Provisional trustees and liquidators; appointment and powers and duties of trustees and liquidators

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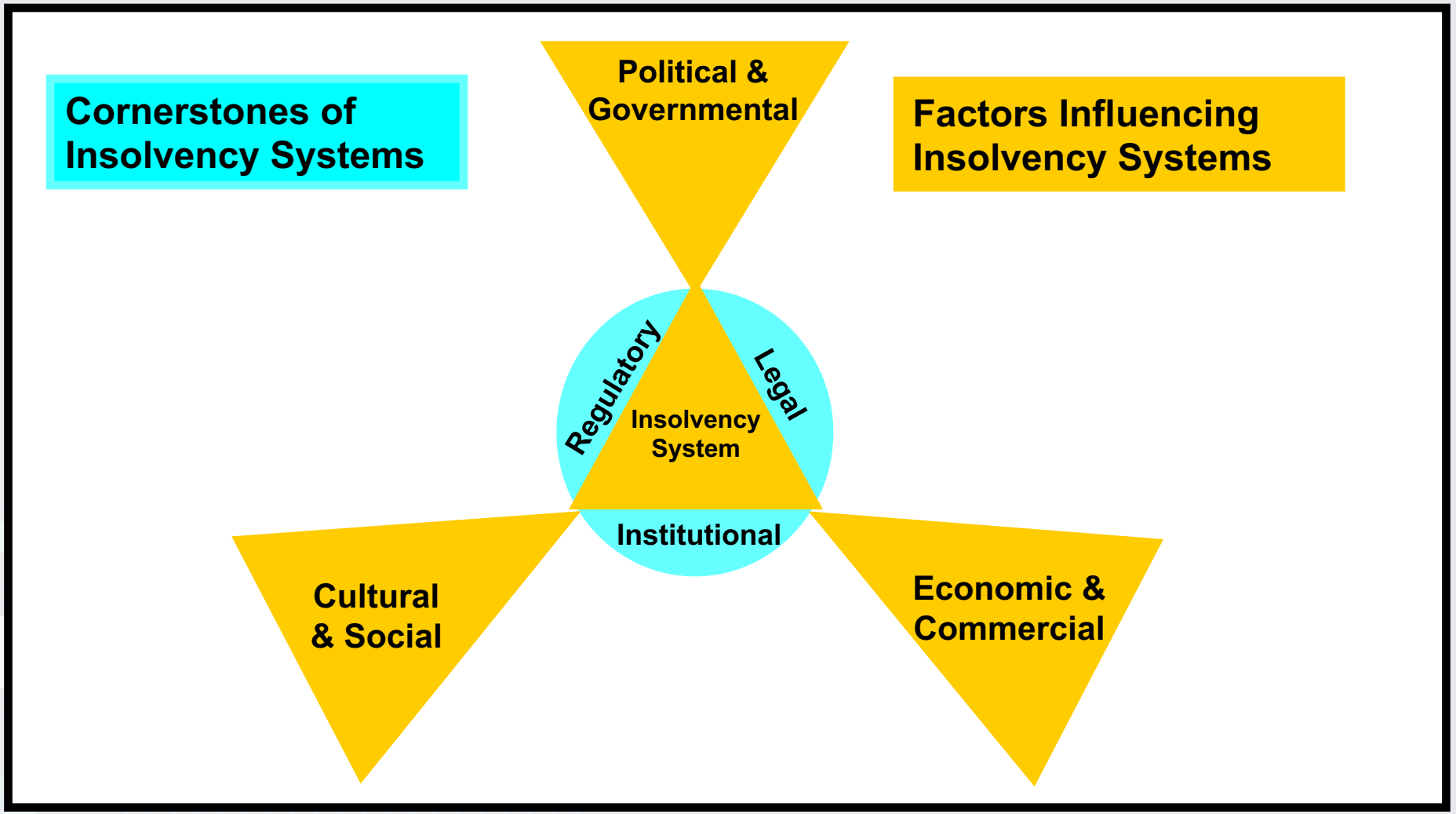
CONTEXT FOR INSOLVENCY SYSTEMS



REGULATION AND APPOINTMENT OF INSOLVENCY PRACTITIONERS

- **TERMINOLOGY**
- "Insolvency practitioner" is the generic term used in SA = the appointment of both trustees (sequestrated estates) and liquidators (companies and close corporations in liquidation)
- Internationally + international legal instruments:
  - the World Bank and UNCITRAL = the term office holder is often used
  - certain jurisdictions in the context of receiverships, administration and business rescue = administrator
  - whereas in SA the new Co Act refers to = bus rescue practitioner.

NEED FOR REGULATION?

Basic Principle:

Insolvency administrators should have the experience and expertise necessary to handle the range of business and legal issues which arise in insolvency…

General trend towards regulation in recent years reflects:

- A general recognition of the need to bring financial activities within a formal framework
- The limits of court time and expertise to supervise individual cases
- Professional bodies' desire to raise standards and protect reputations
- Recognition of the increasing complexities of insolvency

MESSAGE FROM INTERNATIONAL COMMUNITY?

- Insolvency laws and systems are increasingly being recognised as-

1. fundamental institution, essential for the development of credit markets and entrepreneurship in developing countries
2. in turn, those insolvency systems depend on the existence of sound and transparent institutional and regulatory frameworks
3. and of individuals with the required competence, independence, impartiality and integrity working within those frameworks

INTERNATIONAL ASPECTS OF REGULATION

WORLD BANK STUDY + MENA REGION:

Insolvency and creditor rights are part of market infrastructure, and they are part of the core standards for sound financial systems…a government's credibility, the predictability of its rules and policies and the consistency with which they are applied, can be as important for attracting private investment as the content of the rules….

PROFILE?

- be independent of individual representatives
- set standards that reflect the requirements of the legislation and public expectations of fairness, impartiality, transparency and accountability and
- have appropriate powers and resources to enable them to discharge their functions, duties and responsibilities effectively

DIFFERENT MODELS:

- Different models have emerged. Regulation may be undertaken or overseen by:
  - A government department or agency or public body –STATE REGULATION
  - One or more private sector professional bodies
  - A combination of government and professional body
  - The courts
- …and may be on the basis of:
  - Licence
  - Membership of a professional body
  - Individual cases

STATE REGULATION

- 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.
- State also has a constitutional duty to perform its tasks properly and protect the public interests.
- Improper decision is made by the regulatory body, whether it is a state or non state entity, a person can usually challenge this decision under administrative law.
- **Disadvantage** is that, because legislation is enacted it is less flexible and responsive to change, compared to the self-regulatory and co-regulatory models.

SA LAW:
MASTER OF THE HIGH COURT

- The Master of the High Court (Master) acts as the insolvency regulator in the South African insolvency law
- The Master is appointed in terms of the Administration of Estates Act:
  - **[I]n 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.**
- ***Definition of "Master" substituted by s 1 (d) of Administration Of Estates Laws Interim Rationalisation Act 20 of 2001 and by s 2 of Judicial Matters Amendment Act 22 of 2005***

REGULATION IN SA?

- NO REGULATION (BOND OF SECURITY)
- the system flawed and open to abuse
- regulation of the IP -take cognisance of the socio-economic realities that prevail in South Africa
- **any regulatory measures need to be of an international standard so that foreign investors will have the peace of mind that their affairs will be conducted in an impartial and regulated environment**

REGULATION OF IP'S FROM SA PERSPECTIVE:

- Since its core insolvency legislation hails from 1936, the South African Law Reform Commission, as far back as the late eighties, embarked on an extensive study of South African insolvency law with the view to substituting the Insolvency Act of 1936 with a proposed unified act
- It is clear from the changes and recommendations suggested by the Commission that no substantial policy-driven or empirical investigation in respect of regulation in South African insolvency law had been undertaken and as a result, except for a few technical and perfunctory suggestions, the status quo had been more or less maintained
- The Master of the High Court acts as the insolvency regulator in the South African insolvency law

LONG AND WINDING ROAD…TO LAW REFORM

- A story that started in the late 1980s …
- Final version of the Draft Unified Insolvency Bill – 2000
- 2003 = Draft Insolvency and Business Recovery Bill to the Chief State Law Advisers
  - Ito of the Uniform Bill the Master would remain responsible for the supervision of ins law as well as appointments
  - Members of a professional body will qualify to be appointed
  - Minister to recognises the prof body
- NO Business Rescue provisions?
- Unified Insolvency Act came to a grinding halt…

APPOINTMENT OF PROVISIONAL TRUSTEE/LIQUIDATOR

S 18(1) :

(1) As soon as an estate has been sequestrated (whether provisionally or finally) or when a person appointed as trustee ceases to be trustee or to function as such, the Master *may*, in accordance with *policy determined* by the Minister, appoint a provisional trustee to the estate in question who shall give security to the satisfaction of the Master for the proper performance of his or her duties as provisional trustee and shall hold office until the appointment of a trustee (emphasis added)

APPOINTMENT OF PROVISIONAL TRUSTEE/LIQUIDATOR

S 368. Appointment of provisional liquidator.—As soon as a winding-up order has been made in relation to a company, or a special resolution for a voluntary winding-up of a company has been registered in terms of section 200, the Master may, in accordance with policy determined by the Minister, appoint any **suitable person** as provisional liquidator of the company concerned, who shall give security to the satisfaction of the Master for the proper performance of his or her duties as provisional liquidator and who shall hold office until the appointment of a liquidator

MASTER'S DISCRETION

- The Master has statutory authority to appoint a provisional trustee
- No COURT has the authority or jurisdiction to appoint any person as provisional trustee, nor to make any recommendations to the Master in respect of any appointment of a provisional trustee
- Any order by the court that appoints a provisional trustee is a nullity and does not have to be set aside
- The doctrine of functus officio dictates that the decisions of officials are deemed to be final and binding once made SEE= *De Wet v Khammissa…*The court confirmed that the decision of the Master, as an officer of the court, is deemed to be final and binding once it is published, announced or otherwise conveyed to those affected by it
- NB= *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper* 2018 (4) SA 71 (SCA) at para [32] + Ex parte Knoop [2019] ZAKZDHC 25 - Court held that only the Master has the authority to validly appoint a trustee
- *In Munsamy v Astron Energy (Pty) Ltd* 2022 (4) SA 267 (GJ) the court again confirmed that neither the wishes of the creditors nor an order of the court, can replace the Master's decision

APPOINTMENT PROCESS

- **COURT ORDER**
- **REQUISITION SYSTEM?**
- **MASTER'S PANEL?**

The adding or exclusion of persons from the panel is administrative action for the purposes of the Promotion of Administrative Justice Act and can be reviewed by a court = *Motala v Master of the North Gauteng High Court, Pretoria* 2019 (6) SA 68 (SCA) (17 May 2019)??

NEW APPLICATIONS FOR ADMISSION TO THE ACTIVE INSOLVENCY PRACTITIONERS LIST

1. **Qualifications:**
   Any person who has the following qualifications **or** is an admitted attorney, may apply to be considered for inclusion in the National list of liquidators:
   1. LLB
   2. B Proc
   3. B Com
2. **Intakes for new applicants will take place twice annually (May and October). The closing dates for submission of new applications before each intake will be March and August.**
3. **Assessments of new applicants consists of a written test, as well as a short interview. Candidates should have knowledge of the following in preparation of such assessment:**
   1. Insolvency Act 24 of 1936;
   2. Companies Act 61 0f 1973;
   3. Companies Act 71 of 2008;
   4. Close Corporations Act 69 of 1984;
   5. Relevant Case Law;
   6. Latest developments in the insolvency and liquidation industry.
4. **For purposes of the assessment process, should you have met the requirements to be shortlisted, you need to bring:**
   1. ID document or valid drivers' licence;
   2. Own stationary and calculator
5. **Note: Candidates will not be allowed access to their cellular phones during the assessment period.**
6. **Affidavit for new applicants**
   The below-linked information affidavit must be completed and must be lodged, together with the annexures thereto, to the following e-mail address before the closing dates of each intake as mentioned above.

AFFIDAVIT OF NON -INTEREST

- https://www.justice.gov.za/master/m_forms/moh-NewAffidavit-NonInterest.pdf
- https://www.justice.gov.za/master/m_forms/moh-insolv-AffidavitRENEW-Form.pdf

- The “affidavit of non-interest” declares that a person is not disqualified from being appointed. The phrase “non-interest” refers in particular to the requirements of s 55(b) (that the candidate is not related to the insolvent within the specified degree), s 55(e) (that the candidate has no interest opposed to the general interest of the insolvent estate; see also “Independence and impartiality of trustee” below) and s 55(l) (that the candidate has not during the 12 months preceding sequestration acted as bookkeeper, accountant or auditor of the insolvent).

PRACTITIONERS' LEGAL POSITION?

- Officer of the court??
- *Standard Bank v The Master of the High Court* - Liquidators occupying position of trust towards creditors and companies in liquidation — required to be independent and to regard equally the interest of all creditors — expected to carry out their duties without fear, favour or prejudice — standard not met — liquidators removed and fees reduced.
- Liquidators must realise that they perform important functions. The Master, creditors and importantly courts rely on them. In the liquidation process they are expected to act impeccably. The profession must be under no illusion that courts, in appropriate circumstances, when called upon to do so will act to ensure the integrity of the winding-up process.'

MINISTER'S POLICY

- **Judicial Matters Amendment Act No. 16 of 2003-**
- authorises the Minister to determine a policy for the appointment of insolvency practitioners by the Master.
- aim of the legislation was first to create uniform procedures in all Masters' offices for the appointment of these functionaries
- promote the image of the insolvency practitioners and of the Master's division,
- secondly to promote consistency, fairness, transparency and the achievement of equality in these appointments by the various Masters.
- The objective was thus to incorporate the principles of a previous "informal" policy document into legislation.

S 158

- **158. Regulations and policy.**—(1) The Minister may from time to time make regulations not inconsistent with the provisions of this Act, prescribing—

(*a*)the procedure to be observed in any Master's office in connection with insolvent estates

(*b*)the form of, and manner of conducting proceedings under this Act;

(*c*)the manner in which fees payable under this Act shall be paid and brought to account

(2) The Minister may determine policy for the appointment of a *curator bonis*, trustee, provisional trustee or co-trustee by the Master in order to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination

(3) Any policy determined in accordance with the provisions of subsection (2) must be tabled in Parliament before publication in the *Gazette*

POLICY?

- In 2003 -Judicial Matters Amendment Act
- This amendment to the current Act authorises the Minister of Justice and Constitutional Development to determine a policy for the appointment of insolvency practitioners by the Master
- S 158 of the Insolvency Act empowers the **Minister** to determine a policy for the appointment of provisional liquidators, provisional trustees, trustees, co-trustees and co-liquidators as well as curatores bonis to insolvent estates
- The purpose of such policy must be to ***"promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination"***

THE NEW POLICY

In summary, the appointment of liquidators with effect from 31 March 2014 (?) will be based on a mechanical process of allocations derived from lists which the Master is required to compile and maintain, classifying practitioners into the following categories:

- Category A: African, Coloured, Indian and Chinese females;
- Category B: African, Coloured, Indian and Chinese males;
- Category C: White females; and
- Category D: White males

+

- 4:3:2:1 rule

THE “NEW” POLICY?

- The only exception to the allocation according to this directive is that the Master **may**, having regard to the **complexity** of the matter and the **suitability** of the next-in-line insolvency practitioner, but subject to any applicable law
- appoint a **senior practitioner*** jointly with a junior or senior practitioner appointed in alphabetical order
- In those limited circumstances, the Master must then motivate the appointment of this individual and explain such appointment to the practitioner who would otherwise have been appointed but for the exercise of this discretion.
- **According to the new policy, a senior liquidator must have received one instruction per year for a five-year period to qualify as senior.*

SARIPA V MINISTER OF JUSTICE… HIGH COURT?

1. SARIPA claimed that the policy creates an '**inflexible mechanism**' for the appointment of practitioners due to the rigid process whereby the Master is to appoint the next-in-line practitioner without exception and therefore unlawfully encumbers the discretion of the Master.
2. SARIPA's second argument was that the policy infringes the right to **equality** as set out in section 9 of the Constitution.
3. The third argument entailed that the policy is itself was irrational due to it not being '**clear that the policy will in fact benefit those whom it is designed to assist'.**
4. And it was finally argued that the policy is ultra vires and 'any policy which the Minister determines must not only be consistent with section 158(2) of the Insolvency Act but must also not be in conflict with the intention of the legislature, which is that the trustee of an insolvent estate should be elected as such by the creditors'.

JUDGMENT?

- Katz J, subsequently ruled the policy to be invalid…
- The judgement concerned two separate applications challenging the constitutionality of the policy in terms of sections 9, 10, 22 and 33 of the Constitution and on the basis of unlawful exercise of public power.
- The main gist of the judgement rests on the notion that the policy was too rigid and used race- and gender based quotas as consideration
- Firstly, it is ultimately the Master who the legislature has decided is responsible for the appointment of insolvency practitioner and has to apply his/her discretion when making an appointment.
- The Policy puts in place a rigid, inflexible regime in which the Master effectively becomes a rubber stamp which must appoint a designated person by rote from fixed lists arranged alphabetically and on race and gender lines.
- This results in an unlawful fettering of his/her discretion.
- Secondly, the Policy introduces an inflexible race and sex-based appointments process which ultimately proves to be too rigid.

SCA?

- SCA= that remedial measures must operate in a progressive manner assisting those who, in the past, were deprived of the opportunity…such measures must not unduly invade the dignity of those affected by them.
- Court found that remedial measures may not display naked preference.
- The judges held that the implementation of a racial quota system is one such form of naked preference.
- SCA found there was no flexibility in the policy ruling the appointment of insolvency practitioners. Such rigidity is frowned upon and runs contrary to section 9(2) of the Constitution. The Constitutional Court has already prohibited such rigidity.
- SCA also found that, in its current format, the appointment policy could result in a person who is unsuitable and unqualified for such an appointment being appointed as liquidator.

WHY DISCRETION?

- Why is it necessary for the Master to have a discretion to appoint a person with experience in the estate of a mine or a chicken farm?

- *Ex Parte The Master of the High Court South Africa* (North Gauteng) Bertelsmann J held *…that the Master is the only functionary entitled to appoint provisional trustees, liquidators and judicial managers, taking into account creditors' directives. In so doing he stated the following with regard to the rationale for the wide discretion granted to the Master:- "An organisation of this nature (the Master's office) has the institutional knowledge and expertise to apply policy, and to assess the ability and integrity of trustees and liquidators, and is therefore able to judge whether or not individuals are duly qualified to be appointed, either at all or to a specific estate."*

MINISTER OF JUSTICE AND ANOTHER V SA RESTRUCTURING AND INSOLVENCY PRACTITIONERS' ASSOCIATION AND OTHERS 2018 (5) SA 349 (CC)

- *While the policy targets persons who were disadvantaged by unfair discrimination, it does not appear from the information on record that the policy is likely to transform the insolvency industry. In light of the paucity of information on the implementation of the policy, it cannot be said that the policy is likely to achieve the goal of equality (para [40]). The implementation of category D is unlikely to achieve equality in the future. This is because appointing one practitioner in alphabetical order from this category entrenches the status quo. Since white males are in the majority, most appointments would go to them (par [41]). Moreover, the category impermissibly discriminates against other races on the ground that the became citizens on or after 27 April 1994 (para [41]). The failure by the Minister to provide reasons justifying why disadvantaged people should be treated differently, on account of the date on which they became citizens, establishes the arbitrariness of the policy (para [54]).*

Independence and impartiality of practitioner…

- *James v The Magistrate, Wynberg*

v

- *Receiver of Revenue, Port Elizabeth v Jeeva; Klerck v Jeeva*

- **“Harms JA stated that the fact that a liquidator has fiduciary duties towards, say, creditors, does not mean that the liquidator can always be even-handed in their approach.The liquidator is obliged, should the occasion arise, to dispute a creditor’s claim or to impeach a transaction. The mere possibility that there will be a conflict of interests does not disqualify someone if that possibility is so remote that for all practical purposes it can be disregarded. The possibility that the appointment of a person would lead to bias must be weighed against the convenience and advantages of the same person dealing with all related matters. There are decided cases where the appointment of a person with an interest in a matter was approved, or removal refused, due to the circumstances of the case.”**

FISHER V VUSELA CONSTRUCTION (PTY) LTD (IN LIQUIDATION)

- *Fisher v Vusela Construction (Pty) Ltd (In Liquidation)* – attorneys for the liquidators initially acted for the liquidators and for the company under business rescue, acted for the business rescue practitioner, and were the attorneys of record in the liquidation application. One of the joint provisional liquidators was a co-director in the same company as the business rescue practitioner, both of whom had been recommended by the attorneys. Where the business rescue practitioner and another person are members of the same firm, it does not disqualify the other person from appointment as liquidator

POWERS AND DUTIES OF PROVISIONAL TRUSTEE

- Master may before the first meeting give such directions to the provisional trustee as could be given to a trustee by creditors at a meeting=
  - *SAI Investments v Van der Schyff*… a sale by a provisional trustee without the prior consent of the Master was a nullity which cannot be ratified by subsequent consent
- *Beer v Dundee*- the court established that in terms of the Companies Act or the Insolvency Act a person can only act as a provisional trustee or liquidator once appointed by the Master and will only have to powers to act once in possession of the appointment certificate.
- A provisional trustee has the powers and duties of a trustee, except that the provisional trustee may not without the authority of the court bring or defend legal proceedings or sell property of the estate without the authority of the Master or the court
- Powers which may be exercised by a final trustee only if authorised by creditors, may be exercised by a provisional trustee only before the first meeting of creditors and with the consent of the Master

- LIQUIDATOR?

REMOVAL FROM OFFICE

- The Master may remove a trustee from office if, inter alia, the trustee or liquidator was not qualified for appointment, or has become disqualified from appointment, or has acted on authority of a power of attorney to vote on behalf of a creditor, or has failed to perform satisfactorily any duty imposed upon them by the Act, or to comply with a lawful demand of the Master, or if in the opinion of the Master the trustee or liquidator is no longer suitable to be the trustee of the estate concerned
- The Court had the power to remove the trustee of an insolvent estate on the ground of his misconduct as a trustee and this power has not been displaced by the Insolvency Act

AGGRIEVED BY THE APPOINTMENT BY THE MASTER ?

- Appeal to the Minister and provision is made for a further meeting to elect a trustee-s 57 of the Insolvency Act and ss 370 and 371 of the Companies Act.
- INTERNAL REMEDY
- Before someone can apply to a court to review an admin action, important rule in PAJA– the rule of exhaustion of internal remedies

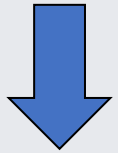
REMOVAL OF LIQUIDATOR

- Liquidators-removed from office- Master should apply the audi alteram partem rule- if removed in terms of section 379(1)(d) of the Companies Act
- Murray N.O and Others v Master of the High Court, Pretoria (2023/016586) [2023] ZAGPPHC 457 (9 June 2023)

SA APPROACH?

- Policy review…

- Fragmented approach?



- Own opinion?

RECOMMENDATIONS

- 3 PILLAR APPOACH?
- REGULATOR + IP + COMPLAINS MECHANISM
- PROFESSIONAL BODY?
  - Infrastructure + COSTS
  - code of conduct
  - interaction with regulator

- LAW IS ONLY PART OF THE SOLUTION…. It is also increasingly recognised by law and finance scholars who assert that law inherently is “incomplete,” that its effectiveness relies heavily on the institutions of implementation.
  - Weigh the possibility of corruption within the agency against the likelihood of corruption without it.

Following statement by Halliday is very relevant…

- *the implementation and institution building are an important as - indeed arguably more consequential than- formal lawmaking. It is a dangerous illusion that the legal framework and institutions of an effective insolvency system can be done cheaply. Effective bankruptcy systems require the careful design, infrastructural expenditure, and political will comparable to major infrastructural projects in transportation or energy or defence. This is especially so in circumstances where there is rapid economic development and social dislocation in a society that had previously invested little in legal institutions. Failure of government to act boldly and decisively can lead not only to incapacity but instability in society and ultimately the market…*

THANK YOU

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