Republic of South Africa

REPORTABLE

THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number:
4314/2014
"SARIPA
Application"

In the matter between

THE SOUTH AFRICAN RESTRUCTURING AND INSOLVENCY PRACTITIONERS ASSOCIATION

Applicant

vs

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT First Respondent

CHIEF MASTER OF THE HIGH COURT OF SOUTH AFRICA Second Respondent

THE ASSOCIATION FOR BLACK BUSINESS RESCUE AND INSOLVENCY PRACTITIONERS Third Respondent

AND

Gauteng Case Number 17327/2014

"CIPA Application

THE CONCERNED INSOLVENCY PRACTITIONERS ASSOCIATION NPC First Applicant

NATIONAL ASSOCIATION OF MANAGING AGENTS Second Applicant

SOLIDARITY Third Applicant

VERENIGING VAN REGSLUI VIR AFRIKAANS Fourth Applicant

vs

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT First Respondent

CHIEF MASTER OF THE HIGH COURT OF SOUTH AFRICA Second Respondent

THE ASSOCIATION FOR BLACK BUSINESS RESCUE AND INSOLVENCY PRACTITIONERS OF SOUTH AFRICA Third Respondent

Handed Down: 13 January 2015
Matter Argued: 13 October 2014

JUDGMENT

KATZ AJ:

1. This judgment concerns two applications challenging the constitutionality of an appointments policy determined by the Minister of Justice and Constitutional Development in accordance with insolvency legislation. The Policy is impugned in terms of sections 9, 10, 22 and 33 of the Constitution[1] and on the basis of unlawful exercise of public power. The context of the challenge raises complex issues concerning law, policy, constitutionality and the interaction of human rights and commercial interests.

[1] Constitution of the Republic of South Africa, 1996.

2. It is now axiomatic that all human rights are interdependent.[2] The core right of dignity can only be respected, protected, promoted and fulfilled if there is a move not only to ensure freedom from torture and the guarantee of other civil and political rights, but also the advancement of socio-economic rights. This has been acknowledged repeatedly by the courts in the context of the right to housing.[3] The long-term reduction of poverty depends on economic development. Consequently, without economic development there is little prospect of civil rights being realised. This gives rise to two questions. First, how can the right to dignity be respected, protected, promoted and fulfilled if there is little or no hope of alleviation from poverty, especially in a society as unequal as is South Africa? Secondly, what does the right to equality mean in South Africa 20 years after the birth of a constitutional non-racial non-sexist society?

3. Equality is an aspiration. More than three hundred years of inequality and pernicious disadvantage (unfair discrimination) at the instance of the State cannot be thought away overnight by raising a new flag and adopting a new supreme law.[4] More is required.

4. The Constitution recognises this and requires protection of all rights in a transformative way. This approach informs constitutional jurisprudence and defines the right to equality,

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[2] *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) at [136]-[148]; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at [23]*; Mazibuko and others v City of Johannesburg and others* 2010 (4) SA 1 (CC) at [2]; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another* 2012 (2) SA 104 (CC) fn 88; *Khosa and others v Minister of Social Development and others; Mahlaule and others v Minister of Social Development and others* 2004 (6) SA 505 (CC) at [40]**.**

[3] Cf. *Government of the Republic of South Africa and Others v Grootboom and others* 2001 (1) SA 46 (CC) at [2] and [83]; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at [41]-42]; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and others (Centre on Housing Rights and Evictions and another, Amici Curiae)* 2010 (3) SA 454 (CC) at [75], [191]; [197] and [201]**.**

[4] Cf. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others* 2004 (4) SA 490 (CC) at [10] and [74]-[76]; *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) at [29]; *Singh v Minister of Justice and Constitutional Development and others* 2013 (3) SA 66 (Equ) at [47]-[48]**.**

which requires remedial measures as a key element of that right.[5] Such measures seek to redress the disadvantage caused by past practices. The Constitutional Court has recognised that such measures may adversely affect some, but that this is the necessary price to pay to enjoy social cohesion and the vision of the Constitution.[6]

5. For this reason, whilst white males, for example, may decry 'affirmative action' as it affects them, carefully crafted affirmative action plans and policies are necessary to ensure that the divisions, bitterness and resentments that have divided South Africa society and the stark disparities between those on the different sides of the colonial and apartheid divide are overcome.

6. Division and bitterness could lead, and in many societies does lead, to conflict and destruction. This is evident in many parts of the world, where violence and breakdown of social harmony is tearing apart societies and families.[7] A failure to appreciate and deal with historical faultlines on a sustainable basis and unresolved resentments can and do lead to civil conflict and often war. South Africans, led by Nelson Mandela in the early 1990s, sought a different route based on healing past divisions and consciously building an open society based on democratic values, social justice and fundamental human rights.[8]

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[5] Cf. in particular, section 9(2) of the Constitution.
[6] *Minister of Finance and another v Van Heerden* 2004 (6) SA 121 (CC) at [44].; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others* 2004 (40 SA 490 (CC) at [76; *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) at [30]-[33]; See also *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at [60].
[7] The preamble to the Constitution reflects that recognition of the injustices of the past require the divisions of the past to be healed.
[8] Cf. *Azanian Peoples Organization (AZAPO) and Others v President of The Republic of South Africa and Others* 1996 (4) SA 672 (CC) at [17].

7. Key amongst the divisions that remain, however, is the intersection of race and class. South Africa remains a society with high levels of poverty and pockets of extreme wealth.[9] It is the reality that the lines between rich and poor continue to track the white/black colour-line.[10] Many, but certainly not all, of those who are poor belong to groups who were not classified as white under apartheid whilst many of the wealthy were classified as white. To this, one needs to add the understanding that the impugned Policy is in respect of insolvency and companies' legislation, which originates in the 1930s (and before). This is, notwithstanding the enactment of a new Companies' Act in 2008, which specifically seeks to 'promote compliance with the Bill of Rights' and an inclusive, multi-stakeholder approach whilst promoting economic development and innovation; affirming the concept of a company and providing for a predictable, effective and efficient regulatory environment for business.[11]

8. It is against this background of the intersectionality of rights; the importance of economic development and transformation of the insolvency environment that these applications are to be understood.

9. What is also important is the role of courts in such a challenge. Courts have not been popularly elected, and are thus not accountable to the people. The Courts' fidelity is to the Constitution and the law.[12] The judicial branch may, and indeed must, scrutinize any

[9] On the World Bank's Gini Index of 2013, South Africa scored 62 (where 0 represents perfect equality between household income and 100 represents perfect inequality).
[10] See the statistics published in the South African Institute of Race Relations *South Africa Survey Online 2014/2015* – updated 8 January 2015 [available at www.irr.org.za] (Accessed 10 January 2015).
[11] Companies Act 71 of 2008 s 7.
[12] Section 165(1) and (2) of the Constitution.

executive or administrative policy or legislation adopted or enacted for constitutional compliance.[13]

10. If a court takes the view that an impugned policy or law may have been more succinctly drafted or framed in a different and better way, that is irrelevant. The sole relevant consideration is whether the policy or law is consistent with the enabling legislation and the Constitution. Consequently, this Court's task is to determine whether the Policy challenged is consistent with the Constitution. If I come to the conclusion that it is not, I am obliged to declare it to be invalid.[14]

THE TWO APPLICATIONS

11. Following the adoption by the Minister of the Policy on the Appointment of Insolvency Practitioners ('the Policy') on 7 February 2014,[15] two separate applications were launched challenging its constitutional validity.

12. In this Court, the South African Restructuring and Insolvency Practitioners Association (SARIPA), represented at the hearing by Mr Manca SC, Ms van Huysteen and Ms Adhikari, launched an application, which consisted of two parts. In part A of the Notice of Motion an order interdicting the coming into operation of the Policy pending the

[13] *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) at [99] .
[14] Section 172(1)(a) of the Constitution. *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Other; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at [59]; *Mazibuko NO v Sisulu NNO and Others NNO* 2013 (6) SA 249 (CC) at [70].
[15] Notice No. 77 *Government Gazette* No. 37287 of 7 February 2014.

finalisation of the review of the Policy was sought on an urgent basis. Part B constitutes the review.

13. SARIPA was formed in 1984 and currently has 445, members including insolvency and business rescue practitioners. SARIPA, in these proceedings, acts in the interests of its members, as well as in the public interest.

14. The Minister (at the time the Minister of Justice and Constitutional Development) ('the Minister') and the Chief Master of the High Court of South Africa ('the Chief Master') are cited as the Respondents. They opposed the application for the interim interdict and the review.

15. The Association for Black Business Rescue and Insolvency Practitioners of South Africa ('ABRIPSA') applied for leave to intervene in the application (in respect of both parts A and B) as the Third Respondent. The intervention was granted and ABRIPSA took full part in the hearing in respect of part A. ABRIPSA supported the opposition to the relief sought. It was represented by three counsel.

16. Part A was heard on an opposed basis on 24 March 2014 and 27 March 2014. An order was granted by this Court (per Gamble J) on 28 March 2014 interdicting and restraining the Minister and the Chief Master from implementing the Policy pending the determination of this review, which was to be determined on an expedited basis.

17. In the Gauteng Division, Pretoria, the Concerned Insolvency Practitioners Association NPC ('CIPA') launched an application challenging the validity of the Policy on 28 February 2014. CIPA is a voluntary organisation established for the purposes of this

litigation. Its members are practising insolvency practitioners who have a common interest in this matter, namely, to obtain relief aimed at preventing the Respondents from adopting and/or implementing the Policy. CIPA seeks a declaratory order to the effect that the Policy is unconstitutional. CIPA was represented at the hearing in this Court by Mr Brassey SC and Ms Engelbrecht.

18. The National Association of Managing Agents ('NAMA') applied for, and was granted leave, to intervene as the Second Applicant in the CIPA application. NAMA was represented by Mr Rip SC and Mr Vorster.

19. NAMA was established in the light of an increase in sectional title ownership in South Africa together with the advent of security-estate living, which led to the need for the establishment of a body to represent the common interests of the market and managing agents dealing with sectional title schemes and homeowners' associations. NAMA represents the interests and rights of a group of creditors involved management of insolvent estates.

20. Solidarity, a trade union, intervened in its own interests as well as that of its members. Solidarity's members, in their capacity as employees, have an interest in the appointment of insolvency practitioners which, they submit, may be prejudiced by the implementation of the Policy. Solidarity was represented by Ms Engelbrecht.

21. The Minister and the Chief Master were also cited as the Respondents and opposed the Gauteng application. Written submissions were made on their behalf by Mr Semenya SC and Ms Platt, while Ms Platt appeared for the Respondents during the hearing.

22. For the sake of convenience the Gauteng application was ordered by agreement to be heard by this Court together with the SARIPA application.[16]

THE CHANGING ROLE OF INSOLVENCY IN SOCIETY

23. In Gainsford NO and Others v Tanzer Transport (Pty) Ltd, Theron JA commented:

> 'The purpose of insolvency legislation is to bring about a concursus creditorum which, once in place, has the effect that:
>
> > "(T)he hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order."'[17]

24. The law of insolvency is generally concerned with protecting the rights and interests of the creditors.[18] However, insolvency, necessarily and appropriately, is shifting from being a creditor-driven regime to focusing on the interests of other stakeholders involved in and affected by the insolvency proceedings.[19] Moreover, it is necessary that

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[16] The two applications were not consolidated in terms of the Uniform Rules of Court. It was submitted by all the parties, that I should write one judgment and that I should have regard to the conspectus of facts adduced in both cases on the usual basis of the *Plascon-Evans* rule, as the applicants seek final relief on motion. I accept the submission.

[17] 2014 (3) SA 468 (SCA) at [1].

[18] *Ex Parte The Master of the High Court South Africa (North Gauteng)* 2011 (5) SA 311 (GNP) at [28].

[19] So, for example, an amendment to the Insolvency Act 24 of 1936 ('the Insolvency Act') now requires that a copy of a sequestration application must be furnished to employees of the insolvent debtor. See *Stratford and Others v Investec Bank Limited and Others* [2014] ZACC 38 (19 December 2014) with reference to s 9(4A). Similarly, the Companies Act 71 of 2008 has introduced business rescue proceedings.

insolvency law and its implementation, like all South African law, be constitutionally compliant.[20]

The Cork Report and Business Rescue

25. The report of the Review Committee on Insolvency Law and Practice[21] ('Cork Report') sets out recommendations for the modernisation and reform of English insolvency law. The Cork Report states that a modern system of insolvency law must consider the interests of three key parties: the debtor,[22] the creditor and society.[23]

26. When considering the effects of insolvency on society, the Cork Report identifies the effect on the livelihoods of all those reliant on a particular enterprise as a legitimate legal consideration. Consequently, 'good modern insolvency law' should recognise the wider effect of insolvency beyond the narrow interests of the insolvent and his/her creditors and, as far as possible, provide mechanisms for preserving commercial entities 'capable of making a useful contribution to the economic life of the country.' This recognition provides the rationale for business rescue – now introduced into the Companies Act 71 of 2008.

27. Business rescue "constitutes a major theme of the new Act, and is amplified in section 7(k) thereof, which states that one of the purposes of the Act 'is to provide for the efficient rescue and recovery of financially distressed companies, in a manner that

[20] Cf. *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister Of Finance* 2002 (4) SA 768 (CC) at [31]. Cf. also *De Lange v Smuts and others* 1998 (3) SA 785 where the Insolvency Act was subjected to constitutional scrutiny.
[21] *Report of the Review Committee Insolvency Law and Practice* Cmnd 8558 (1981). ('Cork Report').
[22] In the United States, for example, bankruptcy laws exist to, in principal, protect the debtor.
[23] The Cork Report at [192].

balances the rights and interests of all relevant stakeholders'."[24] With the implementation of the 2008 Act and the business rescue provisions, "[t]he rights of creditors no longer have pride of place and have been levelled with those of shareholders, employees[25], and with the public interest too."[26]

28. The foregoing suggests that it may be correct, following a narrow approach, that the rights of creditors are paramount in the insolvency process. However, in my view, insolvency proceedings effect much wider interests: society, as a whole is engaged.

29. In summary, whilst it is necessary to have regard to the rights and interests of creditors in insolvency matters, it is also appropriate to consider, in the light of the Constitution, and in particular, the Bill of Rights, the need to protect the rights and interests of employees and society more broadly as they may also be affected by the insolvency proceedings. These, possibly competing, interests need appropriate recognition and protection by those appointed to control and administer insolvent estates and businesses. Whether appointed provisionally, or finally, insolvency practitioners need to be keenly aware of these dynamics and suitably equipped to manage them.[27]

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[24] *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd* 2012 (2) SA 423 (WCC) at [1].

[25] See, for example, *Investec Bank Limited v Stratford and Another* [2013] ZAWCHC 207 at [15]. In terms of s 9(4A) of the Insolvency Act 24 of 1936, employees of a debtor facing sequestration or winding-up must be notified of the proceedings.

[26] *Absa Bank Limited v Newcity Group (Pty) Ltd and Another Related Matter* [2013] 3 All SA 146 (GSJ) at [31]. See also *Dippenaar NO and Others v Business Venture Investments No 134 (Pty) Ltd and Another* [2014] 2 All SA 162 (WCC) at [45].

[27] Trustees are appointed to sequestrated estates and trusts, while liquidators are appointed to liquidated companies and close corporations. The Insolvency Act refers to 'trustees' (defined to include provisional trustees), whilst the Companies Act refers to 'liquidators' (again, defined to include provisional liquidators). The distinction between trustees and liquidators is of no import in this case, thus the terms are used interchangeably.

THE APPLICABLE INSOLVENCY LEGISLATION[28]

The Insolvency Act 24 of 1936

30. Section 18 of the Insolvency Act states:

> '(1) 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.
>
> (2) At any time before the meeting of the creditors of an insolvent estate in terms of section forty, the Master may, subject to the provisions of subsection (3) of this section, give such directions to the provisional trustee as could be given to a trustee by the creditors at a meeting of creditors.
>
> (3) A provisional trustee shall have the powers and the duties of a trustee, as provided in this Act, except that without the authority of the court or for the purpose of obtaining such authority he shall not bring or defend any legal proceedings and that without the authority of the court or Master he shall not sell any property belonging to the estate in question. Such sale shall furthermore be after such notices and subject to such conditions as the Master may direct.
>
> (4) When a meeting of creditors for the election of a trustee has been held in terms of section 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." (Emphasis added).

[28] In setting out the insolvency legislation it is noted that the Applicants argue that the Policy is applicable to both provisional and final appointments, whereas the Respondents say it is only applicable to provisional appointments. Because of the conclusions I have come to nothing turn on this difference in understanding, although there is much to be said (technically) for the Applicants' views.

31. It is the Master who has the power, and who appoints the trustees to sequestrated estates. He or she enjoys discretion as to who to appoint as provisional trustees to insolvent estates. This is to be done in accordance with the Policy determined by the Minister in terms of section 158(2) of the Act.[29]

32. The functions of a provisional trustee 'are essentially to take physical control, and to superintend the administration, of the property and affairs of the estate pending the appointment of a trustee; and it is not the provisional trustee's function to wind-up the estate.'[30]

33. Simply put, a provisional trustee controls and administers the estate until a trustee is appointed at the first meeting of the creditors.[31]

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[29] Section 158(2) of the Act empowers the Minister to determine a Policy for the appointment of provisional trustees, liquidators, co-trustees and co-liquidators as well as *curatores bonis* to insolvent estates.

[30] Meskin *Insolvency Law* [Service Issue 35] at 4 – 25.

[31] Section 40 states:

> '(1) On the receipt of an order of the court sequestrating an estate finally, the Master shall immediately convene by notice in the Gazette, a first meeting of the creditors of the estate for the proof of their claims against the estate and for the election of a trustee.
>
> (2) The Master shall publish such notice on a date not less than ten days before the date upon which the meeting is to be held and shall in such notice state the time and place at which the meeting is to be held.
>
> (3) (a) After the first meeting of creditors and the appointment of a trustee, the Master shall appoint a second meeting of creditors for the proof of claims against the estate, and for the purpose of receiving the report of the trustee on the affairs and condition of the estate and giving the trustee directions in connection with the administration of the estate.
>
> (b) The trustee shall convene the second meeting of creditors by notice in the Gazette and in one or more newspapers circulating in the district in which the insolvent resides or his principal place of business is situate.
>
> (c) Whenever the notice referred to in paragraph (b) is published in any newspaper, the publication shall take place simultaneously in the Afrikaans language and in the English language and in the case of each such language in a newspaper circulating in the district referred to in the said paragraph which appears mainly in that language and the publication in each such language shall as far as practicable occupy the same amount of space: Provided that where in the district

34. A provisional trustee is therefore appointed by the Master, in accordance with the policy determined by the Minister, and once appointed, the provisional trustee will then administer and control the estate until such time as the creditors, at their first meeting, elect the trustee. A similar procedure can be found in the Companies Act.

The Companies Acts 61 of 1973 and 71 of 2008

35. Although the 1973 Act has been repealed, Item 9 of Schedule 5 of the 2008 Act determines that Chapter XIV of the 1973 Act continues to apply until a date to be determined by the Minister.[32]

36. Section 339 of the 1973 Act provides that the law of insolvency applies mutatis mutandis to the winding-up of companies.

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in question any newspaper appears substantially in both such languages publication in both such languages may take place in that newspaper."

[32] Item 9 of Schedule 5 of the 2008 Act provides:

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

37. In terms of section 368, once a winding-up order has been made, the Master may, in accordance with the policy determined by the Minister, appoint a provisional liquidator. The provisional liquidator will hold the office until a liquidator is appointed. The practice of appointing a provisional liquidator is not in any way different to the appointment of a provisional trustee in terms of the Insolvency Act.

38. The functions of provisional liquidators are similar to those of provisional trustees and 'are essentially to take physical control, and to superintend the administration, of its property and affairs pending the appointment of the liquidator; it is not the provisional liquidator's function to liquidate the company.'[33]

39. Therefore, as with an insolvent estate, the Master will, in accordance with the policy determined by the Minister, appoint a provisional liquidator who will control and administer the business until such time as the liquidator is appointed.

The Close Corporations Act 69 of 1984

40. Part XI of the Close Corporations Act sets out the provisions dealing with the liquidation of a close corporation. These provisions are similar to the provisions that deal with the liquidation of companies and the sequestration of estates. The duties and functions of the Master with regards to the liquidation of a close corporation do not differ from those of the Master in respect of companies and estates.[34]

41. However, with regards to an appointment of a provisional liquidator, there is no provision for the appointment by the Master of a provisional liquidator for a close corporation upon

[33] Meskin above n 25 at 4 – 54.
[34] See ss 74 and 76.

a provisional winding-up order being made. Therefore, in terms of section 74, the Master, as soon as is practicable after the provisional winding-up order has been made, must appoint a liquidator[35] in accordance with the Policy determined by the Minister.

42. Provisional trustees and liquidators, in terms of the relevant insolvency legislation, have a significant role to play in the sequestration of an estate and the winding up of a company or corporation. They are appointed by the Master, in accordance with the policy determined by the Minister, to control and administer the estate or the property of the company until a trustee or liquidator has been appointed.

43. Whilst it is accepted that the rights of the creditors are protected at the first meeting of the creditors, they are not involved in the appointment of a provisional trustee or liquidator. Once a provisional sequestration or winding-up order has been made, it is the Master who appoints a provisional trustee or liquidator. And it is that provisional trustee or liquidator who will administer and control the estate or business until such time as the trustee or liquidator is appointed.

THE POLICY

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[35] S 74 provides:

> "S (1) For the purposes of conducting the proceedings in a winding-up of a corporation, the Master shall, in accordance with Policy determined by the Minister, appoint a suitable natural person as liquidator.
> (2) The Master shall make an appointment as soon as is practicable after a provisional winding-up order has been made, or a copy of a resolution for a voluntary winding-up has been registered in terms of section 67 (2).
> (3) When the Master in the case of a voluntary winding-up by members makes an appointment, he or she shall take into consideration any further resolution at a meeting of members nominating a person as liquidator.
> (4) In the case of a creditors' voluntary winding-up and a winding-up by the Court, the Master shall, subject to the provisions of section 76, if a person is nominated as co-liquidator at the first meeting of creditors, appoint such person as co-liquidator as soon as he or she has given security to the satisfaction of the Master for the proper performance of his or her duties."

44. The Policy was published in the Government Gazette on 7 February 2014. Paragraphs 6 and 7 of the Policy were amended[36] and published in the Government Gazette on 17 October 2014.[37] The Policy, in its amended form, reads:

POLICY ON THE APPOINTMENT OF INSOLVENCY PRACTITIONERS

The Minister of Justice and Constitutional Development has under section 158(2) of the Insolvency Act, 1936 (Act No. 24 of 1936), section 10(1A)(a) of the Close Corporations Act, 1984 (Act No. 69 of 1984), and section 158(2) of the said Insolvency Act read with section 339 of the Companies Act, 1973 (Act No. 61 of 1973), determined the Policy in the Schedule.

SCHEDULE

1. Definitions

Unless the context indicates otherwise—

"Chief Master" means the person appointed as the Chief Master of the High Courts in terms of section 2(1) of the Administration of Estates Act, 1965 (Act No. 66 of 1965);

"Close Corporations Act" means the Close Corporations Act, 1984 (Act No. 69 of 1984);

"Companies Act" means the Companies Act, 1973 (Act No. 61 of 1973);

"Insolvency Act" means the Insolvency Act, 1936 (Act No. 24 of 1936);

"insolvency industry" means the industry which involves the administration of insolvent estates and the winding up of companies or close corporations;

"insolvency practitioner" means a natural person who is appointed by a Master of a High Court as a curator bonis, provisional trustee, trustee, co-trustee,

[36] The amendments were designed so as to not exclude black persons who became South African citizens after 27 April 1994. They had been wholly excluded from being appointed as insolvency practitioners. SARIPA argue the amendments introduce "further mechanisms" of unfair discrimination on four grounds. I find it unnecessary for the reasons contained herein to deal with the arguments.

[37] Notice No. 798 *Government Gazette* No. 38088 of 17 October 2014 read with Notice No. 77 *Government Gazette* No. 37287 of 7 February 2014.

provisional liquidator, liquidator or co-liquidator in the circumstances set out in paragraph 3.2 of this Policy;

"insolvent estate" includes the assets of a company or close corporation under winding up;

"Master" means a Master, Deputy Master or Assistant Master of a High Court as referred to in the definition of "Master" in section 1 of the Administration of Estates Act, 1965 (Act No. 66 of 1965);

"Master's List" means any Master's List of Insolvency Practitioners referred to in paragraph 6 of this Policy.

2. Objective

The objective of the Policy is to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination.

3. Scope and application of Policy

3.1 This Policy—

(a) replaces all previous policies and guidelines related to the appointment of insolvency practitioners used in the Masters' offices; and

(b) is intended to form the basis of the transformation of the insolvency industry.

3.2 This Policy applies only in respect of appointments under the following provisions of the Insolvency Act, the Companies Act and the Close Corporations Act:

3.2.1 Insolvency Act:

(a) Section 5(2) the appointment of a curator bonis after a notice of voluntary surrender.

(b) Section 18(1) the appointment of a provisional trustee by the Master.

(c) Section 54(5) the appointment of a trustee where none is elected by the creditors and no provisional trustee is in office.

(d) Section 57(4) the Master declines to appoint an elected trustee.

(e) Section 57(5) the Master considers it desirable to appoint a co-trustee.

(f) Section 62(2) the appointment of a provisional trustee pending the election of a trustee to fill a vacancy.

(g) Section 95(4) the appointment of a trustee where there is no trustee to distribute proceeds due to a secured creditor who did not prove a claim previously.

3.2.2 Companies Act 61 of 1973:

(a) Section 368 the appointment of provisional liquidator by the Master.

(b) Section 370(3)(b) the Master again declines to appoint a person nominated at a further meeting.

(c) Section 374 the Master considers it desirable to appoint co-liquidator.

(d) Section 377(3) the appointment of provisional liquidator or liquidator for a vacancy or where a vacancy is not filled.

3.2.3 Close Corporations Act:

(a) Section 74(1) the appointment of a liquidator (similar to a provisional liquidator for a company).

(b) Section 66(1) read with section 374 of the Companies Act the appointment of a co-liquidator.

(c) Section 76(3)(b) the appointment of a liquidator where the Master declines to appoint an elected liquidator.

3.3 This Policy does not apply to the appointment of an insolvency practitioner for a solvent company wound up voluntarily in terms of section 80 of the Companies Act, 2008 (Act No. 71 of 2008).

4. Policy Statements

The Minister of Justice and Constitutional Development is committed to—

(a) addressing the imbalances of the past and transforming the insolvency industry;

(b) Establishing uniform procedures for the appointment of insolvency practitioners;

(c) Making the insolvency industry accessible to individuals from previously

disadvantaged communities;

(d) promoting the objectives of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003), by empowering insolvency practitioners who are previously disadvantaged individuals;

(e) preventing corruption and fronting; and

(f) promoting transparency and accountability.

5. Directives

The Chief Master must issue directives to be used by all Masters in order to implement and monitor the application of this Policy.

6. Different categories of insolvency practitioners

6.1 Insolvency practitioners on every Master's List must be divided into the following categories:

Category A: African, Coloured, Indian and Chinese females who became South Africa citizens before 27 April 1994;

Category B: African, Coloured, Indian and Chinese males who became South Africa citizens before 27 April 1994;

Category C: White females who became South Africa citizens before April 1994;

Category D: African, Coloured, Indian and Chinese females and males, and White females, who became South Africa citizens on or after 27 April 1994 and White males who are South African citizens,

and within each category be arranged in alphabetical order according to their surnames and, in the event of similar surnames, their first names. Insolvency practitioners added to the list after the compilation thereof must be added at the end of the relevant category.

6.2 A Master's List must distinguish between "senior practitioners", being insolvency practitioners who have been appointed at least once every year within the last 5 years and "junior practitioners", being insolvency

practitioners who have not been appointed as such at least once every year within the last five years but who satisfy the Master that they have sufficient infrastructure and experience to be appointed alone. The senior and junior practitioners must be arranged where they fit alphabetically in Category A to D on the same Master's List.

7. Appointment of insolvency practitioners by Masters of High Courts

7.1 Insolvency practitioners must be appointed consecutively in the ratio A4: B3: C2: D1, where—

'A' represents African, Coloured, Indian and Chinese females who became South African citizens before 27 April 1994;

'B' represents African, Coloured, Indian and Chinese males who became South African citizens before 27 April 1994;

'C' represents White females who became South African citizens before 27 April 1994;

'D' represents 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,

and the numbers 4: 3: 2: 1 represent the number of insolvency practitioners that must be appointed in that sequence in respect of each such category.

7.2 Within the different categories on a Master's List, insolvency practitioners must, subject to paragraph 7.3, be appointed in alphabetical order.

7.3 The Master may, having regard to the complexity of the matter and the suitability of the next-in-line insolvency practitioner 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 such a joint appointment, the Master must record the reason therefor and, on request, provide the other insolvency practitioner therewith.

7.4 If an insolvency practitioner due for appointment in accordance with the alphabetical list of names in a specific category on the Master's List—

(a) fails to lodge a bond of security in time, the next insolvency

practitioner on the Master's List must be appointed, and the person determined previously is moved to the back of that list; or

(b) satisfies the Master that he or she has a conflict of interest or a conflict of interest arises after the appointment, the next-in-line insolvency practitioner must be appointed, and the person determined previously is considered for appointment when the next appointment in that category is made.

8. Commencement

This Policy commences on 31 March 2014.[38]

45. The Policy, inter alia, is intended to form the basis of the transformation of the insolvency industry. The objective of the Policy is to "promote consistency, fairness, transparency, and the achievement of equality for persons previously disadvantaged by unfair discrimination."

46. What is also of significance is that uniform procedures for the appointment of insolvency practitioners are intended to prevent corruption and fronting.[39] It cannot be denied that corruption is rife in South Africa and stringent measures are needed.[40] It can be assumed that the officials at the Masters' Offices may be tempted to accept bribes by insolvency practitioners to obtain appointments. Being appointed as a provisional trustee or liquidator is often lucrative.[41]

[38] The Policy, as mentioned above, has not commenced because of the interdict granted by Gamble J. The Minister and the Master have, quite appropriately, given an assurance that the Policy will not come into operation at least until this judgment has been handed down.
[39] See paragraph 4 of the Policy.
[40] *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* [2014] ZACC 32 (27 November 2014) at [1].
[41] Juanitta Calitz above n 32 at 742-743, Tariff B of the Second Schedule of the Insolvency Act sets out remuneration a trustee may receive. Tariff B states:

47. The Policy regulates the appointment of insolvency practitioners in instances where the Master has a discretion in terms of the Insolvency Act, the Companies Act and the Close Corporations Act.

TARIFF B

[Tariff B amended by s. 36 of Act 16 of 1943 and by Proclamation 229 of 1956, substituted by Proclamation R159 of 1961 and by Proclamation R87 of 1973 and amended by Proclamation R41 of 1985, by Government Notice R1685 of 1987, by Government Notice R1842 of 1992 and by Government Notice 323 of 1995.]

REMUNERATION OF TRUSTEE (SECTION 63)

1.	On the gross proceeds of movable property (other than shares or similar securities) sold, or on the gross amount collected under promissory notes or book debts, or as rent, interest or other income.	10 per cent.
2.	On the gross proceeds of immovable property, shares or similar securities sold, life insurance policies and mortgage bonds recovered and the balance recovered in respect of immovable property sold prior to sequestration.	3 per cent.
3.	On – (i) Money found in the estate; (ii) The gross proceeds of cheques and postal orders payable to the insolvent, found in the estate; and (iii) The gross proceeds of amounts standing to the credit of the insolvent in current, savings and other accounts and or fixed deposits and other deposits at banking institutions, building societies or other financial institutions.	1 per cent.
4.	On sales by the trustee in carrying on the business of the insolvent, or any part thereof, in terms of section 80.	6 per cent.
5.	On the amount distributed in terms of a composition, excluding any amount on which remuneration is payable under any other item of this tariff.	2 per cent.
6.	On the value at which movable property in respect of which a creditor has a preferent right, has been taken over by such creditor provided that the total remuneration of a trustee in terms of this tariff shall not be less than two thousand five hundred rand.	5 per cent.

REMUNERATION OF *CURATOR BONIS* AND PROVISIONAL TRUSTEE

A reasonable remuneration to be determined by the Master, not to exceed the rate of remuneration of a trustee under this tariff.'

48. In terms of the Policy only persons included on the Master's List of Insolvency Practitioners may be appointed as trustees or liquidators.

49. The Policy sets out four self-contained categories.

50. The categories are divided by race and gender. These race categories are not anywhere defined in the Policy.

51. When making an appointment, the Master is required to follow the procedure as provided for in paragraphs 6 and 7.

52. The terms 'African', 'Coloured', 'Indian', 'Chinese' or 'White female' used in Categories A, B and C are limited to a person who became a South African citizen before 27 April 1994.

53. In Category D, the terms 'African', 'Coloured', 'Indian', 'Chinese' females and males, and 'White females' are limited to persons who became South African citizens on or after 27 April 1994 and the term "White males" is limited to persons who are South African citizens.

54. All practitioners in the same category are arranged alphabetically according to their last (family) names and, in the event of similar last names, their first names. Insolvency practitioners added to the list after the compilation thereof must be added at the end of the relevant category.

55. Each Master's List must distinguish between senior practitioners, being insolvency practitioners who have been appointed at least once every year within the last five years, and junior practitioners, being insolvency practitioners who have not been appointed at least once every year within the last five years but who satisfy the Master that they have sufficient infrastructure and experience to be appointed alone.

56. The Master must appoint insolvency practitioners consecutively in the ratio A4: B3: C2: D1. The letters represent the respective racial and gender categories and the numbers represent the number of practitioners in each category who must be appointed in that sequence.

57. This means that the Master must first appoint four practitioners from Category A, then three from Category B, then two from Category C and finally one from Category D before returning to Category A to appoint the next four practitioners. The Master must make the appointments using the alphabetical list.

58. The Master may, having regard to the complexity of the matter and the suitability of the junior or senior practitioner next-in-line to be appointed, appoint a senior practitioner jointly with that junior or senior practitioner and must provide reasons for such appointment.

59. The Master may not have regard to any other factors in making appointments.

The coming into effect of the Policy

60. In terms of section 158(2) of the Insolvency Act, the Minister has determined the Policy. The Policy is intended to replace all previous policies and guidelines relating to the appointment of insolvency practitioners.

61. In terms of the Policy, the Chief Master must issue directives to be used by all the Masters of the High Court in implementing and monitoring the application of the Policy.

62. The Policy provides that only persons included on the Master's List of insolvency practitioners may be appointed as insolvency practitioners. The Policy further provides for the procedure that must be followed by the Master in making the discretionary appointment.

63. The Policy does not make provision for the wishes of creditors regarding the appointment of (provisional) trustees/liquidators.

64. The Master must apply the list on a rotational basis in line with the categories in the Policy delineated by race and gender rather than taking into account, inter alia, the preferences of the creditors.

THE CHALLENGES TO THE POLICY AND APPROACH OF THE COURT

65. The Applicants challenge the Policy on a number of overlapping grounds. These can be grouped as four broad questions:[42]

[42] These four questions emerge from the arguments and facts that have placed before the Court. They do not necessarily reflect the manner in which the parties have brought their applications and there are differences between the Gauteng and Cape applications. The most significant of these is that where SARIPA brings its challenge as a challenge to the exercise of executive power, arguing

(1) Does the Policy unlawfully fetter the discretion of the Master?

(2) Is the Policy rationally connected to its purpose?

(3) Does the Policy fall foul of the equality clause of the Constitution? and

(4) Does the Policy fail for absence of procedural fairness – particularly lack of consultation with relevant stakeholders?

66. All the parties agreed that if the Policy unlawfully fetters the Master's discretion or is irrational or does not comply with the requirements of a remedial measure in terms of s 9(2) of the Constitution, it is inconsistent with the Constitution and must be declared to be invalid.

67. Not all the parties have requested that I deal with all the challenges and some have been argued in the alternative. However, the Respondents have requested that if I conclude that the Policy is unlawful, unconstitutional and invalid on any one of the grounds, I nevertheless make findings in respect of the other challenges. This approach conforms

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administrative review in the alternative, CIPA, NAMA and Solidarity have argued the equivalent issues only within the ambit of administrative law. In both cases, the applicants have brought an equality challenge. SARIPA brought its case in terms of a challenge to the Minister's exercise of executive power unlawfully fettering the Master's discretion and a challenge under s 9(2) of the Constitution. Their challenge also implicated s 9(3) of the Constitution, read with s 7 of Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('PEPUDA'). A third challenge was made to the rationality of the Minister's exercise of power, in the first instance as an exercise of executive power and, in the alternative in light of s 6 of PAJA. An *ultra vires* challenge was also brought but not pursued vigorously in argument. CIPA distinguished between an 'administrative' and 'constitutional' challenge. In its heads of argument, they state that the issue is confined to an issue of law and that there are no disputes of facts. The administrative challenge is brought in terms of s 33(1) of the Constitution and impugns the policy on the basis of (1) unlawful fettering; (2) an unsanctioned and ultra vires use of an inflexible roster system; (3) failure to acknowledge creditors' rights by foreclosing on the Master's exercise of discretion; (4) failure to provide for stakeholder 'say' in the process of provisional appointments; (5) irrationality due to 'sudden death implementation'. CIPA's constitutional challenge is brought in terms of sections 9, 10 and 22 of the Constitution but emphasises the dictum in *Barnard* which found quotas to be unlawful in the employment equity plans and also asserts that the Policy will have discriminatory effects of those it excludes – i.e. causing 'undue harm' to white males in particular. NAMA and Solidarity essentially support CIPA's arguments; however, NAMA contended both factual and procedural grounds for review. The latter are framed in terms of an administrative law challenge and include the inference that due to a failure to consult, the Policy has failed to meet the legitimate expectation of NAMA's constituent members. Solidarity makes specific reference to PAJA but has focused its arguments on the equality argument. The Respondents offered essentially the same response to both cases.

with Constitutional Court guidance provided by Ngcobo J (as he then was) in S v Jordan and Others.[43] I intend to follow it.

PRELIMINARY MATTERS

68. Whilst this judgment refers to the 'Respondents', no affidavits[44] were submitted by the Minister: the Chief Master purported to speak on behalf of the Minister. Strictly speaking, the failure by the Minister to file a confirmatory affidavit or any evidence at all, despite the Policy being formulated, issued and tabled by him, is not only undesirable but constitutes inadmissible hearsay.[45] I have, nevertheless, been requested by all the parties to decide the matter as if the Minister had filed an affidavit in which the Chief Master's facts were confirmed. I will thus assess the applications on the basis of the Chief Master's evidence even though it is not his policy under scrutiny.

69. Because the parties did not address onus in their written submissions, I invited them to make further submissions in this regard. Onus was not fully canvassed and I have assumed that it is for the Applicants impugning the lawfulness and constitutionally of the Policy to make out a prima facie case which the Respondents must then rebut. This approach also applies to the equality test developed in Minister of Finance and Others v Van Heerden.[46]

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[43] 2002 (6) SA 642 (CC) at [21]; See also *City of Cape Town v Premier of the Western Cape and Others* 2008 (6) SA 345 (C) at [167].
[44] At the hearing, Ms *Platt* handed to the Court, without objection from the other parties, a document in which the Minister *"authorizes"* the Chief Master to depose to *"any affidavit on his behalf"*. This is clearly insufficient.
[45] *Gerhardt v State President and Others* 1989 (2) SA 499 (T) at 504G; *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) at [70]; *Von Abo v Government of the Republic Of South Africa and Others* 2009 (2) SA 526 (T) at [46]-[48]; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at [105].
[46] 2004 (6) SA 121 (CC).

70. The bulk of argument by all the parties focused on the effect of the Policy on appointments of provisional liquidators. This is because, as I have indicated above, the Respondents maintain that the Policy applies to provisional appointments only.

However, the text of the Policy suggests that it applies to all instances in which the Master appoints trustees and liquidators including final liquidators and trustees. These include situations in which co-trustees/liquidators are appointed in terms of s 57(5) of the Insolvency Act, s 374 of the Companies Act and s 66(1) of the Close Corporations Act as well as where a Master declines to appoint a trustee/liquidators elected at the creditors' meeting and makes his own appointment in terms of s 57(4) of the Insolvency Act, s 370(3)(b) of the Companies Act and s 76(3)(b) of the Close Corporations Act.

These cases turn largely on the facts as they relate to the power of provisional liquidators, consequences of provisional appointments and how, in this context, the Policy and its effects are to be understood. Determination of the lawfulness of the Policy must be done facially and on the facts adduced.

71. Finally, the Respondents argue that the purpose of the Policy is to effect transformation in the insolvency industry and that it constitutes an affirmative action 'measure' in terms of s 9(2) of the Constitution to promote equality by advancing persons disadvantaged by unfair discrimination. This is not disputed by the parties.

What is also not disputed by any of the parties is that the obiter statements in South African Policy Service v Solidarity obo Barnard [47] that race-based quotas are not constitutionally permissible applies to all remedial measures. This concession by the

[47] 2014 (6) SA 123 (CC) (hereinafter '*Barnard*').

Respondents has informed my approach in applying the Van Heerden test in deciding the equality question and dealing with the Applicants' submissions concerning quotas.

THE LAW AND PRACTICE OF APPOINTING PROVISIONAL TRUSTEES AND LIQUIDATORS

72. Section 18(1) of the Insolvency Act and s 368 of the Companies Act provide that a Master may appoint a provisional trustee/liquidator as soon as:

(1) a winding-up order has been made in relation to a company;

(2) a special resolution for a voluntary winding-up of a company has been registered;

(3) an estate has been finally or provisionally sequestered; or

(4) when an appointed trustee ceases to be or function as such.

73. There is some dispute over whether such appointments were intended to be extraordinary or not.[48] However, it appears that provisional appointments have been made as a matter of course since 1977. This seems to be partly a result of s 20(1)(a) of the Insolvency Act and s 361(1) of the Companies Act, which require that the estate vests in the Master until the first creditor's meeting. The increasing number of sequestrations and winding-up orders, delays in calling of the first creditors' meeting and increasingly complex estates have challenged the Master's Office's ability to manage estates effectively in the interim.[49]

74. In order to ensure continuity from provisional to final liquidator, the Master's Offices introduced a 'requisition system'. This seems to have originated with the Pretoria

[48] J C Calitz and D A Burdette 'The appointment of insolvency practitioners in South Africa: time for change? (2006) 4 *TSAR* 721 at 731.

[49] J C Calitz and D A Burdette 'The appointment of insolvency practitioners in South Africa: time for change? (2006) 4 *TSAR* 721 at 733; Juanitta Calitz and Andrew Boraine 'The role of the master of the high court as regulator in a changing liquidation environment: a South Africa perspective' (2005) 4 *TSAR* 728 at 732.

Master's Office in 1977 but has been accepted as common practice, albeit unauthorised by legislation, by the courts and commentators alike.[50] The requisition system allows creditors to submit nominations as to who the Master should appoint as provisional trustee or liquidator of an estate – usually within 48 hours of the winding up/sequestration order being made by filing requisition forms with the Master's Office.[51] Requisitions indicate the value of the claim against the estate or property and the creditor's choice of provisional trustee or liquidator, chosen from a list of insolvency practitioners.

75. The Master's Office reviews the requisitions and, once satisfied, usually appoint a provisional trustee or liquidator taking into account guidelines similar to those used in the election of final trustees (i.e. using a weighting of number and value for creditor 'votes'). Once the provisional order has been made, a committee of three persons, the 'Master's Panel' scrutinises requisitions, assesses nominees' suitability and then informs suitable candidates of their nominations. Nominees are required to lodge bonds of security for the estimated value of the estate assets before a certificate of appointment as provisional trustee/liquidator can be issued by the Master. Upon appointment, the provisional trustee/liquidator takes charge of the property until the first creditors' meeting elects a final trustee.

76. The requisition system has not always resulted in the creditors' choice being appointed, the Master utilising it as a guide to his otherwise 'unfettered' discretion.[52] At the same

[50] See, for example Meskin 4.1; *Tshishonga v Minister of Justice and Constitutional Development and Another* [2007] JOL 18875 (T); *Distributive Catering Hotels & Allied Workers' Union v Master of the High Court & others* [2006] JOL 17093 (T).
[51] J C Calitz and D A Burdette 'The appointment of insolvency practitioners in South Africa: time for change? (2006) 4 *TSAR* 721 at 733.
[52] J C Calitz and D A Burdette 'The appointment of insolvency practitioners in South Africa: time for change? (2006) 4 *TSAR* 721 at 733.

time, appointment of creditors' nominees does appear to be the norm[53] and a practice seems to have developed in which provisional liquidators/trustees are not only kept in place for significant periods of time,[54] but also placed in a particularly sought after – and potentially lucrative – position.[55] Moreover, there is some evidence that provisional liquidators became de facto final appointments due, inter alia, to creditor apathy.[56]

77. In 2001 a 'policy' document was circulated which has effectively governed the practice of provisional appointments. This was not a policy within the meaning of the post-2003 legislation (see below), was not tabled before Parliament and was not gazetted. It was also not the first attempt to introduce employment equity-type measures into the appointments' process – there apparently being an earlier document produced in the late 1990s.[57] The 2001 policy sought to ensure previously disadvantaged persons were appointed in insolvent estates as co-liquidators and co-trustees in terms of a 'requisition system'. The 2001 document purported to 'correct the imbalances that exist in the appointment of liquidators and trustees so as to actively advance/empower previously disadvantaged people in line with the Government's policy in this regard'. Policy objectives were to:

(1) address imbalances through a long- and medium-term strategy;

(2) create a uniform procedure in all Master's Offices for the appointment of liquidators and trustees;

(3) make the industry accessible to previously disadvantaged persons; and

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[53] Meskin 4.1.

[54] This appears to vary in different regions. Applicants referred to 220 days on average between winding-up/sequestration orders and calling the first creditors' meeting in Gauteng and approximately 3 months in Cape Town.

[55] Juanitta Calitz and Andrew Boraine 'The role of the master of the high court as regulator in a changing liquidation environment: a South African perspective' (2005) 4 *TSAR* 728 at 732.

[56] Juanitta Calitz and Andrew Boraine 'The role of the master of the high court as regulator in a changing liquidation environment: a South African perspective' (2005) 4 *TSAR* 728 at 732.

[57] J C Calitz and D A Burdette 'The appointment of insolvency practitioners in South Africa: time for change? (2006) 4 *TSAR* 721 at 735.

(4) promote the image and confidence of insolvency practitioners and the Master's Division.

78. The 2001 policy expressly identified 'touting' as a commonplace and 'widely accepted' practice, which was unlawful. This practice was linked with 'Black liquidators [being] largely dependant [sic] on the exercise of the Masters discretionary power to obtain appointments'. In addition to recommending various measures to provide for uniformity, transparency and training, the document outlines procedures to be followed in respect of requisitions, composition of a 'Masters panel' and the 'Masters role in promoting affirmative action appointments'.[58]

79. Whilst the Respondents claim that the requisition system was manipulated to the exclusion of previously disadvantaged persons, and some of the Applicants (for example, Solidarity) acknowledged problems with the system, others, such as SARIPA contended that no evidence has been adduced in support of this claim. One of the problems identified by the Respondents was that commercial creditors 'invariably' nominated white males, leading to a 'skewed situation where major decisions were taken by these liquidators...to the detriment of ordinary and vulnerable workers.' On the Respondents' account, the 'policy documents' issued prior to 2004 were directives designed to 'alleviate the plight of the ordinary workers and to afford them some measure of security

[58] 'Workers or employees' are explicitly identified as creditors; the Master is enjoined to exercise his/her discretion when appointing more than two provisional trustees/liquidators to do so in favour in previously disadvantaged persons; the Master is required to appoint at least one provisional trustee/liquidator from a previously disadvantaged community in all matters concerning estates worth more than R5 million; eligibility to be considered as a previously disadvantaged appointee depends on the individual having equity in the legal entity in which he/she is involved and on at least 30% of equity in that entity being held by previously disadvantaged person; qualifications and experience are to be taken into account in making preferential appointments and a roster system must be used when making discretionary appointments; where not requisitions are made in respect of provisional appointments, the Master is required to favour previously disadvantaged persons and the Master is to 'urge all appointed provisional trustees and liquidators to make use of the services of people from previously disadvantaged communities e.g. lawyers, auditors, auctioneers etc.'

and protection'. The result was lack of uniformity and accusations of favouritism and corruption. CIPA takes issue with this characterisation of the requisition process. CIPA indicates that the 'PDI' (previously disadvantaged individual) system introduced by the 2001 policy has radically changed the position and that workers are neither disadvantaged by the requisition system, nor by the governing legislation.

80. This first attempt to effect transformation in the industry, which preceded the amendments to the Acts formally allowing such intervention, was met with similar criticisms of fettering to those brought in this case.[59] In questioning the requisition system and current practice which has, by placing increasing emphasis on provisional appointments, shifted focus away from creditor meetings, J C Calitz and D A Burdette,[60] writing in 2006, call for change in the thinking on appointments. In doing so, they observe that:

> "considering that the requisition system has been applied in various forms for nearly 30 years, it is almost certain that the more established insolvency practitioners will vehemently oppose the abolition of this system of making provisional appointments. Let us hope then, that the system will be modified in order to make it less susceptible to manipulation, and that it will become an open and transparent method of making appointments on an urgent basis".

THE DEVELOPMENT AND COMING INTO EFFECT OF THE POLICY

81. On 9 July 2004, the Judicial Matters Amendment Act 16 of 2003 came into force. It introduced the office of the Chief Master as executive officer of all Masters' Offices and inserted s 158(2) of the Insolvency Act 69 of 1984; s 10(1A)(a) of the Close Corporations Act 69 of 1984 and s 14(1A)(a) of the Companies Act 61 of 1973 to empower the

[59] J C Calitz and D A Burdette 'The appointment of insolvency practitioners in South Africa: time for change? (2006) 4 *TSAR* 721 at 734.
[60] J C Calitz and D A Burdette 'The appointment of insolvency practitioners in South Africa: time for change? (2006) 4 *TSAR* 721 at 750.

Minister to determine policy, governing all discretionary appointments made by the Master, to 'promote the consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination'.

82. Section 14(1A)(a) of the Companies Act, 1973 was repealed by the Companies Act 71 of 2008. However, paragraph 9, Schedule 5 of the 2008 Act provides that Chapter 14 (sections 337-426) of the 1973 Act continue to apply to the winding-up and liquidation of insolvent companies. Consequently s 158(2) of the Insolvency Act applies to insolvent companies in terms of s 339 of the Companies Act, 1973.

83. Between 2004 and 2009, 'several draft policies' were produced. A third draft appears to have appeared on 23 April 2007 and indicates 'track changes' by Acting Chief Master, Ms Mbeki, dated 23, 28, 29 and 30 May 2007. Further 'track changes' by Acting Chief Master, Mr Bassett, indicate revisions on 26 April, 2 May and 3 May 2009.

84. A meeting was held on 29 September 2010 with representatives from the Association for the Advancement of Black Insolvency Practitioners, the Association of Insolvency Practitioners of Southern Africa and the South African Insolvency Practitioner Society.[61] This meeting resolved that a team of two representatives from each organisation would make written submissions to the Respondents.

85. A further 'workshop' took place on 8-10 December 2010 for insolvency practitioner representatives to 'discuss 18 points tabled by the Department.' This workshop generated a number of recommendations which appear in a February 2013 discussion paper. It

[61] This is now SARIPA.

includes a determination that a team would 'clean up' the Masters' lists; that a BEE approach should be followed based on BEE Codes of Good Practice and the Preferential Procurement Policy Framework and its Regulations; that representatives would obtain 'buy-in' from creditor organisations; that the requisition system should be done away with; that proposals regarding 'issues relating to the location of the business of practitioners and the rotation system' would be tabled by the Department; that appointment criteria would be developed by the Master for inclusion in the policy; that a draft model for traineeship would be considered; that, pending a Master's Ombud, a neutral monitoring body of role-players would be established to monitor appointments; that the policy would provide for the Master issuing directives; that the Master should keep statistics of appointments which would be publically available.

86. The workshop appears to have accepted that 'the interests of creditors [are] taken care of at the first meeting of creditors.' This particular resolution was not specifically denied by the Applicants.

87. Two follow-up meetings are recorded as being held on 17 February 2011 and 3 June 2011.

88. A 2013 Discussion Paper situates any policy to be adopted in the context of 'the Role of insolvency in the economy'; the Public Finance Management Act 1 of 1999; the Consumer Protection Act 68 of 2008; Black Economic Empowerment and the need for improved turnaround in Masters' offices.

89. Insolvency is recognised as a means of 'driving economic development'.

The following paragraphs from the 2013 Discussion Paper elaborate:

'1.21 It is in the interest of the economy and society as a whole that insolvency problems should be solved fairly and efficiently. Insolvencies should be finalised quickly, thereby limiting the time that funds are tied up in insolvent estates. Especially in difficult economic times it is important that money should be available to generate growth and should not be entangled in tiresome and time-consuming procedures.
1.22 Effective, speedy and fair procedures are important needs of stakeholders and formed the basis for the review of the law of insolvency by the South African Law Reform Commission, which recommended new insolvency legislation. This legislation is scheduled to be promoted in the near future.'

90. What is also reflected in the 2013 Discussion Paper are matters with which the Policy does not deal.

91. There are some important 'guiding principles' reflected in the 2013 Discussion Paper. I highlight those of relevance to the issues raised in these applications:

3.2 (a) The authority to determine policy is <u>limited to the wording of the legislation or matters included in the wording by clear or necessary implication. The Policy cannot change the law outside the authority given to the Minister by the legislation.</u>

(b) The Policy is limited to the appointment of insolvency practitioners in order to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination. <u>The legality of the Policy may be questioned or the focus of the Policy may be lost if it deals with unrelated matters</u>.

(c)...The Policy should not be arbitrary, haphazard or random.

(d) The Policy is a first step to move away from rules based on the advancement of previously disadvantaged individuals (PDI) towards Black Economic Empowerment.

(e) The Chief Master's Directive relating to the Policy should not deal with matters reserved for the Policy or duplicate the Policy. They should deal with practical matters and matters of form in order to implement the Policy.

92. The Discussion Paper lists the following consultation workshops:

(1) Stakeholders' Meeting – 7 December 2006

(2) Masters' Lekgotla – March 2007

(3) Workshop with insolvency bodies - 8-10 December (and follow-up meetings)

(4) Invitation to comment on draft Policy – 20 December 2011

(5) Invitation to comment on draft Policy – 18 January 2012

(6) Consultative meetings – 29 March 2012 (Cape Town); 30 March 2012 (Durban); 3 April 2012 (Pretoria).

93. The Respondents list the following additional interactions leading up to the adoption of the Policy:

(1) Joint meeting with representatives bodies of insolvency practitioners and attorneys and accounts' representative bodies – 3 October 2012.

(2) Discussion and tabling of draft policy at Direct General Clusters for the Economic Sector and Employment Cluster and Justice Crime Prevention and Security Cluster – no date provided.

(3) Revised draft Policy sent to Chief State Law Advisors for input and comment – no date provided.

(4) Draft Policy tabled in Parliament.

94. The Policy was intended to come into effect on 31 March 2014.

THE NATURE OF THE POLICY

95. Given my findings, little turns on whether the Minister's formulation of the Policy is administrative or executive action. However, due to the framing of the Applicants' challenges, it is necessary to determine whether the formulation of the Policy is administrative action with the meaning of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

96. SARIPA challenges the Policy as an irrational and unlawful exercise of the Minister's executive power. In the alternative, SARIPA argues that the formulation of the Policy constitutes unlawful administrative decision.

97. By contrast, the Applicants in the Gauteng matter have brought their challenge in terms of PAJA, arguing that the Policy is ultra vires,[62] irrational,[63] unreasonable,[64] unlawful[65] and based on reasons other than those authorised by the legislation.[66]

98. The Respondents regard the Minister's actions as an exercise of executive power in terms of s 85(2)(b) of the Constitution. As such, they argue that his actions are excluded from administrative review.[67]

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62 PAJA s 6(2)(a)(i)-(ii) and 6(2)(f).
63 PAJA s 6(2)(f)(ii).
64 PAJA s 6(2)(h).
65 PAJA s 6(2)(i).
66 PAJA s 6(2)(e)(i)-(iv).
67 PAJA s 1(i)(b)(aa).

99. I am inclined to agree with the submission that the Minister's formulation of the Policy constitutes an exercise of executive power. .

100. Distinguishing administrative from executive or legislative action is not always easy and is to be decided on a case-by-case basis.[68] Rather than establishing a strict test, the Constitutional Court has described a continuum of action between legislative or executive powers at one extreme and administrative power at the other. In Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (Section 21) Inc,[69] on which NAMA relies, the issue was whether a policy governing the funding, determination and allocation of subsidies was administrative or legislative action. The Constitutional Court held that the subsidy formula was determined within the limits of the Schools Act 84 of 1996 and thus constituted administrative action.[70] The Court held that:

> 'Policy may be formulated by the Executive outside of a legislative framework....The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the Executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action.'[71]

101. It is this dictum on which NAMA relies. However a further dictum from that case comes nearer to deciding the current matter:

> "The determination of the precise criteria or formulae for the grant of subsidies does contain an aspect of policy formulation but it is policy formulation in a narrow rather than a broad sense. The decision apparently constitutes a broad policy decision because it purports to determine how the allocated budget is to be distributed and not

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[68] cf. *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) at [143] (hereinafter '*SARFU'*); *Minister of Defence and Military Veterans v Motau and Others* 2014 (8) BCLR 930 (CC) at [36] (hereinafter '*Motau*').
[69] 2001 (2) SA 1(CC).
[70] Ibid at [16].
[71] Ibid at [18].

> the amount to be given to each school. However, on closer scrutiny it is in fact not so broad because the MEC determines not only the formula but also in effect the specific allocations to each school. This case may be close to the borderline. However, I am persuaded that the source of the power, being the legislature, the constraints upon its exercise and its scope point to the conclusion that the exercise of the s 48(2) power constitutes administrative action, not the formulation of policy in the broad sense..."[72] (emphasis added).

102. In the matter before me, I have indeed been faced with a policy that purports to prescribe both a broad formula, and a precise allocation. However, in determining the source of the Minister's power, it is necessary to have regard not to the Policy itself (which is being impugned), but to the source of the power exercised by the Minister and whether it concerns policy in the broad or narrow sense. The principle from Ed-U-College applies equally to the distinction between executive and administrative power.

103. The case of Minister of Defence and Military Veterans v Motau and Others[73], required just such a distinction. The Constitutional Court held that:

> 'the fact that a functionary performs a certain act in terms of an empowering legislative provision does not, without more, mean that the functionary is implementing legislation' ....[74]
>
> ...administrative powers usually entail the application of formulated policy to particular factual circumstances. Put differently, the exercise of administrative powers is policy brought into effect, rather than its creation.'[75]

104. A decision more closely related to the <u>formulation</u> of policy is more likely to be executive, whilst that which is closer to the <u>application</u> of policy is more likely to prove administrative.[76] Ancillary factors which should be utilised with caution and in context

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[72] Ibid at [21].
[73] 2014 (8) BCLR 930 (CC).
[74] Ibid at [31]-[32].
[75] Ibid at [37].
[76] Ibid at [38].

include: the source of the power; constraints imposed on the power and whether the exacting scrutiny of administrative review is appropriate to the particular exercise of the power.[77]

105. What is required in each case is to examine the provision conferring the power in question. I thus have regard to the amendments made by the Judicial Matters Amendment Act in respect of the Insolvency and Close Corporations Acts.[78] The Judicial Matters Amendment Act introduced s 158(2) into the Insolvency Act. For convenience, I repeat section 158:

> '158. Regulations and policy
>
> (1) The Minister may from time to time make regulations not inconsistent with the provisions of the Act, prescribing –
>
> (a) the procedure to be observed in any Master's office in connection with insolvent estates;
>
> (b) the form of, and manner of conducting proceedings under this Act;
>
> (c) the manner in which fees payable under this Act shall be paid and brought to account.
>
> (2) The Minister may determine policy for the appointment of a curator bonis, trustee, provisional trustee or co-trustee by the Master in order to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination.
>
> (3) Any policy determined in accordance with the provisions of subsection (2) must be tabled in Parliament before publication in the Gazette.'

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[77] Ibid at [39]-[44]; cf. *Pharmaceutical Manufacturers Association of SA and another: in re ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) (hereinafter *'Pharmaceutical* Manufacturers') at [76] and [79] for an example of the same factors being used in distinguishing administrative from legislative power.

[78] The relevant provisions of the Insolvency Act apply also to the Companies Act.

106. Prior to the amendments made by the Judicial Matters Amendment Act, s 158 was titled only 'Regulations' and included only subsection (1). Subsection (1) clearly deals with specific administrative procedures and processes. By contrast, subsection (2) concerns 'policy', which is described in broader terms than the permissible categories of regulations listed in subsection (1). A similar scheme is found in s 10 of the Close Corporations Act, which provides for regulations dealing with procedures and tariffs in s 10(1) and the relevant policy determination in s 10(1A). It should be noted that the legislature did not understand the power to formulate policy as falling within s 10(1)(n) which provides for regulations made 'as to any other matter required or permitted by this Act' or s 10(1)(o) which provides for regulations 'generally, as to any matter which he or she considers it necessary or expedient to prescribe in order that the purposes of this Act may be achieved'. The fact that the legislature did not merely add a category of permissible regulations to the Minister's powers under subsection (1) of either Act but saw fit to grant the Minister powers to determine policy suggests that what was envisaged was something other than a power concerned with procedures for implementing legislation. The schemes of the two Acts thus suggests that the power granted by s 158(2) and s 10(1A) concerns the Minister's power to 'develop and implement national policy' in terms of s 85(2)(b) of the Constitution. As such it does not constitute administrative action.

107. This does not, however, mean that the Minister's exercise of power is not subject to the requirements of legality and rationality.[79] This the Respondents, quite properly, accept.

[79] P*harmaceutical Manufacturers* at [89].

DOES THE POLICY UNLAWFULLY FETTER THE MASTER'S DISCRETION?

108. It is not in issue that an exercise of discretion, such as the making of an appointment, by the Master is not lawfully made if it is a result of a rigid and inflexible policy.[80]

109. The Applicants argue that the Policy unlawfully fetters the Master's discretion in making appointments of provisional liquidators in terms of s 18(1) of the Insolvency Act. CIPA, NAMA and Solidarity point specifically to the rigidity of the policy and the failure of the Policy to take account of creditors' views in the appointments' process. The Respondents deny that the Policy unlawfully fetters the Master's discretion to appoint, relying on the discretionary space provided for by clause 7.3. They accept that if clause 7.3 does not provide for the appropriate exercise of discretion, the Policy falls outside the purview of s 158(2) and the Constitution, and is invalid.

110. The relevant clauses of the Policy read:

> '7.1 Insolvency practitioners must be appointed consecutively in the ration A4: B3: C2: D1....
> 7.2 Within the different categories on a Master's List, insolvency practitioners must, subject to paragraph 7.3, be appointed in alphabetical order.
> 7.3 The Master may, having regard to the complexity of the matter and the suitability of the next-in-line insolvency practitioner but subject to any applicable law, appoint a senior practitioner jointly with the junior or senior practitioner appointed in alphabetical order....
> 7.4 If an insolvency practitioner due for appointment in accordance with the alphabetical list of names in a specific category on the Master's List –
> (a) fails to lodge a bond of security in time, the next insolvency practitioner on the Master's List must be appointed, and the person determined previously is moved to the back of that list; or
>
> (b) satisfies the Master that he or she has a conflict of interest or a conflict of interest arises after the appointment, the next-in-line insolvency practitioner

[80] The Master may not simply act as a rubber stamp; *National Lotteries Board v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at [9].

must be appointed, and the person determined previously is considered for appointment when the next appointment in that category is made".

111. The first dispute concerns how clause 7.3 should be understood. SARIPA contends that where the Master, having had regard to the 'complexity of the matter and suitability of the next-in-line insolvency practitioner' determines that a joint-appointment is necessary, the senior practitioner appointed must be the next-in-line senior practitioner as determined by the roster.

112. As I understand their argument, the Respondents adopt a wider and more flexible interpretation of clause 7.3, arguing that the senior practitioner appointed need not be the next-in-line on the roster. According to the Respondents, this discretion to appoint any senior practitioner jointly with the next-in-line practitioner (be he or she junior or senior) having regard to his or her suitability and the matter's complexity 'saves' the Policy from the charge of unlawfully fettering the Master's discretion.

113. This wider interpretation would lead to application of the Policy in a manner that was neither rigid, nor inflexible.

114. I am of the view that the Respondents' interpretation of the provision is to be preferred. Clause 7.2 does require the Master to appoint insolvency practitioners in alphabetical order. This is made 'subject to' clause 7.3. On an ordinary, grammatical reading, this means that clause 7.2 is subservient to clause 7.3. Clause 7.3 allows the Master, subject to 'any applicable law', to have regard to the matter's complexity and the next-in-line practitioner's suitability. The latter, read in context, no doubt refers to 'suitability for the particular matter'. The Master then may determine that a 'joint

appointment' is necessary and appoint 'a' senior practitioner with the 'junior or senior practitioner appointed in alphabetical order' (as per clause 7.2). Such joint-appointee need not be selected alphabetically.

115. This interpretation, however, does not resolve the question as to whether the band of discretion left to the Master is sufficiently unfettered to prove lawful.

Unlawful Fettering

116. The need for certainty and sufficient guidelines for decision-makers must not result in policy that enters the realm of regulation by pre-determining outcomes in particular circumstances and micro-managing implementation.[81] As noted by O'Regan J in Dawood and another v Minister of Home Affairs and others; Shalabi and another v Minister of Home Affairs and others; Thomas and another v Minister of Home Affairs and others:[82]

> 'Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary.' At times they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made. There is nothing to suggest that any of these circumstances is present here.'[83]

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[81] cf. *Minister of Education v Harris* 2001 (4) SA 1297 (CC) at [11]-[12]; *Kemp and Others v Van Wyk and Others* [2008] 1 All SA 17 (SCA) at [1], [10]; *MEC for Environmental Affairs & Development Planning v Clairison's CC* 2013 (6) SA 235 (SCA) at [32].
[82] 2000 (3) SA 936 (CC).
[83] at [53].

117. Courts have recognized that the discretion must be recognized and that the guidance given must not constitute a constraint to be applied rigidly and inflexibly in any case.[84]

118. The Constitutional Court in Arun Property Development (Pty) Ltd v City of Cape Town[85] endorsed the view that policy 'serves as a guide to decision-making and may not bind the decision-maker inflexibly',[86] holding that 'Policy is not legislation but a general and future guideline for the exercise of public power by executive government. Often, but not always, its formulation is required by legislation. The primary objects of a policy are to achieve reasonable and consistent decision-making; to provide a guide and a measure of certainty to the public and to avoid case-by-case and fresh enquiry into every identical request or need for the exercise of public power'.[87]

119. The Respondents state that the Policy was promulgated to provide the necessary Dawood guidelines to the Master and to prevent the situation of almost completely unfettered discretion that has existed in the Masters' Offices in respect of appointments of provisional liquidators. This is in accordance with the governing legislation and is thus permissible. The Applicants argue that the Policy unlawfully fetters the discretion of the Master.

The Master's exercise of discretion

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[84] *National Lotteries Board v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at [9]
[85] CCt 78/14) [2014] ZACC 37 (15 December 2014) at [45].
[86] para 46. See also *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management and others* 2006 (2) SA 191 (SCA) at [9].
[87] at [47]. See also *MEC of Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another* 2006 (5) SA 483 (SCA) at [9] which recognises that policy guidelines can be adopted to 'assist decision-makers in the exercise of their discretionary powers...particularly...where the decision is a complex one requiring the balancing of a range of competing interests or considerations, as well as specific expertise on the part of the decision-maker' and *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) at [7].

120. Whilst the Master's discretion has been described as 'unfettered',[88] this is not entirely accurate. As a 'creature of statute'[89] the Master may only exercise discretion within the limits of the legislation governing the appointments of provisional liquidators.[90] Further, any decision made by the Master is subject to the requirements of PAJA.[91] Such limits are not disputed by the Applicants. However, they argue that the Master has, and must be allowed to exercise, wide discretion in respect of which individuals he appoints for particular matters. As part of this determination, the Master must be able to take note of individual qualities other than race and gender as well as the wishes of creditors in making particular appointments.

121. It is so that the courts have endorsed the suggested wide discretion of the Master. The Gauteng Division, Pretoria, has ruled that 'no judge of the High Court of South Africa has authority or jurisdiction to effect any appointment of any person to [the positions of provisional and final liquidators]…nor to make any recommendations to the master in respect of any appointment to any of these positions'.[92] This ruling, however, cannot be applied automatically to the relationship between the Minister's Policy and the Master's appointments. The legislation explicitly subjects the Master's decision-making concerning appointments to Ministerial policy. No equivalent provision authorizes court interference in appointments.

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[88] *Lipschitz v Wattrus* 1980 1 SA 662 (T) at 671G.
[89] *The Master v Talmud* 1969 1 SA 236 (T); *De Lange v Smuts NO* 1998 (3) SA 785 (CC) at 853.
[90] *Lipchitz v Wattrus* 1980 1 SA 662 (T) at 672C. Further, S 2(1)(b)(ii) of the Administration of Estates Act 66 of 1965 provides that the *Chief Master* is 'subject to the control, direction and supervision of the Minister.'
[91] *Ex Parte the Master of the High Court of South Africa (North Gauteng)* 2011 (5) SA 311 (GNP) at [32].
[92] *Ex Parte the Master of the High Court of South Africa (North Gauteng)* 2011 (5) SA 311 (GNP) endorsed by *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and others* 2012 (3) SA 325 (SCA).

122. Section 368 of the Companies Act and s 18(1) of the Insolvency Act provide that the Master 'may' appoint a provisional liquidator/trustee – this contrasts with the peremptory requirement that the Master 'shall' appoint nominated persons as final liquidators (Companies Act s 369). The Master may decline to appoint nominated persons as liquidators on grounds specified in s 370(1), including 'if in the opinion of the Master the person nominated as liquidator should not be appointed as a liquidator of the company concerned'. This, according to Meskin et al[93] suggests a wide discretion. In the last instance, the Master 'shall' appoint someone of his own selection.[94] The Master has discretion 'whenever [he/she] considers it desirable…[to] appoint 'any person not disqualified from holding the office…as co-liquidator'.[95] Where vacancies arise, the Master has discretion not to fill the vacancy if he or she is 'of the opinion that the remaining liquidator or liquidators will be able to complete the winding-up'.[96] The Master exercises further control over liquidators/trustees by being empowered to grant permission to be absent from the Republic for more than 60 days and to impose conditions on such permission and can permit a liquidator to resign or direct him/her to do so.[97] Masters may remove liquidators/trustees from office;[98] resolve disputes between co-liquidators[99] and increase or decrease remuneration of liquidators.[100] All of this indicates that the relevant legislation provides the Master with wide powers in managing liquidators/trustees and the winding-up process. This is certainly an indicator of the granting of wide discretion.

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[93] P M Meskin, B Galgut, PAM Magid, JA Kunst, A Boraine, DA Burdette 'Chapter 4: Trustees and liquidators' Insolvency Law SI-42 June 2014 at [4.24].
[94] Companies Act s 370(3).
[95] Companies Act s 374; Insolvency Act s 57(5.)
[96] Companies Act s 377(1).
[97] Companies Act s 378; Insolvency Act s 61.
[98] Companies Act s 379; Insolvency Act s 60.
[99] Companies Act s 383; Insolvency Act s 15(7).
[100] Companies Act s 384(2); Insolvency Act s 63.

123. Significantly, the remedy for aggrieved persons in respect of appointments of trustees/liquidators includes reconsideration by the Minister as final arbitrator[101] – however, this applies only to trustees elected by the creditors and thus does not apply to provisional trustees.[102]

124. This regime strongly supports the notion that the scheme of the Act requires appointment decisions to be taken first and foremost by the Master – and not by the Minister. The consequence of this is that the Policy envisaged by the legislation may not pre-determine the Master's appointments' decisions.[103]

125. Moreover, if regard is had to the objectives of the policy provided for by s 158(2), the language used suggests a wider and more general policy determination than one which prescribes specific appointment formulae. Even on a generous interpretation[104] given to Clause 7.3 of the Policy, the Policy appears to go beyond the setting of guidelines and to intrude impermissibly into the Master's ability to apply his mind to the making of each appointment.

126. Critically, clause 7.3 on any interpretation does not 'cure' the Policy of overly restricting the Master's ability to make 'suitable' appointments. This is a specific

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[101] Companies Act s 371; Insolvency Act s 57(7)-(9)

[102] P M Meskin, B Galgut, PAM Magid, JA Kunst, A Boraine, DA Burdette 'Chapter 4: Trustees and liquidators' Insolvency Law SI-42 June 2014 at [4.1] and [4.2] with reference to *Minister of Justice v Firstrand Bank Limited and Others* [2004] 1 All SA 268 (SCA) at 272–274.

[103] At the same time, it is important to note two cases in which the Gauteng High Court held the Master liable for failing to comply with what are described as 'policy directives' (cf. *Distributive Catering HoteIs & Allied Workers' Union v The Master of the High Court and Others* [2006] JOL 17093 (T); *SACCAWU v Master of the Supreme Court* [2007] 4 All SA 1034 (T).) As Meskin et al point out, the 'policy' referred to in these cases was not a Policy within the meaning of s 158(2). I note these judgments in order to illustrate the extensive inroads Ministerial Policy may make into the Master's exercise of discretion (P M Meskin, B Galgut, PAM Magid, JA Kunst, A Boraine, DA Burdette 'Chapter 4: Trustees and liquidators' Insolvency Law SI-42 June 2014 at [4.1] fn 9A).

[104] In interpreting the Policy, I have attempted to find a valid one if I could following the constitutional injunction to adopt any reasonable interpretation that protects rather than sets aside governmental action.

requirement of s 368 of the Companies Act and, whilst absent from s 18(1) of the Insolvency Act, it is clear from the evidence, in addition to the overall scheme of the legislation, that 'suitability' must at a minimum, be evaluated in relation to the function of winding-up an estate in order to realize maximum value for creditors, and in society's best interests.

127. The formula provided for by the Policy allows insufficient scope for the Master to balance practitioners' race, gender and years of experience on the one hand, with their industry-specific knowledge and expertise on the other. To disallow such considerations in appointment of provisional liquidators is inconsistent with the Master's oversight role in respect of final liquidators. Whilst the parties have specifically contested the Policy in relation to provisional trustees and liquidators, the Policy comparably applies also to final liquidators. A system which makes use of a strict roster is out of keeping with the discretion required by the Master in s 370 of the Companies Act and s 57 of the Insolvency Act.

128. In light of the above, I thus find that the rote alphabetical system set up by the Policy unlawfully fetters the Master's discretion.

LEGALITY AND RATIONALITY

129. The exercise of all public power, such as determining the Policy, must be in conformity with the Constitution and the doctrine of legality. The Constitution requires that public officials are accountable, responsive and transparent and thus must both act

within the ambit of the powers conferred on them and make justifiable and rational decisions.[105]

130. Rationality is a requirement of the exercise of all public power, including the adoption of measures under s 9(2) of the Constitution. This 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.[106]

131. The Applicants contend that the Policy does not bear a rational relationship to the objective of transforming the insolvency industry. CIPA challenges the feasibility of implementation due to existing delays in the Gauteng Masters' offices and disorganisation of the lists. In addition, the Applicants question the rationality of the decision-making behind the Policy's design, given the data apparently relied upon by the Minister. Of further concern to the Applicants is the Master's insistence that the Policy only affects provisional appointments, when it deals with all discretionary appointments – including those made after the first creditors' meeting.

132. The Respondents rely on Democratic Alliance v President of the Republic of South Africa and Others[107] to argue that the rationality of the steps taken in making the decision must be examined. They list a series of consultation meetings and workshops between 2006 and 2013 in addition to invitations for comment to establish the needs of the insolvency industry. Interested parties were invited and a task team established to assist in formulation of the policy. The Respondents say that the Policy was circulated in draft

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[105] *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) at [66].
[106] *Merafong* para 62; *SA Predator Breeders Association v Minister of Environmental Affairs and Tourism* [2011] 2 All SA 529 (SCA) at [28].
[107] 2013 (1) SA 248 (CC) at [36]-[37].

form to insolvency practitioners, banks, professional bodies, creditor organisations, NEDLAC, the Director General Cluster, the Chief State Law Advisors and, ultimately, approved by Cabinet. Further, the draft policy was tabled in Parliament and gazetted on 7 February 2014. On this basis, they contend that the process followed was rationally related to the purpose of the power and that the impugned Policy is thus rational. The Respondents, moreover, indicate that directives issued by the Masters Offices have set in motion mechanisms which will ensure that the Policy can be smoothly and efficiently implemented. This includes a process to 'clean up the list' of insolvency practitioners. They further submit that gradual implementation is not necessary and does not prove the irrationality of the measure.

133. In assessing the rationality of the Minister's actions, an objective standard must be adopted and courts must be careful not to 'substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested'.[108] At the same time, the courts have held that a rational decision requires a minimum regard to 'relevant factors' brought to the knowledge of the decision-maker.[109] Rationality relates to both the procedure and substance of the decision. Rationality is also implicated in the equality enquiry. I address these arguments together.

DOES THE POLICY FALL FOUL OF THE EQUALITY CLAUSE?

134. It is not in issue that the Policy is designed to be a 'remedial measure' within the meaning of s 9(2) of the Constitution and implicates the right of every citizen to pursue their career of choice, trade or profession subject to the operation of law in terms of s 22 of the Constitution.

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[108] *SA Breeders* para 90; see also *Merafong Demarcation Forum and others v President of the Republic of South Africa and others* 2008 (5) SA 171 (CC) at [63].
[109] *Democratic Alliance* at [108].

135. The Applicants contend that the Policy does not meet the requirements of a remedial measure in terms of the three-part test laid down in Van Heerden.[110] This requires that a measure:

(1) targets a particular class of persons who were subject to unfair discrimination;

(2) is designed to protect or advance those classes of persons; and

(3) promotes the achievement of equality.

136. If the Policy passes this test, it is neither presumed to be fair, nor presumed to be unfair. It can however be challenged in terms of lawful implementation which requires, at a minimum, that it be rationally implemented.

137. Whilst the Applicants have impugned the Policy itself and not its implementation, extensive submissions were made to demonstrate that the Policy could not be rationally implemented. This, it was submitted, adds force to the challenge that the Policy does not meet the required constitutional standard of a remedial measure. Further support for the unlawfulness of the Policy was offered in the submission that the Policy impermissibly makes use of a quota system. I consider the issue of quotas insofar as it relates to the rationality requirement inherent in the second leg of the Van Heerden test.

138. There appears to be no real dispute over the need to transform the insolvency industry, nor over the Policy's objective in targeting classes of persons who have been subject to unfair discrimination.

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[110] at [1]; cf. *Barnard* at [36].

139. What is disputed is whether the Policy adopts a rational formulation which is capable of meeting this objective and promoting the achievement of equality.

140. Accordingly, I focus on the second leg of the Van Heerden test. It is forward-looking. Whilst the second leg focuses on the effect of the Policy on disadvantaged groups, the third necessarily adopts a wider view which requires consideration of the implications of the Policy for both those it seeks to advance and those groups which will not be so protected or advanced.

The Respondents conceded that if the Policy did not meet the test applicable to s 9(2) measures then it is to be regarded as unconstitutional and invalid.

141. The Respondents further conceded that if the Policy made use of quotas, it could not be a valid remedial measure.

Does the policy target a class of people who have been unfairly discriminated against?

142. This is not disputed. The objective of the policy is to 'promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination'.[111] This objective repeats the wording of the Judicial Matters Amendment Act and s 158(2) of the Insolvency Act, s 10(1A)(a) of the Close Corporations Act and s 339 of the Companies Act. The Policy is 'intended to form the basis of the transformation of the insolvency industry'[112] and expresses the Minister's commitments to, amongst others 'addressing the imbalances of the past and transforming the insolvency industry'; 'making the insolvency industry accessible to individuals from

[111] Policy cl 2.
[112] Policy cl 3(b).

previously disadvantaged communities' and 'promoting the objectives of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003) (BBBEE Act), by empowering insolvency practitioners who are previously disadvantaged individuals'.[113] The categories used in the Policy derive from the BBBEE Act s 1 but also include Chinese persons. The latter is a response to the ruling in Chinese Association of South Africa v Minister of Labour[114] that Chinese persons fall within the definition of 'black people' in the Employment Equity Act 55 of 1998 (EEA). Whether the Policy in fact is capable of achieving this object is the subject of the second inquiry.

Is the Policy designed to protect or advance these disadvantaged groups?

143. In Van Heerden, the Constitutional Court elaborated on the proper enquiry as follows:

> 'In essence, the remedial measures are directed at an envisaged future outcome….[T]hey must be reasonably capable of attaining the desired outcome. If the remedial measures are arbitrary, capricious or display naked preference, they could hardly be said to be designed to achieve the constitutionally authorized end. Moreover, if it is clear that they are not reasonably likely to achieve the end of advancing or benefiting the interests of those who have been disadvantaged by unfair discrimination they would not constitute measures contemplated by s 9(2).'[115]

144. Argument was directed at both the Policy's rationality and whether it was likely to improve the position of previously disadvantaged persons. Submissions concerning the latter focused on the effects of shifting from the requisition system to the system under the Policy. This case is not concerned with the merits or otherwise of the requisition system which was accepted by all the parties as unauthorized by the legislation and not a policy within the meaning of the legislation. However, in assessing whether the Policy is likely to benefit those it targets, logic requires that I have regard to the status quo.

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[113] Policy cl 4(a), (c) and (d).
[114] Case No 59251/2007) (TPD).
[115] at [41].

Co-appointees or only provisional appointments?

145. SARIPA submitted that under the requisition system, previously disadvantaged persons are assigned to every matter. This was not accepted by the Respondents. It was, however, common cause that previously disadvantaged persons are appointed as co-trustees in all matters over R5 million.[116] Because the Policy is applicable to co-appointments and replaces all previous policies and guidelines, there is no longer any guarantee of persons from targeted groups benefiting from appointments to large estates. It may well occur, for example, that the 'next in line' on the roster is not a previously disadvantaged person.

146. The Respondents deny that this is an effect of the Policy, maintaining that the Master retains his/her discretion in making co-appointments and that the Policy applies to provisional appointments only.

147. I am inclined to agree with the Applicants that this is a worrying interpretation of the Policy and a possible indicator that it is not rationally related to its purpose. The text of the Policy clearly refers to sections 54(5), 57(4) and 57(5) of the Insolvency Act; sections 370(3)(b) and 374 of the Companies Act and sections 66(1) and 76(3)(b) of the Close Corporations Act. These provisions clearly concern discretionary appointments which are not provisional and include co-appointments.

148. Assuming for the sake of argument, that the Policy does affect only provisional appointments, the question remains whether it is capable of advancing the interests of

[116] cf. J C Calitz and D A Burdette 'The appointment of insolvency practitioners in South Africa: time for change?' (2006) 4 TSAR 721. At 736 '…the master continues to apply what seems to be a revised policy document making provision for the appointment of PDIs in all estates (not only those in excess of R5 million), and which does not recognize white women as previously disadvantaged individuals.'

previously disadvantaged persons and of remedying the mischief identified by the Respondents.

149. The Respondents claim that, by intervening in appointments at the provisional stage, the Policy will provide previously disadvantaged persons with exposure enabling their development of the skill, knowledge and reputation necessary to build successful insolvency practices. The Respondents reason that if individuals are given the opportunity to demonstrate their ability at the provisional stage, creditors will ultimately nominate these persons as 'final' trustees. This, in turn, will gradually transform the distribution of work so that practitioners of all races and genders receive equitable numbers of creditor nominations.

150. There are a number of difficulties with this argument on the facts adduced, both as a matter of logic and as a matter of law. I expressly do not comment on whether this is the best possible plan that could be adopted as that is not for the court to decide.

151. For the Policy to pass muster as a lawful remedial measure, the Minister's reasoning and evidence is critical to identifying whether the system adopted is rationally related to its purpose and reasonably capable of achieving the envisaged outcome. This is a requirement that extends beyond the 'remedial measure' test to the exercise of all public power.

<u>Can intervention in provisional appointments achieve the Policy's stated objective?</u>

152. A number of assumptions underpin the Respondents' reasoning.

153. The first is that because all persons on the Masters' list are qualified as insolvency practitioners, all are equally suitable for all appointments. The second is that a provisional appointment and the exposure it facilitates will provide scope for previously disadvantaged persons to acquire the skill necessary to develop successful practices and generate creditor confidence. A third assumption is that creditor behaviour will change as a result of more previously disadvantaged persons being appointed as provisional liquidators/trustees. This in turn will lead to creditors electing increasing numbers of persons from targeted groups. The final relevant assumption is that the sole cause of corrupt practices in the appointments process is the discretion afforded the Master. Consequently, a non-discretionary roster will ensure transparency, consistency and fairness.

154. The Applicants contend that, because the strict roster system explicitly prevents the Master from having regard to the skills, knowledge, expertise and industry knowledge of appointees, 'unsuitable' provisional liquidators may be assigned to particular estates. Rather than improving creditor confidence, this is likely to achieve the opposite and merely entrench current nomination patterns. The Respondents deny this flaw, pointing out that all insolvency practitioners who will be included in the roster are 'qualified'. It is clear, however, from the evidence that there is a distinction between 'qualification' and 'suitability'.[117]

155. Section 368 of the Companies Act makes specific reference to appointment of 'any suitable person as provisional liquidator'. This wording is not repeated in the Insolvency

[117] It is not hard to imagine the difference. A liquidator experienced in companies dealing with perishable goods, such as butchenes or vegetable markets, may not be suitable for the liquidation of a car-sales company, which has a high stock value at any one time.

Act. However s 60, which deals with 'Removal of trustee by Master' distinguishes between 'qualification' in s 60(a) and being 'no longer suitable to be the trustee of the estate concerned' in s 60(b).[118] These provisions are repeated in s 379 of the Companies Act. Suitability is also required by s 74 of the Close Corporations Act which, it is common cause, applies to the appointments discussed here. Whilst 'qualification' is defined in s 55 and s 372 of the Insolvency and Companies Acts,[119] suitability is not defined. Calitz and Burdette maintain that 'suitable' means 'an independent person who is able to discharge the responsibilities of such office competently, honestly and impartially'.[120] The Applicants contend, however, that suitability relates to a proper match between the sector-specific expertise of an individual practitioner and the estate he or she is required to administer. Section 60 provides textual support for this view, which is in line with the World Bank Principles and Guidelines for effective insolvency and creditor rights systems (2001).[121] Amongst the considerations listed in the World Bank Guidelines is that insolvency practitioners should 'be competent to undertake the particular insolvency case and be knowledgeable about the nature and scope of their duties'.

156. The Policy cannot, in forming the basis for 'transformation of the insolvency industry', change a feature of the industry's regulatory framework which requires a proper match between liquidator/trustee and a particular estate.

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[118] Other grounds for removal include failure to deliver satisfactory performance or comply with Master's demands; mental or physical incapacity and request by the majority of creditors for removal.
[119] Respectively read with s 59 of the Insolvency Act and s 373 of the Companies Act.
[120] J C Calitz and D A Burdette 'The appointment of insolvency practitioners in South Africa: time for change?' (2006) 4 TSAR 721 with reference to *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); *Exparte Clifford Homes Construction (Pty) Ltd* 1989 4 SA 610 (W) 614; *Krumm v The Master* 1989 3 SA 944 (D).
[121] cited in Juanitta Calitz and Andre Boraine 'The role of the master of the high court as regulator in a changing liquidation environment: a South African perspective' (2005) 4 *TSAR* 728 at 734.

Failing to account for suitability in this sense is to overlook the fiduciary position of a trustee/liquidator and the consequent need to ensure that more than minimum criteria apply when entrusting insolvency practitioners with the duties of winding up an insolvent estate.

Insofar as the Policy aims to make the insolvency industry accessible to previously disadvantaged individuals, it needs to do more than increase numbers, but ensure that there can be a match between individual skill and the requirements of the role within the system provided for by legislation. Playing a 'numbers game' goes no further than formal equality which is not lawful affirmative action as contemplated by the Constitution, and which is not the purpose behind the constitutional recognition of valid remedial or advancement measures.[122]

157. Illustrative of this problem is the Applicants' concern that the roster system is likely to have a negative effect on those previously disadvantaged persons who have managed to establish themselves in the industry. They contend that a Policy that aims to promote the interests of previously disadvantaged persons should reward skill and excellence. It is also evident that a system that randomly assigns appointments is unlikely to assist people in building up sector-specific expertise.

158. The notion of rewarding excellence is certainly in keeping with the tenure of broad-based black economic empowerment and integral to the notion of 'empowerment'. The Constitutional Court has noted explicitly, that the Employment Equity Act '...sets itself against the hurtful insinuation that affirmative action measures are a refuge for the

122 *Allpay Consolidated Investment Holdings (Pty) Ltd And Others v Chief Executive Officer, South African Social Security Agency, And Others* 2014 (1) SA 604 (CC) at [55]

mediocre or incompetent. Plainly, a core object of equity at the workplace is to employ and retain people who not only enhance diversity but who are also competent and effective in delivering goods and services to the public'.[123] What is required for a remedial measure to be constitutionally compliant is thus not identical treatment but whether it 'serves to advance or retard the equal enjoyment in practice of the rights and freedoms that are promised by the Constitution' and its effect on the 'sense of self-worth of those affected by it'.[124]

159. In the context of the right to practice one's profession, this approach suggests that a remedial measure needs to operate in a progressive manner, assisting those who, in the past were deprived of the opportunities to access the relevant social goods necessary to enter the insolvency profession to do so now. In the 2013 Discussion Paper which preceded formulation of the Policy, the need for a more comprehensive programme, including training and skills-development was acknowledged. Without any, let alone a proper, explanation offered to the Court, it is difficult to understand how the implementation of a roster which appears to favour formal equality, is a rational response to such preparatory materials and identified needs.

160. It is also perhaps worth noting that the Policy has no 'expiry date' beyond which those persons who have built up their practices are able to compete equitably in the field. First, this directly counters the notion of empowerment as increasing skill and expertise.

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[123] *Barnard* at [41]; cf. also the judgment of Cameron J; Froneman J; Majiedt AJ para 110: 'If the widely used term "affirmative action" means anything, it recognizes that we may have to make an extra effort to find and support those capable persons, who may not brandish the traditional signs of successful candidates. But if decision-makers continually disregard talented candidates while searching for capable individuals from disadvantaged backgrounds, it creates the false impression that the candidates who are eventually chosen are not as capable as those who are rejected. This impression injures the dignity not only of the candidates who are rejected, but also of the candidates who are appointed'.

[124] Sachs J in *Van Heerden* at [142] and [146].

Secondly, at a theoretical level, this mitigates against an increase in management, ownership and control of processes by 'black persons' as well as equity in the context of market competition as it does not provide for any transition from mechanical appointments to a system of equitable competition. Thirdly, this counters provisions in the empowerment legislation which appear to envisage time limits on remedial measures. The BBBEE Act provides that Codes of good practice 'may specify (a) targets consistent with the objectives of this Act; and (b) the period within which those targets must be achieved'.[125] Section 20 of the Employment Equity Act which provides for employment equity plans is clear that such plans should include a timetable. The relationship between targets and timetables is clearly an important means of determining whether the objectives of a remedial measure are likely to be achieved.

161. Insofar as all the parties accept that the Policy is a remedial measure and have drawn analogies with employment equity plans, the failure to provide clear timelines or targets makes it difficult to determine whether it is likely to achieve its intended outcome. The Respondents contend that the Policy is designed to achieve its objectives within 'an estimated period of ten years'. This point, however, was neither pursued in argument, nor elaborated in any way. What is clear from the evidence is that there is insufficient evidence to support the notion that the Policy is likely to achieve the objective of transforming the industry, within a specific period, or at all.

162. The Respondents have not adduced any evidence to demonstrate the basis for their assumption that mechanical appointments can, in fact, change nomination behaviour by creditors. Such behaviour is noted in the 2013 Discussion Paper as the reason for the

[125] s 9(3).

pattern of appointments and identified as an area of practice which needs to change. As it stands, the Policy does not address this and it appears that the expectation that mechanical appointments will lead to transformation of nomination behaviour and patterns of final appointments is a hope rather than a reasonable likelihood.

163. A further problem addressed by SARIPA is that there are too few available insolvency practitioners who are previously disadvantaged persons to populate the lists in each Master's Office as required by the Policy. This will, according to SARIPA, inevitably lead to fronting which is a practice the Policy, appropriately, explicitly seeks to avoid (as does the BBBEE Act).

164. This point becomes particularly important given the clear objective of the Policy to combat corruption and the assertion by the Respondents that the removal of the Master's discretion is to avoid practices of favouritism. Academic comment on the requisition system has documented corruption, including fronting, as a feature of the lack of regulation attending the requisition system.[126] There is, moreover, a constitutional imperative to root out corruption in the public service.[127] There is no reason to believe that a system of quotas will change such practices and the Respondents did not counter the allegation that the quota system would exacerbate practices of fronting and file shuffling. At a minimum, the evidence suggests that it is as likely that fronting and/or file-shuffling is as likely to take place under the Policy regime as without it. Fronting undermines, rather than advances previously disadvantaged persons and allows retention

[126] cf. Anneli Loubser 'An International Perspective on the Regulation of Insolvency Practitioners' (2007) 19 *South African Mercantile Law Journal* 123 at 125; J C Calitz and D A Burdette 'The appointment of insolvency practitioners in South Africa: time for change?' (2006) 4 TSAR 721 at 735; Anneli Loubser 'An International Perspective on the Regulation of Insolvency Practitioners' (2007) 19 *South African Mercantile Law Journal* 123 at 125 and 126; see also *Beinash & Co v Nathan (Standard Bank of SA Ltd Intervening)* 1983 (3) SA 540 (W).
[127] *Glenister* at [83].

of the status quo.[128] This fortifies the inference that the Policy is unlikely to achieve its objectives.

Is the policy rational?

165. As part of the Constitutional Court's discussion (Van Heerden) of the second leg of the s 9(2) test, Moseneke J (as he then was), indicated that an irrational measure could never be acceptable. On the one hand, a measure must be rationally related to the information available to its designer/formulator at the time of making his/her decisions. On the other hand, a measure must bear a rational relationship to its objectives. Below I consider first whether there is a rational relationship between the formulation of the alphabetical mechanical system and the statistical support cited by the Respondents. Next, I consider whether a system that does not account for creditors' views at the provisional stage is irrational in light of the objective of the Policy. Finally, I consider whether the roster system makes use of quotas and if so, whether this renders it unconstitutional.

<u>Information available to the decision-makers</u>

166. The Respondents use a series of statistics to support the decision to adopt the Policy. What has not been made entirely clear at any stage of these proceedings is whether these statistics are being used to justify adoption of the particular 4:3:2:1 ratio used or whether they are being cited in support of a roster system per se. This could be significant as whereas SARIPA takes issue with the particular ratio used, CIPA impugns the use of the roster and quota in its own right (and here I distinguish between the attack on the use of ratios/quotas/targets and the rigidity of the system).

[128] Fronting is, moreover an offence in terms of 130(1)(d) of the Broad-Based Black Economic Empowerment Act 53 of 2003, as amended.

167. The Respondents illustrate the 'imbalance' in distribution of matters with reference to statistics of 31 July 2013 from Safire, the second-largest security bond provider in South Africa:

TABLE 1: SECURITY BONDS ISSUED – 31 JULY 2013 – SAFIRE[129]						
	Males		Females		Unknown	
	% value issued	% number issued	% value issued	% number issued	% value issued	% number issued
White males	43%	40%	10%	14%		
African, Chinese, Indian, Coloured	30%	31%	4%	4%		
Unknown					13%	11%

168. These statistics are disputed by SARIPA which questions the accuracy of the information provided. They point out the following:

(5) At least one instance where an individual is listed as a 'white male' notwithstanding his being 'regularly appointed as a previously disadvantaged practitioner'.

(6) At least one instance in which an individual is reflected as a 'white female' whilst, on the provisional National Master's list, last updated online on 10 April 2014, the same individual is reflected as a 'coloured male'.

(7) The list does not reflect a date making it difficult to assess its accuracy.

(8) It is denied as being 'illustrative of the country-wide picture'.

(9) The figures reflected in this list are misleading as a single bond is registered in respect of an insolvent state, notwithstanding there being multiple insolvency

[129] The tables do not appear in the papers. The information is reproduced in this form to make it easier to read.

practitioners appointed for an estate. Where previously disadvantaged individuals are appointed as joint provisional trustees, they receive 100% of the value of security bonds issued.

169. To this can be added the question of whether these statistics apply to provisional or final appointments – or both.

170. Further statistics are provided by the Respondents which are based on a survey conducted by the Master's office on 8 September 2011:

(1) The biggest provider of security bonds in the year from 1 November 2009 to 31 October 2010 indicated that of 1 415 insolvency practitioners reflected on the list of active insolvency practitioners, 500 persons were issued bonds. Of these persons 281 received fewer than 6 bonds and ten received more than 100 bonds. A discrepancy lies between the two replying affidavits. Whereas Mr Basson's reply to CIPA reflects 1 415 insolvency practitioners on the list, his reply to SARIPA reflects 700 persons.

(2) 'Another provider' for the period 1 November 2009- 31 October indicated that security bonds issued to 117 individuals were issued as follows:

TABLE 2: NUMBER OF PERSONS RECEIVING BONDS – 1 November 2009-31 October 2010 – Issuer unknown	
Number of persons receiving bond	Value of bond
2	> R8 million
5	> R5 million
52	R1 million
58	<R1 million

171. These figures are used as evidence to show that the workload is not evenly spread. The Applicants challenge the utility and accuracy of these figures. These challenges were elaborated most clearly by CIPA in its replying affidavit and I summarise their challenges as follows: First, they allege that no particulars regarding the survey is provided. Secondly, they indicate that there is no necessary correlation between these statistics concerning active practitioners and gender or race distribution. Thirdly, the accuracy of

the bond list may not be an accurate reflection of how many people are involved. This is on the same basis as SARIPA's criticism of the 2013 statistics: for large estates, where, under the requisition system 'PDIs' are co-appointees, these persons appear on the list together with the trustee for the same security bond. This means that if there are 500 security bonds issued, there are in fact 1 000 appointments. 500 of these appointments are of previously disadvantaged persons.

172. CIPA points out that whilst security bond holders are not required to keep records of practitioners' race and gender this is common practice and could have been obtained by the Respondents. CIPA concludes that the statistics demonstrate inefficient administration in the Master's Office and that incorrect data was used in making decisions about the content of the Policy. In trying to demonstrate that a more accurate picture can be obtained, CIPA has entered statistics into evidence that it collected from lists provided by the South Gauteng's Master's office for appointments made by the Master in 2010 and 2013:

TABLE 3: CIPA-COMPILED STATISTICS – South Gauteng Master's Office for 2010 and 2013		
	2010	2013
Total number of matters	1312	1203
Approximate total bond value	R2.5 billion	R977 million
Number of white practitioners appointed	1103	926
Number of 'non-white' practitioners appointed	1531	1384
'Non-white' practitioners appointed as percentage of total appointees	58,13%	59,91%

173. In summarising the current situation in his office, the Chief Master indicates that the current number of insolvency practitioners on the Masters List, 'which is currently in the process of being cleaned up' is 1236. He breaks this figure down as follows:

TABLE 4: NUMBER OF INSOLVENCY PRACTITIONERS ON CHIEF MASTER'S LIST 2014				
Race	Males	Females	Unknown	Totals
African	55	11	6	72
Coloured	15	6	-	21
Indian	35	17	-	52
Chinese	-	1	-	1
White	179	51	7	237
Unknown	47	14	792	853
Totals	331	100	805	1236

174. CIPA challenges this 'picture' as inaccurate and skewed. Given that 70% of the list is unknown, the Master cannot have reached a rational decision about how to formulate the Policy.

175. In argument, I asked Ms Platt to make submissions as to how I should treat these, possibly contradictory, statistics. Ms Platt submitted that no exception was taken to the figures provided by CIPA. Rather, she submitted that whereas the statistics provided by CIPA are regional, those obtained from Safire are reflective of the national picture.

176. The Respondents, however, were unable to provide any information as to the market share held by Safire. They maintained the position that the various statistics provided showed a 'skew' in the industry in favour of white males which justified the adoption of the Policy and seemed to argue that national demographic statistics were applied when deciding upon the particular ratio of white to African, Coloured, Indian and Chinese persons utilised in the Policy.

177. It is not for a court to interfere with the Minister's decision to adopt a particular ratio against any other. That lies firmly within the executive power.[130] However, there must be at least some evidence that whatever scheme he adopts is done so on a rational basis. It is difficult to understand how a proper determination of an appropriate policy could be made with significant gaps in the information considered by the Minister. In the 2013 Discussion Paper preceding the adoption of the Policy, the following conclusion is drawn:

> 'There is an obvious need to keep accurate statistics and to institute measures to ensure an equitable distribution of work in accordance with the transformation agenda of the Government. The proposed abolition of requisitions, appointments in strict rotation based on BEE categories and provision for keeping accurate statistics will go a long way towards achieving an equitable distribution of work.'

178. The rationale for the system includes the promotion of the interests of disadvantaged groups. This was explained in the 2013 Discussion Paper, and before this Court as shifting from the requisition system which favoured white males, to a system in which Black, Coloured, Indian or Chinese males and females would receive 70% of provisional appointments and white females receive 20% of these appointments. Such appointments would 'as a rule not be joint appointments with persons who enjoy requisition support. The appointed persons will earn more fees and gain more experience.' The proportions allocated in the policy are contrasted with mid-year 2011 population estimates obtained from Statistics South Africa: Black/Coloured/Indian/Asian females: 47%; Black/Coloured/Indian/Asian males: 44.1%; white females: 4.6%; white males: 4.4%. The discussion document notes that the comparison with work allocation is 'favourable'

[130] There is some indication from case-law in the Labour Courts that a mechanical application of population demographics to a particular sector may not be an acceptable approach to the design of a remedial measure. Cf. *Naidoo v Minister of Safety and Security and Others* 2013 (3) SA 486 (LC) at [133]-[135]. Cf. *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) at [41] where the Court's understanding of contextually variable discrimination/non-discrimination mitigates against the use of rigid formulae based on national demographics without good reason.

in respect of white persons. These figures are provided in lieu of the lists as these are 'not accurate'.

179. Despite these facts, these figures seem to have formed the basis for the Minister's decision-making regarding the particular formula used in the Policy.

180. The Respondents readily agree that the list is in need of 'cleaning up' and the process of doing so has begun. This is commendable and also necessary in order that the Masters' Office complies with constitutionally required public service standards. However, this does not change the situation that a Policy has been adopted on the basis of inaccurate information, including critical, material gaps and that lists simply are not in place in every Master's office which are capable of being categorized as required by the Policy. A number of consequences follow.

181. First, it is impossible to assess whether there are sufficient insolvency practitioners in each category in each office to populate the list. The Respondents argue that where there are insufficient practitioners in a particular area, previously disadvantaged persons will 'move in' to such areas. No evidence has been led to support this proposition. They also argue that, until such time as separate lists can be compiled by the 15 Masters' Offices, a single, national list will be used, requiring if necessary, that practitioners fly around the country to accept appointments. Leaving aside the feasibility of this, an expectation of this kind runs counter to the notion of opening the industry to new entrants and thus appears contrary to the Policy's objectives. Secondly, the Court's attention was drawn to discrepancies on the lists which in some cases list the same person according to different race or gender categories in different place. If these lists are used as the basis for the

creation of the roster, it seems possible, indeed likely, that arbitrary classifications will result. This is also a consequence of the large numbers of 'unknowns' that remain on the lists.

182. It might be argued that these problems relate to the lists, rather than the Policy and that these are questions of implementation rather than the design of the 'measure'. To a certain extent this may be true. It would certainly be easier to accept that there is a rational basis for the Policy if accurate lists could be placed before the court with statistics to support the reasoning of the Minister. This would be clear evidence that he had applied his mind to the problem and that his choice of the particular system and formula was made deliberately, consciously and in full knowledge of the consequences of the Policy for all those affected by it. It would, similarly, assist in determining whether, on the numbers, advantage would be the likely result for the Policy's designated groups. However, given the centrality of accurate lists to the proposed roster system, the discrepancies and problems with the lists as they stand does diminish the likelihood of the Policy achieving its stated objectives in the near future. This is not determinative, but is a factor to be considered.

Does the failure to account for creditor's views in the roster system render the Policy irrational?

183. The Applicants contend that the interests of creditors are paramount in the insolvency process.[131] Sequestration of a debtor's estate establishes a concursus creditorum. The Insolvency Act aims to 'ensure a due distribution of assets among creditors in the order of

[131] cf. *Ex parte Master of the High Court (North Gauteng)* 2011 (5) SA 311 GNP at [28].

their preference'.[132] The presumption is that the interests of creditors, as a group, are more important than those of individual creditors and other stakeholders.[133] Nothing may be done to reduce the assets in the estate and no action may be taken which prejudices creditors' rights.[134] Insolvency practitioners thus stand in a position of trust vis-a-vis creditors.[135]

184. Whilst all the Applicants challenge the exclusion of creditors' interests from provisional appointments, the argument is most powerfully made by NAMA and, on behalf of employees, by Solidarity. I thus focus on their submissions in this regard.

185. NAMA contends that by excluding creditors from the decision about who to appoint as provisional liquidator, creditors are (potentially) prejudiced. A key issue is the delays in convening the first meeting of creditors which leads to provisional liquidators not only being appointed as a matter of course, but also to their remaining in place for long periods of time. NAMA makes particular reference to mining insolvencies where the granting of a final liquidation order results in lapse of the mining license thus leading to a situation in which it is in the interests of creditors to postpone the final order.[136] In such a situation, it is critical to have an insolvency practitioner in place who is competent (suitable) to manage this particular type of business. The Respondents point out that delays of this kind are a consequence of the actions of creditors and not the Master's Office. Further, they contend that problems arising in relation to mining companies are an exception to the norm. I am inclined to agree with the Respondents on the latter point. There is no authority in the governing insolvency or companies' legislation that requires creditors to

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132 *Walker v Syfret NO* 1911 AD 141 at 166.
133 *Richter NO v Riverside Estates (Pty) Ltd* 1946 OPD 209 at 223.
134 *Ward v Barrett NO* 1963 (2) SA 546 (A) 552.
135 *Standard Bank v The Master of the High Court* 2010 (4) SA 405 (SCA) at [1].
136 Cf. Mineral and Petroleum Resources Development Act 28 of 2002 s 56(d).

have a ‘say’ in the appointment of provisional liquidators. The practice that has emerged in response to what appears to be an overburdened and unworkable system cannot justify ignoring legislation and requiring that a Policy includes creditors’ views in order that practices which evade, rather than comply, with legislation can continue unaffected. Apart from anything else, this kind of reasoning would undermine the purpose of the Policy, as provided for by legislation, which is to ensure transparency and accountability.

186. Solidarity’s argument, however, requires a slightly different approach. It is evident that under the requisition system employees and trade unions have been able to influence the appointment of provisional insolvency practitioners. Attempts by the Master’s Office to influence practice through internal policy directives have clearly tried to protect employee interests by ensuring that they have input into these processes. Moreover, a key motivation behind the Policy appears to ensure that employees are protected although the correlation between creditor input to the provisional process and consequent lack of employee protection runs counter to prior attempts by the Master’s Office to protect employee interests by facilitating trade union involvement in the requisition process. I do, however, find the more general argument about the need to have regard for all stakeholders affected by affirmative action measures somewhat persuasive.

187. However, as Moseneke ACJ writing for the majority in Barnard has cautioned:

> ’[R]estitution measures, important as they are, cannot do all the work to advance social equity. A socially inclusive society idealised by the Constitution is a function of a good democratic state, for the one part, and the individual and collective agency of its citizenry, for the other. Our state must direct reasonable public resources to achieve substantive equality ‘for full and equal enjoyment of all rights and freedoms’. It must take reasonable prompt and effective measures to realise the socioeconomic needs of all, especially the vulnerable. In the words of our Preamble the state must help ‘improve the quality of life

of all citizens and free the potential of each person'. That ideal would be within a grasp only through governance that is effective, transparent, accountable and responsive.'[137]

188. The increasing importance of provisional liquidators/trustees appears to have been a result of problems with implementing the insolvency process and delays in calling the creditors' meeting. Specific provision is made for employees in sections 4(2)(b); 9(4A); 11(2A); 38 and 98A of the Insolvency Act read with s 197B(1) of the Labour Relations Act 66 of 1995. Additional provision is made in the Basic Conditions of Employment Act 75 of 1997 s 41(2). It is within this context that the legislative scheme envisages protection of employees.

189. It is true that the Policy envisages 'transformation of the industry' and also true that such transformation should be viewed in the context of innovations such as business rescue proceedings in the Companies Act of 2008 (which makes specific provision for employees in sections 136, 144, 148, 149, 150, 151(2), 152(1)(c) and 153(1)(b) of the Act 71 of 2008) and international good practice such The World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes (Revised 2011). [138] When considering transformation of English Insolvency Law, the Cork Report listed 'society' as one of the key three interests, together with those of the debtor and creditor, which must be considered. The society which the Constitution envisages is one which does recognise employee interests and this is reflected in the legislation which protects them.

190. However, the manner in which such interests are to be protected is a policy decision that lies with the legislature and, where authorised, by the executive. Such interests can

[137] at [33].
[138] Para C12.4 reads 'Workers are a vital part of an enterprise, and careful consideration should be given to balancing the rights of employees with those of other creditors.' Available online: http://siteresources.worldbank.org/EXTGILD/Resources/5807554-1357753926066/ICRPrinciples-Jan2011[FINAL].pdf (accessed 4 January 2014).

be protected in different ways and it seems to me that the legislature has chosen to protect the interests of employees not by giving them a say in the appointment of trustees/liquidators (be they final or provisional) but in the processes of notification and consultation and provision for remuneration in the Acts. Given this framework, the exclusion from employee voice from the Policy does not render the Policy without rational connection to its objective.

Does the Policy make use of quotas, and if so, does this render the Policy arbitrary or unconstitutional?

191. In Van Heerden, the Constitutional Court stated that a measure that was 'arbitrary, capricious or displayed naked preference' would not pass constitutional muster. In the present matter, the Applicants contend that the proposed system is fundamentally arbitrary and irrational due to its reliance on rigid race- and gender-based categories.

192. The Applicants argue that there is no explanation as to how the racial categories used in the Policy are to be determined, what the criteria for such classification are and under what authority such determination is to be made.

193. Further argument was offered by CIPA and Solidarity as to the fundamentally arbitrary nature of such racial categories and 'racial norming' where racial categories are used in a decontextualized manner, rather than as flexible proxies for disadvantage. In essence, these arguments constitute a challenge to the continued use of apartheid-era classifiers under the affirmative action regime.

194. I accept that racial classification, divorced from other contextual factors, is an arbitrary threat to the dignity and autonomy of individuals. However, arguments of this

kind do not assist the Applicants in attacking the Policy which explicitly references categories that are utilised throughout what can loosely be termed South Africa's 'affirmative action' legislation.

195. The BBBEE Act s 1 states:

> '"black people" is a generic term which means Africans, Coloureds and Indians
> (a) who are citizens of the Republic of South Africa by birth or descent; or
> (b) who became citizens of the Republic of South Africa by naturalisation-
> (i) before 27 April 1994; or
> (ii) on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date.'

196. The Employment Equity Act s 1 states that:

> '"black people" is a generic term which means Africans, Coloureds and Indians.'
>
> '"designated groups" means black people, women and people with disabilities who-
> (a) are citizens of the Republic of South Africa by birth or descent; or
> (b) became citizens of the Republic of South Africa by naturalisation-
> (i) before 27 April 1994; or
> (ii) after 26 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date but who were precluded by apartheid policies."

197. These definitions form the basis of the categories used in the Policy (although modified to exclude disabled persons and include 'Chinese' persons). They form part of a wider policy context in which determinations have been made by the Legislature. Given the fact that the Respondents have firmly situated the Policy within the broader context of this legislation – and thus within this broader policy-context – it is not open to this Court to determine that the categories used are themselves arbitrary and irrational.

198. However, what may be accepted is that in using these divisions as the basis for an inflexible and rigid roster system, the effect is the arbitrary distribution of work amongst insolvency professionals on the list. This is in fact the express intention of the

Respondents and regarded by them as a means of avoiding the favouritism and corruption they have identified under the requisition system.

199. It seems to me, that there is tension between arbitrary and mechanical allocations and the objective of 'achieving equality'. As a matter of logic, all practitioners operating in the insolvency environment should ultimately be able to obtain work on an equitable basis (which must, in the long term be related to the requirements of the work and the nomination practices of creditors). For a measure to effectively assist all practitioners in equitably competing for appointment requires something more than inflexible allocations.[139] This has been recognized by the Respondents in discussion documents and previous, informal, approaches to appointments. There is little explanation beyond a desire to remove discretion from the appointment process to justify the decision not to include measures such as these in the Policy.

200. The discrepancy between the identified need, identified solution and ultimate Policy is suggestive of irrationality. It also supports the inference that the Policy is, in fact, arbitrary as a response to available information. This is in addition to what appears to be a mechanism that will only ever perpetuate a system of arbitrary allocation of work, using BBBEE categories. Without more, this seems unlikely to achieve empowerment or transformation objectives.

201. Key to these arguments is the perceived rigidity of the system and its use of quotas. Relying on Barnard, the Applicants submit that the fact that the Policy uses quotas, rather than targets, is itself sufficient to render it an illegitimate remedial measure.

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[139] Cf. *Affordable Medicines Trust and Others v Minister of Health And Others* 2006 (3) SA 247 (CC) at [63] which understands the right to choose one's profession to be inclusive of the ability to be able to practice. Such ability, in this context, must include the ability to enter the competitive environment which characterises this industry.

202. Critically, in argument, the Respondents accept that if the Policy sets up quotas rather than targets, it would be invalid. Also, where SARIPA impugned the particular ratios used in the Policy, CIPA and Solidarity impugned the Policy on the basis that it was a quota per se. It is for this reason that I need to determine whether the obiter remarks of the majority in Barnard made with reference to the prohibition on quotas in s 15(3) of the Employment Equity Act find wider application. If this is the case, and without more, I must find in favour of the Applicants on the matter of the Policy's suitability as a remedial measure.

Are quotas generally prohibited?

203. The relevant passage in Barnard reads:

> 'Section 15(3) [EEA] contains a vital proviso that the measures directed at affirmative action may include preferential treatment and numerical goals but must exclude 'quotas'. Curiously, the statute does not furnish a definition of 'quotas'. This not being an appropriate case, it would be unwise to give meaning to the term. Let it suffice to observe that s 15(4) sets the tone for the flexibility and inclusiveness required to advance employment equity. It makes it quite clear that a designated employer may not adopt an employment equity policy or practice that would establish an absolute barrier to the future or continued employment or promotion of people who are not from designated groups.'[140]

204. Later in the judgment Moseneke ACJ observes:

> 'Let it suffice to observe that the primary distinction between numerical targets and quotas lies in the flexibility of the standard. Quotas amount to job reservation and are properly prohibited by s 15(3) of the Act. The same section endorses numerical goals in pursuit of workplace representivity and equity. They serve as a flexible employment guideline to a designated employer.'[141]

[140] at [42].
[141] at [54].

205. What emerges from these statements is that at least some flexibility of approach is required. This is expressly articulated by Cameron J, Froneman J and Majiedt AJ in stating that 'over-rigidity…risks disadvantaging not only those who are not selected for a job, but also those who are'.[142] This is because it can create the impression that appointments are due only to race and exclusive of merit. Further, when considering implementation of a measure 'a decision-maker cannot simply apply the numerical targets by rote'.[143]

206. In a different context, when assessing unfair discrimination under PEPUDA, the Equality Court has held that 'There is patent disproportionality in a selection policy based on race and gender to the absolute exclusion of all the other qualities required for a position as responsible and important as that of regional magistrate. Such a policy is irrational within its own terms and objectives'.[144]

207. In that case, as in the present matter, the Employment Equity Act did not apply. The court nevertheless drew on Employment Equity Act jurisprudence to come to this conclusion, noting that the Employment Equity and Equality Acts worked together to give effect to s 9 of the Constitution. To this, I would add the BBBEE Act which uses the language of 'targets', rather than quotas.

208. It seems to me that a rigid formulation cannot be sufficiently sensitive to the achievement of substantive equality whether it is strictly within the employment context or in a broader setting. On this understanding, the dicta of the Barnard court reach

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[142] at [80].
[143] at [96].
[144] *Du Preez v Minister of Justice and Constitutional Development and Others* 2006 (5) SA 592 (EqC) at [38].

beyond the confines of the Employment Equity Act and find application in the current context.

Is the Policy a target or a quota?

209. CIPA contends that whereas quotas rely on absolute exclusions, targets promote inclusion. This distinction was accepted by the Respondents.

210. However, the Respondents submit that the 4:3:2:1 allocation ratio is not an impermissible quota, but rather 'a flexible guideline to the Masters in order to pursue representivity and equity in the appointment of provisional insolvency practitioners after due consideration of all the relevant factors.'

211. Some guidance as to the distinction between targets and quotas can be obtained from American jurisprudence.[145] In Local 28, Sheet Metal Workers' International Association v EEOC,[146] quotas and targets were distinguished as follows:

> 'A quota would impose a fixed number or percentage which must be attained, or which cannot be exceeded, and would do so regardless of the number of potential applicants who meet necessary qualifications.... By contrast, a goal is a numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants available in the relevant job.'

212. In the South African context, Klinck & Nwena state:

> '"Quotas" refer to all preferential techniques that have the effect of reserving all or a fixed percentage of job opportunities for designated groups. This may be achieved through the setting aside of a specific number of positions for designated groups or by

[145] Such guidance is taken with due caution as to the specificity of the South African Equality Clause – cf. *Van Heerden* at [29]
[146] 478 US 421 (1986) at 495.

making designated group status the only or dominant criterion for eligibility for employment opportunities.'[147]

213. According to Andre M Louw, quotas in the employment equity context are 'mandatory and represent a fixed number to be achieved, apparently at any cost', whilst targets are non-mandatory guidelines to achieve representation from designated groups in the workforce. Further, he argues that application of quotas is 'generally divorced from reality and the circumstances of the specific situation in which they are applied'.[148] Louw argues that a target or numerical goal established in an Employment Equity Plan will only be legitimate if regard is had to the factors listed in s 42 of the Employment Equity Act.[149] An element of such goal-setting is that it must be realistic in context.[150]

214. What is clear, is that what is impermissible is <u>rigidity</u> – however it is named.

215. The 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. Indeed, one of the goals of the formula contained in the Policy seems to be to remove all such considerations. A scheme of this kind cannot possibly give effect to the dignity of either those advantaged or disadvantaged by the Policy. On this reasoning, it becomes unnecessary to determine the extent of the 'harm' suffered by white males. It is sufficient to state that perhaps in becoming a nearly absolute barrier to employment the Policy implicates the right to work and inherent dignity of white males. Such harm to the

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[147] JL Pretorius, ME Klinck & CG Ngwena *Employment Equity Law* (looseleaf, service issue 4, 2000 at Ch 9-50.
[148] Andre M Louw 'Extrapolating "equality" from the Letter of the Law: some thoughts on the limits of affirmative action under the Employment Equity Act 55 of 1998' (2006) 18 *SA Mercantile Law Journal* 336 at 338.
[149] Louw at 341-2.
[150] at 346.

core value and right of dignity is the product of a measure which elevates race and gender as absolute categories without any regard to individual characteristics or the context in which appointments must take place. A scheme of this nature does violence to the notion of transformation from a racist, racialised, sexist and gendered past to a non-racial and non-sexist future.[151]

216. I agree with the Applicants that the manner in which the race and gender categories are employed in the roster formula creates silos which overly privileges race and sex at the expense of all other relevant characteristics.

217. This is at odds with the objectives of the Policy on its own terms as well as with the requirement of the Van Heerden test that a remedial measure must be reasonably capable of achieving equality in the long-term. As such, the Policy cannot be regarded as a lawful affirmative action (s 9(2)) measure.[152]

DOES THE POLICY FAIL FOR ABSENCE OF PROCEDURAL FAIRNESS – PARTICULARLY LACK OF CONSULTATION WITH RELEVANT STAKEHOLDERS?

218. NAMA has argued that the Policy was adopted in a procedurally unfair manner due to failure to consult with creditors. SARIPA makes this argument in the alternative. They complain, further, that meetings with NEDLAC did not satisfy procedural fairness

[151] Cf. as an example of the need for more sensitive analysis, Henk Botha 'Equality, Plurality and Structural Power' (2009) 25 *SAJHR* 1 and the effect of cross-cutting categories of disadvantage in Kimberle Crenshaw 'Mapping the Margins: Intersectionality, identity politics, and violence against women of color' (1991) 43 *Stanford Law Review* 1241.

[152] Given that I have come to the conclusion that the second leg of the *Van Heerden* three-fold test has not been satisfied for the reasons articulated, it is not, in the circumstances, appropriate or desirable that the third leg is considered.

requirements to consult as NAMA is not a member of NEDLAC. They further question why this meeting was held at all if, as the Respondents contend, creditors have no rights prior to the first meeting of creditors. NAMA's contention is coupled with the submission that the Minister did not consider important information when formulating the Policy. Their reliance on procedural fairness is based on Janse van Rensburg No v Minister of Trade and Industry NO[153] and De Lange v Smuts NO.[154] NAMA, moreover, makes reference to the practice of consulting creditors in the process of appointing provisional insolvency practitioners since the 1970s. This, they submit, gives rise to the doctrine of legitimate expectation.

219. SARIPA submits that s 158(2) of the Insolvency Act requires that the Policy be tabled in Parliament. They submit that neither the Policy, nor the amended Policy have been discussed in the Portfolio Committee on Justice and the National Assembly. Relying on Doctors for Life International v Speaker of the National Assembly and others,[155] they submit that this falls foul of the s 59 requirement that the National Assembly facilitate public involvement in legislative and other processes in the Assembly and its committees. Further, they submit that this requirement is linked to the National Assembly's oversight functions over executive action. The Respondents counter this by pointing out that this process applies to law-making, not policy-making. Given the consultative process that the Respondents followed over a seven-year period, they submit that there was opportunity to comment and that, moreover, the correct procedure was followed before Parliament. SARIPA, however, contends that the current form of the Policy has not been circulated to SARIPA in order to canvass for submissions prior to tabling in Parliament.

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[153] 2001 (1) SA 29 (CC) at [24].
[154] 1998 (2) SA 785 (CC) at [131].
[155] 2006 (6) SA 416 (CC).

220. It should be noted that CIPA's account of the consultative process notes the inclusion of SARIPA and rather than presenting the problem as an absence of consultation, provides evidence of dissatisfaction with the proposed Policy from a wide range of creditor representatives. CIPA does, however, contest the notion of the Policy being 'tabled' or voted on at a NEDLAC meeting.

221. I find SARIPA's reliance on Doctors for Life misplaced. That case, as well as Merafong Demarcation Forum and others v President of the Republic of South Africa and others,[156] dealt with legislative processes. In Ed-U-College,[157] the Constitutional Court referred to Premier, Mpumalanga and another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal[158] for the proposition that 'there [is] no general duty upon the MEC to afford some opportunity to be heard to all those affected by the exercise of his statutory power. The obligation only arose because, on the facts of that case, a legitimate expectation had arisen which meant that the bursaries could not be cancelled retroactively without an opportunity to be heard being given to those affected by the cancellation. It is important to note that in that case the Constitutional Court was concerned with a retroactive termination of bursaries already granted.

222. The legal principle that can be extracted from this dictum is that where a decision operates prospectively, there is no necessary duty to consult in respect of action taken in accordance with a statutory power. Whether or not such a duty exists, must depend on the particular circumstances of the case. This was made explicit where the it was stated:

> 'Procedural fairness will not require that a right to a hearing be given to all affected persons simply because a decision is to be taken which has the effect of reducing the amount of the annual subsidy to be paid.'[159]

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[156] 2008 (5) SA 171 (CC).
[157] at [20].
[158] 1999 (2) SA 91 (CC).
[159] at [22].

223. Whilst a line of cases, including, Arun Property[160] has noted the value of a process of public participation and expert assistance in the process of formulating policy and it is true that the Minister, like all members of the executive, is accountable to Parliament in the exercise of his powers,[161] I find no reason to conclude that the Minister was required to go further than he did in respect of consultation. By contrast SA Predator Breeders Association v Minister of Environmental Affairs[162] suggests that the Minister has authority to determine which stakeholders were consulted in the process. Selection of particular interests and exclusion of others cannot itself deprive process of its rationality.[163] There is no merit in the procedural unfairness taken by NAMA.

REMEDY AND COSTS

224. CIPA, Solidarity, the Minister and Master requested me to make no order as to costs whatever I may decide on the validity of the Policy.[164] On the other hand SARIPA and NAMA submitted that costs should follow the result, subject to the Biowatch[165] rule. SARIPA also argued that ABRIPSA should pay the costs occasioned by its intervention in the Cape case.

225. After the hearing, I invited ABRIPSA to make submissions on what factors I should take into account in respect of costs vis-à-vis it. ABRIPSA ignored the invitation.

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[160] at [46]
[161] *Pharmaceutical Manufacturers* at [19].
[162] (72/10) [2010] ZASCA 151 (29 November 2010).
[163] at [49].
[164] *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* 2012 (6) SA 588 (CC) at [95].
[165] *Biowatch Trust v Registrar, Genetic Resources and others* 2009 (6) SA 232 (CC).

226. I intend to order ABRIPSA to pay the relevant costs, including those occasioned by the employment of two counsel, and to accept CIPA, Solidarity and the Respondents' submissions. In doing so, and exercising my discretion in respect of costs, I am not unmindful of the useful contention by NAMA that, were I to uphold the challenge but not award costs to the Applicants, this could be regarded as a potential disincentive to challenge unconstitutional conduct. I do not believe that in this unique instance, such a chilling effect will result.

CONCLUSION

227. These applications raise issues concerning the nature of the society South Africans have chosen as their model.

228. In this regard, the role of the judiciary in relation to executive Policy-making is implicated. The place of relevant insolvency laws needs to be assessed in the context of a radically unequal society striving for economic development. Given South Africa's history of state-sponsored racism and sexism, race and gender will always be significant factors when considering the right to equality. Similarly, given the commitment to a democratic and open society based on the rule of law, effective measures for combating corrupt practices such as fronting are key.

229. The Minister and the Chief Master have clearly noted these issues and the Minister has attempted to adopt a policy to deal with the difficult process of appointments of insolvency practitioners to sequestrated estates and liquidated companies. The objectives and goals are admirable and are supported. There is certainly an attempt at remediation

and an acknowledgement that practice needs to change within the Masters' Offices to influence continuing inequities, quite apart from the prevention and combating of corrupt practices and fronting.

230. However, a Policy cannot pass constitutional muster on good intentions alone. It must, in fact comply with constitutional precepts. Given the evidence put before me, I have come to the conclusion that the Policy adopted is inconsistent with the Constitution, and I am thus obliged to declare it invalid.

231. It is important to appreciate that my conclusion is based on two interlinked factors. In this regard, I make no judgment on the merits or demerits of the actual Policy adopted. That is not something within the sphere of the judiciary. The two bases are: first, it is ultimately the Master who the legislature has decided is responsible for the appointment of insolvency practitioners. It is the Master who must apply his/her discretion when making an appointment. The Policy puts in place a rigid, inflexible regime in which the Master effectively becomes a rubber stamp which must appoint a designated person by rote from fixed lists arranged alphabetically and on race and gender lines. This is an unlawful fettering of his/her discretion. The Master, according to the legislative scheme, must retain the discretion as to who to appoint. Secondly, the measure adopted is too rigid. The Policy introduces an inflexible race and sex-based appointments process. 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 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.

232. In the circumstances, I have no option, but to make a declaration as contemplated by section 172(1)(a) of the Constitution. I make the following orders:

1. It is declared that the Policy on the Appointment of Insolvency Practitioners, contained in Government Notice No. 798, published in Government Gazette No. 38088 (17 October 2014) read with Government Notice No. 77 of 7 February 2014 published in Government Gazette No. 27287 (7 February 2014) is inconsistent with the Constitution and invalid.

2. In the Western Cape Division Case No 4314/2014 the Third Respondent is to pay the Applicant's costs, including the costs occasioned by the employment of two counsel in respect of the proceedings in part A of the application.

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KATZ, AJ