

*A Reformatory Approach to State Regulation of Insolvency Law in
South Africa*

PART IV

**CONSTITUTIONAL AND ADMINISTRATIVE LAW ASPECTS OF
STATE REGULATION OF SOUTH AFRICAN INSOLVENCY LAW**

SUMMARY

1	INTRODUCTION.....	163
2	THE CONSTITUTIONAL LAW ASPECTS OF STATE REGULATION OF SOUTH AFRICAN INSOLVENCY LAW.....	165
2.1	INTRODUCTION.....	165
3	ADMINISTRATIVE LAW ASPECTS OF STATE REGULATION OF SOUTH AFRICAN INSOLVENCY LAW.....	169
3.1	INTRODUCTION.....	169
3.3	THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT	170
3.4	PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000.....	190
4	CONCLUSION.....	195



CHAPTER 1: INTRODUCTION

The South African Constitution is different: it ... represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and a commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.¹

In the case of *Pharmaceutical Manufacturer's Association of South Africa: In re Ex Parte President of the Republic of South Africa*² Chaskalson P confirmed that there is only one system of law in South Africa and that all law, including the common law, derives its force from the Constitution of the Republic of South Africa.³ As the supreme law of the land the Constitution has changed the face of our law dramatically in that legislation may now be tested by the courts in order to establish its constitutionality.⁴ From this it also follows that any attempt at law reform in any specific field of South African law must take cognisance of the supremacy principle.⁵

The Constitution featuring a Bill of Rights⁶ was not in place when the Insolvency Act⁷ came into force. Consequently, the values and principles entrenched in the Constitution in many instances differ radically from the values, principles and policies that formed the foundation of the Insolvency Act.⁸ Since the central concern of this thesis is to investigate certain aspects of state regulation in South African insolvency law with the view to ultimately proposing a framework within which further law reform can take place, it will be necessary to refer also to the applicable constitutional and administrative law aspects. The aim is to ensure that any recommendations that are eventually proposed would constitute a more accurate reflection of the current legal, socio-political and economic environment in South Africa.⁹

¹ *S v Makwanyane* 1995 6 BCLR 665 (CC); 1995 3 SA 391 (CC) at 262.

² 2000 2 SA 674 (CC). See Davis "To Defer and then When? Administrative Law and Constitutional Democracy" (2006) *Acta Juridica* 23 (hereafter referred to as Davis).

³ Constitution of South Africa, 1996. Hereafter referred to as the Constitution. In terms of s 1(2) of the Citation of Constitutional Laws Act 5 of 2005 which came into operation on 2005-06-27 all references to the Constitution of the Republic of South Africa Act 108 of 1996, have been replaced by the Constitution of South Africa, 1996. See Hoexter *Administrative Law in South Africa* (2006) 29 (hereafter referred to as Hoexter).

⁴ Dlamini "The Right to Administrative Justice in South Africa" (2000) *TSAR* 697 at 701 (hereafter referred to as Dlamini).

⁵ Burns *Administrative Law under the 1996 Constitution* (2003) 1 (hereafter referred to as Burns).

⁶ The Bill of Rights is set out in ch 2 of the Constitution. See generally: Currie *The Bill of Rights Handbook* (2005) (hereafter referred to as Currie).

⁷ Act 24 of 1936. Hereafter referred to as the Insolvency Act or Insolvency Act of 1936.

⁸ See Evans *A Critical Analysis of Problem Areas in respect of Assets of Insolvent Estates of Individuals* (2009) 379 LLD dissertation University of Pretoria (hereafter referred to as Evans).

⁹ Davis 23.

This part of the study commences with a few general remarks on the impact of the Constitution on insolvency law and in particular the regulation of insolvency law as conducted by the Master. The focus then shifts to a brief discussion of certain aspects of administrative law, in particular the Promotion of Administrative Justice Act¹⁰ as it relates to the powers and functions of the Master. It must be stated here that the aim of this study is not to provide a detailed exposition or comprehensive overview of constitutional and administrative law, but rather to highlight the relevance and potential impact of these branches of South African law on the functioning and day-to-day operation of a regulatory institution in South African insolvency law. The overall intention is to ensure that when proposals for future law reform are made this is done within the spirit of the Constitution.

¹⁰ Act 3 of 2000. Hereafter referred to as “PAJA”. This Act came into force on 2000-11-30, except ss 4 and 10 which came into force on 2001-07-31.



CHAPTER 2: CONSTITUTIONAL LAW ASPECTS REGARDING STATE REGULATION OF SOUTH AFRICAN INSOLVENCY LAW

2.1 INTRODUCTION

With the recognition of the Constitution as the supreme Act of the land, the legal community in South Africa had to adapt from the old concept of parliamentary sovereignty to a new model of constitutional democracy.¹¹ In *Holomisa v Argus Newspaper Ltd*¹² Cameron J (as he then was) summarised this principle very well: “The Constitution has changed the “context” of all legal thought and decision-making in South Africa”.¹³ Although the Constitution must inform the way legislation is interpreted by the courts, there is currently no constitutional court decision or secondary source which deals directly with the application of the Constitution to state regulation in South African insolvency law.¹⁴ Despite the lack of a thorough treatment of the subject of the constitutional aspects of the role of the Master in general, it is clear that the law of insolvency cannot possibly escape the reach of the Bill of Rights, given the contentious nature of an insolvency status and the various conflicting interests involved.¹⁵

¹¹ Hoexter “‘Administrative Action’ in the Courts” 2006 *Acta Juridica* 303 (hereafter referred to as Hoexter “‘Administrative Action’ in the Courts”).

¹² 1996 6 BCLR 836 (W) at 836J.

¹³ Botha “Administrative Justice and Interpretation of Statutes: A Practical Guide” 14 in Lange *The Right to Know* (2004) (hereafter referred to as Lange *The Right to Know*).

¹⁴ Thus far most of the constitutional cases pertaining to South African insolvency law have either dealt with constitutionality in general, or with certain aspects of the legal concept of interrogations within the context of South African insolvency law. See, eg, *De Lange v Smuts* 1998 3 SA 785 (CC); *Bernstein and Others v Bester and Others NNO* 1996 2 SA 751 (CC); *Ferreira v Levin NO* 1996 1 SA 984 (CC). Other insolvency-related aspects which have been subject to judicial scrutiny include s 21 of the Insolvency Act in the case of *Harksen v Lane* 1998 1 SA 300 (CC). See also part 4 in Evans for a detailed discussion of s 21 of the Insolvency Act.

¹⁵ An interesting aspect of the development of regulation in South African insolvency law is the question of how the insolvency profession came to be one of the only unregulated professions in the country. The answer could perhaps be found in the implementation of the previous government’s *apartheid* policy, which in particular formed the basis of a vast system of institutionalised segregation and oppression and few areas of life in South Africa were left untouched (see *President of the RSA v SARFU* 2000 1 SA 1 (CC) at 33). The *apartheid* policy also infiltrated the world of insolvency. The reason for the insolvency industry being largely unregulated is probably due to the fact that until 1994, the insolvency industry consisted of only more or less 200 insolvency practitioners countrywide. They in turn consisted of a small group of white men who had very little competition. Accordingly for decades the industry existed as a closed monopoly. As a direct result the view had always existed that due to the exclusivity and size of the industry, regulation did not seem practical or economically viable. Due to the transformation efforts of government based on the fundamental right against unfair discrimination embedded in the Constitution, the state of affairs in the insolvency industry has gradually been changing and there has been a dramatic increase in the number of practitioners. In certain spheres of the industry the negative attitude towards regulation however still exists and recent attempts to introduce some form of statutory regulation had been unsuccessful. See Calitz “The Appointment of Insolvency Practitioners in South Africa: Time for Change?” (2006) *TSAR* 721; Burdette

It is unrealistic to assume that the demise of *apartheid* has diminished the extent of state intervention in the lives of South Africans. If anything, the present government's commitment to social and economic transformation implies an even greater degree of regulation and state intervention.¹⁶ Another important feature of the new dispensation in South Africa is the concept of "constitutionalism".¹⁷ Currie states that:

Modern constitutionalism is thus a prescriptive doctrine in that it indicates how state power should be exercised and does not simply describe how governments exercise their authority in practise. It is also normative, in that it sets out the values that should be upheld in the governing process.¹⁸

The foundation of constitutionalism is that the power of the state is defined and circumscribed by law to protect the interests of society.¹⁹ The aim and purpose of any state regulation in South African insolvency law should thus be to ensure compliance with the underlying values of the Constitution which includes the protection of societal interests and of individual rights and freedoms.

Law and the constitution do not exist in a vacuum, but rather exist in, and aim to serve society.²⁰ Moreover, given South Africa's past, it is obvious why the Constitution's articulated vision is to protect individuals, and especially vulnerable categories of people, and to safeguard against any abuse of power by organs of state²¹ – hence the constitutional emphasis on the establishment of a public administration that is governed by the principles of

Reform, Regulation and Transformation: The Problems and Challenges Facing South African Insolvency Industry (2005) unpublished paper presented at the Commonwealth Law Conference, London (hereafter referred to as Burdette "Reform, Regulation and Transformation") on file with the author. See Stander "Invloed van die Grondwet op die Aspekte van die Handelsreg" (2000) *SA Merc LJ* 291.

¹⁶ Hoexter 11.

¹⁷ For a detailed discussion of the concept of "constitutionalism" see Barnett *Constitutional and Administrative Law* (2004) 5 (hereafter referred to as Barnett).

¹⁸ Currie *The New Constitutional and Administrative Law: Vol 1 Constitutional Law* (2001) 10 (hereafter referred to as Currie *The New Constitutional and Administrative Law*).

¹⁹ Burns 28.

²⁰ James "The Judiciary and the Emerging Principle of Interest and Spirit of the Constitution" (2003) *Melanesian LJ* 29.

²¹ Section 8(1) of the Constitution. The definition of "organ of state" in s 239 in the Constitution reads as follows:

'Organ of state' means –

(a) Any department of state or administration in the national, provincial or local sphere of government; or

(b) Any other functionary or institution –

(i) Exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) Exercising a public power or performing a public function in terms of any legislation,

But does not include a court or a judicial officer.



the Constitution and that is accountable, transparent, impartial and efficient.²² For this reason, the inclusion in the Bill of Rights of a right to just administrative action is of great importance.²³ One practical outcome of this provision is that service to the people has become a guiding principle of the public service in South Africa.²⁴ A responsive administration is thus one which is alert to the needs of its people and which effectively addresses these needs.²⁵

The growth of the administrative state has also not been without its negative consequences and many countries, including South Africa, have realised that the public administration has become overburdened, cumbersome and inefficient.²⁶ In assessing our current insolvency legislation and specifically its regulatory aspects, it is thus important to ensure that the regulation of insolvency law takes place in an environment conducive to optimal service delivery and the protection of the public interest. The aim of any law reform proposal therefore should ultimately be to create a streamlined administration capable of delivering an efficient and effective public service rather than a complex, inefficient and unsustainable bureaucracy that becomes too costly to maintain.

The twentieth century has also seen the emergence in many countries of the world of the social welfare or benefactor state, a model of governance in which the state is expected to play a positive and interventionist role in socio-economic regeneration and the welfare of its citizens.²⁷ Although the South Africa state cannot be regarded as a typical social welfare state it still pervades many aspects of the lives of its citizens, in particular through the planning of the social and economic life of its inhabitants. It is also clear that our Constitution is committed to an “efficient, equitable and ethical public administration which respects

²² See *inter alia* s 195 of the Constitution and the following: *Ngxusa v Secretary, Department of Welfare, Eastern Cape Provincial Government* 2000 12 BCLR 1322 (E) at 1329B. See Beukes “The Constitutional Foundation of the Implementation and Interpretation of the Promotion of Administrative Justice Act 3 of 2000” 6 (hereafter referred to as Beukes) in Lange *The Right to Know*. See also *Transnet Ltd v Chirwa* 2007 2 SA 198 (SCA) for a detailed discussion of the nature of “public power”. See also Hoexter 192 for a detailed discussion of the nature of “public powers”.

²³ Section 33 of the Constitution. See Beukes 4.

²⁴ The idea of service to the people is aptly summarised in the opening statement of the “*Batho Pele* - ‘People First’: White Paper on Transforming Public Service Delivery”; See Beukes 7. See also s 195(1)(e) of the Constitution.

²⁵ Beukes 7.

²⁶ Hoexter 12.

²⁷ Although there is no specific reference to a benefactor state in ss 195 and 196 of the Constitution which deals with public administration, it is clear that the basic values and principles embodied in these sections represent the ethos of the benefactor state. See Burns 11; Hoexter 10.

fundamental rights and is accountable to the broader public”.²⁸ When assessing our current regulatory system the question should therefore be asked if the Master as the key role-player and supervisory authority in insolvency matters conforms to the principles of efficiency, equitability, social responsibility and accountability. It is therefore also important that these basic principles should form the underlying theme of any law reform proposal for South African insolvency law.

In moving from a culture of authority to a culture of justification and accountability²⁹ it must be clear that the Constitution, and especially the Bill of Rights, has fundamentally changed the way any state authority or administration is supposed to function. For instance, it is precisely because of the principle of accountability that the Master is drawn into the discussion on the constitutional aspects of insolvency law. This is particularly so since some of the most important specific provisions flowing from the principle of accountability are part of the Bill of Rights and include, most significantly, the right to access to information in section 32 and the right to just administrative action in section 33.³⁰ Both of these provisions are aimed at ensuring transparency and accountability in the public administration,³¹ which are among the main themes of the Constitution and which form an integral part of the constitutional foundation of administrative justice.³² With regard to the role and function of the Master as well as any future formation of state regulation in insolvency law, certainly the most significant development within the context of the Constitution is the enactment of PAJA which gives effect to the principles envisaged in section 33 of the Constitution and which will form the subject-matter of the next chapter.

²⁸ See *President of the RSA v SARFU* (n 15) at par 133; Hoexter 14.

²⁹ Burns 49.

³⁰ Currie 17.

³¹ Section 195 of the Constitution.

³² Devenish *The Constitution of South Africa* (2005) 372 (hereafter referred to as Devenish).



CHAPTER 3: ADMINISTRATIVE LAW ASPECTS OF STATE REGULATION OF SOUTH AFRICAN INSOLVENCY LAW

3.1 INTRODUCTION

Before discussing the general powers and duties of the Master as the existing supervisory authority in South African insolvency law in the following part of this study, it is necessary to pause at the potential relevance of the Constitution via the administrative law provision for the Master as public body or institution.³³ Administrative law can broadly be described as a branch of public law that regulates the way in which public authorities – and in certain instances also private entities – perform their powers and functions when implementing or giving effect to statutory and other empowering provisions.³⁴ Hoexter is of the opinion that in present-day South Africa it is more accurate to regard administrative law as regulating the activities of bodies that exercise public powers or perform public functions, irrespective of whether those bodies are public authorities in a strict sense.³⁵ The question what it is that makes a power or a function “public” has not yet been clearly answered by our courts, but such a power could essentially be described as a power inevitably associated with a duty to act in the public interest as opposed to a private interest.³⁶

The development of modern administrative law jurisprudence under the Constitution should not be taken to mean that the Constitution has done away with the common law principles on administrative law. Rather, section 33 and other relevant provisions must be seen as both incorporating and expanding on the established principles of our common law.³⁷ In *Bato Star Fishing (Pty) v Minister of Environmental Affairs*³⁸ O’Regan J cautioned that the continuing relevance of the common law should be worked out on a case-by-case basis.³⁹ In practice,

³³ Cf *President of the RSA v SARFU* 2000 (n 15) at 142. See *Mittalsteel SA Ltd (previously known as Iscor Ltd) v Hlatshwayo* 2007 1 All SA 1 (SCA) for a detailed discussion of the meaning of “public body”.

³⁴ See Hoexter 2; Beukes 3.

³⁵ Hoexter 2.

³⁶ In *POPCRU and Others v Minister of Correctional Services* [2006] 12 BLLR 1212 (E) at 53, Plasket J observed that “the elusive concept of public power is not limited to exercise of power that impacts on the public at large. Indeed, many administrative acts do not”. See also *Transnet Ltd v Chirwa* (n 22); Hoexter 3.

³⁷ Hoexter 28.

³⁸ 2004 4 SA 490 (CC).

³⁹ *Bato Star Fishing (Pty) v Minister of Environmental Affairs* (n 38) at 22.

however, the common law is proving to be a significant aid to the courts in their interpretation of the Constitution and PAJA.⁴⁰

Constitutional and administrative law are both extensive and specialised subjects and worthy of a study on their own. The aim of this chapter is thus not to provide an in-depth discussion of the ambit of the administrative law in general but rather to discuss some of the basic principles of administrative law and in particular PAJA, in order to determine their relevance to state regulation in South African insolvency law. In order to develop a better understanding of the purpose and operation of PAJA it will be essential to initially discuss certain important concepts such as “organ of state”; “administrative action” and “judicial review”. Finally, reference will briefly be made to the impact of Promotion of Access to Information Act⁴¹ on the Insolvency Act.

3.2 THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT

3.2.1 General

The Insolvency Act was enacted in the 1930s. Consequently, at the time it could not embrace the notion of accountability as currently understood and regulated in terms of the new Constitution and the new administrative law regime. In proposing an innovative and efficient regulatory framework for South African insolvency law, it is therefore important to acknowledge the impact and effect of current legislation such as PAJA on the role of a supervisory body in insolvency law. The Bill of Rights contains several provisions of significance for administrative law, and for the purposes of this study the right to just administrative action in particular represents the most important provision. In terms of section 33(1)⁴² of the Constitution everyone has the right to administrative action that is

⁴⁰ Hoexter 28.

⁴¹ Act 2 of 2000. Hereafter referred to as “PAIA”.

⁴² S 33 provides as follows: Just administrative action -

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must -
 - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.



lawful, reasonable and procedurally fair. Section 33(3) thereof requires the enactment of national legislation to give effect to such right, and this requirement was given effect to by the enactment of PAJA.⁴³

Although administrative justice is not a novel concept, its constitutionalisation is undoubtedly a recent and important innovation in South African law.⁴⁴ According to Boule administrative justice is:

...justice emanating from a non-judicial arm of Government, namely, permanent administrative departments, including their political heads, as well as statutory tribunals, boards and para-statal. It denotes the fair and effective performance of its tasks by the administration in an age when justice is as much the province of this branch as it is of the courts.⁴⁵

The purpose of PAJA is thus to give effect to section 33 and to provide greater detail of the scope and application of the explicit constitutional right to administrative justice. It is a truism that the exercising of public power in a modern state depends fundamentally on discretionary decision-making by state officials at all levels of government and in this context the Master is no exception.⁴⁶ It is equally trite that if a state is to meet the requirements of a constitutional democracy, those seeking benefits from the state, and those against whom the state seeks to enforce its powers, must have avenues to seek redress or at least a relatively independent regulation of such discretionary procedures in law.⁴⁷

⁴³ In *Kiva v Minister of Correctional Services and Another* [2006] JOL 18512 (E) the Court held that, because PAJA gives effect to a constitutional right, the provisions thereof must be generously interpreted. See *Kunst et al Meskin, Insolvency Law and its Operation in Winding-up* (1990) (loose-leaf edition) par 1.8 (hereafter referred to as *Meskin*).

⁴⁴ Dlamini 697.

⁴⁵ Boule “Administrative Justice in American and South African Law” in Hund *Law and Justice in South Africa* (1988) 46. See Dlamini 697.

⁴⁶ Apart from the Master, other officers may make decisions in terms of the Insolvency Act, eg, a magistrate issuing a search warrant in terms of s 69(3) of the Insolvency Act. In *Le Roux v Magistrate, Mr Viana* 2006 JDR 0562 (W) the Court held that the issuing of a warrant by a magistrate amounted to a judicial and not an administrative function. It may also occur that procedural prerequisites regarding specific administrative actions may be more onerous on the parties than those imposed by the provisions of the PAJA. In *HTF Developers (Pty) Ltd v Minister of Environmental Affairs & Tourism & Others* [2007] JOL 19542 (SCA) at par 13, the SCA took the view that if the legislature chose to afford a party affected by particular administrative action greater procedural protection by means of the specific provisions of the Act, those provisions cannot be ignored in favour of less onerous prescriptions in general legislation such as the PAJA. See *Meskin* par 1.8.

⁴⁷ See Corder “Reviewing Review: Much Achieved, Much More to Do” (hereafter referred to as Corder “Reviewing Review”) in Corder *Realising Administrative Justice* (2002) 1 (hereafter referred to as Corder *Realising Administrative Justice*).

3.2.2 Administrative Action

The first phase in determining whether PAJA is applicable to the conduct of a public institution such as the Master is to determine whether the powers and functions of the Master can qualify as “administrative action”.⁴⁸ Section 33(1) of the Constitution determines that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. However, this provision does not define administrative action. Instead this function has been left to PAJA⁴⁹ and the following definition in section 1 of PAJA will apply:⁵⁰

- ‘administrative action’ means any decision taken, or any failure to take a decision, by –
- (a) an organ of state, when
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation;
 - or
 - (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect ...

Accordingly for an action or function to be classified as an administrative action in terms of the above definition, it has to comply with certain distinctive elements built into the definition of administrative action.⁵¹ One of these elements would be what constitutes a “decision”.⁵² A decision, for the purposes of PAJA:

- means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to –
- (a) making, suspending, revoking or refusing to make an order, award or determination;
 - (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
 - (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
 - (d) imposing a condition or restriction;
 - (e) making a declaration, demand or requirement;
 - (f) retaining, or refusing to deliver up, an article; or
 - (g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly.⁵³

⁴⁸ See the definition of “administrative action” in s 1 of PAJA.

⁴⁹ Burns 6.

⁵⁰ South African legal academics have however expressed concerns about the definition of administrative action in the Act and the overall view is that the definition is too narrow when read against the minimum requirements of the right to administrative justice in s 33 of the Constitution. Hoexter “‘Administrative Action’ in the Courts” 303.

⁵¹ For a detailed discussion of these elements refer to Hoexter 163-221 and Burns 19-31.

⁵² Section 1(v) of PAJA.

⁵³ Definition in s 1 of PAJA.



The examples included in the definition do not constitute a complete list and it should be noted that the Act makes it clear that an administrative action should not be limited to administrative actions or decisions only, but may also include the failure to act.⁵⁴ The definition of a “decision” also introduces two additional elements contained in the phrase “of an administrative nature”⁵⁵ and the requirement that the decision must be taken in terms of an “empowering provision”.⁵⁶ Firstly, it is apparent that the purpose of the phrase “of an administrative nature” is to ensure that private law matters such as the conclusion of a contract are excluded from the ambit of the definition.⁵⁷ The decision at issue should be of a public law nature involving a relationship of inequality or subordination between the government and the individual or entity.⁵⁸

In terms of section 1 of the Act, “empowering provision” means a law, a rule of the common law, customary law, or an agreement, instrument or any other document in terms of which an administrative action was purportedly taken.⁵⁹ The essence of this provision is the requirement that the exercise of administrative power must have an authoritative basis and that any public power must derive almost exclusively from some or other statutory measure or other empowering provision. The definition of “empowering provision” is exceptionally wide and extends beyond a law, a rule of the common law or customary law to include an agreement, instrument or other document in terms of which administrative action was purportedly taken.⁶⁰

⁵⁴ In *Vulindlela Furniture Manufacturers v MEC, Department of Education and Culture* 1998 4 SA 908 (Tk) the court found that the words “lawful administrative action” contained in s 24(a) of the Interim Constitution are wide enough to include an omission to take administrative action where such a duty had been imposed; see Burns 21. In *Standard Bank of SA Ltd v The Master of the High Court and others* 2009 5 SA 13 (E) at par 90 the Court stated that “[w]hile it is so that a failure to take a decision is a ground for review, a logical precondition is that the decision-maker is either under a legal duty to decide or that a duty to decide has been activated, for example by a request for a decision to be taken by a person with the standing to make such a request”. See Meskin par 1.8.

⁵⁵ See also *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 2 SA 311 (CC) Chaskalson CJ regarded the phrase “of an administrative nature” as bringing regulation-making within the scope of the definition of “decision”. See Meskin par 1.8.

⁵⁶ Hoexter 187.

⁵⁷ Burns 22.

⁵⁸ Burns 22.

⁵⁹ Burns 22.

⁶⁰ PAJA excludes from the operation of the Act certain executive functions and powers. See s 1 of PAJA on the definition of “administrative action” and the exclusions listed there.

A further element built into the definition of administrative action is that the decision has to be taken by an organ of state or by a private person exercising a public power or performing a public function. In the context of PAJA an organ of state bears the meaning assigned to it in section 239 of the Constitution.⁶¹ For purposes of this study it is important to note that the Supreme Court of Appeal held that any institution exercising a public power or performing a public function in terms of legislation is an organ of state.⁶² Although the case of *Mittalsteel South Africa v Hlatshwayo*⁶³ was not decided under section 33 of the Constitution but dealt with the right of access to information under section 32 of the Constitution, it clearly sets out the current approach to the term “organ of state”.⁶⁴ The court’s approach to the definition places the focus on a functional rather than a control test. The question is therefore not whether the particular decision-maker is under the control of the state, but whether it performs a public function in terms of legislation.⁶⁵ The concept of “organ of state” therefore plays a decisive role in determining whether an action is classified as an administrative action and whether it is subject to the application of the principles of just administrative action.⁶⁶ Evidently, the Master does qualify as an organ of state, as it often exercises a public power or public function in terms of legislation⁶⁷ with the result that its decisions will be subject to the provisions of PAJA.⁶⁸

The final requirements of the definition of an administrative action are that the decision has to adversely affect someone else’s rights and must have a direct, external legal effect. These elements are taken to mean that a decision will qualify as an administrative action if it has the capacity to impact directly and immediately on individuals.⁶⁹ The court held in *Grey’s Marine*⁷⁰ that the phrase indicating that the action has to have an affect on a person’s rights should be read to mean that the decision should have the capacity to adversely affect rights.⁷¹

⁶¹ (n 21).

⁶² *Minister of Education, Western Cape v Governing Body, Mikro Primary School* 2006 1 SA 1 (SCA).

⁶³ See (n 33).

⁶⁴ Quinot *Administrative Law Cases and Materials* (2008) 202 (hereafter referred to as Quinot).

⁶⁵ *Mittalsteel South Africa v Hlatshwayo* (n 33) at par 7. See Quinot 202.

⁶⁶ Burns 14.

⁶⁷ The examples will be examined in a later chapter.

⁶⁸ Meskin par 1.8.

⁶⁹ Rudolph *Student Manual: Applying the Promotion of Administrative Justice Act in Practise* (2009) 138 (hereafter referred to as *Rudolph Student Manual*) on file with the author.

⁷⁰ *Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 6 SA 313 (SCA) at 23.

⁷¹ *Rudolph Student Manual* 139.



With regard to the direct, external legal effect requirement, it was held in *Van Zyl v New National Party*⁷² that the decision must be a final decision by an administrative decision-maker that constitutes a legally binding determination of another legal entity's rights.⁷³ A "direct effect" would indicate that the decision is final, not in the sense of being irreversible, but simply that the decision has been made. The phrase "an external effect" indicates that the effect of the decision will be felt by someone other than the decision-maker.⁷⁴ The final requirement, namely that it must have a "legal effect" could, according to *Hoexter*, be taken from the German rule that the decision must at least entail a determination of someone's rights, covering deprivations as well.⁷⁵

The above discussion on the meaning of the concept of "administrative action" is by no means all-inclusive or complete. It should be clear that PAJA originates from section 33 of the Constitution and the definition of administrative action in the Act, although pieced together through various elements, should as far as possible be reconciled with the meaning that has been attributed thereto in the Constitution, so as to avoid constitutional invalidity.⁷⁶ It is also apparent that every action to be incorporated under the scope of PAJA should first meet the requirements of the concept of administrative action as defined in the Act, and this would certainly entail an appraisal of the action measured against all the various elements built into the definition.⁷⁷

In the *New Clicks*⁷⁸ case the Constitutional Court struggled with the concept of "administrative action" in terms of section 1 of PAJA and the four divergent approaches taken by the Court in this case are revealing.⁷⁹ The divergence underscores the sheer difficulty of deciding what is considered to be an administrative action and what is not in

⁷² 2003 10 BCLR 1167 (C).

⁷³ *Van Zyl v New National Party* (n 71) at par 86. See Currie *The Promotion of Administrative Justice Benchbook* (2001) 2 (hereafter referred to as *Currie Benchbook*); Burns 147.

⁷⁴ Hoexter 209.

⁷⁵ Hoexter 204.

⁷⁶ Hoexter 222.

⁷⁷ Burns 28. In *Oosthuizen's Transport (Pty) Ltd and Others v MEC, Road Traffic Matters, Mpumalanga and Others* 2008 2 SA 570 (T) the court held that "administrative action" was action that had the capacity to affect legal rights (at 575I-J).

⁷⁸ See (n 55).

⁷⁹ A majority of two judges agreed that the recommendations and regulations did not qualify as administrative action under PAJA and thus could not be reviewed under PAJA. They then held that review remained available in terms of the principle of legality and that the recommendations and regulations could also be reviewed under s 33 of the Constitution or under the common law. It is not clear from the judgement precisely which of these avenues was relied on in its subsequent review of the regulations. See Hoexter 125.

terms of PAJA. In the words of *Hoexter*: "... for if the Constitutional Court is defeated by section 1 of PAJA, what hope is there for the rest of us?"⁸⁰

Once it has been determined that an action constitutes "administrative action" the next phase will be to determine whether such action complies with the necessary requirements in terms of section 33 (1) of the Constitution, namely whether the action can be classified as "lawful, reasonable and procedurally fair".⁸¹

3.2.3 The Three Requirements of Section 33

As mentioned above, section 33 states that everyone has the right to administrative action that is *lawful, reasonable and procedurally fair*. A "lawful" administrative action means in essence that administrative actions and decisions must be duly authorised by law and that any statutory requirement or precondition linked to the exercising of the power must be complied with.⁸² The requirement of "lawfulness" in relation to an "administrative action" as mentioned in both the Constitution and PAJA, is closely linked to the principle of legality as an important aspect of the rule of law, which in turn forms the basis of just administrative action in general.⁸³

The element of lawfulness covers all grounds generally associated with authority, jurisdiction and abuse of discretion. The important principle is that any exercise of power must be authorised by law. The Constitutional Court explained that it is "central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."⁸⁴ It is thus clear that administrators have no inherent powers and every incident of public power must be inferred from a lawful source, usually legislation.

The concept of "reasonableness" is one of the most elusive and variable concepts in our jurisprudence. It is impossible to assign a static and definitive meaning to it and the concept will

⁸⁰ Hoexter "Administrative Action' in the Courts" 324.

⁸¹ As stated in s 33(1) of the Constitution.

⁸² Hoexter 224.

⁸³ Hoexter 225. For a case dealing with the lawfulness of an administrative action see *Vorster and Another v Department of Economic Development, Environment and Tourism, Limpopo Province, and Others* 2006 5 SA 291 (T) in which the Court stated that lawfulness lies at the heart of administrative justice, and underpins the whole of the South African Constitution. See *Meskin* par 1.8.

⁸⁴ *Fedsure Life Insurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) at par 58. See Hoexter 226.



no doubt develop as it is considered in a variety of circumstances.⁸⁵ However, it is important to note that unlike the common law position,⁸⁶ reasonableness in terms of the new constitutional dispensation is a self-standing ground for the review of administrative action. The essence of the test now concerns an enquiry as to the presence of a rational connection between the decision made, the facts on which such decision is based and the reasoning provided for the decision.⁸⁷ In *Bato Star*⁸⁸ O'Regan J ruled that reasonableness must be determined on a case-by-case basis, depending on the circumstances of each case and taking into account the following: the nature of the decision; the identity and expertise of the decision-maker; the range of factors relevant to the decision; the reasons given for the decision; the nature of the competing interest involved and the impact of the decision on the lives of those affected.⁸⁹

Generally it is accepted that the reasonableness test is often accompanied by an enquiry into the rationality of the decision as well as the proportionality of its outcome.⁹⁰ *Rationality* relates primarily to preventing an abuse of discretionary power or arbitrary decision-making and is considered to be the *minimum* threshold requirement for a valid exercise of public power.⁹¹ This test is now codified in section 6(2)(f)(ii) of PAJA and requires that an administrative action be rationally connected to the purpose for which it was taken; the purpose of the empowering provision; the information before the administrator; or the reasons given for it by the administrator. One consequence of this minimum threshold is that once complied with by the decision-maker a court will be reluctant to interfere with the decision merely because the court holds a different view. Such reasoning upholds the doctrine of the separation of powers and allows for rational choices to be made by the executive on matters that fall primarily within the domain of the executive.⁹²

⁸⁵ Govender “Administrative Law as a Surrogate for Human Rights Law” 45 (hereafter referred to as Govender “Administrative Law as a Surrogate for Human Rights Law”) in Corder *Realising Administrative Justice* (2002).

⁸⁶ Under the common law unreasonableness alone was not enough. The courts required an additional element such as *mala fides* or failure by the decision-maker to apply his or her mind to the matter. See *Union Government v Union Steel Corporation* 1928 AD 220 at 236.

⁸⁷ See *Carephone (Pty) Ltd v Marcus NO and Others* 1998 10 BCLR 1326 (LAC); *Nieuwoudt v Chairman, Amnesty Committee, Truth and Reconciliation Committee* 2002 2 SA 143 (C) at 155.

⁸⁸ See (n 38).

⁸⁹ Hoexter 315.

⁹⁰ See also Hoexter “Unreasonableness in the Administrative Justice Act” 149 (hereafter referred to as Hoexter “Unreasonableness in the Administrative Justice Act”) in Lange *The Right to Know* (2004).

⁹¹ *Pharmaceutical Manufacturers Association of South Africa In Re: Ex Parte Application of the President of the RSA* 2000 3 BCLR 241 (CC) at par 85.

⁹² See also *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 9 BCLR 891 (CC) at par 45.

Proportionality on the other hand means trying to avoid an undue imbalance between the adverse and the beneficial effects or consequences of an action.⁹³ Essentially, this is about establishing proportionality between the means and the ends and by comparing and weighing the advantages and disadvantages of the measures against each other.⁹⁴ Where appropriate the administrator should therefore be sensitised to use less restrictive or oppressive means to achieve the purpose of the administrative action.⁹⁵

Apart from the requirements of lawfulness and reasonableness, section 33(1) of the Constitution guarantees everyone a right to administrative action that is “procedurally fair”. Section 3(1) of PAJA also states that “administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair”.⁹⁶ The concept of procedural fairness is flexible and the range of situations to which it may apply is extensive.⁹⁷

For current purposes it would suffice to point out some of the essential features of this requirement. At common law, procedural fairness was associated with the rules of natural justice which were based on the *audi alteram partem* and *nemo iudex in sua causa* principles. In terms of these principles an affected person was entitled to be afforded an opportunity to be heard, to be informed about all relevant information relating to the decision and to be granted a hearing that was unbiased and impartial.⁹⁸ By virtue of section 3 of PAJA the common law position has now become part and parcel of the statutory requirements for procedural fairness.

⁹³ Hoexter “Unreasonableness in the Administrative Justice Act” 154. See also Hoexter 310.

⁹⁴ Hoexter 310.

⁹⁵ In recent years the courts have moved towards adopting a more objective approach to reasonableness. For example, in *Standard Bank of Bophuthatswana Ltd v Reynolds* [1995] 3 BCLR 305 (B), 1995 3 SA 74 (B), the court departed from the test of “gross unreasonableness” and found that the less stringent test of “unreasonableness” should be adopted. It should however again be stated that “reasonableness” has a wide range of variation and no single meaning can be attributed to it. See *Nel NO v The Master* 2005 1 SA 276 (SCA) for a consideration of “reasonableness” in the context of the Master’s power to reduce or increase the “reasonable remuneration” of a liquidator. See also Hoexter 306; Burns 151; Hoexter “Unreasonableness in the Administrative Justice Act” 154.

⁹⁶ See Hoexter 326. For a case dealing with procedural unfairness, see *Dunn v Minister of Defence and Others* 2006 2 SA 107 (T).

⁹⁷ *Du Preez v Truth and Reconciliation Commission* 1997 3 SA 204 (A); *Mose v Minister of Education, Western Cape* 2009 2 SA 408 (C). See also Burns 206.

⁹⁸ See for instance *South African Roads Board v Johannesburg City Council* 1991 4 SA 1 (A); 71992 4 SA 532 (A).



Section 3 provides for three categories of rules aimed at ensuring procedural fairness. In the first category *mandatory* procedures are specified⁹⁹ which require the decision-maker to give adequate notice¹⁰⁰ of the *nature* and *purpose* of the action; a reasonable opportunity to make representations; a clear statement of the administrative action; adequate notice of any right to review or appeal; and adequate notice of the right to request reasons in terms of section 5 of PAJA. In the second category,¹⁰¹ additional procedural safeguards of a *discretionary nature* are provided for, such as the right to legal representation, the right to present and dispute information and the right to appear in person. In the third and last instance section 3 of PAJA follows the dubious approach of allowing for a departure from the mandatory requirements if it is reasonable and justifiable in the circumstances. The only consolation is that the envisaged departure from the mandatory prescriptions must be justifiable with reference to a range of factors listed in the provision itself.¹⁰² The effect of allowing a decision-maker to depart from the mandatory fair procedure requirements is that a limitation of the right to procedural fairness becomes permissible *ex lege*. To the extent that such a limitation may interfere with the general guarantees in section 33 of the Constitution, section 36 of the Constitution will have to be complied with.

In the final analysis two related issues warrant attention. The first is that the remedy available to an affected person remains a procedural as opposed to a substantive one. This is the essence of section 33 of the Constitution which provides for *procedural* fairness only. Equally, it will also be the case with regard to the second issue, namely the protection of a *legitimate expectation* (as opposed to a *right*) in terms of section 3(1) of PAJA. As the law currently stands, the violation of a legitimate expectation does not entitle the affected person to claim specific performance and the courts will limit their enquiry to what is procedurally the most appropriate remedy.¹⁰³ However, it may be argued that the time has come to consider the right to a substantive remedy in this instance, especially in view of the courts' obligation to provide *appropriate* relief in terms of section 38 of the constitution in the case

⁹⁹ Section 3(2)(b).

¹⁰⁰ On adequate notice see *Bushula v Permanent Secretary, Dept of Welfare, Eastern Cape* 2000 7 BCLR 728 (E); *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2000 2 SA 67 (C).

¹⁰¹ Section 3(3).

¹⁰² Section 3(4)(a) and (b).

¹⁰³ See for instance *Administrator Transvaal v Traub* 1989 4 SA 731 (A); *Bushbuck Ridge Border Committee and Another v Government of the Northern Province and Others* 1999 2 BCLR 193 (T); *Meyer v Iscor Pension Fund* 2003 2 SA 715 (SCA).

of a violation of a right in the Bill of Rights and the vast material in general on the duty of a state to provide for *effective* remedies in response to the violation of a right.¹⁰⁴

3.2.4 Judicial Review and Remedies under PAJA

In order to set the stage for a discussion of the accountability of a supervisory authority in insolvency law, it is necessary to mention that apart from the most popular route of statutory review, the introduction of the Constitution now also presents alternative measures of relief. The Insolvency Act makes provision for the Master's decisions, rulings and orders to be reviewed by a court of law and the bulk of review proceedings and body of case law still represents actions taken under this procedure.¹⁰⁵ However, apart from the statutory relief presented by the Insolvency Act the law relating to judicial review has undergone a fundamental change by virtue of the introduction of the new constitutional dispensation.¹⁰⁶

There are different types of review proceedings in South African law, including the review of the proceedings of inferior courts;¹⁰⁷ automatic review¹⁰⁸ and judicial review in the constitutional sense;¹⁰⁹ judicial review in the administrative law sense¹¹⁰ and special statutory review.¹¹¹ It should also be noted that there are now also five different pathways to administrative review, namely common-law review;¹¹² review proceedings in terms of PAJA; review in terms of section 33 of the Constitution; the constitutional principle of legality; and special statutory review.¹¹³ From a South African perspective judicial review remains the most significant remedy against maladministration, as is evident from the vast administrative law literature available on the subject. This part of the study will offer only a brief overview of the most important principles regarding judicial control over the administrative powers and

¹⁰⁴ See also *Fose v Minister of Safety and Security* 1997 1 BCLR 851 (CC).

¹⁰⁵ Section 151 of the Insolvency Act of 1936. See *Nel and Another NNO v The Master* (n 95).

¹⁰⁶ The judicial review of administrative actions arising from PAJA as well as direct constitutional review under s 33 of the Constitution are now also available to the ordinary citizen seeking relief.

¹⁰⁷ Section 24 of the Supreme Court Act 59 of 1959.

¹⁰⁸ Certain statutes make provision for the decisions of magistrates to be reviewed "automatically" by judges.

¹⁰⁹ Power of the courts to scrutinise and declare unconstitutional any type of legislation, original or delegated, or state conduct that infringes on the rights in the Bill of Rights or otherwise offends against provisions of the Constitution. See Hoexter 109.

¹¹⁰ "Judicial review" according to administrative law refers more specifically to the power of the courts to scrutinise and set aside administrative decisions or rules on the basis of certain grounds of review. Hoexter 109.

¹¹¹ The legislature may and often does confer on the courts a statutory power of review.

¹¹² Hoexter 465.

¹¹³ Hoexter 112.



functions of the Master, which includes review in terms of PAJA and constitutional review in terms of the principle of legality.

PAJA provides for the most immediate justification for judicial review, based on the constitutional mandate in section 33(3) to give effect to the administrative justice rights in the Constitution and to provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal.¹¹⁴ PAJA does not replace section 33 of the Constitution but in effect now provides for the primary or default pathway to review.¹¹⁵ Since PAJA provides the most immediate source of review, the direct constitutional review under section 33 is available only infrequently – typically in cases where original legislation is challenged on the basis that it unjustifiably limits the rights in section 33, or where the decision-maker has acted outside the scope of the constitutional powers assigned to him or her.¹¹⁶ Direct constitutional review will also be appropriate where PAJA itself is impugned for failure to “give effect to” the administrative justice rights.¹¹⁷ The limited application of section 33 accords with the principle of avoidance first expressed in *S v Mhlungu*,¹¹⁸ which requires resort to be had to a specific statutory remedy or the common law before constitutional remedies are sought.¹¹⁹

Critically, however, it should be kept in mind that the application of both PAJA and section 33 is confined to the category of “administrative action”.¹²⁰ This implies that in every case of judicial review it is necessary to initially establish whether the action qualifies as an administrative action which may in review proceedings act as a limiting device in both cases. As a limiting factor, this qualification does not mean that the particular action is altogether unreviewable. In *POPCRU and Others v Minister of Correctional Services and Others*¹²¹ the court held that the fact that some forms of administrative action may be excluded from the limited statutory definition does not mean that these actions are not reviewable in terms of the High Court’s inherent and constitutional jurisdiction.¹²² The court also found that judicial

¹¹⁴ Section 33 of the Constitution; Hoexter 114.

¹¹⁵ Hoexter 115.

¹¹⁶ Hoexter 115

¹¹⁷ Hoexter 463.

¹¹⁸ 1995 3 SA 867 (CC).

¹¹⁹ See *Jayiya v MEC for Welfare, Eastern Cape Provincial Government* 2004 2 SA 611 (SCA).

¹²⁰ Hoexter 115.

¹²¹ See (n 36).

¹²² Meskin par 1.8

review is not limited to administrative acts that impact on the public at large, but extends to public functionaries who are required to act in the public interest.¹²³

The first stage on the road to just and lawful administrative action would thus be to determine whether such action qualifies as an “administrative action” in accordance with PAJA. It will then be evident that apart from certain exceptions,¹²⁴ the action or decision will be controlled by the legal machinery of general administrative law consisting of the constitutional right to administrative justice and the legislative provisions in PAJA.¹²⁵ The extent to which the right to lawful, reasonable and procedurally fair administrative action in the Constitution guarantees the state’s accountability and transparency cannot be underestimated, and is reflected in the right of an individual affected by the administrative action to request written reasons and ultimately to challenge the action by way of judicial review.¹²⁶

3.2.4.1 *The Right to Request Reasons*

In terms of section 5 of PAJA a person whose rights have been *materially and adversely affected* by an administrative action and who has not been provided with reasons for the action, may within 90 days after the date he or she became aware of it, or may reasonably be expected to have become aware of it, request that the administrator furnish written reasons for having taken the relevant action.¹²⁷ The administrator is required to respond to such a request within 90 days.¹²⁸ If the administrator fails to furnish adequate reasons,¹²⁹ or does not inform the party requesting reasons that he or she is departing from the requirements on the basis that it is reasonable and justifiable in the circumstances,¹³⁰ it is presumed that the administrative action in question was taken without adequate reasons.¹³¹

¹²³ Meskin par 1.8

¹²⁴ See definition in s 1 of PAJA. See also *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* (n 55); Hoexter 210.

¹²⁵ Hoexter 9.

¹²⁶ See in general ss 5 and 6 of PAJA.

¹²⁷ Section 5(1) of PAJA.

¹²⁸ Section 5(2) of PAJA.

¹²⁹ On adequate reasons see *Commissioner of South African Police Service v Maimela* 2004 1 BCLR 47 (T).

¹³⁰ Section 5(4) of PAJA.

¹³¹ Section 5(3) of PAJA. See also *Sidorov v Minister of Home Affairs* 2001 4 SA 202 (T) at 207I and 209B.



Following the reasoning with regard to the right to be given reasons in *Transnet Ltd v Goodman Brothers (Pty) Ltd*¹³² one can argue that the right to be given reasons will automatically apply to anyone to whom section 33(1) of the Constitution applies. In other words, since a section 33 (1) right will always be adversely affected by the failure to give reasons, the right to lawful, reasonable and procedurally fair administrative action inevitably entitles one to the right to ask for reasons.¹³³ Although section 5 only refers to a right, a section 5 remedy will equally apply in the case of a legitimate expectation by virtue of section 3 (1) of PAJA.

3.2.4.2 *Judicial Review of Administrative Action*

Although judicial review is not the only method of control of administrative actions, it is conceded to be the most effective. The new constitutional dispensation has fundamentally changed the role of the courts and the courts are now required to give content and meaning to the values and principles as contained in the Constitution.¹³⁴ A clear distinction should be made between judicial appeal where the court is interested in the merits of the case and whether the administrator's decision was correct or incorrect,¹³⁵ and judicial review where the function of the court is purely to examine the legality of the administrative actions in the context of section 6 of PAJA, which is an enquiry into the way in which the decision was taken.¹³⁶

Extensive grounds¹³⁷ are provided for the judicial review¹³⁸ of administrative actions, and these include actions that are not rationally connected to the purpose for which they were taken,¹³⁹ the information at the disposal of the administrator¹⁴⁰ or the reasons furnished by the

¹³² 2001 1 SA 853 (SCA).

¹³³ Wessels "Adequate reasons' in terms of the Promotion of Administrative Justice Act" in Lange *The Right to Know* (2004) 121 (hereafter referred to as Wessels "Adequate reasons").

¹³⁴ Burns 284.

¹³⁵ Burns 285.

¹³⁶ Burns 285.

¹³⁷ Section 6(2) of PAJA. For a case dealing with reviews in terms of s 6(2) of the Act, see *Dunn v Minister of Defence and Others* (n 95).

¹³⁸ As to the test to be applied in such review proceedings, see *Trinity Broadcasting, Ciskei v Independent Communications Authority of SA* 2004 3 SA 346 (SCA).

¹³⁹ In *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* (n 138) it was held that the review threshold for administrative action is rationality. In this case the Court held that, in requiring reasonable administrative action, the Constitution did not intend that in review proceedings the action had to be tested against the reasonableness of the merits of the action in the same way as an appeal, and as the test for rationality was an objective one, it was immaterial whether the functionary acted in the belief, in good faith, that the action had been rational. For more on the requirement of rationality, see *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and Others* 2007 1 SA 576 (SCA). See Meskin par 1.8.

administrator.¹⁴¹ Such review proceedings must be instituted without unreasonable delay,¹⁴² but not later than 180 days after the conclusion of the internal remedies, or, where no internal remedies exist, within 180 days after the person who was informed of the administrative action, became aware of the action and the reasons for it, or might reasonably have been expected to have become aware of it and the reasons for that.¹⁴³ The periods of 90 and 180 days may be extended by agreement between the parties, or where the interests of justice so require, by the Court.¹⁴⁴

The requirements for administrative legality are laid down in section 6(2) of PAJA, which reads as follows:

- (2) A court or tribunal has the power to judicially review an administrative action if –
- (a) the administrator who took it –
 - (i) was not authorised to do so by the empowering provision;
 - (ii) acted under a delegation of power which was not authorised by the empowering provision; or
 - (iii) was biased or reasonably suspected of bias;
 - (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
 - (c) the action was procedurally unfair;
 - (d) the action was materially influenced by an error of law;
 - (e) the action was taken –
 - (i) for a reason not authorised by the empowering provision;
 - (ii) for an ulterior purpose or motive;
 - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
 - (iv) because of the unauthorised or unwarranted dictates of another person or body;
 - (v) in bad faith; or
 - (vi) arbitrarily or capriciously;

¹⁴⁰ In accordance with the principle of *audi alteram partem*, fairness may dictate that a person who may be adversely affected by a decision should be afforded the opportunity to make representations. Such representations should be capable of being made before or after a decision, or both before and after a decision; see *Du Bois v Stompdrift-Kamanassie Besproeiingsraad* 2002 5 SA 186 (C). See Meskin par 1.8.

¹⁴¹ In the *Kiva* case (n 43), the Court held that the applicant was entitled to reasons, not only because his rights had been affected, but also because without reasons he was unable to exercise his right of review. The Court also stated that in law “reasons” are statements that explain *why* a decision was taken.

¹⁴² In *PG Bison Ltd v Johannesburg Glassworks (Pty) Ltd (In Liquidation) and Others* 2006 4 SA 535 (W) the Court, in deciding a point *in limine*, held that an application for the review of the Master’s decision to expunge a claim brought some thirteen months after the applicant became aware of the expungement constituted an unreasonable delay in bringing the review proceedings. Although the application was dismissed on different grounds, the Court held that the application fell to be dismissed solely on the ground of the applicant’s unreasonable delay in bringing the application, taking into account s 7(1)(a) and (b) of the PAJA. See Meskin par 1.8.

¹⁴³ Section 7(1) of PAJA. In *Sasol Oil (Pty) Ltd and Another v Metcalfe NO* 2004 5 SA 161 (W) it was held that the period of 180 days provided for in PAJA overrides the provisions of conflicting earlier legislation providing for shorter timeframes. In this case the relevant legislation provided for a period of 30 days within which to bring review proceedings. The court found that because PAJA was constitutional legislation, the timeframe of 180 days had to prevail over the earlier legislation providing for a timeframe of 30 days. See Meskin par 1.8.

¹⁴⁴ Section 9 of PAJA.



- (f) the action itself –
 - (i) contravenes a law or is not authorised by the empowering provision; or
 - (ii) is not rationally connected to –
 - (aa) the purpose for which it was taken;
 - (bb) the purpose of the empowering provision;
 - (cc) the information before the administrator; or
 - (dd) the reasons given for it by the administrator;
- (g) the action concerned consists of a failure to take a decision;
- (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
- (i) the action is otherwise unconstitutional or unlawful.¹⁴⁵

The grounds for review listed in section 6 of PAJA can therefore be divided into four different categories. The first ground of review manifests itself in the absence of authority. An absence of authority is present when the administrator who took the decision was not authorised to do so by an empowering provision;¹⁴⁶ acted under a delegation of power that was not authorised by the empowering provision;¹⁴⁷ was biased or reasonably suspected of bias;¹⁴⁸ or the action itself contravened a law or was not authorised by the empowering provision.¹⁴⁹ Combined, these grounds for review place an obligation on an administrator to ensure that he or she had the necessary legal authority to make a decision and that the prescribed powers were exercised within the scope of the empowering provision.¹⁵⁰

The second category deals with the way in which the decision was taken and the factors or circumstances taken into consideration by the decision-maker.¹⁵¹ In this instance the grounds for review relate to non-compliance by the decision-maker with a mandatory and material procedure or condition prescribed by an empowering provision; the taking of a decision in a procedurally unfair manner, under the influence of an error of law, for an unauthorised reason or for an ulterior purpose or motive. Also belonging to this category are decisions based on irrelevant considerations or taken under the unauthorised dictates of another person, in bad faith or arbitrarily or capriciously.

¹⁴⁵ Section 6 of PAJA.

¹⁴⁶ Section 6(2)(a)(i) of PAJA.

¹⁴⁷ Section 6(2)(a)(ii) of PAJA.

¹⁴⁸ Section 6(2)(a)(iii) of PAJA.

¹⁴⁹ Section 6(2)(f)(i) of PAJA.

¹⁵⁰ Rudolph *Student Manual* 199.

¹⁵¹ Section 6(2)(b)-(e).

The third category relates to the rationality requirement, which was dealt with above.¹⁵²

In the fourth category, a combination of common law grounds for review and a catch-all possibility can be found. The common law grounds relate to the instance where the decision-maker has failed to take the decision or where the exercise of the power or the performance of the function was so unreasonable that no reasonable person could have so exercised the power or performed the function. In terms of this category an administrative action can be reviewable when it is *otherwise* unconstitutional or unlawful.¹⁵³ Section 6 should also be read with section 7 of PAJA. According to section 7, review proceedings are only possible once all internal remedies provided for in any other law have been exhausted.¹⁵⁴ The court is thus obliged to turn the applicant away if it becomes apparent that the internal remedies available to the applicant have not been exhausted.¹⁵⁵ The court may only grant an exception to this rule in exceptional circumstances and where it is in the interest of justice to do so.¹⁵⁶ The duty to exhaust internal remedies refers only to remedies specifically provided for in the legislation with which the case is concerned. In *Reed v Master of the High Court*¹⁵⁷ Plasket J laid emphasis on the fact that this provision does not place an obligation on a person to deplete all possible avenues of redress such as an application to the Public Prosecutor prior to resorting to judicial review.¹⁵⁸ An example of such an internal remedy is to be found in section 57(7) of the Insolvency Act. The section reads as follows:

Any person aggrieved by the appointment of a trustee or the refusal of the Master to confirm the election of a trustee or to appoint a person elected as a trustee, may within a period of seven days from the date of such appointment or refusal request the Master in writing to submit his or her reasons for such appointment or refusal to the Minister.¹⁵⁹

¹⁵² Section 6(2)(f)(ii).

¹⁵³ Section 6(2)(g)-(i).

¹⁵⁴ Section 7(2)(a) of PAJA. In *Nichol and Another v Registrar of Pension Funds and Others* 2008 1 SA 383 (SCA) the SCA held that PAJA made it compulsory for an aggrieved party to exhaust the internal remedies, unless exempted from doing so by way of an application under s 7(2)(c). This will be the case if the Court is satisfied that there are exceptional circumstances requiring immediate intervention by the court rather than recourse to an internal remedy (such as where the available internal remedy would not provide the applicant with effective redress) (par 18 at 391A-B), and if it is in the interest of justice that the exemption be granted (par 15 at 390B-C). Such exceptional circumstances must exist before or at the time of the institution of the review proceedings (par 16 and 17 at 390C-G). See *Meskin* par 1.8.

¹⁵⁵ Hoexter 480.

¹⁵⁶ Section 7(2)(C) of PAJA.

¹⁵⁷ 2005 2 ALL SA 429 (E).

¹⁵⁸ Hoexter 480. See also *Reed v Master of the High Court* (n 157) at par 20.

¹⁵⁹ Section 57(7) of the Insolvency Act.



In summary, the grounds for review relate to requirements that an administrative action should be lawful, reasonable and procedurally fair. The proper extent of judicial control over the administration is a question of recurrent interest in administrative law, no doubt because it can never be answered absolutely. Judicial review will always be characterised by a continuous tension between the two essential aims of administrative law: to empower officials and give them the necessary freedom to do their work, and to control those powers and to limit their freedom in order to protect the rights of those affected by their decisions.¹⁶⁰

3.2.5 Insolvency Act or PAJA?

One of the questions that may arise when the impact of PAJA on South African insolvency law is examined, and in particular the role of the Master, is which Act will prevail if a complainant has a choice between redress through proceedings provided for in the Insolvency Act, on the one hand, and PAJA, on the other. Section 111 of the Insolvency Act could serve as an example of such a predicament.¹⁶¹ According to section 111 of the Insolvency Act:

- (1) The insolvent or any person interested in the estate may, *at any time* before the confirmation of the trustee's account, in terms of section one hundred and twelve, lay before the Master in writing any objection, with the reasons therefore, to that account.
- (2) If the Master is of the opinion that any such objection is well founded or if, apart from any objection, he is of the opinion that the account is in any respect incorrect or contains any improper charge or that the trustee acted *mala fide*, negligently or unreasonably in incurring any costs included in the account and that the account should be amended, he may direct the trustee to amend the account or may give such other direction in connection therewith as he may think fit: Provided that –
 - (a) any person aggrieved by any such direction of the Master or by the refusal of the Master to sustain an objection so lodged, may apply by motion to the court *within fourteen days* as from the date of the Master's direction, or as from the date of intimation to the objector of the Master's refusal to sustain his objection, after notice to the trustee, for an order to set aside the Master's decision and the court may thereupon confirm the account or make such order as it thinks fit (*emphasis added*).

If the Master is of the opinion that the objection is well founded he or she will direct the trustee to amend the account or otherwise reject the objection and proceed to confirm the account according

¹⁶⁰ It should be noted that in an appropriate case “as a matter of public interest in the finality of administrative decisions and the exercise of administrative functions, considerations of pragmatism and practicality” may compel the court to exercise its discretion to decline to set aside an invalid administrative act. See *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 2 SA 638 (SCA) at 649J and 650E. See also Hoexter 128.

¹⁶¹ Sections 107-112 of Insolvency Act. See also Bertelsmann *et al Mars: The Law of Insolvency in South Africa* (2008) 513-545 (hereafter referred to as Mars).

to section 112 of the Insolvency Act. A person who feels aggrieved by the decision of the Master may approach the court within 14 days for relief. After the expiry of the 14-day period the Master, if he or she has not received notice of the application to court, will proceed to confirm the account. It should be noted that the confirmation “shall be final save as against a person who may have been permitted by the court before any dividend has been paid under the account, to reopen it.” It should be noted that if a trustee has according to the distribution account paid out dividends to creditors, a dividend once paid under a confirmed account cannot be disturbed or reclaimed.¹⁶²

The Insolvency Act therefore includes a provision attached to a time-scale in order for an aggrieved person to approach the High Court and it is clear according to *South African Bank of Athens v Sfier*¹⁶³ that it was undoubtedly the intention of the legislator that the objector should follow this route laid down by section 111. It should also be noted that the outcome of the statutory review procedure is final and cannot be reversed by any other remedy. Where the offending action qualifies as an “administrative action” an applicant may be in the position to choose between the remedies offered by the regime of statutory review as mentioned here in section 111, or those available under PAJA.¹⁶⁴

Consequently, the situation sometimes occurs that enabling legislation stipulates its own requirements relating to the timeframe for review, and the question then is whether such a stipulation prevails over section 7(1) of PAJA or *vice versa*.¹⁶⁵ This point arose in *Sasol Oil (Pty) Ltd v Metcalfe NO*.¹⁶⁶ While the maxim *generalialia specialibus non derogant* suggests that the special time limit for review would override PAJA, Willis J took the opposite view in light of the extraordinary status of PAJA as constitutional and “universal” legislation.¹⁶⁷ On appeal the court found it unnecessary to decide the point relating to the formal supremacy of PAJA, noting merely that it was a novel one and had been the subject of academic debate.¹⁶⁸

¹⁶² Section 112 of the Insolvency Act. See Mars 537.

¹⁶³ 1991 3 SA 534 (T) 539. See also *Gilbey Distillers & Vintners (Pty) Ltd v Morris* 1991 1 SA 648 (A) at 655.

¹⁶⁴ Hoexter 527.

¹⁶⁵ Hoexter 527. See Plasket “The exhaustion of Internal Remedies and Section 7(2) of the Promotion of Administrative Justice Act 3 of 2000” (2002) *South African LJ* 50.

¹⁶⁶ See (n143).

¹⁶⁷ *Sasol Oil (Pty) Ltd v Metcalfe NO* (n 143) at 166C. See Hoexter 527.

¹⁶⁸ See *MEC for Agriculture v Sasol Oil* 2006 5 SA 483 (SCA). In *Sasol Oil (Pty) Ltd and Another v Metcalfe* (n 143) it was held that the period of 180 days provided for in PAJA overrides the provisions of conflicting earlier legislation providing for shorter timeframes. In this case the relevant legislation provided for a period of 30 days within which to bring review proceedings. The court found that because PAJA was constitutional legislation, the timeframe of 180 days had to prevail over the earlier legislation providing for a timeframe of 30 days. See Meskin par 1.8.



In *Sidumo & Another v Rustenburg Platinum Mines Ltd*¹⁶⁹ the Supreme Court of Appeal dealt with the question whether PAJA was applicable to review of a Commission for Conciliation, Mediation and Arbitration¹⁷⁰ arbitration award and confirmed that the only tension that arises in view of the importation of PAJA was the difference in timeframes in relation to reviews under section 145 of the Labour Relations Act¹⁷¹ and PAJA respectively.¹⁷² The court stated that the difference is but one of the symptoms of a lack of cohesion between the provisions of PAJA and the Labour Relations Act.¹⁷³ On appeal to the Constitutional Court the court concluded: “that nothing in section 33 of the Constitution precludes specialised legislative regulation of administrative actions such as section 145 of the Labour Relations Act alongside general legislation such as PAJA. Of course, any legislation giving effect to section 33 must comply with its prescripts.”¹⁷⁴ Ngcobo J indicated in *Zondi v MEC for Traditional and Local Government Affairs*¹⁷⁵ that: “decision-makers who are entrusted with authority to make administrative decisions by any statute are ... required to do so in a manner that is consistent with PAJA.” In other words, unless the legislation is actually inconsistent with PAJA, the provisions in the enabling legislation will be applicable and where feasible PAJA will be read into the enabling legislation. Hoexter is of the opinion that the idea that PAJA automatically prevails over all other more specific legislation is a drastic one and would surely be difficult to justify on practical grounds. It would be easier to think of reasons why it may be desirable or necessary for the enabling legislation to impose special requirements in relation to particular statutory regimes.¹⁷⁶ In the context of the tension between the time limit set according to section 111 and the 180 days time limit in PAJA, it could be submitted that the clear intention of the legislature was to ensure a speedy finalisation of the administration of the insolvent estate, as it would not be to the advantage of the South African economy if the administration were to be unduly delayed.¹⁷⁷

¹⁶⁹ 2008 2 SA 24 (CC).

¹⁷⁰ Hereafter referred to as the “CCMA”.

¹⁷¹ Act 66 of 1965. Hereafter referred to as Labour Relations Act.

¹⁷² Van Niekerk *et al Law@work* (2009) 49.

¹⁷³ The same principles could therefore also be applied to the difference in time-scales between PAJA and the Insolvency Act.

¹⁷⁴ *Sidumo & Another v Rustenburg Platinum Mines Ltd* (n 169) at par 91.

¹⁷⁵ 2005 3 SA 589 (CC).

¹⁷⁶ Hoexter 526.

¹⁷⁷ Hoexter 527.

In *HTF Developers (Pty) Ltd v Minister of Environmental Affairs & Tourism & Others*,¹⁷⁸ the Supreme Court of Appeal took the view that if the legislature chose to afford a party affected by particular administrative action greater procedural protection by means of the specific provisions of the Act, those provisions cannot be ignored in favour of less onerous prescriptions in general legislation such as PAJA. It should also be borne in mind that PAJA is in the first instance an Act of general nature. In other words, it prescribes how the powers given to administrators by other laws within a specific area of administration (insolvency legislation) must be exercised. It lays down uniform, system-wide rules about how administrative action authorised by a particular law must be carried out by administrators, and gives members of the public the right to challenge these actions if they do not follow the rules. Any administrative action should therefore comply with the general requirements in PAJA.¹⁷⁹ The more beneficial view would thus be that special provisions will ordinarily prevail over the more general provision in PAJA, provided of course that they do not unjustifiably infringe on the constitutional rights of the applicant.¹⁸⁰ In *Rustenburg Platinum Mines Ltd v Commission for Conciliation, Mediation and Arbitration*¹⁸¹ Cameron JA:

The Constitution does not require that the legislation enacted to give effect to the right to administrative justice must embody any particular time periods. This is therefore a question on which the legislature may be expected to legislate differently in different fields, taking into account particular needs.¹⁸²

3.3 PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000

In terms of section 32 of the Constitution, everyone has the right of access to information held by the state, or by another person, which may be required¹⁸³ for the exercise or

¹⁷⁸ [2007] JOL 19542 (SCA) at par 13.

¹⁷⁹ Currie “Bill of Rights Jurisprudence” (2000) *Annual Survey of South African Law* 27.

¹⁸⁰ As set out in s 33 of the Constitution.

¹⁸¹ See (n 139).

¹⁸² *Rustenburg Platinum Mines Ltd v Commission for Conciliation, Mediation and Arbitration* (n 139) at par 27.

¹⁸³ As to what is meant by “required”, in *Unitas Hospital v Van Wyk and Another* 2006 4 SA 436 (SCA) the Court held that in order for information to be considered to be “required” within the meaning of s 50(1)(a) of the Act, it had to be information that would be of assistance for the applicant’s stated purpose, and that the mere fact that information would be of assistance did not mean that it was “required” (444E). The court was reluctant to formulate a generally applicable definition of “require”, stating that whether or not information was required depended on the facts of each particular case, and concluded that “reasonably required” connoted a “substantial advantage or an element of need” (444G-I). See Meskin par 1.8.



protection of any right.¹⁸⁴ In terms of item 23 of Schedule 6 to the Constitution, the similarly worded provision in section 23 of the Interim Constitution¹⁸⁵ were to apply pending legislation to give effect to the section 32 right of the 1996 Constitution.¹⁸⁶ Such legislation was subsequently promulgated in the form of the Promotion of Access to Information Act.¹⁸⁷ PAIA does not replace the constitutional right to information but rather gives effect thereto in view of the fact that parties must generally assert their right to access to information via the Act.¹⁸⁸ Offering citizens access to state-held information is one of the most effective ways of upholding the constitutional values of transparency, openness, participation and accountability.¹⁸⁹

Access to records of public bodies is governed by Part 2 of the Act. A public body is defined in section 1 to include all departments of state or administration at the national, provincial and local levels, as well as any other functionary or institution acting in terms of the constitution or “exercising a public power or performing a public function in terms of any legislation.”¹⁹⁰ As the Master is a creature of statute performing a public function in terms of legislation, it is clear that for purposes of PAIA the Master qualifies as a public body and therefore the provisions of the Act would be applicable. Public bodies, and as such the Master, are required to designate information officers in order to render the body as accessible as reasonably possible for requests for its records.¹⁹¹

PAIA is applicable to a “record” – ie any recorded information, regardless of form or medium – of a public body or private body regardless of when the record came into existence.¹⁹² According to section 155(2) of the Insolvency Act the Master has to act as office of record of

¹⁸⁴ The provisions of the 1996 Constitution differ from the Interim Constitution in that s 32 does away with the qualification that the right to information is merely enforceable against the state where the applicant requires the information for the protection of his or her records.

¹⁸⁵ Act 200 of 1993. Hereafter referred to as Interim Constitution.

¹⁸⁶ Section 23 of the Interim Constitution provides that every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights. See *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 2 SA 433 (SEC), where the court gave what it regarded as being the correct interpretation of s 23 of the Interim Constitution. See Meskin par 1.8.

¹⁸⁷ Act 3 of 2000. Hereafter referred to as “PAIA”. This Act came into operation on 2001-03-09, with the exception of ss 10, 14, 16 and 51, which came into operation on 2002-02-15. See Meskin par 1.8.

¹⁸⁸ Hoexter 93.

¹⁸⁹ Hoexter 91.

¹⁹⁰ Part b(ii) of the definition of “public body” is, in fact, identical to the wording in s 1(a)(ii) of the PAJA, and both are based on the definition of “organ of state” in s 239 of the Constitution. See Hoexter 95.

¹⁹¹ Section 17(1) of PAIA.

¹⁹² Section 3 of PAIA. See Hoexter 94.

all documents relating to an insolvent estate for a period of at least five years from date of rehabilitation of the insolvent.¹⁹³ Having regard to the provisions in PAIA in accordance with section 32 of the Constitution, the Master may be obliged to make records or information in his possession available, whether such records were created by him or not. This would appear to be the position even if other legislation provides that the proceedings in terms of which the information was recorded or obtained is confidential or secret.¹⁹⁴

A person requesting a record from a public body need not indicate that the record is required for the exercise or protection of any right.¹⁹⁵ The Act contains a number of exceptions which render the disclosure of information not mandatory, for instance where disclosure would entail the unreasonable disclosure of personal information regarding a third party,¹⁹⁶ or would constitute a breach of a duty of confidentiality owed to a third party in terms of a confidentiality agreement or other agreement not to disclose information supplied to it by another in confidence;¹⁹⁷ or where the information sought relates to records which are privileged from production in legal proceedings unless there is a waiver of the privilege.¹⁹⁸

¹⁹³ Section 155 (2) of the Insolvency Act.

¹⁹⁴ Meskin par 1.8.

¹⁹⁵ Cf s 32 of the Constitution; and see *Cape Metropolitan Council v Metro Inspection Services CC* 2001 3 SA 1013 (SCA), s 11 of PAIA, dealing with records of public bodies, and s 50, dealing with records of private bodies. See Meskin par 1.8.

¹⁹⁶ Section 34 of the Constitution.

¹⁹⁷ Section 37 of PAIA. For a case dealing with the prohibition of the disclosure of information relating to a third party in terms of a confidentiality agreement, see *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 6 SA 285 (SCA). Under the Interim Constitution the matter was more complicated. *Jeeva v Receiver of Revenue, Port Elizabeth* (n 188) held that a proper interpretation of s 23 of the Interim Constitution gives a person the right of access to information whether or not that information is the subject of a legal professional privilege and whether or not it is information covered by the legislative provisions which preserves the secrecy of information held by the South African Revenue Service. The court upheld the legal professional privilege in terms of s 33(1) of the Constitution because it is part of the common law which is a limiting law of general application, it does not negate the essential content of the s 23 right of access to information and because it is reasonable and justifiable in an open and democratic society based on freedom and equality. In another instance the court exercised its discretion to order disclosure of information held by the South African Revenue Service (which it was not otherwise at liberty to disclose) where there was no realistic possibility of that information coming to the knowledge of third parties or that it might have been used by third parties to the prejudice of the taxpayer. (The applicants were persons associated with the insolvent in his business who asked to have access to the documents in the possession of the South African Revenue Service to prepare for an examination.). See also *Ferela v Commissioner for Inland Revenue* 1998 4 SA 275 (T); *Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2000 2 SA 934 (T); *Sackstein NO v South African Revenue Service* 2000 2 SA 250 (SE). There is also no reason why the contents of a file of the revenue authorities in an application for a warrant have to be withheld from the parties affected by it. See *Ferela v Commissioner for Inland Revenue* 1998 4 SA 275 (T). In *Hyundai Motor Distributors (Pty) Ltd v Smit* the court prohibited the Commissioner and officials from making known any information regarding taxpayers except for purposes of prosecution of offences relating to the Income Tax Act and Value-Added Tax Act. In *Sackstein NO v South African Revenue Service* 2000 2 SA 250 (SECLD) the court refused, because of insufficient cause shown, to exercise its discretion in favour of overriding the secrecy provision and stated that the decision whether to communicate information should be taken by the revenue official. With reference to s 6(1) of the Value-Added Tax Act 89 of 1991, it would be



There are two separate requirements that have to be satisfied before the public body is justified in refusing access to personal information, namely the disclosure must invade the privacy of a third party who is a natural person, and disclosing the information must be unreasonable in the circumstances.¹⁹⁹ In *Bernstein v Bester*²⁰⁰ it was stated that the test to determine whether there had been an invasion of a person's privacy is that the person has a subjective expectation of privacy and that society has recognised that expectation as objectively reasonable.²⁰¹ Section 34 (2) of the Act articulates a list of grounds in respect of which there could be no legitimate expectation of privacy, for example if a person has handed over information knowing that it would become available to the public.²⁰²

A public body may also refuse a request for access to a record in its possession if disclosure thereof could reasonably be expected to jeopardise the effectiveness of a testing, examining or auditing procedure or method used by a public body,²⁰³ or when the request for information is manifestly frivolous or vexatious, or where the work involved in processing the request would substantially and unreasonably divert the resources of the public body.²⁰⁴ Despite these exceptions, section 46 of the Act provides that the appointed information officer must grant a request for access if the disclosure would reveal evidence of a substantial contravention of, or failure to comply with, the law and the public interest in such disclosure clearly outweighs the harm contemplated by the relevant provision.²⁰⁵

According to the Constitutional Court in *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996*²⁰⁶ the entrenchment of the right to access to information in the Constitution was "directed at promoting good

wholly artificial to hold that a liquidator of a debtor is not entitled to access to all the debtor's records in the possession of the Commissioner and to disclose such records to the court – *Shrosbree NO v Klerck NO* 2000 4 SA 457 (SECLD).

¹⁹⁸ Section 40 of PAIA.

¹⁹⁹ Devenish 203.

²⁰⁰ See (n 14).

²⁰¹ *Bernstein v Bester* (n 14) at par 75.

²⁰² Devenish 204.

²⁰³ Section 44(2)(a) of PAIA.

²⁰⁴ Section 45 of PAIA. For an example of a case where a public body unsuccessfully refused access to certain information based on s 44 of the PAIA, see *Minister, Provincial and Local Government, RSA v Unrecognised Traditional Leaders of the Limpopo Province (Sekhukhuneland)* [2004] JOL 13034 (SCA).

²⁰⁵ Meskin par 1.8.

²⁰⁶ 1996 4 SA (CC).

government²⁰⁷ and it follows that PAIA, which gives effect to this right, is centrally concerned with good government.²⁰⁸ The notion of an accountable government is thus made impossible if government has a monopoly over the information that informs actions and decisions, and public access thereto is made impossible or unjustifiably excluded.²⁰⁹

²⁰⁷ *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996* (n 206) at par 85.

²⁰⁸ Currie 692.

²⁰⁹ Currie 692.



CHAPTER 4: CONCLUSION

The Constitution, which embodies fundamental human rights, has changed the face of our law dramatically in that legislation may now be tested by the courts in order to establish its constitutionality – the Constitution being the supreme law of the land.²¹⁰ In keeping with the salient features of constitutionalism the objective of any state regulation in South Africa should be to conform to the broad philosophical values of the Constitution. Perhaps the most powerful motivation for a dynamic form of administrative justice permeating all types of public power is the determination to avoid any recurrence of instances of oppression and injustices of the past. As the Insolvency Act was in place long before the new constitutional dispensation, it is important that the aim of any law reform proposal regarding state regulation in insolvency law should be to create an environment of accountability and justification and to bring the regulatory principles of our law in line with the values expressed in modern administrative and constitutional law.

When examining the effect of the Constitution on state regulation in South African insolvency law, it becomes apparent that not a great deal of research, case law or other sources exist on this topic. Despite the lack of any elaborate treatment of the subject, it remains a reality that the Constitution has laid a new foundation in South African law by providing for a multi-faceted right to administrative action. In the context of this study the enactment of PAJA is certainly the most relevant and significant constitutional development. As a public body and organ of state the Master is henceforth bound by the provisions of PAJA, with the result that every administrative action performed by the Master is made subject to the requirements for valid administrative conduct and the grounds for review specified therein.

One of the most effective ways of upholding the underlying constitutional values of transparency, openness, participation and accountability is the access to state-held information offered to citizens in terms of section 32 of the Constitution and PAIA. As the Master is a creature of statute performing a public function in terms of legislation, it is clear

²¹⁰ See ch 1 above.

that for purposes of the latter Act that the Master qualifies as a public body and must therefore comply with the provisions of the Act.

Concern is sometimes raised regarding the impact of the procedural constraints in the Constitution and other relevant legislation applicable to the Master in that these could have the effect of impeding the efficient, effective and swift finalisation of an insolvent estate. However, it must be noted that in redefining the role of the law as well as of any public institution, tension will always exist between the procedural fairness and rationality advocated by the Constitution and PAJA, on the one level, and the need for effective, efficient and expeditious public administration, on the other.²¹¹

With regard to the purpose of this study, namely to make proposals for a professional and effective regulatory framework in South African insolvency law, the principle of constitutional supremacy is critical to the outcome. In other words, in the interpretation and application of every law, the Constitution must be taken as a point of departure. The positive challenge therefore lies in absorbing the right to administrative justice and the access to information entrenched in the Constitution, into the development of a regulatory framework with the aim of securing and assuring public confidence in the insolvency process within the current socio-economic circumstances in South Africa.

²¹¹ Corder 18.

*A Reformatory Approach to State Regulation of Insolvency Law in
South Africa*

PART V

**STATE REGULATION OF SOUTH AFRICAN INSOLVENCY LAW
AND EARLIER LAW REFORM PROPOSALS**

SUMMARY

1	INTRODUCTION.....	199
2	LEGAL FRAMEWORK OF SOUTH AFRICAN INSOLVENCY LAW.....	201
3	REGULATORY FRAMEWORK OF SOUTH AFRICAN INSOLVENCY LAW.....	204
3.1	INTRODUCTION.....	204
3.2	POWERS AND DUTIES OF THE MASTER.....	206
3.2	REVIEW PROCEEDINGS.....	259
4	INSTITUTIONAL FRAMEWORK OF SOUTH AFRICAN INSOLVENCY LAW.....	261
5	PROBLEMS AND PITFALLS IDENTIFIED.....	263
5.1	MASTER AS REGULATORY BODY.....	261
5.2	REGULATION OF INSOLVENCY PRACTITIONERS.....	266
6	LAW REFORM.....	269
6.1	THE DRAFT BILL AND EXPLANATORY MEMORANDUM.....	270
6.2	PROPOSALS RELATING TO THE REGULATORY REGIME IN SOUTH AFRICAN INSOLVENCY LAW.....	272
7	CONCLUSION.....	278



CHAPTER 1: INTRODUCTION

If we lawyers tend to overlook the evolution of substantive law, then we can be downright unconscious about legal institutions and legal practice. Practices are all too often taken for granted and we too often repeat rituals and sustain enterprises long after their reason for being has evaporated.¹

The aim of this part of the study is to provide a theoretical framework for regulatory insolvency law, in order to develop a sense of the basic nature and philosophy of the regulatory environment within South African insolvency law. A critical approach is perceived to be essential on the grounds that it is not viable to evaluate areas of the law, identify policy objectives or suggest reforms, with a sense of purpose, unless there is clarity concerning the objectives and values that are being advanced.² A constant theme throughout the discussion of the current laws and processes will in the first instance be to assess the extent to which our system needs to be reformed in order to measure up to international norms and modern developments elsewhere, and secondly to evaluate whether our present system reflects the foundational values of our own society.³ Moseneke J very aptly articulated this principle when he said:

I am not overstating the character of our democratic transition when I say it is a constitutional revolution. It is the outcome of a collective, but solemn pact to transform our society in a fundamental way. Our aspirations of a good and socially just society stand proudly in our highest law. As our nightmarish past gave way to our idyllic future, the very process of the transition was carefully scripted. Law sanctioned every step of the revolution. The bad and the ugly were to be jettisoned and the good to be kept and nourished with the new found rules and foundational values of the Constitution.⁴

In order to contextualise the chief purpose of this thesis (namely, ultimately to propose a framework within which the law- and policymakers can pursue legal reform based on comprehensive policy objectives in this field of law), a broad outline of the legal, regulatory and institutional frameworks within the South African insolvency law system, with the emphasis on the powers and duties of the Master of the High Court⁵ via the Insolvency Act of

¹ Shepard “The Importance of Legal History for Modern Lawyering” (1997) *Indiana LR* 3.

² Finch *Corporate Insolvency Law* (2009) 3.

³ See part III and part IV above.

⁴ Moseneke *Transformative Constitutionalism: Its Implications for the Law of Contract* (2008) unpublished public lecture delivered at University of Stellenbosch, on file with the author. See also Moseneke “Transformative Adjudication in Post Apartheid South Africa – Taking Stock After a Decade” (2007) *Speculum Juris* 2.

⁵ Hereafter referred to as the Master. Section 1 of the Administration of Estates Act 66 of 1965 (hereafter referred as Administration of Estates Act) defines “Master” in relation to any matter, property or estate, as the Master, Deputy Master or Assistant Master of the High Court who has jurisdiction in respect of the matter, property or estate.

1936,⁶ will be provided. Given the vastness of the Master's influence on our insolvency law, this part of the study does not present an exhaustive exposition of all existing statutory rules and case law, but through considering certain key duties and functions aims to provide a character sketch of the Master.⁷ In addition, an overview of the legal and institutional frameworks present within the South African insolvency law will be included. Finally, the study offers a critical review of the earlier law reform proposals by the South African Law Reform Commission.⁸

⁶ Act 24 of 1936. Hereafter referred to as the Insolvency Act or the Insolvency Act of 1936.

⁷ See generally: Bertelsmann *et al Mars: The Law of Insolvency in South Africa* (2008) (hereafter referred to as Mars); see also Kunst *et al Meskin, Insolvency Law and its Operation in Winding-up* (loose-leaf edition) (hereafter referred to as Meskin); Smith *The Law of Insolvency* (1988) 3 (hereafter referred to as Meskin); Sharrock *et al Hockly's Insolvency Law* (2006) (hereafter referred to as Hockly). See also Burdette *Framework for Corporate Insolvency Law Reform in South Africa* (2002) LLD dissertation University of Pretoria

⁸ The South African Law Reform Commission is an independent statutory body established by the South African Law Reform Commission Act 19 of 1973. See South African Law Commission (as it was then known) *Review of the Law of Insolvency* Project 63 (2000) Report, vol I Explanatory Memorandum (hereafter referred to as the Explanatory Memorandum), and vol II Draft Bill (hereafter referred to as 2000 draft Insolvency Bill or draft Insolvency Bill). See also Evans *A Critical Analysis of Problem Areas in respect of Assets of Insolvent Estates of Individuals* (2009) 430 LLD dissertation University of Pretoria (hereafter referred to as Evans); Evans "Aspects of the Draft Insolvency Bill" (1999) *SA Merc LJ* 210.



CHAPTER 2: LEGAL FRAMEWORK OF SOUTH AFRICAN INSOLVENCY LAW

The main source of South African insolvency law is the Insolvency Act, which also serves as the foundation of our regulatory procedures. The Insolvency Act is also supplemented by the common law,⁹ the Constitution of the Republic of South Africa,¹⁰ as well as precedents set by the High Courts.¹¹ However, the Insolvency Act specifically states that it applies only to individuals and partnerships,¹² and not to companies or other bodies corporate that can be wound up in terms of the Companies Act. Historically, South African insolvency law has been structured around the individual debtor. Certain scholars attribute this phenomenon to the fact that the concept of a separate legal entity complete with its own legal personality as provided for in company law legislation, developed only a considerable time after insolvency law had already become established.¹³ The provisions relating to the winding-up¹⁴ of

⁹ Modern insolvency legislation clearly bears the imprint of both Dutch practices and earlier English bankruptcy laws, most notably on aspects such as rehabilitation and the discharge of debts. See Palmer *Mixed Jurisdictions Worldwide: The Third Legal Family* (2001) 168; Wessels *History of the Roman Dutch Law* (1908) 661; It is important to note that however complete the Insolvency Act may be, it did not repeal the common law in respect of South African insolvency law. Several common law principles and procedures are still applicable eg, *Actio Pauliana*. See Boraine *Die Leerstuk van Vernietigbare Regshandelinge in die Insolvensiereg* (1994) LLD dissertation University of Pretoria (hereafter referred to as Boraine); Boraine “Towards Codifying the *Actio Pauliana*” (1996) *SA Merc LJ* 213 for a detailed discussion of the principles of the *Actio Pauliana*. See *Fairlee v Raubenheimer* 1935 AD 135 at 136. For a more comprehensive discussion of the history of South African insolvency law, see part II above.

¹⁰ Constitution of South Africa, 1996. Hereafter referred to as the Constitution. In terms of s 1(2) of the Citation of Constitutional Laws Act 5 of 2005, which came into operation on 2005-06-27, all references to the Constitution of the Republic of South Africa Act 108 of 1996 have been replaced by the Constitution of South Africa, 1996. The Constitution, which embodies fundamental human rights, has changed the face of South African law dramatically in that legislation may now be tested by the courts in order to establish its constitutionality – the Constitution being the supreme law of the land. See *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC). See part IV ch 2 above.

¹¹ For a detailed discussion of South African insolvency law see generally: Mars; Hockly 1-12; Stander *Die Invloed van Sekwestrasie op Onuitgevoerde Kontrakte* (1994) LLD dissertation Potchefstroom University for Christian Higher Education; Cronje *et al Study Notes: Diploma in Insolvency Law and Practice* (2009) (hereafter referred to as *Study Notes: Diploma in Insolvency Law and Practice*).

¹² See the definition of “debtor” in s 2 of the Insolvency Act. It is to be noted that the definition of “debtor” has been given an extended meaning to include trusts (see *Magnum Financial Holdings (Pty) Ltd (in liquidation) v Summerly* 1984 1 SA 160 (W)), insolvent deceased estates and estates under curatorship (see s 3(1) of the Insolvency Act) and other entities that are not capable of being wound up in terms of the Companies Act 61 of 1973 (hereafter referred to as the Companies Act), or the Close Corporations Act 69 of 1984 (hereafter referred to as the Close Corporations Act). Examples of the latter would be clubs and other associations of persons that do not have juristic personality. See Burdette 4.

¹³ The first company legislation in South Africa had its origins in the Cape in the form of the Joint Stock Companies Limited Liability Act 23 of 1861. See Burdette ch 3, where this aspect is discussed in more detail. See also Keay “The Unity of Insolvency Legislation: Time for a Re-think?” (1999) *Insolvency Law Review* 5 (hereafter referred to as Keay “The Unity of Insolvency Legislation”).

¹⁴ The terms “winding-up” and “liquidation” will be used as synonyms throughout this study. It is interesting to note that the South African Law Reform Commission has used the term “liquidation” and not

companies are contained in the Companies Act, and the provisions relating to the winding-up of close corporations in the Close Corporations Act. These latter Acts are subsequently “connected” to the Insolvency Act, the central piece of legislation, by means of “connecting provisions”¹⁵ that make insolvency law applicable also to these types of entities.¹⁶

Given that South Africa became a constitutional democracy after 1994, the final Constitution is now viewed as the superior law of the land, and is the yardstick by which all other laws are judged.¹⁷ It should therefore be taken into account that when exercising administrative powers and discretions, the Master will be bound by sections 32 and 33 of the Constitution, which give effect to the right to information and fair administrative action respectively.¹⁸ As demonstrated earlier in this study,¹⁹ these rights are augmented by further legislation such as the Promotion of Access to Information Act²⁰ as well as the Promotion of Administrative Justice Act.²¹

It is inevitable that any approach to substantive law is influenced by one’s view of a larger policy direction. South African insolvency law proceeds from the premise that once a sequestration order is granted, a *concursum creditorum*²² comes into being and the interests of the creditors as a group enjoy preference over the interests of individual creditors.²³ The

“sequestration” in the Draft Insolvency Bill; Boraine “The Draft Insolvency Bill – An Exploration (Part 1)” (1998) *TSAR* 621 at 623 where reference is made to this uniformity. See Burdette 4-5.

¹⁵ Section 339 of the Companies Act and s 66 of the Close Corporations Act. See Burdette 134-136.

¹⁶ There are also a myriad of other Acts which also provide for the winding-up of specific types of entities. See eg, part VI of the Long Term Insurance Act 52 of 1998; part VI of the Short Term Insurance Act 53 of 1998; s 29 of the Pension Funds Act 24 of 1956; s 35 of the Friendly Societies Act 25 of 1956; s 18C of the Medical Schemes Act 72 of 1967; ss 27, 28 and 39 of the Unit Trusts Control Act 54 of 1981; ch X of the Co-Operatives Act 91 of 1981; s 33 of the Financial Markets Control Act 55 of 1989; s 68 of the Banks Act 94 of 1990; and ch VIII of the Mutual Banks Act 124 of 1993. See Burdette ch 7.

¹⁷ See (n 10). See part IV ch 2 above. See generally: *S v Makwanyane* 1995 6 BCLR 665 (CC); 1995 3 SA 391 (CC) at 262; Hoexter *Administrative Law in South Africa* (2006) 29 (hereafter referred to as Hoexter); Burns *Administrative Law under the 1996 Constitution* (2003) 1 (hereafter referred to as Burns); The Bill of Rights is set out in ch 2 of the Constitution. See generally: Currie *The Bill of Rights Handbook* (2005) (hereafter referred to as Currie); Evans 379.

¹⁸ Nagel *et al Commercial Law* (2006) 402 (hereafter referred to as Nagel). See part IV above.

¹⁹ Part IV ch 3 above.

²⁰ Act 2 of 2002. Hereafter referred to as “PAJA”.

²¹ Act 3 of 2002. Hereafter referred to as “PAIA”. See part IV above.

²² cf Swart *Die Rol van ’n Concursum Creditorum in Suid-Afrikaanse Insolvensiereg* (1990) LLD dissertation University of Pretoria; In *Walker v Syfret* 1911 AD 141 at 166 the court explained the key concept of *concursum creditorum* as follows:

The sequestration order crystallises the insolvent’s position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.

²³ The main aim of the South African insolvency process is to provide for a collective debt-collecting procedure that will ensure an orderly and equitable distribution of the debtor’s assets where the assets are



concursum creditorum is regarded as one of the key concepts of the South African law of insolvency. The object of the Insolvency Act is to ensure a due distribution of assets among the general body of creditors.²⁴ It is important to note that it is not a primary object of the Insolvency Act to grant relief to debtors.²⁵ South African insolvency law has traditionally been classified as a pro-creditor system,²⁶ mostly due to the fact that our insolvency law exists primarily for the benefit and protection of creditors²⁷ and not at assisting a debtor unable to pay his debts. The requirement of “advantage to creditors” in section 4 of the current Insolvency Act, which serves as prerequisite for sequestration applications, is confirmation of this.²⁸ It is in this domestic legal environment that the regulatory model of South African insolvency law operates.

insufficient to satisfy all the creditor's claims. The law of insolvency can therefore broadly be defined as the totality of rules regulating the situation where a debtor cannot pay his debts, or where his total liabilities exceed all his assets. See *Richter NO v Riverside Estates (Pty) Ltd* 1946 OPD 209 at 223. See Smith 4; Hockly 5; See Mars 6; Evans 198.

²⁴ Mars 3.

²⁵ *R v Meer* 1957 (3) SA 614 N at 619. See Mars 3.

²⁶ According to Wood *Principles of International Insolvency* (1995), South Africa is a pro-creditor country, leaning towards pro-debtor (Wood scores South Africa at 6 on a scale where 1 is extremely pro-creditor and 10 extremely pro-debtor). The above classification is however omitted from the new edition of this work. For a more detailed illustration of the global differentiation between insolvency laws that are pro-debtor or pro-creditor refer to Wood *Principles of International Insolvency* (2007) 4-6 (hereafter referred to as Wood). South Africa still has the requirement of an “advantage for creditors” that has to be proved before a court will grant a sequestration order – see ss 6(1) and 12(1)(c) of the Insolvency Act.

²⁷ *Cf Ex Parte Pillay* 1955 2 SA 309 (N) at 311.

²⁸ In *R v Meer* (n 25) at 619 the court confirmed: “[T]he Insolvency Act was passed for the benefit of creditors and for the relief of harassed debtors”. The requirement of “advantage to creditors” does not apply in the case of companies and is not common in other legal systems. See also Boraine “Vriendskaplike sekwestrasies – ’n produk van verouderde beginsels? (Deel 1)” (1993) *De Jure* 230; Rochelle “Lowering the Penalties for Failure: Using the Insolvency Law as a Tool for Spurring Economic Growth; The American Experience, and Possible Uses for South Africa” (1996) *TSAR* 315; Roestoff “Skuldverligtingsmaatreëls vir Individue in die Suid-Afrikaanse Insolvensiereg: ’n Historiese Ondersoek (deel II)” (2004) *Fundamina* 115; Loubser “Ensuring Advantage to Everyone in a Modern South African Insolvency Law” (1997) *SA Merc LJ* 326 (hereafter referred to as Loubser “Ensuring Advantage to Everyone in a Modern South African Insolvency Law”). See Mars 3.

CHAPTER 3: REGULATORY FRAMEWORK OF SOUTH AFRICAN INSOLVENCY LAW

3.1 INTRODUCTION

International principles and guidelines portray the regulatory framework within an insolvency law system as dealing with the qualification and regulation of office-holders²⁹ as well as the establishment and implementation of the regulatory body that has oversight and responsibility for implementing the regulatory procedures.³⁰ Accordingly, the regulatory body providing regulatory oversight and the insolvency profession responsible for affecting the insolvency procedure represent the two key components of any effective regulatory framework. It is quite a challenge to discuss and define in general terms the character of the regulatory model in South African insolvency law, bearing in mind that when considering the basic international concept of insolvency regulation, it would be tempting to make the observation that the South African insolvency system does not possess any regulatory features of substance whatsoever. This remark will become clearer as we proceed with the discussion. In the *Revised Draft Creditor Rights and Insolvency Standard*³¹ the profile of an international insolvency regulator is described as follows:

The bodies responsible for regulating or supervising insolvency representatives should:

- Be independent of individual representatives⁷;
- 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.³²

If we align the institution of the Master with international norms and standards, it is particularly difficult to clearly define the role of the Master within the context of an international insolvency regulator. From a strategic point of view, we may say that the Master's identity is that of regulator, as it does possess certain regulatory powers, such as applying its powers to compel an insolvency practitioner to act in the interests of the

²⁹ See discussion in part I par 1.6 above. Includes eg, trustees, liquidators, judicial managers.

³⁰ Johnson "Towards International Standards on Insolvency: The Catalytic Role of the World Bank" (2000) *Law in Transition* 73 (hereafter referred to as Johnson).

³¹ Revised Draft Creditor Rights and Insolvency Standard, Based on the World Principles and for Effective Creditor Rights and Insolvency Systems and UNCITRAL Legislative Guide on Insolvency Law, Revised Draft, (2005) (also referred to as *Revised Principles*). Available at <http://siteresources.worldbank.org/GILD/Resources/FINAL-ICRPrinciples-March2009.pdf> (last visited at 30-11-09). See Part III ch 7 above. See also Wessels *International Insolvency Law* (2007) annex 4 (hereafter referred to as Wessels *International Insolvency Law*).

³² *Revised Principles* 20-22.



creditors.³³ As a “creature of statute” the Master possesses only the powers the statute accords, whether expressly or by necessary implication.³⁴ Notwithstanding the suggestion in the Master’s title that there is an association with the courts, the Master is not part of the formal court structure and as such not appointed as an officer of the High Court.³⁵ The Master is appointed in terms of the Administration of Estates Act,³⁶ which includes the definition of the “Master” as follows:

[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.³⁷

The Administration of Estates Act also makes provision for the appointment of a Chief Master who shall act as the executive officer of the Master’s offices and exercises supervision over all the Masters as may be necessary to bring about uniformity in their practice and procedure.³⁸ The Master is appointed by the Minister of Justice and Constitutional

³³ Section 60 (a)-(e) of the Insolvency Act. Section 379 of the Companies Act regulates the removal of a liquidator. See also Hockly 116. Rudolph *Student Manual: Applying the Promotion of Administrative Justice Act in Practice* (2009) 67 (hereafter referred to as *Rudolph Student Manual*).

³⁴ Cf Mars 29. *Die Meester v Protea Assuransiematskappy Bpk* 1981 2 SA 685 (T) 690; *De Lange v Smuts* 1998 3 SA 785 (CC) 853; *The Master v Talmud* 1960 1 SA 236 (C) at 238.

³⁵ Section 34(1)(a) of the Supreme Court Act 59 of 1959 provides for the appointment of officers of the Supreme Court (now High Court) but does not refer to the Master. See Mars 29.

³⁶ See s 2(2) of the Administration of Estates Act. The office of the Master is staffed by civil servants in the employ of the Department of Justice and Constitutional Development (hereafter referred to as the Department of Justice). Only persons with prescribed legal qualifications can be appointed as Master, Deputy Master or Assistant Master. The institutional structures are the following: the Chief Master heads the national office and is responsible for co-ordinating all the activities of the Masters’ offices; there are currently Masters’ offices situated in Bisho, Bloemfontein, Cape Town, Durban, Grahamstown, Johannesburg, Kimberley, Mafikeng, Polokwane, Port Elizabeth, Pietermaritzburg, Pretoria, Thohoyandou and Mthatha; sub-offices are located in places where the High Court does not have a seat, but where workloads require the presence of at least one Assistant Master. At service points, officials attached to the Department of Justice Branch: Court Services deliver services on behalf of, and under the direction of, the Master. Each magistrate’s court is a service point. Each service point has at least one designated official who is the office manager or a person of equal rank. Masters’ representatives are appointed only in intestate estates of R125 000 or less, in terms of s 18(3) of the Administration of Estates Amended Act 47 of 2002. The Master is self-sustainable and achieves this status by charging a fee on every estate administered by the Insolvency Act. The Third Schedule to the Insolvency Act provides for the payment of Master’s fees in all insolvent estates under final sequestration on the total gross value of assets according to the trustee’s account.

³⁷ 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.

³⁸ Section 2(1)(b) of Administrative of Estates Act. Section (1) was substituted by s 14 of Judicial Matters Amendment Act 16 of 2003 and by s 3 of Judicial Matters Amendment Act 22 of 2005. Section 2(1) of the Administration of Estate Act now provides that, subject to subs 2(2) (ie relevant degree required or Minister placing temporary Master in vacated position) and the public service laws, the Minister appoints a Chief Master of the High Courts; appoints a Master of the High Court for the area of jurisdiction of each High Court; and may, in respect of each area, appoint one or more Deputy Masters and Assistant Masters, who may, subject to the control, direction and supervision of the Master, do anything which may lawfully be done by the Master. The Chief Master is subject to the control, direction and supervision of the Minister; is the executive officer of the Masters’ offices; and shall exercises control, direction and supervision over all the Masters.

Development for the area of jurisdiction of a provincial division of the High Court. Each Master has an office at the seat of the High Court in respect of whose area of jurisdiction he has been appointed.³⁹ The Master who has jurisdiction under the Insolvency Act in relation to any matter is “the Master of the Supreme Court within whose area of jurisdiction that matter is to be dealt with and includes an Assistant Master”.⁴⁰

It should also at this stage be noted that although the Master is generally responsible for the supervision of South African insolvency law, this is not the only discipline it has to contend with. In addition to the regulation of insolvency law, the Master has, inter alia, the following functions: supervising the administration of estates of deceased persons,⁴¹ including the registration of wills; registration of trusts;⁴² supervising the administration of estates of minors and legally incapacitated persons and the administration of the “Guardian’s Fund”, where unclaimed monies and certain funds of minors and incapacitated persons are held in reserve.⁴³

The aim of the remaining part of this chapter is to provide a delineation of the duties and functions of the Master as stipulated in the Insolvency Act, by roughly following the timeline of the procedures as they appear in the Act. The study does not provide a detailed exploration of each of the duties and functions pertaining to the Master, although an attempt will nevertheless be made to set out the rules and producers in sufficient detail as to facilitate an understanding of the framework and operation of the Master within South African insolvency law. Additionally, in order to provide a complete image, the provisions under previous insolvency legislation will also be considered in instances where the role of the Master varied in character and nature.

3.2 POWERS AND DUTIES OF THE MASTER

3.2.1 Commencement of the Sequestration Process

³⁹ Section 3(1) of the Administration of Estates Act.

⁴⁰ Section 2 of the Insolvency Act. See also s 4 of the Administration of Estates Act.

⁴¹ See Administration of Estates Act and Wills Act 7 of 1953.

⁴² Trust Property Control Act 57 of 1988.

⁴³ See ss 76 (1) (b) and 86-93 of Administration of Estates Act; Mental Health Care Act 17 of 2002. In terms of the Prevention of Organised Crime Act, 121 of 1998, where the court has authorised the attachment of such assets by the Asset Forfeiture Unit, it appoints a curator to administer the assets. The appointed curator, however, has no authority to act as such until duly authorised by the Master.

Besides the principles of *cessio bonorum*, which originated from the Roman-Dutch law, there was no generally applicable insolvency law coordinating the commencement of the insolvency process in the early Cape until 1803.⁴⁴ Under the leadership of Governor De Mist, the then Commissioner-General at the Cape, an Ordinance largely based on the 1777 Amsterdam Ordinance was issued in 1804.⁴⁵ The system applied in cases where the debtor had ceased payment of his debts, or where the debtor had surrendered his estate by means of *cessio bonorum*.⁴⁶ During the early nineteenth century the Ordinance 64 of 1829 had been adopted and provided for the voluntary surrender of an estate by the debtor, as well as the compulsory sequestration of the debtor's estate if the debtor had committed certain specified acts of insolvency.⁴⁷ A significant aspect of this Ordinance had been that following the granting of the sequestration order, the estate of the insolvent vested in the Master, and subsequently in the trustee.⁴⁸ The administration of the estate was dealt with by a trustee under the supervision of the Master.⁴⁹

The subsequent Insolvency Act of 1916⁵⁰ made provision as well for two means in which the estate of an insolvent debtor could have been placed under sequestration, namely the voluntary surrender of the debtor's estate by the debtor himself, and the compulsory sequestration of the debtor's estate on receipt of a petition from a creditor.⁵¹ The 1916 Act also made provision for a debtor to assign his estate in order to avoid the consequences of sequestration. Under this provision of the Act an assignment indicated an agreement whereby a debtor agreed to transfer his property to an assignee for the benefit of creditors. An estate assigned under this provision was not considered to be an insolvent estate and the debtor did

⁴⁴ See De Villiers *Die Ou-Hollandse Insolvensiereg en die Eerste Vaste Insolvensiereg van de Kaap De Goede Hoop* (published Doctoral Thesis, Leiden, 1923) (hereafter referred to as De Villiers); Wessels 669; Mars 4. See part 11 above.

⁴⁵ The De Mist Ordinance was named the *Provisioneele Instructie voor de Commissarissen van de Desolate Boedelkamer* of 1804. See Stander "Geschiedenis van die Insolvensiereg" 1996 *TSAR* 376 (hereafter referred to as Stander "Geschiedenis van die Insolvensiereg").

⁴⁶ Creditors could however not directly sequester the estate of a debtor, and the creditors basically did not participate in the administration of the insolvent estate. See Stander "Geschiedenis van die Insolvensiereg" 376; Mars 8.

⁴⁷ De Villiers 107; Wessels 670 and Stander "Geschiedenis van die Insolvensiereg" at 376 are of the opinion that this Ordinance established the true foundation of the South African insolvency law.

⁴⁸ Stander "Geschiedenis van die Insolvensiereg" at 376 is of the opinion that this was the first time that it had become apparent that the trustee received ownership of the assets of the estate. See also Evans "Who Owns the Insolvent Estate?" 1996 *TSAR* 719.

⁴⁹ This Ordinance introduced English insolvency law principles into our legal system. See Wessels 670.

⁵⁰ Act 32 of 1916. Hereafter referred to as the Insolvency Act of 1916 or the 1916 Insolvency Act.

⁵¹ Sections 3-7 of the 1916 Insolvency Act.

not suffer any diminution in capacity.⁵² After the date of assignment the estate was administered and distributed by the assignee under the supervision of the Master, having powers and duties similar to a trustee in an insolvency matter.⁵³ The existing 1936 Insolvency Act repealed the 1916 Insolvency Act, and currently regulates the process to declare an individual debtor's estate bankrupt, subsequently referred to as the sequestration process.⁵⁴ Although the consequences of the different methods described within in the Act are similar, the procedure and requirements for each process differ in certain material respects, and the role of the Master therefore also varies.

3.2.1.1 Voluntary surrender

One of the methods of sequestration involves the debtor applying to the court for the acceptance of the surrender of his estate for the benefit of creditors.⁵⁵ The Act makes provision for certain formalities to be complied with prior to an applicant applying for a voluntary surrender of an estate.⁵⁶ Preceding the date of application, the applicant has to publish a notice of surrender in the *Government Gazette* and in a newspaper circulating in the magisterial district where he resides, or where he has traded, or in the district where he had his principal place of business.⁵⁷ The debtor is also required to send a copy of the notice of

⁵² Sections 115-128 of the 1916 Insolvency Act. See Nathan 359.

⁵³ Nathan xxv.

⁵⁴ Sequestration is initiated by an application to the High Court made by the debtor himself known as voluntary surrender or by a creditor or creditors, which in turn is referred to as a compulsory sequestration. Section 343 of the Companies Act states the three modes in which a company may be wound up, namely, by the court, creditors' voluntary winding-up and members' voluntary winding-up. See McKenzie-Skene "Reforming Insolvency Law: A Comparative Study of Scotland and South Africa" (2005) *Nottingham LJ* 48 (hereafter referred to as McKenzie-Skene); Roestoff "Debt Relief for Consumers – The Interaction between Insolvency and Consumer Protection Legislation (Part II)" (2005) *Obiter* 99.

⁵⁵ Section 3(1) of the Insolvency Act. See *Ex parte Harmse* 2005 1 SA 323 (N) for the effect of publication more than 30 days before the date of the application. See also Roestoff "Premature Publication of a Notice of Surrender of an Insolvent Estate – Is it Fatal to the Application?" *Ex parte Harmse* 2005 1 SA 323 (N)" (2005) *THRHR* 681. *Study Notes: Diploma in Insolvency Law and Practice* 22.

⁵⁶ Section 4 of the Insolvency Act.

⁵⁷ Section 4(1) of the Insolvency Act. *cf Ex parte Viviers et uxor (Sattar intervening)* 2001 3 SA 240 (T) which deals with an application for surrender after a previously aborted application. Such a notice may be recalled, with the consent of the Master, at a later stage by publishing a notice to that effect in the *Government Gazette (GG)* as well as in the local newspaper. The notice may also expire if the court rejects the application or if the debtor does not continue with the surrender. The latter, on the other hand, constitutes an act of insolvency which could enable the creditors to apply for compulsory sequestration of the estate. They could bring such an application within 14 days from date of application for voluntary surrender. See *Study Notes: Diploma in Insolvency Law and Practice* 23.

surrender to all known addresses of possible creditors within seven days from date of publication.⁵⁸

A notice of surrender published in the *Government Gazette* may not be withdrawn without the written consent of the Master. If it appears to the Master that the notice was published in good faith, and that there is good cause for its withdrawal, the Master will provide written consent thereto. A notice of withdrawal together with the Master's consent will have to be published at the expense of the applicant and the notice of surrender will thereafter be deemed to be withdrawn.⁵⁹ Under certain circumstances the Master (where the value of the goods is less than R5 000), or the court (where the value of the goods exceeds R5 000) may authorise the sheriff to continue with a sale in execution.⁶⁰ As a rule the court will order the sheriff to hand over the proceeds of the sale to the Master pending the outcome of the application to surrender.⁶¹

The debtor must also prepare a statement of affairs and all assets and liabilities have to be listed,⁶² and two copies must be sent to the Master's office in the district where the debtor resides or does business.⁶³ The purpose of this procedure is to notify the creditors that an application is to be brought to enable them to object to such an application. The statement of affairs must confirm the assets and liabilities of the debtor and it must be confirmed by a sworn statement. In practice the Master will on receipt of the statement of affairs open a file

⁵⁸ Sections 4(1) and 4(2)(b) of the Insolvency Act. Compare *Standard Bank of SA Ltd v Sewpersadh* 2005 4 SA 148 (C), where it was decided that compliance with the similar requirements in s 9(4A) are peremptory. The debtor must also in terms of s 4(2)(b) of the Act furnish a copy of the notice to registered trade unions, employees (in the prescribed manner), and the South African Revenue Service. In terms of s 197B of the Labour Relations Act 66 of 1995 (hereafter referred to as Labour Relations Act), an employer that applies to be sequestrated must provide a consulting party in terms of s 189(1) of the Labour Relations Act, with a copy of the application. An employer that is facing financial difficulties that may reasonably result in sequestration must advise a consulting party.

⁵⁹ Sections 5; 6(1) and (2) of the Insolvency Act. Notice to appear in the *GG* and in newspaper in which notice of surrender appeared. Such a publication for a voluntary surrender also has the consequence that all sales in execution (not attachments) are stayed. The sheriff may not, from date of publication of the notice, hand over any proceeds from such sales to judgment creditors of the estate.

⁶⁰ Section 5(1) of the Insolvency Act.

⁶¹ See Smith 24; *Study Notes: Diploma in Insolvency Law and Practice* 23.

⁶² In accordance with Form B in the First Schedule to the Insolvency Act. The statement of affairs will lie open for inspection for 14 days from date of notice of surrender at the Master's or local magistrate's offices.

⁶³ Section 4(3) of the Insolvency Act. Where no local Master's office exists, two copies must be sent to the provincial Master's office and one to the magistrate's office of that specific district. The statement of affairs must be drawn up shortly before the application is brought, it must confirm the assets and liabilities of the debtor according to Form B, it must be confirmed by a sworn statement, and it must lie open for inspection for 14 days from date of notice of surrender at the Master's or local magistrate's offices. See *Study Notes: Diploma in Insolvency Law and Practice* 23.

in the name of the insolvent debtor, and at this stage allocate an estate number to the file.⁶⁴ Subsequently the applicant must prove that all the mentioned preliminary formalities as prescribed by the Act had been complied with.⁶⁵ Once the court has accepted the surrender of the debtor's estate the administration process of the estate commences and results in consequences similar to those of a compulsory sequestration order.

3.2.1.2 *Compulsory Sequestration*

Apart from the voluntary surrender of a debtor's estate, the Insolvency Act also makes provision for an application by a creditor for the compulsory sequestration of the debtor's estate.⁶⁶ In this type of application the role of the Master differs only marginally from the previous application.⁶⁷ The first stage entails the applicant lodging security with the Master to defray all sequestration costs pending the appointment of a trustee. The Master subsequently issues a certificate not more than 10 days before the application confirming that sufficient security has been received.⁶⁸ The proceedings leading to the creditor's compulsory application is divided into two distinct stages.⁶⁹ The first phase would be to apply for a provisional order of sequestration by *prima facie* proving that he has met the following requirements:⁷⁰ the applicant has established a claim entitling him to apply for the sequestration of the debtor's estate;⁷¹ the debtor has committed an act of insolvency or is insolvent⁷² and that there is reason to believe that it will be to the advantage of the creditor or creditors of the debtor if the estate is sequestrated.⁷³

⁶⁴ Section 4(6) of the Insolvency Act of 1936. See *Study Notes: Diploma in Insolvency Law and Practice* 28.

⁶⁵ Section 6(1) of the Insolvency Act. See *Commissioner, SARS, v Hawker Air Services (Pty) Ltd* 2006 4 SA 292 (SCA); *Lynn & Main Inc v Naidoo* 2006 1 SA 59 (N).

⁶⁶ Section 9(1) of the Insolvency Act. Proceedings may be instituted by a single creditor whose claim is not less than R100 or by two or more creditors whose claims in the aggregate are not less than R200. See Mars 103-107.

⁶⁷ See s 9(4A) of the Insolvency Act. See *Standard Bank of SA Ltd v Sewpersadh* (n 58). There is a peremptory requirement when an application is presented to court to furnish a copy of the application to registered trade unions, to employees, in the prescribed manner, to the South African Revenue Service, to the debtor, unless the court dispenses with this, and to file an affidavit by the person who furnished a copy of the application which sets out the manner in which copies were furnished.

⁶⁸ Sections 9(3), (4), (5) and 14(1) of the Insolvency Act. *Study Notes: Diploma in Insolvency Law and Practice* 28.

⁶⁹ See Smith "How Not to Seek a Compulsory Sequestration Order" (2006) *Juta's Business Law* 94 (hereafter referred to as Smith "How Not to Seek a Compulsory Sequestration Order").

⁷⁰ Section 10 of the Insolvency Act.

⁷¹ Sections 9(1) and 10(a) of the Insolvency Act.

⁷² Section 10(b) of the Insolvency Act. The Act makes provision for certain acts of insolvency and if the sequestrating creditor can prove to the satisfaction of the court that the debtor committed one of these acts the creditor need not prove *de facto* insolvency. Section 8 of the Insolvency Act. Friendly sequestrations are

Before an application can be adjudicated on by a court, a copy of the notice of motion and the founding affidavits must be lodged with the Master.⁷⁴ The Master may on receipt of such documents issue a written report to the court, indicating any facts which would appear to him to justify the court in postponing or dismissing the hearing.⁷⁵ The practice of reporting to court on a notice of motion received varies from one Master's office to another, with smaller offices such as Bloemfontein and Cape Town issuing a report to court on a regular basis, and the office of the Master in Pretoria hardly ever issuing such report.

Should the applicant prove on the return day of the rule *nisi* on a balance of probabilities that he has a liquidated claim;⁷⁶ the debtor is insolvent or committed an act of insolvency; and that there is reason to believe that the sequestration would be to the advantage of the creditors, the court may grant a final sequestration order.⁷⁷ After the requirements have been satisfied the

a form of compulsory sequestration where the application is brought on grounds that the debtor in giving notice in writing to a creditor of his inability to any of his debts, has committed an act of insolvency (s 8(g)). The debtor deliberately notifies a "friendly" creditor who in turn then applies for the sequestration of the debtor. Friendly sequestrations are resorted to mostly so the debtor can evade the more stringent requirements of the voluntary surrender proceedings as well as the different degree in proof of the "advantage to creditors" requirement. Section 6 of the Insolvency Act states that in case of the voluntary sequestration the application "will be" to the advantage of creditors and in return ss 10 and 12 of the Insolvency Act require only a "reason to believe" the sequestration will be to the advantage of the creditor(s). See Evans "Unfriendly Consequences of a Friendly Sequestration" (2003) *SA Merc LJ* 437 (hereafter referred to as Evans "Unfriendly Consequences of a Friendly Sequestration") and sources referred to at 437; Mars ch 4.

⁷³ He must also state that the sequestration is to the advantage of the creditors as a group, together with all other relevant facts and circumstances s 10(c) of the Insolvency Act. *Commissioner SARS, v Hawker Air Services (Pty) Ltd* 2006 4 SA 292 (SCA); *Lynn & Main Inc v Naidoo* 2006 1 SA 59 (N). Boraine "Vriendskaplike sekwestrasies – 'n produk van verouderde regsbeginsels?" (1993) *De Jure* 229; (1994) *De Jure* 31.

⁷⁴ Section 9(4) of the Insolvency Act. If there is no such Master at the seat of the court, the Master will designate an officer of the public service (usually a magistrate) for this purpose in the GG. Ss 9(4A)(a)(i)-(iv) and 11(2A)(a)-(c) of the Insolvency Act. When bringing this application the applicant must also furnish a copy of the application to the debtor, registered trade unions, employees of the debtor and the South African Revenue Services. In terms of s 197B of the Labour Relations Act, an employer that receives an application for sequestration must provide a consulting party in terms of s 189(1) of that Act with a copy of the application. An employer that is facing financial difficulties that may reasonably result in sequestration must advise a consulting party. See Smith "How Not to Seek a Compulsory Sequestration Order" for a detailed discussion of this case. See *Standard Bank of SA Ltd v Sewpersadh* (n 58). *cf Lindhaven Meat Market CC v Reyneke* 2001 1 SA 454 (W), which deals with an application based on a disputed claim. Sequestration is not an appropriate procedure to enforce a disputed claim – *Investec Bank Ltd v Lewis* 2002 2 SA 111 (C) at 116C. In terms of s 197B of the Labour Relations Act 66 of 1995, an employer that receives an application for sequestration must provide a consulting party in terms of s 189(1) of that Act with a copy of the application. An employer that is facing financial difficulties that may reasonably result in sequestration must advise a consulting party. *Study Notes: Diploma in Insolvency Law and Practice* 28.

⁷⁵ Sections 9(4) and (5) of the Insolvency Act.

⁷⁶ Section 9(1) of the Insolvency Act. See Mars 109.

⁷⁷ Section 12 of the Insolvency Act. See *Ganes v Telecom Namibia Ltd* 2004 3 SA 615 (SCA).

court will on the return day of the *rule nisi* issue a final sequestration order.⁷⁸ According to the Act, the registrar of the High Court has the responsibility of sending an original of every sequestration order and of every other order relating to an insolvent estate, trustee or an insolvent, made by the court, to the Master.⁷⁹ This aspect of the procedure has important practical consequences, as the Master on receipt of such notice opens a file in the name of the debtor and allocates a file number to the file. Upon receipt of a sequestration order or an order setting aside a provisional sequestration order, the Master shall also give notice in the *Government Gazette* of such an order.⁸⁰ When an appeal against a final sequestration order has been noted, the administration of the estate shall continue provided that no property of the estate shall be realised without the written consent of the insolvent.⁸¹

3.2.2 Custody and Control of the Insolvent Estate

The main objective of the Insolvency Act is to provide for the liquidation of the insolvent's estate and to secure an even distribution of his assets among creditors in accordance with the order of preference provided for by the Act.⁸² It is the duty of the trustee to fulfil this objective and he does so by collecting and realising the assets, and distributing the proceeds among creditors. In order to render it possible for the trustee to ensure these duties and simultaneously ensure that the assets are preserved, the Act provides that one of the effects of the sequestration order is to divest the debtor of his estate and to transfer ownership to the trustee.⁸³

Thus one of the immediate consequences of the granting of the sequestrating order is divesting the insolvent of his estate and vesting the estate in the Master until trustee is appointed.⁸⁴ In practice there is little tangible evidence of the estate of an insolvent passing to

⁷⁸ Section 12(1) of the Insolvency Act.

⁷⁹ Section 17 of the Insolvency Act. See Hockly 46.

⁸⁰ Section 17(4) of the Insolvency Act. See Hockly 46.

⁸¹ Section 150(3). In terms of s 339 of the Companies Act, s 150(3) applies to a company in liquidation unable to pay its debts so that an appeal against the winding-up order does not suspend the operation of the order – see *Choice Holdings Ltd v Yabeng Investment Holding Co Ltd* 2001 (2) SA 768 (W). See Delpont “The Noting of an Appeal against a Winding-up Order: Suspension or continuation?” (2002) *THRHR* 632; *Slabbert, Verster & Malherbe v Die Assistent-Meester* 1977 (1) SA 107 (NC).

⁸² Smith 81.

⁸³ Section 20(1) of the Insolvency Act. See Smith 81; Mars 181. *Study Notes: Diploma in Insolvency Law and Practice* 52.

⁸⁴ Sections 20(1)(a) and 20(2) of the Insolvency Act. Section 20(2) provides that all of an insolvent's assets vest in his trustee upon sequestration. In terms of s 361(1) of the Companies Act, all the property of a company in liquidation is deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office. In *Legh v Nungu Trading 353 (Pty) Ltd* 2008 2 SA 1



the Master, as the provision resulting in the estate of an insolvent passing to the Master does not require any positive action from the Master with respect to the property.⁸⁵ As a rule a provisional trustee will be appointed to manage the estate and release the Master of the responsibility of ensuring the security of the assets.⁸⁶

Upon receipt of the sequestration order the sheriff is required to attach and draw up an inventory of the movable property of the estate within his district and is not in the possession of a person who claims to be entitled to retain it under a right of pledge or a right of retention.⁸⁷ He must surrender any cash which he collects to the Master and must make arrangements for the safekeeping of the movable property at a suitable place or appoint some suitable person to hold the property.⁸⁸ Immediately after making the attachment, the sheriff must report, in writing, to the Master that the attachment has been completed and must also send a copy of the inventory to the Master.⁸⁹

After receiving notice of the final sequestration order, the insolvent is obliged to tender all documents and records pertaining to his affairs and which have not yet been taken into the custody to the sheriff.⁹⁰ Within seven days of service he must also lodge a statement of affairs with the Master.⁹¹ At any time before the second meeting of creditors, the insolvent is also obliged if required to assist the trustee in collecting and taking charge of any property

(SCA) the court concluded, ss 20 (1) (a) and 20 (2) (a) of the Insolvency Act, in so far as they vested the property of the insolvent in the liquidator, were not applicable to a company in liquidation. Thus, s 339 of the Companies Act was not applicable to either of the sections. See Evans ch 7 for a detailed discussion of the effect of sequestration on the property of the insolvent. See also Stander “Die Eienaar van die Bates van die Insolvente Boedel” (1996) *THRHR* 388; Evans “Who owns the Insolvent Estate” (1996) *TSAR* 719. See also s 20(1)(c) of the Insolvency Act; Boraine “Unexecuted Contract or Merely a Stay of Execution?: *Warricker v Senekal*” (2008) *SA Merc LJ* 544. See Smith 81; *Mears v Rissik* 1905 TS 303.

⁸⁵ Or custody and control of a company’s property. See s 361 of the Companies Act provides that in any winding-up by the court all the property concerned shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office. At all times while the office of liquidator is vacant or he is unable to perform his duties, the property of the company is deemed to be under the control of the Master. See Burdette part 4B.

⁸⁶ The first mention of the practice of transferring the assets of the insolvent to the Master was detected in the Ordinance 64 of 1929, which stated the effect in law to divest the insolvent and to vest in the Master of the Supreme Court. See Burton 39; De Villiers 107.

⁸⁷ Section 19(1) of the Insolvency Act.

⁸⁸ *Rennie v The Master; Glaum v The Master* 1980 2 SA 600 (C).

⁸⁹ Section 19(3)(a) and (b) of the Insolvency Act.

⁹⁰ Section 16(2) of the Insolvency Act.

⁹¹ Section 16(2) of the Insolvency Act.

belonging to the estate. In return the Master may approve an allowance in money or goods as the Master considers necessary to support the insolvent and his dependants.⁹²

An additional effect of the sequestration of the separate estate of one of two spouses shall be to vest in the Master, and upon his appointment in the trustee, all the property of the spouse whose estate has not been sequestrated (the “solvent spouse”) as if it were property of the sequestrated estate.⁹³ Where the solvent spouse claims property as his own, the burden of proving that he is entitled to property in terms of section 21(2) is on the solvent spouse, and on successfully proving ownership the assets in question will be released.⁹⁴

3.2.3 Appointment of *Curator Bonis*, Provisional Trustee and Trustee

The international standards and guidelines on best practice recognise that in order to exercise powers and discharge functions, duties, responsibilities and accountabilities effectively, an office-holder should be suitable (or, in terms of some legislation, “fit and proper”); and by his conduct foster public confidence in the insolvency system.⁹⁵ Together with the implementation of the regulatory agency, the qualification and regulation of office-holders represent one of the three building blocks underpinning an effective and efficient insolvency law system.⁹⁶ The insolvency profession is, and always has been, one of the few unregulated⁹⁷ professions in South Africa.⁹⁸ The role of the Master in this field of insolvency law has also over the years prove to be a enthusiastic point of discussion for those involved in

⁹² Section 23(12) of the Insolvency Act.

⁹³ The position in respect of a marriage out of community of property is dealt with in s 21 of the Insolvency Act. *Study Notes: Diploma in Insolvency Law and Practice* 70. The Constitutional Court has decided with a majority of five to four that s 21 did not constitute unfair discrimination and did not amount to expropriation, consequently that ss 64(2), 65(1) and 65(2) were not unconstitutional (*Harksen v Lane* 1998 1 SA 300 (CC)). Cf Evans “A Critical Analysis of section 21 of the Insolvency Act 24 of 1936” (1996) *THRHR* 613-625 and 1997 *THRHR* 71-83.

⁹⁴ Section 21(2)(a)-(e) of the Insolvency Act. See Evans ch 10 for a comprehensive discussion of this topic.

⁹⁵ Johnson 72.

⁹⁶ Johnson 71.

⁹⁷ By “unregulated” is meant that there is no legislation regulating admission to, or participation in, the insolvency profession. Requirements such as minimum qualifications, practical experience, registration, codes of conduct, *etc.*, are non-existent.

⁹⁸ Loubser “An International Perspective on the Regulation of Insolvency Practitioners” (2007) *SA Merc LJ* 123 (hereafter referred to as Loubser “An International Perspective on the Regulation of Insolvency Practitioners”); Calitz “The Appointment of Insolvency Practitioners in South Africa” 721.

this field of the law – proof of this is to be found in the variety of comments that were received by the South African Law Reform Commission on the 1996 Draft Insolvency Bill.⁹⁹

Although the term “insolvency practitioner” is not used or defined in any South African legislation it is increasingly being used internationally and nationally by professional organisations and interested parties in the field of insolvency to refer to a fairly diverse group of officers. Such officers could include the provisional trustee and final trustee of estates under sequestration,¹⁰⁰ provisional liquidators and final liquidators of close corporations¹⁰¹ and companies being wound up,¹⁰² possibly also a *curator bonis*¹⁰³ and judicial managers¹⁰⁴ of companies under judicial management.¹⁰⁵ The nearest that South African lawmakers came to introducing a collective term was in the Draft Insolvency Bill where the term liquidator was employed to replace the term “trustee” in order to make provision for the possibility that the insolvency of both a natural and a juristic person would at some point in the future be regulated by a unified piece of legislation.¹⁰⁶

In 2003 the Minister of Justice and Constitutional Development, reacting to persistent allegations of corruption in the appointment of insolvency practitioners, introduced a Judicial Matters Amendment Act.¹⁰⁷ This amendment to the current Act authorises the Minister of Justice and Constitutional Development¹⁰⁸ to determine a policy for the appointment of insolvency practitioners by the Master.¹⁰⁹ The stated aim of the legislation was first to create uniform procedures in all Masters’ offices for the appointment of these functionaries and thus to promote the image of the insolvency practitioners and of the Master’s division, and secondly to promote consistency, fairness, transparency and the achievement of equality in these appointments by the

⁹⁹ See (n 8).

¹⁰⁰ Sections 18; 6 or 57 of the Insolvency Act.

¹⁰¹ Section 74 of the Close Corporations Act.

¹⁰² Sections 368 or 369 of the Companies Act.

¹⁰³ Section 5 of the Insolvency Act.

¹⁰⁴ Sections 429 or 431 of the Companies Act.

¹⁰⁵ Section 427(1) of the Companies Act.

¹⁰⁶ Loubser “An International Perspective on the Regulation of Insolvency Practitioners” 123. See Burdette part 4B; Keay “The Unity of Insolvency Legislation” 5. See discussion in Part I par 1.6 above.

¹⁰⁷ Act 16 of 2003. In *Beinash & Co v Nathan (Standard Bank of SA Ltd Intervening)* 1998 3 SA 540 (W), Flemming DJP confirmed the view that some liquidators acted dishonestly when he stated that liquidators and trustees were regarded by many as ineffective and “even sometimes disrespected in regard to integrity” at 545D. See Loubser “An International Perspective on the Regulation of Insolvency Practitioners” 123.

¹⁰⁸ Hereafter referred to as the Minister or the Minister of Justice.

¹⁰⁹ The relevant power was inserted into s 158(2)-(3) of the Insolvency Act, s 15(1A) of the Companies Act and s 10 of the Close Corporations Act, respectively.

various Masters.¹¹⁰ The objective behind the amendment of the Act was thus to incorporate the principles of a previous “informal” policy document into legislation.¹¹¹

The restraint on the Master’s discretion in both the informal as well as the statutory policy can be questioned. It has been stated that the Master has an unfettered and exclusive administrative discretion to appoint a provisional trustee of his choice.¹¹² In *Dawood and another v Minister of Home Affairs and others*¹¹³ Parliament had given officials of the Department of Home Affairs extensive powers to grant or extend residence permits, but legislation had not provided any criteria to guide the exercise of the discretionary powers.¹¹⁴ O’Regan J in dealing with discretionary powers created in terms of legislation, stated that “[d]iscretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner.”¹¹⁵ In both the *Dawood* case and *Janse van Rensburg NO v Minister of Trade and Industry NO*¹¹⁶ the court expressed the view that wide discretionary powers capable of infringing on fundamental rights ought to be accompanied by criteria or guidelines to guide their exercise. The lack of criteria regarding the Master’s discretion is therefore clearly vulnerable to Constitutional claims.

¹¹⁰ *Memorandum on the Objects of the Judicial Matters Amendments Bill* (2003) at par 2.2. See Loubser “An International Perspective on the Regulation of Insolvency Practitioners” 125.

¹¹¹ It is not clear when the policy document was implemented for the first time. The original policy document is termed *Policy: Strategy on/procedures for appointment of liquidators and trustees*, and is undated. The document would appear to have been implemented in 1998 or 1999. The document deals not only with the appointment of trustees and liquidators, but also *inter alia* with topics such as the training and the lodging of requisitions. On file with the author. One concern is that the legislative amendments provide for the application of a policy document that has been accepted and approved of by Parliament. To date this has not been done, although the Master continues to apply what seems to be a revised policy document making provision for the appointment of historically disadvantaged individuals in all estates (not only those in excess of R5M), and which does not recognise white women as historically disadvantaged individuals. Other attempts to finalise the Minister’s policy document include certain “drafts documents” which from time to time had been made available to certain role players in the industry and include: Department of Justice and Constitutional Development *Division: Master of the Court Policy: Strategy on/procedures for the Appointment of Liquidators and Trustees* (June 2001); Chief Masters Directive – The appointment of Liquidators (2007); *Minister’s Policy Guideline on the Appointment of Liquidators, Curator Bonis, Trustees and Judicial Managers* (2007) on file with the author.

¹¹² *Lipschitz v Wattrus NO* 1980 1 SA 662 (T) at 671. See also Meskin par 4.1 4-1. Considering the fact that the exercising of such a discretion amounts to an administrative action by the Master, it is doubtful whether the Master still has an “unfettered discretion” in view of the provisions of s 5(1) of the PAJA. At the very least the Master may be compelled to provide reasons for appointing a specific person, or refusing to appoint a specific person, as provisional trustee.

¹¹³ 2000 3 SA 936 (CC).

¹¹⁴ Hoexter 234.

¹¹⁵ *Dawood and another v Minister of Home Affairs and others Parliament* (n 113) at par 53.

¹¹⁶ 2001 1 SA 29 (CC).



A trustee appointed to administer an insolvent estate assumes certain statutory responsibilities and occupies a position of trust, not only towards creditors but also to the insolvent himself.¹¹⁷ Nonetheless, South Africa currently lacks any form of statutory regulation of insolvency practitioners, and they are also not appointed as officers of court.¹¹⁸ Furthermore there is also no statutory recognition of a private or public body, and no statutory system of licensing of individuals or any entry-level requirements or qualifications required for people to practise as insolvency practitioners in South Africa.¹¹⁹ Although, as will be discussed, there are certain statutory and non-statutory procedures that the Master follows when appointing a provisional or final trustee, these fall short of a complete regulatory model.

Section 59 of the Insolvency Act confirms that on the application of any interested person the court may either before or after the appointment of a trustee declare the appointed person disqualified from holding the office of trustee. According to section 59 the Court may remove or disqualify a person if:

- (a) he has accepted or expressed his willingness to accept from any person engaged to perform any work on behalf of the estate in question, any benefit whatever in connection with any matter relating to that estate; or
- (b) in order to induce a creditor to vote for him at the election of a trustee or in return for his vote at such election, or in order to exercise any influence upon his election as trustee, he has –
 - (i) wrongfully omitted or included or been privy to the wrongful omission or inclusion of the name of a creditor from any record by this Act required; or
 - (ii) directly or indirectly given or offered or agreed to give to any person any consideration; or
 - (iii) offered to or agreed with any person to abstain from investigating any previous transactions of the insolvent concerned; or
 - (iv) been guilty of or privy to the splitting of claims for the purpose of increasing the number of votes.¹²⁰

Prior to 1965 the removal of a trustee could only be affected by the Court. In 1965 the Insolvency Amendment Act¹²¹ transferred certain of the court's powers to the Master, and the Master is at

¹¹⁷ *Jacobs v Hessles* 1984 3 SA 601 (T). See Mars 293.

¹¹⁸ *James v Magistrate Wynberg* 1995 1 SA 1 (C). See Mars 293.

¹¹⁹ According to the Act the High Court has the power to remove or disqualify a person as representative of the estate. Apart from the grounds for removal by the Master the Court also has the additional authority to not only remove a trustee from office but also declare him incapable of being appointed trustee of an insolvent estate for whatever period it deems fit. Section 57 of the Insolvency Act.

¹²⁰ Section 59 of the Insolvency Act. Under the 1916 Act it was decided in *Master of the Supreme Court v Griffith's Trustee* 1909 T.S 984 that the Master is not "a person interested" within the meaning of this section and had no *locus standi* to apply for an order for removal of the trustee under this section. The Court pointed out that other sections (ss 60 and 61) afford the Master a *locus standi*. See Nathan 204.

¹²¹ Act 99 of 1965. See Smith 201.

present empowered to remove a trustee on any grounds mentioned in the provision. Section 60 of the Insolvency Act provides the following grounds for removal by the Master:

The Master may remove a trustee from his office on the ground –

- (a) that he was not qualified for election or appointment as trustee or that his election or appointment was for any other reason illegal, or that he has become disqualified from election or appointment as a trustee or has been authorized, specially or under a general power of attorney, to vote for or on behalf of a creditor at a meeting of creditors of the insolvent estate of which he is the trustee and has acted or purported to act under such special authority or general power of attorney; or
- (b) that he has failed to perform satisfactorily any duty imposed upon him by this Act or to comply with a lawful demand of the Master; or
- (c) that he is mentally or physically incapable of performing satisfactorily his duties as trustee; or
- (d) that the majority (reckoned in number and in value) of creditors entitled to vote at a meeting of creditors has requested him in writing to do so; or
- (e) that, in his opinion, the trustee is no longer suitable to be the trustee of the estate concerned.¹²²

The Companies Act specifically sets out the role of the Master in relation to the conduct of the liquidator in general. Section 381(1) expressly states that the Master is bound to “take cognisance of” the liquidator’s conduct and to investigate and take action “as he may think expedient” in any situation where there is reason to believe, or an interested party complains, that the liquidator is in default in relation to the administration of the winding up.¹²³

3.2.3.1 Appointment of a Curator Bonis

After the publication of a notice of surrender in the *Government Gazette* the Master has a discretion to appoint a *curator bonis* to take control of the debtor’s estate.¹²⁴ As mentioned elsewhere, the effect of the sequestration of the estate of an insolvent debtor will be that the estate will vest in the Master until a trustee has been appointed.¹²⁵ As a result of the right of ownership (or custody and control of the assets)¹²⁶ the Master also has the duty to protect the assets.¹²⁷ In cases where the Master is of the opinion that the particular assets in the debtor’s

¹²² Section 60 (a)-(e) of the Insolvency Act. See also Hockly 116. Section 379 of the Companies Act regulates the removal of a liquidator.

¹²³ Meskin par 15.2.6.3.

¹²⁴ Section 5(2) of the Insolvency Act.

¹²⁵ Section 20(1)(a) of the Insolvency Act.

¹²⁶ In terms of s 361(1) of the Companies Act, the assets of a company in liquidation fall under the custody and control first of the Master, and then of the liquidator (once one has been appointed).

¹²⁷ Mars 29.

estate are at risk as the case would be when the estate contains perishables, the Master will urgently appoint a *curator bonis* to take control of the assets or business of the insolvent.

The duty of the *curator bonis* would be to take the estate into custody and take over the control of any business or undertaking of the debtor subject to the Master's directions.¹²⁸ The function of the *curator bonis*, who is in the position of a caretaker, is strictly an interim one and his duty is to safeguard the interest of the estate until a provisional or final trustee has been appointed. There is no provision for the sale of assets by the *curator bonis* other than in the ordinary course of business. However, after the court has ordered the sequestration of the estate and prior to the first meeting at which a trustee is elected, the Master may appoint a provisional trustee and authorise him to sell assets urgently.¹²⁹

The purpose of the appointment of a *curator bonis* would be to control the estate, and the Master has a discretion to decide on which person would be suitable to appoint.¹³⁰ Although there is no explicit provision that security should be lodged by a candidate before his appointment as *curator bonis*, the Master in practice regularly insists on security.¹³¹ Once a provisional trustee or final trustee has been appointed the *curator bonis* is expected to transfer control of the assets to the appointed trustee. The *curator bonis* is obliged to keep proper record of estate transactions and must frame an account and lodge this with the Master. The *curator bonis* would be entitled to a reasonable remuneration for his services to be determined by the Master.¹³² Such remuneration is taxable by the Master and is included in the costs of sequestration of the estate.¹³³

3.2.3.2 Appointment of a Provisional Trustee

¹²⁸ Smith 175.

¹²⁹ It is respectfully submitted that the *obiter* remark by Gautschi AJ in *Storti v Nugent* 2001 3 SA 783 (W) at 787F-G, that the Master cannot make a provisional appointment when a final order has been issued without a provisional order, is incorrect. *Study Notes: Diploma in Insolvency Law and Practice* 138.

¹³⁰ Smith 176.

¹³¹ *Study Notes: Diploma in Insolvency Law and Practice* 138.

¹³² The Master may for good cause reduce or increase the fee or disallow it either wholly or in part. See s 63(1) of the Insolvency Act. See *Nel v The Master* 2005 1 SA 276 (SCA).

¹³³ Section 97(2)(c) of the Insolvency Act. See *Study Notes: Diploma in Insolvency Law and Practice* 138.

The 1916 Insolvency Act granted the Court a discretion to appoint a provisional trustee before a final trustee is appointed or when the trustee has been removed, or is not acting as such.¹³⁴ According to the Act the appointment of a provisional trustee was done by way of a petition by the Master or a creditor to the court, and was contained in the petition for sequestration of the debtor's estate.¹³⁵ The provisional trustee had the powers of a final trustee, but was unable to take legal action without the court's permission and could not realise any of the estate assets without the permission of the Court or the Master.¹³⁶ The court had a discretion to appoint a provisional trustee, and was not bound to have regard to the wishes of any of the creditors.¹³⁷ Generally, however, the wishes of the majority of creditors prevailed,¹³⁸ and the court appointed the nominated applicant if such person was supported by a substantial body of creditors.¹³⁹

With the enactment of the current 1936 Insolvency Act¹⁴⁰ the responsibility to appoint a provisional trustee was removed from the courts and the Master at present possesses the power to appoint a provisional trustee.¹⁴¹ However, the Insolvency Act fails to state the criteria for making such an appointment and states in the negative the qualifications of a trustee by declaring which persons are disqualified from acting as a trustee.¹⁴² This effectively confers on the Master a discretion as to the method and the identity of the person appointed as the provisional trustee of an insolvent estate.¹⁴³

¹³⁴ Section 57 of the 1916 Insolvency Act.

¹³⁵ Nathan 196.

¹³⁶ Section 57(3) of the 1916 Insolvency Act.

¹³⁷ Nathan 197. See Calitz "The Appointment of Insolvency Practitioners in South Africa" 721.

¹³⁸ *Ex Parte Reid* 1922 CPD 62.

¹³⁹ Nathan 197. See Calitz "The Appointment of Insolvency Practitioners" 723.

¹⁴⁰ It is important to note that however complete the Insolvency Act may be, it did not totally repeal the common law in respect of South African insolvency law, and that English law played an important role in the development of our insolvency law.

¹⁴¹ Section 18(1) of the Insolvency Act. Calitz "The Appointment of Insolvency Practitioners" 723. See *Study Notes: Diploma in Insolvency Law and Practice* 141.

¹⁴² Section 55 of the Insolvency Act.

¹⁴³ In *Krumm v The Master* 1989 3 SA 944 (D) reference was made to a Master's Instruction which stated that because of possible bias a wide range of candidates may not be considered for appointment. The court stated that the exercise of a discretion by the Master to appoint a provisional liquidator could only be attacked on review on the basis that the Master failed to exercise his discretion at all, that he acted *mala fide*, or was motivated by improper considerations. The court held that it was not grossly unreasonable for the Master to issue and apply a directive such as the one which he did in the matter. The court concluded with the following (952F-G): "His (the Master's) approach may be said to be over-cautious, but is it not better that, if he should err, he should do so on the side of caution?" It is submitted that this decision may be influenced by s 33 of the Constitution, which provides that administrative action should be justifiable in relation to the reasons given for it. A court may order the Master to exercise his discretion properly, but will only in exceptional circumstances substitute its own decision for that of the Master. Cf *UWC v MEC for Health and Social Services* 1998 3 SA 124 (C) at 130F. See also *Study Notes: Diploma in Insolvency Law and Practice* 138.

In 1977 the then Master of the Supreme Court in Pretoria issued a directive¹⁴⁴ stating that due to the fact that the estate vested (or fell under his custody and control) in the Master,¹⁴⁵ and due to the fact that the Master could not sufficiently protect the interests of creditors until such time as a trustee or liquidator had been appointed at the first meeting of creditors, the Master was implementing a system whereby a provisional trustee would be appointed, as far as possible, in all insolvent estates. By making such an appointment the Master would be divested of the estate and the subsequent risk involved and the appointed insolvency practitioner could proceed to take the necessary steps to protect the interests of creditors in that particular estate.¹⁴⁶ The reality in practice, however, is that in recent times commerce has become more sophisticated, and it has become impractical to leave the active decision-making in the administration process of an insolvent estate until after a first meeting of creditors had been convened.¹⁴⁷

Section 18(1) of the Insolvency Act makes provision for the appointment of a provisional trustee by the Master.¹⁴⁸ Section 18(1) reads as follows:

- (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*).¹⁴⁹

From the wording of this subsection it is clear that the legislature intended that the appointment of a provisional trustee should be an extraordinary appointment, the word “may” indicating that it

¹⁴⁴ The “directive” was sent to all insolvency practitioners by the Master in the form of a letter, informing them that the Master would in future ask for nominations from creditors prior to making a provisional appointment.

¹⁴⁵ In terms of s 20(1)(a) of the Insolvency Act, the estate of an insolvent vests first in the Master and then in the trustee (once one has been appointed). In terms of s 361(1) of the Companies Act, the assets of a company in liquidation fall under the custody and control first of the Master, and then of the liquidator (once one has been appointed).

¹⁴⁶ The making of an appointment is the most effective means of protecting the interests of creditors, which of course is what was intended by the legislature. See Meskin par 4.1 4-1 and the authority quoted therein in (n 6) 4-3. See Calitz “The Appointment of Insolvency Practitioners” 728.

¹⁴⁷ Calitz “The Appointment of Insolvency Practitioners” 725.

¹⁴⁸ Section 368 of Companies Act makes provision for the appointment of a provisional liquidator in the case of a company being wound up by the court or by resolution. One important difference between the wording of s 368 of the Companies Act and s 18(1) of the Insolvency Act is that s 368 requires the appointment of a “suitable person” as provisional liquidator. By “suitable” is meant an independent person who is able to discharge the responsibilities of such office competently, honestly and impartially. See, eg, *Murray v Edendale Estates Ltd* 1908 TS 17 22; *In re Greatrex Footwear (Pty) Ltd (II)* 1936 NPD 536 at 537-539; *Wolstenholme v Hartley Farmers Agricultural Co-operative Co Ltd* 1965 4 SA 73 (SR); *Ex parte Clifford Homes Construction (Pty) Ltd* 1989 4 SA 610 (W) 614; *Krumm and Another v The Master and Another* (n 143).

¹⁴⁹ As amended by s 3 of Judicial Matters Amendment Act 16 of 2003.

was not the intention that such an appointment should be made in all cases but rather that the Master has a discretion to decide whether such appointment is deemed necessary.¹⁵⁰ Unfortunately, this section also does not provide for any criteria which should be applied by the Master when making the appointment, and for this reason the making of provisional appointments is solely at the discretion of the Master. It should be noted that the Master has the discretion to appoint a co-trustee at any time if he deems it appropriate in the circumstances.¹⁵¹

Considering the rather detailed provisions relating to the appointment of a final trustee as set out in section 54 of the Act, it is rather surprising to find an absolute lack of rules relating to the appointment of provisional trustees.¹⁵² This further supports the view that the appointment of provisional trustees were meant to be extraordinary appointments made by the Master. It is also worth mentioning the provisions of section 18(4) of the Insolvency Act, which provide for the appointment of the provisional trustee as final trustee when no person has been elected as the final trustee at the first meeting of creditors.¹⁵³ Section 18(4) reads as follows:

- (4) When a meeting of creditors for the election of a trustee has been held in terms of section forty and no trustee has been elected, and the Master has appointed a provisional trustee in the estate in question, the Master shall appoint him as trustee on his finding such additional security as the Master may have required.

Although the Insolvency Act sets out certain disqualification criteria for the appointment of trustees,¹⁵⁴ it does not categorically state who should be appointed by the Master as a provisional or final trustee. In order to circumvent the lack in statutory guidelines the Master, of his own accord, commenced the use of a register to which he could add the names of

¹⁵⁰ See also Meskin par 4-1. See Burdette *Reform, Regulation and Transformation: The Problems and Challenges facing South African Insolvency Industry* (2005) unpublished paper presented at the Commonwealth Law Conference, London (hereafter referred to as Burdette “Reform, Regulation and Transformation”); See Calitz “The Appointment of Insolvency Practitioners” 728.

¹⁵¹ Section 57(5) of the Insolvency Act. It has in the past been mentioned that the Master has an unfettered and exclusive administrative discretion to appoint a provisional trustee of his choice. This discretion has however been curbed by the amendments to the Act granting the Minister the power to advise the Master on the method of appointment by means of a policy document. *Lipschitz v Watrus NO* (n 112). See also Meskin par 4.1 4-1. Considering the fact that the exercising of such a discretion also amounts to an administrative action by the Master, it is doubtful whether the Master still has an “unfettered discretion” in view of the provisions of s 5(1) of PAJA. At the very least the Master may be compelled to provide reasons for appointing a specific person, or refusing to appoint a specific person, as provisional trustee.

¹⁵² Although there are no legislative rules for the appointment of provisional trustees, the Master has developed a set of criteria for this purpose.

¹⁵³ See Calitz “The Appointment of Insolvency Practitioners” 728.

¹⁵⁴ See s 55 of the Insolvency Act for a list of these disqualifications.



persons who, in his view, qualified as persons suitable for appointment as trustees. Over time this became known as the “Master’s panel”. In order for one’s name to be added to the register, or in order to be placed on the “Master’s panel”, prospective trustees have to make application to the relevant Master’s office. Although each Master’s office has a different *modus operandi* when it comes to the placement of prospective trustees on the panel, the procedure usually consists of the submission of certain documentation to the Master, and a subsequent interview of the candidate by a panel consisting of personnel from the Master’s office, and one or more practising practitioners who represent either Association of Insolvency Practitioners of Southern Africa¹⁵⁵ or Association for the Advancement of Black Insolvency Practitioners¹⁵⁶ (or both).¹⁵⁷ The main point of concern, however, is that the Master’s professed panel has no legal status whatsoever and is vulnerable to any litigation challenging its constitutionality.¹⁵⁸

As mentioned, after the granting of the sequestration order the Master may appoint a provisional trustee to take control of the estate until the appointment of the final trustee at the first meeting of creditors. In order to assist the Master in appointing a person as the provisional trustee who would in all probability also be elected as the final trustee, the Master introduced what is known today as the “requisition system”.¹⁵⁹ The requisition system entails the submission of nominations by the creditors of the estate as to who should be appointed as the provisional trustee or liquidator of the estate.¹⁶⁰

¹⁵⁵ Hereafter referred to as “AIPSA”. AIPSA is a voluntary member organisation representing the interests of insolvency practitioners.

¹⁵⁶ Hereafter referred to as “AABIP”. AABIP is a voluntary member organisation that provides for the needs of black insolvency practitioners.

¹⁵⁷ Criteria as mentioned on official webpage of the Master available at www.doj.gov.za/master (last visited at 09-11-30).

¹⁵⁸ Burdette “Reform, Regulation and Transformation” 8.

¹⁵⁹ For a discussion of the reasons for the introduction of the requisition system, see Meskin par 4.1 4-2. In the unreported decision in *Prosch v Standard Bank of South Africa Limited* unreported case no 14279/1990 (WLD), Roux J stated that he simply could not accept that the Master blindly appointed the person recommended by the majority in value of creditors as this was at odds with the Master’s unfettered discretion to appoint a suitable person. He further held, assuming that such a practice existed, that a creditor who overstated his claim in a requisition or failed to disclose that he was disqualified from voting in terms of s 365(2)(a) of the Companies Act could not be held liable for damages by a person who alleged that he should have been appointed as provisional liquidator. Such a person’s loss resulted from not being selected by the Master and his remedy was to review the decision by the Master to appoint another person. Cf Van Rensburg “The Appointment of Provisional Liquidators and Trustees – Let Commerce Decide” (1998) *De Rebus* 70. *Study Notes: Diploma in Insolvency Law and Practice* 138.

¹⁶⁰ *Study Notes: Diploma in Insolvency Law and Practice* 141.

In order to allow the creditors sufficient time to lodge their nominations, the Master will usually not make a provisional appointment until 48 hours have elapsed from the granting of the sequestration or liquidation order by the court.¹⁶¹ The requisitions (nominations) lodged by the creditors are then scrutinised and in most cases, but not always, the person or persons with the majority of votes in number and value are then appointed as the provisional trustee.¹⁶² The Master is not bound by the requisitions and has a discretion to appoint any person as the provisional trustee.¹⁶³ In some cases the Master would even appoint a person or persons who received no nominations from creditors at all, once again in terms of the unfettered discretion granted to the Master in terms of the provisions of the various Acts.¹⁶⁴

Once the Master has decided on the appointment of a particular person as provisional trustee, that person will be called upon by the Master to lodge security and “an affidavit of non-interest”, the form of which may differ from one Master to another.¹⁶⁵ The phrase “non-interest” refers in particular to *inter alia* that he is not related to the insolvent within the specified degree;¹⁶⁶ that he has no interest opposed to the general interest of the insolvent estate¹⁶⁷ and that he has not during the twelve months preceding sequestration acted as bookkeeper, accountant or auditor of the insolvent.¹⁶⁸

It is usually required from the provisional trustee to investigate the value of the assets after his appointment and to report it to the Master. The Master may call for security for the full amount of the assets or for an amount specified by him.¹⁶⁹ The bond of security must be countersigned by a bank or insurance company acceptable to and on record with the Master. The Master may remove a trustee from his office if, *inter alia*, he was not qualified for

¹⁶¹ This is the practice in the office of the Master in Pretoria. Other offices of the Master do not necessarily follow this *modus operandi*, eg, the Cape Town office, which will make an appointment as soon as possible after the granting of a sequestration order.

¹⁶² Section 54 (2) of the Insolvency Act.

¹⁶³ Even if the Master has a discretion he is in terms of s 5 of PAJA obliged to furnish reasons for the exercise of this discretion and in terms of s 6 the reasons must be rational and the action must, amongst other things, not be taken arbitrarily or take irrelevant considerations into account. See s 33(2) of the Constitution. See part IV above.

¹⁶⁴ *Study Notes: Diploma in Insolvency Law and Practice* 142; See Calitz “The Appointment of Insolvency Practitioners” 729.

¹⁶⁵ *Study Notes: Diploma in Insolvency Law and Practice* 142.

¹⁶⁶ Section 55(b) of the Insolvency Act.

¹⁶⁷ Section 55(e) of the Insolvency Act.

¹⁶⁸ Section 55(l) of the Insolvency Act. The provisions in s 372 of the Companies Act in respect of the disqualification of a liquidator are almost identical to the provisions of s 55 of the Insolvency Act.

¹⁶⁹ Section 18(1) of the Insolvency Act.



appointment, or has become disqualified from appointment, or has acted on authority or a power of attorney to vote on behalf of a creditor, or if in the opinion of the Master the trustee is no longer suitable to be the trustee of the estate concerned.¹⁷⁰

Ordinarily, the provisional trustee is also appointed as final trustee following the first meeting. In such cases the liquidation and distribution accounts of the trustee deals with his administration as provisional and final trustee. If the provisional appointee is not appointed finally, he should account to the final appointee.¹⁷¹ If the provisional appointee is appointed finally, he charges remuneration for his administration as a whole when the liquidation and distribution accounts are lodged. If the provisional appointee is not appointed finally (whether another person is appointed or the provisional or final order is set aside) the provisional appointee is entitled to reasonable remuneration determined by the Master, but not to exceed the rate of remuneration of a final appointee.¹⁷² While this non-statutory arrangement no doubt goes a long way towards ensuring that suitable persons are appointed to act as practitioners, the system is far from perfect and it is submitted that the system still lacks the structure, transparency and certainty which a statutory framework will provide.

3.2.3.3 *Appointment of the Final Trustee*

At this point it is important to mention that a distinction should be made between the making of provisional and final appointments by the Master. Section 54 of the Insolvency Act contains the rules for the election of a final trustee at the first meeting of creditors. In terms of section 54(2) of the Insolvency Act, any person who has obtained a majority in number and in value of the votes of the creditors entitled to vote, and who voted at such meeting, shall be elected as the trustee of that estate. It bears mentioning that subsection (1) of section 54 states that the creditors may elect one or two trustees at the first meeting of creditors.¹⁷³

¹⁷⁰ Section 60 of the Insolvency Act; s 379 of the Companies Act.

¹⁷¹ In order to have his security bond reduced to nought the provisional appointee will usually lodge a certificate by the final appointee with the Master that the provisional appointee has accounted to the final appointee to his satisfaction. In order to hold the guarantor liable for past indiscretions by the provisional appointee, the security bond will not be cancelled.

¹⁷² Tariff B in the Second Schedule to the Insolvency Act. *Study Notes: Diploma in Insolvency Law and Practice* 145.

¹⁷³ The reason for this is that the voting rules in s 54 are taken a step further due to the fact that it may happen that no one person has the majority of the votes in both number and value. It frequently occurs that one person obtains the majority of the votes in value (especially those trustees who enjoy the support of the larger creditors such as banks), while another person obtains the majority of the votes in number. In such a

South African insolvency law is categorised as a creditor-driven insolvency system, and one of the grounds on which this conclusion is based is the input of creditors allowed in the administration of insolvent estates.¹⁷⁴ A principle conclusion of the IMF is that “[t]he law should enable creditors to play an active role in the insolvency proceedings. To that end, it should allow for the formation of a creditors’ committee, with the cost of such a committee being an administrative expense.”¹⁷⁵ The first meeting of creditors grants the opportunity to creditors to nominate and elect a person of their choice as final trustee. Although South African law does not provide for the creation of a creditor’s committee, to a certain extent the voting system at creditor’s meeting provide them with the opportunity to protect their rights.

When a person has been elected as trustee at the first meeting of creditors the Master will proceed to appoint him as such unless he was not properly elected; or he is disqualified under section 55 from being elected or appointed a trustee; or he has failed to give security within seven days or within such further period as the Master may allow; or in the opinion of the Master he should not be appointed trustee.¹⁷⁶ If the Master declines to appoint the elected person as trustee for one of the reasons stated in section 55, he shall give notice in writing to the interested party of his refusal and include the reason therefore. However, if the reason is that the Master is simply of the opinion that the applicant should not be appointed for a reason other than mentioned in section 55, the Master need not, in terms of section 57(1),¹⁷⁷ provide further particulars.¹⁷⁸

There is a special procedure for persons aggrieved by the appointment of a trustee by the Master or his refusal to appoint a person as trustee to appeal to the Minister of Justice and provision is made for a further meeting to elect a trustee.¹⁷⁹ This procedure does not apply to appointments

case both persons will be elected as trustees of the estate in question. See Calitz “The Appointment of Insolvency Practitioners” 780.

¹⁷⁴ See Wood *Principles of International Insolvency* (2007) 4-5 (hereafter referred to as Wood); Evans at 453 proposes that South Africa adopt a more liberal debtor friendly approach.

¹⁷⁵ *Orderly and Effective Insolvency Procedures* (1999) prepared by the Legal Department, IMF.

¹⁷⁶ Sections 56(2) and 57(1) of the Insolvency Act. See also ss 375 and 370 of the Companies Act.

¹⁷⁷ See s 370 of the Companies Act.

¹⁷⁸ Hockly 114. It is highly questionable whether this section is in line with the present Constitutional dispensation. See s 33(2) of the Constitution given effect by s 5 of PAJA. See Hoexter *Administrative Law in South Africa* (2006) (hereafter referred to as Hoexter) ch 8 for a detailed discussion of the right to written reasons.

¹⁷⁹ Section 57 of the Insolvency Act and ss 370 and 371 of the Companies Act. No new claims can be submitted for proof at this meeting. In terms of s 57(3) of the Insolvency Act and s 370(2)(d) of the Companies Act this meeting is deemed to be the continuation of a first meeting held after an adjournment thereof. In terms of s 44(3) of the Insolvency Act creditors must submit their claims 24 hours or more before the time advertised

outside the nomination process at meetings, such as provisional appointments¹⁸⁰ or joint appointments by the Master in the exercise of his discretion.¹⁸¹ The opportunity to appeal to the Minister when aggrieved by the Master's decision not to appoint a certain person as trustee represents an example of an internal remedy provided for by legislation. Before someone can apply to a court to review an administrative action, there is an important rule in PAJA that must be complied with – the rule of exhaustion of internal remedies.¹⁸² This indicates that, where the law sets out procedures allowing someone to review or appeal a decision of the administrator, these must be exhausted before an affected person can approach a court. A person can therefore refer to judicial review as a last resort.¹⁸³ The Master's decision not to appoint a person as trustee will thus not be reviewed by a court unless this internal remedy has been exhausted.¹⁸⁴

It would be fair to state that the appointment of insolvency practitioners in insolvent estates in South Africa is a controversial subject to deal with. This is not due to the complexity of the legislative provisions or their practical application, but due to the obvious shortcomings in the regulatory process. A review of the regulation of insolvency practitioners in other jurisdictions reveals that South Africa lacks a sufficient and effective regulatory framework.¹⁸⁵ Any regulation of the insolvency profession, however, needs to take cognisance of the socio-economic realities that prevail in South Africa. In addition, any such regulation needs to be sensitive towards an industry that is in dire need of transformation. However, 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.¹⁸⁶

for the commencement of the meeting. In *Minister of Justice v Firstrand Bank Ltd* 2003 6 SA 636 (SCA) court held s 371 of the Companies Act does not apply to provisional liquidators.

¹⁸⁰ *Minister of Justice v Firstrand Bank Ltd* (n 179).

¹⁸¹ *Janse Van Rensburg v The Master* 2004 5 SA 173 (T).

¹⁸² See <http://www.doj.gov.za/paja/about/review.htm> (last visited at 09-11-30)

¹⁸³ This is dealt with in s 7(2) of the PAJA. See Hoexter 478.

¹⁸⁴ In *Koyabe and Others v Minister for Home Affairs and Others* (CCT 53/08) [2009] ZACC 23 the applicants sought leave to appeal to the Constitutional Court against the judgment of the High Court. They urged the Court to accept that a lapsing of the time-period for them to seek a ministerial review means that the internal remedy as required under PAJA had been exhausted. The High Court held that s 7(2)(a) of PAJA requires the exhaustion of internal remedies prior to approaching a court for judicial review. The Court found that the applicants had not exhausted their internal remedy and that there were no exceptional circumstances that would allow it to exempt them from doing so.

¹⁸⁵ Calitz "The Appointment of Insolvency Practitioners" 780.

¹⁸⁶ In terms of the World Bank *Principles for Effective Insolvency and Creditor Rights System* (2001) (also referred to as *Principles*) and United Nations Commission on International Trade Law¹⁸⁶ *Legislative Guide on Insolvency Law* (2005) (hereafter referred to as "UNCITRAL *Legislative Guide*" or "*Legislative Guide*") the bodies responsible for regulating or supervising insolvency practitioners should be independent of individual representatives, set standards that reflect the requirements of the legislation and public expectations of fairness,

3.2.4 Powers and Duties of the Master relating to the Effects of the Sequestration Order

Although the Master is not actively involved in the administration process of the estate and only acts in a supervisory capacity, a number of the powers of the trustee are subject to the Master's direction. A few of these powers are *inter alia* the entering of a caveat in the Deeds Office,¹⁸⁷ application to set aside directions by creditors,¹⁸⁸ resignation by the trustee or absence from the Republic for a period longer than 60 days,¹⁸⁹ payment of an allowance to the insolvent and his family before the second meeting,¹⁹⁰ sale of property before the second meeting¹⁹¹ and the destruction of documents.¹⁹²

The following provisions of the Insolvency Act expressly provides that the powers in question may be exercised only with the authority of creditors (obtained at a meeting) or the Master: obtaining legal advice,¹⁹³ the compromise of debts of more than R1 000 due to the estate, submission to arbitration, admission of claims¹⁹⁴ and the continuation of a business.¹⁹⁵ A few of the more significant matters in which the Master acts in a supervisory role will now be discussed.

3.2.4.1 Continuation of a Business

The Insolvency Act makes provision for the Master to consent to certain urgent matters such as the urgent sale of assets¹⁹⁶ or the continuation of a business.¹⁹⁷ A provisional or final trustee may continue a business¹⁹⁸ only with the authority of creditors, or, in the absence of

impartiality, transparency and accountability, and have appropriate powers and resources to enable them to discharge their functions, duties and responsibilities effectively – *See Revised Principles*.

¹⁸⁷ Section 18B of the Insolvency Act.

¹⁸⁸ Section 53(4) of the Insolvency Act. A creditor can also apply to set directions aside and this includes an unproved creditor with a “contingent” claim – *Pine Village Home Owners Association Ltd v The Master* 2001 2 SA 576 (SECLD).

¹⁸⁹ Section 61 of the Insolvency Act.

¹⁹⁰ Section 79 of the Insolvency Act.

¹⁹¹ Section 80 bis of the Insolvency Act.

¹⁹² Section 155 of the Insolvency Act. *Study Notes: Diploma in Insolvency Law and Practice* 156.

¹⁹³ Section 73 of the Insolvency Act.

¹⁹⁴ Section 78 of the Insolvency Act.

¹⁹⁵ Section 80 of the Insolvency Act.

¹⁹⁶ Section 80bis of the Insolvency Act.

¹⁹⁷ Section 80(1) of the Insolvency Act.

¹⁹⁸ Meskin is of the opinion that by its reference to “business” in this context the legislature intends to refer exclusively to a business which can be operated independently of the insolvent's participation. See Meskin par 5.25.1.

their instructions, the Master.¹⁹⁹ In the case of the provisional trustee, the authority of creditors envisaged is one given at a meeting of creditors duly convened under the Insolvency Act, and thus until the first meeting of creditors the only source of authorisation would be the Master, and, if he refuses, the court.²⁰⁰ In practice, the Master will generally require that the views of the creditors be ascertained by the trustee and based on the received input by creditors the Master will determine whether to grant his permission.²⁰¹ The main consideration influencing the decision of the creditors as well as the Master would generally be whether the continuance would be to the advantage of the creditors.

3.2.4.2 *Urgent Sale of Assets*

A provisional trustee has the powers and duties of a trustee, except that he may not without the authority of the court bring or defend legal proceedings and he may not without the authority of the Master or the court sell property of the estate.²⁰² Subject to this provision, the 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.²⁰³ Following the first meeting the Master may at any time before the second meeting of creditors authorise the sale of property on such conditions and in such manner as he may direct.²⁰⁴ The Master will in practice upon a properly substantiated and motivated application by the trustee, give authority to realise assets and give specific instructions as to the manner and the terms and conditions of such realisation.²⁰⁵

¹⁹⁹ Section 80 (1) read with s 18(1) of the Insolvency Act.

²⁰⁰ Meskin par 5.25.1.

²⁰¹ Meskin par 5.25.1.

²⁰² Section 18(3) of the Insolvency Act.

²⁰³ Section 18(2) of the Insolvency Act.

²⁰⁴ See s 80 bis of the Insolvency Act and s 386(2A) and (2B) of the Companies Act.

²⁰⁵ Sections 80(1); 82 and 83 (11) of the Insolvency Act. After the final trustee has been appointed the creditors may prescribe the manner of and the conditions for the sale of property at the second meeting of creditors and must consent if the trustee takes over security at the value placed thereon by the creditor when proving his claim. Section 82 of the Insolvency Act provides that subject to the provisions of s 83 (realisation of securities for claims) and s 90 (rights of the Land Bank), the trustee shall, as soon as he is authorised to do so at the second meeting, sell all the property of the estate in such manner and upon such conditions as creditors may direct. According to *Janse van Rensburg & 'n Ander NNO v Land- en Landboubank van SA* 2003 5 SA 228 (T) at 237F in terms of s 339 of the Companies Act, s 90 of the Insolvency Act apply to companies. See also *Land and Agricultural Development Bank of South Africa t/a Land Bank v The Master & others* 2005 4 SA 81 (C). See Kelly-Louw "The Land Bank – out with the old and in with the new!" (2006) *Juta's Business Law* 69; Kelly-Louw "Investigating the statutory preferential rights the Land Bank requires to fulfil its developmental role" (2004) *SA Merc LJ* 378.

If directions by the creditors have not been received during the second meeting of creditors, the Master may alternatively issue directions as he sees fit.²⁰⁶ The Insolvency Act provides further that if creditors have not given any directions by the final closing of the second meeting of creditors, the trustee shall after notice in the *Government Gazette* realise the property by public auction or public tender.²⁰⁷

3.2.5 Meetings of Creditors

South African insolvency law does not provide for creditors' committees as found in various other jurisdictions and makes use of the meeting of creditors in an insolvent estate to afford creditors the opportunity to protect their interests and participate in the general administration of the estate. There are four types of meetings: the first and second meetings, which are compulsory in each estate, and the special and general meetings, which are convened when required.²⁰⁸ The meeting of creditors provides an interactive forum for discussion and debate to enable creditors to receive information on the course of insolvency proceedings and provide an opportunity to the trustee to consult with creditors on various issues.²⁰⁹ Although the purpose of the various meetings varies, claims can be proved²¹⁰ and interrogations held²¹¹ at any of the indicated meetings.

Meetings of creditors must, in terms of section 39(2) of the Act, be presided over by the Master, and although the proceedings may on the surface appear judicial in nature, they are in administrative in essence.²¹² Section 39(1) of the Insolvency Act provides that the Master must convene any meeting at such place as he considers to be most convenient for all parties

²⁰⁶ Section 81(3) of the Insolvency Act.

²⁰⁷ Section 82 (1) of the Insolvency Act. *Muller v De Wet NO 2001 2 SA 489 (W)* decided that notice of a public auction must be given in the *GG*, whether the creditors have given directions as to the manner of the sale or not. See also See Hockly 160; *Study Notes: Diploma in Insolvency Law and Practice* 174.

²⁰⁸ In general, the provisions of the Insolvency Act or similar provisions of the Companies Act or Winding-up Reg 7-15 apply to meetings held during the winding-up of companies. If an insolvent individual submits an offer of composition it is considered at a meeting which is convened in a manner similar to a general meeting. See s 364 of Companies Act.

²⁰⁹ The trustee may at any time convene a general meeting and must convene it if required to do so by the Master or creditors representing at least a quarter of the proved claims in value. See s 41 of the Insolvency Act and ss 386(1)(d) and 412 of the Companies Act and Winding-up Reg 10.

²¹⁰ Section 44(3) of the Insolvency Act. See s 366 of the Companies Act.

²¹¹ Section 65(1). See s 415 of the Companies Act.

²¹² Mars 374.

concerned.²¹³ The Master as a rule convenes the first meeting in the district where the insolvent resided or had his main place of business.²¹⁴ The trustee should convene all subsequent meetings at the same venue where the first meeting was held or get the permission of the Master to convene a meeting elsewhere, especially if the first meeting was not held before the Master.²¹⁵ In a district in which there is a Master's office, meetings are held before him or a public servant designated by him. Where there is no Master's office in a district, meetings are held before the magistrate or a public servant designated by him.²¹⁶

3.2.6 Proof of claims

As a general rule any creditor who wishes to share in the distribution of the proceeds of the assets in the estate must prove a claim against it at a meeting of creditors.²¹⁷ A claim may be proved at any of the various types of meetings of creditors to the satisfaction of the presiding officer at such meeting.²¹⁸ One of the most important functions of a presiding officer at a meeting of creditors is to examine and afterwards accept or reject a claim. The presiding officer must examine the claim carefully but it is not required to adjudicate upon a claim as if

²¹³ *Steelnet (Zimbabwe) Limited v Master of the High Court Johannesburg and Others* [2008] ZAGPHC at 185 the court held: "Neither the Insolvency Act, nor the Companies Act, provide for meetings in an insolvent estate to be held "independent of the offices of" the relevant Master. The power and duty regarding the meetings of creditors is granted to the Master in terms of s 364(1) of the Companies Act. s 364(2) further provides that meetings of creditors under s 364 of the Companies Act shall be summoned and held as nearly as may be in the manner provided by the law relating to insolvency. In addition, s 39(2) of the Insolvency Act provides that "all meetings of creditors held in the district wherein there is a Master's office shall be presided over by the Master or an officer in the public service, designated, either generally or specially, by the Master for that purpose". Therefore, meetings of creditors must, in terms of s 39(2) be presided over by the Master or by any officer in the public service designated either generally or specially by the Master for that purpose. The section does not make reference to or permit for such meetings to be held independent of the office of the Master".

²¹⁴ Section 39(1) of the Insolvency Act.

²¹⁵ Section 39(2) of the Insolvency Act.

²¹⁶ Section 39(2) of the Insolvency Act. See Winding-up Reg 7(2).

²¹⁷ Section 44 of the Insolvency Act and s 366 of the Companies Act deal with the proof of claims. There is a clear implication that claims can be proved at any meeting of creditors. Proof of claims is the first matter dealt with at any meeting if claims have been submitted for proof. The affidavit, claim form and documents submitted in support of the claim must be delivered at the office of the presiding officer not later than 24 hours before the advertised time of the meeting, failing which the claim shall not be admitted to proof at that meeting, unless the presiding officer is of the opinion that through no fault of the creditor he has been unable to deliver the documentation within the prescribed period. The late lodgement of documents cannot be overcome by lodging the claims more than 24 hours before an adjourned meeting. In *Slabbert, Verster & Malherbe v Die Assistent-Meester* 1977 1 SA 107 (NC), the Assistant Master held the erroneous view that a meeting would not proceed as a result of an appeal against the sequestration order. He advised a creditor accordingly. The Assistant Master discovered his mistake and the meeting proceeded. The court confirmed the decision by the Master to condone the late delivery of the claim. *Study Notes: Diploma in Insolvency Law and Practice* 191.

²¹⁸ Section 44(1) of the Insolvency Act.

it were a court of law.²¹⁹ A long line of decisions have indicated that the presiding officer may admit a claim upon *prima facie* proof.²²⁰ In deciding whether to admit a claim the presiding officer performs a quasi-judicial function and he must exercise his judgment independently.²²¹ No rigid rule exists as to when a presiding officer should be satisfied with the claim and each case must be decided on its own merits.²²² In the case of *Steelnet v The Master*²²³ the court confirmed that it is not in dispute that the presiding officer's adjudication of a claim constituted an "administrative action" as envisaged by PAJA that was therefore reviewable in terms of section 6 of PAJA and section 33 of the Constitution.²²⁴

For individual insolvents section 44(1) of the Insolvency Act provides that no claim shall be proved after the expiration of three months from the conclusion of the second meeting except with the leave of the court or the Master and payment of the cost occasioned by the late proof of the claim.²²⁵ Section 366(2) of the Companies Act and not the provisions of section 44(1),²²⁶ or section 104(1),²²⁷ or, it is submitted, section 104(2) of the Insolvency Act applies to companies. The liquidator may apply to the Master to establish a time or times within which creditors are to prove their claims in order to participate in a distribution under an account lodged with the Master before such proof. In practice the Master may insist that the liquidator must give notice in the *Government Gazette* of the proposed fixing of times for the proof of claims. Once an account has been lodged, claims proved after the fixed date are excluded from the distribution under such account, unless the Master extends the date.²²⁸

²¹⁹ *Cachalia v De Klerk* 1952 4 SA 672 (T) at 675.

²²⁰ *Ben Rossouw Motors v Druker* 1975 1 SA 816 (T); *Chappel v The Master* 1928 CPD 289 at 291; *Ilsley v De Klerk NO* 1934 TPD 55. *Study Notes: Diploma in Insolvency Law and Practice* 191. See Mars 390. In *Marendaz v Smuts* 1966 4 SA 66 (T) Rabie J said the following about ss 44(4) and 44(7) of the Insolvency Act: "The decided cases referred to show, in my view, that each case must be decided on its own merits and that no hard and fast rule can be laid down as to when a presiding officer ought to be satisfied with the proof of a claim as provided in s 44(3) of the Act, or as to when he resort to the calling of evidence as provided for in s 44(7)". *Study Notes: Diploma in Insolvency Law and Practice* 191.

²²¹ *Aircondi Refrigeration (Pty) Ltd v Ruskin* 1981 1 SA 799 (W) 804.

²²² *Marendaz v Smuts* (n 220). See Mars 409; Hockly 106.

²²³ *Steelnet (Zimbabwe) Limited v Master of the High Court Johannesburg* (n 213).

²²⁴ *Steelnet (Zimbabwe) Limited v Master of the High Court Johannesburg* (n 213).

²²⁵ Section 366(2) of the Companies Act applies to a Company. See the case of *Stone & Stewart v Master of the Supreme Court* unreported case no 8828/1987 (TPD).

²²⁶ See the unreported case of *Stone & Stewart v Master of the Supreme Court* (n 225). Meskin disagrees – par 9.5 (n 2).

²²⁷ *Townsend v Barlows Tractor Co (Pty) Ltd* 1995 1 SA 159 (W).

²²⁸ *Study Notes: Diploma in Insolvency Law and Practice* 191.



A creditor²²⁹ who has not proved his claim before the date when the trustee lodged his account is not entitled to share in the distribution under that account unless the Master, before the confirmation of the account, is satisfied that the creditor has a reasonable excuse for the delay in proving his claim and permits the creditor to share in the distribution under the account.²³⁰ A creditor who has not been permitted to share in an account lodged before the proof of his claim is entitled to an equalising dividend under a further account if sufficient funds are available and the Master is satisfied that the creditor had a reasonable excuse for delaying the proof of his claim.²³¹

The rejection of a claim at a meeting does not bar the creditor from proving his claim at a subsequent meeting or from establishing his claim by legal action before the time for such actions has expired in terms of section 75.²³² Any person aggrieved by the decision of the presiding officer to reject or admit a claim can in terms of section 151 approach the court to have the decision reviewed, provided that the court shall not re-open a duly confirmed account otherwise than provided in section 112.²³³ A person does not have *locus standi* to review the proof of a creditor's claim merely because he does not wish to be interrogated by the creditor.²³⁴ The court may take into account evidence which had not been available to the presiding officer at the meeting.²³⁵

The presiding officer, the trustee (or provisional trustee) or his agent, or a creditor who has proved his claim or his agent may interrogate under oath any person present at the meeting who wishes to prove a claim or has proved it.²³⁶ If the person is not present he may be summoned to appear.²³⁷ If he fails without reasonable excuse to appear, be interrogated under oath or answer fully and satisfactorily any lawful question put to him, his claim, if already proved, may be expunged by the Master, and if not yet proved, may be rejected at the meeting.²³⁸

²²⁹ Except certain salary claims (s 98A (3) of the Insolvency Act) and a creditor whose claim is secured by a mortgage bond over immovable property (s 95 of the Insolvency Act).

²³⁰ Section 104(1) of the Insolvency Act.

²³¹ *Study Notes: Diploma in Insolvency Law and Practice* 191.

²³² Section 44(3) of the Insolvency Act.

²³³ A more comprehensive discussion follows below.

²³⁴ *Jeeva v Tuck NO 1998 1 SA 785 (SECLD)*.

²³⁵ *Marendaz v Smuts* (n 220).

²³⁶ Section 44(7) of the Insolvency Act.

²³⁷ Section 44(8) of the Insolvency Act.

²³⁸ Section 44(9) of the Insolvency Act.

After the meeting the presiding officer must hand over the proved claims to the trustee.²³⁹ The trustee must examine all available books and documents to ascertain whether the estate in fact owes the claimant the amount claimed.²⁴⁰ If the trustee disputes a claim he must report it to the Master stating his reasons.²⁴¹ The trustee must furnish the creditor with a copy of the reasons and notify him that he has 14 days or a longer period allowed by the Master to give reasons why the claim should not be disallowed or reduced. The trustee must certify that he has complied with this requirement and the creditor must furnish the trustee or liquidator with a copy of documents submitted to the Master and the trustee or liquidator must submit his remarks on the matter to the Master.²⁴² The Master may confirm the claim or reduce or disallow it and inform the creditor accordingly.²⁴³

3.2.7 Interrogations

During the process of administering an insolvent estate the need for information about the affairs of the insolvent before or after the estate was sequestrated may arise. The Insolvency Act affords the process of obtaining such information by way of interrogations (enquiries) of the insolvent or other interested parties.²⁴⁴ The relevant sections in the Companies Act are also touched upon in so far as they relate to the role and performance of the Master. Interrogation as part of insolvency law is an extensive and specialised subject and worthy of a study on its own. However, as the objective of this part of the study is to gain a bird's-eye view of the South African regulatory framework, a detailed discussion of interrogations in general falls beyond the scope of this chapter.

Historically, one of the subjects of a general interrogation in South African insolvency law was the cause of the insolvency. Both the 1843 Ordinance and the 1916 Insolvency Act included the phrase “cause and ground of his insolvency”²⁴⁵ in case of the former and “concerning the cause of insolvency”²⁴⁶ in the latter case. Although our present Insolvency

²³⁹ Section 45(1) of the Insolvency Act.

²⁴⁰ Section 45(2) of the Insolvency Act.

²⁴¹ Section 45(3) of the Insolvency Act. See *Caldeira v The Master of the Supreme Court* 1996 1 SA 868 (N).

²⁴² Regulation 3. Winding-up Reg 18 contains similar provisions, but not the sensible provision in Reg 3 that the creditor should furnish a copy of his submission to the trustee.

²⁴³ Section 45(3) of the Insolvency Act.

²⁴⁴ Meskin par 8-1.

²⁴⁵ Section 60 of Ordinance 6 of 1843.

²⁴⁶ Section 55(1) of the 1916 Insolvency Act.

Act permits questions relating to the business and affairs of the insolvent before and after the sequestration of the estate, the object is to obtain a complete and detailed picture of the insolvent's estate and financial affairs. The focus of such proceedings is on gathering information which could assist the trustee in his administration duties, rather than on investigating any probable causes of insolvency.²⁴⁷ The matter of investigating the cause of insolvency was omitted from our current law.

By way of comparison, the present English system has a robust investigation procedure, linked to the idea of maintaining public confidence.²⁴⁸ The investigatory functions primarily rest with the official receiver, who routinely conducts an exhaustive investigation of the individual debtor's financial condition and the causes of bankruptcy.²⁴⁹ With regard to a company under any form of administration or liquidation, the office-holder²⁵⁰ is immediately vested with powers of investigation under the Insolvency Act 1986.²⁵¹ Although the primary responsibility of an office-holder is the collection and realisation of a company's assets and the settlement of its liabilities, there is also an obligation on all office-holders to report to the Secretary of State if it appears that there has been any misfeasance on the part of the directors such as, for instance, a breach of the Company Directors Disqualification Act.²⁵² The Companies Investigation Branch, located within the Insolvency Service, also carries out investigations on receipt of complaints, investigates the companies against which they have been made, and assesses whether or not there appears sufficient reason to investigate and whether or not an investigation is in the wider public interest.²⁵³

Within South African insolvency law there are different types of interrogations which can as a rule be divided into public and private enquiries. The Insolvency Act provides for three different types of interrogations: the provision primarily aimed at investigating the validity of claims lodged for proof at a meeting of creditors,²⁵⁴ a creditor's enquiry in order to

²⁴⁷ See Hockly 147; Mars 415.

²⁴⁸ Milman 90.

²⁴⁹ Insolvency Act 1986 ss 290 and 366.

²⁵⁰ The term "Office-holder" is used in the Insolvency Act 1986 and thus in the United Kingdom (hereafter referred to as the "UK") and may refer to an administrator, administrative receiver, provisional liquidator or liquidator.

²⁵¹ Insolvency Act 1986 ss 235 and 236.

²⁵² Company Directors Disqualification Act, 1986.

²⁵³ Section 447 of the Companies Act 1985.

²⁵⁴ Section 42 of the Insolvency Act.

investigate the affairs of the insolvent²⁵⁵ and a private Master's enquiry in terms of the provisions of Section 152. Corresponding provisions contained in the Companies Act also provide for public enquiries by creditors,²⁵⁶ and provisions relating to private enquiries before the Master or a Commissioner appointed by the Master or the Court.²⁵⁷

An examination of the subject matters as set out in the Insolvency Act shows that the scope of interrogations is defined in the widest terms, and the presiding officer has no discretion to disallow a relevant question unless it would prolong the interrogation unnecessarily.²⁵⁸ As stated by section 65, which deals with the subject matter of interrogations, the insolvent or witness may be interrogated concerning all matters relating to the business affairs of the insolvent, matters concerning the property of the insolvent and the business affairs or property of the solvent spouse.²⁵⁹ Although it has in the past been confirmed that an interrogation is held both in the public interest and that of the creditor,²⁶⁰ the main purposes of interrogations could *inter alia* be listed as follows:

- 1 to seek out and recover assets;
- 2 to determine whether the insolvent or company was a party to any impeachable transactions which can be set aside;
- 3 to determine whether any civil claims can be instituted against directors and officials of companies in liquidations and other persons in terms of sections 423 and 424 of the Companies Act;²⁶¹

²⁵⁵ Sections 64, 65 and 66 of the Insolvency Act.

²⁵⁶ Sections 415 and 416 of the Companies Act.

²⁵⁷ Sections 417 and 418 of the Companies Act. See Mars 418.

²⁵⁸ *Pretorius v Marais* 1981 1 SA 1051 (A).

²⁵⁹ Section 65 of the Insolvency Act. See also *Harksen v Lane NO* 1998 1 SA 300 (CC) in which the constitutionality of this section was tested. Section 415 of the Companies Act has the same provisions as s 65. This section provides the examination of directors, officers and other persons who is deemed to be in a position to provide material information. See Mwelase "Insolvency Interrogations: An Investigation into sections 64, 65, 66 and 152 of the Insolvency Act 24 of 1936" (2005) 37 LLM dissertation Potchefstroom University for Christian Higher Education (hereafter referred to as Mwelase).

²⁶⁰ See *Simon v The Assistant Master* 1964 3 SA 715 (T); *Ex parte Dickson & Orr* 1931 TPD 207. See also Mars 424.

²⁶¹ See *Cooper v SA Mutual Life Assurance Society* 2001 1 SA 967 (SCA) for the requirements to fix liability under s 424(1). See also the cases referred to in *Kalinko v Nisbet* 2002 5 SA 766 (W). This case decided that a subordinated debt did not die a natural death upon the insolvency of the debtor for purposes of pursuing the statutory remedy under s 424(1). See also *Heneways Freight Services (Pty) Ltd v Grogor* 2007 2 SA 561 (SCA).

4 to determine whether the estate or company in liquidation has other civil claims against any other parties; and to determine the validity and enforceability of any claims which any other parties make against the estate.²⁶²

It is submitted that the role of presiding officer at such interrogation proceedings could be compared to that of a judge in a jury trial.²⁶³ In most common law jurisdictions the jury is responsible for establishing the facts of the case, while the judge determines and applies the law.²⁶⁴ The judge oversees the process to ensure that the procedures have been followed correctly and he rules on all questions of law relating to the particular case.²⁶⁵ The presiding officer in an insolvency interrogation acts more or less like a neutral umpire in relation to the process and, as a judge does at a jury trial, also makes decisions relating to the law. During the interrogation proceedings the presiding officer must call and administer the oath to the insolvent or other witnesses and has to ensure that the proceedings are conducted in accordance with the fundamental principles of justice and that he performs his functions fairly and impartially.²⁶⁶ The court may intervene to stop a proceeding if it amounts to an abuse of the provisions in the Act or if it is vexatious or oppressive.²⁶⁷

The only limitations on the scope of an enquiry are that the matter in relation to which the question is being asked must concern a topic described in the relevant provisions and the question may not according to the presiding officer prolong the interrogation.²⁶⁸ The purpose of the relevant sections is not to place the trustee in a superior position to that of the debtor and creditors of the estate but “to place [him], because of the disabilities resulting from the sequestration, on such a footing that [he] can litigate on equal terms with [the] debtors and creditors”.²⁶⁹

In a public interrogation the officer who is to preside or who presides at any meeting of creditors may summons any person who is known or upon reasonable grounds is believed to be or to have

²⁶² *Study Notes: Diploma in Insolvency Law and Practice* 209.

²⁶³ Section 2 of Article 3 of the US Constitution specifies the subject-matter jurisdiction of the federal courts and requires trial by jury in all criminal cases, except impeachment cases. The alternative to a jury trial is a bench trial in which a judge or panel of judges make all decisions.

²⁶⁴ Von Mehren *Law in the United States* (2007) 224 (hereafter referred to as Von Mehren).

²⁶⁵ Von Mehren 224.

²⁶⁶ *Cf Advance Mining Hydraulics (Pty) Ltd v Botes NO & Others* 2000 1 SA 815 (T) at 824-825.

²⁶⁷ *Lane and Another NNO v Magistrate Wynberg* 1997 2 SA 869 (C) at 874.

²⁶⁸ Section 416 of the Companies Act provides, subject to certain conditions and clarifications that ss 66 to 68 of the Insolvency Act apply to a company unable to pay its debts.

²⁶⁹ *Pitsiladi v van Rensburg and Others* 2002 (2) SA 160 (SE). See Meskin par 8-2.

been in possession of any property which belonged to the insolvent before the sequestration of his estate or which belongs or belonged to the insolvent estate or to the spouse of the insolvent or to be indebted to the estate, or any person who in the opinion of said officer may be able to give any material information concerning the insolvent or his affairs (whether before or after the sequestration of his estate) or concerning any property belonging to the estate or concerning the business, affairs or property of the insolvent's spouse, to appear at such meeting or adjourned meeting for the purpose of being interrogated.²⁷⁰ In *Bestbier v Chief Magistrate, Stellenbosch and Another*²⁷¹ the court assumed, without making a formal finding, that the issuing of a subpoena by a presiding officer constituted an administrative action and was governed by the provisions of the PAJA.²⁷²

3.2.7.1 Public Interrogations

The insolvent is obliged to attend the first and second meetings of creditors, and must also attend further meetings if required to do so in writing by the trustee.²⁷³ There is a similar obligation on directors or officers to attend meetings of a company unable to pay its debts.²⁷⁴ Both the Insolvency and Companies Acts make provisions for a general or public inquiry. As mentioned, section 65(1) provides that the presiding officer, the trustee and any creditor who has proved a claim against the estate or the agent of any of them may interrogate a person called and sworn

²⁷⁰ Sections 64(2) and 64(3) of the Insolvency Act; s 414(2) of the Companies Act. If at any time the Master is of the opinion that the insolvent or the trustee of that estate or any other person is able to give any information which the Master considers desirable to obtain, concerning the insolvent, or concerning his estate or the administration of the estate or concerning any claim or demand made against the estate, he may by notice in writing delivered to the insolvent or the trustee or such other person summon him to appear before the Master or before a magistrate or an officer in the public service mentioned in such notice to deliver all the information within his knowledge concerning the insolvent or concerning the insolvent's estate or the administration of the estate. Section 152(1) of the Insolvency Act; s 381 of the Companies Act. Section 381(2) of the Companies Act provides that the Master may at any time in relation to any winding-up examine the liquidator or any other person on oath concerning the winding-up.

²⁷¹ 2006 2 ALL SA 598 (C).

²⁷² *Smith v Porritt and others* [2007] SCA 19 (RSA); Hoexter 184. It is not an abuse of the process if the subpoena does not specify in precise terms the documentation required by the witness provided that the subpoena is not unlimited in scope and does not go beyond what is permissible for investigation under s 64(2) of the Insolvency Act. The subpoena could therefore not be issued *duces tecum* and the judgment in *Laskarides v German Tyre Centre (Pty) Ltd* also confirmed that the presiding officer should be able to justify the production of the documents requested in the subpoena to be sustained exclusively by reference to material available at the time. It was also found that a party causing the subpoena to be issued should tender the reasonable out-of-pocket costs and expenses of a witness subpoenaed for the purposes of producing, compiling, copying, printing and collating documents, material and information. See also *Foot v The Master* unreported case no 14797/1992 (CPD); *Pitsiladi v van Rensburg and Others* (n 269).

²⁷³ Section 64(1) of the Insolvency Act. The Constitutional Court has ruled that ss 64(2), 65(1) and 65(2) of the Insolvency Act are constitutional in principle *Harksen v Lane* 1998 1 SA 300 (CC).

²⁷⁴ Section 414(1) of the Companies Act.

“concerning all matters relating to the insolvent or his business or affairs, whether before or after the sequestration of his estate, and concerning any property belonging to his estate, and concerning the business, affairs or property of his spouse”.²⁷⁵ In the case of a company or corporation, one may interrogate “concerning all matters relating to the company or its business or affairs in respect of any time, either before or after the commencement of the winding up, and concerning any property belonging to the company”.²⁷⁶

Section 39(6) of the Insolvency Act provides that the place where a meeting of creditors is to be held must be accessible to the public. Section 65(2A) provides that, notwithstanding the provisions of section 39(6), the presiding officer must order that the part of the proceedings where a witness may incriminate himself or give evidence that may prejudice him at a criminal trial must be held *in camera* and that no information regarding such questions and answers may be published in any manner whatsoever. In terms of section 65(6) any witness may be assisted at the interrogation by counsel, an attorney or agent. Proceedings may be set aside as not in accordance with the fundamental principles of justice if unrepresented witnesses are not informed of their right to legal representation.²⁷⁷

Section 66(3) of the Insolvency Act authorises the officer presiding at a meeting to commit a summonsed person to prison if he fails to produce a book or document or fails to answer a question lawfully put to him, or to answer it fully and satisfactorily. In *De Lange v Smuts*²⁷⁸ a majority of the Constitutional Court held that the committal provision infringes section 12(1)(b) of the 1996 Constitution only to the extent that a person who is not a magistrate is authorised to issue a warrant committing to prison an examinee at a creditors’ meeting held under section 65 of the Insolvency Act.²⁷⁹ Therefore the outcome of the judgment was that the Master when acting as presiding officer will not be able to issue a warrant in terms of section 66(3). The main intent of the ruling had been that while the Master acts as presiding officer he lacks the independence of the judiciary, given that he acts in an administrative and not a judicial capacity.²⁸⁰

²⁷⁵ Section 65(1) of the Insolvency Act.

²⁷⁶ Section 415(1) of the Companies Act. But interrogation may only occur where the company is unable to pay its debts on the date the section in the Companies Act is invoked. See *Taylor and Steyn v Koekemoer* 1982 1 SA 374 (T). See also Meskin 8-1.

²⁷⁷ *Advance Mining Hydraulics (Pty) Ltd v Botes NO* 2000 1 SA 815 (T); 2000 2 BCLR 119 (T).

²⁷⁸ 1998 3 SA 785 (CC).

²⁷⁹ Section 66(3) read with s 39(2) *De Lange v Smuts* (n 34) at 819C.

²⁸⁰ Sections 414 and 415 of the Companies Act contain provisions similar to ss 64 and 65 of the Insolvency Act for a company unable to pay its debts. See Meskin par 8-6.

3.2.7.2 *Private Interrogations*

The constitutionality of the interrogation process has been thoroughly tested in our courts, and some of the most significant constitutional judgments, such as *Ferreira v Levin*; *Vryenhoek v Powell*²⁸¹ and *Bernstein v Bester*,²⁸² dealt with the constitutionality of sections 417 or 418 of the Companies Act in terms of the Interim Constitution.²⁸³ The court rejected an attack on the provisions of sections 417 and 418 of the Companies Act and found that the mechanisms embodied in these provisions furthered very important public policy objects, such as the honest conduct of the affairs of a company.²⁸⁴

Following *Ferreira v Levin*; *Vryenhoek v Powell*²⁸⁵ and *Pharboo v Getz*,²⁸⁶ the Companies Act was amended to provide that *inter alia* any person being interrogated may be required to answer any question put to him at the examination, notwithstanding that the answer might tend to incriminate him and shall, if he does refuse on that ground, be obliged to so answer at the instance of the Master.²⁸⁷ The provision further provides that the Master may compel the person to answer only once the Master has consulted with the Director of Public Prosecutions, who has jurisdiction. Any incriminating answer or information directly obtained, or incriminating evidence directly derived from an examination, shall not be admissible as evidence in criminal proceedings in a court of law against the person concerned or the body corporate of which he is or was an officer, except in criminal proceedings where the person concerned is charged with an offence relating to certain prescribed matters.²⁸⁸

Section 152 of the Insolvency Act provides that the Master may summon the insolvent, the trustee or any other person who is able to give any information concerning the insolvent, his estate or the administration of the estate or any claim or demand made against the estate to

²⁸¹ 1996 (1) SA 984 (CC).

²⁸² 1996 (2) SA 751 (CC).

²⁸³ See part IV above. The UK has a similar provision to our s 417 in s 236 of Insolvency Act 1986 which states that:

The court may, on the application of the office-holder, summon to appear before it – (a) any officer of the company, (b) any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or (c) any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealing, affairs or property of the company.

²⁸⁴ *Bernstein v Bester* NNO 1996 (2) SA 751 (CC) at par [50] 782A.

²⁸⁵ *Ferreira v Levin*; *Vryenhoek v Powell* 1996 (1) SA 984 (CC)

²⁸⁶ 1997 (4) SA 1095 (CC).

²⁸⁷ Sections 415(3) and (5) and 417(2)(b) and (2)(c) of Companies Act.

²⁸⁸ See Meskin par 8-6; *Study Notes: Diploma in Insolvency Law and Practice* 209.

appear before the Master, a magistrate, or an officer in the public service mentioned in the Master's notice.²⁸⁹ The section 152 procedure can even be employed if it is feasible for an enquiry to be held at a meeting, and a creditor still had ample time to prove his claim and subsequently convene an enquiry.²⁹⁰ The Companies Act in turn also provides that the Master may at any time in relation to any winding-up examine the liquidator or any other person under oath concerning the winding-up.²⁹¹

Section 417 of the Companies Act provides for the examination by the Master or the Court in any winding-up of a company unable to pay its debts and section 418 for the examination by commissioners appointed by the Master or the court.²⁹² Examinations by commissioners and any applications are therefore private and confidential unless the court or the Master directs otherwise.²⁹³ In *Merchant Shippers SA v Millman*²⁹⁴ the court stated that there was good reason for the preservation of secrecy,²⁹⁵ not only with regard to the examination, but also the application for the enquiry. In *Bernstein and Others v Bester and Others*²⁹⁶ privacy had been described as "an amorphous and elusive" concept. Ackermann J held that privacy should be demarcated with respect to the rights of others and the interests of the community.²⁹⁷ The court pointed out that it was difficult to see how information regarding the affairs of an insolvent company which an individual possesses can be private. Even if confidential facts were included in the summonsed documents, the compulsion to disclose may amount to justifiable limitation to privacy.²⁹⁸

²⁸⁹ Mars 419.

²⁹⁰ *Cools v The Master* 1998 4 SA 212 (C). Section 152 applies to Close Corporations – *Nedcor Bank Ltd v The Master* 2002 5 SA 132 (SCA).

²⁹¹ Section 381(2) of Companies Act. In terms of s 381(3) to (5) the Master may appoint a person to investigate the books and vouchers of a liquidator.

²⁹² *South African Philips (Pty) Ltd v The Master* 2000 2 SA 841 (N) held that an enquiry in terms of s 417 cannot be held in the case of a creditors' voluntary winding-up, unless in terms of s 346(1)(e) the Master or a creditor or member applies to have the company wound up by the court. An enquiry in terms of s 417 cannot be held in the case of a voluntary winding-up, because the section requires a winding-up order by the court – *Janse van Rensburg v The Master* 2001 3 SA 519 (W), confirmed in *Michelin Tyre Co (South Africa) (Pty) Ltd v Janse van Rensburg* 2002 5 SA 239 (SCA).

²⁹³ Section 417(7) of the Companies Act.

²⁹⁴ 1986 1 SA 413 (C).

²⁹⁵ See also *Lategan v Lategan* NO 2003 6 SA 611 (D & CLD) at 625J-626D.

²⁹⁶ *Bernstein and Others v Bester and Others* (n 284).

²⁹⁷ De Waal *et al* *The Bill of Rights Handbook* (2001).

²⁹⁸ *Bernstein and Others v Bester and Others* (n 284) at 796B. Unless the court or, as the case may be, the Master, were to direct otherwise, s 417(7) operates to deny all persons access to the application and any documents accompanying it and to the examination or enquiry itself, the record of it, and to any books or papers produced at it. Cf *Meskin Henochsberg on the Companies Act*, (loose-leafed) at 894 and see *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 4 SA 389 (D&CLD).

Section 418 of the Act empowers the Master to delegate his powers under section 417 thereof to a Commissioner, who would typically be a senior magistrate, advocate or attorney with experience in this field of law. This would typically be the case where urgency prevails. Because of the probability that assets may be removed or evidence destroyed, it might at times be essential for the liquidator to convene an enquiry without delay. If the Master is not readily available to preside at such enquiry it is advisable to apply for an enquiry in terms of section 417 read with section 418 to be held before a Commissioner who could be available at short notice.²⁹⁹ The Commissioner is generally a retired judge, a senior advocate or a senior attorney experienced in the field of insolvency.³⁰⁰

The question arises in this context whether a decision by the Master to approve an enquiry under section 152 of the Insolvency Act, or sections 417 and 418 of the Companies Act, amounts to an administrative action as envisaged by PAJA and as such is subject to the relevant judicial review proceedings.³⁰¹ In *Podlas v Cohen and Bryden*,³⁰² which had been decided prior to the promulgation of PAJA, the court, in examining the nature of an enquiry under section 152, found that such an enquiry is purely investigative and that the presiding officer makes no findings that detrimentally affects a person's rights.³⁰³ In *Strauss and Others v The Master of the High Court and Others*³⁰⁴ the Court referred with approval to the *Podlas* decision, adding³⁰⁵ that it cannot be held that a decision to convene an enquiry under section 152 of the Insolvency Act, or sections 417 and 418 of the Companies Act, amounts to an administrative action and would consequently not be reviewable under the provisions of PAJA.

²⁹⁹ Calitz "Sections 417 and 418 of the Companies Act – Relevance Prevailing over the Right to Privacy: *Gumede v Subel* 2006 3 SA 498 (SCA)" (2006) *Obiter* 403 (hereafter referred to as Calitz "Sections 417 and 418 of the Companies Act"). See *Study Notes: Diploma in Insolvency Law and Practice* 209.

³⁰⁰ Commissioners should conduct enquiries in such a way that they not only demonstrate their impartiality and lack of bias, but also avoid a "perception of bias, objectively assessed on reasonable grounds." See *ABSA Bank v Hoberman* 1998 2 SA 781 (C) at 796G and 799B.

³⁰¹ See discussion in Part IV ch 3 above.

³⁰² 1994 4 SA 662 (T).

³⁰³ Although this case was decided prior to the promulgation of PAJA and dealt with the nature of an enquiry under s 152, the decision is relevant in the context that the definition of "administrative action" in such Act refers to one that "adversely affects the rights of any person and which has a direct, external legal effect". *Study Notes: Diploma in Insolvency Law and Practice* 209.

³⁰⁴ 2001 1 SA 649 (T).

³⁰⁵ *Podlas v Cohen and Bryden* (n 302) at 665F-666E.

In *Strauss v The Master*³⁰⁶ Mynhardt J concurred with the decision in *Podlas v Cohen and Bryden NNO*³⁰⁷ and also recognised that an enquiry in terms of section 152 is purely investigative since the presiding officer makes no findings that can detrimentally affect a person's rights.³⁰⁸ The position as set out in these decisions is affected by the coming into operation of PAIA and PAJA.

In *Gumede v Subel SC, Arnold NO*,³⁰⁹ which involved the review of the decision of a commissioner in an enquiry held in terms of sections 417 and 418 of the Companies Act, it was originally contended that the decision was reviewable as an administrative action in terms of sections 1(b) and 6 of PAJA; the argument was not pursued, however.³¹⁰ In *Nedbank Ltd v Master of the High Court*,³¹¹ the Court expressed the view, *inter alia*, that when the Master gives effect to section 417 of the Companies Act, he does not act administratively, and accordingly PAJA does not apply to a decision by the Master to convene such enquiry.³¹² However, in *Nafcoc Investment Holding Co Ltd and Others v Miller*³¹³ Snyders J stated that “[t]he decision [by the Master] to authorise the . . . enquiry is one that is subject to the Promotion of Administrative Justice Act 53 of 2002 [*sic*] (PAJA)” and that “[i]n terms of section 6(2)(e)(iii) of PAJA a court has the power to judicially review an administrative action if the action was taken because relevant considerations were not considered.”³¹⁴

It should however be noted that in *Bernstein v Bester*³¹⁵ Ackermann J decided that an enquiry in terms of sections 417 and 418 of the Companies Act did not constitute administrative action in the context of an alleged violation of the Interim Constitution of 1993, and in *Podlas v Cohen and Bryden*³¹⁶ in which Spoelstra J went on to state, expressly, that “an enquiry in terms of section 152 of the Insolvency Act (which is equivalent to section 417 of

³⁰⁶ 2001 1 SA 649 (T).

³⁰⁷ 1994 4 SA 662 (T).

³⁰⁸ For a discussion on the role of the presiding officer see *ABSA Bank v Hoberman* 1998 2 SA 781 (C).

³⁰⁹ [2006] 3 All SA 411 (SCA).

³¹⁰ Meskin at par 1.8.

³¹¹ 2009 3 SA 403 (W).

³¹² See *Nedbank Ltd v Master of the High Court*, (n 311) at par 36, in which the Court referred to the fact that ss 417 and 418 of the Companies Act are purely investigative measures and that a decision to take evidence from a witness in winding-up does not have the potential to adversely affect the rights of any person.

³¹³ Decision under unreported case no 27442/2008 (WLD).

³¹⁴ *Nafcoc Investment Holding Co Ltd and Others v Miller and Others* unreported case no 27442/2008 (WLD) at par 23.

³¹⁵ *Bernstein v Bester* (n 284). This reasoning was also followed in *Roux v Die Meester* 1997 SA 815 (T) and in *Strauss v The Master* 2001 1 SA 649 (T).

³¹⁶ *Podlas v Cohen and Bryden* (n 305) at 675.

the Companies Act) is purely investigative” and that “the presiding officer neither made findings that could detrimentally affect any person’s rights, nor determined any rights, but simply recorded the evidence and regulated the proceedings.”³¹⁷ It is thus submitted that in view of the abovementioned Constitutional Court judgments, the more plausible approach was followed in *Nedbank Ltd v Master of the High Court*.³¹⁸

3.2.8 Taxing of the Remuneration of the Insolvency Practitioner

It should be noted that South Africa at present follows a commission-based system regarding the remuneration of insolvency practitioners.³¹⁹ In terms of section 63 of the Insolvency Act the trustee is entitled to a reasonable remuneration for his services to be taxed by the Master according to the tariff as set out in the Act, in effect providing for a percentile-based commission on the nature of each type of asset.³²⁰ However, it is clear that the tariff is merely a guide to be used by the trustee, as the Master still has to tax the trustee’s remuneration in terms of section 63 of the Insolvency Act.³²¹

The remuneration claimable in terms of the tariff is comprehensive, and the trustee is not entitled to claim additional remuneration for any additional services rendered. It should also be noted that co-trustees share the remuneration equally, or on another basis as agreed between them.³²² However, the tariff is merely a guide to the taxation of the trustee’s remuneration and if a particular service cannot appropriately be accommodated under any of the items, then the Master must on an *ad hoc* basis fix a reasonable fee.³²³ In terms of 63(1) of the Insolvency Act, the Master may increase or reduce the remuneration as determined in

³¹⁷ *Podlas v Cohen and Bryden* (n 305) at par 97.

³¹⁸ See (n 311).

³¹⁹ Burdette “Liquidators’ Fees: The Time Factor and the Notion of Swings and Roundabouts *Nel and Another NNO v The Master and Others* 2005 1 SA 276 (SCA)” (2005) *THRHR* 686 (hereafter referred to as Burdette “Liquidators’ fees”).

³²⁰ For example, where movables are sold a commissioned-based fee of 10% is prescribed, while in the case of the sale of immovable property the rate is only 3%. Where a company is being wound up by the court or as a voluntary winding-up by creditors, Tariff B of Schedule 2 to the Insolvency Act (made applicable to companies by Annex CM 104 read with Reg 24 of the Winding-up Regs) sets out the tariff that applies. See also Chief Master Directive *Remuneration of Trustees, Liquidators, Judicial Managers and similar functionaries* (2009-06).

³²¹ See also Burdette “Liquidators’ Fees” 686. See also *Gore v The Master* 2002 2 SA 283 (E).

³²² *Cooper v The Master of the Supreme Court and Others* 1998 1 All SA 158 (N). Burdette “Liquidators’ fees” 687.

³²³ *Rennie NO v The Master; Glaum NO v The Master* 1980 2 SA 600 (C). In terms of a company there are similar provisions contained in s 384(1) of the Companies Act.



terms of section 63(1) if, in the Master's opinion, there is good cause for doing so,³²⁴ and he may disallow such remuneration in whole or in part on account of any failure or delay by the liquidator in the discharge of his duties.³²⁵ The Master as seen below has a very wide discretion in taxing the trustee's remuneration.³²⁶

In the case of *Nel v The Master and Others*³²⁷ the court held that the Master, in considering a reasonable remuneration, may take into account any factor which may be relevant in determining a reasonable fee. Van Heerden AJA observed:

[T]he Master has a duty to satisfy himself as to the reasonableness of the remuneration arrived at by the application of the tariff ... The concept of "good cause" is very wide [and includes] ... any factor which may be relevant in determining what constitutes reasonable remuneration for a liquidator's services in the circumstances of each case. Obviously, what factors are relevant will vary from case to case, but may certainly include aspects such as the complexity of the estate in question, the degree of difficulty encountered by the liquidator in the administration thereof, the amount of work done by the liquidator and the time spent by him in the discharge of the duties involved.³²⁸

The relevant factors to be considered will thus vary from case to case, but would include aspects such as the complexity of the estate in question, the degree of difficulty encountered by the liquidator in the administration of the estate, the amount of work done by the liquidator and the time spent in the discharge of the duties involved.³²⁹ In the *Elliot Brothers*³³⁰ case, it was also confirmed that the Master may take into account the overall degree of difficulty or extent of the trustee's performance of his duties. The discretion to reduce or increase the fee is consequently a very wide one, and the Master may adjust the fee "as a whole".³³¹ In *Klopper v The Master*³³² the court held that in determining whether good cause existed to increase of the appellant's remuneration, the Master had to consider all facts which had relevance on the administration of the estate. This included time and effort together with the degree of complexity of the duties.³³³

³²⁴ Cf *Elliot Brothers (East London) (Pty) Ltd v The Master* 1988 4 SA 183 (E) at 190-191 regarding the application of similar provisions contained in s 63 of the Insolvency Act.

³²⁵ *Thorne v The Master* 1964 3 SA 38 (N).

³²⁶ See eg *Collie v The Master* 1972 2 SA 7 (T); *Hillhouse v Stott* 1990 4 SA 580 (W) at 583.

³²⁷ 2005 1 SA 276 (SCA).

³²⁸ *Nel and Another NNO v The Master and Others* (n 327) at 285. See Hockly 117.

³²⁹ Burdette "Liquidators' fees" 688. See *Johannes Klopper v The Master of the High Court* unreported case no 2475/2008 (CPD) delivered on 2008-06-13.

³³⁰ *Elliot Brothers (East London) (Pty) Ltd v The Master* 1988 4 SA 183 (E).

³³¹ *Elliot Brothers (East London) (Pty) Ltd v The Master* (n 330); *Thorne v The Master* 1964 3 SA 38 (N).

³³² [2008] SCA 155 (RSA).

³³³ *Klopper v The Master* (n 332) at par 16.

3.2.9 The Liquidation and Distribution Account

The trustee appointed in an insolvent estate must within six months from the date of his (final) appointment submit an estate account, also referred to as the liquidation and distribution account, to the Master.³³⁴ The account of the trustee serves as a record of the administration of the estate for which the trustee is appointed and provides details of the administration of the estate to the Master.³³⁵ The process of administering an insolvent estate consists of a number of phases. However, the entire process of liquidation aspires towards the realising of the assets which eventually leads to the distribution of the proceeds to the proved creditors. This action may take place only according to a duly confirmed liquidation and distribution account.³³⁶

The Master is empowered by the Act to remove the trustee from office if he fails to perform satisfactorily any duty imposed upon him by the Act, or to comply with a lawful demand from the Master.³³⁷ If a trustee fails to submit a liquidation and distribution account within the six months period afforded to him, the Master will in practice issue a written demand (also known as a final demand) to the trustee requesting that he submit an account within a certain timeframe and include a written warning that if he fails to comply he will be removed from office.³³⁸ If a trustee of an insolvent estate is unable to submit an account within the prescribed period he must before the period has expired submit an affidavit to the Master in which he states the reasons why an account cannot be lodged, and must include any information regarding the affairs of the insolvent required by the Master and state the amount of money available for payment to creditors.³³⁹

³³⁴ Section 91 of the Insolvency Act and s 403(1) of the Companies Act. Neither in the Insolvency Act nor in its regulations there under is there any form prescribed for the compiling of the account. Accordingly each account may be submitted in any form provided such form complies with the related requirements of the Act. The Companies Act, however, provides for the account to be substantially lodged in the form prescribed and set out in Annex CM101 to the winding-up regulations to the Act. The Annex contains a general description as to the contents of each account. See Meskin paras 11.3.1-11.3.2. Previously according to the Insolvent Ordinance 6 of 1843 and the Transvaal Insolvency Law of 1895 the trustee had to lodge with the Master an account reflecting the liquidation of assets and debts and apart from the account also draw up a plan of distribution specifying the proved creditors in order of preference and also the balance which will remain for division amongst them. 1916 Insolvency Act also provided that the trustee had to frame his accounts consisting of a liquidation account, if he had carried on business a trading account and a plan of distribution of the assets and lay them before the Master. Section 108 of the Insolvent Ordinance of 1843. See Buchanan *Decisions in Insolvency* (1896) 144 (hereafter referred to as Buchanan) and ss 92-93 of the 1916 Insolvency Act. See Nathan 311.

³³⁵ Section 107 of the Insolvency Act. See *Ex parte Thomas*; *Ex parte Thomas* 2002 4 All SA 227 (T); See Mars 513.

³³⁶ Sections 112 and 113 of the Insolvency Act. See Mars 513.

³³⁷ Section 60(b) of the Insolvency Act.

³³⁸ Mars 513.

³³⁹ Section 109 of the Insolvency Act. The affidavit must be sent to each proved creditor by registered post. (The trustee should provide proof that the affidavit has been posted to creditors by registered post). The requirement



The account is ordinarily submitted to the Master in duplicate. If the insolvent resided or carried on business in a district in which there is no Master's office, a copy of the account must also be transmitted to the local magistrate with an indication when it will lie open for inspection.³⁴⁰ As soon as possible after lodging an account with the Master the trustee must give notice of such fact and that the account "will lie open for inspection by the creditors of the estate at the place or places and during the period stated in such notice".³⁴¹ The period for inspection is fourteen days from date of publication of the notice in the *Government Gazette* and the location where inspection of the account by interested parties may take place is the Master's office and where relevant also the office of the magistrate.³⁴² If the account was open for inspection at the office of a magistrate, the magistrate will send the copy of the account to the Master with an endorsement to indicate the period during which it was open for inspection.

In *Wilkins v Potgieter*³⁴³ Roux J indicated that the Master should not allow an account to be advertised unless the Master had studied the relevant documents and correlated them with the account.³⁴⁴ In practice the Master will give permission that the account may be advertised or raise queries that must be dealt with prior to the account being advertised. Although the Act does not contain a specific requirement that the Master be required to give his permission before the account is advertised, the Master has the right, whether or not any objections against an account have been received, to direct the trustee to amend the account if the Master is of the opinion that the account is in any respect incorrect or contains an improper charge or that the trustee acted *mala fide*, negligently or unreasonably in incurring any costs included in the account.³⁴⁵

The insolvent as well as any interested person may at any time before the confirmation of the account submit a written objection together with the grounds for the objection to the Master.³⁴⁶ The objecting party also has to send a copy of the objection and supporting

that a trustee had to advertise his application for extension in the *GG* fell away when this section was amended in 1983. The Companies Act contains similar provisions in s 404 in respect of the liquidator of a company.

³⁴⁰ Section 108(1) of the Insolvency Act. *Cf* s 406(1) and (2) of the Companies Act.

³⁴¹ Section 108(4) of the Insolvency Act and s 406(1)(a) of the Companies Act.

³⁴² Meskin par 11.4.1. Meskin Appendix II. Section 108(2) of the Insolvency Act. The liquidator of a company need not advertise in newspapers but must submit a copy of the notice in the *GG* to each proved creditor. Section 406(3) of the Companies Act and Winding-up Reg 20.

³⁴³ 1996 4 SA 936 (T).

³⁴⁴ *Study Notes: Diploma in Insolvency Law and Practice* 340.

³⁴⁵ Section 111(2) of the Insolvency Act. *Cf* s 407(3) of the Companies Act.

³⁴⁶ Section 111(1) of the Insolvency Act and s 407(1) of the Companies Act. See Mars 526. Previously according to the Ordinance of 1843 objections against the account had to be sent to the Master in writing within a certain time period but the objector had to apply to the Supreme Court (now the High Court) by way

documents to the trustee, who within 14 days of receipt must furnish a written response to the Master, who then may refer the remarks to the objector for the latter's information.³⁴⁷

Alternatively, and, it is submitted, also in any event, the Master may require the trustee or the objector or, it is submitted, both, to appear before him either personally or by an agent.³⁴⁸

According to section 111 of the Act:

- (2) If the Master is of the opinion that any such objection is well founded or if, apart from any objection, he is of the opinion that the account is in any respect incorrect or contains any improper charge or that the trustee acted *mala fide*, negligently or unreasonably in incurring any costs included in the account and that the account should be amended, he may direct the trustee to amend the account or may give such other direction in connection therewith as he may think fit:

The Master is required to rule on the objection received.³⁴⁹ As mentioned, section 111 of the Insolvency Act requires the Master to make a ruling if he is of opinion that the objection is well founded and may direct the trustee to amend the account or may give such other direction in connection therewith as he may think fit.³⁵⁰ If any person feels aggrieved by the direction of the Master or the refusal to sustain an objection he may apply to court for an order to set aside the Master's decision.³⁵¹ The word "review" is frequently used in this context; however, the concept of "review" obtains a different meaning in the sphere of insolvency law.³⁵² Mars refers to the review proceedings afforded in the Insolvency Act as a statutory remedy which includes an application for relief or a re-consideration procedure.³⁵³

It is clear from the wording of the Act that the objecting party is limited to the grounds stated in his objection lodged in terms of section 111(1) of the Act. The objector cannot proceed beyond the grounds stated therein.³⁵⁴ This principle should however be distinguished from the fact that

of motion proceedings to rule on the objection. See Buchanan 150. Under the former Transvaal Law of 1895, objections to the account were made directly to the Court. However, under the previous 1916 Insolvency Act this approach was amended and objections were lodged with the Master, who had to decide upon them. See Nathan 310.

³⁴⁷ Mars 525; s 111 of Insolvency Act read with Reg 6(1) of the Act.

³⁴⁸ Regulation 6(2) of the Insolvency Act; Meskin Winding-up Reg 19(2).

³⁴⁹ Mars 527. It is respectfully submitted that the ruling upon an objection by the Master amounts to administrative action by him, and such a ruling will consequently be subject to the provisions of the PAJA. See Meskin par 11.5.1.

³⁵⁰ Section 407 of the Companies Act reads similar to s 111 of the Insolvency Act.

³⁵¹ Section 111(2)(a) of the Insolvency Act. See Mars 527 in (n 122).

³⁵² *CP Smaller (Pty) Ltd v The Master and Others* 1977 3 SA 159 (T); *Fourie's Poultry Farm (Pty) Ltd v Kwanatal Food Distributors (Pty) Ltd (in liquidation) and Others* 1991 4 SA 514 (N).

³⁵³ Mars 527 in (n 122).

³⁵⁴ See *Fourie's Poultry Farm (Pty) Ltd v Kwanatal Food Distributors (Pty) Ltd (in liquidation) and Others* (n 352) at 518; *Hudson v The Master* 2002 1 SA 862 (T) at 867.



the objector is not limited to the “material” placed before the Master. In the case of *South African Bank of Athens Ltd v Sfier*³⁵⁵ De Klerk J confirmed that the procedure when applying to court in terms of section 407 of the Companies Act or section 111 of the Insolvency Act, although referred to as a review, does not refer to review proceedings in the strict sense, as the applicant is not limited to the material placed before the Master. It is not a review and not even an appeal in the wide sense, limited to the facts which were before the Master. It is indeed a fresh application where new facts and in appropriate cases also oral evidence will be allowed.³⁵⁶

It was also soundly argued by the court that the purpose of both section 407 of the Companies Act and the similarly worded section 111 of the Insolvency Act was to enable the objector to take the matter further when he does not obtain the relief he seeks from the Master. This would occur, for instance, where the Master refuses to sustain the objection and also where the Master refuses to sustain the objection based on the grounds that he is unable to resolve the dispute on the facts.³⁵⁷ This will also be applicable where the Master errs on the facts before him or where his conduct is such that it is open to criticism or tainted with irregularity.³⁵⁸

In *Van Zyl NO v The Master*³⁵⁹ it was said that where no new facts are placed before the court, the court should hesitate to substitute the opinion of the Master with that of its own in exercising its wide powers under section 407(4) (a) of the Companies Act unless it is clear that any particular ruling of the Master is tainted by irregularity or error.³⁶⁰ However, in *Gore v The Master*³⁶¹ the court’s opinion was (and, it is submitted, correctly so) that the rulings of the Master “ordinarily deserve some deference” but there does not seem to be any warrant for holding that the court’s wide powers of review should be restricted in those cases where no new facts are placed before it.³⁶²

A thorny issue emerges when the objection is based on a complex factual dispute. The question is often raised whether the Master has jurisdiction to rule on such an objection and

³⁵⁵ 1991 3 SA 534 (T).

³⁵⁶ *South African Bank of Athens Ltd v Sfier* (n 355) at 536. See Mars 528.

³⁵⁷ *South African Bank of Athens Ltd v Sfier* (n 355) at 536F-537E; *Fourie’s Poultry Farm (Pty) Ltd v Kwanatal Food Distributors (Pty) Ltd (in liquidation) and Others* (n 352) at 524-525. See Mars 528.

³⁵⁸ Mars 529.

³⁵⁹ 2000 3 SA 602 (C) at 607.

³⁶⁰ Mars 529.

³⁶¹ 2002 2 SA 283 (E) at 289.

³⁶² Mars 529.

may hear oral evidence in order to arbitrate such a dispute. As confirmed in the *Fourie's Poultry Farm*³⁶³ case, the attitude of the Master when ruling on an objection is that, being a creature of statute his powers are limited to those conferred to him by the Act, either expressly or by implication.³⁶⁴ Notwithstanding a provision in the regulations³⁶⁵ which allows the Master to hear evidence by the trustee or objector, the Master does not have the resources or experience to resolve complex factual disputes and usually refuses to sustain an objection if it involves factual disputes. In such cases the correct procedure is for the objector to apply to the court for a decision, even if it was beyond the powers of the Master to rule on the objection, and the court may refer the matter for the hearing of oral evidence.³⁶⁶ In the decision of *CP Smaller v The Master*³⁶⁷ the following was stated with reference to the provisions of the Insolvency Act:³⁶⁸

There is no provision in the Insolvency Act for the Master to hear evidence as a result of an objection to an account in terms of section 111 of the Insolvency Act. A Master cannot use his power in such a way as to relieve persons from the expense of protecting their own interests. The Master cannot decide questions upon which the rights of creditors *inter se* may depend.³⁶⁹

In the same case it was also submitted that the Master does not have the infrastructure or experience to resolve complex factual disputes and in practice usually refuses to sustain an objection if it involves factual disputes.³⁷⁰ In practice the general attitude of the Master in matters which include a factual dispute is to notify the objector that the objection falls beyond his jurisdiction and would then inform the objector that he is to approach the court in order to protect his rights. There are different opinions as to the correct procedure in cases of complex factual disputes. Mars is of the opinion that in such cases the correct procedure would be for

³⁶³ *Fourie's Poultry Farm (Pty) Ltd v Kwanatal Food Distributors (Pty) Ltd (in liquidation) and Others* (n 352)

³⁶⁴ See *The Master v Talmud* 1960 1 SA 236 (C) 238; *Götz v The Master and Others NNO* 1986 1 SA 499 (N); *Fourie's Poultry Farm (Pty) Ltd v Kwanatal Food Distributors (Pty) Ltd (in liquidation) and Others* (n 352); *CP Smaller (Pty) Ltd v The Master and Others* (n 352) at 163 and cases there cited. The Master's refusal to sustain the objection on this ground is properly the subject of an application under s 111(2) of the Insolvency Act and in such application the Court may act in terms of Rule 6(5)(g) of the Rules of the Supreme Court in relation to any relevant dispute of fact: *South African Bank of Athens Ltd v Sfier* (n 355); *Fourie's Poultry Farm (Pty) Ltd v Kwanatal Food Distributors (Pty) Ltd (in liquidation) and Others* (n 352) at 522-525 (these cases were decided under s 407 of the Companies Act but it is respectfully submitted that the conclusion holds also for s 111 of the Insolvency Act). See Meskin par 11.5.1.

³⁶⁵ Regulation 6 (see Mars at 630; Meskin Appendix II at 115) and Winding-up Reg 6. *Study Notes: Diploma in Insolvency Law and Practice* 340.

³⁶⁶ *Fourie's Poultry Farm v Kwanatal Food Distributors* (n 352) at 522E-528D.

³⁶⁷ *CP Smaller (Pty) Ltd v The Master and Others* (n 352)

³⁶⁸ *CP Smaller (Pty) Ltd v The Master and Others* (n 352) at 163. According to Appendix IV Reg 19 in the case of a company the Master may require the attendance of the liquidator or the objecting party. Meskin par 11.5.1; Mars 527.

³⁶⁹ *CP Smaller (Pty) Ltd v The Master* (n 352).

³⁷⁰ *Study Notes: Diploma in Insolvency Law and Practice* 340.

the objecting party to apply to court for a decision. The court may then refer the matter for the hearing of oral evidence. *Meskin* holds the opinion that the Master in such a case should rule against the party on whom the onus would lie in relation to such issue.³⁷¹ *Meskin* further submits that the Master's inability to decide an issue of fact does not mean that an objection involving the resolution of such issue is on that ground beyond the jurisdiction of the Master as there is no jurisdictional limitation as to grounds upon which an objection may be based to be derived from the relevant statutory provisions.³⁷²

In the *Fourie's Poultry Farm* case the procedure to follow in a case of this nature was also examined and in his judgment Page J considered the Full Bench decision in *South African Bank of Athens Ltd v Sfier*.³⁷³ Both these judgments confirmed that even if it was beyond the powers of the Master to rule on the objection, in such cases the correct procedure would be for the objecting party to approach the court for a decision, and the court may refer the matter for the hearing of oral evidence.³⁷⁴ Also that section 407(4)(a) of the Companies Act did not intend, by the use of the words "apply" and "application", to prohibit any party aggrieved by a decision of the Master on an objection against the liquidation and distribution account from proceeding by way of action and especially when having regard to the unique nature of the proceedings as contemplated by the section as explained in the case of *South African Bank of Athens Ltd v Sfier*.³⁷⁵ Although referred to as a review, it is not a review in the strict sense and the applicant is not limited to the material placed before the Master.³⁷⁶

The "taking of the Master's decision on review" to the court "ipso facto constitutes a bar to the confirmation of the account until such time as the review and the objection to which it relates have been finally determined",³⁷⁷ unless, it is respectfully submitted, the court orders otherwise. If the Master authorised advertisement and no objections are received or the objections have been finalised, the confirmation of the account is a mere formality once proof has been received by the Master that the account has been advertised according to law. The Master confirms the account by way of an endorsement on the account and informs the

³⁷¹ *Meskin* par 11.5.1.

³⁷² *Meskin* par 11.5.1.

³⁷³ 1991 3 SA 534 (T).

³⁷⁴ *Fourie's Poultry Farm v Kwanatal Food Distributors* (n 352) at 522E-528D.

³⁷⁵ *South African Bank of Athens Ltd v Sfier* (n 355); *Fourie's Poultry Farm v Kwanatal Food Distributors* (n 352) at 515.

³⁷⁶ *South African Bank of Athens Ltd v Sfier* (n 355).

³⁷⁷ *Fourie's Poultry Farm v Kwanatal Food Distributors* (n 352) at 528.

trustee of the confirmation.³⁷⁸ The trustee must give notice in the *Government Gazette* of the confirmation of the account.³⁷⁹

3.2.9.1 Confirmation of the Liquidation and Distribution Account

If an account has duly lain open for inspection the court when refusing an application for an order to set aside the Master's decision overruling an objection may itself confirm an account. In all other cases, *viz* where no objections have been lodged or where an objection has been lodged and appropriately dealt with, the Master may confirm the account.³⁸⁰ Previously under the Ordinance of 1843 it was the duty of the trustee to apply to court on motion for the distribution plan to be confirmed by the Supreme Court.³⁸¹ It was also stated clearly in the provision that the confirmation had the effect of a final sentence.³⁸²

In 1895 the Transvaal Insolvency Act³⁸³ was enacted and although largely an adaptation of the Cape Ordinance of 1843 some of the provisions were rearranged, abridged and in some instances amended.³⁸⁴ One of these amendments was the provision which dealt with the confirmation of the account and plan of distribution framed by the trustee. According to the 1895 Insolvency Act the Master had the power to confirm an account in matters where no objection had been received.³⁸⁵ If however an objection against the account had been received, the High Court had to decide on the objection and upon the confirmation of the account. Such confirmation either by the Master or the court again had the effect of a final sentence.³⁸⁶

Section 112 of the present Act reads as follows:

³⁷⁸ In *Gilbey Distillers & Vintners (Pty) Ltd v Morris* 1991 1 SA 648 (A) at 656C-656E the appeal court gave the following exposition of the meaning of "duly confirmed":

The account must have been open for inspection by creditors under s 108; objections (if any) must have been dealt with in terms of section 111; and confirmation must have taken place by the Master (consequent upon him honestly applying his mind to the matter) and not, say, by an imposter. But the fact that the confirmation is flawed by reason of it having been procured by the fraud of a creditor or the trustee or because the Master was ignorant of facts material to his decision cannot detract from the account having been duly confirmed in the sense envisaged by section 151. To uphold the argument that it does would result in the provision for finality in section 112 being rendered largely inoperative.

³⁷⁹ Section 113(1) of the Insolvency Act and s 409(2) of the Companies Act.

³⁸⁰ Mars 532.

³⁸¹ Now known as the High Court. The Renaming of High Courts Act 30 of 2008 came into effect on 2009-03-01.

³⁸² Section 112 of Ordinance 6 of 1843.

³⁸³ Act 13 of 1895. Hereafter referred to as 1895 Insolvency Act.

³⁸⁴ Mars 11.

³⁸⁵ Section 119 of the 1895 Insolvency Act.

³⁸⁶ Section 119 of the 1895 Insolvency Act. See Buchanan 68.

When a trustee's account has been open to inspection by creditors as hereinbefore prescribed and –

- (a) no objection has been lodged; or
- (b) an objection has been lodged and the account has been amended in accordance with the direction of the Master and has again been open for inspection if necessary as in paragraph (b) of subsection (2) of section *one hundred and eleven* prescribed and no application has been made to the court in terms of paragraph (a) of the said subsection (2) to set aside the Master's decision; or
- (c) an objection has been lodged but withdrawn or has not been sustained and the objector has not applied to the court in terms of the said paragraph (a), the Master shall confirm the account and his confirmation shall be final save as against a person who may have been permitted by the court before any dividend has been paid under the account, to reopen it.³⁸⁷

The Master is not bound to confirm an account against which no objection has been received, for if he is of the opinion that the account is in any respect incorrect, or that the trustee had acted *mala fide*, negligently or unreasonably in incurring any costs included in the account, he may direct the trustee to amend the account.³⁸⁸ Section 112 provides that confirmation of an account by the Master “shall be final save as against a person who may have been permitted by the court before any dividend has been paid under the account, to reopen it”.³⁸⁹ The words “confirmation shall be final” do not give to the each item in the account the quality of a judgment and means merely that effect must be given to the account as confirmed unless the Court permits it to be reopened.³⁹⁰

In *Wilkens v Potgieter*³⁹¹ Roux J set aside an account although dividends had already been paid out on the grounds that the account had not been “duly confirmed” because the proper procedure had not been followed. The judge agreed that as the proper procedure as set out in section 45(3) had not been followed this resulted in the confirmation being invalid.³⁹² However, the appellate division in *Gilbey Distillers & Vintners (Pty) Ltd v Morris*³⁹³ explicitly decided that where a confirmation was flawed, *inter alia* because the Master had been ignorant of certain facts, this could not detract from the account being duly confirmed.

³⁸⁷ Section 112 of the Insolvency Act and s 408 of the Companies Act.

³⁸⁸ Subsection 2 of s 111 has been amended by s 35 of Act 99 of 1965.

³⁸⁹ Section 408 of the Companies Act provides that confirmation of the account “shall have the effect of a final judgment” subject to a similar provision in respect of reopening of the account. This provision of the Companies Act does not mean that confirmation of the account has the effect of a final judgment in respect of amounts collectable in terms of the account. *Cf Kilroe-Daley v Barclays National Bank Ltd* 1984 4 SA 609 (A) at 627D-E; *Standard Bank of South Africa Ltd v Master of the Supreme Court* 1997 2 All SA (C); *Wipesco v Herrigel* 1983 2 SA 20 (C); *PG Bison Ltd v Johannesburg Glassworks (Pty) Ltd (In Liquidation)* 2006 4 SA 535 (W).

³⁹⁰ *Cf Kilroe-Daley v Barclays National Bank Ltd* 1984 4 SA 609 (A) at 627D-E;

³⁹¹ 1996 4 SA 936 (T).

³⁹² *Wilkens v Potgieter* (n 391) at 940. See Mars 538.

³⁹³ 1991 1 SA 648 (A).

Mars submits that if a confirmed account can be set aside merely because it does not agree with documentation in possession of the Master, this will render section 112 ineffective.³⁹⁴

In cases where a dividend has been paid, the Appeal Court has expressed doubt whether the court may review the confirmation of the account on the grounds of *just error* or even on the ground of fraud. However, the court noted that fraud was a special case and that it had been said that “fraud unravels everything”.³⁹⁵ In the unreported decision of *Sequera v Hodgson*³⁹⁶ Eloff JP held that once the account had been confirmed and distribution had ensued even fraud would not entitle a creditor to ask for the account to be set aside and the best he could do was to sue the liquidator for damages. By contrast in *Wilkens v Potgieter*³⁹⁷ Roux J set aside a confirmed account although dividends had been paid out. However, in *Rutherford v Ferguson*³⁹⁸ Pretorius AJ concluded that the meaning of “final” is that the court’s power to review the confirmation of an account where a dividend has been paid has been ousted, even where there had been fraud on the part of the trustee.³⁹⁹

The trustee must without delay lodge with the Master receipts or paid cheques as proof that the dividends to creditors have been paid.⁴⁰⁰ If any dividend remains unpaid at the expiration of a period of two months from the confirmation of the account, the trustee must deposit this in the Guardian’s Fund for the account of the creditor.⁴⁰¹ Special provision is made for cases where contribution cannot be collected in terms of the account.⁴⁰²

3.2.10 Rehabilitation of Insolvent Individual

The effect of rehabilitation is to put an end to the sequestration, discharging all debts of the insolvent which were due or the cause of which had arisen before the sequestration and

³⁹⁴ Mars 538.

³⁹⁵ *Gilbey Distillers & Vintners v Morris* 1991 1 SA 648 (A) at 659. *Cf Morris and Strydom v The Master* 1994 2 SA 731 (N) at 735.

³⁹⁶ Unreported case no 17355/1994 (WLD).

³⁹⁷ *Wilkens v Potgieter* (n 391).

³⁹⁸ 2000 2 SA 275 (O) at 279-280.

³⁹⁹ Mars 537.

⁴⁰⁰ Section 114(1) of the Insolvency Act and s 410 of the Companies Act. Premature payment is sometimes made to a secured creditor where the trustee has realised the security and wishes to limit the estate’s liability for interest. However, such payments ought to be made conditional upon immediate repayment in the event that for any reason the Master refuses to confirm the account. See Mars 541.

⁴⁰¹ Section 114(2) of the Insolvency Act 24. See also ss 91-92 of the Administration of Estates Act.

⁴⁰² Section 118 of the Insolvency Act. *Cf* s 342(2) of the Companies Act.



relieving the insolvent of every disability resulting from the sequestration.⁴⁰³ The insolvency of a party comes to an end when he is rehabilitated and although a person's estate is sequestrated his person is rehabilitated.⁴⁰⁴ Any insolvent not rehabilitated by the court within 10 years from the date of (provisional) sequestration,⁴⁰⁵ is deemed to be rehabilitated after the expiry of that period unless a court upon application by an interested person orders otherwise before the expiration of the 10 years.⁴⁰⁶

The period during which an insolvent person applies for rehabilitation depends on certain factors such as whether the prescribed period after confirmation of the first account has lapsed,⁴⁰⁷ whether the insolvent's estate has previously been sequestrated,⁴⁰⁸ or whether the applicant has previously been convicted of certain offences.⁴⁰⁹ An additional factor to be reckoned with is whether the Master would be recommending the rehabilitation.⁴¹⁰ When an applicant applies for rehabilitation prior to the expiry of the four-year period, as mentioned in the Insolvency Act, section 124(2) contains a *proviso* stating that no application for rehabilitation shall be granted before the expiration of four years from the date of sequestration of the estate of the applicant, except upon the recommendation of the Master.⁴¹¹

⁴⁰³ Section 129(1) of the Insolvency Act.

⁴⁰⁴ Hockly 192.

⁴⁰⁵ *Grevler v Landsdown* 1991 3 SA 175 (T) at 178D.

⁴⁰⁶ "Automatic" rehabilitation is provided for in s 127A of the Insolvency Act. Ss 124-126 of the Insolvency Act sets out the circumstances under which rehabilitation may be sought prior to the expiration of the 10-year period, and the procedure which must be followed to obtain an order of court. The period after sequestration when an insolvent may apply to court for rehabilitation depends on the circumstances. Provisions in the Insolvency Act are laid down for the furnishing of security, facts to be averred in the application and notice in the *GG*, to the Master and to the trustee. See Hockly 192; In *Ex parte Elliot* 1997 4 SA 292 (W); *Ex parte Minnie et Uxor* 1996 3 SA 97 (SEC).

⁴⁰⁷ Section 124(2)(a) of the Insolvency Act.

⁴⁰⁸ Section 124(2)(b) of the Insolvency Act.

⁴⁰⁹ Section 124(2)(c) of the Insolvency Act.

⁴¹⁰ Section 124(2) of the Insolvency Act.

⁴¹¹ See the *proviso* to s 124(2), *Kruger v The Master* 1982 1 SA 754 (W); *Ex parte Porritt* 1991 3 SA 866 (N); *Ex parte Anderson* 1995 1 SA 40 (SE); *Greub v The Master* 1999 1 SA 746 (C). In certain cases the insolvent may also apply for rehabilitation at an earlier stage. After giving six weeks notice he may apply if no claims were proved against his estate within six months from the sequestration, he has not been convicted of certain offences and his estate has not been previously sequestrated. He may also apply after giving the appropriate notice if the Master has issued a certificate that creditors have accepted an offer of composition in which payment has been made, or security has been given for payment of no less than 50c in the rand to every concurrent creditor in the estate. He may also seek an early rehabilitation after the confirmation of an account providing for the payment in full of all the claims of creditors with interest thereon. See ss 124(1); 124(5); 124(3) of the Insolvency Act.

The Master's recommendation may thus be viewed as a *sine qua non* for the applicant's rehabilitation.⁴¹² In this context "to recommend" means that the Master has to assess all to be said for, and against, the application for rehabilitation and that he must decide whether removal of the diminished status of the insolvent is desirable. In formulating his opinion as to whether the applicant is worthy of rehabilitation, the Master must bear in mind:

[T]he purpose of rehabilitation, namely whether the applicant is a person who ought to be allowed to trade with the public on the same basis as any other honest man and whether, if he traded in a negligent manner or so as to deceive others prior to his becoming insolvent, he has been subject to his insolvency long enough to ensure that he has received a sufficiently severe lesson as to the necessity of trading honestly.⁴¹³

Refusal to recommend the rehabilitation constitutes a decision which is subject to review in terms of section 151 and the court may consider the matter *de novo* as if it were a court of appeal.⁴¹⁴ According to Mars there are conflicting views as to whether the Master's refusal to grant a recommendation is reviewable under section 151 of the Act, since in one case the court held that the Master's refusal does not represent a decision, ruling or order as contemplated in section 151 of the Act.⁴¹⁵ In another case, however, the court ruled that the Master's decision not to recommend rehabilitation was a decision in terms of section 151 and was thus subject to review.⁴¹⁶

It is duty of the Master in every application for rehabilitation to have before the court on the day set down for the hearing of the application a report thereon.⁴¹⁷ A trustee who receives a notice of an application must also report to the Master any facts which in his opinion would justify the court in refusing, postponing or qualifying rehabilitation⁴¹⁸ and the Master's report

⁴¹² The Master's recommendation must be based on the information available to him. See *Ex Parte Porritt* 1991 3 SA 866 (N); *Ex Parte Anderson* 1995 1 SA 40 (SE).

⁴¹³ *Ex Parte Anderson* 1995 1 SA 40 (SE) at 45 *per* Leach J citing from Wessels J in *Ex Parte Heydenreich* 1917 TPD 657 at 658. See Mars 571.

⁴¹⁴ *Greub v The Master* 1999 1 SA 746 (C).

⁴¹⁵ *Cf Kruger v The Master* 1982 1 SA 754 (W) at 758.

⁴¹⁶ *Greub v The Master* 1999 1 SA 746 (C) at 751. Squires J in the matter of *Ex Parte Porritt* (n 411) dealing with the word "recommendation", acknowledged the fact that because the word has no special meaning given to it by the legislation, the word would have to bear its normal ordinary interpretation, being to name or speak of a person as worthy of a particular attention or consequence i.e. recommendation is the action of commending someone or something as worthy or desirable for such result. Implicit in this, as also pointed out by Squires J will be to consider and weigh the merits and demerits of the subject of recommendation in relation to what is recommended. See *Chairperson Association v Minister of Art and Culture and Others* (6063/04) [2005] ZAGPHC 89.

⁴¹⁷ Section 127(1) of the Insolvency Act.

⁴¹⁸ Section 124(4) of Insolvency Act.



to the court usually refers to the trustee's report to him.⁴¹⁹ As the Master and not the court is in possession of the estate file, the Master basically acts as the court's eyes and ears concerning the facts of the insolvency and other matters concerning the affairs of the insolvent. The Master would therefore advise the court on any matters which in his opinion may affect the fate of the application.

In *Ex parte Le Roux*⁴²⁰ Irish AJ was somewhat surprised at the passive attitude adopted by the Master and the trustee in their reports. The debtor had managed to amass assets of some R30,000 and gave no details as to the composition of his family, or other income received by members of the family. Some of the monthly expenditure items were startling at face value and no justification was given for the expenditure. Because creditors obtained little benefit from the sequestration and there was nothing in the application to suggest that the applicant had learnt the lessons of insolvency and had any genuine appreciation of the possible hardship which his sequestration may have caused, the court was not satisfied that a proper case for rehabilitation had been made out and postponed the application with leave to enrol it again with papers duly supplemented.⁴²¹

Even if the provisions of the Act have been complied with, the court is not obliged to grant the rehabilitation.⁴²² The insolvent has no right to the rehabilitation and the court has a discretion to either grant, refuse or postpone rehabilitation. The test to be applied by the court is whether the applicant is a fit and proper person to trade with the public on the same basis as any other honest person.⁴²³ The court will attach great weight to any views expressed or recommendations made in the reports submitted by the Master.⁴²⁴ In *Ex parte Theron*⁴²⁵ the court criticised the Master for issuing certificates that part of the insolvent's income should be paid to the trustee in terms of section 23(5) and recommended that the court should in terms of section 127(2) make rehabilitation conditional on compliance with the certificate of

⁴¹⁹ Mars 566.

⁴²⁰ 1996 2 SA 419 (C).

⁴²¹ *Study Notes: Diploma in Insolvency Law and Practice* 294.

⁴²² *Ex Parte Woolf* 1958 4 SA 190 (N).

⁴²³ *Cf Kruger v The Master* 1982 1 SA 754 (W); *Ex parte Le Roux* 1996 2 SA 419 (C) 423I-424A; *Greub v The Master* 1999 1 SA 746 (C); *Ex Parte Heydenrich* 1917 TPD 657 at 658.

⁴²⁴ See Mars 576; s 116 of the Insolvency Act. If after the confirmation of a final plan of distribution there is any surplus in an insolvent estate which is not required for the payment of claims, costs, charges or interest, the trustee shall, immediately after the confirmation of that account, pay that surplus over to the Master, who shall deposit it into the Guardians' Fund. At the date of rehabilitation such moneys will be paid out to the insolvent at his request.

⁴²⁵ 1994 4 SA 136 (O).

the Master. Where creditors are not liable to pay contributions the court will only in exceptional circumstances make rehabilitation subject to further payments to creditors.⁴²⁶

3.2.11 Master's Powers in relation to Books and Records

The Master has custody of all books and records and other documents relating to an insolvent estate.⁴²⁷ Immediately after his appointment the trustee of an insolvent estate must open a book in which he must enter a statement of all moneys, goods, books, accounts and other documents received by him on behalf of the estate.⁴²⁸ The Master may at any time direct the trustee to produce such book for inspection and may also direct the trustee to deliver to him books and documents relating to the estate.⁴²⁹

It is not necessary for the Master him self or any officer under him to produce in evidence any original document under his control, for it is sufficient if such document is produced by any person authorised by the Master to produce it.⁴³⁰ If there is endorsed upon or attached to any document or record a certificate purporting to have been signed by a person describing him self as Master, wherein he describes the nature of the document or record and states that it relates to a specified insolvent or insolvent estate, that document or record shall on its mere production by any person *prima facie* be deemed to be what the certificate describes it to be.⁴³¹

As it is not always possible to produce the original document as kept on record by the Master the Act makes provision for the certification of a document by the Master. Any document or record which is endorsed or to which a statement is attached purporting to have been signed by a person describing himself as Master, wherein he certifies that the document or record is a true copy of or extract from a document or record relating to a specified insolvent or insolvent estate, and wherein he describes the nature of the original document or record, shall on its mere production by any person be as admissible in evidence in any court of law and be

⁴²⁶ The court may require the insolvent to consent to judgment against him for the payment of any debt which was or could have been proved against his estate. Section 127(3) of the Insolvency Act.

⁴²⁷ Section 154(1) of the Insolvency Act.

⁴²⁸ Section 71(1) of the Insolvency Act.

⁴²⁹ Section 71(2) of the Insolvency Act. See Mars 29.

⁴³⁰ Mars 30.

⁴³¹ Section 154(2) of the Insolvency Act.



of the same force and effect as the original document or record would be.⁴³² Any of the books and records relating to the estate which are in the possession of the trustee may be destroyed six months after confirmation of the final account on receipt of written consent by the Master. Documents in the Master's office and the Master's other records relating to an insolvent estate may be destroyed by the Master after five years have elapsed from the date of the insolvent's rehabilitation.⁴³³

3.3 REVIEW PROCEEDINGS

An individual who wishes to challenge any decision or action of the Master is confronted with several different avenues of relief. In a previous part to this study the legal principles regarding judicial control over the administrative powers and functions of the Master, which includes review in terms of PAJA and constitutional review in terms of the principle of legality, have already been dealt with.⁴³⁴ However, there is also the option of the internal remedy conferred by the legislature in the form of a special statutory power of review.⁴³⁵

Section 151 of the Insolvency Act empowers the Court to review any decision (other than one relating to the appointment of a trustee), ruling or order made, or taxation effected, by the Master under the Insolvency Act and any decision, ruling or order made by a presiding officer at a meeting of creditors of such estate.⁴³⁶ In *Strauss v The Master* it was held that a decision, ruling or order as contemplated in section 151 of the Act must have three attributes before it can be reviewed: Firstly, it must be final in effect and not susceptible to alteration by the court of first instance. Secondly, it must be definitive of the rights of the parties. Thirdly, it must have the effect of disposing of at least a substantial portion of the relief sought.

The type of review envisaged by this section is one on which the court has powers of both appeal and review with the additional power, if required, of receiving new evidence and entering into and deciding the whole matter afresh.⁴³⁷ The review proceedings here envisaged

⁴³² Section 154(3) of the Insolvency Act.

⁴³³ Section 155(2) of the Insolvency Act. See Meskin par 15-7.

⁴³⁴ See part IV par 3.2.4.2 above.

⁴³⁵ Hoexter 110-111.

⁴³⁶ Section 151 read with s 57 of the Insolvency Act. See Meskin par 15-12.

⁴³⁷ *Nel and Another NNO v The Master (ABSA Bank Ltd Intervening)* 2005 1 SA 276 (SCA). See Hockly 9.

were confirmed in *Nel and Another NNO v The Master*⁴³⁸ as the “third type of review”, where Parliament confers a statutory power of review. In the judgment in *Johannesburg Consolidated Investment Co v Johannesburg Town Council*⁴³⁹ reference was also made to this kind of review and it was stated that the Court may decide the matter *de novo*. It possesses not only the powers of a court of review in the legal sense, but also has the function of a court of appeal with the privilege of being able, after setting aside the decision arrived at, to deal with the whole matter on fresh evidence.⁴⁴⁰

The nature of the section 151 review was also confirmed in *Nedbank Ltd v The Master of the High Court*,⁴⁴¹ where it was held that the aim and object of an enquiry in terms of section 417 into the affairs of a company in liquidation is purely investigative. Accordingly, no rights or obligations are determined or affected by the Master when he makes the decision to institute the enquiry, and as such does not constitute an administrative action. It accordingly follows that the “special” type of review provided in section 151 of the Insolvency Act, read together with the provisions of section 339 of the Companies Act, is also inapplicable to a section 417 enquiry.⁴⁴²

⁴³⁸ *Nel and Another NNO v The Master (ABSA Bank Ltd Intervening)* (n 437).

⁴³⁹ 1903 TS 111 at 117. See also *Gumede and others v Subel* 2006 3 SA 498 (SCA).

⁴⁴⁰ Meskin par 15-12. The one limitation on the court’s power of review in this context is that it cannot reopen any duly confirmed trustee’s account after a dividend in terms thereof has been paid. A duly confirmed account in this context is one which results from the proper procedure having been followed. But the fact that the confirmation is flawed by reason of it having been procured by the fraud of a creditor or the trustee or because the Master was ignorant of facts material to his decision cannot detract from the account having been duly confirmed in the sense envisaged in s 151 of the Act. Section 108 read with s 111 of the Insolvency Act. See *Gilbey Distillers & Vintners (Pty) Ltd and Others v Morris NO and Others* 1991 1 SA 648 (A).

⁴⁴¹ *Nedbank Ltd v The Master* (n 311).

⁴⁴² *Nedbank Ltd v The Master* (n 311) at par 45.



CHAPTER 4: INSTITUTIONAL FRAMEWORK IN SOUTH AFRICAN INSOLVENCY LAW

South Africa does not have specialised insolvency courts. The High Courts in general deal with insolvency matters, and play their part both in applying and developing the law through case law.⁴⁴³ The courts therefore play a limited role in the insolvency or winding-up proceedings and they are generally not involved in routine matters or the day-to-day administration process.⁴⁴⁴ It is interesting to note that early legislation specifically made provision for insolvency practitioners to be appointed by the court, and it was only with the enactment of the 1936 Insolvency Act that this responsibility was handed over to the Master.⁴⁴⁵

As discussed earlier in this study, the current US regulatory framework consists of a highly evolved bankruptcy court and the judicial-oriented system of bankruptcy courts, and this distinguishes US bankruptcy law from most other insolvency jurisdictions around the world.⁴⁴⁶ The present governing policy favours direct negotiation between debtors and creditors, paving the way for the prominent role of the private attorney in the US bankruptcy process.⁴⁴⁷ It is safe to conclude that the specialisation of the US bankruptcy judges and the degree of their daily involvement in bankruptcy cases give them a better feel for the complexities of consumer bankruptcy than is enjoyed by a generalist judge in a jurisdiction without specialist bankruptcy courts.⁴⁴⁸ Because the US system places the courts in a far more central role than many other common law systems, lawyers have exclusive access to courts and their jurisdictional monopoly has resulted in lawyers playing a key role in shaping the legal culture in the American bankruptcy system.

The administrative format of the English system also minimises the role of private attorneys in the general bankruptcy process, which distinguishes the English bankruptcy process from

⁴⁴³ The High Court in the main commercial centre, Johannesburg, has a commercial court which deals occasionally with cases involving insolvency. The courts have authority in the case of the winding up of companies to give directions regarding the administration of the winding-up.

⁴⁴⁴ In the case of individuals, the court issues rehabilitation orders (the procedure to discharge the insolvent debtor from insolvency) if the debtor does not wait for “automatic” rehabilitation after ten years.

⁴⁴⁵ Section 57 of the 1916 Insolvency Act.

⁴⁴⁶ Skeel “Debt’s Dominion” 43.

⁴⁴⁷ Milman *Personal Insolvency Law, Regulation and Policy* (2005) 149 (hereafter referred to as Milman).

⁴⁴⁸ Milman 149.

the lawyer-oriented US system.⁴⁴⁹ Judges and lawyers are not influential actors in the English insolvency process and government relies heavily on the expertise and experience of the Insolvency Service in regard to policy and law reform. In scaling down on the interaction with the courts in regard to bankruptcy administration, the English system represents a cost-effective alternative to the judicial-oriented system of the US.

During the late nineties a high-level Commission of Inquiry, the Hoexter Commission, rejected proposals for specialised insolvency courts in South Africa.⁴⁵⁰ The Commission was of the opinion that the principles governing the law of insolvency were neither inaccessible, nor complicated enough to the ordinary practitioner or judge, to merit the creation of a specialist court. The Commission's grounds for adopting its findings generally amounted to resisting the temptation to create a specialised *niche* area of the law if it was not essential.⁴⁵¹

⁴⁴⁹ Martin "Common-Law Bankruptcy Systems: Similarities and Differences" (2003) *American Bankruptcy Institute LR* 373 (hereafter referred to as Martin "Common-Law Bankruptcy Systems").

⁴⁵⁰ Third and final report of the *Commission of Inquiry into the Rationalization of the Provincial and Local Divisions of the Supreme Court* vol 1 Book 2 Part 3 (1997) Report number RP 201/97 (hereafter referred to as the *Hoexter Report*).

⁴⁵¹ *Hoexter Report* 99.



CHAPTER 5: PROBLEMS AND PITFALLS IDENTIFIED

To recognise that the effects of insolvency are not limited to the private interests of the insolvent and his creditors, but that other interest of society or other groups in society are vitally affected by the insolvency and its outcome, and to ensure that these public interests are recognised and safeguarded.⁴⁵²

The discussion above offers a broad outline of the structure of the regulatory system in South African insolvency law. In recent years there has been a great deal of debate surrounding the Master's reputation as insolvency regulator, which in turn has led to this field of law increasingly being the subject of scholarly articles, reflection and deliberation.⁴⁵³ On a larger scale the main problem at present is that the Master is burdened with the task of preserving the integrity of the law relating to insolvency matters without having the necessary legal and infrastructural resources and institutional capacity to support this undertaking. In addition, the system continues to lag behind international standards, as drawn from the guidelines and rules of best practice generated by bodies such as the World Bank and UNCITRAL, as well as the comparative study of particular leading international jurisdictions. The aim of this chapter is to identify certain challenges and shortcomings within the current system in order to facilitate a later discussion on policy consideration and law reform. The problems and pitfalls mentioned are by no means a *numerus clausus* and are also in certain instances not unique to the institution of the Master.

5.1 Master as Regulatory Body

As has already been established, the Master acts as regulator in South African insolvency law, but is limited in power and scope to the functions and powers granted within the four corners of the Insolvency Act.⁴⁵⁴ In comparison with the role of international institutions such as the UK's Insolvency Service, the Master lacks the discretion and the authority of an authentic regulator. According to its statutory purpose, the priority of the Master lies very much in protecting the interest of creditors through the legislative powers granted to it, in contrast to the more influential role of international regulators, who act to protect the rights of

⁴⁵² Cork *Report* ch 4.

⁴⁵³ The following are recent publications on comparative consumer insolvency law: Niemi-Kiesiläinen *et al Consumer Bankruptcy in Global Perspective* (2003); Ziegel *Comparative Consumer Insolvency Regimes – A Canadian Perspective* (2003).

⁴⁵⁴ See par 3.1 above.

creditors and furthermore to protect the public interest.⁴⁵⁵ An example of this would be the legislative powers of the Insolvency Service to create legislation in order to develop certain policies and to promote its role as regulator.⁴⁵⁶

The legal framework within South African insolvency law results in the Master being involved and entangled in various technical issues relating to the administration of the insolvent estate. Consequently, the Master does not prioritise matters of a public nature, such as the investigative aspect of the cause of insolvency or being involved in the development of general insolvency policies and law reform, as these represent matters which fall outside the Master's statutory agenda. Due to its multifarious character, the Master finds him self in the midst of certain challenges relating to the regulation of insolvency law.

The lack of specialisation by the Master's office officials in the particular field of insolvency law, and their inadequate training and experience, creates a level of ineffectiveness and inefficiency among staff. As a result of officials having to be able to function in all the different sections situated in the Master's office it is very difficult to train people in specialised skills, as they tend to be operating as "jacks of all trades". This state of affairs is not only unproductive but also in direct contrast to the government's skills development policies.⁴⁵⁷ South Africa's economic engine could also be negatively affected if funds are not administered expeditiously and efficiently, as each year the value of estates under the supervision of the Masters' offices amounts to approximately R18 billion.⁴⁵⁸ In a recent keynote address the acting Chief-Master acknowledged the following:

The workload in those two offices has, not surprisingly, increased at a phenomenal rate. The rightsizing initiative and filling of vacancies have inevitably resulted in the appointment of many new staff members who are still in the process of finding their feet.⁴⁵⁹

The lack of specialisation in the office of the Master combined with the lack of resources not only has an impact on service delivery, but also prevents the Master from effectively acting out the Constitution's commitment to "an efficient, equitable and ethical public

⁴⁵⁵ See Burdette 6-9.

⁴⁵⁶ See part III ch 4 above.

⁴⁵⁷ See Skills Development Act 97 of 1998.

⁴⁵⁸ See <http://www.info.gov.za/aboutgovt/justice/>

⁴⁵⁹ Basset *His Master's Voice: A Message from the Regulator* (2009) unpublished paper presented at the AIPSA Conference, Johannesburg.



administration which respects fundamental rights and is accountable to the broader public”.⁴⁶⁰

A good illustration of this allegation can be found in the case of *Moseneke v The Master*⁴⁶¹ where the Master opposed the application on considerations which included:

- a The lack of human resources, infrastructure, training and finance to administer the intestate estates of Blacks.
- b The current workload of the masters of the high court which already provides substantial pressure and managerial problems.
- c The transferal of intestate Black estates from the magistrate’s to the master’s office would create chaos.⁴⁶²

One of the first disparities that one notices when studying the functions of the Master within the context of international standards is the lack of investigative powers of the Master relating to the cause of the insolvency. In most foreign jurisdictions the investigation into the cause of insolvency, which also includes the behaviour of the insolvent prior to the sequestration of his estate, represents a major objective in the justification of these regulatory institutions.⁴⁶³ Customarily, the investigative process of insolvency law is also established as a public policy measure.

The UK’s Cork Committee⁴⁶⁴ was a strong advocate of having a robust investigation procedure, linking the idea to maintaining public confidence in the ability of the bankruptcy system to weed out abuse.⁴⁶⁵ The investigatory function rests with the official receiver, who investigates an individual debtor as well as officers and directors of companies. Although the South African system hosts a strong interrogation procedure, the investigative powers of the Master are limited to the general enquiries afforded by the Act, which generally aims to obtain information on the financial affairs of the insolvent and the whereabouts of property. To be able to determine the cause of insolvency not only has the advantage of separating the *bona fide* insolvent from the person abusing the system but in the context of law reform will also have substantial scientific and empirical value. The existence of limited liability also

⁴⁶⁰ See *President of RSA v SARFU* 2000 1 SA 1 (CC) at par 133. See also Hoexter *Administrative Law in South Africa* (2006) 14.

⁴⁶¹ 2001 2 SA 18 (CC). The case dealt with the constitutionality of certain provisions of the Black Administration Act 38 of 1927.

⁴⁶² *Moseneke v The Master* (n 461) at par 14.

⁴⁶³ In the UK the Insolvency Service’s Companies Investigation Branch (“CIB”) investigates serious corporate abuse using compulsory powers under the Companies Act 1985. See also ss 235 and 236 of the Insolvency Act 1986.

⁴⁶⁴ The full reference of this committee’s work is *Cork Report of the Review Committee Insolvency Law and Practice* Cmnd 8558 (1982) 16 (hereinafter referred to as the *Cork Report*).

⁴⁶⁵ *Cork Report* par 238.

increases the potential for abuse of the system. Prevention of abuse of this privilege requires investigation into the conduct of those responsible for the insolvent company.

Apart from the restrictive nature of the Master's investigative powers, the court has also reduced the powers of the Master, who no longer has the status of a judicial officer in the official structure of the court (*De Lange v Smuts NO*),⁴⁶⁶ to the extent that a person who is not a magistrate is authorised to issue a warrant committing to prison an examinee at a creditors' meeting held under section 65 of the Insolvency Act. Although according to the Master's officials this judgment has not yet had a negative effect on the number of interrogations taking place before the Master, it could in future result in all the uninteresting and tedious matters being scheduled with the Master and all challenging matters of note being transferred to the magistrate's court, or in the case of a winding-up to a commissioner. This will unquestionably lead to a decline in experience and knowledge regarding the legal and technical aspects of interrogations at the Master.

5.2 Regulation of Insolvency Practitioners

International elements are increasingly encountered by trustees in the estates which they are charged with administering. This trend is likely to continue given the integration of the global economy, the growth in international economic interdependence and the greater mobility of people and property.⁴⁶⁷ The study of the regulation of the insolvency profession in other jurisdictions has long indicated that South Africa lacks an adequate regulatory framework. As a result legitimate concerns may be raised about whether there are sufficient regulatory safeguards in place to ensure that only impartial insolvency practitioners with the necessary experience are appointed to act as office-holders. Practitioners perform a vital role in protecting the integrity of the system. As the situation stands now, the Master and particularly officials responsible for the appointments of provisional trustees are on a daily basis subject to criticism and are not only vulnerable to statutory review proceedings but are also confronted with the constitutional aspects of possessing a discretionary power to appoint a person as trustee without any legal or statutory guidelines. The unfortunate result is that the appointment of insolvency representatives by the Master will always be viewed with cynicism and beset with controversy.

⁴⁶⁶ 1998 3 SA 785 (CC).

⁴⁶⁷ Keay "International Elements in Bankruptcy: Problems and Solutions" (1992) *Adelaide LR* 245 (hereafter referred to as Keay "International Elements in Bankruptcy: Problems and Solutions").

A notable feature of present-day commerce is the recognition that insolvency administration has become a specialised discipline. The idea of regulating the industry should therefore not be viewed as a “watchdog” initiative, but rather as an opportunity to reform the industry in order to give creditors confidence in the persons they appoint and ultimately reducing the amount of supervision provided by the state.⁴⁶⁸ It is the view of various academic scholars in South Africa that the present regulatory regime is inadequate and in desperate need of reform. *Loubser* comments that: “The situation at the moment is that no qualifications, whether academic or practical, no experience and no professional affiliation are required by law. As a result, there is virtually no control over or disciplinary action against negligent, dishonest or incompetent insolvency practitioners”.⁴⁶⁹ In *Beinash & Co v Nathan (Standard Bank of SA Ltd intervening)*, Fleming DJP confirmed this view when he stated that the liquidators and trustees were regarded by many as ineffective and “even sometimes disrespected with regard to integrity”.⁴⁷⁰ The many media reports concerning allegations of corruption and fraud against practitioners as well as the Master’s personnel have certainly done nothing to change this widely held view.⁴⁷¹

Reform of the English insolvency practice and the formation of a new insolvency practitioner’s profession were cornerstones of the Cork Committee’s *Report*.⁴⁷² These recommendations were implemented by the Insolvency Act 1986, and mandatory licensing of all persons wanting to be recognised as insolvency practitioners were instated.⁴⁷³ The reformers and government chose the classic approach of licensing professionals through statutory mandate. But since this was a government wary of professional monopolies, it created a hybrid of a profession that kept the government’s hand in the formulation and enforcement of professional ethics, and maintained its capacity to adjust the rate of admissions into the profession.⁴⁷⁴ The model of regulation is therefore one of practitioner-led self-regulation within a statutory framework overseen by the state. Both the UK’s Insolvency

⁴⁶⁸ Calitz 734.

⁴⁶⁹ Loubser “An International Perspective on the Regulation of Insolvency Practitioner” 124.

⁴⁷⁰ 1998 3 SA 540 (W) 545D. See Loubser “An International Perspective on the Regulation of Insolvency Practitioner” 126.

⁴⁷¹ See eg, *Sunday Times Business Times* (2004-03-24) 1; *Sakebeeld* (2004-03-24) 14; *Business Day* (2004-04-22) 1; “Liquidation industry rife with corruption” *Independent online* (2003-10-12). See also Loubser “An International Perspective on the Regulation of Insolvency Practitioner” 126.

⁴⁷² Carruthers “Professionals in Systemic Reform of Bankruptcy Law: The 1978 US Bankruptcy Code and the English Insolvency Act 1986” 2000 *American Bankruptcy LJ* 68 (hereafter referred to as Carruthers).

⁴⁷³ Fletcher *Law of Insolvency* (2009) 28.

⁴⁷⁴ Ramsay “Professionals in Systemic Reform of Bankruptcy Law: The 1978 US Bankruptcy Code and the English Insolvency Act 1986” (2000) *American Bankruptcy LJ* 35 at 71 (hereafter referred to as Ramsay “Professionals in Bankruptcy Reform”).

Service and the US's Trustee system encompass the regulation of private sector insolvency practitioners and the insolvencies administered by latter. The UK and US experience underlines the critical importance of a strong regulatory framework in the regulation and monitoring of the insolvency profession.

Any attempt at regulating the South African insolvency profession, however, needs to take cognisance of the socio-economic realities that prevail in South Africa. Then again, any regulatory measures need to be of an international standard in order for foreign investors to have the peace of mind that their affairs will be conducted in an impartial and regulated environment. Although South Africa is in dire need of a proper general regulatory framework, it is probably not necessary for an overregulated environment such as found in the UK. Although the English licensing model has at times been criticised as overly complex and fragmentary,⁴⁷⁵ the focus on professionalism, ethics, qualification and experience might still provide a suitable benchmark when an attempt is made to strike a balance between the unique South African socio-economic environment and the safeguarding of public interest and fostering of public confidence.

⁴⁷⁵ See Finch 168; also see Walters "Complaints Handling in the Insolvency Practitioners Profession" A Report Prepared for the Insolvency Practices Council, (2008-01-23) available at <http://ssrn.com/abstract=109475> (last visited 09-11-30).

CHAPTER 6: LAW REFORM

We also hope to finalise a legislative framework relating to some of the services which are rendered by the masters of the high courts, most notably the revision of the law of insolvency. The current legislative framework relating to the winding-up of insolvent estates is outdated and requires urgent revision. Although it has been adapted over the years, our Insolvency Act dates back to 1936.⁴⁷⁶

Although the South African Law Reform Commission set out reviewing the South African law of insolvency in the late eighties, and has published a number of working papers for discussion, reports as well as draft legislation, this has not been taking place at any great speed and the final proposals are still awaiting recommendation.⁴⁷⁷ Perhaps one should be more patient with the law reform process and bear in mind that South Africa's commercial sector is perhaps relatively conservative.⁴⁷⁸ Moreover, one should also consider that in developing and transitional countries political interference, a lack of experience and resources, and the constraints imposed by weak enforcement agencies often make the task of legal drafting and the implementation of reform initiatives even more challenging.⁴⁷⁹ Insolvency law also does not operate within a vacuum, and parallel with the insolvency law reform efforts the Department of Trade and Industry⁴⁸⁰ is currently in the phase of a comprehensive review of corporate law in South Africa.⁴⁸¹ This process seeks to establish a comprehensive legislation and regulatory framework for the purposes of regulating companies and heralds some major changes to the environment in which companies operate.⁴⁸² The expectation is that this development will provide the insolvency law reform effort with some momentum.

⁴⁷⁶ Budget vote speech by the deputy Minister of Justice and Constitutional Development, Mr A Nel, MP, Parliament (2009-06-24) available at <http://www.info.gov.za/speeches> (last visited at 09-11-30).

⁴⁷⁷ Havenga "Simplification and Unification in Corporate and Insolvency Law – Are We Making Any Progress?" (2000) *SA Merc LJ* 408 (hereafter referred to as Havenga).

⁴⁷⁸ Evans 483.

⁴⁷⁹ Mistelis "Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations" (2000) *The International Lawyer* 1055 (hereafter referred to as Mistelis). See Evans 430 for a detailed discussion and criticism of the commission's interchangeable use of the terms "reform" and "review".

⁴⁸⁰ Hereafter referred to as "DTI".

⁴⁸¹ See the Companies Bill 61 of 2008 as introduced in the National Assembly with explanatory summary of Bill published in *GG* no. 31104 of 2008-05-30. The Companies Bill 61 of 2008 was signed by the President as Act 71 of 2008 and published in *GG* no.32121 of 2009-04-07.

⁴⁸² Suggestions include ending the distinction between close corporations, private and public companies; a possible statutory code of conduct for directors; more reporting requirements for companies including on remuneration; and black economic empowerment, environmental and labour issues.

In this chapter the insolvency law review proposed by the Law Reform Commission in respect of regulatory aspects as well as the regulation of the insolvency industry will be considered in more detail. This is necessary in order to determine whether substantial policy issues have been considered and in order to ascertain if it is at all necessary to consider suggesting further proposals relating to the law reform regarding the regulatory regime in South African insolvency law.

6.1 THE DRAFT BILL AND EXPLANATORY MEMORANDUM⁴⁸³

Almost two decades ago, policymakers in South Africa engaged in an extensive study of South African insolvency law.⁴⁸⁴ The South African Law Reform Commission published its *Report on the Review of the Law of Insolvency* in 2000.⁴⁸⁵ This report contained a Draft Insolvency Bill and an Explanatory Memorandum⁴⁸⁶ and included recommendations for what were described as mainly technical reforms to insolvency law in South Africa.⁴⁸⁷ The Bill contains only proposals regarding the insolvency of individuals. However, one consolidated Act is envisaged that would incorporate the winding-up provisions of companies and close corporations.⁴⁸⁸ Some of the main substantive changes proposed in the original 2000 South African Law Reform Commission report include abolition of many of the preferent claims currently provided for in the Insolvency Act,⁴⁸⁹ changes in the provisions for setting aside prior transactions, and provisions to regulate the insolvency practitioners industry.⁴⁹⁰ The findings of this study were published in 2000 by the South African Law Reform Commission, but have till now failed to result in the promulgation of efficient and effective insolvency law legislation.⁴⁹¹

⁴⁸³ In 1999 the South African Law Commission published its second draft Insolvency Bill and Explanatory Memorandum (n 8). This Explanatory Memorandum and Draft Bill were however officially published in 2000. The previous draft Bill was published for comment in 1996 as the Review of the Law of Insolvency: Draft Insolvency Bill and Explanatory Memorandum working Paper 66; Project 63 (1996) (hereafter referred to as 1996 draft Bill). See Evans 9 (n 27).

⁴⁸⁴ Boraine “The Draft Insolvency Bill – An Exploration (Part 1)” (1998) 4 *TSAR* 621 at 622 (hereafter referred to as Boraine “The Draft Insolvency Bill – an Exploration (Part 1)”).

⁴⁸⁵ See (n 8). See also Evans 430; Evans “Aspects of the Draft Insolvency Bill” (1999) *SA Merc LJ* 210.

⁴⁸⁶ See (n 8).

⁴⁸⁷ See McKenzie-Skene 48.

⁴⁸⁸ For a detailed discussion see Burdette ch 11.

⁴⁸⁹ Sections 97-102 in Insolvency Act.

⁴⁹⁰ South African Law Reform Commission *Report*, par 20.1 *et seq.*

⁴⁹¹ Burdette “Reform, Regulation and Transformation” 5.



In the same year the South African Law Reform Commission published its proposals, the Centre for Advanced Corporate and Insolvency Law (CACIL) at the University of Pretoria,⁴⁹² acting on a remit from the Standing Advisory Committee of Company Law,⁴⁹³ produced proposals for a new uniform insolvency law.⁴⁹⁴ These proposals by CACIL were based on the South African Law Reform Commission's original proposals for reform of non-company insolvency law, but incorporated reformed company insolvency law provisions.⁴⁹⁵ The enactment of a unified statute as suggested by the South African Law Reform Commission could possibly reflect a shift in policy in our insolvency law also in respect of the type of debtor that will be assisted since, historically, our insolvency law has been structured around the individual.⁴⁹⁶

The final version of the Draft Unified Insolvency Bill reflecting the sum total of the research conducted by the South African Law Reform Commission and CACIL was eventually presented to the South African Law Reform Commission, *via* the Standing Advisory Committee on Company Law, in 2000.⁴⁹⁷ In 2003 the Cabinet of the South African government approved the Draft Insolvency and Business Recovery Bill⁴⁹⁸ and it was handed over to the Chief State Law Advisers for final certification before being referred to Parliament. However, before the certification process could be completed the absence of a business rescue model was brought to the Department of Justice's attention and the process came to a grinding halt.⁴⁹⁹ The final Draft Unified Bill has not yet been officially published by the Law Reform Commission and as such the original Draft Bill included in the 2000 South African Law Reform Commission Report remains the only official version reflecting the changes proposed by the Law Reform Commission. Consequently this study will henceforth refer solely to the 2000 version of the Bill.

In its report on the review of insolvency in South Africa the Law Reform Commission mentions that the general principles of a number of legal systems and reform proposals were considered in its search for innovative solutions to the problems experienced with the law of

⁴⁹² Hereafter referred to as "CACIL".

⁴⁹³ See Burdette "Reform, Regulation and Transformation" 5.

⁴⁹⁴ Keay "To Unify or not to Unify Insolvency Legislation: International Experience and the Latest South African Proposals" (1999) *De Jure* 62.

⁴⁹⁵ See (n 105).

⁴⁹⁶ Burdette "Reform, Regulation and Transformation" 9.

⁴⁹⁷ See Burdette "Reform, Regulation and Transformation" 6-9.

⁴⁹⁸ The name awarded to the Bill when it was envisaged that the Business Rescue provisions for corporate entities would form part of the Insolvency Act.

⁴⁹⁹ See Burdette "Reform, Regulation and Transformation" 10.

insolvency, and in a few cases where it seemed advisable provisions were adapted for use in South Africa.⁵⁰⁰ It is clear from the general proposals as well as the proposals regarding the regulatory regime in South Africa, however, that no in-depth comparative study on specific issues such as state regulation in insolvency law had been undertaken, and if so the outcome had not been published.

The Explanatory Memorandum refers to the system in the UK, where the Department of Trade and Industry supervises the regulation and activities of insolvency practitioners, and where it is compulsory for such practitioners to be members of one of the eight recognised professional bodies. The Memorandum also refers to the UK system's qualification and training requirements.⁵⁰¹ It is not clear, however, whether the UK was the benchmark which the Commission applied or if it played any part when the regulatory changes were suggested. The Memorandum also does not provide any substantial motivation for referring to the regulatory system in use in the UK only. Consequently there is a lack of clarity about the whole continuum of regulatory issues and the means by which the suggested changes would function.⁵⁰²

6.2 PROPOSALS RELATING TO THE REGULATORY REGIME IN SOUTH AFRICAN INSOLVENCY LAW

The tenor of the South African Law Reform Commission's Draft Insolvency Bill⁵⁰³ suggests that the government at the time of issuing its report was evidently not ready to make the paradigm shift to bring about a change to the underlying policy and overall structure of the regulatory framework of South African insolvency law.⁵⁰⁴ When the Explanatory Memorandum to the Draft Bill is perused for amendments or revisions of the current policy and status quo, the changes detected can at best be described as technical ones. The Memorandum suggests that the Draft Bill places more responsibilities on creditors and reduces the role of the Master.⁵⁰⁵ It is not exactly clear, however, on what research or comparative study the Commission bases this suggestion. The only substantive change linked

⁵⁰⁰ Explanatory Memorandum 10.

⁵⁰¹ Explanatory Memorandum 141.

⁵⁰² Evans 430.

⁵⁰³ See *Commission Paper* 582 vol 1 and vol 2.

⁵⁰⁴ See Burdette 656. See also Boraine "Fresh Start Procedures for Consumer Debtors in South African Bankruptcy Law" 2002 *International Insolvency Review* 1.

⁵⁰⁵ Explanatory Memorandum 14.



to the regulatory system is the acceptance by the Commission as a general premise that creditors should accept responsibility for the protection of their own interests.⁵⁰⁶

6.2.1 Role of the Master

There are a few recommendations in the report which have the effect of reducing the role of the Master in insolvency law.⁵⁰⁷ Clause 41 stipulates that the liquidator⁵⁰⁸ instead of the Master or a magistrate may preside at most creditors' meetings. In the Explanatory Memorandum to clause 41 it is suggested that allowing the liquidator to attend at meetings may prevent objections regarding creditors' lack of participation in creditors' meetings. The reasoning behind the proposal is that its practicality outweighs the seeming independence of having the Master as presiding officer. There is also some merit in having the same person allowing claims at the meeting and then subsequently having to decide on a dispute in regard to such claims.⁵⁰⁹

Another proposal concerning the general functions of the Master is the reduction of the investigative powers in regard to the liquidation and distribution account. In *Wilkens v Potgieter*,⁵¹⁰ Roux J said that the Master had a clear duty to study the relevant documents and correlate them with the account received. In the suggested clause 87(2) the Master may as he deems fit insist on strict compliance with the format of the account.⁵¹¹ This suggestion confirms that the Master will not have the duty of critically investigating each and every account. In the absence of the duty to investigate each account, the prerequisite for vouchers and proved claims to accompany every account also falls away. Clause 87(9) requires vouchers and claims only on request of the Master.⁵¹² This proposal by the Commission is a clear example of a so-called practical or technical reform proposal. Although the Master is still to receive the account from the liquidator, the careful and sometimes unnecessary

⁵⁰⁶ Explanatory Memorandum 14.

⁵⁰⁷ Explanatory Memorandum 12.

⁵⁰⁸ Explanatory Memorandum 12.

⁵⁰⁹ Explanatory Memorandum 117.

⁵¹⁰ 1996 4 SA 936 (T).

⁵¹¹ Set out in Schedule 1, Form D (Form and contents of account).

⁵¹² Explanatory Memorandum 221. See also Cronje *The Role of Regulators in Insolvency Regimes – South Africa* (2004) 4 presentation at the International Insolvency Commission (INSOL) Conference, India (hereafter referred to as Cronje).

dissection of the account is no longer expected. This proposal does not represent any shift in policy or an adjustment in the nature of the role of the Master, but it does lighten the burden of the Master, and allow him to in devote his attention to more purely regulatory issues.

The clause in the Draft Bill which elicited the most comments by far was the question on the appointment of liquidators and especially whether the Master should retain its discretion in this regard. Although the Commission acknowledged that a properly exercised discretion is preferable to rigid rules which cannot provide adequately for all circumstances, it in any case went ahead and limited the discretionary powers of the Master. It proposed in clause 32(2) that creditors should be given the right to nominate a liquidator of their choice by a majority in value or number according to rules that apply at the first meeting. The Master's discretion to overrule the wishes of creditor had been suggested to be limited as follows:

- The Master may appoint a liquidator of his choice in terms of clause 32(7) if no liquidator is nominated or elected by creditors.
- If no liquidator is elected at a meeting of creditors the liquidator appointed in terms of clause 32 becomes the liquidator of the estate in terms of clause 52(3).
- If the Master deems it necessary for the proper administration of an insolvent estate he may at time appoint one additional liquidator in terms of clause 32(2A) or 54(4) within 48 hours notice by telefax, electronic mail or personal delivery to each liquidator already appointed of the reasons for an additional appointment.
- In terms of clause 32A the Master must keep a public record which must be updated at least every 14 days of additional appointments which reflect the name and the reference number of the estate, the name and address of the person appointed, and the amount of security called for and the reason for the appointment.
- The Master should have the right to refuse to appoint a qualified person because the Master is of opinion that he is not suitable for appointment in the estate in question (clause 54).
- The Master should have the right the right to decide whether a nominee has interest opposed to the general interests of the creditors if the nominee has declared under oath that he does not have such interests (clause 55).
- The Master should have the right to remove a liquidator from office because in the opinion of the Master he is no longer a suitable person to be liquidator (clause 58).
- When a liquidator must be appointed the Master must direct the remaining liquidator or liquidators to convene a meeting for the election of a new liquidator and the Master should not merely appoint a person that he regards as suitable (clause 60).⁵¹³

Given the acknowledgement of consistent rumours of undue influence with regard to appointment procedures in the Master's office, and admission that the dominance of one group of creditors in the administration and appointment process of the estate holds a threat,

⁵¹³ Explanatory Memorandum 101.



proposals that the liquidator should be appointed by the court were rejected.⁵¹⁴ The Commission submitted that it would be more difficult to review a process where someone other than a public official such as the Master is alleged to be at fault. It therefore viewed it advisable to limit the discretion of the Master rather than remove it completely.⁵¹⁵

6.2.2 Regulation of Insolvency Practitioners

With regards the regulation of the industry, the suggestion by the Commission was that a person who is not a member of a professional body recognised under the proposed legislation should be disqualified from being elected or appointed as an insolvency representative.⁵¹⁶ It was also suggested that the Minister of Justice may from time to time publish by notice in the *Government Gazette* the name of a recognised professional body if it appears to the Minister that such a body regulates the practice of a profession and maintains and enforces rules for ensuring that a member of such body is a fit and proper person to be appointed as an insolvency representative and meets acceptable requirements with respect to education, practical experience and training. Recognition may be revoked if the professional body no longer satisfies these requirements.⁵¹⁷

Another significant new provision included in the Bill is the power bestowed on the Master to suspend a liquidator on the strength of a complaint made to him on affidavit or if the person has been charged with an offence, pending the investigation into the suitability of the liquidator to remain in office.⁵¹⁸ It is clear from the Bill that the investigation should be undertaken by the Master, but the clause fails to give any detail as to the nature and scope of the Master's power to investigate. Given the impact this proposal would have on the Master's resources, it is unfortunate that the Commission did not use the opportunity to include specific guidelines. It is also unclear whether the constitutionality of such an investigation into the rights of the individual had been carefully considered.

Under the heading "General guidelines proposed by commentators" the Commission Report

⁵¹⁴ Explanatory Memorandum 101.

⁵¹⁵ Explanatory Memorandum 101.

⁵¹⁶ Explanatory Memorandum 14.

⁵¹⁷ Clause 53 of Draft Bill. See Cronje 4.

⁵¹⁸ Clause 58(2) of Draft Bill.

states that one of the commentators remarked that the Master fulfills such an important role that as a result creditors are less interested and involved. Another commentator said that the existing Act leans too heavily on “policing” by the state. By contrast, another commentator mentioned that without the Master to monitor the administration of estates fraud by liquidators would become rampant.⁵¹⁹ The Commission states in the Explanatory Memorandum that the general guidelines proposed by commentators did not reveal any startling solutions to existing problems.⁵²⁰

Evans mentions that there is no indication or proposal in the commission report to consider the policy considerations in South African insolvency law upon which this “review” or “investigation” will hinge.⁵²¹ Evans further submits that a failure to consider policy issues will lead to a disjointed and flawed “revision” of insolvency law.⁵²² It is clear from the changes and recommendations suggested by the Commission that no substantial policy-driven 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.

Although it falls beyond the scope of this study to provide an exhaustive survey or detail analysis of the reform process of our Company law, it is interesting to note that the Department of Trade and Industry⁵²³ followed a distinctly different path of law reform to that of the South African Law Reform Commission.⁵²⁴ In 2004, DTI published a policy paper which acted as the foundation for the subsequent debate and process of law reform thereafter.⁵²⁵ The intention of the Department was clearly revealed in the following statement:

It is not the aim of the DTI simply to write a new Act by unreasonably jettisoning the body of jurisprudence built up over more than a century. The objective of the review is to ensure that new legislation is appropriate to the legal, economic and social context of the South Africa as

⁵¹⁹ Explanatory Memorandum 11.

⁵²⁰ Explanatory Memorandum 10.

⁵²¹ See Evans 430 for a detailed discussion and criticism of the commission’s interchangeable reference to the words “reform” and “review”.

⁵²² Evans 431.

⁵²³ Hereafter referred to as “DTI”.

⁵²⁴ Companies Bill 61 of 2008 has been signed by the President as Act 71 of 2008 published in *GG* no 32121 (2009-04-07).

⁵²⁵ See “South African Company Law for the 21st Century: Guidelines for Corporate Law Reform” – *GG* 26493 of (2004-06-23).



a constitutional democracy and open economy. Where current law meets these objectives, it should remain as part of the company law.

It is submitted that one should be cautious of a law reform initiative which had been founded on research concluded in a pre-Constitutional era.⁵²⁶ The key objective of any law reform proposal should be not only to be compatible and harmonious with international best practice in the field of law, but also to incorporate the legal, economic and social context of a contemporary South Africa. It is submitted that although the investigation of the South African Law Reform should not be regarded as completely redundant, a fresh approach supported by a policy-based methodology is urgently required. When assessing the present state of the law of insolvency the following statement very aptly articulates this above notion:

This will probably mean that the old pre-Constitution jurisprudence will need to be read with circumspection – practitioners and courts should no longer be entitled to simply rely on this old case law as authority. Each and every pre-Constitutional precedent will need to once again be scrutinized, this time against the values that permeate through the Bill of Rights, so as to make sure that all law (including case law) is constitutionally compliant. That it is our duty to do this is beyond question – the common law must be developed so that it is brought into line with our Constitution.⁵²⁷

⁵²⁶ See part IV above.

⁵²⁷ Hopkins “The Influence of the Bill of Rights on the Enforcement of Contracts” (August 2003) *De Rebus* 22.

CHAPTER 7: CONCLUSION

History shows that the institution of the Master was initially established with the aim of acting as custodian for persons such as widows and orphans, and, in time, minors and incapacitated persons, in order to protect their interests. The supervisory duty of the Master in relation to insolvency law was only relatively recently incorporated into the Master's general duties and functions.⁵²⁸ It is also clear that the courts initially dominated the insolvency process and the Master had only limited functions, which were more administrative in nature. In time the Master gradually accumulated powers over the daily administration of the insolvency process and the role of the Master became more prominent and the nature of its functions more complex, ranging from judicial to administrative in nature.

One can pinpoint certain common denominators when studying regulatory bodies in other jurisdictions such as the UK and the US. Some of these denominators are that regulatory frameworks of some nature do exist; that they possess broad investigative powers focused on the cause of the insolvency and the probability of fraud; and that they are not involved in the administrative duties of the insolvency representative on a daily basis, are able to initiate and implement strong policy direction, and are actively involved in the development of legislation and governmental policies relating to insolvency law.⁵²⁹

In the absence of these characteristics and proper rule-making and policy development powers, it is difficult to view the Master as an independent regulatory body and to unearth a credible measure to determine its success. Since the profit criterion of the private sector is not applicable to public servants and the Master has only limited powers when acting as regulator it is difficult to find tangible measures of success to justify the Master's activity. Examples of this predicament are the constrained provisions under which the Master may remove a trustee from office as well as the limited scope of the investigative powers afforded to the Master by legislation.

Another inconsistency between the Master as regulator and its equivalent in other international jurisdictions is the lack of official control in regard to the South African

⁵²⁸ See par 4.2.3.2 above.

⁵²⁹ See part III above.



insolvency profession. Literature on the regulation of insolvency law suggests that in the absence of a sophisticated regulatory framework, the role of the regulatory body becomes more acute. In the absence of any statutory regulation of the South African insolvency profession the role of the Master is becoming more controversial and also resulting in the underlying tensions and irregularities that can be found in this industry. The absence of a proper regulatory framework and a specialised regulator could result in the general ineffectiveness of the South African insolvency system as a whole.

The attraction of foreign capital is often crucial to the sustainable development of developing countries and the insolvency regime provides the investor with the predictability and transparency needed to assess the risk of an investment decision. Insolvency laws and systems are increasingly being recognised as a fundamental institution essential for the development of credit markets and entrepreneurship in developing countries and, in turn, these insolvency systems depend on the existence of sound and transparent institutional and regulatory frameworks.⁵³⁰ South African law- and policymakers are at present on the threshold of introducing significant new legislation in both corporate and insolvency law disciplines.⁵³¹ Interested parties will have to achieve a balance between the interests of debtors and creditors and the public interest while at the same time acknowledging the link between these interests and institutional structures and their capacities. The absence of an effective insolvency regime will have an adverse impact on the future availability of credit and foreign capital.⁵³² The design and development of a strong central government agency responsible for regulating South African insolvency law has therefore become vital in assuring public confidence in the system of regulation and supervision, and in the process of insolvency law.⁵³³

⁵³⁰ Joyce *The Role of Insolvency Regulators in the Past and in the Future* 4 (2003) unpublished paper delivered at the International Insolvency Conference, Singapore, (hereafter referred to as Joyce “The Role of Insolvency Regulators in the Past and in the Future”) on file with the author. *Cf* Mistelis 1057.

⁵³¹ See Companies Bill 61 of 2008 as introduced in the National Assembly (proposed s 75) with explanatory summary of Bill published in GG No. 31104 of 2008-05-30.

⁵³² Falke *Insolvency Law Reform in Transition Economies* (2003) 27 LLD dissertation Humboldt University of Berlin (hereafter referred to as Falke).

⁵³³ *Cf* Mistelis 1057.