THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 693/15

In the matter between:

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**FIRST APPELLANT**
CHIEF MASTER OF THE HIGH COURT OF SOUTH AFRICA	**SECOND APPELLANT**
and	
THE SOUTH AFRICAN RESTRUCTURING AND INSOLVENCY PRACTITIONERS ASSOCIATION	**FIRST RESPONDENT**
THE CONCERNED INSOLVENCY PRACTITIONERS ASSOCIATION	**SECOND RESPONDENT**
NATIONAL ASSOCIATION OF MANAGING AGENTS	**THIRD RESPONDENT**
SOLIDARITY	**FOURTH RESPONDENT**
VERENIGING VAN REGSLUI VIR AFRIKAANS	**FIFTH RESPONDENT**

Neutral Citation:	*Minister of Justice v The SA Restructuring & Insolvency Practitioners Association* (693/15) [2016] ZASCA 196 (2 December 2016)
Coram:	Mpati P, Wallis, Swain, Mathopo and Van der Merwe JJA
Heard:	13 September 2016
Delivered:	2 December 2016

Summary: Constitutional law: Equality and affirmative action measures: the ambit of the test for equality.

Insolvency law: Insolvency Act 24 of 1936 s 18(1) – policy issued by Minister in terms of s 18(1) – policy also applicable to appointments of liquidators in terms of ss 368 and 374 of Companies Act 61 of 1973 – aim to transform the insolvency industry to make it more accessible to previously disadvantaged insolvency practitioners – policy unconstitutional and irrational – policy declared unlawful and invalid.

ORDER

On appeal from the Western Cape Division of the High Court, Cape Town (Katz AJ sitting as court of first instance): judgment reported *sub nom SA Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development & others, and another application* 2015 (2) SA 430 (WCC).

1. The appeal is dismissed with costs, such costs to include the costs of two counsel.

JUDGMENT

Mathopo JA (Mpati P, Wallis, Swain and Van der Merwe JJA concurring):

[1] This appeal concerns the constitutionality of a policy that seeks to regulate the appointment of insolvency practitioners, primarily as provisional trustees and liquidators, but also as co-trustees and co-liquidators, as well as appointments to certain other comparable positions under various statutes. In this judgment I will deal with the policy as if it applied only to appointments of trustees on insolvency, but it must be read mutatis mutandis as applying to and including all the appointments that are the subject of the policy. Where I refer expressly to liquidators, as opposed to trustees, I am referring to liquidators, either provisional or final, appointed in terms of the Companies Act 61 of 1973, as amended, or under the Close Corporations Act 69 of 1984.

[2] The policy was determined by the Minister of Justice and Constitutional Development pursuant to his powers in terms of s 158(2)[1] of the Insolvency Act 24 of 1936 (the Act), and was to come into operation on 31 March 2014. Insofar as it related to appointments under other statutes the promulgation of the policy occurred in terms of corresponding powers.[2] The first respondent challenged the policy by way of an application in two parts; part A being an interim interdict restraining its implementation, and part B review proceedings directed at having it set aside. In the Western Cape Division of the High Court, Gamble J dealt with the urgent application in respect of Part A and interdicted the appellants from implementing the policy. The review application in Part B came before Katz AJ in which the policy was challenged on four bases. These were that it infringed the right to equality provided for in s 9 of the Constitution; it unlawfully fettered the discretion of the Master; is ultra vires the Act; and was irrational.

[3] Acting in terms of s 172(1)*(a)* of the Constitution, the high court declared the policy inconsistent with the Constitution and invalid. An application for leave to appeal was refused. This appeal is with the leave of this court.

Litigation history

[4] The appellants are the Minister of Justice and Constitutional Development (the Minister) and the Chief Master of the High Court of South Africa (the Chief Master).[3] The respondents are The South African Restructuring and Insolvency Practitioners Association

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[1] This subsection reads as follows:
'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.'

[2] Section 10(1A)*(a)* of the Close Corporations Acts 69 of 1984 and s 368 of the old Companies Act 61 of 1973.

[3] The office of the Chief Master as the executive officer of all Masters' offices was introduced by the promulgation of the Judicial Matters Amendment Act 16 of 2003 which came into effect on 9 July 2004. Section 2*(a)*(i) of the Administration of Estates Act 66 of 1965 makes provision for the appointment of a Chief Master of the High Court and a Master of each High Court.

(SARIPA), The Concerned Insolvency Practitioners Association (CIPA), the National Association of Managing Agents (NAMA), Solidarity and the Vereniging van Regslui vir Afrikaans. Originally there were two applications; the first one being that referred to in [2] above brought by SARIPA against the Minister and the Master. The second was brought by CIPA in the Gauteng Division, Pretoria of the High Court to declare the policy to be unconstitutional. That application and the present application by agreement were heard together by the court a quo.[4] NAMA and Solidarity were granted leave to intervene by the high court, and the Vereniging van Regslui vir Afrikaans was joined as a party. The respondents represent various interested groups of persons who are involved, either as insolvency practitioners, legal practitioners and academics, creditors and employees, in the sequestration or liquidation of insolvent estates.

Background

The appointment of insolvency practitioners prior to the impugned policy

[5] The background relating to the history of the impugned policy was described comprehensively by the court a quo. The administration of insolvent estates was originally regulated by the Insolvency Act 32 of 1916. This placed the responsibility for appointing provisional trustees on the court. With the advent of the Insolvency Act 24 of 1936 (the Act) that duty and power was transferred to the Master. Before the Act was amended, in 2004, the Master's power of appointment of a provisional trustee or liquidator was entirely discretionary.[5] Currently, in terms of s 18(1) of the Act, the Master may, after an estate has been sequestrated, in accordance with the Policy determined by the

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[4] Presumably an order was made in terms of s 27(1)*(b)* of the Superior Courts Act removing the application by CIPA from the Gauteng Division, Pretoria to the Western Cape Division.

[5] Prior to its amendment, s 18(1) read:
'As soon as an estate has been sequestrated (whether provisionally or finally) or when a person appointed as trustee ceases to be a trustee or to function as such, the Master may 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 duties as provisional trustee and shall hold office until the appointment of a trustee.

Minister, appoint a provisional trustee. The Minister exercises his powers in terms of s 158 of the Act when determining the policy envisaged in s 18. It is the Master who, in terms of this policy, appoints the provisional trustee, once a provisional sequestration order has been granted. The provisional trustee will administer and control the estate until such time that the trustee is appointed at the first meeting of creditors. The Master may still, however, be involved inasmuch as he or she is empowered by s 57(5) of the Act, whenever they consider it desirable, to appoint a co-trustee.

[6] It appears that the present policy is the first of its kind promulgated under s 158 of the Act. Previous policies and directives were issued by the Minister, during 1998 and 2001, aimed at making the insolvency industry accessible to previously disadvantaged persons. However, these policies were not policies promulgated in terms of any specific provision of the Act. The 2001 Policy made provision for a previously disadvantaged person to be appointed as a co-provisional trustee in every estate. The main rationale behind appointing a previously disadvantaged individual was that he or she could learn from the experienced trustee how properly to administer an estate, in order to gain sufficient experience and exposure in the industry. The Master, in accordance with the 2001 policy, created a separate panel of names for this category of practitioner.

[7] The 2001 policy was implemented as follows. Creditors, on becoming aware of an application for the provisional sequestration of an estate, would indicate their support for a provisional trustee by filing a requisition which indicated the extent of their claims against the estate, and their provisional trustee of choice. The Master's office would review the requisitions and, once satisfied that they were in order, ordinarily appoint a provisional trustee using the following as guidelines: i) the candidate nominated by the creditors who held the majority in value of claims; ii) the candidate nominated by the creditors who held the majority in number of claims; iii) the candidate who

enjoyed the support of the employees or trade union In addition a previously disadvantaged individual or individuals would be appointed from a list held by the Master. All the individuals identified as suitable candidates to be appointed in that estate, would then be informed that they should immediately lodge with the Master bonds of security for the estimated value of the assets of the estate involved. Thereafter, the Master would issue certificates of appointment as provisional trustees. The provisional trustee would then take charge of the estate and immediately administer the estate until the first meeting of creditors. At the first meeting, creditors who had proved their claims against the estate were entitled to elect trustees and the person receiving a majority of the votes, by number and value of claims, would be elected as trustee. If one person gained a majority in number, and another a majority in value, they would both be elected. The Master would then ordinarily[6] confirm those who had been elected and would also confirm the appointment of the previously disadvantaged individual, if that person was not elected as trustee by the creditors. This system, known as the requisition or referral system, has according to the Minister, not achieved its purpose of including previously disadvantaged persons in the appointment of insolvency practitioners. That proposition is hotly disputed by both SARIPA and CIPA.

[8] As noted above the Judicial Matters Amendment Act 16 of 2003, made provision for the appointment of a Chief Master of the High Courts who serves as the executive officer of all the Masters' offices and exercises control, direction and supervision over all the Masters. The Minister's power to determine policy for the appointment of practitioners was also provided for in the Judicial Matters Amendment Act, which conferred the power to lay down policy in relation to the appointment of insolvency practitioners.

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[6] The master has a discretion under s 57(1) of the Act in certain circumstances not to appoint a person elected as trustee at a first meeting of creditors, but this occurs fairly infrequently and does not affect the discussion in the body of the judgment.

[9] Subsequent to the promulgation of the Judicial Matters Amendment Act, the Chief Master revoked the 'Lategan Document', a document issued by a Deputy Master in the High Court in Pretoria, which purported to deal with the appointment of practitioners. In surveys conducted over the period 2011 to 2013 by the Chief Master, the picture appeared to be a bleak one for the advancement of previously disadvantaged practitioners. The numbers showed that far fewer previously disadvantaged practitioners were appointed, than was reflected on the list of active insolvency practitioners. In 2013, the national statistics, which only focused on race and gender, showed that the workload amongst insolvency practitioners was unevenly distributed: White males received approximately 43%; White females received approximately 10%; African, Coloured, Indian and Chinese females received approximately 4% and African, Coloured, Indian and Chinese males received approximately 30%. I leave aside the fact that this is significantly short of 100%, which is unexplained.

[10] The impugned policy was formulated against the backdrop of what has been set out above. It went through various phases, which included consultations meetings and comments from interested parties.[7] For the purpose of this judgment we need not detain ourselves with these phases, save to mention that the policy was published in the Government Gazette by the Minister on 7 February 2014.[8] The Chief Master has also issued several directives in terms of the policy to deal with its implementation.

The Policy

[11] At the heart of the dispute between the parties lie clauses 6 and 7 of the policy. According to the appellants, the objective of the policy is to 'promote consistency, fairness, transparency and the achievement

[7] The extent of these consultations is in dispute.

[8] Department of Justice and Constitutional Development Regulations, GN R77, *GG* 37287, 7 February 2014. Clauses 6 and 7 of the Policy were amended with effect from 17 October 2014, and the notice was gazette by Department of Justice and Constitutional Development Regulations, GN R789, *GG* 38088, 17 October 2014.

of equality for persons previously disadvantaged by unfair discrimination' and it is intended to form the basis for the transformation of the insolvency industry. The policy replaces all previous policies and guidelines, in relation to the appointment of insolvency practitioners, used in the Masters' offices. It applies amongst others, not only to the appointment of provisional trustees by the Master in terms of s 18(1) of the Act but also to a range of other appointments. The policy sets out the procedure to be followed by Masters when making a discretionary appointment and their power to do so.

[12] In terms of clause 6.1 of the policy, every Master's List must be divided into various categories. Clause 6 reads:

'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 African citizens before 27 April 1994;

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

Category C: White females who became South African citizens before 27 April 1994;

Category D: African, Coloured, Indian and Chinese females and males, and White females, who 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 five 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.'

[13] The appointment process is then set out in clause 7 which reads as follows:

'**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.

. . . '

This means that the Master must appoint insolvency practitioners consecutively in the ratio A4:B3:C2:D1 across all classes of appointments. In other words, the Master must 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 another four practitioners. When appointing within a category, the Master must proceed down the alphabetical list until the end is reached and then start again at the top. There is no

power to depart from this, but the Master may in the circumstances set out in clause 7.3 appoint an additional trustee. A great amount of the argument before us was addressed to the extent of the discretion that this clause gives to Masters.

[14] It is common cause that the policy is aimed at the discretionary appointments, in terms of the Act, of insolvency practitioners by the Master. The policy further obliges the Chief Master to issue directives to be used by all Masters in order to implement and monitor the application of the policy. The Chief Master issued three such directives in 2014.

[15] The policy principally implicates the provisions of the Act that deal with the appointment of provisional trustees and co-trustees. The relevant legislative provisions governing the appointment of provisional trustees are as follows. Section 18 of the 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.

. . . .'

[16] According to the above section the power to appoint provisional trustees resides with the Master, and the Master's discretion is to be exercised in accordance with the policy determined by the Minister in terms of s 158(2) of the Act. As noted earlier in this judgment the Minister is also empowered, in terms of s 10(1A)*(a)* of the Close Corporations Acts 69 of 1984,[9] and s 368 of the old Companies Act 61 of 1973,[10] to determine the policy for the appointment of liquidators and provisional liquidators. The policy thus applies to these appointments as well.

[17] It is apparent that provisional trustees and provisional liquidators play a significant role in the liquidation of an estate and the winding-up of a company or close corporation. They are appointed to control and administer the estate or the property of the company until a trustee or liquidator has been appointed. Only persons included on a Master's list of insolvency practitioners may be appointed as provisional trustees or liquidators, and their appointment must be done in accordance with the procedures set out in clauses six and seven of the policy. Unlike a final trustee appointed at the first meeting of creditors, the provisional trustee takes instructions from the Master, who stands in the position of the creditors (s 18(2) of the Act). They may be authorised by the Master or the court to sell property belonging to the estate. Experience in the high court suggests that this authority is frequently sought and granted.

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[9] This section reads: 'The Minister may determine policy for the appointment of a liquidator by the Master in order to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination.'

[10] The section provides that:
'As soon as a winding-up order has been made in relation to a company, or a special resolution for a voluntary winding-up of a company has been registered in terms of section 200, the Master may, in accordance with policy determined by the Minister, appoint any suitable person as provisional liquidator of the company concerned, who shall give security to the satisfaction of the Master for the proper performance of his or her duties as provisional liquidator and who shall hold office until the appointment of a liquidator.'

[18] The policy replaces all previous policies and guidelines relating to the appointment of insolvency practitioners and envisages that only persons included on the Master's list may be appointed. It is one of the policy considerations that the Master's list must be revised before the policy is implemented. To be included on the list an interested person must have applied, supported by an affidavit. Among the requirements for appointments include, that the appellant must have sufficient infrastructure within the area of jurisdiction of the Master in question. They must also be appropriately qualified in the field of law or commerce and hold a four years' bachelor's degree, or have five years suitable experience in administration and winding-up of an insolvent estate, at the time when the policy comes into effect.

[19] The policy empowers the Master to appoint provisional trustees on a rotational basis in line with the categories set out in clauses 6 and 7 which are based on race and gender. The policy does not provide for the wishes of creditors to be taken into account in these discretionary appointments.

The High Court

[20] The high court agreed with the respondents and found that the policy puts in place a rigid regime in which the Master becomes a rubberstamp, compelled to appoint designated persons by rote from the Master's list, which is arranged alphabetically on a race and gender basis. It also found that the policy constituted an unlawful fettering of his discretion. The high court adopted an approach that, in so far as the policy aimed to transform and make the insolvency industry accessible to previously disadvantaged individuals, it needed to do more than increase numbers. The policy had to ensure that there was a correlation between the individual's skill set and the requirements for the role, within the system provided for by the legislation. The policy failed, as a remedial measure, to provide clear timelines or targets to determine whether it was likely to achieve its intended objective. As a

result of this the high court concluded that there was insufficient evidence to support the notion that the policy was likely to achieve its aim of transforming the industry within a specific period, or at all. It also took issue with what it found to be a mechanical application of the policy which failed to appreciate and provide any scope allowing the Master to take into account the skills, knowledge, expertise and experience of the practitioner when appointing a trustee. As a result, it held that the policy could not pass constitutional muster and declared the policy inconsistent with the Constitution and invalid.

Equality submissions

[21] The mainstay of the appellant's argument was that the policy was intended to form the basis of transformation of the insolvency industry. The respondents accept that the object of the policy was to promote consistency, fairness, transparency and the achievement of equality for insolvency practitioners previously disadvantaged by unfair discrimination. SARIPA contended that the policy will not achieve these objectives and that it would undermine the transformation already achieved in the industry mainly by detracting materially from the business of skilled previously disadvantaged practitioners.

[22] The appellants argued that the policy was a measure contemplated by s 9(2) of the Constitution in that it promotes the achievement of equality and was designed to protect and advance persons (and categories of persons) previously disadvantaged by unfair discrimination. The purpose of the policy was to protect and develop previously disadvantaged insolvency practitioners who had suffered unfair discrimination because of past injustices. These past injustices were being preserved by the requisition system of appointment of provisional trustees or liquidators, which system was creditor driven. The appellants attacked the requisition system as reducing previously disadvantaged insolvency practitioners to mere beggars and submitted that it perpetuated the myth that previously disadvantaged insolvency practitioners are incompetent. During oral

submissions before us, they submitted that if properly applied, the policy would help to eradicate the socially constructed barriers inhibiting entry, by previously disadvantaged practitioners, into the insolvency industry. It would also root out systemic or institutionalised racism prevalent in the current practice of the requisition system. We were urged to incline to the view that the current system for the appointment of provisional trustees or liquidators was skewed in favour of previously advantaged practitioners who obtained knowledge and skills at the expense of the disadvantaged practitioners, as a result of the oppressive and discriminatory practices which existed in the past.

[23] In support of their submissions, the appellants relied on the three pronged test espoused in *Minister of Finance & another v Van Heerden* 2004 (6) SA 121 (CC) para 37 where Moseneke J said the following:

'When a measure is challenged as violating the equality provision, its defender may meet the claim by showing that the measure is contemplated by s 9(2) in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination. It seems to me that to determine whether a measure falls within s 9(2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality.'

[24] The appellants contended that the policy met all three requirements and that it was neither unfair, nor presumed to be unfair. It was submitted that it would facilitate access to the industry and restore the previously disadvantaged insolvency practitioners' rights to equality, dignity and would also realise their right to follow their trade, profession or occupation – which was previously denied and was now being curtailed by the requisition system. In essence we were urged to

accept that the measures proposed in the policy will ameliorate the imbalances of the past.

[25] As regards the requisition system the argument advanced is that this system adds to the social barriers to entry and perpetuated the imbalances of the past, because it allows creditors to determine and dictate who should be appointed in the provisional phase. The requisition system was inimical to s 9(2) of the Constitution and was not a measure which promoted the achievement of equality. It was urged upon us that the policy appointment had two benefits: (a) first, that disadvantaged persons from the categories identified would be appointed to larger estates by virtue of being the next-in-line practitioner and (b) second, that they would benefit when they were appointed as co-practitioners.

[26] The respondents, however, submitted that the transformation which had been attained in the insolvency industry would be undermined. Previously disadvantaged individuals would lose work currently assigned to them because of their skill and expertise. Under the current system previously disadvantaged individuals are appointed as co-provisional trustees in every insolvent estate. The crux of the respondents' submission is that the mechanical process of appointments contemplated in the policy will do more harm than good, because some of the previously disadvantaged insolvency practitioners will not be allocated the same amount of work, owing to the roster system.

[27] It was contended by SARIPA that the policy discriminated against white males, white females and African, Indian, Chinese or Coloured males, in varying degrees. They also submitted that it discriminated against African, Indian, Coloured and Chinese persons who became South African citizens after 27 April 1994. Having regard to the test in *Van Heerden*, the policy was almost an absolute barrier to white males, who would be assigned no more than 10% of the

available work, even though many of them were active in the profession. They submitted that the 'rigid race and gender-based' categories and ratios amounted to the imposition of quotas as opposed to numerical targets, rendering the policy constitutionally impermissible.

[28] Under the requisition system, employees and trade unions have a say in the appointment of insolvency practitioners, a factor which Solidarity as a trade union, appreciates. Their submission was that the policy's exclusion of the employees' or trade union's voice from the appointment resulted in the policy lacking a rational connection to its objective. Solidarity's argument that the policy fails to take the role of trade unions and employees into account cannot be disputed. The approach by both the Minister and the Chief Master was that this was irrelevant, as was the exclusion of any role for creditors in regard to provisional appointments.

[29] Affirmative action measures are designed to ensure that suitably qualified people, who were previously disadvantaged, have access to equal opportunities and are equitably represented in all occupation categories and levels.[11] They must be suitably qualified in order not to compromise efficiency at the altar of remedial employment. Due to our country's history and the constitutional obligation, post democracy, to redress the past injustices, measures directed at affirmative action may in some instances embody preferential treatment and numerical goals, but cannot amount to quotas. In advancing employment equity and transformation, flexibility and inclusiveness is required. Remedial measures must operate in a progressive manner assisting those who, in the past, were deprived of the opportunity to access the relevant

[11] This is recognised in terms of s 9(2) of the Constitution which states: 'Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.'

requirements necessary to enter the insolvency profession, but such remedial measures must not trump the rights of previously advantaged insolvency practitioners. Rigidity in the application of the policy or which has the effect of establishing a barrier to the future advancement of such previously advantaged insolvency practitioners, is frowned upon and runs contrary to s 9(2) of the Constitution. These principles emerge from the decisions of the Constitutional Court to be referred to below.

[30] The essence of the parties' contentions on the equality leg is this. They agree 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 and profession, a right afforded in s 21 of the Constitution. The respondents, however, submit that the policy was rigid in its application and calculated to establish a barrier to the future advancement of affected people, contrary to s 9(2) of the Constitution.

[31] It was stated by Moseneke ACJ in *South African Police Service v Solidarity OBO Barnard* [2014] ZACC 23; 2014 (6) SA 123 (CC) that:

'[32] Remedial measures must be implemented in a way that advances the position of people who have suffered past discrimination. Equally, they must not unduly invade the human dignity of those affected by them, if we are truly to achieve a non-racial, non-sexist and socially inclusive society.

[33] We must remind ourselves that restitution 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 socio-economic 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 grasp only through governance that is effective, transparent, accountable and

responsive. Our public representatives will also do well to place a premium on an honest, efficient and economic use of public resources.'

[32] Remedial measures must therefore operate in a progressive manner assisting those who, in the past, were deprived, in one way or another, of the opportunity to practise in the insolvency profession. Such remedial measures must not, however, encroach, in an unjustifiable manner, upon the human dignity of those affected by them. In particular, as stressed by Moseneke J in para 41 of *Van Heerden,* when dealing with remedial measures, it is not sufficient that they may work to the benefit of the previously disadvantaged. They must not be arbitrary, capricious or display naked preference. If they do they can hardly be said to achieve the constitutionally authorised end. One form of arbitrariness, caprice or naked preference is the implementation of a quota system, or one so rigid as to be substantially indistinguishable from a quota. This explains why s 15(3) of the Employment Equity Act 55 of 1998, permits preferential treatment and numerical goals, but disallows quotas.[12] Counsel for the Minister and the Chief Master accepted that if the policy imposed a quota or rigid system for the appointment of insolvency practitioners as trustees it would infringe these principles and would have to be struck down.

[33] The policy embodied in clause 7.1 embodies a strict allocation of appointments in accordance with race and gender. Insolvency practitioners are for this purpose divided into four groups stratified by race, gender and age. Appointments are to be made from these groups in strict order from group A to group B and thence to group C, and finally group D. Within each group allocations are to be made alphabetically. The Chief Master's directives served to establish committees to monitor compliance by Masters with the policy. The

[12] *South African Police Service v Solidarity (obo Barnard)* 2014 (6) SA 123 (CC) para 42; *Solidarity v Department of Correctional Services* 2016 (5) SA 594 (CC) paras 51 and 103-109.

clause contains none of the flexibility and all of the rigidity that the Constitutional Court has said is impermissible.

[34] In an endeavour to overcome the rigidity of clause 7.1 counsel for the Minister and Chief Master argued that the requisite flexibility was to be found in the Master's powers under clause 7.3. She submitted that this vested the Master with a discretion in every case. I disagree. Clause 7.3 does not permit a departure from the appointment process prescribed in clause 7.1 of the policy. It provides the Master with a mechanism, in an ill-defined range of cases, to compensate to some degree for the fact that the policy dictates the appointment of someone not qualified to undertake the task, either because of its complexity, or because of their unsuitability – the two are not mutually exclusive. This power of appointment does not resolve the fact that clause 7.1 requires the Master to make an appointment in accordance with a rigid quota. After all the unqualified person is still to be appointed and to have their share in the fees accruing from the administration of the estate, even though the reason for invoking clause 7.3 is that they are not qualified or unsuitable to perform that task. The Master's ability to insert a backstop into the process does not detract from the need in every case to comply with clause 7.1. The system is arbitrary and capricious.

[35] In its recent decision in *Solidarity v Department of Correctional Services*, the Constitutional Court was divided over whether the Department of Correctional Services' policy regarding appointments embodied a quota. The difference between the two judgments (Zondo J and Nugent AJ) was that Zondo J held that the power of the National Commissioner to depart from the strict numerical categorisation by race and gender in the policy – which was almost identical to the policy in the present case – saved it from being an impermissible quota. Here there is no such general discretion. The policy is entirely dependent on a strict racial and gender allocation of appointments and is arbitrary with no saving discretion. The Master has a remedial power that does

not avoid the result of the policy being applied. That is not the kind of general discretion that Zondo J held saved the policy before the Constitutional Court.

[36] The rigid and unavoidable appointment process prescribed by clause 7.1 is arbitrary. It is also in my view capricious because it has been formulated with no reference to its impact when applied in reality. One illustration of how capricious the system is arises from a consideration of the fact that it has no regard to the relative number of insolvency practitioners falling in each category. The Chief Master's statistics and schedules, although contested, reveal that the majority of insolvency practitioners at present are White males, followed by African, Indian, Coloured and Chinese males, White females and African, Indian, Coloured and Chinese females. The 4 appointments in category A will benefit persons in that category – Black, Indian, Coloured and Chinese women – to a far greater extent than the ratio 4:3:2:1 might suggest. Because this is the smallest group of practitioners, the turn of members of the group to be appointed will come round relatively rapidly (4 in every 10 appointments), while that of White males and insolvency practitioners of every race and gender born after 27 April 1994 (1 in every 10 from among a far larger group) will come round but rarely.[13] The prejudice to young Black men and women who have recently completed their studies, are well qualified and wishing to enter practice as an insolvency practitioner, is obvious. There is no evidence either that this was considered by the Minister when formulating the policy.

[37] Nor is there any evidence that the implementation of the policy is even practical at present given the disproportion in numbers between the four groups. The policy makes no allowance for a practitioner to refuse an appointment or for what the Master is to do in that case. In a small largely rural area there may be only a handful of

[13] An early analysis, when the categories were differently composed, indicated that White males would get fewer than 4% of all appointments.

insolvency practitioners falling into category A, yet they are to be appointed in forty percent of cases. It is unclear what is to happen if they are too busy to undertake more work. The Master has no discretion to appoint someone from Category B without departing from the policy. But even if this is viewed as an extreme case and the priority given to people in category A prompts more people in that category to enter the business of an insolvency practitioner, that will not matter if they were born after 27 April 1994. Why young people should be discriminated against in this fashion escapes me. The disproportionate treatment of the different groups is obvious and no rational reason has been advanced therefor. The likely effect will be to force many insolvency practitioners in category D, or category C, out of the profession and deter others, especially the young, from entering it.

[38] For those reasons I agree with the high court that the policy fails to meet the test in *Van Heerden*, and is thus unconstitutional. Ordinarily, such a finding would be the end of the dispute, but I agree with the high court's approach in para 67 of its judgment:

'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 of the grounds, I nevertheless make findings in respect of the other challenges. This approach conforms with Constitutional Court guidance provided by Ngcobo J . . . in *S v Jordan & others (Sex Workers Education and Advocacy Task Force and others as Amici Curiae)* 2002 (6) SA 642 (CC) para 21. I intend to follow it.'

Fettering the Master's discretion

[39] The relevant parts of clause 7 of the policy are set out in para 13 above. The case of the appellants is that the Master retains his discretion to appoint insolvency practitioners who are on the Master's list because the list has been categorised into senior and junior practitioners. The argument advanced was that before an appointment was made the Master would consider issues such as the complexity of

the matter, and whether the next-in-line practitioner has the infrastructure to deal with complex insolvent estates. According to the appellants this would entail an exercise of discretion to ascertain whether the next-in-line practitioner was suitable. In assessing the suitability of a practitioner, we were urged to accept that the Master would also consider issues such as race, gender, years of experience, as well as his or her specific knowledge and expertise. The argument continued that, in the exercise of the discretion, junior insolvency practitioners who had no skills would benefit when they were co-appointed to handle complex estates with senior practitioners, in terms of clause 7.3 of the policy. The nub of the appellants' argument was that the exercise of this discretion dispelled the notion that the Master is shackled by the policy.

[40] SARIPA's submissions on this score were in essence, that the policy goes beyond providing a guideline to the Master, but served to predetermine the outcome of the exercise of the Master's powers, thus binding his decision-making powers inflexibly. Their view is that the Master would, under the policy, not retain the ability to make decisions based on his own appreciation of all the facts before him. Because the policy requires the Master to appoint the next-in-line practitioner, the Master was debarred from considering each individual estate and applying his mind, having regard to the relevant factors.

[41] CIPA's submissions with regards to the discretion of the Master were essentially that except for clause 7.3, the Master was given no discretion in terms of the policy. No allowance was made for the aptitudes pertinent to the industry, and the wishes of the creditors and other persons of interest were not catered for. They are joined in this submission by NAMA who contended that by excluding creditors, from the decision about who to appoint as provisional trustees or liquidators, creditors were potentially prejudiced. The policy took away any discretion the Master might have, and reduced the Master's function to one of rubberstamping.

[42] Solidarity pointed out that under the policy, the Master would disregard all other factors and allocate work on the basis of race and gender. This, they contended, deprives the Master of exercising an appropriate discretion and was accordingly inconsistent with section 9(2) of the Constitution.

[43] The high court agreed with the appellants' contention that clause 7.3 does provide for a discretion by the Master. In terms of clause 7.3 the Master was at large to appoint any suitable practitioner jointly with a senior or junior practitioner appointed in alphabetical order, having regard to the complexity of the matter and the suitability of the next-in-line practitioner. The high court accordingly held that the discretion of the Master was unfettered in this regard.

[44] In my view the arguments under this head proceeded from a misconception as to the scope of the Master's powers of appointment. The argument proceeded from the premise that the Master had an unfettered discretion to appoint a provisional trustee and contended that the policy dictated by the Minister improperly fettered that discretion. In my view the premise is faulty. Section 18(1) confers on the Master a power to make appointments of provisional trustees 'in accordance with policy determined by the Minister'. The Master does not have an unfettered discretion. That may have been the case in the past before the amendments to the Act brought about in 2003,[14] but it is no longer the case. The Master's discretion is now to make appointments in accordance with the policy. So the existence of the policy cannot be taken as unduly fettering the Master's discretion, because the Master only has a discretion to exercise in accordance with the policy. (This is a different matter from whether the policy imposes an unduly rigid system of, or akin, to a quota.)

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[14] *Hartley NO v The Master* 1921 AD 403 at 412; *Lipschitz v Wattrus NO* 1980 (1) SA 662 (T) at 671G.

[45] I accept for the purposes of argument that the provisions of s 18 do not mean that the Minister is entitled to remove all discretion from the Master. It merely means that the Minister may circumscribe the parameters within which the Master exercises the discretion. Viewed in that light there is a considerable restriction imposed by clause 7.1, but some discretion remains in terms of clause 7.3. If the Master decides that an estate is a complex estate, or that the next in line practitioner is unsuitable, they are accorded the power to exercise their discretion by making an additional appointment of a senior practitioner to supplement the appointment made in terms of clause 7.1. In doing so the Master is not bound by the requirements of clause 7.1 and may simply appoint a senior practitioner who the Master believes will remedy the deficiency. The Master is left to determine what is a complex estate and may exercise judgment in regard to the capabilities of different insolvency practitioners. There is a limited residual discretion left for the Master to exercise in making these appointments. That suffices to hold that the Master's discretion is not improperly fettered.

Irrationality

[46] It is desirable to deal briefly with this argument. Rationality is not a high hurdle to surmount. What needs to be shown is that the policy lacks a rational connection to the objectives it is directed at achieving. The problem here is that there is no explanation in the affidavit of the Chief Master, who also spoke for the Minister, as to the basis upon which the policy was formulated. The explanation of the 4:3:2:1 ratio and how it was derived was that:

'The percentages were arrived at by taking numbers which can work with ease in practice (4:3:2:1) and give approximately the same result (70%) as the target of 75% for non-whites used when work is allocated by the State to lawyers.'[15]

[15] Vol 2, p 197. This is taken from the explanation for the policy annexed to the Chief master's answering affidavit.

No reliable figures were put forward by the Chief Master to show the number of practitioners in each category[16] so that it is impossible to say that those falling in the different categories are indeed not receiving their fair share of the work of insolvency practitioners. It does not suffice for the Chief Master to say that White males receive 43% of appointments and African, Indian, coloured and Chinese males 30%, unless we have an appreciation of the relative proportions of people falling in these categories in the profession as a whole. If White males constitute 65% of insolvency practitioners and African, Indian, coloured and Chinese males only 20% then the distribution of appointments under the current system may be demonstrating a rapid advancement of the latter group at the expense of the former.

[47] The real problem is that in the absence of proper information about the basis upon which the policy was formulated, and proper information concerning the current demographics of insolvency practitioners, one cannot say that the policy was formulated, on a rational basis properly directed at the legitimate goal of removing the effects of past discrimination and furthering the advancement of persons from previously disadvantaged groups. The absence of any explanation at all for its manifestly discriminatory impact on young people is telling. The impression is given that the ratio is arbitrary and cobbled together with no apparent justificatory basis.

[48] That difficulty is compounded by the many aspects of the policy that are unexplained. For example, there is no explanation proffered by the appellants as to what constituted a complex estate or an unsuitable practitioner. In assessing what is a complex estate important factors such as:

(i) knowledge, skill and locality of the insolvency practitioners;

(ii) value of the assets in the insolvent estate;

(iii) nature of the insolvent business and its assets;

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[16] The explanation of the policy said that these figures would only emerge after the various Masters' lists had been cleaned up.

(iv) requisitions by creditors and trade unions

are to be excluded from the list.

[49] Another weakness is to be found in the Master's definition of a senior practitioner which is a person who has received at least one appointment per annum over the preceding five years. It matters not whether the appointment involved winding up a few small estates created by voluntary surrenders, or five major liquidations of companies. This does not suggest any consideration of the skills and expertise necessary to deal with an insolvent estate. There is no rational basis for this distinction and it undermines the rationality of the policy as a whole.

[50] The fact that the policy requires the Master to appoint the next-in-line practitioner in each case is itself irrational. It fails to take into account factors such as the nature of the individual estate, and the industry specific knowledge, expertise or seniority of the practitioner concerned. What this means is that absent consideration of these factors, which are not exhaustive, the Master does so mechanically as per the roster. The policy negates what was described by Bertelsmann J in *Ex Parte The Master of the High Court South Africa (North Gauteng)* 2011 (5) SA 311 (GNP) para 26, as the 'institutional knowledge and expertise' of the Master to assess the ability and integrity of the trustees and liquidators, and decide whether they are qualified to be appointed to a specific estate.

Costs

[51] I now turn briefly to deal with the argument relating to costs. In the high court, CIPA, Solidarity and the appellants requested that no order as to costs be made. SARIPA and NAMA submitted that costs should follow the result. The high court awarded no costs against the appellants. However, as regards the costs of this appeal there are no reasons for costs not to be awarded against the appellants.

[52] In the result the following order is made:

1. The appeal is dismissed with costs, such costs to include the costs of two counsel.

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R S Mathopo
Judge of Appeal

Wallis JA (Mpati P, Swain and Mathopo JA concurring)

[53] I have had the pleasure of reading the judgment of Mathopo JA with which I am in entire agreement. I write this addendum to his judgment to deal with my concern that in formulating and publishing the policy the Minister has disregarded a significant constraint on his powers and thereby infringed the principle of legality or, as it was said in the past, acted ultra vires.

[54] My starting point is that we are dealing with the legislation that governs the liquidation of insolvent estates and the winding up of companies and close corporations. Noticeably missing from the submissions on behalf of the Minister and the Chief Master was any argument addressed to that fact. A brief resumé of the law in this regard and the purpose of this legislation is therefore called for. I start with the statement in *Walker v Syfret NO*,[17] where Innes J said that the effect of a sequestration order is to bring about a *concursus creditorum* which 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] *Walker v Syfret NO* 1911 AD 141 at 166.

Nothing can be done thereafter to affect the rights and obligations of creditors in the insolvent estate.[18] What was true in 1911 remains true over a century later.[19]

[55] This passage highlights the fundamental purpose of insolvency legislation, which is to secure the realisation of the remaining assets of the insolvent and the distribution of the resulting amounts among creditors in accordance with the order of preference laid down by law. Although the Master plays a vital role in overseeing the process of winding-up an estate,[20] the process is nonetheless creditor-driven. It is the majority of creditors in number or value of claims that have the right to elect trustees or nominate liquidators. They have the right to take decisions in respect of the manner in which the assets falling into the estate, or constituting property of the corporate body, in winding-up are to be dealt with.[21] The logic of this is obvious. It is the creditors who stand to lose as a result of the insolvency. They are the best judges of their own interests and they are the people best situated to instruct the trustee or liquidator how to go about the process of liquidation or winding-up. They are the people who can judge whether it is desirable to borrow more money in order to complete a building project in the hope of a substantial payment, or to commence litigation with a view to recovering amounts owing to the estate, to give but two examples. It is after all their money that is being spent on this and their money that is at risk.

[56] While there have been changes to our company law, with the enactment of the new Companies Act 107 of 2008, which replaces the old system of judicial management with the new system of business rescue, the focus of the statutes on the interest of creditors has not

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[18] *Ward v Barrett NO and Another* 1963 (2) SA 546 (A) at 552E-G.
[19] *Gainsford and Others NNO v Tanzer Transport (Pty) Ltd* 2014 (3) SA 468 (SCA) para 1.
[20] *Ex parte v Master of the High Court South Africa (North Gauteng)* 2011 (5) SA 311 (GNP) para 19.
[21] *Ibid* para 28; *Geduldt v The Master* 2005 (4) SA 460 (C) at 466A-C.

altered. The interests of employees are now looked after but primarily from the perspective of their role as creditors. It remains the position that their contracts of employment are terminated by a liquidation or sequestration order. Although the judge in the high court devoted a portion of his judgment[22] to the proposition that there is a changing role of insolvency in society, nothing that he said detracts from the fundamental principle that the purpose of a sequestration or liquidation order is to bring the estate of the insolvent or the affairs, of the corporate body, under the jurisdiction of the law to be administered with a view to realisation to best advantage in the interests of creditors.

[57] Once it is recognised that the purpose of the Insolvency Act, and the provisions in the Companies Act, dealing with the liquidation of companies are designed to be driven by creditors in their own interests, that necessarily affects the basis upon which trustees and liquidators are to be appointed. The primary consideration must be the interests of the creditors and serving those interests. If the appointment of trustees and liquidators occurred speedily as contemplated by the relevant statutes this understanding of the situation would be even clearer, because there might not even be a need for the appointment of a provisional trustee or liquidator. Neither statute requires such an appointment to be made and both contemplate that the first meeting of creditors will be speedily convened. Thus the Insolvency Act provides in s 40(1) that on receipt of an order of the court sequestrating an estate finally the Master shall immediately convene a first meeting of creditors.[23] Furthermore the Master has only a limited basis for refusing to appoint the person chosen by the creditors as trustee or liquidator.

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[22] Paras 23-29.

[23] Section 364(1) of the Companies Act 61 of 1973 is to like effect. In a members voluntary winding-up the Master is obliged to appoint the person nominated by the company as liquidator subject only to their not being disqualified from appointment. See s 369(1).

[58] Provisional appointments have become more significant because of delays in progressing from a provisional to a final sequestration or winding-up order and because of delays in the various Masters' offices. The evidence tendered by CIPA indicated that the average delay in Gauteng is some seven months. Under the requisition system, where creditors were able to play a significant role in the selection of the provisional trustee or liquidator, this mattered less and there was usually a smooth transition from provisional to final liquidation or winding-up, with the provisional trustee or liquidator being elected or nominated for final appointment. But the system envisaged by the policy deliberately sets out to remove the voice of the creditors from the process of appointment. The Chief Master said this explicitly in his answering affidavit:

'I deny that the law provides that the Master's discretion has to take into account creditors' directives at the provisional appointment phase.'

[59] While that stance may be technically correct, in that there is nothing in the relevant statutes that expressly obliges the Master to pay heed to creditors' wishes when making provisional appointments, it is beside the point. The statutes make it clear that they exist to serve the interests of creditors. Nothing in the statutes empowers the Master to disregard the interests of creditors and to appoint on a roster basis persons who, in terms of the policy, the Master may regard, either because of the complexity of the estate or because they are unsuitable, as unqualified for such appointment. In other words it is not open to the Master to act in a manner that disregards or is in conflict with the interests of creditors.

[60] The Chief Master annexed to his answering affidavit a document explaining the policy. It said that:

'To determine the persons to be appointed in a particular matter is no doubt the most critical aspect of insolvency appointments …'

I agree. The reason is that in view of the delays in reaching the stage of final sequestration or winding-up and the delays in convening the

first meeting of creditors, an increasing proportion of the work of liquidation or winding-up is undertaken by the provisional trustee or liquidator. Under the policy they are able to do this without any directions from the creditors and solely on the basis of the directions of the Master.

[61] The problems with this approach are manifest. If the matter is in the hands of creditors they will follow the maxim of horses for courses and select as trustees or liquidators persons with knowledge of the area of business in which the insolvency has occurred. With the roster the next-in-line will be appointed even though what is involved is a mine or a farm or some other business requiring specialised knowledge, such as a chain of pharmacies or a major retailer. The creditors must tolerate the appointment even though there is a substantial risk that the steps the appointee takes in the course of liquidation or winding-up are inimical to their interests. All they can do is ask the Master to exercise the discretion under clause 7.3 of the policy. But the sale of an asset at an under price, or at a time that is not propitious for realising maximum value, is beyond their powers to prevent.

[62] There can be no objection to the broad purpose of consistency, fairness, transparency and the elimination of the impact of past discrimination. Nor can there be any objection to the elimination of certain undesirable features of the appointment process, ranging from importuning to solicitation to outright dishonesty, that the Chief Master claims were endemic under the old system. But in my view it remains a requirement that any policy that is put in place for the appointment of trustees and liquidators must be consistent with the purpose of our insolvency legislation and be directed at serving the interests of creditors. In formulating this policy their interests have quite deliberately been disregarded at any stage prior to the first meeting of creditors. That is what the explanatory document said and it was echoed in the affidavit of the Chief Master.

[63] In my view that was impermissible. Given the purpose of the legislation with which we are concerned, it seems to me that the actions of the Minister in determining the policy under s 158 of the Act, and the actions that the Master must undertake in terms of that policy, must be in accordance with the interests of creditors in the liquidation of the estate or the winding-up of the company or close corporation. As the policy was formulated on the basis that those interests were irrelevant, and on its face it does not recognise or serve those interests it was in my view outside the legitimate powers vested in the Minister and its promulgation involved a breach of the principle of legality.

[64] There is a fundamental principle that must be observed in this regard. It was summarised in *Gauteng Gambling Board*[24] where Navsa JA, speaking for a unanimous court said:

'More than six decades ago this court in *Van Eck NO and Van Rensburg NO v Etna Stores* 1947 (2) SA 984 (A) said the following:

"For to profess to make use of a power which has been given by statute for one purpose only, while in fact using it for a different purpose, is to act *in fraudem legis*, construing that term in the more restricted manner adopted by the majority of this Court in the case of *Dadoo Ltd v Krugersdorp Municipal Council* (1920 AD 530). . . Such a use is a mere *simulatio* or pretext. . . . And I should add that, of course, if the person exercising the power avowedly uses it for some purpose other than that for which alone it has been given, he acts simply *contra legem*: where, however, he professes to use it for its legitimate purpose, while in fact using it for another, he acts *in fraudem legis.*"

In present-day jurisprudence acting with an ulterior motive or purpose is subsumed under the principle of legality.'

[65] In my opinion it is precisely that type of breach of the principle of legality that has occurred here. In their legitimate desire to address past discrimination and disadvantage, the Minister and the Chief Master have overlooked the fundamental purpose of the legislation that

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[24] *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) paras 46 and 47.

governs the sequestration of estates and the winding-up of companies and close corporations, which is to serve the interests of creditors as conceived by the creditors themselves. The policy that has been promulgated is not directed at that purpose and disavows the need for the process of appointment that it governs to have regard to the views or interests of creditors. That is an exercise of power for a purpose other than any for which it was bestowed. It should not be difficult for the Minister and the Chief Master to devise a policy that serves both purposes instead of trying to serve one at the expense of the other.

[66] For that further reason as well as those set out in his judgment I concur in the order proposed by Mathopo JA.

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M J D Wallis
Judge of Appeal

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