New policy on the appointment of insolvency practitioners – could this be a turning point in the South African insolvency industry?

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The Minister of Justice and Constitutional Development (the Minister) has recently determined a policy on the appointment of insolvency practitioners, which was published in the *Government Gazette* No 37287 on 7 February 2014 (the policy). This policy, once it commences, will replace all the previous policies and guidelines that are currently being utilised by the Master's offices to appoint insolvency practitioners and its stated intention is to "form the basis of the transformation of the insolvency industry". The publishing of this policy has since caused upheaval in the insolvency industry and has raised the operative question: Does this policy serve the interests of South Africa's diverse nation as it purports to do or does it in fact pull back on the progress made since 1994 and actually hinder those who have been previously disadvantaged?

This article will aim to provide a summary of the pertinent changes that the implementation of the policy will cause and highlight a few of the arguments raised by the South Africa Restructuring and Insolvency Practitioners Association (SARIPA) and The Concerned Insolvency Practitioners Association (CIPA) against the implementation of the policy.

Before considering the new policy it is apposite to briefly outline the current one. Due to the lengthy period between the date on which an individual is sequestrated or a company or close corporation is placed into liquidation and the date on which the Master convenes the first meeting of creditors, it is common practice for the Master to appoint a provisional trustee or liquidator to administer the estate prior to the appointment of the final trustee or liquidator at the first meeting of creditors. Practically, the appointment of a provisional trustee or liquidator is done through the creditors signing requisitions in support of a specific trustee or liquidator, the so called "requisition system".

In 2001, the Minister published a policy document called "Strategy on/Procedures for Appointment of Liquidators and Trustees" in terms of which guidelines for the completion of requisitions and a provision for the appointment of a previously disadvantaged person in each and every estate as a co-provisional trustee or liquidator were laid down. The idea surrounding this policy was that by appointing a previously disadvantaged person as a co-trustee or liquidator, that person would benefit from spending time with a learned trustee or liquidator and would learn how to properly administer an estate so that they could eventually go out and do so on their own.

The following paragraphs stand out in the new policy:

- The definition of an "insolvency practitioner" is "a natural person who is appointed by a Master of the High Court as a *curator bonis*, provisional trustee, trustee, co-trustee, provisional liquidator, liquidator or co-liquidator".
- Paragraph 3 sets out the circumstances under which the policy's directions to the Master will apply. It is through this paragraph that it becomes clear that the appointment of the final trustee or liquidator will still, to a large extent, be done as it has in the past by utilising the creditors' votes.
- Paragraph 6.1 sets out the different categories for insolvency practitioners that must appear on every Master's list:
    - There is a proviso that states that African, Coloured, Indian and Chinese people as included in the categories are limited to those who became a South African citizen before 27 April 1994 or are descendant from such a citizen.
    - The categories are as follows: Category A being African, Coloured, Indian and Chinese females; Category B being African, Coloured, Indian and Chinese males; Category C being White females; and Category D being White males.
    - Within each category the names are to be arranged in the alphabetical order of surnames and, if there are similar surnames, then by first names, with insolvency practitioners who are added to the list after the compilation of the list to be added to the end of their relevant category.
- Paragraph 6.2 says the Master's list must distinguish between "senior practitioners" and "junior practitioners". "Senior" being those who have been appointed at least once a year within the last five years and "junior" being those who have not, but who have sufficient infrastructure and experience to be appointed on their own.
- Paragraph 7.1 sets out the way in which the Master is to appoint the practitioners, namely Category A:4, Category B:3, Category C:2 and Category D:1. Where the number indicates the number of insolvency practitioners to be appointed in sequence.
- Paragraph 7.2 then states that each practitioner is then also to be appointed in alphabetical order.
- Paragraph 7.3 is where the Master's discretion comes in. It states that in complex matters the Master may appoint an additional senior practitioner jointly with the junior or senior practitioner who was appointed due to the fact that they were next-in-line. But if the Master decides to do this, he is required to record his reason for doing so and, on request, must provide that reason to the other practitioner.
- Paragraph 7.4 deals with the situation where the next-in-line practitioner is unable to be appointed due to the fact that he fails to lodge his security bond timeously or there is a conflict of interest. Then the Master must appoint the practitioner next-in-line after him. The only difference in these two situations is if the practitioner's unavailability is due to failing to lodge the security bond, then his name is moved to the end of the Master's list, whereas if the unavailability is due to a conflict of interest, that practitioner may be considered for appointment when the next appointment for that category is made.

- Paragraph 8 set out the commencement date for the policy as 31 March 2014.

On 11 March 2014 SARIPA issued an application out of the High Court of South Africa, Western Cape Division, Cape Town under case number 4314/2014, in terms of which it applied for an interdict to restrain the Minister and the Chief Master from implementing the new policy and further applying for the court to review and set aside the policy. SARIPA's founding affidavit is deposed to by Jurgens Johannes Steenkamp, an insolvency practitioner.

The founding affidavit is lengthy and as such only some of the pertinent arguments will be stated in this article. SARIPA states that the "stated objectives of the policy are to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination" but that "the policy will not achieve these objectives. Instead, the policy unlawfully fetters the discretion of the Master, infringes the right to equality in section 9 of the Constitution and is irrational and *ultra vires* the Insolvency Act".

SARIPA raised four main arguments, that the policy unlawfully fetters the Master's discretion, that it infringes the right to equality and that the policy is irrational and *ultra vires*.

It is argued that the policy creates an "inflexible mechanism" for the appointment of provisional trustees and liquidators due to the fact the Master is required to appoint the next-in-line practitioner without exception. SARIPA states that the Master is entitled to appoint a second senior practitioner to act jointly with the first appointed practitioner, but only if the matter is complex and only if the next-in-line practitioner who was appointed is not suitable for the matter. By requiring these two things, SARIPA alleges that the policy itself shows that the Master could be required, by following the rules of the policy, to appoint a first practitioner who is not suitable to be appointed at all, simply because they are next-in-line. Further, the policy itself creates the absurd rule that the Master may only appoint a second practitioner who is a senior practitioner, this is despite the fact that a specific matter may not warrant the expertise of a senior practitioner and a junior would suffice. SARIPA states that the Master should, despite any guidelines of a policy, be in a position to exercise his discretion based on all of the factors of the case, including whether a candidate is not suitable for a matter due to, for example, not having any experience in the industry in question. According to SARIPA the policy thus "inhibits the Master in the proper exercise of (his) discretion" and thus renders the policy irrational.

SARIPA's second argument is that the policy infringes the right to equality as set out in section 9 of the Constitution. An interesting point made by SARIPA in relation to this argument is that on a perusal of paragraph 6.1 of the policy, it actually excludes certain people from ever being able to be appointed as provisional trustees or liquidators. It does this by including the proviso, as set out above, that African, Coloured, Indian and Chinese people as included in the categories *are limited to those who became a South African citizen before 27 April 1994 or are descendant from such a citizen*. Thereafter there is no category created for those African, Coloured, Indian and Chinese people who became South African citizens after 27 April 1994 and who did not descend from a South African citizen who was a citizen before 27 April 1994. This essentially

prohibits non-white foreign citizens as well as naturalised non-white foreigners from ever being eligible to be appointed as a provisional trustee or liquidator, but interestingly does not oust their white counterparts who fall within the same category.

SARIPA's third argument is that the policy is itself irrational. SARIPA states "it is not clear that the policy will in fact benefit those whom it is designed to assist". It states this because at present it is a requirement that a previously disadvantaged person be appointed as a co-provisional trustee or liquidator in every matter, yet under this new policy, previously disadvantaged persons will actually only be appointed in 70% of the matters, therefore causing fewer previously disadvantaged persons to be appointed. Further, the policy will in fact prejudice those previously disadvantaged persons who are currently well-established and who have "built up a good practice because of their ability and effort" due to the fact that the Master would have to simply appoint the next-in-line practitioner. It essentially places them into the same position as those previously disadvantaged people who do not have the "skill, experience or record of hard work". These things will actually cause the gains that have been made in transforming the industry to be set back, which is opposite to the stated objectives of the policy.

The final argument that SARIPA places before the court is that the policy is *ultra vires*. They state that "any policy which the Minister determines must not only be consistent with section 158(2) of the Insolvency Act but must also not be in conflict with the intention of the legislature, which is that the trustee of an insolvent estate should be elected as such by the creditors". SARIPA alleges that the current system of requisition together with the policy document as issued in 2001 regarding the appointment of a previously disadvantaged person to every estate as a co-provisional trustee or liquidator gives effect to both the legislature's intention and it works towards transformation.

In addition to bringing in its own arguments against the policy document, the application as brought by CIPA under case number 17327/2014 in the High Court of South Africa, Gauteng Division, Pretoria states that "during workshops at which the policy was discussed the Master made it clear that he wanted to abolish the requisition system altogether⋯according to him 'the requisition system exists to benefit the previously advantaged and the selected few, if any, of the previously disadvantaged'". Further it relates the consequences of implementing the policy to certain of its members and describes how in CIPA's view the policy will not achieve what it is aiming to achieve as it will result in various previously disadvantaged people in the insolvency industry losing their jobs as the trusts for which they work will be receiving a largely reduced volume of work. For example they state that St Adens (Pty) Ltd t/a St Adens International "currently⋯secures about 240 new matters a year, but if the Appointments Policy is implemented, the number will probably drop to about five or six. The company will be able to survive for a few months on work in progress, but within eighteen months there will no longer be work to do for about 80% of its staff and they will have to be retrenched".

In a similar vein to that of SARIPA, CIPA states that "in deciding upon the candidate to whom work should be distributed, the Master should be entitled, indeed is required, to consider the complexity of the work, the experience and capacity of the potential candidates to perform it, the

wishes of the interested parties and the imperatives implicit in consideration of affirmative action and empowerment".

In terms of the court order handed down by the Honourable Mr Justice Gamble on 28 March 2014 in the High Court of South Africa, Western Cape Division, Cape Town to the application brought by SARIPA, the Minister and the Chief Master have been interdicted and restrained from implementing the policy pending the determination of Part B of the notice of motion, being the part that calls for *inter alia* the review and setting aside of the policy. The determination of Part B of the notice of motion has been postponed for hearing on 28 and 29 May 2014.

The verdict on the policy's survival is thus still out and we will have to wait and see which side's arguments prevail. The only thing we can hope for is that the court will take both the fairness of the policy's implementation to all insolvency practitioners within South Africa's diverse nation and the need for a transformative system that will uphold, nurture and hone the skills of those who were previously disadvantaged into account when determining whether the policy should stand as it is or not.

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