*, section 57(5).

<sup>79</sup> *Ibid.*, section 62(2).

<sup>80</sup> *Ibid.*, section 95(4).

<sup>81</sup> Ministerial Policy, at paragraph 3.2.2.

- (i) the appointment of a provisional liquidator by the Master;<sup>82</sup>
- (ii) where the Master declines to appoint a person nominated at a meeting of creditors;<sup>83</sup>
- (iii) where the Master considers it desirable to appoint a co-liquidator;<sup>84</sup> and
- (iv) the appointment of a provisional liquidator or liquidator to fill a vacancy.<sup>85</sup>

41 In relation to the Close Corporations Act,<sup>86</sup> the policy applies only to:<sup>87</sup>

- (i) the appointment of a liquidator;<sup>88</sup>
- (ii) the appointment of a co-liquidator;<sup>89</sup> and
- (iii) the appointment of a liquidator where the Master declines to appoint an elected liquidator.<sup>90</sup>

42 The policy does not apply to the appointment of an insolvency practitioner for a solvent company being wound up in terms of the provisions of section 80 of the 2008 Companies Act.<sup>91</sup> The policy provides for the Master to create a list from which appointments are to be made under four different categories.<sup>92</sup> These categories, which must be arranged in alphabetical order,<sup>93</sup> are:

- Category A: African, Coloured, Indian and Chinese females who became South African citizens before 27 April 1994;
- Category B: African, Coloured, Indian and Chinese males who became South African citizens before 27 April 1994;
- Category C: White females who became South African citizens before 27 April 1994;
- Category D: African, Coloured, Indian and Chinese females and males, and White females, who have become South African citizens on or after 27 April 1994 and White males who are South African citizens.

43 Insolvency practitioners whose names are added to the list after the compilation thereof, must be added to the list at the end of the relevant category.<sup>94</sup> In terms of paragraph 6.2 the Master's list must distinguish between "senior practitioners" and "junior practitioners". A "senior practitioner" is an insolvency practitioner who has been appointed as such at least once a year for the past five years. A "junior practitioner" is an insolvency practitioner who has not been appointed as such at least once a year for the past five years, but who has satisfied the Master that he or

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<sup>82</sup> Section 368, 1973 Companies Act.

<sup>83</sup> *Ibid.*, section 370(3)(b).

<sup>84</sup> *Ibid.*, section 374.

<sup>85</sup> *Ibid.*, section 377(3).

<sup>86</sup> Close Corporations Act 69 of 1984.

<sup>87</sup> Ministerial Policy, at paragraph 3.2.3.

<sup>88</sup> Section 74(1), Close Corporations Act.

<sup>89</sup> *Ibid.*, section 66(1).

<sup>90</sup> *Ibid.*, section 76(3)(b).

<sup>91</sup> Ministerial Policy, at paragraph 3.3.

<sup>92</sup> *Ibid.*, at paragraph 6.1.

<sup>93</sup> *Idem.*

<sup>94</sup> *Idem.*

she has sufficient infrastructure and experience to be appointed alone. The senior and junior practitioners must be arranged alphabetically in the relevant Categories on the Master's List.<sup>95</sup>

44 When the various Masters make appointments from their lists, insolvency practitioners must be appointed consecutively in the following ratio: Category A – 4: Category B – 3: Category C – 2: Category D – 1.<sup>96</sup> This entails that the first four appointments will be made from category A, the next three from Category B, the next 2 from Category C and one from Category D. The appointments then revert to Category A from which the next four appointments are made, and so on. Appointments must be made in alphabetical order.<sup>97</sup> However, paragraph 7.3 of the policy provides that the Master may nevertheless have regard to the complexity of the matter and the suitability of the insolvency practitioner, and may, but subject to any applicable law, appoint a senior practitioner jointly with the junior or senior practitioner appointed in alphabetical order. If the Master makes a joint appointment, he must record the reason for the appointment, which must be provided to the other insolvency practitioner if requested to do so.<sup>98</sup>

45 If an insolvency practitioner who is due for appointment in accordance with the alphabetical list of names in a specific category on the Master's List fails to lodge a bond of security<sup>99</sup> within the stipulated time, the next insolvency practitioner on the Master's List must be appointed, and the name of the person previously determined is moved to the back of the list.<sup>100</sup> However, if an insolvency practitioner who is due for appointment in accordance with the alphabetical list of names in a specific category satisfies the Master that he has a conflict of interest, or a conflict of interest arises after the appointment, the insolvency practitioner whose name is next in line must be appointed, and the name of the person previously determined is considered for appointment when the next appointment in that category is made.<sup>101</sup>

46 Without analysing the policy in any detail, on a cursory level there are already several concerns regarding the manner in which this new system will work. Firstly, whether it is good practice to make appointments purely on the basis of an alphabetical list of names is questionable. The levels of skill and experience of persons on the list will differ vastly, and stakeholders should have the right to have their interests protected by experienced and properly qualified insolvency practitioners. Secondly, it is not clear how the names will be selected from the list, for example whether it will be done manually or electronically, or how the integrity of the system will be protected. If the system is not subjected to externally

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<sup>95</sup> *Ibid.*, at paragraph 6.2.

<sup>96</sup> *Ibid.*, at paragraph 7.1.

<sup>97</sup> *Ibid.*, at paragraph 7.2.

<sup>98</sup> *Ibid.*, at paragraph 7.3.

<sup>99</sup> In order to ensure the proper administration of the estate.

<sup>100</sup> Ministerial Policy, at paragraph 7.4(a).

<sup>101</sup> *Ibid.*, at paragraph 7.4(b).

verifiable safeguards ensuring the integrity of the appointments made in each case, the system may be open to corruption, or at the very least allegations of corruption. Thirdly, the distinction between “senior practitioners” and “junior practitioners” is questionable; a person who has taken one appointment as a trustee or liquidator per year for five years can hardly be said to be a senior practitioner. Also, the policy does not stipulate whether the appointments taken over the past five years are based on sole or joint appointments. Fourthly, the policy does not address the lack of proper statutory regulation of the insolvency profession, nor the lack of proper qualifications and training for insolvency practitioners, and it is still currently possible for any person, qualified or unqualified, to become an insolvency practitioner.

*SA Restructuring and Insolvency Practitioners Association v The Minister of Justice and Constitutional Development*<sup>102</sup>

47 The grounds on which the applicants, the South African Restructuring and Insolvency Practitioner Association (SARIPA), challenged the Ministerial Policy were based on four broad questions:

- whether the policy unlawfully fettered the discretion of the Master in appointing provisional liquidators in terms of section 18(1) of the Insolvency Act;
- whether the policy was rationally connected to its purpose;
- whether the policy violated the equality clause of the Constitution; and
- whether the policy failed through lack of procedural fairness – particularly a lack of consultation with the relevant stakeholders.

48 The Court held that insofar as the policy established a rote alphabetical system for the appointment of liquidators, it unlawfully fettered the Master’s discretion.<sup>103</sup> The Court went on to state that the exercise of all public power (such as determining the policy) must be in conformity with the Constitution and the doctrine of legality; rationality is a requirement of the exercise of all public power, including the adoption of measures under section 9(2) of the Constitution, which means that the measure must relate to the purpose for which the power is given, as well as the information available to the functionary exercising the power.<sup>104</sup> The Court also considered that the policy cannot, in forming the basis for transformation of the insolvency industry, change a feature of the industry’s regulatory framework that required a proper match between the liquidator (or trustee) and a particular estate.<sup>105</sup> The Court stated that the evidence before it also suggested that the policy was unlikely to achieve its objectives.<sup>106</sup> Finally, the Court held that it is ultimately the Master, who the Legislature has decided is responsible

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<sup>102</sup> Above note 13.

<sup>103</sup> *Ibid.*, at paragraph 128.

<sup>104</sup> *Ibid.*, at paragraphs 129–133.

<sup>105</sup> *Ibid.*, at paragraph 156.

<sup>106</sup> *Ibid.*, at paragraph 164.

for the appointment of insolvency practitioners, who must apply his discretion when making an appointment, whereas the Ministerial policy put in place a rigid, inflexible regime in which the Master effectively became a rubber stamp, compelled to appoint a designated person by rote from fixed lists arranged alphabetically and along race and gender lines.<sup>107</sup> As a result, the Court found that the policy was too rigid, and as such, the Court declared it inconsistent with the Constitution and invalid.<sup>108</sup>

49 In its judgment, the Court also referred to the fact that:<sup>109</sup>

- “The Constitutional Court has emphasized that while the Constitution is a transformative one and that remedial action to address past injustices is a required and indeed a lawful imperative, such measures need to be nuanced;
- Underpinning and in addition to the Policy unlawfully fettering the Master’s discretion, the facts firmly suggest that the actual Policy will not cure the mischief it aims to address;
- There is no reasonable likelihood of the Policy solving problems of corruption or fronting, nor of advancing the transformative agenda required by the Constitution.”

50 The Minister of Justice and Constitutional Development lodged an application for leave to appeal the judgment of the Western Cape High Court in this case, which was dismissed.<sup>110</sup> In the meantime, however, the Supreme Court of Appeal has granted the Minister of Justice and Constitutional Development leave to appeal the judgment in the Western Cape High Court, and this appeal is due to be heard soon.<sup>111</sup> Instead of focusing on the constitutionality or not of the Ministerial Policy, especially since this aspect is now under appeal, this paper focuses on the approach taken by the Government of South Africa in regulating the insolvency profession and asking the question as to whether this is the correct approach that should be taken.

### **The Ministerial Policy Measured Against International Best Practice**

51 Before measuring the Ministerial Policy against the standards of international best practice, it is appropriate to say something generally about the transformation issues that are peculiar to South Africa since its transition to democracy. Insolvency law plays a central role and influences a substantial part of any given economy, as

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<sup>107</sup> Ibid., at paragraph 231.

<sup>108</sup> Ibid., at paragraph 232.

<sup>109</sup> Ibid., at paragraph 231.

<sup>110</sup> *South African Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development and Others; Concerned Insolvency Practitioners Association NPC and Others v Minister of Justice and Constitutional Development and Others* [2015] 1 All SA 589 (WCC).

<sup>111</sup> *South African Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development and Others; Concerned Insolvency Practitioners Association NPC and Others v Minister of Justice and Constitutional Development and Others* Case no 359/15 ordered on 16 July 2015.

insolvency procedures play an important role in the willingness of creditors to lend in the first place and hence strengthen financial markets.<sup>112</sup> Designing an insolvency framework in today's rapidly changing commercial environment entails a challenging process of balancing local government policies with international best practice, yet constantly acknowledging the objective of bringing insolvency law within the South African constitutional framework. An important objective of any policy should be to promote the achievement of equality for those previously disadvantaged by unfair discrimination. The South African Constitution provides the basis for any type of remedial measure or programme, such as the black economic empowerment programme<sup>113</sup> or affirmative action programme.<sup>114</sup> Section 9(2) of the Constitution also explicitly sanctions affirmative measures taken for the development of a more equal society, and therefore also includes actions taken to correct economic inequalities that were created by previous racially discriminatory practices.<sup>115</sup> It should also be noted that the South African policy objectives of transformation and development of the economy to support the government's economic goals of growth, employment and equity will only be achieved by increasing investment in and the competitiveness of the economy, and the broadening of economic participation in mainstream economic activities of previously excluded persons.<sup>116</sup> It has already been established in case law that the transformation process will unavoidably affect some members of society more adversely than others.<sup>117</sup>

52 The transformative and reformative actions mandated by the Constitution are embodied in the Broad-Based Black Economic Empowerment programme which has been designed to directly address issues of economic redistribution and wealth creation for all South Africans.<sup>118</sup> However, any such programmes, policies or other measures taken by the Government in order to effect transformation in South African society must be taken and carried out in accordance with the Constitution.<sup>119</sup> The B-BBEE Act is the national legislation referred to in section

<sup>112</sup> E. Cirmizi, "The Challenges of Bankruptcy Reform" (2012) 27(2) *The World Bank Research Observer* 199.

<sup>113</sup> The Broad-Based Black Economic Empowerment Act 53 of 2003 (hereafter the B-BBEE Act).

<sup>114</sup> As governed by the Employment Equity Act 55 of 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act 52 of 2002.

<sup>115</sup> See A. Janse Van Rensburg, "The constitutional framework for broad-based black economic empowerment" (unpublished LLD thesis, University of Free State, 2010) for in-depth discussion of the Broad Based Black Economic Empowerment principle.

<sup>116</sup> See "Overview of the Department of Trade and Industry", available at: <[http://www.thedti.gov.za/about\\_dti.jsp](http://www.thedti.gov.za/about_dti.jsp)> [last viewed 30 August 2015].

<sup>117</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*, at paragraph 76; *Minister of Finance and Another v Van Heerden*, at paragraph 145; *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape, and Another* [2002] 3 SA 265 (CC); 2002 9 BCLR 891 (CC), at paragraph 7.

<sup>118</sup> Van Rensburg, above note 115, at 121.

<sup>119</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*, above note 117, at paragraph 76; *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape, and Another*, above note 117, at paragraph 7.

217(3) of the Constitution, providing for a legislative framework for the promotion of black economic empowerment.<sup>120</sup> The objectives of the B-BBEE Act include the following:<sup>121</sup>

- promoting economic transformation in order to enable meaningful participation of Black people in the economy;
- achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises; and
- increasing the extent to which Black women own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure and skills training.

53 In our opinion, the lack of a detailed skills transfer framework is the single main obstacle to the successful implementation of the Ministerial Policy discussed above. Skills development and skills transfer is an important part of not only the Employment Equity Act (all companies who employ people are also subject to a skills levy), but a considerable part of the B-BBEE Act is also dedicated to skills development and skills transfer. This sentiment was echoed by Katz AJ in the *South African Restructuring And Insolvency Practitioners Association* case when he stated:

“[t]he Respondents have not persuaded me that the Policy can be implemented in a manner which is not mechanical and rigid. There is explicitly no scope for considering the skills, knowledge, expertise and experience of practitioners when being appointed by the Master.”<sup>122</sup>

54 The elephant in the room is thus the fact that the Ministerial Policy fails to address any transfer of knowledge and skills on a measurable scale. In drafting the Policy the main emphasis was on transformation and changing the racial profile of the profession. Even if the skills transfer policy is applied rationally, as our courts require, the words of the Labour Court in *Naidoo v Minister of Safety and Security and Another*<sup>123</sup> about a “spectre of perverse race and gender rivalry” producing “in consequence confrontation and alienation”, are a reality and should be addressed.

55 The significance of a modern insolvency system as a key foundation of sustainable economic development has widely been acknowledged and documented by international institutions such as the World Bank<sup>124</sup> and Working Group V of

<sup>120</sup> At: <[https://www.thedti.gov.za/economic\\_empowerment/docs/National\\_Summit\\_Report.pdf](https://www.thedti.gov.za/economic_empowerment/docs/National_Summit_Report.pdf)> [last viewed 30 August 2015].

<sup>121</sup> Section 2, Broad Based Black Economic Empowerment Act 53 of 2003.

<sup>122</sup> Above note 13, at paragraph 215.

<sup>123</sup> [2013] 5 BLLR 490 (LC); 2013 (3) SA 486 (LC); (2013) 34 ILJ 2279 (LC) (15 February 2013).

<sup>124</sup> See World Bank *Principles for Effective Insolvency and Creditor/debtor Rights Systems* (Revised 2015), available at: <[http://siteresources.worldbank.org/EXTGILD/Resources/5807554-1357753926066/2015\\_Revised\\_ICR\\_Principles\(3\).pdf](http://siteresources.worldbank.org/EXTGILD/Resources/5807554-1357753926066/2015_Revised_ICR_Principles(3).pdf)> [last viewed 30 August 2015] (also referred to as World Bank *Principles for Effective Insolvency and Creditor/debtor Rights Systems*).

the United Nations Commission on International Trade Law (UNCITRAL).<sup>125</sup> Furthermore, there is a general recognition that, in turn, those systems depend on the existence of strong and efficient regulatory frameworks.<sup>126</sup> While the primary focus of the reform process of insolvency law and institutions should thus be on how best to serve the needs and interests of society, it would be unrealistic to ignore the wider global context in which trade and commerce take place.

56 In the aftermath of the Asian financial crisis in the 1990s, the World Bank launched an initiative to improve the future stability of international financial systems.<sup>127</sup> This took the form of a project to identify certain principles and guidelines for sound insolvency systems and for the strengthening of related debtor-creditor rights in emerging markets, and in conjunction with international partner organisations the *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* were approved in 2001.<sup>128</sup> The publication has recently been thoroughly reviewed and updated and the title changed to *Principles for Effective Insolvency and Creditor/Debtor Regimes*.<sup>129</sup> In the executive summary of the 2015 document the following significant statement is made:

“Strong institutions and regulations are crucial to an effective insolvency system. The institutional framework has three main elements: the institutions responsible for insolvency proceedings, the operational system through which cases and decisions are processed, and the requirements needed to preserve the integrity of those institutions—recognizing that the integrity of the insolvency system is the linchpin for its success. A number of fundamental principles influence the design and maintenance of the institutions and participants with authority over insolvency proceedings.”<sup>130</sup>

57 A general analysis of the global norms recognised by international institutions worldwide yields the conclusion that the essential proposition of insolvency practitioners in all systems is very similar: that every effective insolvency system requires competent and ethical insolvency practitioners who should have the experience and expertise necessary to deal with the range of business and legal issues which arise in insolvency matters.<sup>131</sup>

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<sup>125</sup> See UNCITRAL *Legislative Guide on Insolvency Law* (2005), available at: <[http://www.uncitral.org/pdf/english/texts/insolven/05 - 80722\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/insolven/05 - 80722_Ebook.pdf)> [last viewed 30 August 2015]. See further B. Wessels and G Boon (eds), *Cross-Border Insolvency Law – International Instruments and Commentary* (2015, Kluwer Law International, Deventer) for a collection of international and regional legal instruments relating to insolvency of companies, financial institutions, and consumers, as well as to corporate rescue law.

<sup>126</sup> K. Pistor, “The Standardization of Law and its Effect on Developing Economies” (2002) (50) *American Journal of Comparative Law* 101.

<sup>127</sup> B. Wessels, “Insolvency Law”, Chapter 28 in J. Smits, *Elgar Encyclopedia of Comparative Law* (2006, Edward Elgar Publishing, Cheltenham), at 305.

<sup>128</sup> Above note 124.

<sup>129</sup> *Idem*.

<sup>130</sup> *Ibid.*, at 5.

<sup>131</sup> *Ibid.*, see principle D8.

58 The international standards and guidelines on best practice recognise that in order to exercise powers and discharge functions, duties, responsibilities and accountabilities effectively, an office-holder should be suitable (or, in terms of some legislation, “fit and proper”); and by his or her conduct foster public confidence in the insolvency system.<sup>132</sup> A trustee or liquidator appointed to administer an insolvent estate assumes certain statutory responsibilities and occupies a position of trust, not only towards creditors but also in regard to the insolvent debtor.<sup>133</sup>

59 Principle D8 of the World Bank Principles states the following regarding the competence and integrity of insolvency practitioners:

“The system should ensure that: - Criteria as to who may be an insolvency representative should be objective, clearly established, and publicly available; - Insolvency representatives be competent to undertake the work to which they are appointed and to exercise the powers given to them; - Insolvency representatives act with integrity, impartiality, and independence; and - Insolvency representatives, where acting as managers, be held to director and officer standards of accountability, and be subject to removal for incompetence, negligence, fraud, or other wrongful conduct.”<sup>134</sup>

60 It is evident from various other international instruments that the determination of minimum qualifications is an integral and essential part of any effective insolvency law system. According to the UNCITRAL recommendations:

“The insolvency law should specify the qualifications and qualities required for appointment as an insolvency representative, including integrity, independence, impartiality, requisite knowledge of relevant commercial law and experience in commercial and business matters. The insolvency law should also specify the grounds upon which a proposed insolvency representative may be disqualified from appointment.”<sup>135</sup>

61 In a recent report, concluding a project conducted by the Organisation for Economic Co-operation and Development (OECD) in partnership with the European Commission, the following statement was made:

“Effective regulation to help meet the challenges facing governments will only be achieved through stronger regulatory governance, closing the loop between regulatory design and evaluation of outcomes. This draws attention to a range of issues, including:

- institutional leadership and oversight;

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<sup>132</sup> World Bank Regulatory Working Group “Insolvency Law and the Regulatory Framework” on 09/15/2000, available at: <<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/LAWANDJUSTICE/GILD/0,,contentMDK:20154425~menuPK:146222~pagePK:64065425~piPK:162156~theSitePK:215006,00.html>> [last viewed 30 August 2015].

<sup>133</sup> *Jacobs v Hessles* 1984 3 SA 601 (T); see also *Standard Bank of South Africa v The Master of the High Court*, above note 20, at paragraph 133.

<sup>134</sup> Above note 124.

<sup>135</sup> UNCITRAL *Legislative Guide on Insolvency Law*, above note 125 (part two, chap. III, paras 35-74) Qualifications 115.

- reviewing the role of regulatory agencies and the balance between private and public responsibilities for regulation with a view to securing accountability and avoiding capture;
- a renewed emphasis on consultation, communication, co-operation and co-ordination across all levels of government and beyond, including not least the international arena; and
- strengthening capacities for regulatory management within the public service.<sup>136</sup>

62 From the discussion above it is clear that the Ministerial Policy does not comply with international best practice, and that the South African insolvency profession should be properly regulated. Not only will proper regulation ensure compliance with international best practice, but it will also create a professional environment where practitioners are required to meet proper standards in regard to entry-level qualifications, training and continuing professional development. It is our considered opinion that attempts at transforming the insolvency profession through Ministerial Policy documents - such as the one that has already been struck down once as being unconstitutional - are doomed to failure, and even if the policy is found to be constitutional further down the line on appeal, it should be clear that the policy has already had a detrimental polarising effect on an extremely brittle profession. What is required is a properly regulated insolvency profession that not only ensures the integrity and competence of practitioners, but which simultaneously ensures the development and transfer of skills to new entrants to the profession.

63 In 2003, there were various requests to the Department of Justice and Constitutional Development to properly regulate the profession, with some stakeholders going as far as providing the Minister with draft legislation in order to do so. It is unfortunate that this offer was never taken up, as by now the legislation could have been in operation for more than a decade - even taking into consideration possible delays in passing the legislation. In our view the government lost an opportunity to properly regulate the profession at that time.

## Recommendations

64 In the late 1990s, the UK reviewed their system of the regulation of insolvency practitioners by establishing the *Insolvency Regulation Working Party*, which included representatives from recognised insolvency bodies as well as the State.<sup>137</sup> The terms of reference were “to review the current state of regulation in the insolvency profession and in the light of the review to consider whether there are ways in which in the public interest and in the interest of all those affected by

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<sup>136</sup> C. Varley, “Regulatory Policy and the Road to Sustainable Growth”, presentation available at: <<http://www.oecd.org/regreform/policyconference/46312747.pdf>> [last viewed 30 August 2015].

<sup>137</sup> F. Tolmie, *Corporate and Personal Insolvency Law* (2nd ed) (2003, Routledge-Cavendish, London), at 204.

insolvency proceedings, such regulation could be made more efficient and effective.”<sup>138</sup> It is submitted that a similar committee or stakeholder’s group should be established with a similar assignment to review and investigate the current state of affairs in South Africa.

65 Based on policy considerations, a series of recommendations that could improve and reform the regulatory structure of the South African insolvency law are suggested:<sup>139</sup>

- A new insolvency regulatory framework should be developed articulating a set of criteria for the minimum level of entry qualifications; experience as well as the monitoring and overview of the system. Practitioners should be held to minimum standards of qualification and should be required to engage in continued educational requirements on a regular basis.
- The emphasis should be on the principle of transfer of skills through either apprenticeship or other types of mentor structures.
- In order to develop a system based on accountability, which would satisfy the public interest and create trust and confidence in the system, it would be vital to investigate a more cost effective mechanism of accountability and adopt a simpler and faster dispute resolution process.<sup>140</sup>

### **Concluding Remarks**

66 A well-functioning insolvency system should ensure that the resolution of financial distress maximizes the total value received by all interested parties.<sup>141</sup> It is vital that an insolvency system contains sufficient measures of protection of the rights of creditors, as the ability of creditors to provide credit and capital is essential to the growth of a market economy. While the objective of any law reform process should be to accommodate the broader macro-economic policies into the insolvency system, it would be unrealistic to ignore the wider global context in which trade and commerce have effect.<sup>142</sup> The main challenge will be to strike a balance between transposing current standards of best practice into the insolvency system, and having regard to the practical and political realities of the system itself.

67 In deviating from a culture of authority to a culture of justification and accountability in South Africa it should be emphasized that the Constitution, especially the Bill of Rights, has fundamentally altered the way any state regulation

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<sup>138</sup> *Idem*.

<sup>139</sup> The recommendations are not intended to be exhaustive, nor do they attempt to set out the entire ground work for this field of insolvency law.

<sup>140</sup> Calitz, above note 41, at 315.

<sup>141</sup> Cirmizi, above note 112, at 199.

<sup>142</sup> G. Johnson, “Towards International Standards on Insolvency: The Catalytic Role of The World Bank” (2000) *Law in Transition* 71.

or administration is supposed to function.<sup>143</sup> In attempting to formulate a workable definition of the term “public interest” relating to insolvency law, Keay states the following:

“... [f]or the purpose of insolvency law, that the public interest involves taking into account interests which society has regard for and which are wider than the interests of those parties directly involved in any given insolvency situation, that is, the debtor and the creditors.”<sup>144</sup>

68 The aim and purpose of any regulation in South African insolvency law should thus be to ensure compliance with the underlying values and norms of the Constitution, which include the protection of the public interest and of individual rights and freedoms.<sup>145</sup>

69 Following the 2008 global financial crisis, one of the major trends that emerged among insolvency reformers was the introduction of professional requirements for insolvency practitioners.<sup>146</sup> Capacity building of insolvency professionals is essential as a positive correlation between minimum qualifications requirements and higher recovery rates is evident.<sup>147</sup> Failing to adequately prepare less experienced practitioners for practice will place a burden on the entire system, as inefficiencies in the process would evidently contribute to a greater loss for all stakeholders. Such losses are consistently transferred to market participants in the form of higher lending costs and fees, and more restricted access to credit. As insolvency practitioners perform skilled tasks that are crucial to the efficiency and effectiveness of the insolvency system, it is vital any law reform effort should comprise of a system where skills transfer is integrated into the system while still maintaining public confidence in the integrity of the credit system.

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<sup>143</sup> Burns and Beukes, above note 6, at 49. J. Calitz, “State Regulation of South African Insolvency Law - An Administrative Law Approach” (2012) 33(3) *Obiter* 458.

<sup>144</sup> A. Keay, “Insolvency Law: A Matter of Public Interest?” (2000) (51) *Northern Ireland Legal Quarterly* 525; Calitz, above note 7, at 293.

<sup>145</sup> C. J. Botha, “Administrative Justice and Interpretation of Statutes: A Practical Guide”, chapter in C. Lange and J. Wessels (eds), *Administrative Justice and Interpretation of Statutes: A Practical Guide* in (2004, SiberInk, Cape Town), at 14.

<sup>146</sup> Cirmizi, above note 112, at 199.

<sup>147</sup> See *Doing Business 2009*, Closing a Business at 55, Figure 11.3, available at: <<http://www.doingbusiness.org/reports/global-reports/doing-business-2009/>> [last viewed 30 August 2015]. See also A. Martinez, “Good Practices in Insolvency Practitioners Regulation”, available at: <<http://www.ifc.org/wps/wcm/connect/77756b004b5f79be9b1ebb6eac26e1c2/Good+practice+IP.pdf?MOD=AJPERES&CACHEID=77756b004b5f79be9b1ebb6eac26e1c2>> [last viewed 30 August 2015].

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