

**Regulation of insolvency law in South Africa:
the need for reform**

by

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ABSTRACT

Regulatory bodies must function properly in order for their duties to be performed. The performance of the regulatory body impacts the entire insolvency system. Academics have noted that the Master does not meet the standards of what is expected of an insolvency regulator. The Constitution requires that the power of the state be defined and regulated by the law to ensure the protection of the interests of society. State regulation must comply with the underlying values of the Constitution which also includes the protection of the interests of society. The state has a constitutional duty to protect societal interests, ensure that justice is promoted and ensure that just administrative action is achieved. The Master also has the requisite duty to protect societal interests. Academics have found that the objectives and outcomes of the regulation of insolvency law are still not in line with the Constitution and the values and principles it enshrines.

Criticisms of the Master's office include the lack of resources and institutional capacity, the lack of sufficient investigative powers and insufficient guidelines for the Master when applying their administrative discretion when appointing provisional insolvency practitioners. The lack of regulation of insolvency practitioners in South Africa has also been criticised which has a negative impact on the performance of the insolvency industry. Academics have proposed suggestions to reform the regulation of insolvency law in South Africa. However, none of these suggested proposals have been implemented as yet.

The most recent development is the draft policy on the regulation of insolvency practitioners that has been submitted to NEDLAC in 2012. The policy aims to provide guidelines relating to the appointment of provisional insolvency practitioners. The policy also includes a code of conduct which insolvency practitioners must adhere to in order to be appointed as a provisional insolvency practitioner. The policy has the potential to provide sufficient guidelines to the Master when appointing insolvency practitioners. The precise guidelines in the policy reflect the need for transformation of the industry and the need for administratively fair decision making. Thus, the provisions of the proposed policy will be effective in countering the criticisms and transforming the insolvency industry and profession.

Foreign jurisdictions have also encountered the problem of lack of regulation of insolvency practitioners. To circumvent this problem some foreign jurisdictions have made the recent development of adopting (or considered adopting) self-regulation or co-regulation of

insolvency practitioners. In comparison to South Africa, they have made more progress towards improving the regulation of insolvency practitioners. The result of this is that South Africa is out of step with foreign jurisdictions. It is imperative that South Africa adopts reform initiatives to strengthen the regulation of insolvency law.

TABLE OF CONTENTS

CHAPTER 1 INTRODUCTION

1.1 Background	1
1.2 Problem statement	3
1.3 Research objectives	3
1.4 Delineation and limitations	4
1.5 Significance of the study	4
1.6 Overview of chapters	4

CHAPTER 2 MODES OF REGULATION

2.1 General	5
2.2 Modes of regulation and their respective advantages and disadvantages	5
2.2.1 State regulation	5
2.2.2 Self-regulation	6
2.2.3 Co-regulation	7

CHAPTER 3 REGULATION OF INSOLVENCY LAW IN SOUTH AFRICA

3.1 Background	9
3.2 The Master as regulator of insolvency law	9
3.3 Problems identified and criticisms of South Africa's regulatory system	16
3.3.1 Background	16
3.3.2 Criticisms relating to the Master	18
3.3.2.1 The lack of resources and institutional capacity	18
3.3.2.2 The lack of investigative powers	20
3.3.2.3 Administrative discretion in appointing provisional trustees or liquidators	20
3.3.3 Criticisms relating to insolvency practitioners	22
3.3.3.1 Background	22
3.3.3.2 Lack of regulation of insolvency practitioners	23
3.4 Recommendations for reform	24
3.4.1 Recommendations relating to the Master	24
3.4.2 Recommendations relating to insolvency practitioners	26
3.5 Recent developments	
3.5.1 Proposed policy on the appointment of insolvency practitioners	
3.5.1.1 Background	27
3.5.1.2 Main features of the proposed policy	27
3.5.1.3 Comments	30
3.5.2 The policy and regulation of the insolvency industry	31
3.5.2.1 Main features	31
3.5.2.2 Comments	34
3.6 Conclusion	34

CHAPTER 4 RECENT COMPARATIVE DEVELOPMENTS

4.1 General	37
4.2 New Zealand	37
4.3 Australia	39
4.4 England and Wales	43
4.5 Comments	45
4.6 Conclusion	47

CHAPTER 5 CONCLUSION

5.1 State regulation of insolvency law in South Africa	49
5.2 Regulatory systems in foreign jurisdictions	51
5.3 A comparison of insolvency regulatory systems in foreign jurisdictions and South Africa's regulatory system	52
5.4 Concluding remarks	53

Post script

A significant development, subsequent to completion of this manuscript, has been the publication on 7 February 2014 in the government gazette of the new national *Policy on the Appointment of Insolvency Practitioners*, set to become effective on 31 March 2014. (See *government gazette 37287* of 7 February 2014.) Regrettably, due to the delay in its being publicised, it was not possible to incorporate the finalised policy into this dissertation.

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CHAPTER 1 INTRODUCTION

1.1 Background

South African insolvency law is regulated by the state. This function is carried out, essentially, by the Master which has regulatory powers and duties in terms of the Insolvency Act 24 of 1936¹ and the relevant sections of both the Companies Act 61 of 1973 and the Companies Act 71 of 2008.² For some time now, the function of the Master as insolvency regulator and the shortcomings of the regulatory system in South Africa, particularly with respect to appointment of insolvency practitioners and regulation of their conduct and practice, have been the subject of much debate and criticism. Academic commentary, notably by Calitz in her seminal doctoral research on the subject, has included comparisons being drawn with systems applicable in foreign jurisdictions as well as consideration of international minimum standards which have been developed for regulation of insolvency law. Recommendations have been made for reform of the South African regulatory system.

The Constitution requires that the power of the state be defined and regulated by the law to ensure the protection of the interests of society.³ State regulation must comply with the underlying values of the Constitution which also includes the protection of the interests of society.⁴ The state has a constitutional duty to protect societal interests, ensure that justice is promoted and ensure that just administrative action is achieved.⁵ The Master's office has a constitutional commitment to 'an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public'.⁶ Currently, the objectives and outcomes of the regulation of insolvency law are still not in line with the Constitution and the values and principles it enshrines.

Criticism of the South African insolvency regulatory system has occurred on a number of levels and has targeted various aspects of it. Criticisms include media reports of fraud and corruption at the Master's office and improper exercise of the Master's administrative discretion when appointing provisional trustees and liquidators, with decisions being taken on review to the high court by dissatisfied persons. Poor functioning of the Master's office has

¹Act 24 of 1936, hereafter referred to as 'the Insolvency Act'.

²Act 61 of 1973, hereafter referred to as 'the Companies Act 1973' or where appropriate 'the 1973 Act'; Act 71 of 2008, hereafter referred to as 'the Companies Act 2008' or where appropriate 'the 2008 Act'.

³Calitz J, 'Some Thoughts on State Regulation of South African Insolvency Law' *De Jure* 2011 291; Burns *Administrative Law under the 1996 Constitution* (2003) 28.

⁴*Ibid.*

⁵Cora Hoexter, *The new Constitutional and Administrative law* Vol 2, 2002 2.

⁶Calitz J 2011 (n 3) 299.

been attributed, inter alia, to the lack of investigative powers granted to it to perform its duties and its lack of resources and institutional capacity to deal efficiently with the extensive duties with which it is burdened in the regulation and administration of insolvency matters.⁷

It has been submitted that the extensive role that the Master fulfils in insolvency proceedings results in creditors being less involved in the proper control of the administration of the estate, thus burdening the Master with the task of finalising the administration of the estate. The Master does not only supervise the regulation of insolvency law. Other duties of the Master include supervision of the administration of deceased estates⁸ and the guardian's fund,⁹ registration of wills and registration of trusts.¹⁰ The question has been raised whether the Master has too much on its plate to be able to perform efficiently and effectively its duties as regulator of insolvency law.

The insolvency profession itself has also been criticised regularly for its inefficiency, lack of competence and its dishonest conduct.¹¹ One of the suggested reasons for this is the lack of proper regulation of insolvency practitioners. At present, there is no legislation, regulations or binding code of conduct dictating how an insolvency practitioner should carry out his or her tasks, nor are there any indications of the level of competence and qualifications a person should have to be able to become an insolvency practitioner. Although insolvency practitioners demonstrate an array of knowledge and experience, the range of it varies extensively.¹² There is evident inconsistency in the training and qualification requirements for insolvency practitioners and there is also insufficient regulation to ensure that all practitioners demonstrate the required skills.¹³

The *World Bank Principles for effective insolvency and creditor rights systems* states that regulatory bodies: 'should be (i) independent of individual administrators; (ii) set standards that reflect the requirements of the legislation and public expectations of fairness, impartiality, transparency and accountability; and, (iii) have appropriate powers and

⁷Calitz J 2011 (n 3) 298.

⁸In terms of the Administration of Estates Act 66 of 1965.

⁹See ss 86-93 of the Administration of Estates Act 66 of 1965.

¹⁰In terms of the Trust Property Control Act 57 of 1988; Calitz J, 2011 (n 3) 298.

¹¹ South African Law Reform Commission *Review of the Law of Insolvency* Project 63 (2000), Report, vol I Explanatory Memorandum (hereafter referred to as SA Law Commission Explanatory Memorandum). It may be noted that at the time the South African Law Reform Commission published its report, it was called the South African Law Commission. However in this dissertation it will be referred to by its current name.

¹²USAID Financial Sector Program Report 'Insolvency systems in South Africa strengthening the regulatory framework' December 2010 29.

¹³*ibid.*

resources to enable them to discharge their functions, duties and responsibilities effectively.’¹⁴ The World Bank has suggested the minimum requirements and standards to be expected of a regulatory body.¹⁵ Academic commentators have submitted that South Africa’s regulatory body has failed to meet some of these minimum requirements and that this has impacted on the proper functioning of insolvency law in South Africa.

Calitz submits that the regulation of insolvency law is crucial to guarantee the proficiency of office holders and insolvency practitioners to guarantee the competence and efficiency, and to preserve the integrity, of the system.¹⁶ In order for efficient and proper regulation to take place, the regulatory body requires adequate resources¹⁷ and requires members who are properly skilled and capable to perform their relevant duties. Regulatory bodies have a duty to ‘regulate’ which is defined as ‘to control or direct according to rule, principle or law’.¹⁸ The body in charge of regulation has the duty to supervise and execute the regulatory procedures (as set out in the legislation) and the content of the regulations relating to the ‘office holders’ in charge of the administration of insolvent estates.¹⁹

1.2 Problem statement

South African insolvency law is regulated by the state. The regulatory functions are carried out by the Master’s office. There has been large scale criticism of the performance by the Master of its extensive regulatory duties including claims that it fails to meet minimum international standards required for an insolvency regulatory body. There is urgent need for recommendations to be acted upon and for reform initiatives to come to fruition

1.3 Research objectives

Large-scale debate and criticism surrounds the current system in South Africa with respect to the regulation of insolvency law and insolvency practitioners by the Master’s office. This study considers some of the main criticisms and recommendations for reform which have been put forward. It canvasses some recent developments, both locally and abroad, and reflects on the need for reform to the position in South Africa.

¹⁴World Bank (2009) Effective Insolvency systems regulatory framework guidelines principle D.7.

¹⁵Discussed in chapter 3 below

¹⁶Calitz J, *A Reformatory Approach to State Regulation of Insolvency Law in South Africa* 2009 LLD thesis. University of Pretoria (Chapter 1) 2.

¹⁷*Ibid.*

¹⁸The *Concise Oxford English Dictionary* (12 ed) 2011.

¹⁹Calitz J 2011 (n 3) 291.

1.4 Delineation and limitations

In South Africa, winding up and liquidation of insolvent companies is regulated by Part G of Chapter 2 of the Companies Act 2008 and Chapter XIV of the Companies Act 1973²⁰ read with the Insolvency Act insofar as it is applicable. Sequestration of individuals' estates is regulated by the Insolvency Act. This short dissertation is not intended to constitute a comprehensive comparative analysis of the regulation of insolvency law and practice. Therefore, given the limited scope of this study, this dissertation will focus on the Insolvency Act and is not intended to reflect an examination of provisions of the Companies Acts or the regulation of business rescue practice.

1.5 Significance of the study

The significance of this study is to highlight the urgency for reform of our regulatory system and to emphasise the importance of implementing the reform proposals suggested by academics to achieve a proper regulatory system that is more in line with our constitutional values and international standards.

1.6 Overview of chapters

This dissertation is divided into five chapters. This chapter and Chapter 2 provide introductory background to the study. Consideration having been given to appending Chapter 2's content as an excursus, in light of the restricted nature of this short dissertation, the decision was taken to present it as a brief, substantive chapter which explains the various possible forms of regulation that may be adopted (i.e. state regulation, self-regulation and co-regulation). Chapter 3 deals with regulation of insolvency law in South Africa: the current position; inherent problems with the system; criticisms; recommendations for reform; and recent developments. Chapter 4 canvasses some recent developments in three foreign jurisdictions, viz, New Zealand, Australia and England and Wales. The final chapter contains the conclusions reached in this study.

I have endeavoured, in this dissertation, to discuss the position according to the law as it stood on 31 December 2013.

²⁰ It should be noted that Item 9 of schedule 5 to the Companies Act 2008 states that Chapter XIV of the Companies Act 1973 will continue to apply notwithstanding the repeal of the 1973 Act with effect from 1 May 2011. This is pending finalisation of legislation proposed to be enacted to regulate the liquidation of insolvent corporate entities.

CHAPTER 2 MODES OF REGULATION

2.1 General

The modes of regulation differ according to the type of body tasked with regulation. A regulatory body could either be a government department or agency (the state), a court (the judiciary), a non-state body, such as a professional association, or a combination of these.²¹

Where the regulatory body is a government department or agency it is known as state regulation. Regulation by only a non-state body is known as self-regulation and a combination of regulation by a state and non-state body is known as co-regulation. Most jurisdictions have adopted one of these three forms of regulation, thus one needs to be familiar with them in order to understand the regulation of insolvency law in South Africa and in some of the foreign jurisdictions discussed in later chapters.

2.2 Modes of regulation and their respective advantages and disadvantages

2.2.1 State regulation

State regulation occurs when the regulations are specified, administered and enforced by the state. The state sets out the legislative rules or regulations, monitors compliance of these rules and ensures enforcement by using sanctions.

The state also has a constitutional duty to perform its tasks properly and protect the public interests. If an improper decision is made by the regulatory body, whether it is a state or non-state entity, a person can challenge this decision under administrative law. However, it is submitted that it would be much easier to challenge a decision made by a state regulating body since there are more stringent checks and balances on the state to ensure that there is proper transparency and review mechanisms for the person challenging the decision.

While the statutory nature of the framework makes the imposition and implementation of penalties and sanctions much simpler than, for example, in the self-regulatory context,²² a disadvantage is that, because legislation is enacted it is less flexible and responsive to change, compared to the self-regulatory and co-regulatory models.²³

²¹USAID 2010 (n 12) 53 ; World Bank (2005) *Principles for effective insolvency and creditor rights systems* available at http://www.worldbank.org/ifa/ipg_eng.pdf (accessed on 1/08/2013) D.7.

²²*ibid.*

²³R Baldwin & M Cave, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford: Oxford University Press, 1999).

In the case of state regulation of insolvency law, the state has the requisite duty as well as a constitutional commitment to ensure that there is proper regulation of insolvency law. State regulation of insolvency law makes available constitutional checks and balances as well as administrative law remedies.

2.2.2 Self-regulation

Self-regulation arises where the industry single-handedly undertakes responsibility for maintaining and creating codes of conduct.²⁴ The most recent practice of self-regulation has been that the state sets the standard for regulation and then delegates it to the industry or body to regulate compliance.²⁵ On the other hand, the state might oblige the standards to be set by the industry or a body, confirm the sufficiency of the standards set, and then leave regulation of compliance to the industry.²⁶ Self-regulation may operate in an informal, non-binding manner or it may involve rules that are legally enforceable in courts.²⁷ Self-regulatory regimes may regulate the entire industry or sector or they may regulate only those who voluntarily join the association.²⁸

A common practice under self-regulation has been where the independent industry body lays down codes which must be abided by.²⁹ It has been submitted that self-regulation helps and supplements statutory regulation since the codes laid down may establish levels of practice which extend beyond legal requirements.³⁰ Codes are more flexible than regulation by statute since they can be easily amended to new situations.³¹

Some disadvantages of self-regulation are: first, the enforcement of self-regulation is not very impartial; and, secondly, most regulations or codes that do include sanctions are not compulsory.³² The voluntary nature of the rules and norms denotes that organisations are not compelled to preserve high standards.³³ If there is no compulsory requirement of membership

²⁴ AC Page 'Self-Regulation and codes of practice' *Journal of Business Law* 1980 24-31.

²⁵ R Baldwin & M Cave 1999 (n 23) at 125.

²⁶*Ibid.*

²⁷*Ibid.*

²⁸*Ibid.*

²⁹ AC Page 1980 (n 24).

³⁰ R Baldwin & M Cave 1999 (n 23) at 126.

³¹*Ibid.*

³²*Ibid* 128.

³³*Ibid.*

of the self-regulating body, then there is a possibility that offenders would remain outside the self-regulatory scheme.³⁴

In comparison, state regulation has at its disposal judicial and authoritative enforcement mechanisms with penalties, powers to subpoena, discovery procedures, rules of evidence, hearing and due process rules. Self-regulation however does not have these judicial and authoritative tools and often does not have sufficient enforcement procedures.³⁵ Self-regulatory bodies are ordinarily appointed without a general election process and are not answerable through constitutional channels.³⁶ Norms are produced in an internal process without constitutional checks and balances.³⁷

However it is noted, especially in the insolvency law context, that not all self-regulatory systems are wholly unaccountable and free from controls other than those applied by members.³⁸ In most self-regulatory systems of insolvency law there is additional accountability where the codes delegated by the body is approved by the state or the non-state body is required to comply with reporting and publication of codes requirements laid down by the state. The codes that are laid down by the insolvency body or association are not binding on those who are not members of the body or association. This is the most commonly noted disadvantage of self-regulation of insolvency law.

2.2.3 Co-regulation

Co-regulation refers to the situation where the professional body develops and administers its own arrangements with the state providing the legislative backing to enable the arrangements to be enforced.³⁹ Co-regulation differs from self-regulation in that co-regulation always consists of a state and a non-state element, whereas self-regulation is independent of the state body.⁴⁰ Thus a co-regulatory system incorporates the advantages of state regulation and self-regulation into one single system.

³⁴R Baldwin & M Cave 1999 (n 23) at 128.

³⁵R Baldwin & M Cave 1999 (n 23) at 130.

³⁶*Ibid.*

³⁷*Ibid.*

³⁸*Ibid.*

³⁹Australian Department of Finance and De-regulation – Regulation Impact Statement (RIS) ‘The harmonization and modernization of the regulatory framework applying to insolvency practitioners in Australia’ 03 Jan 2012 available at <http://ris.finance.gov.au/files/2012/01/03-Insolvency-Practitioners-RIS.pdf> last accessed 28 October 2013 hereafter referred to as ‘Regulation Impact Statement’.

⁴⁰Sender “Soft Law, Self-regulation and Co-regulation in European Law: Where do they meet?” (Jan 2005) *Electronic Law Journal of Comparative Law* Vol 9.1 page 27 available at www.ejcl.org.

In a self-regulatory system, there is no means of making certain that the insolvency practitioners, especially those who are not members of the association, abide by the rules and codes that it laid down whereas a co-regulatory system would ensure that the codes of practice initiated by professional bodies would be formally recognised and would be binding on all insolvency practitioners, whether they are a member of the professional body or not. With co-regulation, by providing a legal framework that includes effective enforcement procedures, the state can compel the insolvency professionals to abide by the rules that their own profession has created.

CHAPTER 3 REGULATION OF INSOLVENCY LAW IN SOUTH AFRICA

3.1 Background

South African insolvency law is regulated by the state. The regulation may be regarded, in essence, as being carried out by the Master which has specified regulatory powers and duties in terms of the Insolvency Act and the relevant sections of the Companies Act.⁴¹ No other body is awarded regulatory powers and duties. However, the Master does not have statutory powers to issue directives nor does the Master participate in the drafting of insolvency legislation.⁴² Criticism has been levelled at the role that the Master plays as regulator as well as on the basis of there being insufficient regulation of insolvency practitioners in South Africa. Recommendations, based to some extent on internationally recognised minimum standards, have been made for reform in this regard. This chapter will canvass the position in South Africa, the criticisms, the recommendations for reform and some recent developments reflecting reform initiatives.

3.2 The Master as regulator of insolvency law

The Master is a public servant who is charged with control over the administration of insolvent estates. The Master is appointed in terms of the Administration of Estates Act⁴³ which states that the Master:

In relation to any matter, property or estate means the Master, Deputy Master or Assistant Master of a High Court appointed under section 2, who has jurisdiction in respect of that matter, property or estate and who is subject to the control, direction and supervision of the Chief Master.⁴⁴

A Master's office is situated in each of the provincial divisions of the High Court.⁴⁵ The office of the Master is not part of the court structure; it is a 'creature of statute' and possesses only the powers that the statute accords.⁴⁶ Extensive powers and duties are conferred on the Master. However these powers and duties must be exercised within the bounds of the Insolvency Act.⁴⁷ The Master is not a judicial officer and thus he cannot issue court orders or

⁴¹See, for example, section 60 of the Insolvency Act 24 of 1936. See Calitz *De Jure* 2011 (n 3) 297.

⁴²Calitz J, 'Historical overview of state regulation of insolvency law in South Africa' *Fundamina* 16(2) 2010 2.

⁴³Act 66 of 1965.

⁴⁴Section 1 of Act 66 of 1965.

⁴⁵E Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 9 ed (2009) Juta 29 (hereafter referred to as Mars).

⁴⁶*The Master v Talmud* 1960 1 SA 236 (C) 238.

⁴⁷Mars (n 45) 29.

judgments.⁴⁸ The Master has an essential role to play in insolvency matters. In terms of the Insolvency Act, it is apparent that the Master is the supervisory body in our insolvency law.⁴⁹

Some of the Master's functions and duties include:

- receiving applications for voluntary surrender and calling for valuation of property of the applicant;⁵⁰
- appointing a curator bonis to the estate of a debtor who has caused a notice of surrender to be published;⁵¹
- holding an insolvent's property until a trustee has been appointed;⁵² determining the time and place of meetings of creditors;⁵³
- and exercising custody over all documents relating to insolvent estates and endorsing documents and certificates relating to them.⁵⁴

As stated in *Ex Parte Master of the High Court of South Africa*:⁵⁵

Every stage of the administration of insolvent estates, companies and close corporations under winding up, from the launching of the original sequestration or liquidation application to rehabilitation of the insolvent or the deregistration of the corporate entity is controlled by the Master's office.⁵⁶

In Ex parte Master of the High Court of South Africa, the Master applied to the High Court for an order declaring that the Master is the only person authorised to appoint the following: trustees and provisional trustees of sequestrated and provisionally sequestrated estates; liquidators and provisional liquidators in provisional and final liquidations of companies and judicial managers and provisional judicial managers in judicial management and provisional judicial management. The Master also sought an order declaring that no judge of the High Court has the authority or jurisdiction to effect any appointment of the above mentioned persons.

The cause for seeking such an order was that in practice attorneys who were applying for sequestration, liquidation or judicial management orders would include a prayer in the notice

⁴⁸Mars (n 45) 29.

⁴⁹Calitz J 2011 (n 3) 298 .

⁵⁰Section 4 Act 24 of 1936.

⁵¹Section 5 Act 24 of 1936.

⁵²Section 21(1) Act 24 of 1936.

⁵³Section 39 Act 24 of 1936.

⁵⁴Section 154 Act 24 of 1936.

⁵⁵*Ex parte: Master of the High Court of South Africa* (North Gauteng) 2011 (5) SA 311

⁵⁶*Ibid* para 25.

of motion and draft order for a specific individual to be appointed as a trustee or provisional trustee, liquidator or provisional liquidator or judicial manager or provisional judicial manager. Often, the court would grant such orders as prayed. The Master asserted that this is in conflict with the relevant statutory provisions that grant the power of appointment to the Master and no one else.

Having listed the extensive duties and functions of the Master, the court held that, as the legislation states, the Master is the only functionary entitled to appoint provisional trustees and trustees, provisional liquidators and liquidators, provisional judicial managers and judicial managers.⁵⁷ The court held that the Master has the institutional knowledge and capacity to apply policy and to consider the capacity and integrity of trustees and liquidators and is thus capable of determining whether or not a person is duly qualified to be appointed as a trustee or liquidator.⁵⁸ A final trustee is appointed by the creditors at the first meeting.⁵⁹ However, if the trustee is elected at a meeting not presided over by the Master, his election is not valid until confirmed by the Master.⁶⁰

The Master may refuse to confirm the election of the person appointed as trustee if in the opinion of the Master, he should not be appointed as trustee to the estate in question.⁶¹ However a person who is aggrieved by the appointment or refusal of appointment of a person as trustee may request the Master to provide reasons for such appointment or refusal of appointment.⁶² The Master is also granted the power to remove a trustee from office for any one of the reasons stated in the Insolvency Act.⁶³

This judgment confirms the duties of the Master. It is a useful illustration of what exactly the Masters' powers entail in the sequestration and liquidation procedure. It also illustrates that the Masters' powers cannot be easily encroached on.

Since a trustee⁶⁴ cannot be appointed immediately after a sequestration order is granted there is a need for a provisional trustee or provisional liquidator to be appointed.⁶⁵ A provisional

⁵⁷*Supra* at para 19.

⁵⁸*Supra* at para 26.

⁵⁹*Supra* at para 27.

⁶⁰*Supra* at para 18; Section 56(1)Act 24 of 1936.

⁶¹*Ibid*; Section 57(1)Act 24 of 1936.

⁶²*Ibid*; Section 57(8)Act 24 of 1936.

⁶³*Ibid*; Section 60Act 24 of 1936 .

⁶⁴Or liquidator in the case of liquidations.

⁶⁵Mars (n 45), 97.

trustee⁶⁶ will also need to be appointed where a person appointed as a trustee discontinues being a trustee or stops performing their duties.⁶⁷ Thus the Insolvency Act and the Companies Act 1973 (in the case of liquidations) state that as soon as an estate has been provisionally or finally sequestrated or liquidated, the Master may, in accordance with the policy determined by the Minister, appoint a provisional trustee⁶⁸ to the estate to hold office until the appointment of a trustee.⁶⁹

In terms of the Insolvency Act creditors or other interested persons seeking appointment as a provisional trustee⁷⁰ must apply to the Master.⁷¹ The court has no intrinsic authority to make such appointment, thus the authority lies with the Master.⁷² Since the Act does not provide any guidelines for assisting the Master in determining whom to appoint as provisional trustee or liquidator, the Master has to exercise his 'unfettered administrative discretion.'⁷³ The Master's decision may only be challenged under review proceedings if the Master failed to exercise his discretion at all or if his decision was motivated by improper considerations.⁷⁴

Since there are no criteria for the appointment of trustees and liquidators, the Master developed a register that listed the names of persons who in his opinion were suitable to be appointed.⁷⁵ This became known as the 'Master's panel' of trustees and liquidators.⁷⁶ The effect is that only those persons appearing on this list may be appointed as a trustee or liquidator.⁷⁷ However, these lists do not have any legal status whatsoever.⁷⁸ For a practitioner to be placed on the register they must make an application to the Masters' offices and generally they must provide the relevant documentation and undergo an interview.⁷⁹ Calitz and Burdette submit that the interview panel does to some extent exercise subjective decision

⁶⁶Or liquidator in the case of liquidations.

⁶⁷Mars (n 45), 98.

⁶⁸Or liquidator in the case of liquidations.

⁶⁹In terms of s18(1) of the Insolvency Act and s 368 of the Companies Act 1973.

⁷⁰Or liquidator in the case of liquidations.

⁷¹Mars (n 45), 97.

⁷²*Ibid.*

⁷³Mars (n 45), 97.

⁷⁴*Ibid.*

⁷⁵ Calitz J, Burdette DA 'The appointment of insolvency practitioners in South Africa: time for a change?' *TSAR* 2006 732.

⁷⁶*Ibid.*

⁷⁷*Ibid.*

⁷⁸*Ibid.*

⁷⁹*Ibid.*

making when determining if a practitioner should be placed on the list, thus essentially determining whether or not they should be an insolvency practitioner.⁸⁰

Of some assistance to the Master in appointing provisional trustees and liquidators is the requisition system where creditors of the insolvent estate can nominate who should be a provisional trustee or liquidator.⁸¹ From these nominations it will be determined which practitioner has obtained the most votes and the Master will take this into account when making its determination (as a guideline). However the Master is not bound by the requisition and does not necessarily have to appoint the person with the most votes or a person nominated by the creditors.⁸² Calitz and Burdette submit that there are numerous problems with the requisition system including that it encourages insolvency practitioners to advertise for creditors to nominate them as trustees or liquidators.⁸³ At the Master's office there is no proper monitoring of the submission of requisitions and there have been numerous cases of requisitions having gone missing, allegations of false requisitions being submitted and duplication of requisition lists in different estates.⁸⁴

In 2003 the Judicial Matters Amendment Act⁸⁵ was introduced which authorised the Minister to determine relevant policies for the appointment of trustees and provisional trustees and co-trustees.⁸⁶ This power was inserted into section 158(2) of the Insolvency Act.⁸⁷ In terms of the Act this policy must be tabled in parliament and published in the Government Gazette. Because no such policy has been published as yet, the Master still relies on the requisition system and internal policies when applying their administrative discretion.

With regard to the Master's administrative discretion and the use of the requisition system, the case of *Distributive Catering Hotels and Allied Workers Union v The Master*⁸⁸ ('the *Distributive case*') is relevant. In this case two companies were wound up by special resolution. The applicant, a trade union representing the workers of the companies,

⁸⁰Calitz J, Burdette DA 2006 (n 75) 732.

⁸¹*Ibid* 733.

⁸²*Ibid* 734.

⁸³*Ibid*.

⁸⁴*Ibid*.

⁸⁵Act 16 of 2003.

⁸⁶Including provisional and final liquidators, curators bonis, co-liquidators and provisional judicial managers, such power was inserted into the s15(1A) of the Companies Act 1973 and s 10 of the Close Corporations Act 1984.

⁸⁷ Loubser A, 'An international perspective of the regulation of insolvency practitioners' *SA Merc Law Journal* 2007 125.

⁸⁸*Distributive Catering Hotels and Allied Workers Union v Master of the High Court and others* (6438/2005) [2006] ZAGPHC 58 (11 May 2006) hereafter referred to as the 'Distributive case'.

nominated Mr Enver Motala to be appointed as provisional liquidator. Along with the signed requisition, there was an attachment listing the names of the workers who belonged to the union. Notwithstanding the applicant's nomination for appointment, Motala was not appointed. The applicants sent a letter to the Master expressing their dissatisfaction. The Master responded by producing a letter, received from one of the liquidated companies, denying the existence of any union being related to the companies. The applicant's main contention was that the Master failed to appoint their preferred or nominated provisional liquidator without having made any efforts or enquiries to verify the existence of the employees and whether they were indeed unionised. The applicant averred that the Master did not exercise her discretion properly or, alternatively, that she failed without good reason to consider relevant and admissible evidence before she took an adverse administrative decision, thus alleging that the Master's decision was both substantively and procedurally unfair.

The Master in her letter indicated the Minister's Policy Directives 2001 to be applicable to the exercise of her discretion in appointing provisional liquidators. The policy titled 'Strategy on Procedures for Appointment of Liquidators and Trustees' dated June 2001 was issued by the Department of Justice and Constitutional Development.⁸⁹ This is an unsigned document and there is uncertainty whether it was ever approved by the Minister. The document was amended on 8 September 2003 by a document signed by the Director of insolvency appointments and interrogations however, this amendment was revoked by Chief Master's Directive 5/2007 issued on 20 August 2007.

The court made reference to directives numbers 2, 5 and 6. The court held that it was quite clear from these directives that the Minister was aware that some interested parties, such as employers, company directors or co-liquidators, may, for various reasons, try to manipulate the appointment of liquidators to exclude liquidators nominated by trade unions.⁹⁰ The court noted that, in particular, directive number 5 states in clear language that the letter or certificate of the trade union will supersede any representation by directors or management of the entity in question.⁹¹

The court held that the underlying purpose of these directives is to ensure a measure of representivity, equality and fairness for ordinary employees during liquidations of

⁸⁹*Policy: Strategy on Procedures for Appointment of Liquidators and Trustees* dated June 2001.

⁹⁰*Distributive case supra* para 8.

⁹¹*Ibid.*

companies.⁹² Bosiello J viewed these measures as being intended to afford the workers, who in most instances are the most vulnerable, maximum protection against exploitation by corporate creditors.⁹³ Bosiello J held that in the appointment of provisional liquidators, the Master must consider the Minister's Policy Directives seriously and 'not pay mere lip service thereto' as this is compatible with the important amendments to the Insolvency Act, which also lays emphasis on the protection of ordinary workers or employees.⁹⁴ He stated that 'to do otherwise would defeat the lofty ideals of creating an egalitarian society as postulated by the Constitution, the supreme law.'⁹⁵

As a matter of interest, the union responded to the allegation that there was no trade union representing the workers of the companies by explaining that the union representation was in the process of being finalised when the two companies went into liquidation. The court found that in line with the directive (to be specific, directive 6) the Master is obliged to regard such representation to have been achieved and will protect the workers involved by ensuring the appointment of the representative nominated by the trade union as a provisional liquidator.⁹⁶

The court found that the Master erred in failing to accept the requisitions duly signed by the applicant trade union which were duly supported by a letter which clearly stipulated that the applicant trade union represented at least 34 employees of the companies.⁹⁷ The court held that 'such conduct by the Master is not only in conflict with the Minister's Policy Directives but has the effect of defeating the laudable objectives of the Minister's Policy Directives viz. to ensure that the voice of the workers is heard and their interests, as a vulnerable group, are properly and adequately protected during the liquidation or sequestration of their employers.'⁹⁸ Thus the court found the Master's decision to be subject to be reviewed and set aside.

It is submitted that the above case, is one of many, which is authority for the proposition that the Master has to take into account circumstances, such as vulnerabilities of employees, ministerial directives, the objectives and values of the Constitution as well as the Insolvency Act, when appointing provisional trustees and liquidators. However this case is distinct from

⁹²*Distributive case supra* Para 9.

⁹³*Ibid.*

⁹⁴ *Ibid.*

⁹⁵*Ibid.*

⁹⁶*Distributive case supra* Paragraph 10 .

⁹⁷*Distributive case supra* Paragraph 11 .

⁹⁸*Distributive case supra* Paragraph 11 .

the others because the court set aside the Master's decision on the basis that she had not correctly applied a 'Ministerial policy document' which is an internal policy document issued by the Minister and is not a policy document as contemplated in section 158(2).⁹⁹ The correctness of this decision has been questioned on the basis that 'at the relevant time the Master enjoyed an unfettered discretion in relation to the appointment of provisional liquidators and trustees without being obliged to take cognisance of a policy document which had no standing in law.'¹⁰⁰

3.3 Problems identified and criticisms of South Africa's regulatory system

3.3.1 Background

According to the *World Bank Global Insolvency law database (GILD)* regulatory working group, insolvency regulation entails two main elements: first, the need for independent qualification standards and training for liquidators and administrators; and, secondly, the actual 'development and design' of the regulatory body.¹⁰¹ Development and design includes the procedures and systems used, along with the measures adopted, to promote specialisation of the insolvency industry.¹⁰²

It has been suggested¹⁰³ that the regulatory body should at minimum be able to demonstrate that:

- (a) Standards and practice guidance reflect the requirements of the law; recognize the interests and rights of those involved in insolvencies; and meet public expectations of a profession;
- (b) Requirements as to competence, suitability, integrity and virtue are set at appropriately high levels to provide assurance that insolvency representatives can be expected to properly and fully discharge their functions, duties, responsibilities and accountabilities;
- (c) Effective, timely and proportionate action will be taken within the clearly defined criteria, as a result of monitoring, inspection, complaint or other information or intelligence, in relation to incompetent or dishonest insolvency representatives, on the facts and merits without regard to reputation or other personal factors; and
- (d) Procedures are fair, impartial and transparent both towards those it regulates and those who complain or are otherwise adversely affected by an

⁹⁹ J Kunst and J King (eds) *Meskin Insolvency Law* (loose-leaf edition) Lexis Nexis (on electronic Lexis Nexis databases).

¹⁰⁰ *Ibid.*

¹⁰¹ World Bank (2000) *Insolvency law and the regulatory framework* available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/LAWANDJUSTICE> 2.6 .

¹⁰² *Ibid.*

¹⁰³ World Bank (2009) *Effective Insolvency systems regulatory framework guidelines* principle D.8 8(a)-(d) (n 14)

insolvency representative's conduct, decisions or actions; and are subject to appeal or review.¹⁰⁴

The regulatory body has the responsibility to set the standards of qualification and training for insolvency practitioners and the members of the regulatory body, and to ensure that the body is constructed and continually being developed in such a manner that it can effectively perform its regulatory tasks. Ideally, the regulatory body should possess the knowledge and understanding of insolvency legislation, procedures and practice.¹⁰⁵ The regulatory body should also be proficient in executing its functions, obligations, tasks and responsibilities whilst implementing its supremacy objectively, reasonably and consistently.¹⁰⁶

It has been submitted by academics that South Africa's regulatory body has failed to meet some of the above minimum requirements and that this has impacted on the proper functioning of insolvency law in South Africa.

It has been stated that with the recognition of the Constitution as the supreme law of the land, the legal community in South Africa has had to adapt from the old concept of parliamentary sovereignty to a new model of constitutional democracy.¹⁰⁷ In *Holomisa v Argus Newspaper Ltd*¹⁰⁸ Cameron J encapsulated this principle very fittingly: 'The Constitution has changed the "context" of all legal thought and decision-making in South Africa'. The basis of constitutionalism is the standard that the power of the state is defined and constrained by law to protect the interests of society and therefore the aim and intention of any state regulation in South Africa should be to ensure compliance with the underlying values of the Constitution, which includes the protection of societal interests.¹⁰⁹

Thus, the state and the Master each have a constitutional duty to ensure that societal interests are protected. It is also accepted that the Master has a duty to ensure proper service delivery and efficient, equitable and ethical public administration which affects fundamental rights and is accountable to the broader public.¹¹⁰ It has been noted by academics that the Master has failed in certain respects to perform its constitutional duties.

¹⁰⁴World Bank 2009 *supra*

¹⁰⁵World Bank (2000) Insolvency law and the regulatory framework available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/LAWANDJUSTICE> 2.6 .at 16

¹⁰⁶World Bank 2000 (n 105) 16.

¹⁰⁷Hoexter, 'Administrative Action' in the Courts' 2006 *Acta Juridica* 303.

¹⁰⁸1996 6 BCLR 836 (W) 836J.

¹⁰⁹Burns, *Administrative Law under the 1996 Constitution* (2003) 28

¹¹⁰As discussed in 1.5 above.

Much criticism has been levelled at the Master on the basis of its overall performance as a regulatory body, the exercise of its powers as regulator and its institutional capacity. There have also been criticisms that the insolvency profession in South Africa is not adequately regulated. This chapter will highlight some of these criticisms.

3.3.2 Criticisms relating to the Master

3.3.2.1 Lack of resources and institutional capacity

Commentators have noted the important role that the Master plays in insolvency law which was recorded by the South African Law Reform Commission in its *Report on the Review of the Law of Insolvency*, published in 2000.¹¹¹ The impact of this important role, according to one of the commentators, is that creditors are less involved and interested in the sequestration or liquidation of the debtor's estate.¹¹² Creditors do not exercise the proper monitoring of the administration of the insolvent estate and instead leave the responsibility in the hands of the Master to finalise the administration.¹¹³ One of the commentators stated that 'the Master's office is burdened with the duty to make too many decisions regarding the administration of the estate, resulting in creditors becoming too unperturbed and too dependent on the Masters office to protect their interests.'¹¹⁴

The implication of creditor's over-reliance on the Master is illustrated by the *Wilkins v Potgieter*¹¹⁵ case.¹¹⁶ In this case the court set aside a first account, in terms of which dividends had been paid, on the basis that there is a clear duty on the Master to study the relevant documents and correlate them with the draft account provided by the trustee.¹¹⁷ Only once the Master is satisfied, may he permit an account to lie for inspection.¹¹⁸ It is noted that the Master is placed in a difficult position since he is in a conflicting situation where he is required to be involved in the administration of the estate and also to act as an impartial arbitrator.¹¹⁹ It has also been submitted that it is fairly impossible for the Master to be able to exercise the required proper control over trustees and liquidators by simply inspecting the

¹¹¹The SA Law Commission Explanatory Memorandum 2000 (n 11).

¹¹²*Ibid* at para 3.1.

¹¹³*Ibid*.

¹¹⁴*Ibid*.

¹¹⁵1996(4)SA 936 (T).

¹¹⁶SA Law Reform Commission Explanatory Memorandum (n 11), at para 3.3.

¹¹⁷*Ibid*.

¹¹⁸*Ibid*.

¹¹⁹SA Law Reform Commission Explanatory Memorandum (n 11), at para 3.4.

documents before him.¹²⁰ It is further submitted that even if this was an effective control measure, the Master does not have the proper institutional capacity to perform this time consuming task efficiently.¹²¹ This will also cause further delays in the process.¹²²

USAID points out that the Master has insufficient experience and training.¹²³ It is submitted that the possible cause of this problem is the inconsistency in training in the different provinces. Calitz notes that this lack of specialisation of the Master and its constituents, and their insufficient training and experience, ‘creates a level of ineffectiveness and inefficiency amongst the staff’.¹²⁴ The result of this is that officials are required to function in various sections or departments in the Master’s office.¹²⁵ A practical illustration of this is that an official could be responsible for administration of deceased estates for a period of time and then move on to being responsible for administration of insolvent estates, regardless of whether they have the necessary knowledge of insolvency law.¹²⁶ Calitz notes that it is for this reason that it becomes difficult to train officials in one particular field since they are not assigned to one section of the Master’s office.¹²⁷

The Master does not have adequate resources and sufficient capacity to perform its role as insolvency regulator.¹²⁸ Calitz highlights that ‘the lack of specialisation in the Master’s office along with the lack of resources has an impact on service delivery, as well as prevents the Master from efficiently carrying out the Constitution’s commitment to an efficient, equitable and ethical public administration which respects the public’s fundamental rights and which is accountable to the broader public.’¹²⁹

3.3.2.2 Lack of investigative powers

Another problem noted by commentators is that the Master does not have sufficient investigative powers to be able to perform the duties expected in terms of the legislation. Calitz thoroughly examined the functions of the Master, within the context of international standards and found that the Master lacks investigative powers relating to the cause of

¹²⁰*Ibid.*

¹²¹*Ibid.*

¹²²*Ibid.*

¹²³USAID 2010 (n 12) 13.

¹²⁴Calitz J, 2009 LLD thesis (n 16) 258.

¹²⁵*Ibid.*

¹²⁶*Ibid.*

¹²⁷*Ibid.*

¹²⁸Calitz J 2011 (n 3) 298.

¹²⁹Calitz J, 2009 LLD thesis (n 16) 259.

insolvency.¹³⁰ Calitz notes that most regulators in foreign jurisdictions conduct investigations on the cause of insolvency, and whilst doing this, also investigate the behaviour of the insolvent before the sequestration of his estate.¹³¹ This is required by public policy.¹³²

The Insolvency Act does provide for an interrogation procedure which is aimed at acquiring the necessary information about the insolvent's financial affairs and the location of his property.¹³³ Thus we can see that the investigative powers afforded to the Master 'are limited to general enquiries' and not in finding out the actual cause of insolvency.¹³⁴ Calitz submits that the advantages of determining the cause of insolvency are: first, 'it separates the *bona fide* insolvent from the person abusing the system', and, secondly, from a law reform perspective, it would also 'have substantial and empirical value'.¹³⁵

3.3.2.3 Administrative discretion in appointing provisional trustees or liquidators

The Master has an unfettered administrative discretion to appoint provisional trustees. However, there have been numerous administrative law challenges in the High Court relating to the Master's appointment of liquidators and trustees. These challenges are prevalently based on the contention that the Master has failed to apply his discretion properly. USAID also reports on the lack of confidence in the discretion of the Master to appoint liquidators and insolvency practitioners.¹³⁶

The Insolvency Act fails to provide proper criteria for the appointment of trustees by setting out only who is disqualified from being appointed as a trustee. Chapter XIV of the 1973 Companies Act¹³⁷ requires that the Master should appoint a 'suitable person' as a provisional or final liquidator and similarly sets out who is disqualified from being appointed as a provisional or final liquidator.¹³⁸

Calitz and Burdette submit that in the appointment of insolvency practitioners there is a discrepancy between what the Insolvency Act and the 1973 Companies Act require and what

¹³⁰Calitz J 2009 LLD thesis (n 16) 259.

¹³¹*Ibid.*

¹³²*Ibid.*

¹³³*Ibid.*

¹³⁴*Ibid.*

¹³⁵*Ibid.*

¹³⁶USAID (n 12) 13.

¹³⁷Which is still in effect; see 1.4 above.

¹³⁸Calitz J and Burdette DA 2006 (n 75) 732

actually occurs in practice.¹³⁹ The Master in each office has the authority to determine, according to their interpretation of the law, the practice and procedures to be followed in their offices.¹⁴⁰ Thus, when it comes to the appointment of insolvency practitioners, the practices and procedures followed could possibly be different in each of the offices. There is insufficient uniformity in the Master's application of the criteria for the provisional appointments in the different provinces.¹⁴¹ It is submitted that this inconsistency is the result of the wide discretion granted to the Master in the appointment of trustees and liquidators.

In terms of a 2003 amendment to the Insolvency Act,¹⁴² the Master is compelled to make an appointment in accordance with a policy determined by the Minister of Justice and Constitutional Development.¹⁴³ However, the Minister has not issued any formal policy. The most recent development in this regard is that in 2012, a policy was drafted and submitted to the National Economic Development and Labour Council (NEDLAC) for approval with the intention of it being published in the Government Gazette. This draft policy will be examined more thoroughly below.

Corruption and bribery have become a common problem in the appointment of insolvency practitioners. There have been numerous reports of close associations being formed between insolvency practitioners and Master's office officials as well as reports of insolvency practitioners granting benefits to the officials. In one of his key note addresses the then Acting Chief Master illustrated as occurrences of subtle forms of bribery, the granting of gifts during the festive season and lunches between practitioners and officials.¹⁴⁴ He submitted that 'the independence of the regulator is undermined if close associations are formed between the regulator and practitioners.'¹⁴⁵ It is submitted that reports or even suspicion, for that matter, of bribery and corruption occurring undermines, and has a negative impact on, our entire insolvency law system. It is for this reason that there is a need for proper regulation to prevent such occurrences. In response to the allegations of corruption and bribery in 2009, the

¹³⁹*Ibid* at 729.

¹⁴⁰ Minister of justice and constitutional development : 'Policy on appointment of insolvency practitioners' submitted to NEDLAC July 2012 (on file) 1.

¹⁴¹ Calitz J and Burdette DA 2006 (n 75) 729.

¹⁴² In terms of The Judicial Matters Amendment Act 16 of 2003.

¹⁴³ Calitz J and Boraine A 'The role of the Master of the High Court as regulator' TSAR 2005 733.

¹⁴⁴ Lawrence Basset 'His Master's voice: a message from the regulator' (2009) unpublished paper presented at the AIPSA conference, Johannesburg available at

<http://www.saripa.co.za/downloads/conf2009/LawrenceBasset.pdf>

¹⁴⁵*Ibid*.

Chief Master issued a directive, with the purpose of ‘reminding officials that if they accept bribes or benefits that would constitute being a bribe, they would be dealt with severely.’¹⁴⁶

Calitz notes that the measures adopted by the Master when making its decision could in fact make it more susceptible to litigation challenging its constitutionality.¹⁴⁷ It is submitted once again that the root of this problem lies in the administrative discretion granted to the Master to appoint insolvency practitioners.

3.3.3 Criticisms relating to insolvency practitioners

3.3.3.1 Background

An insolvency practitioner has a very important role to play in sequestration and liquidation proceedings, as set out in the Insolvency Act and the 1973 Companies Act. The Master is responsible for the appointment of insolvency practitioners as well as to act as a ‘supervisor’ to ensure that the insolvency practitioner performs his duties properly. Thus the Master is also in charge of the regulation of the insolvency profession.

Generally, attorneys, accountants or debt collectors act as insolvency practitioners and they are generally governed by the professional bodies to which they belong. This is the only form of regulation there is for insolvency practitioners. It is submitted that an insolvency practitioner has to comply only with the professional standards of either an attorney, chartered accountant or debt collector. There is no statutory body or legislation regulating the insolvency profession. There are voluntary member organisations representing the interests of insolvency practitioners (such as SARIPA). However membership of these organisations is not subject to qualification or experience requirements.¹⁴⁸

3.3.3.2 Lack of regulation of insolvency practitioners

The insolvency profession has been criticised regularly for its inefficiency, lack of competence and dishonest conduct.¹⁴⁹ It has been noted that the cause for such criticism is that there is a lack of proper regulation of insolvency practitioners. At present there is no legislation or binding code of conduct regulating the insolvency profession. There are no regulations dictating how an insolvency practitioner should perform their task, nor are there

¹⁴⁶ Chief Master’s Directive 5 of 2009.

¹⁴⁷ Calitz J 2011 (n 3) 301.

¹⁴⁸ Calitz J ‘System of regulation of South African Law: Lessons learnt from the United Kingdom’ *Obiter* 2008 369.

¹⁴⁹ SA Law Reform Commission Explanatory Memorandum (n 11).

any indications of what level of competence and qualifications a person should have to be able to become an insolvency practitioner. Although insolvency practitioners demonstrate an array of knowledge and experience, the range of it varies extensively.¹⁵⁰ There is evident inconsistency in the training and qualification requirements for insolvency practitioners and there is also insufficient regulation to ensure that all practitioners demonstrate the required skills.¹⁵¹

Calitz states that the insolvency profession ‘lacks an adequate regulatory framework.’¹⁵² Mr Andries Nel, the then Deputy Minister of Justice and Constitutional Development in a keynote address¹⁵³ noted that the Master does not possess proper authority to fulfil the proper regulatory function of the insolvency profession.¹⁵⁴ Ideally, if the Master operated a complete regulatory function, it would be involved in the following licensing, training and capacity building, disciplining as well as removal of insolvency practitioners. However, the Master does not have the full authority to perform all of these functions.¹⁵⁵

It is submitted that the lack of regulation of insolvency practitioners in South Africa is a very serious obstacle in our insolvency law. Insolvency practitioners have an essential role to play in the insolvency procedure, thus there needs to be a proper form of regulation to ensure that they perform their duties efficiently.

It needs to be noted that in our insolvency law for an insolvency practitioner to be appointed as a trustee or liquidator ‘no qualifications whether academic or practical, no experience and no professional affiliations are required in terms of the Insolvency Act.’¹⁵⁶ It is submitted and has been submitted by many that this is where the problem lies.

We all recognise that the liquidation industry cannot continue to exist in its present state, where a person wakes up one morning and decides that he or she wants to be a liquidator and goes to the Master, requesting that his or her name be placed on a panel. We also recognise that it is not professional for insolvency practitioners to operate from mobile offices on four wheels.¹⁵⁷

¹⁵⁰ USAID 2010 (n 12) 29.

¹⁵¹ *Ibid.*

¹⁵² Calitz J 2011 (n 3) 302.

¹⁵³ Keynote address by Deputy Minister of Justice and Constitutional Development, Mr Andries Nel, MP, at the International Association of Insolvency Regulators (IAIR) annual general meeting and conference, Sandton available at <http://www.info.gov.za/speech/DynamicAction?pageid=461&tid=5229> (accessed on 14/06/2013).

¹⁵⁴ Key note address *supra*.

¹⁵⁵ Key note address *supra*.

¹⁵⁶ Loubser A 2007 (n 87) 125.

¹⁵⁷ Lawrence Basset 2009 (n 144) 4.

Loubser submits that the absence of regulation in relation to the qualifications of insolvency practice and their professional conduct has opened the door for fraud and corruption as well as overall incompetence of the profession.¹⁵⁸

USAID reports on the inconsistency in training and required qualification of insolvency practitioners.¹⁵⁹ It is submitted that this inconsistency has led to senior insolvency practitioners and those belonging to large firms being preferred over ‘new-comers’ and junior practitioners who are perceived to be less experienced.¹⁶⁰ The effect of this is that there is no proper room for progression and advancement of the insolvency profession since only a limited number of practitioners are fortunate enough to obtain experience and skills in larger estate administrations.¹⁶¹

3.4 Recommendations for reform

3.4.1 Recommendations relating to the Master

The Insolvency Act provides the Master with certain investigative powers during the sequestration and distribution of an insolvent estate.¹⁶² In the SA Law Commission Explanatory Memorandum report a commentator recommended that to prevent creditors from being too dependent on the Master to protect its interests, the investigative powers granted to the Master should be reduced.¹⁶³ The South African Law Reform Commission also recommended and concluded that the Master’s investigative power should be reduced in the sense that the Master should not have the duty of critically investigating each and every account.¹⁶⁴ Calitz refers to this proposal as a ‘technical reform proposal’ since in terms of the proposal the duty is still with the Master to receive the account from the trustee or liquidator.¹⁶⁵ All that changes is ‘that sometimes unnecessary dissection is not required’.¹⁶⁶ Calitz thus submits that the proposal does not really make any significant changes in the

¹⁵⁸Loubser A 2007 (n 87) 126.

¹⁵⁹USAID 2010 (n 12) 29.

¹⁶⁰*ibid.*

¹⁶¹USAID 2010 (n 12) 29.

¹⁶²Such as interrogation powers such as in terms of sections 42, 64.65, 66 and 152 of the Insolvency Act

¹⁶³SA Law Reform Commission Explanatory Memorandum 2000 (n 11) at para 3.1

¹⁶⁴SA Law Reform Commission Explanatory Memorandum 2000 (n 11) 196 This is in terms of the suggested clause 87(2) where the Master may as hedeems fit insists on strict compliance with the format of the account.

¹⁶⁵Calitz J LLD thesis 2009 (n 16) 267.

¹⁶⁶*ibid.*

nature of the role of the Master besides reducing the burden on the Master by removing the investigation requirement.¹⁶⁷

Academics suggest the following reform proposals regarding the problem of lack of resources: USAID infers that more resources should be granted to the Master's office in order for them to be able to effectively perform all of its duties.¹⁶⁸ Calitz considers the possibility of reducing the duties placed on the Master and suggests that another body should take over the regulation of insolvency law in South Africa after taking into account the escalated workload placed on the Master's office.¹⁶⁹ This body would only be involved in the regulation of insolvency law and thus would be able to effectively perform its duties.¹⁷⁰

Regarding the Master's administrative discretion when appointing provisional insolvency practitioners, Calitz and Burdette proposed the need for more precise legislative guidelines on this aspect.¹⁷¹ They have also suggested that there is a need for the Minister to issue a formal policy on the appointment of insolvency practitioners.¹⁷²

3.4.2 Recommendations relating to insolvency practitioners

To allow for progression and advancement of the insolvency profession, it has been recommended that there is a need to encourage senior insolvency practitioners as well as larger firms to participate in mentoring junior insolvency practitioners as well as those who are lesser qualified.¹⁷³ This would lead to an expansion in the growth and overall performance of the industry. Proper regulation would ensure that all practitioners maintain uniform training and skills as well as permit proper disciplinary control which is at present deficient. We do not have a regulatory structure to train, qualify, supervise and discipline insolvency practitioners.¹⁷⁴ It has been recommended that there is a need for qualifications to be laid down for insolvency practitioners in such a way that the qualifications will ensure that only persons who are suitable and capable for the profession qualify to be insolvency practitioners but at the same time ensuring that the 'bar is not set too high.'¹⁷⁵ It has been

¹⁶⁷*Ibid* at 268.

¹⁶⁸USAID 2010 (n 12).

¹⁶⁹ Calitz J 2011 (n 3) 310.

¹⁷⁰*Ibid*.

¹⁷¹Calitz J and Burdette DA 2006 (n 75) 729.

¹⁷²*Ibid*

¹⁷³USAID 2010 (n 12) 35.

¹⁷⁴USAID 2010 (n 12) 29.

¹⁷⁵Andries Nel (n 153).

submitted that insolvency practitioners will perform more efficiently once there is statutory regulation.¹⁷⁶

Andries Nel stated that there have been some attempts to attend to the problems faced in the liquidation industry. However these have been insufficient and accordingly have failed.¹⁷⁷ He inferred that this is because of the failure to address the root cause which is a lack of a proper regulatory framework in the insolvency profession.¹⁷⁸ He also recommended that statutory regulation of the industry is a necessity, with a substantial focus on institutional reform and capacity building. Calitz and Burdette, in similar vein, submitted that “the idea of regulating the industry should not be viewed as a ‘watchdog’ initiative, but instead as a chance to reform the industry.”¹⁷⁹

3.5 Recent developments

3.5.1 Proposed policy on appointment of insolvency practitioners

3.5.1.1 Background

As mentioned above,¹⁸⁰ the Judicial Matters Amendment Act 2003 provided for the appointment of a Chief Master to be the executive officer of each Master’s office and to exercise supervision over all of the Masters. The purpose was to bring about uniformity in the practice and procedure to be followed by the Master in each province.¹⁸¹ It also granted the Minister of Justice and Constitutional Development the power to determine a policy, to be tabled in parliament before publication in the Government Gazette, for the appointment of insolvency practitioners in order to ensure consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination.¹⁸² In July 2012, a proposed policy was submitted to NEDLAC for consideration the outcome of which has not been publicised. The main features of the proposed policy will be set out below.

¹⁷⁶*Ibid.*

¹⁷⁷*Ibid.*

¹⁷⁸*Ibid.*

¹⁷⁹Calitz J & Burdette DA (n 75) 734.

¹⁸⁰As discussed in chapter 3.2 See, further, Calitz J 2011 (n 3) 301.

¹⁸¹*Ibid.*

¹⁸²*Ibid.*

3.5.1.2 Main features of the proposed policy

In the policy document, dissatisfaction was expressed at the fact that nine years had lapsed since statutory provision was made for such a policy, with no recommendation yet having been made to, and thus no policy having been determined by, the Minister.¹⁸³ It was also noted that the Masters still act in terms of the non-statutory policy, issued without any authority in 2001 by the Department of Justice and Constitutional Development, for the guidance of the exercise of their discretion,¹⁸⁴ reliance upon which was criticised in the *Distributive* case.¹⁸⁵ The preamble to the policy states that ‘there is a need to instill confidence in the process of appointing insolvency practitioners and to prevent corruption, fronting and favoritism.’¹⁸⁶ The proposed policy is intended to replace all previous policies and guidelines, relating to the appointment of insolvency practitioners, used in the Master’s office and to form the basis of the transformation of the insolvency industry.¹⁸⁷ It is intended to be a first step, away from rules based on the advancement of previously disadvantaged individuals (PDI), towards the adoption of criteria for the appointment of insolvency practitioners that would be in line with Broad Based Black Economic Empowerment (BBBEE) requirements.¹⁸⁸

The proposed policy applies to matters where the Master has to exercise its discretion to appoint provisional insolvency practitioners, ie, provisional liquidators, provisional trustees and *curators bonis*.¹⁸⁹ Thus, creditors would retain their right to vote at creditors’ meetings for the appointment of a practitioner after a final sequestration or liquidation order is granted.¹⁹⁰ In terms of the proposed policy, persons may be appointed by the Master as provisional insolvency practitioners only if their names appear on a Master’s List¹⁹¹ which must be arranged alphabetically according to whether they are junior or senior practitioners and where

¹⁸³*Ibid.*

¹⁸⁴ See 3.2, above, for discussion of the *Policy: Strategy on Procedures for Appointment of Liquidators and Trustees* dated June 2001, referred to as the ‘2001 Policy’, referred to by Calitz J2011 (n 3) 301.

¹⁸⁵ See 3.2, above.

¹⁸⁶ Principle 1.2 (preamble of the policy) and Principle 4.2 (n 140).

¹⁸⁷ Principle 4.2 (n 140). The policy document states that the Chief Master’s Directive relating to the policy should not deal with matters reserved for the policy or duplicate the policy but ‘with practical matters and matters of form in order to implement the policy’. The rationale behind this is to prevent directives, implemented after the policy, from conflicting or undermining this proposed policy.

¹⁸⁸ See Principle 1.3 (preamble to the policy) (n 140); *Ibid.*

¹⁸⁹*Ibid.*

¹⁹⁰ The policy applies to appointments made in terms of the Companies Act 1973, and not to appointments for a solvent company wound up voluntarily in terms of section 80 of the Companies Act 2008. See Policy submitted to NEDLAC (n 140) 1.

¹⁹¹ Principle 8.1 (n 140).

they fit for BBBEE categories 1 to 4.¹⁹² Persons who wish to be included on a Master's List must apply by way of affidavit in the prescribed form¹⁹³ stating that they are bound by the Code of Conduct for insolvency practitioners contained in schedule 1 to the policy.¹⁹⁴

Applicants must lodge a certificate that they are members in good standing of at least one of four professional organisations, these being:

- the Association for the Advancement of Black Insolvency Practitioners (Abripsa);
- South African Restructuring and Insolvency Practitioners Association (SARIPA);¹⁹⁵
- the South African Institute of Chartered Accountants (SAICA);
- or the Law Society of South Africa (LSSA).¹⁹⁶

The certificate must certify that:¹⁹⁷

- the applicant has sufficient knowledge and experience to administer an insolvent estate;
- according to reliable information stated in the affidavit, the applicant has sufficient infrastructure to administer insolvent estates, and the Master, or Masters, in whose areas of jurisdiction the applicant has sufficient infrastructure or access to sufficient infrastructure;
- and the applicant is current with all tax responsibilities.

The applicant must also hold a recognised four-year bachelor's degree in law or commerce. There is a proviso that the Chief Master may dispense with this requirement if the applicant has at least five years suitable practical experience in administration and winding up of insolvent estates.¹⁹⁸

In terms of the code of conduct for insolvency practitioners in schedule 1 to the policy, the Chief Master has the authority to remove names from the Master's list in the following circumstances:

¹⁹²In terms of Principle 8.6 (n 140).

¹⁹³Principle 8.2 (n 140). Schedule 2 to the policy also prescribes specific supporting documents.

¹⁹⁴*Ibid.*

¹⁹⁵The policy document mentioned SARIPA's former name, the Association of Insolvency Practitioners of Southern Africa (AIPSA).

¹⁹⁶Principle 8.3 (n 140).

¹⁹⁷*Ibid.*

¹⁹⁸Principle 8.4 (n 140).

(a) Persons who no longer qualify to be included on the List or who did not qualify when they were included (this includes a person removed by the court on account of misconduct from an office of trust and persons who gave false information on a material matter during an application to be included on the List). (b) Persons who could be removed from office by the Master in terms of section 60 of the Insolvency Act or section 379 of the Companies Act, 1973 (which applies to close corporations as well) – failure to perform satisfactorily any duty imposed by the relevant Act or to comply with a lawful demand of the Master and (c) Persons who thwart the implementation of the Policy that is those persons who are guilty of not participating actively in the administration or affording jointly appointed practitioners an opportunity to participate in the administration of estates.¹⁹⁹

The policy also lays down certain criteria to be met before the Chief Master can remove a name from the Master's list.²⁰⁰ The Chief Master is also required to provide written reasons for his or her decision to remove or not to remove a practitioner's name from a Master's list and is required to furnish any interested person with those reasons.²⁰¹ The policy lays down an extensive list of requirements that must be met when insolvency practitioners are appointed by the Master.²⁰²

Apparently, not much progress has been made since the policy was submitted to NEDLAC. Only once NEDLAC has considered the policy, can it be submitted to the Minister of Justice and Constitutional Development for consideration. If the Minister approves the policy it will be tabled in Parliament and published in the Government Gazette.

3.5.1.3 Comments

Given the criticisms noted by academics, it is submitted that the proposed policy does circumvent some of the problems relating to the Master's administrative discretion mentioned above. The policy provides detailed guidelines that the Master is required to follow when appointing provisional insolvency practitioners. The policy matches the recommendations made by Calitz and Burdette by providing precise guidelines for the appointment of insolvency practitioners and by recommending that the requisition system be abolished.²⁰³

The policy contains a lot of procedural detail which is non-negotiable, so that the Chief Master is effectively bound. This leads to the consideration of whether there is an advance attempt of micro management of the appointment of insolvency practitioners. However, after

¹⁹⁹In terms of Principle 8.8 (n 140).

²⁰⁰Refer to Principle 8.9 for the listed criteria to be met.

²⁰¹Principle 8.10 (n 140).

²⁰² Refer to principle 9 for the list of requirements that must be met.

²⁰³As stated in the explanatory memorandum of the policy.

taking into account the criticism and recommendation that there is a need for more precise guidelines, it is submitted that this detail is required. The precise guidelines in the policy reflect the need for transformation of the industry and the need for administratively fair decision making. Thus, the provisions of the proposed policy will be effective in countering the criticisms and transforming the insolvency industry and profession.

Recently, there have also been many challenges surrounding the appointment of black and white insolvency practitioners. A recent illustration of such a challenge in the media recently is Abripsa's call for answers from the Reserve Bank after the Registrar of Banks (a division of the reserve bank) filed an application to set aside the appointment of two black liquidators.²⁰⁴ According to Abripsa this application by the reserve bank 'negates transformative objectives'. The registrar wanted a white practitioner to be appointed who is 'a more knowledgeable and experienced nominee', rather than the two practitioners who were appointed by the Master. Abripsa contended that the Reserve Bank was opposed to Black Economic Empowerment and that the Government should step in since the Reserve Bank is a state entity.

It is submitted that the above illustration emphasises the point that problematic issues surround the appointment of insolvency practitioners on an ongoing basis and that it is essential that clear, transparent criteria and processes be put in place. The proposed policy provides for such required guidelines quite effectively. It is submitted if the policy was in effect there would be more clarity on the distinction between the role of a senior and junior practitioner and their position taking into account the BBBEE policy and the relevant categories, thus the policy should be initiated without any further delay.

3.5.2 The policy and regulation of the insolvency industry

3.5.2.1 Main features

In the explanatory memorandum to the policy the need for statutory regulation of the insolvency profession is noted.²⁰⁵ According to the memorandum, draft legislation (The Insolvency Practitioners Bill) has been prepared for this, but it has been postponed until the policy for the appointment of insolvency practitioners is finalised.²⁰⁶ This Bill has not been

²⁰⁴IOL Business 'Black liquidators oppose white choice' Nov 3 2013 available at <http://www.iol.co.za/business/companies/black-liquidators-oppose-white-choice-1.1601348> .

²⁰⁵Policy submitted to NEDLAC (n 140) 24.

²⁰⁶*Ibid.*

made publicly available. The memorandum notes that because regulation of the industry is urgent and statutory regulation cannot yet be implemented, temporary provision is made in the policy for the regulation of the industry.²⁰⁷ ‘Statutory regulation is the ideal, but for now the Policy requires professional affiliation in line with the existing and international practice.’²⁰⁸ This is done through the code of conduct contained in Schedule 1 of the policy, which practitioners must abide by in order to be on the Master’s lists.²⁰⁹

According to the code of conduct:

- Practitioners must at all times render and perform their services and conduct themselves in a competent, correct, professional, honourable and impartial manner.²¹⁰
- Practitioners may not engage in conduct which is dishonest or otherwise discreditable, prejudicial to the administration of justice, likely to diminish public confidence in practitioners as a profession or the administration of estates, or likely to bring practitioners as a profession into disrepute.²¹¹
- Practitioners who in fact possess, or ought to possess, a particular level of knowledge or skill must employ that level of knowledge or skill in the provision of services.²¹²
- They may not undertake work requiring a certain expertise without possessing or being able to apply that expertise.²¹³
- They may not declare or create the impression that they have specific expertise which they do not have or undertake any task which they know or ought to know that they are not competent to deal with.²¹⁴
- They must also ensure that they have sufficient knowledge of the applicable law to fulfil all professional engagements.²¹⁵
- Practitioners may not, without lawful excuse, fail to make payment of monies to other parties within the time limits set out in legislation or, in the absence of such statutory

²⁰⁷*Ibid.*

²⁰⁸Policy submitted to NEDLAC (n 140) 24.

²⁰⁹*Ibid.*

²¹⁰Section 2 of the code of conduct.

²¹¹*Ibid.*

²¹² Code of conduct para 3.1.

²¹³ Code of conduct para 3.2.

²¹⁴Code of conduct para 3.3.

²¹⁵ Code of conduct para 3.4.

provision, fail to make payment within a reasonable time from the date that such monies become due and payable.²¹⁶

- They must observe the principles relating to good corporate governance as set out in the King III report.²¹⁷
- They may not, by means of misrepresentation, reward or benefit, or offer of any reward or benefit, whether directly or indirectly, induce or attempt to induce any person to vote for their appointment.²¹⁸
- Practitioners must promote and advance transformation and empowerment of legitimate and sustainable black-owned and female-owned practices and may not make themselves guilty of fronting or failure to report cases of fronting of which they are aware.²¹⁹
- Practitioners may not make a donation, contribution or payment in any form to a public official or public officer, which constitutes a bribe or is contrary to a directive by the Master or the Department of Justice and Constitutional Development.²²⁰
- Practitioners may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or knowingly make a materially false or misleading statement to stakeholders or others.²²¹
- Practitioners may not allow bias, conflict of interest or undue influence of others to affect their decisions or conduct.²²²
- Practitioners must render and perform their services free from any improper influence or pressure and in an impartial and independent manner in the best interests of the general body of creditors of estates.²²³

In terms of the policy the code of conduct will be enforced and administered by a council which will be constituted by the following:²²⁴ an official in the Department of Justice and Constitutional Development as chairperson - nominated in writing for that purpose by the Minister of Justice and Constitutional Development; and a representative nominated in writing by Abripsa and SARIPA. The council would also constitute of an attorney nominated

²¹⁶ Code of conduct para 4.2.

²¹⁷ Code of conduct para 5.6.

²¹⁸ Code of conduct para 6.3.

²¹⁹ Code of conduct para 6.4.

²²⁰ Code of conduct para 6.6.

²²¹ Code of conduct para 6.7.

²²² Code of conduct para 7.3.

²²³ Code of conduct para 7.3.

²²⁴ Code of conduct para 8.1 – 8.6

in writing by the LSSA, an accountant nominated in writing by SAICA. The chairperson may, after consultation with the Council, nominate one or more persons to form part of the council during a particular investigation and may appoint an attorney or an accountant, or both, to assist with any particular investigation.

The powers of the council are contained in Annexure 1 to Schedule 1. The council must investigate complaints against practitioners, according to the procedure set out in the code and may issue a written reprimand, impose a fine and recommend to the Chief Master that the practitioner be removed from the Master's lists if a practitioner has been found to contravene the code. Practitioners must comply with all orders, requirements and requests by the council or the chairperson or secretary of the council. Refusal or failure by a practitioner to comply with a direction to appear or produce anything constitutes unprofessional conduct.

3.5.2.2 Comments

In relation to the insolvency profession and regulation of insolvency practitioners, it has been suggested that the regulator should be involved in licensing, training and capacity building, disciplining and removal of insolvency practitioners from the profession. It has also been recommended that there be listed qualifications required in order to enter the profession. The code lists the required qualifications that a practitioner must have in order to have their name on the Master's list and be appointed as provisional insolvency practitioner. The code also provides at length for the disciplining and removal of insolvency practitioners from the Master's lists.

However, it is submitted that the policy along with the code is only applicable to provisional insolvency practitioners that are appointed by the Master. The policy and code does not apply to final trustees or liquidators who are appointed by creditors. This means that the code cannot provide the regulation that the insolvency profession requires since the code does not circumvent all of the problems and criticisms of the insolvency profession. There is still an urgent need for legislation to be initiated to regulate both provisional and final insolvency practitioners.

However, the code does provide for some form of regulation of provisional insolvency practitioners. Thus it is submitted that this policy needs to be tabled in parliament immediately, because the policy's code of conduct would ensure that practitioners, who are

provisionally appointed by the Master, maintain a satisfactory standard of performance and skill.

3.6 Conclusion

The Master is the regulator of insolvency law. It is crucial that the Master's office functions efficiently and meets the standards of what is required of a regulatory body. However, academics have noted that the Master has fallen short, in certain aspects, of what is expected of a regulatory body.

Criticisms of the Master's office include the lack of resources and institutional capacity, the lack of sufficient investigative powers and insufficient guidelines for the Master when applying their administrative discretion when appointing provisional insolvency practitioners. The lack of regulation of the insolvency profession has also been criticised. It has been noted that the Master as regulator does not have the full authority to regulate the profession nor is there a statutory body or legislation regulating the profession. This lack of regulation has impacted on the performance of the insolvency industry. Some of the criticisms discussed include that there is no required qualifications in terms of the Insolvency Act for a person to act as a practitioner, inconsistency in training of insolvency practitioners and insufficient supervision and disciplinary control of practitioners.

It has been recommended that more resources should be granted to the Master's office. It has also been recommended that another body should take over the regulation of insolvency law. It has also been proposed that precise legislative guidelines be provided regarding the appointment of insolvency practitioners. Another suggestion was that the Minister must issue a formal policy on the appointment of insolvency practitioners. In relation to the insolvency profession, it was emphasised that statutory regulation of the profession is a necessity. It is submitted that it is vital that these comments and suggestions be considered in order for us to be able to achieve an improved regulatory system.

The most recent development regarding the regulation of insolvency law in South Africa is the draft policy on the regulation of insolvency practitioners that has been submitted to NEDLAC in 2012. The policy intends to provide guidelines relating to the appointment of provisional insolvency practitioners. The policy provides criteria for the appointment of provisional insolvency practitioners that are in line with BBBEE requirements. It is submitted

that the policy provides sufficient guidelines to enable the Master to apply his administrative discretion properly when appointing provisional insolvency practitioners.

The policy also includes a code of conduct that insolvency practitioners must adhere to in order to be placed on the Master's list. The policy's code of conduct has the potential to regulate provisional insolvency practitioners. However, the policy and its code of conduct only applies to the appointment of provisional practitioners. Thus, it is submitted that the code of conduct is inadequate to achieve the level of regulation of the industry that would conform to international standards. The enactment of legislation regulating both provisional and final insolvency practitioners would most likely achieve this. An Insolvency Practitioners Bill has been drafted but it has been suspended pending the initiation of the policy on the appointment of insolvency practitioners. It is submitted that the policy has the potential to provide temporary regulation of provisional insolvency practitioners until legislation is enacted.

The policy is at a standstill, since nothing has been done further to initiate the policy. The effect of this is that the regulation of South African insolvency law is still in the same position as before the policy was drafted. The policy has the potential to circumvent the problems relating to the appointment of provisional insolvency practitioners, therefore it should be initiated without any further delay.

CHAPTER 4 RECENT COMPARATIVE DEVELOPMENTS

4.1 General

Issues relating to regulation of insolvency practitioners are not unique to South Africa. A number of foreign countries have developed, or are in the process of implementing, reform initiatives in an endeavour to improve the regulatory systems applicable in their jurisdictions. Interestingly, to some extent, a tendency, or a shift in thinking, is apparent, away from state regulation, towards self-regulation and co-regulation of insolvency practitioners.²²⁵ In this chapter, some recent developments in New Zealand, Australia and England and Wales will be sketched with a view to comparing them with initiatives intended for, and progress, or the lack of it, made in, South Africa.

4.2 New Zealand

The position in New Zealand has been criticised on the basis of there being insufficient regulation of insolvency practitioners.²²⁶ Insolvency practitioners do not have to obtain a licence to be an insolvency practitioner. Indeed, as recently highlighted, in order for a person to practice as an insolvency practitioner, he or she must be over the age of eighteen and not be mentally ill or bankrupt.²²⁷ In April 2010, the New Zealand Government introduced the Insolvency Practitioners Bill (the Bill)²²⁸ which has generated much debate, mainly focusing on whether it would introduce sufficient regulation of insolvency practitioners in New Zealand or whether more is required.

The Bill establishes the following regulatory regime: a public register for insolvency practitioners, a requirement that all insolvency practitioners must be registered and allows for the removal and disqualification of insolvency practitioners from appointments in certain circumstances.²²⁹ The Bill still does not lay down any qualification or experience requirements that a person must have in order to practice as an insolvency practitioner.²³⁰ The Bill also does not provide for a monitoring or inspection regime.²³¹

²²⁵ See modes of regulation discussed at 2.1, 2.2 and 2.3, above.

²²⁶ Insolvency Practitioners Bill 2010; available at <http://www.parliament.nz/resource/0000160370>.

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ *Ibid.*

The Bill has been through its second reading in parliament.²³² Under the current version of the Bill (as reported back from the Commerce Select Committee in May 2011), insolvency practitioners will need to be registered on a register held by the Companies Office.²³³ In his second reading speech Hon Craig Foss the Minister of Commerce mentioned that further policy work had been done on the Bill and that a supplementary order paper had been introduced with further amendments that would better align the requirements for the different types of practitioners and elucidate the obligations of insolvency practitioners.²³⁴

The New Zealand Institute of Chartered Accountants (NZICA) and INSOL New Zealand (INSOLNZ)²³⁵ maintain that the Bill (as currently drafted) will not go far enough to ensure that insolvency practitioners have the necessary experience, competence and integrity. Accordingly, a joint proposal has been developed to enhance the self-regulation of insolvency specialists. NZICA and INSOLNZ petitioned for a ‘stronger’ Bill on the basis that the current Bill does not adequately regulate insolvency practitioners and it does not provide any guarantee that an insolvency practitioner is capable to practice or is a ‘fit and proper’ person to practice.²³⁶ According to NZICA and INSOLNZ it is essential that insolvency practitioners acquire a greater range of skills and expertise since insolvency practice in New Zealand has grown to be more complex and specialised.²³⁷ It has also been noted that, in comparison with international standards, New Zealand’s insolvency practitioners are under-regulated.²³⁸ NZICA and INSOLNZ submit that further regulation of the insolvency profession would ensure that insolvency practitioners have the required skills and experience to perform their duties and ensure that the profession is appropriately regulated and administered providing the public and creditors with confidence in the system.²³⁹

NZICA and INSOLNZ have proposed that the New Zealand insolvency industry should self-regulate and that NZICA and INSOLNZ should be the industry bodies to do this.²⁴⁰ They

²³²Insolvency Practitioners Bill Second Reading [sitting date: 26 September 2013 Vol 693 page: 13820] www.parliament.nz.

²³³*Ibid.*

²³⁴*Ibid.*

²³⁵INSOL International is a global association of professionals including accountants, lawyers, regulators, judges and academics who specialise in business turnaround and insolvency. The New Zealand member association, INSOL New Zealand (INSOL), operates as an affiliate group to NZICA’s Insolvency Special Interest Group.

²³⁶Insolvency practitioner regulation consultation document 17 June 2013 www.insol.org.nz/, hereafter referred to as ‘the consultation document’.

²³⁷*Ibid.*

²³⁸*Ibid.*

²³⁹*Ibid.*

²⁴⁰Consultation document (n 236) at 6.

propose a self-regulatory system in which every insolvency practitioner (whether a member of NZICA or INSOLNZ or not) must hold an insolvency practitioner licence before they accept assignment as the insolvency practitioner of an insolvent estate.²⁴¹ Only once the relevant criteria listed by NZICA are met, will it (NZICA) grant the insolvency practitioner a licence.²⁴² Those practitioners issued with a licence who are not full members of NZICA or not otherwise admitted as non-member partners, such as INSOL members, must comply (as a condition to being licenced) with NZICA's code of ethics, disciplinary processes, practice review requirements and engagement standards.²⁴³ NZICA has also set down specified criteria for its own members to meet in order for them to obtain a licence.²⁴⁴ There are also specified criteria for an INSOL member who is not an NZICA member to meet in order to obtain a licence.²⁴⁵ After issuing licences, once the necessary requirements are met, NZICA will maintain a database of licenced insolvency practitioners.²⁴⁶

INSOLNZ and NZICA received submissions on the joint proposal where twelve submissions of fifteen supported the proposal.²⁴⁷ INSOLNZ and NZICA have considered the submissions and other feedback and have noted that no further consultation is required.²⁴⁸ INSOLNZ and NZICA now intend to work towards finalising the proposal.²⁴⁹

4.3 Australia

The Australian insolvency profession is regulated by the state. Australia's individual bankruptcy and corporate insolvency is regulated and administered by two separate state divisions. Bankruptcy policy is administered by the Attorney-General's Department and its practice by the profession is regulated by the Insolvency and Trustee Service Australia (ITSA).²⁵⁰ Corporate insolvency policy is administered by the Treasury and the practice of

²⁴¹*Ibid.*

²⁴²*Ibid.*

²⁴³*Ibid.*

²⁴⁴*Ibid.*

²⁴⁵*Ibid.*

²⁴⁶*Ibid.*

²⁴⁷Summary of and response to submission on NZICA's and INSOL's proposed insolvency self-regulation 9 December 2013 available on www.insol.org.nz.

²⁴⁸*Ibid.*

²⁴⁹*Ibid.*

²⁵⁰Submission of the IPA to the productivity commission – Regulatory Burdens 1 April 2010 (The IPA submission) available at www.pc.gov.au/_data/assets/pdf_file0011/95609/sub007.pdf hereafter referred to as 'IPA submission'.

corporate insolvency is largely regulated by the Australian Securities and Investment Commission (ASIC). Both ASIC and ITSA are government agencies.²⁵¹

ITSA registers trustees in relation to bankruptcy and also licenses debt agreement administrators.²⁵² A trustee is then regulated by ITSA and is subject to regulation and discipline processes under the Bankruptcy Act.²⁵³ In order for a practitioner to be able to be appointed as a liquidator, administrator or receiver, they must be licensed by ASIC as a 'registered liquidator' or 'official liquidator'.²⁵⁴ Corporate insolvency practitioners (liquidators, administrators, receivers) are registered and regulated by ASIC and are disciplined by processes under the Corporations Act.²⁵⁵ An insolvency practitioner may be a person registered by ITSA as a trustee in bankruptcy and at the same time be registered by ASIC as a registered liquidator. The Insolvency Law Reform Bill 2013 is the most recent development in Australian bankruptcy law. The Bill aims to improve insolvency practitioner professionalism, competency, communication and transparency as well as the efficiency of insolvency administration in Australia.²⁵⁶

Recently, professional associations have laid down standards of conduct as well as codes of conduct by which their members must abide.²⁵⁷ Membership of these associations is voluntary making the code binding on its members only.²⁵⁸ The Accounting Professional Ethical Standards Board (APESB) and the Insolvency Practitioners Association (IPA) are examples of associations which have laid down codes in Australia. Most insolvency practitioners are members of at least one of the professional associations, binding them to an enforceable code of conduct. However, it is still possible for insolvency practitioners to become registered liquidators through licensing by ASIC even though they are not members of any professional association.²⁵⁹ Brown and Symes have stated that 'this is unacceptable,

²⁵¹*Ibid.*

²⁵²*Ibid.*

²⁵³IPA submission 2010 (n 250).

²⁵⁴D Brown & C Symes, Submission to Senate Inquiry into Liquidators and Administrators 19 March 2010 available at <https://senate.aph.gov.au/submissions/committee.pdf> last accessed 3 November 2013.

²⁵⁵*Ibid.*

²⁵⁶Keynote address by Greg Medcraft, the chairman of ASIC at the IPA National Conference 9 May 2013 2 available at [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Keynote-address-to-Insolvency-Practitioners-Association-of-Australia-National-Conference-2013.pdf/\\$file/Keynote-address-to-Insolvency-Practitioners-Association-of-Australia-National-Conference-2013.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Keynote-address-to-Insolvency-Practitioners-Association-of-Australia-National-Conference-2013.pdf/$file/Keynote-address-to-Insolvency-Practitioners-Association-of-Australia-National-Conference-2013.pdf) last accessed 31 October 2013.

²⁵⁷Browns & Symes, 'Insolvency Practitioner Regulation: providing practice standards through the use of codes of conduct' available at www.law.adelaide.edu.au/research/bils/docs/Brown-Symes_-_Insolvency-practitioner-regulation.pdf.

²⁵⁸*Ibid.*

²⁵⁹Browns & Symes (n 257).

and contrary to international best practice, that such people could in theory be licensed without being bound by any enforceable code of conduct.²⁶⁰

An advantage of professional bodies laying down codes is that they serve as a standard of conduct in disciplinary proceedings.²⁶¹ They serve as a guide for action in a specific case and they demonstrate the profession's commitment to integrity and public service.²⁶² The Insolvency Practitioners Association of Australia (ISA) has been working together with ASIC to improve insolvency practitioner standards, and have introduced the Code of Professional Practice (The IPA code),²⁶³ the latest edition being the third edition which is effective from the 1 January 2014.²⁶⁴ The IPA code is well accepted by the insolvency profession, the regulators of insolvency law as well as the Courts.²⁶⁵

The primary purposes of the IPA code is to go beyond what is stated in legislation, regulations and judicial pronouncements by: setting standards of conduct for insolvency professionals; informing and educating IPA members as to the standards of conduct required of them in the discharge of their professional responsibilities; and providing a reference for stakeholders and disciplinary bodies against which they can gauge the conduct of IPA members.²⁶⁶ It is anticipated that the IPA code will assist regulators, courts and tribunals in their understanding of proper professional standards and acceptable insolvency practice.²⁶⁷ However, the IPA code is subject to the law and remains subject to the views of the courts which are not obliged to accept or follow its requirements or guidance.²⁶⁸

In his keynote address at the Australian IPA National Conference, in 2013, the chairman of ASIC, Greg Medcraft, noted the importance of self-regulation of the insolvency profession by stating that industry and professional bodies also play a role in the regulation of the insolvency profession and that ASIC cannot be relied on solely to regulate the insolvency sector.²⁶⁹ He noted that industry standards complement legislation, provide guidance on how to comply with the law and extend further the standards set by legislation.²⁷⁰ He submitted

²⁶⁰ *Ibid.*

²⁶¹ Dal Pont G 'What are Rules of Professional Conduct for?' *New Zealand Law Journal* 1996 254.

²⁶² Dal Pont G 1996 (n 261).

²⁶³ *Ibid.*

²⁶⁴ IPA Code of Professional Practice for Insolvency Practitioners Third edition (the IPA code).

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.* at 1.

²⁶⁷ IPA code (n 264) at 2.

²⁶⁸ IPA code (n 264) at 2.

²⁶⁹ Keynote address by Greg Medcraft, the chairman of ASIC (n 256).

²⁷⁰ *Ibid.*

that if self-regulating bodies do not efficiently regulate the profession, the state will step in and impose legislative reform which could lead to the possibility of the state ‘over-regulating the sector’.²⁷¹ He acknowledged the importance of the IPA code in the Australian insolvency profession and applauded the IPA for their willingness to continually improve the IPA code.²⁷²

Brown and Symes commented on the co-operation, in Australia, between the relevant state regulatory body and self-regulatory body, illustrating instances where the IPA code was recognised by ASIC and considered by the courts in their decisions.²⁷³ However, they have noted that there are certain aspects of the IPA code that need to be improved, such as the IPA’s disciplinary, enforcement and complaints procedures.²⁷⁴ The authors criticise the lack of formal recognition of the IPA code and they suggest that Australia should shift to a co-regulatory system.²⁷⁵ According to them, this would result in formal recognition of industry codes and would rectify the voluntary nature of member association, ensuring that all insolvency practitioners belong to a professional association and are bound by its thereof.²⁷⁶ The authors are of the view that, subject to the need for an improvement in the enforcement mechanisms for the codes, the IPA and APESB can be used as a basis for a co-regulatory approach in Australian insolvency law.²⁷⁷ They anticipate that a co-regulatory model might lead to a more effective regulatory system with closer scrutiny and enforcement mechanisms.²⁷⁸

4.4 England and Wales

In England and Wales, the supervision and authorisation (regulation) of insolvency practitioners (trustees and liquidators) is undertaken by a government agency, the Insolvency Service acting on behalf of the Secretary of State for Business Innovation and Skills (BIS), under statutory powers granted by the Insolvency Act 1986, or by one of seven recognised professional accountancy, legal or insolvency practitioners’ bodies under delegated functions

²⁷¹*Ibid.*

²⁷²*ibid*

²⁷³See Browns & Symes 2013 (n 257) 13 -15 for reference to key decisions of Australian courts that have considered the IPA code.

²⁷⁴Browns & Symes 2010 (n 250).

²⁷⁵*Ibid.*

²⁷⁶Browns & Symes 2010 (n 250).

²⁷⁷*Ibid.*

²⁷⁸*Ibid.*

within the framework of the legislation and memoranda of understanding.²⁷⁹ Thus, in England and Wales, there is a state body and a non-state body regulating the profession.

These seven professional bodies are responsible for regulation of insolvency practitioners based on terms agreed upon in memoranda of understanding between them and the Secretary of State.²⁸⁰ The powers conferred on the professional bodies cover: setting comparable standards between the bodies for education and experience; monitoring; investigating complaints; and discipline. The bodies report to the Insolvency Service on the proper discharge of their delegated functions and they are subject to monitoring by it.²⁸¹ Calitz appropriately identifies this regulatory scheme as being one of ‘government-monitored self-regulation’.²⁸² It is submitted that it would also be appropriate to regard it, in essence, as a co-regulatory system.²⁸³

In terms of the Insolvency Act 1986, it is a criminal offence (punishable by imprisonment or a fine) for an individual or company to act as an insolvency practitioner if they are not qualified to do so.²⁸⁴ If a person wants to act as an insolvency practitioner, they must acquire a license authorising them to act as an insolvency practitioner either by being a member of one of the recognised professional bodies or by making an application to the Secretary of State.²⁸⁵ The Secretary of State will grant a licence to the applicant once the similar eligibility criteria, by the recognised professional bodies, are met.²⁸⁶ These criteria relate to fitness and propriety as well as education and training.²⁸⁷

The English system, as it stands, is not a traditional co-regulatory system because the state is not involved only in the oversight of the regulation by the professional bodies. The Secretary of State is responsible for supervising the regulation by professional bodies and also regulates insolvency practitioners. The position, therefore, is that, under the existing regulations, some

²⁷⁹ In terms of ss 391 and 393 of the Insolvency Act of 1986 (hereafter referred to as Insolvency Act 1986).

²⁸⁰ Calitz 2008(n 148) 365.

²⁸¹ *Ibid.*

²⁸² Calitz 2008 (n 148) 363.

²⁸³ See 2.4, above.

²⁸⁴ In terms of s 389 (1) of the Insolvency Act 1986.

²⁸⁵ In terms of s 388 of the Insolvency Act 1986.

²⁸⁶ In terms of s 396-398 of the Insolvency Act 1986.

²⁸⁷ *Ibid.*

insolvency practitioners are directly regulated by the Secretary of State for Business Innovation and Skills (BIS) and others are regulated by the listed professional associations.²⁸⁸

This has been criticised for creating a conflict of interest because the government is also the oversight regulator. Another problem is that the Secretary of State cannot impose fines or sanctions against insolvency practitioners for non-compliance but may only remove the practitioner's licence. On the other hand, the professional associations can impose sanctions, including monetary fines, as well as restrictions on the type of work that the insolvency practitioner can continue to carry out. This led the government to include authorisation of insolvency practitioners in clause 9 of the draft Deregulation Bill, published by parliament in July 2013.²⁸⁹

In terms of the Draft Deregulation Bill, the Secretary of State will no longer be involved in the licensing and regulation of insolvency practitioners. Insolvency practitioners, who are currently regulated by the Secretary of State, will be regulated by one of the seven professional bodies that are involved in the regulation of insolvency practitioners. It has been noted that transferring regulatory powers from the state to the professional bodies would simplify the current regulatory framework and remove the conflict of interest mentioned above. It will also ensure that equal sanctions are imposed on all insolvency practitioners who have failed to comply with the standards required. The Minister of Business, Innovation and Skills, Jo Swinson, has stated that transferring the state's power to regulate insolvency practitioners to professional associations will provide 'greater clarity and consistency to the regulatory regime'. She also noted that the result of this would be that the state could now focus on its role of overseeing the regulation of the insolvency profession.²⁹⁰

The process is ongoing, however, as, in its latest report, issued on 19 December 2013, the parliamentary Joint Committee on the Draft Deregulation Bill recommended that clause 9 should be the subject of further consultation with all relevant stakeholders.²⁹¹

²⁸⁸'New measures to streamline insolvency regulation announced' 01 July 2013 available at <http://insolvency.presscentre.com/Press-Releases.New-measures-to-streamline-insolvency-regulation-announced-68efa.aspx> accessed on 01 November 2013.

²⁸⁹Draft Deregulation Bill July 2013 at 3 available on www.parliament.uk/business/committees/committees-a-z/joint-selection/draft. The intention behind this Bill is mainly to save costs by reducing unnecessary state regulation in a number of government related spheres of activity.

²⁹⁰*Ibid.*

²⁹¹See the report of the Joint Committee on the Draft Deregulation Bill at <http://www.publications.parliament.uk/pa/jt201314/jtselect/jtdraftdereg/101/101.pdf>; accessed 22 January 2014. The main reason for this was the provision, in the draft Bill, for insolvency practitioners to be able to

4.5 Comments

Like South Africa, New Zealand has a state regulated system. As noted, there is no legislation in South Africa that regulates insolvency practitioners. Academics have emphasised the need for such legislation. However, in South Africa, the Insolvency Practitioners Bill has been postponed pending the finalisation of the insolvency practitioners' policy. New Zealand, on the other hand, has made attempts to initiate legislation (in the form of the Insolvency Practitioners Bill) to regulate the insolvency profession.

As in South Africa, New Zealand does not specify qualifications that a person must have to be an insolvency practitioner. The New Zealand Insolvency Practitioners has been criticised for its failure to provide adequate regulation, the result of this is that attempts have been made to improve the Bill to strengthen the regulation of the profession. Suggestions and proposals have also been made by professional bodies (NZICA and INSOLNZ) for a self-regulatory system. As mentioned earlier, these proposals have been supported thus indicating that New Zealand would adopt a self-regulatory system. However, INSOLNZ and NZICA should reconsider their proposal suggesting that New Zealand adopt a licensing system, taking into account the recent developments made in the UK where licensing as a requirement to practice as an insolvency practitioner has been removed.

It is submitted that South Africa should take into account the lessons learnt and the developments made in New Zealand. It is imperative that the South African government firstly initiate legislation to regulate insolvency practitioners and secondly encourage industry bodies to self-regulate the insolvency profession. The Australian state body ASIC has adopted this mechanism of encouraging and supporting insolvency bodies to regulate the profession.

As mentioned above the chairman of ASIC has warned of the possibility of the state over-regulating the profession if insolvency bodies do not self-regulate the profession themselves.²⁹² It is submitted that this warning should also apply to South Africa and New Zealand. Consideration of this warning leads to the conclusion that state regulation of insolvency practitioners would be insufficient and there is a need for the industry to supplement state regulation of the profession in order to achieve an enhanced regulatory

register as a corporate insolvency practitioner only, or a personal insolvency practitioner only; see paras 210-4 of the report.

²⁹²Refer to 4.3.

system. After considering the main disadvantage of state regulation (i.e. that it is less flexible and responsive to change), it is submitted that there is a need for a self-regulatory or co-regulatory system to complement state regulation of the insolvency profession.

It is submitted that the combination of state regulation and the regulation provided by the Australian insolvency bodies provides satisfactory regulation of the insolvency profession. However, as mentioned earlier there have been some set-backs in the Australian self-regulatory system. The main disadvantage being that the codes are not binding on persons who are not members of the insolvency body. The result of this led to suggestions that Australia adopt a co-regulatory system, which would ensure that the codes are binding on every insolvency practitioner. England and Wales has a co-regulatory system in place that requires that every insolvency practitioner be a member of one of the professional associations and thus be bound by a code of conduct.

It is apparent from the illustration of the regulatory system in England and Wales (after its most recent developments) that co-regulation satisfies the criteria as regards what is expected of a regulatory system. It is submitted that Australia should adopt a co-regulatory system to ensure formal recognition of the regulation of the professional bodies. However, the Australian licensing system would also have to be reconsidered and removed, lest a conflict of interest similar to the system in England and Wales should arise. It is submitted that the system in England and Wales, once the Draft Deregulation Bill is enacted, would be the most suitable co-regulatory model to follow.

It is submitted that if, in the near future, South Africa or New Zealand were to adopt a self-regulatory system, which, it is submitted, would be a step in the right direction, it is most likely that after some time they too would feel the need to shift to a co-regulatory system.

4.6 Conclusion

The lack of regulation of insolvency practitioners has been a problem in many foreign jurisdictions. In the jurisdictions considered above, there is an apparent tendency to adopt, or to move towards adopting, systems of self-regulation or co-regulation of insolvency practitioners. Adopting these alternate forms of regulation has been perceived as improving the overall regulation of insolvency practitioners in these jurisdictions.

New Zealand's state regulatory system has been criticised even after the recent introduction of the 2013 Insolvency Law Reform Bill. It has been noted that the regulation of insolvency

practitioners is insufficient and that there are many gaps which the legislation leaves unfilled. It has been suggested that a self-regulating professional body would be most suitable to fill in the gaps and complement the legislation.

The Australian insolvency profession is regulated by the state and professional associations (such as the IPA) have initiated codes of conduct further regulating the profession. Only members of the association are bound by the codes, thereby illustrating the disadvantage of the codes being unenforceable against all insolvency practitioners because they are applicable only to members. One of the two Australian regulating state bodies, ASIC, has welcomed the code that has been initiated by the IPA and expresses its support of IPA's attempts to assist in the regulation of insolvency practitioners. The aim of the IPA code is to fill the gaps that the legislation regulating the profession has left out, mainly focusing on providing standards of conduct for insolvency professionals.

One of the main criticisms of this system that have been noted by academics is that the codes initiated by the voluntary associations are not formally recognised. Although the IPA code has been approved by ASIC it is not formally recognised, which denotes that practitioners who do not wish to be bound by the code can terminate their membership with the association (if they are a current member) or refrain from being a member of the association. They will still be able to obtain or maintain a licence from ASIC allowing them to practice as a practitioner. The result of the lack of formal recognition of the code is also that the IPA and other voluntary associations are not accountable to anyone but their members, and such accountability is not necessarily through democratic channels. This has led academics to the suggestion that Australia should adopt a co-regulatory model to ensure formal recognition of the regulation of the professional bodies.

The Insolvency Act 1986, in conjunction with memoranda of understanding, as will the draft Deregulation Bill, once it is enacted, requires all insolvency practitioners to be a member of one of the seven listed professional associations. The state may also lay down what is expected of the professional association in terms of regulation of insolvency practitioners and lay down criteria of who should be eligible to practice as an insolvency practitioner. It also sets out requirements that the professional body must comply with in order to be able to regulate the profession.

South Africa and New Zealand have in place a state regulatory system that regulates insolvency practitioners. There is a need for an improved regulatory system in both

jurisdictions. However New Zealand in comparison to South Africa has made attempts to improve its regulatory system by initiating legislation to regulate the profession and considering self-regulation of the profession.

It is submitted that regardless of the noted disadvantages of a self-regulatory system, New Zealand and South Africa should in fact adopt this form of regulation as suggested and perhaps, at a later stage, shift to a co-regulatory system. The purpose of this is to ensure that the relevant professional associations initiates a code, enforcement mechanism and monitoring system that is worthy of being formally recognised by the state. This is to ensure that the professional association implements a proper regulatory system and is capable of assisting in the regulation of the profession.

It is submitted that the co-regulatory system ‘ticks all the boxes’ in terms of what is expected of a regulatory system. If Australia, in the near future, intends to adopt a co-regulatory system, the Australian licensing system would also have to be reconsidered and removed lest a conflict of interest similar to that in England and Wales should arise. It is submitted that the system in England and Wales, once the Bill is enacted, would be the most suitable co-regulatory model to follow.

CHAPTER 5 CONCLUSION

5.1 State regulation of insolvency law in South Africa

In any legal system, it is crucial to the entire insolvency system that the insolvency regulatory body functions properly. With this in mind, various organisations, such as the World Bank, for example, have set out certain minimum standards to be expected of a regulatory body.²⁹³ Published academic research reflects that the operations of the regulatory body of insolvency law in South Africa, the Master, do not meet the minimum standard and proposals that have been made for the reform of the system of regulation of insolvency law. However, despite the apparent urgency for reform, none of these proposals have been implemented as yet. Thus, no progress has been made.

The Master, as regulator of South Africa's insolvency law, has many powers and duties granted in terms of the Insolvency Act emphasising the crucial role that the Master has to play in insolvency law.²⁹⁴ The Master has a constitutional duty to ensure that 'an efficient, equitable and ethical public administration is provided which respects fundamental rights and is accountable to the broader public.'²⁹⁵ Academics have found that the objectives and outcomes of the regulation of insolvency law are not in line with the Constitution and the values and principles it enshrines.²⁹⁶

Criticisms of the Master's office include the lack of resources and institutional capacity, the lack of sufficient investigative powers and insufficient guidelines for the Master when applying their administrative discretion when appointing provisional insolvency practitioners.²⁹⁷ However, nothing significant has been done to improve the lack of resources and institutional capacity of the Master's office, nor has there been an endeavour to increase the investigative powers of the Master. It is submitted that failure to take into account these criticisms is a major setback for the reform of South African insolvency law.

The lack of regulation of insolvency practitioners in South Africa has also been criticised. This lack of regulation has a negative impact on the performance of the insolvency industry.²⁹⁸ The Master does not have the full authority to regulate the profession nor is there

²⁹³See 1.1 and 3.3.1.

²⁹⁴See 3.2.

²⁹⁵Section 195 of the Constitution of the Republic of South Africa, 1996.

²⁹⁶See 3.3.1 for a further discussion of the Master's constitutional duties.

²⁹⁷ See Chapter 3.3.2 for a comprehensive discussion of the criticisms of the Master laid down by academics.

²⁹⁸ See chapter 3.3.3.2 for a discussion of the regulation of insolvency practitioners in South Africa.

a statutory body or legislation regulating the profession. Frequent criticisms made by academics include that: there are no required qualifications, in terms of the Insolvency Act, for a person to act as a practitioner; inconsistency in training of insolvency practitioners; and insufficient supervision and disciplinary control of practitioners.

Academics have also made recommendations to improve the regulation of insolvency law in South Africa.²⁹⁹ Suggestions have been made that more resources should be granted to the Master's office and there has been consideration of a different body taking over the regulation of insolvency law in South Africa. It has been proposed that precise legislative guidelines should be provided regarding the appointment of insolvency practitioners. It has also been suggested that the Minister issue a formal policy on the appointment of insolvency practitioners. A common recommendation has been that statutory regulation of the profession is a necessity. It is essential that these comments and suggestions be considered in order to achieve an improved regulatory system.

However, some developments have taken place in South Africa with respect to the regulation of insolvency law.³⁰⁰ The most recent one is that a draft policy on the regulation of insolvency practitioners was submitted to NEDLAC in 2012. The policy aims to provide guidelines relating to the appointment of provisional insolvency practitioners. The policy provides criteria, for the appointment of provisional insolvency practitioners, that are in line with BBBEE requirements. The policy requires that persons must satisfy certain criteria before being appointed as a provisional insolvency practitioner of an insolvent estate. The policy also provides for the manner in which the Master's list may be arranged. It is submitted that the draft policy provides sufficient guidelines to enable the Master to apply his administrative discretion properly when appointing provisional insolvency practitioners.

The draft policy also contains a code of conduct that insolvency practitioners must adhere to so that they may be placed on the Master's list. Some of the requirements in terms of the code are that practitioners must conduct themselves in a professional, honourable, impartial manner, may not engage in dishonest and fraudulent conduct and must possess the required skill and knowledge of an insolvency practitioner. The policy creates a council that will enforce and administer the code of conduct. This council will have the authority to issue a

²⁹⁹Refer to chapter 3.4 for a discussion of the recommendations made by academics.

³⁰⁰A discussion of these recent developments is contained in chapter 3.5.

written reprimand or impose a fine or to recommend that a practitioner be removed from the Master's list if he or she contravenes the code.

It is important to note that the policy and its code of conduct only apply to the appointment of provisional practitioners. Thus the code of conduct is inadequate to achieve the level of regulation of the industry that would conform to international standards. The enactment of legislation regulating both provisional and final insolvency practitioners would most likely achieve this. An Insolvency Practitioners Bill has been drafted but it has been suspended pending the initiation of the policy on the appointment of insolvency practitioners. The policy therefore holds the potential to provide temporary regulation of provisional insolvency practitioners until legislation is enacted. However, as things stand, nothing further has been done to implement the proposed policy. It is submitted that the new policy should be implemented in South Africa without any further delay.

5.2 Regulatory systems in foreign jurisdictions

The lack of regulation of insolvency practitioners has been a problem in many foreign jurisdictions. As seen above, in some foreign jurisdictions, there is an apparent tendency to adopt, or to move towards adopting, systems of self-regulation or co-regulation of insolvency practitioners.³⁰¹ Adopting these alternate forms of regulation has been perceived as improving the overall regulation of insolvency practitioners in these jurisdictions.

New Zealand's state regulatory system has been criticised even though the Insolvency Law Reform Bill of 2013 has recently been introduced.³⁰² The regulation of insolvency practitioners in New Zealand is evidently insufficient and there are many gaps which the legislation leaves unfilled. It has been suggested that a self-regulating professional body would be most suitable to fill the lacunae and complement the legislation.

The Australian insolvency profession is regulated by the state. Professional associations (such as the IPA) have initiated codes of conduct supplementing the regulation of the profession.³⁰³ Only members of the association are bound by the codes and this has proved to be a disadvantage since the codes are therefore unenforceable against insolvency practitioners who are not members. One of the two Australian regulating state bodies, ASIC, has supported

³⁰¹Refer to chapter 2 for an explanation of the concepts self-regulation and co-regulation.

³⁰²See 4.2 for a discussion of the regulation of insolvency law in New Zealand.

³⁰³See 4.3 for a discussion of the regulation of insolvency practitioners in Australia.

the code that has been initiated by the IPA, expressing its support for IPA's attempts to assist in the regulation of insolvency practitioners.

Academics have taken note that the codes initiated by the voluntary associations are not formally recognised. Although the IPA code has been approved by ASIC it is not formally recognised, which denotes that practitioners who do not wish to be bound by the code can terminate their membership with the association (if they are a current member) or refrain from being a member of the association. They will still be able to obtain or maintain a licence from ASIC allowing them to practice as a practitioner. The result of this is that the IPA and other voluntary associations are not accountable to anyone but their members. This has prompted academics to suggest that Australia should implement a co-regulatory model to ensure formal recognition of the regulation of the professional bodies.

The Insolvency Act of England and Wales and, once it is enacted, the draft Deregulation Bill requires all insolvency practitioners to be a member of one of the seven listed professional associations.³⁰⁴ The state may also lay down what is expected of the professional association in terms of regulation of insolvency practitioners and lay down criteria of who should be eligible to practice as an insolvency practitioner. It also sets out requirements that the professional body must comply with in order to be able to regulate the profession.

5.3 A comparison of insolvency regulatory systems in foreign jurisdictions and South Africa's regulatory system

South Africa and New Zealand have in place a state regulatory system that regulates insolvency practitioners. There is a requirement for an improved regulatory system in both jurisdictions. However, New Zealand, in contrast to South Africa, has made attempts to improve its regulatory system by initiating draft legislation to regulate the profession and by considering self-regulation of the profession.

Australia's insolvency profession is self-regulated. However, propositions have been made for the profession to be co-regulated. In England and Wales, insolvency practitioners are co-regulated. It is submitted that if Australia were to adopt a co-regulatory system, its licensing system would also have to be reconsidered, and possibly even be removed, to avoid a conflict of interest, similar to that which arose in England and Wales. The system in England and

³⁰⁴See 4.4 for a discussion of the regulation of insolvency practitioners in England and Wales.

Wales, if the Bill were to enacted, would be the most apposite co-regulatory model to follow.³⁰⁵

5.4 Concluding remarks

It is submitted that state regulation of insolvency practitioners on its own is inadequate to regulate the insolvency profession, regardless whether a self-regulatory system or a co-regulatory system is adopted. There is a vital need for insolvency professional bodies to assist in the regulation of practitioners. It is evident that developments in foreign jurisdictions, in this regard, have been more advanced than those in South Africa. It is submitted that, in this country, the state has failed to fulfil its constitutional duties to protect societal interests and that the position is also out of step with foreign jurisdictions. The outcome of the lack of progress and development is that we are still encountering the same problems and set-backs in our regulatory system which were noted by academics some time back.

In the circumstances, the existing divide between the position in South Africa and that in foreign jurisdictions is widening and it is submitted that this emphasises the urgency with which South Africa needs to address the reform of its insolvency regulatory system.

³⁰⁵ See 4.5 for the comparisons drawn between the regulation in foreign jurisdictions and the regulation in South Africa.

BIBLIOGRAPHY

BOOKS

- Baldwin R, Cave M *Understanding regulation: Theory Strategy and Practice* Oxford University Press Oxford 1999
- Bertelsmann E, et al *Mars: The Law of Insolvency in South Africa* (9th ed) Juta 2009
- Burns Y *Administrative Law under the 1996 Constitution* Lexis Nexis 2003
- Hoexter C *The New Constitutional and Administrative Law* (Vol 2) Juta 2002
- Hoexter C *The Concise Oxford English Dictionary* (12 ed) Oxford University Press 2011

JOURNAL/ ARTICLES

- Calitz J 'Some thoughts on state regulation of South African Insolvency Law' *De Jure* 2011 290.
- Calitz J 'Historical overview of state regulation of Insolvency Law in South Africa' *Fundamina* 16 (2) 2010 1.
- Calitz J, Boraine A 'The Role of the Master of the High Court as Regulator' *TSAR* 2005 728.
- Calitz J, Burdette DA 'The Appointment of Insolvency Practitioners in South Africa: Time for a Change?' *TSAR* 2006 721.
- Calitz J 'System of Regulation of South African Insolvency Law: Lessons from the United Kingdom' *Obiter* 2008 352.
- Dal Pont G 'What are the rules of professional conduct for?' *New Zealand Law Journal* 1996
- Loubser A 'An International Perspective on the Regulation of Insolvency Practitioners' *SA Merc Law Journal* 2007 123.
- Page AC 'Self-regulation and Codes of Practice' *Journal of Business Law* 1980

Woods G 'Making corporate self-regulation effective in developing countries' *World Development* Vol 34 (5) 2006

ONLINE JOURNAL/ARTICLES/SOURCES

Brown D, Symes C 'Insolvency practitioner regulation: providing practice standards through the use of codes of conduct' available at www.law.adelaide.edu.au/research/bils/docs/Brown-Symes-Insolvency-practitioner-regulation.pdf

Sender 'Soft law, Self-regulation and Co-regulation in European law: Where do they meet' *Electronic Law Journal of Comparative Law* (Vol 9.1) 2005 available at www.ejcl.org

Kunst J, King *Jet al* *Meskin Insolvency Law* (loose-leaf edition) Lexis Nexis available on Lexis Nexis database

World Bank 'Insolvency Law and the regulatory framework' 2000 available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/LAWANDJUSTICE>

World Bank 'Principles for effective insolvency and creditor right systems' 2005 available at http://www.worldbank.org/ifa/ipg_eng.pdf

World Bank 'Insolvency Law and regulator framework' – Finland at <http://web.worldbank.org>

REPORTS

South African Law Reform Commission *Report on the Review of the Law of Insolvency* Project 63, Report Vol 1 Explanatory Memorandum 2000

Schultz W et al 'Study on co-regulation measures in the media sector' Final report (2006) available at http://ec.europa.eu/avpolicy/docs/studies/coregul/final_rep_en.pdf

USAID Financial Sector Program Report 'Insolvency systems in South Africa strengthening the regulatory framework' December 2010

Australian Department of Finance and De-regulation – Regulation Impact statement 'the harmonisation and modernisation of the regulatory framework applying to insolvency practitioners in Australia' 03 January 2012 available at <http://ris.finance.gov.au/files/2012/01/03-Insolvency-Practitioners-RIS.pdf>

TABLE OF CASES

Die Meester v Protea Assuransiematskappy Bpk 1981 (4) SA 685 (T)

Distributive Catering Hotels and Allied Workers Union v Master of the High Court and others (6438/2005) [2006] ZAGPHC (11 May 2006)

Ex Parte: Master of the High Court of South Africa (North Gauteng) 2011 (5) SA 311

President of the RSA v SARFU 2000 (1) SA 1 (CC)

The Master v Talmud 1960 1 SA 236 (C)

Wilkens v Potgieter 1996(4) SA 936 (T)

TABLE OF STATUTES

Administration of Estates Act 66 of 1965

Companies Act 71 of 2008

Companies Act 61 of 1973

Constitution of the Republic of South Africa Act 108 of 1996

Insolvency Act 24 of 1936

England and Wales Insolvency Act of 1986

Judicial Matters Amendment Act 16 of 2003

Trust Property Control Act 57 of 1988

KEY NOTE ADDRESSES/SPEECHES AND PAPERS PRESENTED

Fitzpatrick J, Symes C 'A primal sketch of an insolvency ombudsman' Paper presented to INSOL Academics Meeting, Singapore, March 2011

Key note address by Deputy Minister of Justice and Constitutional Development, Mr Andries Nel, MP at the International Association of Insolvency Regulators annual general meeting and conference, Hilton Hotel, Sandton available at

<http://www.info.gov.za/speech/DynamicAction?pageid=431&tid=5229>

Key note address by Greg Medcraft, the chairman of ASIC at the IPA National Conference 9 May 2013 available at [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Keynote-address-to-Insolvency-Practitioners-Association-of-Australia-National-Conference-2013.pdf/\\$file/Keynote-address-to-Insolvency-Practitioners-Association-of-Australia-National-Conference-2013.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Keynote-address-to-Insolvency-Practitioners-Association-of-Australia-National-Conference-2013.pdf/$file/Keynote-address-to-Insolvency-Practitioners-Association-of-Australia-National-Conference-2013.pdf)

Lawrence Basset 'His Master's voice: a message from the regulator' unpublished paper presented at the AIPSA conference Johannesburg 2009 available at <http://www.saripa.co.za/downloads/conf2009LawrenceBasset.pdf>

The Hon. Michael Kirby, 'Bankruptcy and insolvency: change, policy and the vital role of integrity and probity' address to IPA national conference 19 May 2010

DIRECTIVES

Chief Masters Directive 5 of 2009

POLICIES

Minister of Justice and Constitutional Development: 'Policy on the appointment of insolvency practitioners' submitted to NEDLAC July 2012

CODES

IPA code of professional practice for insolvency practitioners Third edition

DRAFT BILLS AND BILLS

United Kingdom Draft Deregulation Bill July 2013 available at www.parliament.uk/business/committees/committees-a-z/joint-selection/draft

New Zealand : Insolvency Practitioners Bill Second reading Sitting date: 26 September 2013 Vol 693 page: 13820 www.parliament.nz

SUBMISSIONS AND CONSULTATION DOCUMENTS

Brownes D, Symes C Submission to senate enquiry into liquidators and administrators 19 March 2010 available at <http://senate.aph.gov.au/submissions/committee.pdf>

Submission of the IPA to the productivity commission –Regulatory Burdens 1 April 2010 available at [www.pc.gov.au/ data/assets/pdf_file0011/95609/sub007.pdf](http://www.pc.gov.au/data/assets/pdf_file0011/95609/sub007.pdf)

Insolvency Practitioner regulation consultation document 17 June 2013 available at www.insol.org.nz

LLD THESIS

Calitz J 'A Reformatory Approach to State Regulation of Insolvency Law in South Africa' LLD thesis University of Pretoria 2009

ONLINE NEWSPAPER ARTICLES AND PRESS RELEASES

IOL Business 'Black liquidators oppose white choice' 3 November 2013 available at <http://www.iol.co.za/business/companies/black-liquidators-oppose-white-choice-1.1601348>

'New measures to streamline insolvency regulation announced' 01 July 2013 available at <http://insolvency.presscentre.com/Press-Release.New-measures-to-streamline-insolvency-regulation-announced-68efa.aspx>