IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Constitutional Court Case No: **13/2017**
Supreme Court of Appeal Case No: **693/2015**
Western Cape High Court Case No: **4314/2014**
North Gauteng High Court Case No: **17327/2014**

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

FIRST RESPONDENT'S HEADS OF ARGUMENT

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INTRODUCTION

1. The appellants seek to defend the Policy on the Appointment of Insolvency Practitioners ("the Policy") [1]which was determined by the first appellant ("the Minister") pursuant to his powers in terms of s 158(2) of the Insolvency Act 24 of 1936 ("the Insolvency Act").

2. The Policy was declared inconsistent with the Constitution and invalid by the Western Cape Division of the High Court ("the Court *a quo*") on 13 January 2015.[2] This finding was confirmed by the Supreme Court of Appeal ("the SCA") on 2 December 2016.[3]

3. The stated objectives of the Policy are to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination. The Policy is therefore intended to form the basis of the transformation of the insolvency industry.

4. However, the first respondent ("SARIPA") contends that the Policy will not achieve these objectives. Instead, the Policy infringes the right to equality in s 9 of

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1 The Policy was published in the Government Gazette No. 37287 of 7 February 2014. A copy is "JMD2", record 1/46-51. Certain amendments to the Policy were published in the Government Gazette No. 38088 of 17 October 2014. A copy of those amendments is at record 6/486-488.

2 The judgment of the Court *a quo* is at record 12/999-1089. The order is at record 12/1090.

3 The judgment of the SCA is at record 13/1155-1188.

the Constitution and is irrational and *ultra vires* the Insolvency Act. In particular, SARIPA contends that the Policy will undermine the transformation which has already occurred in the insolvency industry, because the mechanical appointments process required by the Policy will result in previously disadvantaged practitioners losing a great proportion of the work which they are currently assigned because of their skill and experience.[4] Furthermore, currently a previously disadvantaged insolvency practitioner is in any event appointed to every insolvent estate as a co-provisional trustee.[5]

5. The SCA accordingly held that the Policy, which requires the second appellant ("the Master") to make appointments of insolvency practitioners in accordance with "*a rigid quota*"[6] in a ratio which appears to have been "*cobbled together with no apparent justificatory basis*"[7] is "*arbitrary and capricious*",[8] and thus fails to meet the test formulated in the matter of *Van Heerden*[9] by this Court.[10]

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4 Founding affidavit ("FA") para 69.5, record 1/32. We point out that this was met with a bare denial in the answering affidavit ("AA") (para 81, record 2/128-129) and there is no evidence on the papers to support the claim made in the appellants' heads of argument that there are "*only a handful of disadvantaged insolvency practitioners*" who fall into this category (paras 59, 62).

5 FA paras 39, 45 and 69.1, record 1/19, 22 and 29. In the AA a bald and general denial of this assertion is made, but no reason for the denial is given (paras 63, 67 and 81, record 2/123-124 and 129-130). Similar statements are made by the second respondent ("CIPA") at their FA paras 31-42, record 6/512-516. The SCA accepted this account of the current appointments process (SCA judgment paras 6-7, record 13/1159-1160). The heads of argument filed on behalf of the appellants do not address this issue ("the appellants' heads").

6 SCA judgment para 34, record 13/1173.

7 SCA judgment para 47, record 13/1179.

8 SCA judgment para 34, record 13/1173.

9 *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) ('*Van Heerden*').

10 SCA judgment para 38, record 13/1175.

6. In addition, the SCA noted that neither the Minister nor the Master offered any justification for the "*manifestly discriminatory impact*" of the Policy on young black insolvency practitioners born on or after 27 April 1994 by relegating them to the category which is only permitted to receive 10% of the available work.[11]

7. The SCA furthermore found that the Policy is irrational for a number of reasons, including that it was formulated on the basis of inadequate and unreliable information and contained a number of unexplained aspects,[12] and that the Minister infringed the principle of legality by disregarding a significant constraint on his powers, namely 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*".[13]

8. We respectfully submit that these findings of the SCA are unassailable, and that there is no prospect that this Court will come to a different conclusion.

9. In these submissions, we firstly address the merits of the application for leave to appeal (which is not addressed in the appellants' heads). We submit that the application for leave to appeal should be dismissed with costs. In the event that

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11 SCA judgment paras 36, 37 and 47, record 13/1174-1175 and 1179.
12 SCA judgment paras 46-50, record 13/1178-1180.
13 SCA judgment paras 53, 62 and 65, record 13/1181, 1185-1187.

leave to appeal is granted, we submit that the appeal falls to be dismissed on the merits. In support of that submission, we briefly outline the current practice in the insolvency industry, as well as the impugned features of the Policy. We then address the grounds for the review of the Policy.

LEAVE TO APPEAL

10. In order to be granted leave to appeal, the appellants must show that the matter raises a constitutional issue or an arguable point of law of general public importance which ought to be considered by this Court, and that it is in the interests of justice that leave be granted.

11. SARIPA accepts that the matter raises a constitutional issue. However, SARIPA contends that it is not in the interests of justice that leave to appeal be granted, as the appeal has no prospects of success.

12. In the matter of *Ronald Bobroff*,[14] this Court confirmed that even in a matter which is of great public importance, leave to appeal may be refused if there are no reasonable prospects of success.

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14 *Ronald Bobroff & Partners Inc v De La Guerre* 2014 (3) SA 134 (CC) para 5.

13. The Policy was found to be unconstitutional at the interim interdict stage as well as at the review stage, and that finding was confirmed by a unanimous judgment in the SCA. We respectfully submit that there are no reasonable prospects that this Court will come to a different conclusion.

14. The SCA held the Policy to be unconstitutional on a number of grounds, all of which we respectfully submit are indisputable, as explained more fully below. However, for present purposes, two examples will suffice.

15. First, as we have said, the SCA found that the Policy has the result that young black insolvency practitioners born on or after 27 April 1994 are permitted to be appointed to only 10% of the insolvent estates. No justification for this inexplicable discrimination has been offered, and we can conceive of none.[15] The issue is not addressed at all in the appellants' heads.

16. Second, the SCA found that the appointments process constitutes a rigid quota system which this Court has held to be prohibited.[16] In the appellants' heads, they insist that the Policy permits the Master to *"deviate"* therefrom,[17] in order to allow

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15 In an earlier version of the Policy, the Minister made provision in categories A and B for the descendants of those practitioners who became citizens before 1994 (see para 10, record 6/441). It is not known why that was changed in the final amendment (record 6/486).

16 In *South African Police Service v Solidarity obo Barnard* 2014(6) SA 121 (CC) ('*Barnard*') para 18.

17 Paras 52.6 to 52.8.

it to be saved on the basis set out by this Court in the *Correctional Services* matter.[18] However, this is based on a misunderstanding of the Policy, as we explain below. We respectfully submit that on this issue, too, there is no realistic prospect that this Court will come to a different conclusion.

17. It is difficult to understand why the appellants have persisted in defending the Policy in its present form. As the SCA points out, it "*should not be difficult for the Minister and the Master to devise a policy*" which meets their "*legitimate desire to address past discrimination and disadvantage*"[19] in a lawful and constitutional manner.

18. SARIPA has consistently contended that the correct course of action would be for the Minister to withdraw the Policy and meaningfully engage with all relevant parties, including SARIPA, to solicit opinions as to the root causes of the lack of transformation in the industry and the most effective and fair manner in which to achieve such transformation. These inputs should then be used to develop a rational policy response which is objectively capable of fostering transformation in the industry, and which is lawful and passes constitutional muster.[20]

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18 *Solidarity and Others v Department of Correctional Services and Others* 2016 (5) SA 594 (CC) ('*Correctional Services*') paras 50-64.

19 SCA judgment para 65, record 13/1186-1187.

20 Replying affidavit ("RA") para 7, record 4/305; RA para 12, record 6/442. This assertion was repeated in the applications for leave to appeal in the SCA and in this Court. Those documents have, however, been omitted from the record before this Court by the appellants.

19. The appellants have never addressed this assertion, and they have instead repeatedly sought to defend this manifestly unlawful and unconstitutional Policy, no doubt at great expense to the public purse.

20. In the premises, we respectfully submit that the application for leave to appeal falls to be dismissed with costs.

THE CURRENT PRACTICE[21]

21. Every stage of the administration of an insolvent estate, from the launching of the original application, to the rehabilitation of the insolvent or the deregistration of the corporate entity, is controlled by the Master's office, whose duties include many specialised functions and administrative tasks that can only be carried out efficiently by a dedicated organisation that exists specifically for that purpose. The Master's office has the institutional knowledge and expertise to apply policy and to assess the ability and integrity of trustees,[22] and is therefore able to judge whether or not individuals are duly qualified to be appointed, either at all or to a specific

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21 This is set out at FA paras 27-45, record 1/16-22, in the judgment of the Court *a quo* at paras 72-80, record 12/1027-1032, and in the SCA judgment at paras 5-7, 17, 55 and 58, record 13/1158-1159, 1165, 1182 and 1184.

22 We use the term *"trustee"* to include reference to liquidators.

estate.[23] Sector-specific skills on the part of a trustee are very important, especially in complex estates.[24]

22. The SCA confirmed that the South African insolvency system is creditor-driven. It is the majority of creditors in number and value of claims that have the right to elect trustees and to take decisions in respect of the manner in which assets falling into the estate should be dealt with. That is because it is "*the creditors who stand to lose as a result of the insolvency. They are the best judges of their own interests...*".[25]

23. Over the years the appointment of provisional trustees has increasingly become the norm mainly, because with the ever-increasing volume of sequestrations and liquidations, the time between the granting of a final order and convening of the first meeting of creditors has increased and a provisional trustee needs to be appointed to take charge of the assets in the interim.[26] In practice this is done by individuals who seek the appointment to a provisional office presenting so-called requisitions by creditors to the Master.[27] Since 1998, it has been policy to appoint a previously disadvantaged individual as a co-trustee, regardless of whether that

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23 *Ex parte The Master of the High Court South Africa (North Gauteng)* 2011 (5) SA 311 (GNP) ('*Ex parte The Master*') at paras 25-27.

24 See, in this regard, the judgment of the Court *a quo* para 155, record 12/1058-1059 and the SCA judgment para 61, record 13/1185.

25 SCA judgment para 55, record 13/1182.

26 SCA judgment paras 58 and 60, record 13/1184-1185.

27 The requisition system is explained in the SCA judgment at para 7, record 13/1159-1160.

person has support from creditors or not, at first in all estates above R5 million, and then from 2001, in all estates. The provisional trustees take charge of the estate and administer the estate until such time as a first meeting of creditors is convened, and the appointment lasts until the appointment of final trustees. It is apparent that provisional trustees "*play a significant role in the liquidation of an estate and the winding up of a company or close corporation*".[28]

24. At the first meeting of creditors of an insolvent estate, and pursuant to ss 54(1) and (2) of the Insolvency Act, the creditors who have proved claims against the estate may elect trustees, and any person who has obtained a majority in number and in value of the votes of creditors shall be elected as trustees. In practice, and subject to the provisions of s 57(1) of the Insolvency Act, the Master will confirm those elected and will also confirm the appointment of the previously disadvantaged individual as trustee, even if that person was not elected as such by the creditors. As a result, a previously disadvantaged individual is appointed at both the provisional and final appointments stage in every estate, with or without support from creditors.[29]

25. Against this background, both SARIPA and CIPA challenged the assertions made in the Court *a quo* by the Master in respect of the current appointment of

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28 SCA judgment para 17, record 13/1165.
29 FA paras 43-44 record 1/21.

insolvency practitioners. The Master said that the current practice "*unfairly favours the previously advantaged at the expense of the previously disadvantaged*", and that "*in broad terms, 43% of security bonds issued by one of the largest service providers nationally, as at 31 July 2013, are in favour of white males*".[30] The Master relied, in this regard, on statistics produced by Safire, a security bond provider.[31] In the appellants' heads, reliance is again placed on this evidence as providing a rationale for the Policy.[32]

26. SARIPA and CIPA point out that the statistics relied on are misleading.[33] That is because one bond is issued in respect of each insolvent estate, irrespective of the number of trustees appointed. Since a previously disadvantaged practitioner is appointed to each insolvent estate as joint provisional trustee, such practitioners will receive 100% of the value of security bonds issued.[34] The statistics provided by Safire therefore simply cannot be relied upon to evaluate the demographic profile of insolvency practitioners appointed. In any event, as demonstrated by SARIPA, the data contains a range of inaccuracies, including as regards the racial and gender classification of insolvency practitioners.[35]

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30 AA para 11.3, record 2/78-79.
31 AA paras 12-15, record 2/79-82; "LGB1", record 2/137.
32 Para 67.
33 SARIPA RA para 36, record 6/448-449; CIPA RA paras 11-14, record 8/705-710.
34 RA para 36.4, record 6/449.
35 RA para 36.2, record 6/448.

27. We point out that the contention in appellants' heads that the factual allegations upon which they rely to justify the Policy are uncontested,[36] is patently incorrect. As we have said, both SARIPA and CIPA provided extensive evidence of the inaccuracy of the information relied upon by the appellants. Indeed, the SCA confirms in its judgment that this evidence is contested.[37]

28. The SCA further found that the Master had not put forward "*reliable figures to show the number of practitioners in each category 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*".[38] We respectfully support this finding, which is not addressed directly by the appellants in their heads of argument, although they do appear to concede that there is a "*lack of accurate information*".[39]

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36 Paras 12-14 and 67-68.
37 SCA para 36, record 13/1174
38 SCA judgment para 46, record 13/1178-1179.
39 Appellants' heads para 67.

THE POLICY

29. The Policy applies to discretionary appointments of trustees by the Master, and mainly of provisional trustees.[40]

30. The Policy requires, in paragraphs 7.1 and 7.2 thereof, that the Master appoints insolvency practitioners from a list on which they have been arranged in alphabetical order, classified by race and gender, and identified as a junior or senior practitioner, in the ratio A4:B3:C2:D1 – in other words, the Master must first appoint four insolvency practitioners from category A (African, Coloured, Indian and Chinese females who became South African citizens before 27 April 1994); then three from category B (African, Coloured, Indian and Chinese males who became South African citizens before 27 April 1994); then two from category C (White females who became South African citizens before 27 April 1994); and then finally one from category D (White males who are South African citizens, and African, Coloured, Indian and Chinese males and females, and White females, who became South African citizens after 27 April 1994).

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40 The Policy specifies that it applies to appointments made in terms of certain sections of the Insolvency Act and other statutes (paragraph 3.2, record 1/47-48), most of which refer to provisional trustees. However, certain of the sections specified include final trustees (see the judgment of the Court *a quo* para 70, record 12/1026, and the SCA judgment para 11, record 13/1161-1162).

31. These appointments must be made by the Master in this manner, "*in alphabetical order*", without taking any other relevant factors into account, including the field and level of expertise, or the seniority, of what is referred to as "*the next-in-line practitioner*".

32. Paragraph 7.2 of the Policy provides that this appointment process is subject to paragraph 7.3 of the Policy. Paragraph 7.3 provides that the Master "*may, having regard to the complexity of the matter and the suitability of the next-in-line insolvency practitioner... appoint a senior practitioner jointly with the junior or senior practitioner appointed in alphabetical order*". The Master must provide reasons for any such appointment.

33. This means that regardless of whether the initial, next-in-line insolvency practitioner is suitable for the appointment in question, he or she must be appointed by the Master. In effect, the Policy *"dictates the appointment of someone not qualified to undertake the task*".[41] Indeed, in the justification of the Policy prepared by the Master in February 2013, it is expressly asserted that the Master may not take into account factors like the knowledge, skills and locality of the insolvency

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41 SCA judgment para 34, record 13/1173.

practitioner, the value of the assets in issue, or the nature of the business or assets, when appointing a trustee.[42]

34. Thereafter, "*in an ill-defined range of cases*",[43] if the Master determines that the practitioner so appointed is unsuitable, the Master may in terms of paragraph 7.3 of the Policy in addition appoint a further practitioner, who must be a senior practitioner, jointly with the unsuitable practitioner.

35. It is clear that there is no discretion whatsoever on the part of the Master in respect of the appointment of the first insolvency practitioner, who must be appointed mechanically from the alphabetical roster, in accordance with the prescribed ratio. Paragraph 7.3 merely provides "*a backstop*", which permits the Master to "*compensate to some degree for the fact that the policy dictates the appointment of someone not qualified to undertake the task*".[44]

36. Before the SCA, the appellants contended that paragraph 7.3 of the Policy permits the Master to *"deviate"* from the Policy. The SCA rejected this contention.[45] The appellants persist with this contention before this Court.[46] They still do not explain

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42 "LGB3", record 3/210 at para 3.61. See, in this regard, the SCA judgment para 48, record 13/1179.
43 SCA judgment para 34, record 13/1173.
44 Ibid.
45 Ibid.
46 Appellants' heads paras 52.6-52.8 and 55.

how the power to appoint a further practitioner in terms of paragraph 7.3 permits a *"deviation"* from paragraph 7.1 in respect of the first or initial appointment of the unsuitable practitioner.

37. Furthermore, SARIPA contends that the joint senior appointment permitted by paragraph 7.3 must in any event be the next senior practitioner on the alphabetical list and in the right category, and that the Master is not at large to appoint any senior practitioner. SARIPA contends that this interpretation of paragraph 7.3 is the only possible construction of that paragraph, given the language used, read in context and bearing in mind the purpose of the Policy,[47] namely to ensure the appointment of a fixed number of insolvency practitioners of each racial category. This purpose would be undermined if the Master could simply add a joint appointment of any race or gender.

38. However, the SCA confirmed[48] the finding by the Court *a quo* that this provision must be construed to mean that, once the Master has determined that the next-in-line insolvency practitioner is unsuitable for the appointment in question, he or she is at large to appoint (in addition to the unsuitable appointment) any suitable senior practitioner, from any category, and at any position on the alphabetical list (i.e.

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47 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

48 SCA judgment para 45, record 13/1178.

"*outside the formula*"), having regard to the industry-specific knowledge and expertise of the practitioner.[49]

39. We respectfully submit that even if it is correct that the Master may appoint any senior practitioner jointly with the initial appointee, it remains the case that the Master has no discretion whatsoever in respect of the initial appointee (the next-in-line practitioner), who must be appointed, regardless of suitability, and without consideration of any other relevant factors. We return to this issue below.

40. We now turn to the grounds of review of the Policy.

THE GROUNDS OF REVIEW

The Policy infringes the right to equality

41. The appellants contend that the Policy is a measure contemplated by s 9(2) of the Constitution. SARIPA contends that the Policy does not qualify as such a measure, as it fails to meet the test formulated by this Court in *Van Heerden.*

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49 Judgment of the Court *a quo* paras 111-115, record 12/1042-1043.

42. SARIPA contends that the Policy constitutes impermissible discrimination in that it discriminates against white males, white females (to a lesser extent) and African, Indian, Chinese or Coloured males (to a still lesser extent) in terms of s 9(3) of the Constitution and s 7 of the Equality Act.

43. The Policy also discriminates against African, Indian, Chinese or Coloured persons (whether male or female) who became South African citizens after 27 April 1994. As the SCA found, this of necessity includes African, Indian, Chinese or Coloured persons (whether male or female) who were born on or after 27 April 1994.[50] Such persons are included within Category D of the Policy.[51]

44. This would in effect group persons in those categories with white men and would limit the persons in Category D to being assigned no more than 10% of the discretionary appointments to which the Policy applies.

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50 SCA judgment para 36-37, record 13/1174-1175.

51 Amended Policy at record 6/486-488.

The Van Heerden test

45. In *Van Heerden,* this Court held that in determining whether a measure which is challenged as violating the Constitutional equality provision, falls within s 9(2), the enquiry is:

45.1. Firstly, whether the measure targets persons or categories of persons who had been disadvantaged by unfair discrimination;

45.2. Secondly, whether the measure is designed to protect or advance such categories of persons; and

45.3. Thirdly, whether the measure promotes the achievement of equality. [52]

46. The stated purpose of the Policy is to effect transformation of the insolvency industry and to put in place measures to allow for the entry into the industry of previously disadvantaged persons.[53] It clearly meets the first *Van Heerden* requirement.

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52 *Van Heerden* at para 42.

53 "JMD2", paragraph 4, record 1/48-49.

47. The second requirement is more complex. In terms of the second *Van Heerden* requirement, for the Policy to be lawful, it must be reasonably capable of achieving its stated outcome. [54]A policy which is arbitrary, capricious or displays naked preference will not meet the second requirement. [55]Further, if a Policy is not reasonably likely to achieve the end of advancing or benefiting those who have been previously disadvantaged it will not constitute a measure contemplated by s 9(2). [56]

48. As to the third requirement, this Court held that *"the achievement of [equality] may often come at a price for those who were previously advantaged."*[57] However, *"a measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened."*[58] This requires a balance between undoing past wrongs and achieving the constitutional vision of a diverse, non-racist South Africa.

49. SARIPA contends that, flowing from the reasoning in *Van Heerden*, the following principles apply in determining whether or not the Policy is lawful and constitutional:

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54 *Van Heerden* at para 41.
55 *Van Heerden* at para 41.
56 *Van Heerden* at para 41.
57 *Van Heerden* at para 44.
58 *Ibid.*

49.1. The Policy must not cause undue harm to those adversely affected by the measure, e.g. by creating an absolute barrier to a particular class of persons;

49.2. The Policy must be reasonably capable of achieving the objective of promoting historically disadvantaged groups or persons; and

49.3. The Policy must not permit or require the appointment of wholly unqualified people.

50. As to the first principle, although the Policy is not an absolute barrier to white males, it comes close to such a barrier.[59] They will only ever be assigned no more than 10% of the available work, even though many of them are active in the profession of insolvency practitioners.[60]

51. The consequence is that a substantial number of white male insolvency practitioners will not be able to continue practising their chosen profession.[61]

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59 FA para 67, record 1/28.
60 *ibid.*
61 *ibid.*

52. In addition, the Policy comes close to being an absolute barrier in respect of African, Indian, Chinese or Coloured males or females who became South African citizens after 27 April 1994 (including African, Indian, Chinese or Coloured persons who were born on or after 27 April 1994), as they are grouped with white men and as such both groups collectively are limited to being assigned no more than 10% of the available appointments. This of necessity means that young persons born after 27 April 1994, irrespective of race or gender, are restricted to only ever receiving no more than 10% of appointments in terms of the Policy.

53. The Policy also disadvantages white female practitioners, *vis-à-vis* both their African, Coloured, Indian and Chinese female and male counterparts.

54. The Policy accordingly causes undue harm to white male insolvency practitioners, white female insolvency practitioners as well as to African, Indian, Chinese or Coloured males or females who became South African citizens after 27 April 1994 (including African, Indian, Chinese or Coloured persons who were born on or after 27 April 1994).

55. The appellants do not attempt to provide any justification for the differentiation between South Africans who became citizens before and after 27 April 1994. If, for example, one were to assume that ongoing discrimination based on race could be

invoked to justify preferring African over white females, what could the justification possibly be for preferring white females over African females who became citizens after 27 April 1994? Or for preferring white females over black practitioners born on or after 27 April 1994? It is irrational, and it is presumptively unfair in terms of s 9(5) of the Constitution. On this basis alone the Policy falls to be set aside.

56. Further, the rigid race and gender-based categories and ratios within which the appointments in terms of the Policy must be made, amount to the imposition of quotas as opposed to numerical targets, and are therefore constitutionally impermissible measures within the meaning of the second leg of the *Van Heerden* test.

57. The appellants conceded in argument before the Court *a quo* that if the Policy sets up quotas rather than targets it would be invalid.[62] They made the same concession in the SCA.[63]

The Policy constitutes an impermissible quota system

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62 Court *a quo* judgment para 202, record 12/1078.
63 SCA judgment para 32, record 13/1172.

58. The question of what constitutes a quota as opposed to a target has not been definitively settled by the Courts. However, as this Court has held in *Barnard*[64] and *Correctional Services*[65], in the context of the Employment Equity Act 55 of 1998 ("the EEA"), one of the distinctions between a quota and a numerical target is that a quota is rigid whereas a numerical target is flexible.

59. Although the lawfulness of the Policy does not fall to be determined under the EEA, it is submitted that there can be no constitutionally acceptable justification for holding that quotas are lawful in the context of an explicit affirmative action measure which will have a significant impact on the ability of several groups of citizens to earn a living through their chosen profession, albeit outside of the context of the EEA.

60. It follows that within the employment equity context, a quota is a measure that amounts to job reservation and / or creates absolute barriers to employment because it contains fixed numbers or percentages that must be attained or cannot be exceeded, irrespective of any other relevant considerations apposite to maintaining or filling a post and is thus rigid and inflexible and does not allow for deviation. [66]

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64 *Barnard* at para 54.
65 *Correctional Services* at para 51.
66 *Correctional Services* at para 51 and 53 and *Barnard* at para 18.

61. Whether or not a given measure will have the aforementioned characteristics attached to it is dependent on the nature of the measure and its implementation. This is a practical, not an abstract question. Therefore the test for whether or not a restitutionary measure (such as the Policy) employs the use of quotas, rests on the flexibility or rigidity with which the measures adopted in the Policy to achieve equity targets (informed by demographics), can be implemented.

62. It is submitted that the SCA correctly found that the Policy is entirely dependent on a strict racial and gender allocation of appointments and is arbitrary with no saving discretion.[67]

63. Clause 7.1 of the Policy requires a strict allocation of appointments in accordance with race and gender. The appointment of insolvency practitioners is to be made from the four categories set up by the Policy, stratified by race, gender and age in strict order and within each group, allocations are to be made alphabetically. As the SCA correctly found clause 7.1 contains none of the flexibility and all of the rigidity that this Court has said is impermissible. [68]

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67 SCA judgment para 35 record 13/1173.
68 SCA judgment para 33 record 13/1172.

64. The appellants persist with the argument that the requisite flexibility is to be found in the Master's powers under clause 7.3. which they contend vests the Master with a discretion in every case.

65. However, the appellants fail entirely to provide any basis for disputing the finding of the SCA that clause 7.3 does not permit a departure from the appointment process prescribed in clause 7.1 of the policy. [69]

66. All clause 7.3 does is to provide the Master with a mechanism to be utilised within imprecise parameters to compensate to some degree for the fact that the Policy dictates that an unqualified person is still to be appointed (in terms of clause 7.1) and to have their share in the fees accruing from the administration of the estate, even though the very reason for invoking clause 7.3 is that they are not qualified or unsuitable to perform that task. [70]

67. It is submitted that the power of appointment in clause 7.3 could never, in such circumstances be said to resolve the fact that clause 7.1 requires the Master to make an appointment in accordance with a rigid quota.

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69 SCA judgment para 34 record 13/1173.
70 Ibid.

68. Thus the Policy contains no general discretion of the kind contemplated by this Court in *Correctional Services* that would allow the Master to depart from the strict numerical categorisation by race and gender in the Policy.

69. The Policy is clearly inflexible at conception and in addition the Policy explicitly requires rigidity at the level of its execution.

70. The Policy sets up both racial and gender quotas which equate to job reservation, are inherently and irrationally discriminatory, and are also demeaning in implementation in that they fail to acknowledge an individual insolvency practitioner's worth.

71. It is submitted that the Policy is an affirmative action measure based on quotas and as such is inherently *"arbitrary, capricious and displays naked preference"*, and accordingly does not pass the constitutional tests as formulated by this Court in *Van Heerden*, *Barnard* and *Correctional Services*.

The Policy will not achieve transformation

72. As to the second principle, the Policy will not in fact benefit those whom it is designed to assist.

73. Under the Policy, previously disadvantaged practitioners will only be assigned to 70% of matters as opposed to the present system where a previously disadvantaged individual is assigned to every matter.[71]

74. The Policy has no regard to the relative number of insolvency practitioners falling into each category and the appellants presented no evidence that the implementation of the policy is even practical at present given the disproportion in numbers between the four groups. [72]As the SCA noted, the Policy makes no allowance for a practitioner to refuse an appointment or for what the Master is to do in that case. [73]

75. As the SCA further points out it is unclear what is to happen in areas where, for example, there may be only a handful of insolvency practitioners falling into category A, who stand to be appointed in 40% of cases but who are too busy to undertake more work. [74].

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71 FA para 69.1, record 1/29. SCA judgment para 6 record 13/1159 and para 26 record 13/1169.
72 SCA judgment para 36-37 record 13/1174.
73 SCA judgment para 37 record 13/1174.
74 Ibid. It is submitted that such practitioners will likely have to outsource the work to other practitioners who do have capacity, which will likely result in fronting, which the Policy is allegedly designed to eradicate. FA para 69.2, record 1/30.

76. The Master has no discretion in such cases to appoint someone from another category without departing from the Policy.[75] Given that young black and/or female practitioners born after 27 April 1994 are limited to only ever receiving 10% of appointments, the Policy will only ever have a limited ability to increase the numbers of black and female insolvency practitioners in the industry.

77. Further, the Policy does not, with some exceptions, apply to the appointment of final trustees. These posts will continue to be filled by the creditors, in accordance with the provisions of the Insolvency Act, unless the Master refuses to appoint the person nominated by the creditors.

78. The Policy will therefore only have a limited effect in transforming the industry.

79. In addition, if the Policy is designed to inform the Master that, in terms of the general discretion granted to him in s 57(1) of the Insolvency Act, he should be of the opinion that he should reject the (final) trustees elected by the creditors at the first meeting of creditors on the basis that they do not meet the criteria laid down in the Policy, or are not next in line, then the Policy will fly in the face of the provisions of the Insolvency Act, which clearly intends that the (final) trustees should be those elected by the creditors.

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75 SCA judgment para 37 record 13/1174.

80. Finally, the Policy will prejudice previously disadvantaged or female practitioners who are currently well-established.[76] This is because the Policy simply assigns a matter to the next person on the list, and previously disadvantaged or female practitioners who have built up a good practice because of their ability and effort will be in the same position as those without the skill, experience or record of hard work.

81. A policy that intends to promote the interests of previously disadvantaged and female people should reward those within the group that excel. The Policy does not do that. Indeed, there are previously disadvantaged practitioners who will lose a great proportion of the work which they are currently assigned because of their skill and experience, as a consequence of the Policy.[77]

82. The Policy compels the Master to appoint the next on the list rather than exercise his discretion to appoint skilled and experienced previously disadvantaged practitioners to appropriate estates and who enjoy the support of creditors. In this way, the Policy will set back the gains made in respect of the transformation of the industry, and so achieve the opposite of its stated objectives.

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76 FA para 69.5, record 1/32.
77 *ibid.*

83. It is accordingly clear that the Policy will not achieve its objectives. The SCA explicitly applied the *Van Heerden* test in reaching its conclusion that the Policy was unconstitutional.[78]

84. For all these reasons, we respectfully submit that the Policy cannot be said to be a measure permitted by s 9(2) of the Constitution, and instead constitutes unfair discrimination on the grounds of race, ethnic origin, colour and gender prohibited by s 9(3) of the Constitution. This limitation of the right to equality cannot be said to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and the appellants have not attempted any such justification.

The Policy is irrational

85. Rationality is a necessary element of the lawful exercise of public power, like the power exercised by the Minister in respect of the Policy. This means that there must be a rational relationship between the scheme which is adopted and the achievement of a legitimate government purpose, any decision must be rationally related to the purpose for which the power was given, and the action of the

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78 SCA judgment paras 23-38, record 13/1168-1175.

functionary must bear a rational connection to the facts and information available to him or her and on which he or she purports to base such action.[79]

86. This Court set out the "*rationality standard*" in the *Law Society*[80] case as follows:

> "*[32] ... The constitutional requirement of rationality is an incident of the rule of law, which in turn is a founding value of our Constitution. The rule of law requires that all public power must be sourced in law. This means that State actors exercise public power within the formal bounds of the law. Thus, when making laws, the legislature is constrained to act rationally. It may not act capriciously or arbitrarily. It must only act to achieve a legitimate government purpose. Thus, there must be a rational nexus between the legislative scheme and the pursuit of a legitimate government purpose. The requirement is meant 'to promote the need for governmental action to relate to a defensible vision of the public good' and 'to enhance the coherence and integrity' of legislative measures.*" (footnotes omitted)

87. This Court furthermore held that the question of whether "*a legislative provision or scheme is rationally related to a given governmental object entails an objective enquiry*", because otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because "*the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.*" [81]

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79 *SA Predator Breeders Association v Minister of Environmental Affairs and Tourism* [2011] 2 All SA 529 (SCA) at para 28.

80 *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) ('*Law Society*').

81 *Law Society* at para 33.

88. We respectfully submit that the Policy does not bear a rational relationship with the achievement of the government purposes, including the transformation of the industry, the prevention of fronting and corruption, and the promotion of accountability and transparency. Indeed, as explained above, the Policy may, in certain respects, undermine the meaningful transformation of the industry by detracting materially from the business of previously disadvantaged individuals. The Policy will thus fail to achieve the stated government purpose in a number of ways.

89. As we have explained, the Policy was furthermore formulated on the basis of inaccurate information, which renders it irrational, as there is no rational connection between the action of the Minister (the Policy) and the facts and information available to the Minister and on which he purports to have based the Policy.

90. Moreover, as held by the SCA, the Master, speaking on behalf of the Minister, did not provide any explanation "*as to the basis upon which the policy was formulated*", particularly the 4:3:2:1 ratio and how it was derived, and the Master failed to put forward reliable figures in respect of the demographics of insolvency practitioners.[82] As a consequence, and in the absence of such reliable information,

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82 SCA judgment para 46, record 13/1178.

"*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*". This applies also to the "*telling*" absence of an explanation for the discrimination against young people explained above. As a result, "[t]*he impression is given that the ratio is arbitrary and cobbled together with no apparent justificatory basis*".[83]

91. The SCA held that the difficulty in that regard is "*compounded by the many aspects of the policy that are unexplained*". These include the question of what constitutes a complex estate, and the definition of a senior practitioner, which *"does not suggest any consideration of the skills and expertise necessary to deal with an insolvent estate"*.[84]

92. In respect of the unreliable and inaccurate information which informed the formulation of the Policy, the appellants rely[85] on the *NICRO* case.[86] In that case, this Court held that legislative choices may be based on "*reasonable inferences unsupported by empirical data*". However, that is no authority for a proposition that policies with far-reaching consequences may be made on the basis of inaccurate information.

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83 SCA judgment para 47, record 13/1179.
84 SCA judgment para 49, record 13/1180.
85 Appellants' heads paras 65-70.
86 *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC) ('*NICRO*').

93. Accordingly, in *SA Predator Breeders Association* the SCA had no difficulty setting aside a policy which had been formulated on the basis of the relevant Minister's misinterpretation or distortion of the recommendations of a panel of experts.

94. In *NICRO* this Court went on to hold that where the justification of the limitation of a constitutional right by the State *"depends on factual material, the party relying on justification must establish the facts on which the justification depends"*.[87] We have explained above the infringement of the right to equality by the Policy. The appellants are accordingly obliged to justify this infringement with facts which must be established by them. In any event, an inference cannot be said to be "*reasonable*" for purposes of the *NICRO* standard when it is based on inaccurate information.

95. We point out that the repeated references in the appellants' heads to "*common cause*" between the parties with regard to the information relied on by the appellants,[88] are incorrect. As we have explained, that information is not accepted by the respondents. While SARIPA accepts that the insolvency industry requires

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87 *NICRO* at para 36.
88 Paragraphs 67-69.

further transformation, and remains committed to supporting such transformation,[89] we respectfully submit that the respondents have established that the Policy is based on inaccurate information, which therefore cannot be relied upon by the appellants to justify the Policy. Moreover, any policy designed to pursue transformation objectives must do so in a lawful and constitutionally compliant manner.

96. Finally, we have also explained that the Policy irrationally requires the Master, who has the expertise and discretion to appoint a suitable insolvency practitioner in the interests of creditors, instead to knowingly appoint an unsuitable insolvency practitioner. This submission was accepted by the SCA, which held that the fact that the Policy requires the Master not to use the institutional knowledge and expertise of the office to consider factors relevant to the appointment of a trustee, and instead to make appointments "*mechanically as per the roster*" is "*itself irrational*".[90]

97. For these reasons, it is submitted that the Policy falls to be set aside as unlawful and unconstitutional for lack of rationality.

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89 FA para 12, record 1/9.
90 SCA judgment para 50, record 13/1180.

The Policy is *ultra vires* the Insolvency Act

98. In *Arun Property Development,* this Court held that "*a policy must be consistent with the operative legislative framework*".[91]

99. Any policy which the Minister determines must thus be consistent with s 158(2) of the Insolvency Act. We submit that the Policy furthermore may not be in conflict with the intention of the legislature, which is that the trustee of an insolvent estate should be a person elected as such by the creditors, or that the appointment should at least be in the interests of creditors. This intention is apparent from the structure of the Insolvency Act.

100. The SCA held that "*the fundamental purpose of insolvency legislation*" is to "*secure the realisation of the remaining assets of the insolvent and the distribution of the resulting amounts among creditors...*". For that reason, the process is creditor-driven.[92] Indeed, the relevant legislation is "*designed to be driven by creditors in their own interests*", and that "*necessarily affects the basis upon which trustees and liquidators are to be appointed. The primary consideration must be the interests of creditors and serving those interests.*"[93]

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91 *Arun Property Development (Pty) Ltd v Cape Town City* 2015 (2) SA 584 (CC) ('*Arun Property Development*') at para 46.

92 SCA judgment para 55, record 13/1182. Also see *Walker v Syfret* 1911 AD 141 at 166.

93 SCA judgment para 57, record 13/1183.

101. The Minister is accordingly not empowered to make policy which disregards the interests of creditors, and the Master may also not disregard the interests of creditors by appointing a practitioner which the Master regards as unqualified for such particular appointment.[94]

102. The present requisition system, together with the appointment of a co-trustee who is a previously disadvantaged individual, gives effect not only to the intention of the legislature but also addresses the transformation cause. Any policy determined by the Minister must adhere to this principle. If it does not it will be *ultra vires* the provisions of the Insolvency Act.

103. In *Affordable Medicines Trust and Others v Minister of Health and Others* [95], this Court explained the *ultra vires* principle in the following terms:

> "*In exercising the power to make regulations, the Minister had to comply with the Constitution, which is the supreme law, and the empowering provisions of* [relevant legislation]. *If, in making regulations, the Minister exceeds the powers conferred by the empowering provisions of the* [relevant Act], *the Minister acts ultra vires (beyond the powers) and in breach of the doctrine of legality. The finding that the Minister acted ultra vires is in effect a finding that the Minister acted in a manner that is inconsistent with the Constitution and his or her conduct.*"[96]

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94 SCA judgment paras 59 and 63, record 13/1184 and 1186.

95 *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) ('*Affordable Medicines Trust*').

96 *Affordable Medicines Trust* at para 50.

104. Particular attention is given under the current system to the interests of employees in that the Master's office, after reviewing the requisitions submitted by creditors, will usually (but not always) appoint as one of the provisional trustees, the candidate who enjoys the support of the employees or trade union.[97]

105. The fact that the legislature intended that the interests of employees as creditors of an insolvent estate be specifically taken into account is borne out by an examination of the language used in the relevant provisions of the Insolvency Act. The SCA in *Gungudoo*[98] analysed the relevant provisions of the Labour Relations Act 66 of 1995, the Insolvency Act and the Companies Act 61 of 1973, and held that *"what emerges from this analysis is that the purpose of the relevant provisions of the LRA, the Insolvency Act and the 1973 Companies Act, which were adopted as a package, was to ensure that where a debtor conducts a business, notice of sequestration or winding-up proceedings must be given to employees of the business."*[99]

106. The obvious rationale for the aforementioned notification requirements is to provide employees, and in particular organised labour, with an opportunity to

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97 FA para 42.2.3, record 1/20.

98 *Gungudoo and Another v Hannover Reinsurance Group Africa (Pty) Ltd and Another* 2012 (6) SA 537 (SCA) ('*Gungudoo*'). Although *Gungudoo* was overturned in this Court in *Stratford and others v Investec Bank Limited and others* 2015 (3) SA 1 (CC), this observation was not interfered with.

99 *Gungudoo* at para 40.

engage in the liquidation process with a view to limiting the negative consequences for employees. This accords with the principle that the South African insolvency system is creditor-driven.[100]

107. The Policy ignores the wishes of the creditors generally and the interests of employees and trade unions. That constitutes "*an exercise of power for a purpose other than any for which it was bestowed*", which breaches the principle of legality, or put differently, is inconsistent with the legislative framework and *ultra vires.*[101]

The Policy unlawfully fetters the discretion of the Master

108. We respectfully submit that the Policy is unlawful in that it is incorrectly cast in the form of inflexible rules, and accordingly unlawfully fetters the Master's discretion.

109. In *Kemp,*[102] the SCA held that while a public official may take into account policy when exercising a discretion, he or she may not "*elevate principles or policies into rules that are considered to be binding with the result that no discretion is exercised at all.*"

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100 *Ex Parte The Master of the High Court* at para 28.
101 SCA judgment paras 53 and 65, record 13/1181 and 1186-1187.
102 *Kemp NO v Van Wyk* 2005 (6) SA 519 (SCA) ('*Kemp*') at para 1.

110. As a general principle, a policy may provide guidelines to a decision-maker in exercising a power under a law, but may not pre-determine the outcome of every application of the power irrespective of the circumstances of a particular case. A policy may guide the exercise of discretion, or even create prescriptive presumptions. However, the decision-maker must always retain the ability to make a decision based on an appreciation of all the factors in a particular case.

111. It is not unlawful for a decision-maker to use a policy to guide a particular decision, "*provided that [the decision-maker] was independently satisfied that the policy was appropriate to the particular case, and did not consider it to be a rule to which he was bound*".[103] In addition, the decision-maker will be required to consider each case individually, and to justify every decision: "*the law requires nothing less*".[104]

112. Furthermore, public bodies are not entitled to make policy that has the effect of legislation. In *Rivonia Primary School*[105] this Court held that although the school governing body had the ability to determine the capacity of a school, a school's admission policy could not inflexibly limit the discretion of the Head of Department ("*HOD*") to admit a learner to a public school contrary to a capacity

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103 *Kemp* at para 10.

104 *National Lotteries Board v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at para 10.

105 *MEC for Education in Gauteng Province and others v Governing Body of the Rivonia Primary School and others (Equal Education and others as amici curiae)* 2013 (6) SA 582 (CC) ('*Rivonia Primary School*').

determination in a school's admission policy. The Court held that *"the suggestion that the Gauteng HOD was rigidly bound by a school's admission policy when exercising that power is untenable. [A] policy serves as a guide to decision-making and cannot bind the decision-maker inflexibly ... ".*[106]

113. In *Harris*,[107] this Court set aside a policy that attempted to create a binding rule for the age at which learners could be admitted to school, and held that *"[i]n the light of the division of powers contemplated by the Constitution and the [relevant legislation], the Minister's powers ... are limited to making a policy determination and he has no power to issue an edict enforceable against schools and learners."*[108] Sachs J concluded that the relevant policy was worded in peremptory, not permissive terms and therefore exceeded the Minister's powers under the legislation to enact a policy.[109]

114. In *Sasol Oil*,[110] the SCA recognised that adopting a policy to guide the discretion of decision-makers was "*legally permissible and eminently sensible*". However, the Court stressed that a policy "*must not be applied rigidly and inflexibly*". An affected party must have an opportunity to demonstrate that there is something

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106 *Rivonia Primary School* at para 54.
107 *Minister of Education v Harris* 2001 (4) SA 1297 (CC) ('*Harris*').
108 *Harris* at para 11.
109 *Harris* at para 12.
110 *MEC for Agriculture, Conservation, Environment and Land Affairs, Gauteng v Sasol Oil and Another* 2006 (5) SA 483 (SCA) ('*Sasol Oil*') para 19.

exceptional about its case that warrants a departure from the policy. This is so because 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*".[111]

115. In *Arun Property Development,* this Court endorsed the view expressed in *Rivonia Primary School* that policy serves as a guide to decision-making and may not bind the decision-maker inflexibly,[112] because policy "*is not legislation but a general and future guideline for the exercise of public power by executive government... 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*".[113]

116. The clear imperative that emerges from these authorities is that a policy may guide the exercise of discretion, or even create presumptive positions. However, the decision-maker must always retain the ability to make a decision based on an appreciation of all the factors in a particular case.

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111 *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* 2000 (3) SA 936 (CC) ('*Dawood*') para 53.

112 *Arun Property Development* at para 46.

113 *Arun Property Development* at para 47.

117. As we have explained, the Policy requires the Master to appoint the next-in-line practitioner in each case. It does not permit the Master to consider each individual estate and make a decision which is justifiable with reference to the relevant factors (like suitability, industry-specific knowledge and expertise, or seniority). We respectfully submit that the Policy therefore constitutes an unlawful fettering of the Master's discretion.

118. The SCA held that what it calls the "*limited residual discretion*" retained by the Master in terms of paragraph 7.3 of the Policy "*suffices to hold that the Master's discretion is not improperly fettered*".[114]

119. We reiterate that the relevant paragraph of the Policy requires the Master to appoint the next-in-line senior practitioner. However, even if it were correct that the Master is at large to appoint any senior practitioner jointly with the initial appointee, this does not save the Policy.

120. Instead, it serves to underline the unlawful fetters upon the Master's discretion as well as the irrationality of the Policy, as it emphasises that in respect of the initial appointment by the Master, he or she will have no discretion whatsoever: even

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114 SCA judgment para 45, record 13/1177-1178.

where an insolvency practitioner is (in the considered view of the Master) manifestly unsuitable to a particular estate, he or she must be appointed by the Master. We respectfully submit that it is irrational to require an official who has the expertise to make a suitable appointment, to instead knowingly make an unsuitable appointment in a mechanical, rote fashion.

121. Furthermore, in cases where the relevant next-in-line practitioner is not suitable for the matter, the Policy requires the joint appointee to be a senior practitioner even if the matter is not so complex that a senior practitioner is required. The unsuitability of the practitioners appointed thus becomes compounded: a practitioner unsuited to a particular estate because of lack of industry-specific knowledge is joined by a practitioner whose seniority renders him or her unsuited to the estate.

122. The Master has a duty to ensure that an estate is run by the trustee in a manner which realises the maximum value of the assets in the estate, in the interests of creditors.[115] If a person without the necessary background in the industry is the next person on the list, the estate (and its creditors) may be seriously prejudiced. In such circumstances the creditors would invariably select a trustee who was known to have the requisite skill.

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115 See, in this regard, judgment of the Court *a quo* para 156, record 12/1059.

123. Prior to 9 July 2004, the Master's power of appointment of a provisional liquidator was entirely discretionary, such discretion being an unfettered and exclusively administrative one.[116] However, following the introduction of the *Judicial Matters Amendment Act* 16 of 2003 ("the JMA") which came into force on 9 July 2004, the Minister may determine the policy for the appointment of, *inter alia*, provisional liquidators, and once the Minister publishes such policy in the *Gazette*, the Master must make discretionary appointments in accordance with such policy.

124. The most recent expression by the courts of the nature and extent of the power of the Master with regards to the appointment of provisional trustees and liquidators demonstrates that the ability of the Minister to adopt a policy does not eliminate the Master's discretion. In *Ex parte The Master*[117] the Court held that the Master is the only functionary entitled to appoint provisional trustees, liquidators and judicial managers, taking into account creditors' directives.[118] The Court stated the following with regard to the rationale for the wide discretion granted to the Master:

> *"An organisation of this nature (the Master's office) has the institutional knowledge and expertise to apply policy, and to assess the ability and integrity of trustees and liquidators, and is therefore able to judge whether or not individuals are duly qualified to be appointed, either at all or to a specific estate."*[119]

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116 *Lipschitz v Wattrus NO* 1980 (1) SA 662 (T) at 671.

117 Cited with approval by the SCA in *Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO and Others* 2012 (3) SA 325 (SCA) para 7.

118 At para 33.

119 At para 26.

125. In contrast, the Policy provides an inflexible mechanism for the appointment of insolvency practitioners. The relevant next-in-line practitioner must be appointed, without exception. The approach adopted by the Policy is incompatible with the fact of the Master's discretion. By removing the discretion of the Master completely and requiring that discretionary co-appointments be made in accordance with strict rules, the Policy provisions are impermissibly elevated to the status of rules, and intrudes "*impermissibly into the Master's ability to apply his mind to the making of each appointment*".[120]

CONCLUSION

126. In the premises, and for all these reasons, we respectfully submit that the SCA correctly held the Policy to be inconsistent with the Constitution and invalid.

127. We accordingly respectfully submit that the application for leave to appeal should be dismissed with costs, including the costs of two counsel. If this Court should grant leave to appeal, then we respectfully submit that the appeal should be dismissed with costs, including the costs of two counsel.

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120 Judgment of the Court *a quo* para 125, record 12/1048.

Brendan Manca SC
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Mushahida Adhikari

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Chambers, Cape Town
27 September 2017

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CCT CASE NO: 13/17

SCA CASE NO: 693/2015

WCHC CASE NO: 4314/2014

NGHC CASE NO: 17327/2014

In the matter between:

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First applicant
THE CHIEF MASTER OF THE HIGH COURT OF SOUTH AFRICA	Second applicant

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
VEREENIGING VAN REGSLUI VIR AFRIKAANS	Fifth respondent

SECOND RESPONDENT'S WRITTEN SUBMISSIONS

INTRODUCTION

1. In the period before a final liquidator or trustee is appointed, the Master of the High Court enjoys a discretion, sanctioned by statute, to make provisional appointments in order to safeguard the assets in the estate. Since an estate is wound up in the interests of creditors, the Master generally appoints the candidate they favour, but in the last two decades or so a supplementary appointment has also been made from the ranks of Previously Disadvantaged Persons (PDIs) in the interests of race and gender transformation. The extra expense entailed in this, often supernumerary, appointment is not borne by the estate but is met by an apportionment of the fee between the appointees.

2. To compete for the approval of the financial institutions that dominate the lending market, liquidators must maintain high standards of professionalism and the creditors have little reason to complain about the service they receive. As the work load has increased, the offices of the Master have found the process of making appointments ever more onerous. Jockeying for position by candidates, with the risk of attendant corruption, complicates what might otherwise appear to be a relatively straightforward exercise of discretion within the scope of a narrow set of parameters. To streamline the process, the Justice Minister has resolved to implement a roster system that is all but completely mechanical. The wishes of creditors will now have no part to play; nor, in making the first appointment, will

the nature of the matter or its complexity; all that will count is the position of the person next in line. Appointments, in short, are to be made by rote.

3. Complicating the system is the perceived need to recognize imperatives of transformation. This entails, in the view of the Justice Minister, a process of redress that ultimately ensures an approximate representation of the demographic composition of the South African population. This is to be achieved by dividing the practitioners up into four lists framed by race and gender and weighting the distribution of cases accordingly. The precise way in which this is to done is described below.

4. The first two respondents in this appeal, which are bodies that represent the interests of insolvency practitioners, make common cause with the remaining respondents in proceedings designed to set the new policy aside on the grounds that it is unconstitutional and unlawful. They were successful in the Cape Provincial Division and before the Supreme Court of Appeal. Aggrieved at this result, the Justice Minister and the Chief Master seek leave to appeal to this Court. They contend that the Appointments Policy is constitutionally sound, on the basis that it advances transformation and equality in a rational manner, without fettering the discretion of the Master.

THE FACTS

The process of winding up estates

5. When creditors are unable to obtain payment of debts owed to them by an insolvent debtor, they can apply to court for an order that authorizes the winding up of the estate.[1] The ensuing process, which is an extension of the process by which execution is levied against the assets of the debtor, entails a *concursus creditorum* in which claims are proved and a realization of the property of the debtor to a degree sufficient to meet the claims. A network of statutes governs the way this is done,[2] but they are amplified by directives handed down by the Master[3] and practices that have become customary over many years.

6. In the early days, the court supervised the process of winding up set in train by its order, but in due course the task devolved on the Master of the court under the courts' supervision. In order to achieve the desired result, the Master has the power to appoint liquidators, who wind up the estates of companies, and trustees, who wind up the estates of insolvent individuals. In deciding which insolvency practitioner to appoint, the Master is obliged[4] to give effect to the wishes of creditors expressed in the first meeting convened under the court order. In order

[1] CIPA FA para 28 Vol 6 p 510 *ll* 17 – 19.
[2] CIPA FA paras 14 – 27 Vol 6 p 503 *l* 13 – p 510 *l* 14.
[3] CIPA FA paras 35 – 42 Vol 6 p 513 *l* 14 – p 516 *l* 14.
[4] Subject to a narrow set of exceptions, not relevant here.

to deal with the *interregnum*, which today endures for many months, the Master typically appoints a provisional liquidator.[5]

7. On the matter of this appointment the Master enjoys a discretion but under the current regime he or she is guided by the recommendations of the relevant creditors since they, together with the insolvent debtor, are solely concerned with the outcome of the process. The creditors' recommendations are expressed in a system of so-called 'requisitions' that have, to date, enjoyed the support, and indeed endorsement, of the Master.[6] On the objects of the process, there is no material dispute between CIPA and the appellants.[7]

Practice in place prior to promulgation of the Appointments Policy

8. The practice that has been in place in recent years provides as follows:

8.1. In all estates above R5 million, the Master is obliged to appoint a previously disadvantaged individual as a co-trustee or co-liquidator (the 'PDI') regardless of whether that person had support from creditors or not. The rationale of the policy is that the PDI would be able to learn from the experienced liquidator with whom he was appointed and, having gained the requisite experience, would receive appointments on merit.[8]

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[5] CIPA FA para 28 Vol 6 p 510 *l* 21 – p 511 *l* 6.
[6] CIPA FA para 29 Vol 6 p 511 *ll* 7 – 16.
[7] CIPA FA para 69 Vol 7 p 525 *l* 15 – p 526 *l* 3, accepted as correct by the respondents in AA para 66 Vol 7 p 659 *ll* 9 - 11.
[8] CIPA FA para 39 Vol 6 p 515 *ll* 5 – 11.

8.2. To give effect to this initiative, the Master established a panel of PDIs. Before any person could qualify as a PDI for purposes of enjoying preferential discretionary appointment, the Master had to be satisfied that the person in question had equity in the company or legal entity in which he or she is involved, and that at least 30% equity in the said legal entity was held by PDIs. The appointment was a discretionary appointment done alphabetically.[9]

The proposed Appointments Policy

9. The Justice Minister has the power to frame policies designed to regulate the process of winding up estates. In the purported exercise of this power, the Justice Minister has promulgated the Appointments Policy that is intended to replace the system of requisitions by one that sanctions the appointment of provisional liquidators and trustees by rote.

10. Eligibility for appointment will be determined, not on a first come first served basis, but by the application of a weighting system that gives preference to black and female candidates. The comparator for the purpose of assigning the weights is crude national demographic representation and no regard is had to the distribution of races and genders on the list of approved practitioners kept by the Master.

[9] CIPA FA para 40 Vol 4 p 515 *ll* 12 - 21.

11. If the Appointments Policy is implemented, Masters of the Court will be obliged to categorize incoming estates work by value; then, subject to a highly circumscribed overriding discretion, distribute the matters by rote and without concern for the wishes of creditors, in accordance with a weighting system designed to reflect, not the composition of the panel, but national demographics by race and gender.[10]

CONSTITUTIONAL CONTEXT AND RELEVANT FACTS

12. The Constitution of the Republic of South Africa Act 108 of 1996 ('the Constitution') seeks to promote equality. As the Constitution mandates, various statutes seek to give effect to the constitutional injunction to promote equality.[11] In some instances, the promotion of equality is not directly regulated in the statute, but provision is made for policy intervention. That is the case in the present instance.

12.1. Masters of the High Court are entrusted by a series of statutes with a measure of discretion in the winding up of insolvent estates within their respective jurisdictions. The discretion includes, in certain circumstances, a discretion in making appointments of a trustee, co-trustee, liquidator or provisional liquidator ('insolvency practitioner') to wind up the applicable estate.[12]

[10] Annexure C to CIPA FA Vol 7 pp 553 – 558, read with CIPA FA para 9 Vol 6 p 502 *ll* 10 - 16.
[11] Notably, these include the Employment Equity Act 55 of 1998 ('the EEA') and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('the Equality Act').
[12] CIPA FA para 33 Vol 6 p 512 *ll* 19 – 23.

12.2. Upon its amendment in 2003, s 158(2) of the Insolvency Act 24 of 1936 ('the Insolvency Act') (and related legislation) gave the Minister of Justice and Constitutional Development ('the Minister')[13] the power to 'determine policy for the appointment of a *curator bonis*, trustee, provisional trustee or co-trustee by the Master in order promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination.'[14] A statement of policy so determined must, in terms of subs (3), be tabled in Parliament before it is gazetted, but once gazetted, it becomes legally binding and must, in consequence of the Judicial Matters Amendment Act 16 of 2003, which came into force on 9 July 2004, be observed by every Master of the High Court.

13. Purporting to act in accordance with the powers conferred on him, the Minister promulgated the Appointments Policy on 7 February 2014.[15] The Appointments Policy is designed to regulate the appointment of insolvency practitioners in instances where the Master enjoys a discretion on appointment ('discretionary appointments'). Its avowed objective is 'to promote consistency, fairness, transparency in the achievement of a quality for persons previously disadvantaged by unfair discrimination'. The Appointments Policy is intended to 'form the basis of the transformation of the insolvency industry'. Paragraph 5 of the

[13] The then responsible Minister, now known as the Minister of Justice and Correctional Services.
[14] See FA in Application for Leave to Appeal paras 22 - 23 pp 7 - 8.
[15] CIPA FA para 8 Vol 6 p 502 *ll* 3 – 9; Annexure C to CIPA FA Vol 7 pp 553 – 558.

Appointments Policy provides that the Chief Master 'must issue directives to be used by all Masters in order to implement and monitor of the application of this policy'.[16]

14. Central to the implementation of the Appointments Policy is the creation and maintenance of a list of insolvency practitioners, divided into categories. Under the Appointments Policy, the allocation, which takes place by rotation, is made within categories delineated by race and gender. Persons on the approved list, which must be arranged alphabetically or in a strictly controlled random manner, are divided into one of four categories. Categories C and D comprise White females and males respectively, and categories A and B comprise black, Coloured, Indian or Chinese persons (for want of a better term, here described as 'non-Whites') who are likewise respectively females and males. The categories are then weighted in order to reflect the Minister's conception of disadvantage. The first four appointments must be given to persons in category 1 (non-white females); the next three to persons in category 2 (non-white males); the next two to persons in category 3 (white females); and the remaining one to persons in category 4 (white males). This process is repeated with each round of appointments.[17]

[16] Clause 5 Vol 7 p 556 *ll* 9 - 11.
[17] Clause 7 Vol 7 p 557 *l* 3 - pp 558 *l* 2. See FA in Application for Leave to Appeal para 18 p 6 and para 20 p 7.

15. In terms of the Appointments Policy the Master's list must distinguish between 'senior practitioners' who had been appointed at least once every year within the last five years and 'junior practitioners', being insolvency practitioners who had not been appointed at least once every year within the last five years, who had satisfy the Master that they have sufficient infrastructure and experience to be appointed alone.[18] The Master may, having regard to the complexity of the matter and the suitability of the next in line insolvency practitioner, appoint a senior practitioner jointly with the junior or senior practitioner appointed in alphabetical order. If the Master makes such an appointment the Master must record the reason therefore and, on request, provide the other insolvency practitioners therewith.[19]

16. The appointments are made by way of robot-like application of the system. It is clear from paragraphs 7.1 and 7.2 of the Appointments Policy that the appointments 'must' be made.[20] The only exceptions are those set out in paragraphs 7.3 (only providing for additional practitioners to be appointed in complex matters)[21] and 7.4 where the 'next in line' insolvency practitioner is unfit to be appointed for the reason set out in that paragraph.[22]

[18] Clause 6.2 Vol 7 p 556 *ll* 25 – 29. See FA in Application for Leave to Appeal para 19 pp 6 - 7.
[19] See FA in Application for Leave to Appeal para 21 p 7.
[20] Vol 12 p 557 *l* 6 & *l* 14.
[21] Vol 12 p 557 *ll* 14 - 15.
[22] Vol 12 p 557 *ll* 16 - 20.

PROCEDURAL HISTORY

The applications

17. The Appointments Policy was originally published on 7 February 2014 and promulgated by the Justice Minister. It was challenged in two sets of litigation: one brought by SARIPA in the Western Cape High Court,[23] the other brought by CIPA, Solidarity and NAMA in the North Gauteng High Court.[24] The fifth respondent ('VRA') was subsequently joined as an *amicus curiae.*[25] Following an agreement reached between the parties, the hearing of the two matters was consolidated and proceeded in the Western Cape High Court.[26]

18. Before Katz AJ, it was argued that the Appointments Policy deprives the Masters of the general discretion vested in them by the applicable statutes and, in the process, negates the power and duty currently in place to realize the preference for specific appointees expressed by creditors and other interested persons.[27] It was submitted that -

18.1. In producing these results, the Appointments Policy travels beyond the permissible scope of the appellants' powers when properly construed in the light of the enabling statutes and is *ultra vires* the empowering statutes. In

[23] Judgment para 12 Vol 7 p 1004 *ll* 4 – 10.
[24] Judgment para 17 Vol 7 p 1005 *ll* 8 – 10.
[25] Judgment para 17 Vol 7 p 1005 ll 17 – 18; para 20 Vol 7 p 1006 *ll* 3 – 6; Solidarity NoM and FA Vol 5 pp 832 – 846; NAMA NoM and FA Vol 5 pp 847 – 907; VRA NoM and FA Vol 6 pp 910 – 931.
[26] Judgment para 22 Vol 7 p 1006 *ll* 12 – 13.
[27] CIPA FA para 10 Vol 7 p 502 *ll* 17 – 20.

addition, it is unreasonable, arbitrary and irrational. By exhibiting these fundamental shortcomings, so it was contended, the Appointments Policy violates the established provisions of administrative law.[28]

18.2. Furthermore, the Appointments Policy, by mechanically imposing race and gender requirements, violates the equal treatment provisions of clause 9 and comparable provisions of the Bill of Rights in the Constitution. It does not meet the standard for legality expressed by this Court in its assessment of the qualities of legitimate transformative measures under the Constitution.[29]

18.3. In addition, in implementing the Appointments Policy in summary fashion when it could and should be implemented in a gradual manner that properly recognizes the legitimacy of established interests and prevailing investments, the Justice Minister is acting in an arbitrary, unreasonable and irrational manner in breach of the principles of administrative law.[30]

19. The result, in the submission of the applicants, was that the Appointments Policy must be struck down as unlawful.[31]

20. In opposing the application, the Chief Master and the Justice Minister defended the Appointments Policy as being constitutionally sound[32] and consistent with

[28] CIPA FA para 10 Vol 7 p 502 *l* 20 – p 503 *l* 2.
[29] CIPA FA para 11 Vol 7 p 503 *ll* 3 – 6; *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23.
[30] CIPA FA para 12 Vol 7 p 503 *ll* 7 – 11.
[31] CIPA FA para 13 Vol 7 p 503 *ll* 12.
[32] AA paras 6.1 – 6.6 Vol 7 p 613 *l* 10 – p 615 *l* 8.

enabling legislation.[33] They claimed that the challenge was 'misplaced' because the Justice Minister enjoys policy making power[34] that entitles him to promote race and gender based equality, and because the Appointments Policy ultimately seeks the advancement of equality.[35] They contended that the interests of creditors ought not to 'cloud' considerations concerning the propriety of the Appointments Policy.[36]

Judgment in the Western Cape High Court

21. In his judgment of 13 January 2015, Katz AJ recognized the inequalities that persist in South Africa some 20 years after the advent of democracy and the necessity for remedial measures to realize the aspiration of an equal society.[37] But, the learned Judge stressed, measures taken by a repository of power[38] are subject to the constraints of constitutionality and requirements of legality and rationality.[39]

22. In response to the argument that the Appointments Policy constituted an unlawful fettering of discretion, the learned Judge emphasized that the 'need for certainty and sufficient guidelines for decision-makers must not result in a policy that enters the realm of regulation by pre-determining outcomes in particular circumstances

[33] AA para 6.7 Vol 7 p 615 *l* 9 – p 618 *l* 21.
[34] AA para 7 Vol 7 p 619 *ll* 1 - 11.
[35] AA paras 8 - 9 Vol 4 p 619 *l* 12 – p 620 *l* 7.
[36] AA para 12 Vol 4 p 620 *l* 15 – p 621 *l* 4.
[37] Judgment paras 2 – 7 Vol 12 p 1000 *l* 9 – p 1003 *l* 2.
[38] Judgment para 99 Vol 12 p 1037 *ll* 10 – 11.
[39] Judgment para 107 Vol 12 p 1041 *ll* 9 – 11.

and macro-managing implementation'[40] and that a policy is not to 'constitute a constraint to be applied rigidly and inflexibly in any case'.[41] Consistent with these principles, the appointment of insolvency practitioners may not result in a pre-determination of the decision that must be made by the Master in the exercise of the discretion entrusted to him or her.[42] In breach of this principle, the Appointments Policy impermissibly intruded upon the Master's ability to apply his mind to the making of appointments,[43] not least by precluding a consideration of the suitability of the appointee as enjoined by the statute.[44] In the light of these considerations, the only conclusion was that 'the rote alphabetical system set up by the [Appointments] Policy unlawfully fetters the Master's discretion'.[45]

23. In considering the arguments based on illegality and irrationality, the learned Judge commenced by emphasizing the constitutional requirements of legality and rationality that circumscribe the exercise of public power.[46] He accepted that the rationality enquiry was implicated by considerations of equality, since the Appointments Policy was designed with the intention that it be a remedial measure within the meaning of s 9(2) of the Constitution.[47] In his view 'insofar as the [Appointments] Policy aims to make the insolvency industry accessible to previously disadvantaged individuals, it needs to do more than increase numbers,

[40] Judgment para 116 Vol 12 p 1043 *l* 19 – p 1044 *l* 13.
[41] Judgment para 117 Vol 12 p 1043 *ll* 14 – 16.
[42] Judgment paras 120 – 124 Vol 12 p 1045 *l* 10 – p 1048 *l* 2.
[43] Judgment para 125 Vol 12 p 1048 *ll* 3 – 8.
[44] Judgment paras 126 - 127 Vol 12 p 1048 *l* 9 – p 1049 *l* 6.
[45] Judgment para 128 Vol 12 p 1049 *ll* 7 – 8.
[46] Judgment paras 129 – 130 Vol 12 p 1049 *ll* 10 – 18.
[47] Judgment paras 133 – 134 Vol 12 p 1051 *ll* 3 – 15.

but ensure that there can be a match between individual skill and the requirements of the role within the system provided for by legislation'. Formal equality achieved by a 'numbers game' is not lawful affirmative action as contemplated by the Constitution;[48]

24. Pursuing the theme, the learned Judge held that, in the absence of an explanation on how a roster system implementing formal equality could constitute a rational response to identified needs, there was none to be found.[49] Moreover, in the absence of a timetable against which to measure achievement of objectives, it was difficult to conceive how the measure could be evaluated.[50] No evidence had been adduced to demonstrate the capacity of the Appointments Policy to change behaviour (and therefore promote greater opportunities for the previously disadvantaged),[51] in circumstances where it may well result in fronting and other corrupt practices.[52] To make a proper decision was all but impossible where the information available was incomplete and often inaccurate.[53]

24.1. Finally, he held that, while allocating by reference to race and gender was not *per se* irrational,[54] an inflexible and rigid roster system based on race classification is arbitrary, irrational and unsuitable as a remedial measure.[55] He stressed the requirement that flexibility of approach is required[56] and that

[48] Judgment para 156 Vol 12 p 1059 *ll* 11 – 18.
[49] Judgment para 159 Vol 12 p 1061 *ll* 5 – 8.
[50] Judgment paras 160 - 1061 Vol 12 p 1061 *l* 9 – p 1062 *l* 11.
[51] Judgment para 162 Vol 12 p 1062 *ll* 12 – 19.
[52] Judgment para 163 Vol 12 p 1062 *l* 20 – p 1063 *l* 16.
[53] Judgment paras 166 – 182 Vol 12 p 1064 *l* 11 – p 1071 *l* 12.
[54] Judgment paras 192 – 197 Vol 12 p 1075 *l* 16 – p 1076 *l* 27.
[55] Judgment paras 198 – 202 Vol 12 p 1077 *l* 1 – p 1078 *l* 12.
[56] Judgment para 205 Vol 12 p 1079 *ll* 4 – 5.

rigidity in the implementation of remedial measures is impermissible.[57] The Appointments Policy could not conceivably be implemented in a manner that was not mechanical and rigid. It was not capable of achieving equality in the long term.[58]

25. In light of this analysis, Katz AJ set the Appointments Policy aside.

The SCA Judgment

26. The Appointments Policy, the SCA noted,[59] mandates the mechanical appointment of provisional trustees within rosters generated by reference to race and gender race-based categories. In the process it creates no scope for a consideration of the wishes of creditors.[60] The Justice Minister and the Chief Master, maintaining that 'that the [Policy] was intended to form the basis of transformation of the insolvency industry',[61] contended that it is a measure contemplated in s 9 of the Constitution[62] and conforms with the requirements laid down by this Court[63] in *Minister of Finance v Van Heerden*.[64] The fact that, besides discounting the wishes of creditors, the Appointments Policy paid no heed to the interests of trade unions and employees was indisputable, said the Court,

[57] Judgment para 214 Vol 12 p 1081 *l* 14.
[58] Judgment paras 215 – 217 Vol 12 p 1081 *l* 15 – p 1082 *l* 15.
[59] Judgment para 11 Vol 13 p 1161 *l* 25 - p 1162 *l* 1.
[60] Judgment para 19 Vol 13 p 1166 *ll* 13 - 17.
[61] Judgment para 21 Vol 13 p 1167 *ll* 10 - 12.
[62] Judgment para 22 Vol 13 p 1167 *l* 19 - p 1168 *l* 9.
[63] 2004 (6) SA 121 (CC) para 37.
[64] See Judgment paras 23 - 24 Vol 13 p 1168 *ll* 10 -32.

but their concerns were regarded as irrelevant by the Justice Minister and the Chief Master. [65]

27. Whether the stance of the Chief Master and the Justice Minister was correct had to be determined upon an application of the principles that emerged from the cases governing the proper scope of affirmative action measures.

27.1. The SCA summarised them in the following terms:

> '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. 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 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.'[66]

27.2. The SCA continued thus:

> '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

[65] Judgment para 28 Vol 13 p 1170 *ll* 9 - 13.
[66] Judgment para 29 Vol 13 p 1170 *l* 14 - p 1171 *l* 4. Footnotes omitted.

> 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 whys 15(3) of the Employment Equity Act 55 of 1998, permits preferential treatment and numerical goals, but disallows quotas.'[67]

28. In argument, the Justice Minister and the Chief Master had been constrained to concede that, if the Appointments Policy imposed a quota or a rigid system for the appointment of insolvency practitioners, it would infringe these principles and would have to be struck down.[68] It sought to escape the grip of this concession by contending that the requisite flexibility was to be found in a clause (7.3 of the Appointments Policy) that gives the Master the power to nominate an abler practitioner to support the one selected by rote but unequal to the task.[69]

29. Not so, said the SCA:[70]

29.1. '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

[67] Judgment para 32 Vol 13 p 1172 *ll* 1 - 15.
[68] Judgment para 32 Vol 13 p 1172 *ll* 15 - 18.
[69] Judgment para 34 Vol 13 p 1173 *ll* 1 - 4.
[70] Judgment para 34 Vol 13 p 1173 *ll* 4 - 5.

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 clause contains none of the flexibility and all of the rigidity that the Constitutional Court has said is impermissible.'[71]

29.2. '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.'[72]

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[71] Judgment para 33 Vol 13 p 1172 *ll* 19 - 28.
[72] Judgment para 34 Vol 13 p 1173 *ll* 5 - 19.

29.3. The Appointments Policy, which embodied no general discretion to depart from strict numerical categorisation,[73] was 'entirely dependent on a strict racial and gender allocation of appointments',[74] because the Master's 'remedial power ... does not avoid the result of the [Appointments Policy] being applied'.[75]

30. The SCA then turned to consider a second problem. The Appointments Policy had been formulated with no reference to its impact when applied in reality,[76] because it takes no account of the relative number of insolvency practitioners falling in each category.[77] Concerned as it was with the demography of the country, not the practitioners, its effect would be to give a wholly unwarranted preference to persons in underrepresented categories. This was no mean concern.

> '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. The prejudice to young Black men and women who

[73] Judgment para 35 Vol 13 p 1173 *ll* 24 - 29.
[74] Judgment para 35 Vol 13 p 1173 *ll* 28 - 30.
[75] Judgment para 35 Vol 13 p 1173 *ll* 30 - 31.
[76] Judgment para 36 Vol 13 p 1174 *ll* 2 - 3.
[77] Judgment para 36 Vol 13 p 1174 *ll* 5- 6.

have recently completed their studies, are well qualified and wishing to enter practice as an insolvency practitioner, is obvious.'[78]

31. In the light of the current divergence of representation, the SCA considered the practical difficulties of allocating the bulk of the work to a handful of practitioners who, in the nature of things, would be unable to perform their duties.[79] By contrast, the talents of experienced and able practitioners in other categories would simply go to waste. Particularly disturbing was the potential under-utilization of those born after 27 April 1994: they were lumped together with the largest group, white males, and the category was eligible for only 10% of the cases.[80]

32. In the eyes of the SCA, the objection to the policy was not that it unlawfully fettered the Master's discretion: the statute envisaged that the Master's discretion could be constrained by policy and some discretion continued to vest in the Master under the Policy.[81] The problem was rather that there was no rational connection between the Appointments Policy and the objectives it sought to achieve. The Chief Master and the Minister had provided no explanation for the basis upon which the Appointments Policy had been formulated.[82]

32.1. No reliable figures were presented by them to show the number of practitioners in each category,[83] 'so that it is impossible to say that those

[78] Judgment para 36 Vol 13 p 1174 *ll* 6 - 20.
[79] Judgment para 37 Vol 13 p 1174 *l* 23 - p 1175 *l* 2.
[80] Judgment para 37 Vol 13 p 1175 *ll* 2 - 10.
[81] Judgment paras 39 - 45 Vol 13 p 1175 *l* 23 - p 1178 *l* 15.
[82] Judgment para 46 Vol 13 p 1178 *ll* 20 - 22.
[83] Judgment para 46 Vol 13 p 1178 *ll* 28 - 29.

falling within the different categories are indeed not receiving their fair share of the work of insolvency practitioners'.[84]

32.2. In the 'absence of proper information on the basis upon which the [Appointments Policy] was formulated, and proper information concerning the current demographics of insolvency practitioners, one cannot say that the [Appointments 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'.[85]

32.3. This problem was compounded, so the SCA held, by the many unexplained aspects of the Appointments Policy and the exclusion of relevant considerations in complex estates particularly.[86] The Appointments Policy 'does not suggest any consideration of the skills and expertise necessary to deal with an insolvent estate', which 'undermines the rationality of the [Appointments Policy] as a whole'.[87] Moreover, 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'.[88]

33. In the papers, the Justice Minister and the Chief Master had rightly conceded that insolvent estates are wound up in the interests of creditors[89] and that the 'primary

[84] Judgment para 46 Vol 13 p 1178 *l* 29 - p 1179 *l* 2.
[85] Judgment para 47 Vol 13 p 1179 *ll* 11 - 20.
[86] Judgment para 47 Vol 13 p 1179 *ll* 21 - 30.
[87] Judgment para 49 Vol 13 p 1180 *ll* 1 - 9.
[88] Judgment para 50 Vol 13 p 1180 *ll* 10 - 14.
[89] Judgment paras 54 - 57 Vol 13 p 1181 *l* 12 - p 1183 *l* 27.

consideration must be in the interests of creditors and serving those interests'.[90] It might be 'technically correct' to say that these interests are not expressly recognized by the statutes,[91] but upon a proper construction of the enactments, it is clear that they are designed to serve the interests of creditors.

34. Nothing contained in them –

> 'empowers the Master to disregard the interests of creditors and to appoint on a roster basis persons who, in terms of the [Appointments 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'.[92]

34.1. By overlooking the fundamental purpose of the legislation that governs the sequestration of estates and the winding up of companies and close corporations, the Department had committed a breach of the principle of legality.[93]

THIS APPLICATION FOR LEAVE TO APPEAL

35. In these proceedings, the Applicants criticize the findings of both of the Courts below.

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[90] Judgment para 57 Vol 13 p 1183 *ll* 15 - 16.
[91] Judgment paras 58 - 59 Vol 13 p 1184 *ll* 10 - 18.
[92] Judgment para 59 Vol 13 p 1184 *ll* 20 - 26.
[93] Judgment para 65 Vol 13 p 1186 *l* 1 - p 1187 *l* 9.

35.1. They contend[94] that the appointment of insolvency practitioners according to a roster is not inflexible but allows for appropriate deviation as contemplated in *Solidarity v Department of Correctional Services.*[95]

35.2. They then argue that the finding that the Master's discretion is not inappropriately fettered is inconsistent with the conclusion that he Appointments Policy is rigid and therefore unconstitutional.[96]

35.3. Finally, they argue that the Appointments Policy is not irrational. It contends that the inferences underlying the system were rational even if unsupported by empirical data;[97] that the SCA's criticism of the identification of senior practitioners under the system is 'vague and indistinct';[98] that generalised experience, as opposed to experience and skills applicable to the estate that is being wound up, is sufficient;[99] and that it is wrong to consider that creditors' wishes are to be taken into account in the appointment of an insolvency practitioner.[100]

36. The Applicants ask that the Appointments Policy be upheld or, failing that, that it be given 24 months to rectify any perceived constitutional repugnancy.[101]

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[94] FA in Application for Leave to Appeal para 37 pp 15 - 23.
[95] 2016 (5) SA 594 (CC).
[96] FA in Application for Leave to Appeal paras 37.9 - 37.10 pp 22 - 23.
[97] FA in Application for Leave to Appeal para 42 p 25.
[98] FA in Application for Leave to Appeal para 43 p 26.
[99] FA in Application for Leave to Appeal paras 44 - 45 pp 26 - 27.
[100] FA in Application for Leave to Appeal paras 46 - 51 pp 27 - 29.
[101] FA in Application for Leave to Appeal paras 61 - 63 p 32.

37. For its part, CIPA commends the decision of the SCA to this Court and respectfully endorses its reasoning. Below we deal principally with matters that, we submit, deserve to be deal with in greater depth.

RIGIDITY OF THE POLICY

38. The Applicants accept that the data relied on cannot survive scrutiny,[102] but say that the inferences that may be drawn from data are sufficient in a policy-making context.[103] The problem with this submission is that the inferences contended for are unsupported. It is common cause that there has been no accurate assessment of the demographic composition of the pool of insolvency practitioners (whether nationally or in particular jurisdictions). To submit that there is a 'skew' in the allocation of work, the Applicants must show that practitioners of a particular race and/or gender win more (or less) work than their representation in the pool of available practitioners suggests that they ought to. No data to this effect is available, as the SCA made clear.

39. The Appointments Policy allocates almost half of the work to black women, without it having been established that there is a sufficient number of black female practitioners to serve the demand. And, since those who became citizens after 27 April 1994 are, together with all white male practitioners, allocated only 10% of the work, it stands to reason that supply of practitioners will far outstrip demand under the Appointments Policy. The insolvency practitioners who became South

[102] Applicants' HOA paras 67 - 68 p 28.
[103] Applicants' HOA paras 65 - 66 pp 27 - 28 and paras 69 - 70 p 29.

African citizens after 27 April 1994 and those who are white males will have to seek alternative means of generating an income. Fewer practitioners will end up doing more of the work, whether or not they have the capacity to do so.

40. Of course, it is the position of the Applicants (recorded by the SCA, and repeated in the application for leave to appeal) that the interests of creditors ought not to enter the mind of the Master when the appointment is made. In their view of the world, sufficient capacity to be able to do the work and aptitude for or experience in winding up estates of a particular kind are completely irrelevant.

40.1. So, for example, they appear to consider as uncontroversial the position that a practitioner that has only been involved in the winding up of one estate per year for five years ought to be considered a 'senior practitioner'.

40.2. They also treat as ridiculous the notion that experience only in winding up small, individual estates cannot prepare an insolvency practitioner for the work to be performed in the complex winding up of companies that requires specialised industry knowledge (eg mining companies or pharmaceutical companies).

41. The Applicants blithely submit that reliance can be placed on the oversight role of the Master, despite the common cause fact that the Master is unable to deal with the current workload - the very fact that has led to the need for the appointment of insolvency practitioners by the Master on an interim basis prior to the first meeting of creditors.

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CIPA'S SUBMISSIONS

The Applicants' exclusive reliance on the statutory framework

42. The Applicants rest their case on the proposition that they have a constitutional commitment to effectuate transformation. This contention, so uncontroversial on its face, needs to be placed in proper context.

43. The Applicants raise no challenge to the constitutionality of the provisions empowering the Justice Minister to make a policy for the appointment of insolvency practitioners; quite the contrary, they rely on these provisions in their explanation that the Appointments Policy is a remedial measure that is contemplated under the Constitution. It is, therefore, the statutory framework that provides the bounds for the exercise of ministerial discretion and so determines whether the policy was properly adopted.

44. The Department cannot go behind this framework in order to invoke the Constitution in aid. Since 'a litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right',[104] the 'courts must assume that the [statute] is consistent with the

[104] *MEC for Education: KwaZulu Natal v Pillay* 2008 (1) SA 474 (CC) at para [40]. *Cf* also the judgments cited therein: *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae*) 2006 (2) SA 311 (CC) at paras [96] and [434] – [437]; *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 (CC) at para [51]; *NAPTOSA and Others v Minister of Education, western Cape and Others* 2001 (2) SA 112 (C) at 123I – J.

Constitution and claims must be decided within its margins'.[105] If the legislation does not fully protect the constitutional right (power), its constitutionality should be challenged, but the legislative provisions cannot be bypassed by invoking the Constitution directly:[106] the 'Constitution is primary, but its influence is mostly indirect. It is perceived through its effects on the legislation and the common law – to which one must look first'.[107]

45. In construing the scope of the power, it is, of course, not merely permissible but also obligatory to favour an interpretation that best accords with the spirit of the Constitution. This, however, is a separate question. The central question in this case is whether the Appointments Policy remains within the bounds set by the statutory provisions, properly construed. The power to make policy is determined by these statutes and the Department, have framed its case in the way it has, must base its case on the legislation and not directly on the Constitution.

The effect of the statutory framework

46. The power to make a policy to regulate the appointment of insolvency practitioners derives from s 158(2) of the Insolvency Act and s 10(1A) of the Close Corporations Act. Where express directives are wanting, the scope of the power must be construed purposively. Such a construction can produce only one

[105] *MEC for Education: KwaZulu Natal v Pillay* 2008 (1) SA 474 (CC) at para [40].
[106] *My Vote Counts NPC v Speaker of the National Assembly & Others* [2015] ZACC 31 paras 44 – 66. The rationale for the principle is that, where Parliament has given a particular meaning to a basic right in the form of legislation, it is not for courts to reinterpret that same right.
[107] *My Vote Counts NPC v Speaker of the National Assembly & Others* [2015] ZACC 31 para 52.

result; that is, that the power is conferred, and so must be exercised, in order to promote the interests of creditors.[108] Whatever is left in the estate once it is wound up, will go to creditors and therefore the estate, in a sense, 'belongs' to them.[109] Since they have an equitable interest in the money, it is their rights and interests that are transcendent.

47. Those interests are best served by the effective and equitable winding up of estates in the interests of a just and commercially sound distribution of assets to creditors.[110] These are the interests that the Justice Minister must treat as paramount when framing a policy for the appointment of trustees. Making appointments expeditiously obviously feeds into this objective; so, rather less obviously, does the need to ensure a fair distribution of work among trustees; but the ultimate objective is to promote the interests of creditors in a proper winding up of the estate, and in framing policy under the enactments, the Justice Minister is statutorily enjoined to treat this goal as paramount.

48. Nothing in the Judicial Matters Amendment Act 16 of 2003, which by amendment conferred on the Justice Minister the broad power to make policy on trustee appointments, is inconsistent with this conclusion. It stipulates that the policy

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[108] See description of administration of estates in practice CIPA FA paras 28 – 29 Vol 6 p 510 *l* 17 – p 511 *l* 16.

[109] In its founding affidavit, CIPA goes to lengths to explain the legal framework. It summarizes the relevant statutes and, by highlighting the operative provisions, explains their object and purpose. The object and purpose is to ensure that estates are wound up in the manner that best promotes the interests of creditors. The creditors are the persons who initiate the process of winding up in order to recover the money due to them. See CIPA FA paras 14 – 27 Vol 6 p 503 *l* 13 – p 510 *l* 14.

[110] CIPA FA para 69 Vol 6 p 525 *l* 15 – p 526 *l* 3. This entails recognition that estates are managed and ultimately wound up in the interest, of the public at large or the *fiscus*, but of the persons properly deemed by law to be their beneficiaries.

must exhibit a number of qualities: consistency; fairness; transparency; and the achievement of equality for persons previously disadvantaged by unfair discrimination.[111] By properly balancing these considerations, the Justice Minister will create a policy that suitably serves the ultimate goal of ensuing that estates are effectively wound up in the interests of creditors. To concentrate, as the Justice Minister has done, on transformation is to fail to strike the balance, and the failure is only compounded by the determination to adopt a roster system so absurdly mechanical.

49. The Applicants naturally contend otherwise. They argue that the Appointments Policy has 'as its objective' the achievement of all four goals, an assertion also made in the Appointments Policy itself.[112] This is easily stated, but belied by the content of the Appointments Policy.

49.1. Under it, categories of insolvency practitioners are created by reference to race and gender[113] and it contemplates that alphabetical lists of insolvency practitioners must be prepared, with each list containing the names only of persons filling within the created category.[114]

[111] Insolvency Act s 158(2); Close Corporations Act s 10(1A)(*a*).
[112] Annexure C to CIPA FA clause 2 Vol 4 p 554 *ll* 13 -15.
[113] Annexure C to CIPA FA clause 6.1 Vol 7 p 557 *ll* 11 – 20.
[114] Annexure C to CIPA FA clause 6.1 Vol 7 p 557 *ll* 21 – 22.

49.2. Provision is made for designation as either a senior or junior practitioner, but they remain on the list in their alphabetical position, irrespective of the designation.[115]

49.3. When appointments of insolvency practitioners are made -

49.3.1. the first four appointments must go to persons on list A (African, Coloured, Indian and Chinese females);

49.3.2. the next three appointees must be persons on list B (African, Coloured, Indian and Chinese males);

49.3.3. in the next two matters, persons from list C (White females) will get an opportunity; and

49.3.4. the final appointment in ten must go to category D (White males).[116]

49.4. The appointments follow the alphabetical list,[117] with exceptional provision made for the co-appointment of a senior practitioner based on reasoned considerations of suitability and complexity.[118]

50. In requiring the distribution to be by rote, the Appointment Policy gives the superficial appearance of achieving one of the enactment's goals – transparency – but the comfort this affords is somewhat illusory. The Appointments Policy

[115] Annexure C to CIPA FA clause 6.2 Vol 7 p 556 *l* 25 – p 557 *l* 5.
[116] Annexure C to CIPA FA clause 7 Vol 7 p 557 *ll* 6 – 13.
[117] Annexure C to CIPA FA clause 7.2 Vol 7 p 557 *ll* 14 – 15.
[118] Annexure C to CIPA FA clause 7.3 Vol 7 p 557 *ll* 16 – 20.

makes sure that the next in line receives the file but says nothing about the way the files are to be marshalled ahead of distribution. Transparency on who might be the next person to be appointed as an insolvency practitioner cannot serve to provide transparency on the manner in which matters will be ordered in the Master's office. Put differently, there is nothing in the Appointments Policy to direct the Masters on the order in which matters must be allocated, so that files may be 'shuffled' to secure appointment of particular insolvency practitioners to particular matters.

51. What is 'fair' cannot be arrived at by adoption and mechanical application of a roster mandating appointment of insolvency practitioners on the basis of race and gender quotas, without any consideration being given to *inter alia* (1) the current race and gender profile of persons qualified to accept appointment as insolvency practitioners; (2) suitability of an insolvency practitioner for appointment in a particular matter; (3) the vested interests of creditors in the appointment of insolvency practitioners that are suitable; and (4) the interests of current insolvency practitioners who will be deprived of the ability to compete fairly for business based solely because of the colour of their skin.

First challenge: improper fettering of discretion

52. 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. The ultimate aim of the Appointments Policy must be to set parameters for the exercise of the power to appoint that recognizes the statutorily mandated discretion and properly respects it. The ultimate goal, it must be stressed, is to secure the services that best promote the interests of the beneficiaries of the estates, creditors specifically.

53. The Appointments Policy in its current form constitutes an improper limitation on the power conferred. The Appointments Policy sets up a system of rosters by which appointees are allocated matters in turn. The Master is given no discretion on the matter, except in the exceptional case provided for in clause 7.3. And even then, the primary appointment is made in accordance with the roster, with an additional appointment envisaged only where the limited provision allows for it. No allowance can be made for aptitudes pertinently attuned to the industry in question or other peculiarities that the matter may exhibit; nor is any provision made (outside the – highly exceptional – dictates of the statute) for a judicious consideration of the wishes and desires of the creditors, members and other persons who have the paramount interest in the manner in which the appointment is made.

54. To be sure, the statute anticipates that policy will influence decision-making powers, but where it serves to determine the outcome of decisions, the benefit of

individualized discretionary decision-making is lost.[119] A decision-maker must always be open to persuasion that it is inappropriate to apply a policy in a given case.[120] If this principle is not observed, the policy is bad in law.

55. So much is clear from a long line of authorities, of which the two cited below are illustrative.

55.1. In *Computer Investors Group Inc v Minister of Finance*[121] it was explained as follows:

> 'Where a discretion has been conferred on a public body by a statutory provision, such a body may lay down a general principle for its general guidance, but it may not treat this principle as a hard and fast rule to be applied invariably in every case. At most it can be only a guiding principle, in no way decisive. Every case that is presented to the public body for its decision must be considered on its merits. In considering the matter the public body may have regard to a general principle, but only as a guide, not a decisive factor. If the principle is regarded as a decisive factor, then the public body will not have considered the matter, but will have prejudged the case, without having regard to its merits. The public body will not have applied the provisions of the statutory enactment.'

55.2. In *Foodcorp (Pty) Ltd v Deputy Director General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management*[122] the SCA held:

> 'Although the power to make a regulation is permissive that does not mean that the Minister is entitled to adopt a binding formula without promulgating a

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[119] Baxter p 416 and the authorities there cited. See, in particular, *Computer Investors Group Inc v Minister of Finance* 1979 (1) SA 879 (T) at 898.
[120] Baxter pp 417 - 418 and the authorities there cited.
[121] *Computer Investors Group Inc v Minister of Finance* 1979 (1) SA 879 (T) at 898.
[122] [2005] 1 All SA 531 (SCA) at para 9.

> regulation. However, if it is assumed that he adopted a formula merely for administrative purposes, he could not thereby lay down an immutable rule, ignoring his residual discretion. Otherwise it would have amounted to the unwarranted adherence to a fixed principle, something the repository of a discretion may not do'.

Second challenge: Appointments Policy is an irrational remedial measure

56. The Applicants' focus in this appeal is on the Appointments Policy as a remedial measure. They submit, correctly, that the Constitution expressly sanctions remedial measures which advance the position of people who have suffered in the past. In the Applicants' submission, the Appointments Policy clearly seeks to right the wrongs of the past. But of course, s 9(2) of the Constitution does not give a blanket guarantee that *any* 'measure' taken under its provisions will be constitutional, irrespective of the nature of the measure and the nature and extent of its impact on third parties.[123]

57. The judgment in *Van Heerden* postulates an objective test for considering whether the measures taken will achieve protection or advancement. The measures employed must be capable of achieving the desired restitutionary object.[124] In order to determine whether the measure 'properly falls within the ambit of s 9(2)',

[123] Laurie Ackermann *Human Dignity: Lodestar for Equality in South Africa* Juta 2013 p 364. See also Chapter 4 pp 181 – 254 of the publication for a more general discussion in this regard.
[124] Laurie Ackermann *Human Dignity: Lodestar for Equality in South Africa* Juta 2013 p 355.

three criteria have to be satisfied.[125] *Van Heerden* emphasizes[126] it is only legislative and other measures that *properly* fall within the requirements of s 9(2) that are not presumptively unfair; and differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination is warranted only if the measures concerned conform to the internal test set by s 9(2).[127]

58. The only principled justification for imposing an actual negative burden on third parties is the actual amelioration of the disadvantaged.[128] In *Van Heerden*[129] Moseneke J (as he then was) observed that a restitutionary measure 'must be reasonably capable of attaining the desired outcome'[130] and 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'.[131] The purposes of the Appointments Policy are to ensure both fairness and advancement of the previously disadvantaged – and under the Constitution the measure and its outcome must be equitable. What is equitable must be determined by reference to a consideration of *all relevant factors* (i.e. rational considerations).

59. Examined for coherence upon its own terms (ie that rotation based on demographics according to a schedule to ensure demographic representativeness),

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[125] *Van Heerden* in para 37.
[126] *Van Heerden*.
[127] *Van Heerden* at para 32.
[128] Laurie Ackermann *Human Dignity: Lodestar for Equality in South Africa* Juta 2013 p 383.
[129] *Van Heerden*.
[130] *Van Heerden* at para 41.
[131] *Van Heerden* at para 41.

the Appointments Policy is revealed as hopelessly crude and arbitrary. The Appointments Policy ignores everything but race and gender. In its most egregious form, the implementation of the Appointments Policy leads to the outright prohibition of the appointment of suitable insolvency practitioners solely on the grounds that the pursuit of the demographically influenced rotation system will potentially be frustrated.[132] There is a patent disproportionality in such a selection process based on race and gender to the exclusion of all other qualities required for a position as responsible and important as that of, for example, a provisional liquidator. This renders the Appointments Policy irrational on its own terms and objectives and creates an absolute barrier and an insurmountable obstacle to those not favoured to be appointed.

60. The Appointments Policy falls foul of the law because it engages upon social engineering based on naked race and gender profiling. In the course of parcelling up practitioners on the basis of their race and gender, it sets up a scheme that, properly analysed, constitutes nothing but a compendium of absolute race and gender quotas. An insolvency practitioner, however appropriate and extensive his or her qualifications and experience and irrespective of whether the creditors would have preferred this person, will be rejected for appointment if the schedule according to which appointments are made does not call for the appointment of a person of that race or gender at the given time.

[132] CIPA FA para 76 Vol 4 p 528 *l* 19 – p 529 *l* 12.

61. In *Barnard*[133] this Court had to consider whether a system of quotas was lawful under the EEA, which makes a relatively oblique reference to their being impermissible. The learned judges agreed with Moseneke ACJ that the EEA 'does not sanction affirmative action measures that are overly rigid' and that it 'does not countenance … decisions "that would establish and absolute barrier" to the employment or advancement of those not from designated groups'.[134] For this reason 'a decision-maker cannot simply apply the numerical targets by rote'.[135]

62. The Applicants take comfort from the principle expressed in *Barnard* judgment that numerical goals in pursuit of work place representivity and equity are endorsed if they serve as a flexible employment guideline. Relying on the judgment in *Correctional Services*,[136] they submit that clause 7.3 of the Appointment Policy provides for the requisite flexibility because the Master is empowered to make a co-appointment of a senior practitioner if questions of the suitability of the next-in-line practitioner arise, and the matter is complex.[137]

63. No doubt much energy can be expended in making semantic evaluations of the difference between quotas and targets (or goals). The matter is not one of semantics, however, but one of philosophy.

63.1. Quotas serve to segmentalize society into silos and, when racially applied, produce a structure of multiracialism that, at heart, is unconcerned with

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[133] *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23.
[134] *Barnard* at para 87.
[135] *Barnard* at para 96.
[136] *Solidarity and 10 Others v Department of Correctional Services and Others* 2016 (5) SA 594 (CC).
[137] Appellants HOA para 96 p 34.

remediation. In their nature, quotas are rigid and exclusionary: they are required to be met, irrespective of circumstance.

63.2. Targets, on the other hand, set norms against which remedial measures, genuine motivated and sensitively applied, can be evaluated for effectiveness. Targets are flexible and inclusive. They are programme objectives translated into numbers and the numbers are based on rational considerations that include degrees of under-representation, barriers and attempts to eliminate them, and the available pool of suitably qualified persons, sometimes within a specific region.

63.3. The failure to meet a target does not naturally result in a penalty because a number of factors are considered to determine whether reasonable progress has been made.[138] Typically, the failure to meet a quota is regarded as a transgression and penalized accordingly.

64. The comfort the Applicants derive is illusory. The Appointments Policy, properly analysed, implements a set of quotas, thoroughly inflexible in their terms, that is of precisely the nature reprobated in *Barnard*. It weights the allocation of work significantly in favour of females and black people, and provides them with a disproportionate amount of the work on the basis of considerations that are wholly extraneous to their capacity to do the work. It takes no account of the realities of

[138] JL Pretorius, ME Klinck, CG Ngwena *Employment Equity Law, August 2013 [10-42],* and the authorities there cited.

the available pool of insolvency practitioners, and it does not include targets set for particular years or periods. In so doing it creates a system of quotas.

65. Deviation from the roster system is provided for – in an extremely limited sense – under clause 7.3 of the Appointments Policy. Clearly, the characteristics of the 'deviation provision' do not provide evidence of a level of flexibility or a nuanced approach that can save the Appointments Policy from unlawfulness based on the fact that it uses race-based decision-making above all else. In truth, clause 7.3 proves the inflexibility: the roster must be followed, irrespective of individual characteristics, and assistance, in the form of a senior practitioner, is contemplated precisely because it must be recognised that the person appointed by application of the system may well not be able to perform the function required of him or her, given considerations of complexity and suitability. It cannot be relied on to redeem the Appointments Policy.

66. The Applicants argued in the Courts below that they did not wish to confer a wide discretion on the Master in appointment decisions, yet now they would have this Court find that the Appointments Policy is not rigid. The contention cannot be upheld: under clause 7.3 there is some room for the Master to make additional appointments in exceptional cases, but this 'deviation' from the ordinary application of the roster system does nothing to upset the conclusion that, in every case, the primary appointment will be made in accordance with the race and gender roster, with no exceptions to be tolerated. The *Correctional Services* deviation requirement is not met, since the very assumption underpinning the

appointment of the additional practitioner is that the one that is unsuitable remains.

CONCLUSION AND REMEDY

67. *Barnard*,[139] the case on which the Applicants so assiduously rely, admirably expresses the central principle in cases such as this:

> 'After all, remedial measures are an exception to the important general principle that personal attributes such as race and gender are not proper bases for granting or refusing … opportunities. This is because they have no bearing on an individual's capacity, ability or intelligence. The Constitution makes an exception because it recognises that substantive equality can be achieved only by providing advantages to groups of people upon whom apartheid imposed heavy disadvantages. Even so, we must note with care how these remedial measures often utilise the same racial classifications that were wielded so invidiously in the past. Their motivation is the opposite of what inspired apartheid: for their ultimate goal is to allow everyone to overcome the old divisions and subordinations. But fighting fire with fire gives rise to an inherent tension. That is why, as the main judgment observes, we must "remain vigilant that remedial measures under the Constitution are not an end in themselves".'[140]

68. The Appointments Policy enacted by the Justice Minister flouts these principles. In consequence it deserved to be struck down by the courts below. CIPA submits that their conclusions are not to be faulted.

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[139] At para 93.
[140] Emphasis supplied.

69. CIPA accordingly seeks an order dismissing the application for leave to appeal, or the appeal, with costs including the costs of two counsel.

MSM Brassey SC

MJ Engelbrecht

Counsel for fourth respondent

Chambers, Sandton

28 September 2017

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CCT CASE NO: 13/17
SCA CASE NO: 693/15
WCHC CASE NOS: 4314/14 & 8250/14
NGHC CASE NO: 17327/14

In the matter between:

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First applicant
CHIEF MASTER OF THE HIGH COURTS OF SOUTH AFRICA	Second applicant
and	
THE SOUTH AFRICAN RESTRUCTUTING 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 RESGLUI VIR AFRIKAANS	Fifth respondent

FOUTH RESPONDENTS' HEADS OF ARGUMENT

INTRODUCTION

1. In the purported exercise of a policy-making power afforded to him under s 158(2) of the Insolvency Act 24 of 1936 ('**the Insolvency Act**'), the Minister

of Justice and Constitutional Development[1] ('**the Justice Minister**') adopted a '*formula*'[2] to regulate the discretionary appointment by Masters of the High Court of trustees, co-trustees, liquidators and provisional liquidators ('**insolvency practitioners**') to wind up estates.

2. The formula, which forms the substantive part of the Policy on the Appointment of Insolvency Practitioners published in Government Gazette number 37287 of 7 February 2014 ('**the Appointments Policy**') envisages the allocation of appointments of insolvency practitioners, by rotation, within categories defined by race and gender (subject to considerations of the date of persons attaining citizenship of South Africa). The first four appointments must be given to persons in category A (non-white females); the next three to persons in category B (non-white males); the next two to persons in category C (white females); and the remaining one to persons in category D (white males and persons who became citizens after 27 April 1994). This process is repeated with each round of appointments.

3. In this application, the Justice Minister and the Chief Master of the High Courts of South Africa ('**the Chief Master**') (together, '**the Applicants**') seek leave to appeal[3] against an order of the Supreme Court of Appeal ('**SCA**')

[1] As he then was.
[2] This is the terminology used by the applicants - see Applicants' HOA para 45 p 15; Application for leave to appeal FA para 21.
[3] Application for leave to appeal NOM prayer 1 p 2; FA para 9.

dismissing the Applicants' appeal to that Court[4] against a Western Cape High Court order declaring the Appointments Policy inconsistent with the Constitution of the Republic of South Africa Act 108 of 1996 ('**the Constitution**') and invalid.[5] The Applicants ask this Court to not confirm the declaration of invalidity,[6] and to issue an order that the Appointments Policy be put into immediate effect.[7] In the alternative, and in the event that this Court finds any part of the Appointments Policy to be inconsistent with the Constitution, the Applicants seek an order affording them a period of 24 months to '*remedy such inconsistency*'.[8]

4. The fourth respondent ('**Solidarity**') joins the first and second respondents ('**SARIPA**' and '**CIPA**', respectively) in opposing both the application for leave to appeal, and the grant of the consequential relief. It is submitted that the judgment of the SCA is correct in its factual and legal analysis and that the decision of the SCA is in accordance with the law. The appointment of insolvency practitioners on the basis of work allocation under a quota cannot be tolerated as a legitimate affirmative action measure, not least because the '*formula*' is irrational and fails to take into consideration the main purpose of sequestration proceedings. Solidarity's

[4] Order para 1 Vol 13 p 1181 // 1 - 2.
[5] Order para 1 Vol 12 p 1090 // 19 - 23.
[6] Application for leave to appeal NOM prayer 2 p 2.
[7] Application for leave to appeal NOM prayer 3 p 2.
[8] Application for leave to appeal NOM prayer 4.1 p 2.

opposition focuses on the quota-like nature of the Appointments Policy, and is inconsistency with the Constitutional requirements for a remedial measure.

THE APOINTMENTS POLICY

5. The Appointments Policy in the form published on 7 February 2014[9] has as its stated objective the promotion of '*consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination*'.[10] It is intended to replace all previous policies and guidelines related to the appointment of insolvency practitioners, and to serve as a basis for the transformation of the insolvency industry.[11] Nonetheless, it applies only to the appointment of insolvency practitioners under listed statutory provisions,[12] which we refer to as '*discretionary appointments*'.

6. Clause 6 of the Appointments Policy in this original form created four categories in to which a Master's list of insolvency practitioners was to be divided:[13]

6.1. Category A: African, Coloured, Indian and Chinese females;

6.2. Category B: African, Coloured, Indian and Chinese males;

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[9] Vol 1 pp 47 - 51.
[10] Appointments Policy para 2 Vol 1 p 47 // 13 - 15.
[11] Appointments Policy paras 3 - 3.2 Vol 1 p 47 // 16 - 20.
[12] Appointments Policy para 3.2 Vol 1 p 47 / 21 - p 48 / 21.
[13] Appointments Policy para 6.1 Vol 1 p 49 // 13 - 14.

6.3. Category C: White females; and

6.4. Category D: White males.[14]

7. For purposes of this categorisation, African, Coloured, Indian and Chinese persons were to be '*limited to a person who became a South African citizen before 27 April 1994 or a descendant of such a citizen'*.[15]

8. The Appointments Policy made provision for a distinction between '*senior practitioners'* (being insolvency practitioners who had been appointed at least once every year in the last five years) and '*junior practitioners'* (being those who had not been appointed as least once every year in the last five years, but who satisfy the Master that they have sufficient infrastructure and experience to be appointed alone).[16]

9. According to clause 6.2, '*senior and junior practitioners must be arranged where the fit alphabetically in Category A to Category D on the* ***same*** *Master's list'*,[17] so that there is no provision for separate lists of senior and junior practitioners.

10. The Appointments Policy provides that insolvency practitioners must be appointed consecutively according to the following ratios:

[14] Appointments Policy para 6.1 Vol 1 p 49 *ll* 17 - 20.
[15] Appointments Policy para 6.1 Vol 1 p 49 *ll* 14 - 16.
[16] Appointments Policy para 6.2 Vol 1 p 49 *ll* 25 - 29.
[17] Appointments Policy para 6.2 vol 1 p 50 *ll* 3 - 4. Emphasis supplied.

10.1. the first four appointments must come from category A (black females);

10.2. the next three appointments must come from category B (black males);

10.3. thereafter, two appointments must come from category C (white females); and

10.4. finally, one appointment must go to a white male.[18]

11. Thereafter, the formula repeats itself.[19]

12. Within these categories, the appointments are to be made in alphabetical order, subject only to clause 7.3 of the Appointments Policy,[20] which provides that:

'*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.*'

13. Where the insolvency practitioner allocated does not lodge a security bond in time, or there is or arises a conflict of interest, the next insolvency practitioner on the list must be appointed.[21]

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[18] Appointments Policy para 7.1 Vol 1 p 50 *ll* 6 - 13.
[19] Application for leave to appeal FA para 20.
[20] Appointments Policy para 7.2 Vol 1 p 50 *ll* 14 - 15.
[21] Appointments Policy para 7.4 Vol 1 p 50 *l* 21 - p 51 *l* 4.

14. No other criteria for appointment are included in the Appointments Policy.

15. The Appointments Policy was due to commence on 31 March 2014,[22] but on 28 March 2014 SARIPA obtained an order interdicting its implementation pending review.[23] In its review, SARIPA made the point that the Appointments Policy created an absolute barrier to African, Indian, Chinese or Coloured persons who became citizens after 27 April 1994, because the definition excluded them.[24]

16. The Applicants denied the allegation,[25] but in effort '*to address a lacuna*',[26] an amendment to the Appointments Policy was published on 17 October 2017.[27] Clauses 6 and 7 of the Appointments Policy were amended, with the categories now defined as follows:

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

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

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

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[22] Appointments Policy para 8 Vol 1 p 51 / 6.
[23] Order Vol 5 p 433 // 2 - 8.
[24] SARIPA FA para 68 Vol 1 p 28 // 12 - 22.
[25] SARIPA FA para 80.1 Vol 2 p 128 // 12 - 13.
[26] Application for leave to appeal FA para 10.
[27] Vol 6 pp 486 - 488.

16.4. Category D: African, Coloured, Indian and Chinese females and males, and White females, who have become South African citizens on or after 27 April 1994 and White males who are South African citizens.[28]

17. Notably, descendants of those who were South African citizens prior to 27 April 1994 were not to form part of categories A to C, and they were now included in category D.

18. The amended clause 6 provided that the alphabetical list was to be by reference to surnames and, in the event of similar surnames, by reference to first names. It also provided that insolvency practitioners added to the list after its completion were to come at the end of each category.[29]

19. The quality of the system, which is that allocates work to insolvency practitioners through the mechanical allocation of work by rote on the basis of race and gender considerations, and without consideration of individual qualities of prospective appointees, was not improved by the amendment of the definition of persons who are to fall within Category D. What the amendment patently serves to do is to:

19.1. relegate the opportunity of white males to be appointed as insolvency practitioners to even less than the ten per cent contemplated under the Appointments Policy prior to its amendment;

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[28] Amended Appointments Policy para 2 Vol 6 p 486 / 17 - p 487 / 4.
[29] Amended Appointments Policy para 2 Vol 6 p 487 // 5 - 7.

19.2. provide to previously disadvantaged individuals who became citizens after 27 April 1994 the opportunity *only* to be appointed as an insolvency practitioner in less than 10% of the cases, where that opportunity is to be shared with white males.

CONTEXT WITHIN WHICH THE APPOINTMENTS POLICY IS INTENDED TO OPERATE

20. The Applicants propose to use the Appointments Policy to regulate the appointment of insolvency practitioners in those instances where the Master is called upon to make a discretionary appointment.[30]

21. The discretionary appointments by the Master have assumed significance, because long delays in the Master's offices, particularly in calling first meetings of creditors, mean that the Masters' appointments exercise significant influence for lengthy periods.[31] In recognition of the fact that the delays prevent creditors from exercising their rights concerning the selection of insolvency practitioners at an early stage, and in light of an understanding that the process is, and must be a creditor-driven one, the Master has, over time, allowed for creditors to indicate their preference by way of the so-called '*requisition system*'. The requisition system allows

[30] As appears from the identified circumstances in which the Appointments Policy applies, discussed hereinbefore.
[31] CIPA FA para 28 Vol 6 p 510 / 20 – p 511 / 6.

creditors to make their preferred candidates for appointment known to the Master and, in expressing such preference, the creditors may take into account the particular aptitude of candidates for appointment, their track record and other relevant considerations. Although the Master, under the requisition system, remains obliged to exercise a discretion under the various statutes, he is assisted in his selection by the very parties whose interests are to be protected.[32]

22. In an effort to promote opportunities for person disadvantaged by past discriminatory policies, the requisition system was coupled with a system that allowed for the appointment of previously disadvantaged individuals ('**PDIs**') to work in conjunction with the practitioners selected by the creditors. The system, designed to promote the governmental interest in transformation, nevertheless preserved the interests of the creditors by retaining for them an opportunity to indicate their preferences prior to appointments being made and an opportunity for the Master to take those preferences into account in making appointments in the exercise of the statutory discretion.[33]

23. The Appointments Policy is intended to replace this system.

[32] CIPA FA paras 29 – 32 Vol 6 p 511 / 7 – p 513 / 13.
[33] CIPA FA paras 39 – 42 Vol 6 p 515 – p 516 / 14.

LITIGATION HISTORY

24. Before Katz AJ in the Western Cape High Court, various parties challenged the legality of the Appointments Policy.[34] Solidarity's participation as applicant was actuated by its status as trade union and the interest that it has in protecting employees' rights through its involvement in the process of appointment of insolvency practitioners.[35] It was also concerned that the Appointments Policy constituted the adoption of a quota.[36]

25. The learned Katz AJ held that the Appointments Policy is inconsistent with the Constitution and invalid.[37] The finding was based on his conclusion that the Appointments Policy unlawfully fettered the discretion of Masters of the High Court in appointing insolvency practitioners,[38] and that it did not constitute a constitutionally sanctioned remedial measure, on the basis that it adopted a quota system for the allocation of work.[39] The learned judge found that transformation of the insolvency industry required more than just an increase in numbers,[40] and required that a policy adopted for the purpose of transformation nonetheless ensured that there would be a correlation between the individual's skill set and the requirements

[34] Judgment para 1 Vol 12 p 1000 // 2 - 6; paras 11 - 12 Vol 12 p 1004 // 1 - 10; paras 17 - 20 Vol 12 p 1005 / 8 - 7.
[35] Judgment para 20 Vol 12 p 1006 // 3 - 6. See also Solidarity FA para 3 Vol 9 p 838 / 20 - p 839 / 4, read with Solidarity FA paras 7.3 - 7.5 Vol 9 p 840 / 8 - p841 / 20
[36] Solidarity FA para 7.6 Vol 9 p 841 / 21 - p 842 / 6.
[37] Order para 1 Vol 12 p 1090 // 19 - 23.
[38] Judgment paras 108 - 128 Vol 12 p 1041 / 12 - p 1049 / 8.
[39] Judgment paras 134 - 217 Vol 12 p 1051 / 11 - p 1082 / 15.
[40] Judgment para 156 Vol 12 p 1059 // 11- 18.

applicable to the estate in question.[41] The Court also bemoaned the absence of clear timelines and targets to determine whether the Appointments Policy was likely to achieve its objective.[42]

26. On appeal with leave of the SCA, the Applicants sought to have the order set aside.[43] They submitted that the learned judge incorrectly found that the Appointments Policy fettered the Master's discretion.[44] They contended also that the learned judge incorrectly found the Appointments Policy to fall short of the requirements of a legitimate affirmative action measure[45] and that it was irrational.[46]

27. Before the SCA, Solidarity submitted that the order of Katz AJ was to be upheld. Although the learned judge had disagreed with Solidarity's contention that the interests of creditors must be given primacy in the allocation of work to insolvency practitioners, Solidarity considered that the judgment displayed a keen understanding of the limits of the Minister's policy-making powers and the constitutional bounds of remedial measures.

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[41] Judgment para 215 Vol 12 p 1081 // 15 - 21. See also para 156 Vol 12 p 1059 // 11 - 13.
[42] Judgment para 161 Vol 12 p 1062 // 3 - 11.
[43] Notice of Appeal para 2 Vol 13 p 1125 // 1 - 10.
[44] Application for leave to appeal para 1 Vol 13 p 1093 / 14 - 1095 / 5.
[45] Application for leave to appeal para 2 Vol 13 p 1095 / 6 - p 1097 / 4.
[46] Application for leave to appeal para 3 Vol 13 p 1097 / 5 - p 1098 / 4.

DISCUSSION OF THE SCA JUDGMENT

28. The unanimous SCA judgment penned by Mathopo JA is comprehensive and Solidarity submits that it is correct.

29. The SCA correctly records that the Appointments Policy obliges the Master to follow the alphabetical list on a rotation system and that the Master cannot deviate from the list. At most, the Master may appoint an additional insolvency practitioner (together with the one allocated by rote).[47]

30. Contrary to what the Applicants assert, the SCA appreciated that transactions entered into by the insolvency practitioners appointed under the discretionary appointment clause are subject to the direction of the Master.[48] The SCA's findings on the harm that may be done by insolvency practitioners who do not have the requisite experience in a particular business[49] must be read and understood in light of the practical reality that the Master will not always have the requisite knowledge to determine whether a transaction is properly to be entered into or not. The Master must rely on the expertise of the insolvency practitioner so that the Master may be guided on the appropriate course of action in a particular case.

[47] Judgment para 13 Vol 13 p 1163 // 1 - 34.
[48] Judgment para 17 Vol 13 p 1165 // 10 - 23.
[49] Judgment paras 49 - 50 Vol 13 p 1180 // 1 - 21; paras 54 - 63 Vol 13 p 1181 / 12 - p1186 / 10.

31. The SCA correctly accepted Solidarity's submission that the Appointments Policy left no space for the Master to bring into account the role of trade unions and the interests of employees, which constituted a shortcoming.[50]

32. The judgment cannot be faulted in its assessment that affirmative action measures must not be devised in a manner that sacrifices *'efficiency at the altar of remedial employment*', that quotas cannot be tolerated and that '*flexibility and inclusiveness'* is required in transformation projects.[51] In making these pronouncements, the SCA followed the judgments of this Court concerned with the appropriate application of affirmative action in employment.[52]

33. The SCA correctly recorded the concession of the applicants that a rigid quota would have to be struck down.[53] The test in *Minister of Finance & Another v Van Heerden*[54] (***'Van Heerden'***) cannot be satisfied if the rigidity meant that the Appointments Policy could not meet the requirement of not displaying naked preference.[55] It can never be that the mere statement that a policy is a remedial measure can protect it from scrutiny for constitutional compliance. The Applicants' assessment of the SCA's

[50] Judgment para 28 Vol 13 p 1170 *ll* 4 - 13.
[51] Judgment para 29 Vol 13 p 1170 / 14 - p 1171 / 4.
[52] Judgment para 29 Vol 13 p 1171 *ll* 4 - 6; paras 31 - 32 Vol 13 p 1171 / 15 - p 1172 / 15; para 35 Vol 13 p 1173 *ll* 20 - 33.
[53] Judgment para 32 Vol 13 p 1172 *ll* 15 - 18.
[54] [2004] 12 BLLR 1181 (CC).
[55] Judgment para 32 Vol 13 p 1172 *ll* 1 - 13 and para 38 Vol 13 p 1175 *ll* 11 - 12.

findings on the application of the *Van Heerden* test suggests that they believe the mere invocation of a transformational goal to be enough. It is not, as the SCA properly found.[56]

34. The SCA correctly distinguished between the question whether the Appointments Policy was rigid (quota-like) and whether it amounted to an unlawful fettering of discretion.[57] The Applicants are quite wrong to suggest that the SCA is inconsistent in its findings regarding rigidity and fettering. The SCA makes the point that the system is rigid in the sense that the allocation of work is predetermined on a rotation system, and requires the appointment of an unqualified person even in the face of the Master recognizing the shortcomings of the would-be appointee. The only discretion that the Master retains, is to make a further appointment.[58] But, as the SCA points out, that '*does not detract from the need in every case to comply with clause 7.1. The system is arbitrary and capricious*'.[59] The high-water mark of the SCA's finding on fettering is that there is a '*limited residual discretion left for the Master to exercise*',[60] but this does not come close to a discretion to make appointments of persons suitable to the particular estate.

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[56] Judgment para 32 Vol 13 p 1172 // 4 - 8.
[57] Judgment para 44 Vol 13 p 1177 // 20 - 25.
[58] Judgment para 45 Vol 13 p 1177 / 26 - p 1178 / 15.
[59] Judgment para 34 Vol 13 p 1173 // 17 - 19.
[60] Judgment para 45 Vol 13 p 1178 // 12 - 13.

35. The applicants are also quite wrong to criticize the SCA for its interpretation and application of the judgment in *Solidarity v Department of Correctional Services.*[61] The SCA, correctly, recognized that the discretion in the *Correctional Services* case was more general, allowing the National Commissioner to *not* make the appointment of a candidate that would promote employment equity goals, in favour of another more suitable and highly qualified candidate, in particular circumstances, or for operational reasons. The Appointments Policy does not allow for such a situation: under it, the appointment of the unsuitable person must nonetheless be made.[62] As the SCA explained:

'*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 suitable to perform that task*'.[63]

36. The SCA Judgment cannot be faulted in its conclusion that the Appointments Policy had been formulated without proper consideration of its impact in reality. The unintended consequences of the application of the Appointments Policy, particularly its adverse effect on the promotion

[61] *Solidarity and 10 Others v Department of Correctional Services and Others* 2016 (5) SA 594 (CC).
[62] Judgment para 35 Vol 13 p 1173 *ll* 20 - 33.
[63] Judgment para 34 Vol 13 p 1173 *ll* 13 - 17.

of young persons from previously disadvantaged groups, cannot be ignored.[64]

37. Equally, the observations of the SCA that the Appointments Policy does not appear to be capable of practical implementation,[65] are supported. Under the Employment Equity Act 55 of 1998 ('**EEA**'), employers are required to do workplace analysis in order to ensure that workplace realities are taken into account in the setting of targets.[66] In the *Correctional Services* case, this Court confirmed that a consideration such as regional demographics, which provide an insight into the pool of available candidates, had to be brought into account. This, because the potential pool of persons from whom a selection is to be made must inform the availability of persons to take up appointments. The Appointments Policy does not allow for bringing such matters into account.

38. The SCA correctly observed that the basis for formulation of the rotation quota was never explained.[67] It is not enough for the applicants to contend that they were not required to take all information into account in setting the quota. What is quite apparent, is that not even the numbers that were

[64] Judgment paras 36 - 37 Vol 13 p 1174 / 1 - p 1775 / 10.
[65] Judgment para 37 Vol 13 p 1174 / 23 - p 1175 / 2.
[66] EEA s 19.
[67] Judgment para 46 Vol 13 p 1178 / 17 - p 1179 / 10.

taken into account appropriately could have led to the conclusion that the formula adopted was appropriate.

39. The findings of the SCA on rationality are also supported.[68] It is clear that the Appointments Policy left much to be desired in terms of its regulation of appointments to ensure appropriate allocation of work.

40. The addendum authored by Wallis JA[69] correctly reflects upon the purpose of insolvency legislation and the paramount interests of creditors.[70] It also makes the point, correctly, that the context within which the power to make discretionary appointments is given requires to Master not to disregard the interests of creditors.[71] Contrary to what the Applicants assert,[72] there is nothing wrong with the SCA's conclusion that the absence of an express obligation to take creditors' interests into account does not mean that these interests can be disregarded. Solidarity supports as correct the conclusion in the addendum to the SCA judgment that the power to devise a policy had to be exercised in the proper context - here, the protection of creditors' interests, which could never have been ignored in the circumstances.[73]

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[68] Judgment paras 48 - 50 Vol 13 p 1179 / 21 - p 1180 / 21.
[69] With all but one of the judges concurring.
[70] Judgment paras 54 - 56 Vol 13 p 1181 / 12 - p 1183 / 10.
[71] Judgment para 59 Vol 13 p 1184 // 16 - 26.
[72] Application for leave to appeal FA para 46
[73] Judgment para 65 Vol 13 p 1186 / 27 - p 1187 / 9.

41. The recognition in the addendum that certain specialized knowledge may be required for the winding up of particular estates,[74] is of paramount importance. This fact, which the Appointments Policy does not bring into account at all, cannot be left out of account.

LEAVE TO APPEAL OUGHT NOT TO BE GRANTED IN THE CIRCUMSTANCES

42. The Applicants' attack is based on grounds that, it is submitted, are legally unsustainable.

42.1. They accept that the application of the Appointments Policy may lead to the appointment of an unsuitable insolvency practitioner, but consider that this is rectified by the joint appointment of a senior practitioner with the unsuitable practitioner. In the Applicants' submission, this saves the Appointments Policy from being considered rigid and inflexible.[75]

42.2. In response to the finding that the Appointment Policy contains none of the flexibility and all of the rigidity that this Court has held to be impermissible,[76] and its conclusion that it encompasses no general discretion to deviate from the formula such as would save the appointments Policy from Constitutional invalidity,[77] the Applicants

[74] Judgment para 61 Vol 13 p 1185 // 6 - 19.
[75] Application for leave to appeal para 26.
[76] Judgment para 33 Vol 13 p 1172 // 26 - 28.
[77] Application for leave to appeal FA paras 37.4 - 37.5.

argue that the Master does enjoy such a discretion to deviate,[78] solely on the basis of the ability to make the joint appointment alongside the appointment of the unsuitable practitioner (which it characterizes as a '*deviation clause'*).[79]

42.3. The Applicants appear to argue that, because the SCA considered the Appointments Policy to retain some discretion for the Master (in the sense of enjoying the ability to make the joint appointment), there could not have been a finding that the formula is inflexible and rigid.[80] But, that is to confuse the formula and the ability to make the additional appointment (which is once more regulated by the inflexible and rigid formula).

42.4. Despite the aforesaid recognition in the Appointments Policy that the formula may lead to the appointment of an unsuitable insolvency practitioner, the Applicants protest that the minimum criteria applicable to the appointment of insolvency practitioners insulates the formula under the Appointments Policy from criticism that it fails to take into account suitability.[81] They submit that '*anyone placed on the Master's list is competent to wind up an insolvent estate'*.[82] Also

[78] Application for leave to appeal FA para 37.7.
[79] Application for leave to appeal FA paras 37.7 - 37.8.
[80] Application for leavr to appeal FA para 37.10.
[81] Application for leave to appeal FA para 29.
[82] Application for leave to appeal FA para 30.

contrary to their acceptance that the absence of industry-specific knowledge may render a practitioner unsuitable, they rely on general requirements such as infrastructure and years of experience to support the notion that any practitioner appointed will have the necessary skills.[83]

42.5. Although the Applicants seek immediate (as opposed to gradual) implementation of the Appointments Policy,[84] they assert that it will '*gradually begin to shape the correction needed to bring the insolvency industry in alignment with the equality clause of the Constitution*'.[85] This, in the absence of goals to be achieved over time. The position cannot be sustained.

42.6. Rather than denying that the information on which the Appointments Policy was based was inaccurate, the Applicants argue that they were entitled to rely on inferences derived from assumptions on the '*skewed*' spread of work derived therefrom.[86] This, on the basis of an incorrect assertion that it was a matter of common cause that there is a skew in the appointment of insolvency practitioners.[87]

[83] Application for leave to appeal FA para 45.
[84] Application for leave to appeal NOM prayer 3.
[85] Application for leave to appeal FA para 31.
[86] Application for leave to appeal FA paras 32 - 34.
[87] Application for leave to appeal FA para 33; FA paras 41 - 42.

42.7. In response to the criticism of the SCA that the definition of a '*senior practitioner*' does not consider skills and expertise, the Applicants loosely assert that the '*reasoning of the courts is vague and indistinct*' and that it does not take into account the Master's '*oversight function in insolvency proceedings*'.[88] The indisputable fact is that the definition does not bring these matters into account - no reasoning is required.

42.8. Finally, the Applicants characterize as '*patently incorrect*' the conclusion of the SCA that the wishes of creditors are to be taken into account in the appointment of insolvency practitioners,[89] simply because there is no express provision for it in the statutes. The purpose of the legislation is ignored by the Applicants in their unwavering position that creditors are not to have any say in discretionary appointments. Reliance on the oversight role of the Master and checks and balances [90] only serves to underscore that the potential for adverse effects on creditors exists. Why an unsuitable insolvency practitioner ought to be appointed, only for his or her

[88] Application for leave to appeal FA para 43.
[89] Application for leave to appeal para 46.
[90] Application for leave to appeal paras 48 - 50.

mistakes to be rectified (assuming this can be done) through after-the-fact intervention, is not explained.

43. As a result, the case advanced by the Applicants is not reasonably arguable. The appeal has no prospects of success and this application for leave to appeal should be refused. This much appears from the analysis of the SCA judgment in the foregoing section and the case law of this Court concerning legitimate affirmative action measures under the Constitution and applicable legislation.

44. If the Applicants were truly concerned with achieving constitutionally complaint transformation of the insolvency industry, they ought to have taken guidance from the judgments of Katz AJ and the SCA, and set out to devise a policy that met the standards set out in these judgments. Rather, they sought to defend the indefensible allocation of work in a quota-system, and thereby postponing the development of an appropriately formulated transformation policy. Through alternative relief, they now seek further period of 24 months to amend the Appointments Policy to secure constitutional compliance.[91] Their approach suggests no urgency in securing an appropriately devised policy.

[91] Application for leave to appeal NOM prayer 4.1.

45. Given the direction of this Court that the merits of the appeal be addressed in these heads, we now turn to a consideration of the merits.

EQUALITY AND REMEDIAL ACTION UNDER THE CONSTITUTION

46. It is trite that apartheid was a system of racial segregation enforced through legislation by the National Party governments, who were ruled South Africa from 1948 to 1994. The system of apartheid was based on the notion that South Africa did not comprise a single nation, but was made up of four distinct racial groups.[92] In terms of the Population Registration Act, passed in 1950, every citizen would be subject to one authorised act of racial classification that would ultimately influence every aspect of their lives.[93] The consequence of the official classification of persons under the Population Registration Act was that, '*race became the sine qua non of South African society*' and the fundamental organizing principle for the allocation of all resources and opportunities.

47. The Interim Constitution of 1993 constituted a '*historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the reocognition of human*

[92] Deborah Posel 'What's in a name? Racial categorisations under apartheid and their afterlife' in *Transformation* 47 (2001) at 52.
[93] Deborah Posel 'What's in a name? Racial categorisations under apartheid and their afterlife' in *Transformation* 47 (2001) at 54.

rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.'[94] Accordingly, the adoption of the Interim Constitution laid '*the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge'*.[95] Ultimately, the legacy could be '*addressed on the basis that there is a need for understanding, but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation*'.[96]

48. The Constitution adopted in 1996 provides that neither the state nor any other person may unfairly discriminate on the basis of race.[97] It authorizes measures to protect and advance those have been discriminated against in the past.[98] Therefore, although discrimination based on race and/or gender contravenes the principle of equal treatment, South African law acknowledges inequality for black persons[99] and women as a categories of people who have been discriminated against in the past under apartheid

[94] 'National Unity and Reconciliation' – Postamble to the Interim Constitution.
[95] 'National Unity and Reconciliation' – Postamble to the Interim Constitution.
[96] 'National Unity and Reconciliation' – Postamble to the Interim Constitution.
[97] Constitution s 9(3) and s 9(4).
[98] Constitution s 9(2).
[99] As defined in the EEA, for example.

and patriarchy. The law endeavours to address these inequalities by affirmative action measures based on the very grounds on which the inequalities came about. In this context, the use of race and gender does not constitute an '*arbitrary*' or '*illegitimate*' basis for distinction – that race and gender as grounds for distinction are relevant to, or that there is a '*sufficient connection*' between race and gender and the right to equality.

49. That said, it is one of the great paradoxes of South Africa's constitutional transition that the Constitution commits us to a non-racial and non-sexist society,[100] and yet is relied on to explain that we can eradicate discrimination and disadvantage only if we remain conscious of the deep racial and sexual fault lines characterizing our society.[101] On the one hand, the Constitution is determined to free individuals from the shackles of narrow social categories which have, in the past, been used to determine their identities and circumscribe their life chances.[102] On the other hand it authorizes affirmative action programmes ostensibly based on these very

[100] Constitution s 1.

[101] See, for example, *Van Heerden* at paras 147 – 8 (rejecting the notion that South Africa is a '*colour-blind and race-neutral country*' as was asserted, within the American context, by the majority of the Supreme Court in *City of Richmond v JA Croson Co* 488 US 469 (1989).

[102] The Constitution demands respect for the dignity, equality and freedom of all individuals, regardless of differences of race, gender, sexual orientation, religion, culture, etc. See for example Constitution ss 1(*c*), 9 and 10.

categories,[103] and filters complaints of unfair discrimination through categories that include race.[104]

50. That the racial categorizations of the apartheid era still provide the blueprint for official definitions of race is evident from legislation such as the EEA. Census forms and a myriad other official documents and bureaucratic procedures confirm the impression that, despite the repeal of the Population Registration Act by way of the Population Registration Repeal Act 114 of 1991, the classification of all South Africans into distinct racial groups is still accepted as a given.

51. Continued reliance on the racial categories of the apartheid era does little to challenge the crude, '*common sense*' view which equates race with biological attributes and uses it as a basis for making cultural generalizations. It is submitted that we ought to look at finding ways of remedying the effects of past racism which do not perpetuate crude bio-cultural conceptions of race. Moreover, racially based forms of redress are a blunt instrument for remedying past disadvantage, and the raise concerns about the tendency of race-conscious measures to legitimate inequality.

[103] Constitution s 9(2).
[104] Constitution s 9(3) and s 9(4).

52. The Constitution thus requires us to avoid the extremes both of a denial of the lingering effects of our history of institutionalized racism and sexism, and of uncritical reliance on the master dichotomies which it seeks to transcend. But how can the law recognize difference and register disadvantage while, at the same time, avoiding the reification of identities? How are we to live with the paradox that, in order to transcend the rigid social hierarchies which defined South Africa's colonial and apartheid past, we need to acknowledge the ways in which these stratifications have shaped identities and, at the same time, invoke these very categories in an attempt to remedy past injustices?

53. Sachs J, in his concurring judgment in *Van Heerden* makes the point that a narrowly tailored provision based on race considerations might fail to comply with s 9(2)[105] He suggests that we need to de-emphasize race, even if the overall goal is to redress disadvantage flowing directly from our apartheid past. Thus, sometimes, we need to resist the temptations of racialized thinking – despite the fact that the Constitution is not and cannot be colour-blind, and despite the fact that one cannot ignore the deep racial divisions characterizing South African society.

[105] At paras 155 – 156.

54. Such an understanding of what is required to progress South Africa towards a non-racial society might demand a test similar to the one adopted by the United States Supreme Court, namely that, to survive scrutiny, race '*classification*' must be narrowly tailored to further a compelling government interest.[106]

55. What must be guarded against is the perpetuation of multi-racialism (as opposed to non-racialism) through the allocation of benefits according to race-based demographics. Unlike Singapore, a country that is constitutionally constructed on the basis of assumed purity of different ethnic groups,[107] one of the founding principles of South Africa under the Constitution is non-racialism. This country has elected not to formally categorize persons be reference to race, and to turn its face against the allocation of benefits on the basis of race, as was the case in the apartheid state. Constitutionally it cannot be permissible to create silos of different races and to afford the races benefits consistently with their demographic representation in society – for that would hardly be different than the creation of '*homelands*' within which members of the different '*races*' were allowed to compete only against those who were of the same race, and

[106] See *Adarand Constructors Inc v Pena* 115 S Ct 2097 at 2113 (1995); *Shaw v Reno* 509 US 630 at 642 – 644 (1993); *Richmond v JA Croson Co* 488 US 469 at 505 – 508 (1989).
[107] See A Ackermann 'They Give us the Categories and We Fill Ourselves in' 4 *Int'l J on Minority & Group Rts* 451 (1996 – 1997).

only for such portion of the allocation as the demographic representation of that person's '*race*' would allow.

56. Importantly, the injunction to promote equality through measures that address past disadvantage does not justify the creation of new patterns of disadvantage.[108] Ultimately, affirmative action measures are aimed at redressing the effects of past discrimination without creating new *de facto* barriers – and it is perverse when a barrier is created that results in a person from a designated group suffering discrimination. [109] As the SCA noted in *Solidarity obo Barnard v South African Police Service*,[110] '*ironically, in order to redress past imbalance with affirmative action measures, race has to be taken into account. We should do so fairly and without losing focus and reminding ourselves that the ultimate objective is to ensure a fully inclusive society – one compliant with all facets of our constitutional project*.' [111]

57. For this reason, even though legislative and other remedial measures are not considered presumptively unfair, [112] they are *not* placed beyond scrutiny.

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[108] *Van Heerden* at para 27, by reference to *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs & Tourism & others* 2004 (7) BCLR 687 (CC) at para 74.
[109] *Naidoo v Minister of Safety and Security and Others* 2013 (3) SA 486 (LC) at para 158.
[110] 2014 (2) SA 1 (SCA) at para 80.
[111] *Solidarity obo Barnard v South African Police Service* 2014 (2) SA 1 (SCA) para 80. This Court overturned the judgment, but the sentiment expressed in this paragraph remains valid.
[112] *Van Heerden* at paras [32] – [33].

58. In *Van Heerden* it was held that a restitutionary measure under 9(2) '*ought not to impose such undue harm on those excluded from its benefits that our long-term constitutional goal [of a non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity] would be threatened*'.[113] Sachs J, in his separate concurring judgment in *Van Heerden*, made the point that a restitutionary measure would not pass constitutional muster if the advantaged were to '*be treated in an abusive or oppressive way that offends their dignity and tells them and the world that they are of lesser worth than the disadvantaged*';[114] also that '*if the measure at issue is manifestly overbalanced in ignoring or trampling on the interests of members of the advantaged section of the community, and gratuitously and fragrantly imposes disproportionate burdens on them, the courts have the duty to interfere*';[115] and in summation that '*some degree of proportionality, based on the particular context and circumstances of the case, can never be ruled out. That too is what promoting equality (s 9(2)) and fairness (s 9(3)) require*'.[116]

[113] At para 44.
[114] At para 151.
[115] At para 152.
[116] At para 152.

59. As this Court pointed out in *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal,*[117] a '*harmonious balance needs to be found between the urgent need to eradicate unfair discrimination on the one hand, and the obligation to act fairly, on the other. There is no doubt that in the process of transition upon which we have embarked, we need to remain committed to the goal of equality, but that goal must be pursued in a manner consistent with the other constitutional requirements'*.[118]

THE APPOINTMENTS POLICY IS NOT A LEGITIMATE REMEDIAL MEASURE

General

60. The Appointments Policy does not meet the standard imposed by this Court in *Van Heerden.* It is also inconsistent with the standards enunciated in by this Court in *South African Police Service v Solidarity obo Barnard* ('***Barnard***') ,[119] which placed beyond doubt the fact that efficiency and competence ought not to be sacrificed in the pursuit of transformation and that persons tasked to fulfil functions have to be suitably qualified for the task at hand.[120] *Barnard* makes plain that flexibility and inclusiveness are

[117] 1999 (2) SA 91 (CC)
[118] See para 44 at 1999 (2) SA 91 (CC) p 111E-F.
[119] 2014 (6) SA 123 (CC).
[120] At para 41.

non-negotiable qualities of affirmative action measures, and that job reservation (that is, the rigid application of race-based quotas) is '*properly prohibited*' under our constitutional dispensation.[121] For this reason ***'a decision-maker cannot simply apply the numerical targets by rote***'.[122]

61. The Masters, under the Appointments Policy, are to disregard all factors that would otherwise actuate them in making discretionary appointments, and must allocate work on the basis of considerations of race and gender alone. It is quite clear that the Appointments Policy constitutes an attempt to extend the goal of racial representivity to the selection of insolvency practitioners: no longer should creditors be given the opportunity to select the persons who are to safeguard their interests. Race- and gender-based allocation of opportunities under the Appointments Policy simultaneously deprives:

61.1. the Master of exercising a discretion on *who* to appoint; and

61.2. creditors of pursuing their individual interests, through the selection of an insolvency practitioner that is best suited in the circumstances.

62. The overarching goal of our Constitution is not limited to establishing,

[121] At para 42.
[122] At para 96, emphasis supplied.

progressively, a society in which the consequences of past discrimination are eliminated, but also a society in which the dignity of all is equally respected and protected.

62.1. In the *Van Heerden* judgment it is observed that the achievement of the equality goal may '*often come at a price for those who were previously advantaged*'.[123] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*[124] it was asserted that '*measures that bring about transformation will inevitably affect some members of society adversely, particularly those coming from the previously advantaged communities*'.

62.2. But even in recognizing this, this Court has called for a balancing exercise and held that a restitutional measure under s 9(2) '*ought not to impose such undue harm on those excluded from its benefits that our long-term constitutional goal [of a non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity] would be threatened*'.[125]

63. There is an inescapable tension between the entitlement of those seeking restitutionary equality and the right of those adversely affected by it not to

[123] At para 44.
[124] 2004 (7) BCLR 687.
[125] *Van Heerden* at para 44

be unfairly discriminated against. This tension cannot be wished away. The only way it can be resolved is if the measure in question satisfies a proper application of the proportionality principle. [126] Thus, that which is done in order to achieve equality ought not to travel beyond that which may be justified in the circumstances.

64. The Appointments Policy does not live up to this standard:

64.1. Before any consideration is given to suitability of a candidate or the complexity of the matter at hand, the next in line insolvency practitioner must be appointed. Who is next in line is determined by considerations of race and gender alone, and the first seven appointments in every round must go to non-White practitioners, irrespective of the actual percentage of non-White insolvency practitioners on the Masters' lists. Those who became citizens after 27 April 1994 and white males compete for one in ten appointments, even though the Applicants point out that they make out the bulk of the insolvency practitioners on the list.

64.2. The Appointments Policy accepts, implicitly, that it results in the appointment of persons who may not be suitable given the subject

[126] Laurie Ackermann *Human Dignity: Lodestar for Equality in South Africa* Juta 2013 p 388.

matter or complexity of the case. That is why clause 7.3 provides for the appointment of a senior practitioner to assist the person who does not exhibit the requisite skills or experience. [127] Patently, the interests of creditors are not balanced with the societal transformation objective.

64.3. Neither are the interests of current insolvency practitioners given any attention in a balancing exercise. The income-generating capacity of insolvency practitioners who are not female and/or black is cut with immediate effect, with axiomatic harm to them. They are effectively told that from the moment the Appointments Policy is implemented, based on their race and gender, they must be excluded from consideration for 90% of the opportunities to ply their trade. [128]

<u>The Appointments Policy is an impermissible quota</u>

65. Quotas a prohibited under the EEA, and it is submitted that the prohibition appropriately extends beyond the employment sphere. The Applicants accept that an inflexible quota cannot pass constitutional muster.[129]

[127] Vol 7 p 557 // 16 – 20.
[128] The effect is discussed at length in CIPA FA paras 51 – 67 Vol 6 p 520 / 19 – p 525 / 8.
[129] Judgment para 32 Vol 13 p 1172 // 15 - 18.

66. Properly seen for what it is, the formula under the Appointments Policy constitutes an impermissible quota.

67. The distinction between a quota and a target lies in the operative mechanics of the measure - whether it has direct or indirect effect.[130]

67.1. Direct effect measures are those producing immediate end results for the benefiting groups (such as quotas where specific positions, or a specific number of positions are reserved for members of a group). The measure is, in a sense, indifferent to the process of selection, because it aims only that producing specific results. Although at first glance quotas may be regarded as more acute and vigorous in their pursuit of equality, they are not truly radical as transformational tools because they do not cater for the roots of the pathology.

67.2. Measures with indirect effect are ones under which a procedure is set up to enhance equality of opportunities as a means of achieving substantive equality, without focus on the outcome of the procedure. Measures that focus on the procedure to enhance opportunity are flexible, because they ca adjust to the particularities of each context in order to maximize results. Moreover, they aim at curing the *causes*

[130] George Gerapetritis *Affirmative Action Policies and Judicial Review Worldwide* Springer International Publishing Switzerland 2016 at p 5.

of underrepresentation instead of providing relief at the end point. Arguably, such measures are more effective as transformational measures in the long run.

68. Gerapetritis argues that:

'Discerning between measures of direct and indirect effect may also contribute significantly to the conceptual clarity of affirmative action. However, the most expedient linguistic approach would suggest that when the measure is of a direct effect, such as the imposition of rigid quotas or quotas by effect, it is more appropriate to use the terminology of "positive discrimination", whereas if the measure is of an indirect effect, thus encouraging participation of underrepresented groups without establishing quotas, the language of "positive/affirmative" action is more apposite. The above distinction indicates that quotas are by definition a mode of discrimination, since they award automatic end-result benefits, whereas measures providing motives have a mere affirmative nature without immediate implications on social competition.'[131]

69. The United States Supreme Court, as a general rule, assesses measures to identify whether there is a case of impermissible quota or quota by effect through the use of the language of '*set-asides*',[132] or describing the measures as '*insulating each category of applicants with certain desired qualifications from competition with all other applicants*'.[133] In the present case it is quite clear that the Appointments Policy is not concerned with the

[131] *Id* at pp 5 - 6.
[132] *Richmond v Croson* 488 US 469 (1989).
[133] *Regents of the University of California v Bakke* 438 US 265 (1978).

creation of equality of opportunity. Its only aim is to allocate work on the basis of race and gender. Its effect is direct, placing it firmly in the realms of positive discrimination (for being a quota) as opposed to the realms of affirmative action (for creating the path towards substantive equality). It is a set-aside, where insolvency practitioners do not compete for appointment based on the quality of the service that they render, nor their experience, skills or aptitude; they are chosen in each case based on their race and gender and they are insulated from competition from those who fall outside the class.

70. Such a system cannot be constitutionally sanctioned.

Inappropriate reliance on the *Correctional Services* case

71. In the application for leave to appeal to this Court, the Applicants say the Appointments Policy is saved by the possibility of deviation, and they explain their reasoning as follows:

'*assessing the suitability of the next-in-line practitioner as provided for in clause 7.3 of the [Appointments Policy] of necessity encompasses a consideration of race, gender, years of experience of that practitioner and their industry knowledge and expertise, thereby providing the Master with the scope and flexibility to balance the complexity of the matter against the suitability of the next-in-line practitioner. Where there is a mismatch, the Master is authorised to*

make a joint appointment. There is nothing rote, mechanical, rigid or inflexible about this process.'[134]

72. At best for the Applicants, this means that the Master may recognize that an insolvency practitioner is not suitable for appointment, based on the considerations other than the race and gender of that practitioner. But the Master cannot, for that reason, decline to make the appointment. The appointment must still be made, subject only to the appointment of a further practitioner, chosen from the alphabetical list. There is no guarantee that the senior practitioner (who, it must be emphasized, need only have been appointed once per year for a period of five years to qualify for this accolade) has the requisite experience or industry-specific knowledge.

73. Reliance by the Applicants on the judgment in *Correctional Services* is inappropriate in the circumstances.

74. In *Correctional Services* the employment equity plan under consideration set targets to be attained in a five-year period, and appointments were to be made strictly to advance the attainment of these targets. The plan was

[134] Application for leave to appeal FA para 26.

based on a consideration of progress in transformation that had been made in the workplace over time.[135]

75. The plan did, however, provide for the National Commissioner of Correctional Services to deviate from the targets. A deviation meant that the National Commissioner could approve the appointment of a candidate from a non-designated group in certain circumstances despite the fact that the appointment of a candidate from a designated group should be preferred as it would advance the targets of the plan. This would occur where a candidate has special skills or where operational requirements of the Department of Correctional Services dictated that that candidate be appointed. The effect of the provisions relating to the deviations is that they enabled the Department of Correctional Services not to make appointments that advanced the numerical targets in certain circumstances. In other words, although the appointment of candidates that advanced the pursuit of the numerical targets of the plan, and, therefore, the achievement of equitable representation, was the preferred route, exceptions to that approach were provided for.[136]

[135] *Correctional Services* paras 8 - 9.
[136] *Correctional Services* para 7.

76. It is important to recognize the distinctions between the present case and *Correctional Services*, and those aspects that may appropriately find application.

77. The *Correctional Services* judgment was concerned with the legitimacy of an employment equity plan devised under the EEA. The statute provides that employers must devise an employment equity plan that is ultimately aimed at achieving broad representation of the races and genders within a workplace and at various employment levels. Targets are set to be achieved at intervals (*eg* by the end of a five-year plan), and are based on an assessment of current levels of representation, in order to survive challenge, by reference to relevant considerations such as the pool of suitable available candidates, the demography of particular regions and staff turnover (*ie* the number of positions that are likely to become available).[137] The EEA adopts the term '*equitable representation'* - in other words, representation that is targeted must be fair given the circumstances prevailing. This Court observed that:

'... it seems to me that, if a designated employer uses a wrong basis to determine the level of representation of suitably qualified people from and amongst the different designated groups, the numerical goals or targets that it may set for

[137] *Correctional Services* at paras 76 - 77.

itself to achieve within a given period would be wrong. ... A wrong basis will lead to wrong targets.' [138]

78. This Court concluded that the absence of a rational basis for the targets led to the conclusion that the failure to appoint candidates was unfair and not justifiable.[139]

79. In the present case, the Master is not an employer that is concerned with the transformation of his or her workforce. The EEA is not applicable. Although the Insolvency Act provides for a ministerial policy that must advance transformation of the industry, no provision is made under the statute for '*broad representation'.*

80. But even if it is accepted that the Master may legitimately pursue broad representation of the races and genders in making discretionary appointments, that pursuit must surely take into account the realities of the industry in which it is taken up. In order to establish whether there are '*imbalances'* or if appointments are '*skewed'* in favour of a particular race or gender, it must be understood what the demographic make-up of the available pool of candidates is. In the present case that exercise has simply not been done. It has certainly not been done by reference to the available

[138] *Correctional Services* at para 78.
[139] *Correctional Services* at para 82.

pool of candidates in distinct Master's jurisdictions, so that it is impossible to determine whether the allocation of 40% of appointments to black females in a particular jurisdiction will not amount to an unfairly high allocation of opportunity to them, or will result in them being overburdened to a degree that does not allow them to fulfil their functions satisfactorily.

81. Moreover, in *Correctional Services*, the deviation as contemplated under the plan allowed the National Commissioner to make an appointment that was not in pursuit of the plan, as explained above. Not so here. Every appointment is required to be made in accordance with the formula. And if the formula renders an appointment that is not suitable, a further (senior) practitioner is selected for co-appointment, again through the application of the formula. This is not a deviation, as is suggested. It is simply a repetitive application of a rigid formula. The skills, experience and aptitude of the would-be appointee is left out of account at every turn, so that there is no consideration of '*operational requirements'* as was the case in *Correctional Services*.[140]

[140] *Correctional Services* at para 60.

82. No aspect of the *Correctional Services* majority judgment can give the Applicants any basis for contending that the Appointments Policy ought not to be set aside.

THE COURT'S POWER TO INTERFERE WITH THE POLICY

83. The Applicants adopt the position that the '*issues arising in this matter are essentially polycentric in nature and subject to very limited interference by the court*'.[141] But this does not detract from the fact that the Courts may, indeed must, scrutinize executive or administrative policy for constitutional compliance.[142] If a Court comes to the conclusion that a policy is not consistent with the Constitution, then such a policy must be declared invalid.[143]

84. All law and conduct is subservient to the Constitution, and the power to set a policy on the appointment '*must be accorded contours that fit into the broader ethos of the Constitution'*,[144] whether the power is executive or administrative. Put differently, the separation of powers is not an escape

[141] Application for leave to appeal FA para 27.
[142] *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) at para 99.
[143] Constitution s 172(1)(*a*); *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para 59; *Mazibuko NO v Sisulu NNO and Others* 2013 (6) SA 249 (CC) at para 70.
[144] See *HOD, Mpumalanga Department of Education v Hoërskool Ermelo* at para 59.

route for unconstitutional conduct, because unconstitutional conduct cannot be tolerated. This Court made it plain in *AllPay*[145] that -

> *'There can be no doubt that the separation of powers attributes responsibility to the courts for* ***ensuring that unconstitutional conduct is declared invalid and that constitutionally mandated remedies are afforded for violations of the Constitution****. This means that the Court must provide effective relief for infringements of constitutional rights.'*

85. That power is to be exercised in the present case. In their application for leave to appeal to this Court, the Applicants do not challenge the finding of Katz AJ that the Appointments Policy was adopted on the basis of inaccurate information.[146] Rather, they rely on the judgment of this Court in *Minister of Home Affairs v National Institute for Crime Prevention and Reintegration of Offenders (NICRO) and Others,*[147] in which it was held that '*legislative choice is not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data';*[148] that a sufficient connection between means and ends may be enough to justify a policy choice;[149] and that, despite the absence of factual material, a Court

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[145] *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others (Corruption Watch and another as amici curiae) (No 2)* 2014 (6) BCLR 641 (CC) ('**AllPay 2**') at para 42. See also *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at paras 19 and 69.

[146] Application for leave to appeal FA para 32.

[147] 2005 (3) SA 280 (CC).

[148] *Id* at para 35.

[149] *Id* at para 35.

may invoke common sense and judicial knowledge to justify the limitation of constitutional rights.[150]

86. It is the Applicants' position that the assertion of '*a skew in the industry with regard to work being given to previously disadvantaged individuals'* is sufficient to justify the adoption of the formula.[151] The Applicants argue that '*past practice has distorted the participation of appointees for provisional and final insolvency practitioners'*.[152] This, because '*white males and females enjoy the lion's share of appointments in insolvency matters'*.[153] For this, the applicants rely on selective statistics of security bonds issued, rather than on a summary of actual appointments made over time (information that must be within the knowledge of the Master, given the oversight role). On this basis the assertion is made that there are '*skewed patterns in the appointment of insolvency practitioners at the provisional phase and in other circumscribed circumstances'*.[154] The true position is not revealed, but the statistics provided by CIPA suggest that the Applicants' assumptions are wrong.[155]

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[150] *id* at para 36.
[151] Application for leave to appeal FA paras 33 - 34.
[152] SARIPA AA para 16 Vol 2 para 16 p 82 *ll* 10 - 11.
[153] Applicants' HOA para 13 p 5.
[154] Applicants' HOA para 40 p 14.
[155] CIPA RA paras 13.2 - 13.72 Vol 8 p 707 *l* 1 - p 709 *l* 13.

87. The reasoning in *Correctional Services*, discussed at length above, brings an end to this argument. To qualify as an affirmative action policy, or a transformational policy, the root must be found in the factual realities. The Applicants contend that the Appointments Policy will facilitate access to the industry and that, over time, it will *'restore the right to equality, dignity and the right to follow an occupation of choice previously denied to insolvency practitioners of colour, or where they were curtailed'*.[156] As a fact, this assertion cannot withstand scrutiny, given that persons who became citizens after 27 April 1994 may, together with white males, only be appointed in 10% of the cases where insolvency practitioners are appointed. If the vast majority of insolvency practitioners fall in Category D (white males and all other persons who became citizens after 27 April 1994), there is no rational basis for allocating only 10% of the work to them.

88. In any event, for all the reasons so clearly enunciated by the SCA in its judgment, the interests of creditors must be brought into account in the selection of an appropriate insolvency practitioner to be appointed. This, in circumstances where there is no dispute between the parties that the main purpose of sequestration proceedings is to provide for a collective debt collecting process that will ensure an orderly and fair distribution of a

[156] Applicants' HOA para 40 p 14.

debtor's assets in circumstances where these assets are insufficient to satisfy all creditors' claims.[157] Nothing more need be said in this regard, except that the avowed failure to bring the interests of creditors into account warrant the setting aside of the Appointments Policy.

COSTS AND *BIOWATCH*

89. This matter concerns important constitutional issues. Once it is accepted that this is a constitutional matter, the approach to costs should be that the *bona fide* constitutional challenger should not be burdened with a costs order if it loses and that it should be awarded costs if it is successful. The so-called *Biowatch principle*[158] applies, as explained by Rogers J in *Democratic Alliance v President of South Africa and Others:*[159]

> *'as a general rule in constitutional litigation an unsuccessful litigant in proceedings against the state should not be ordered to pay costs. The general rule is concerned not with the characterisation of the parties, but the nature of the issues. Equal protection under the law requires that costs awards should not depend on whether a party is acting in its own interests or in the public interest and should not be determined by whether the litigant is financially well endowed or indigent, or reliant on external funding. The critical question is whether the litigation has been undertaken to assert constitutional rights, whether the constitutional issues are genuine and substantive, and whether*

[157] Applicants' HOA para 16 p 5, and the authority there cited.
[158] *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC) paras 16 - 25.
[159] 2014 (4) SA 402 (WCC) at para 107.

there has been impropriety in the manner in which the litigation has been undertaken'.

90. It follows that, if the application for leave to appeal is dismissed, there is no reason to deprive the respondents of a costs order favourable to them; and, if the appeal is upheld, each party should pay its own costs.

CONCLUSION AND RELIEF

91. The application for leave to appeal must be dismissed, alternatively the appeal ought to be dismissed on the merits. The Appointments Policy cannot be implemented in any form. It improperly ignores the statutory object that is to be pursued through the appointment of insolvency practitioners and it sets up race and gender as a basis for the allocation of opportunities in circumstances where the mechanical application of a race- and gender-based system is inconsistent with the Constitution and accordingly irrational and unlawful.

92. Solidarity accordingly asks that the application for leave to appeal, alternatively the appeal, be dismissed with costs.

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28 September 2017