An analysis of selected regulatory shortcomings that affect the Master of the High Court's ability to execute its duties as the insolvency regulator of South Africa

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Summary

This study analyses the regulatory shortcomings of the legislative framework pertaining to the Office of the Master of the High Court, insofar as it functions as the insolvency regulator of South Africa. The Master's office functioning, and practical problems associated with the Insolvency law regime are investigated. The study provides a general background regarding the development and importance of this institution, and the significance of the problems associated with the Master's office as a key entity to the success of the insolvency law process. The substantive discussion dealing with the legislative technicalities that implicate the Master's office within the insolvency law sphere focuses on the role, functions, and statutorily prescribed powers of the Office. The study further provides an internal comparative analysis of other similar bodies as it relates to the roles, powers and functions of these entities in order to determine, against the background of the challenges identified earlier, whether any viable adaptations can be made to the regulatory realm of the Master's office. After a critical analysis of the research findings, observations are made in order to provide recommendations for law reform.

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Chapter 1: Introduction

1.1. Background to the study

In February 2020, the High Court in Johannesburg delivered a judgment with potentially revolutionary implications. *Khammissa v Master, Gauteng High Court*[1] posed important and fundamental questions about the role of the Master in the winding-up process, particularly during the appointment stage of a liquidator.[2] The Court decided on a number of issues related to the decisions made in Master's Offices throughout the country. One of the issues considered was the status of decisions made by Assistant Deputy Masters. The case highlighted significant problems with the performance of the Master's Office and its ability to fulfil its pivotal role in relation to the insolvency process. Right from the start, the presiding officer did not refrain from emphasising the scope of these shortcomings, given the comments made in the judgment about the Master assuming a "Pontius Pilate" approach in this case.

The underlying implications of the "Pontius Pilate" comment forms the basis for this study. The judgment contains the following statement:

> "[T]he Pontius Pilate posture adopted by the Master is baffling. I agree with Mr Suttner SC, on behalf of the applicants, that it cannot be gainsaid that the matter is serious because the Master sits at the apex of insolvency law and practice, presides over important decisions affecting the appointment of liquidators and governs the custody of large assets. Which decision and appointment certificate prevails in this case involves important questions of law and is of importance to insolvency law practitioners and liquidators."[3]

The Master's reluctance – or inability as this study aims to determine – to get involved in the *Khammissa* matter, notwithstanding that it is seated at the apex of the insolvency law and practice regulatory framework, points to a greater issue at large. This issue

[1] *Khammissa and Others v Master, Gauteng High Court, and Others* 2021 (1) SA 421 (GJ) (hereafter "*Khammissa*").
[2] See the discussion by Jooste "*JQR Companies & Close Corporations"* 2021 *Juta's Quarterly Review of South African Law* (hereafter "Jooste") 2.
[3] *Khammissa* para 13.

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relates to how the regulatory regime's shortcomings are inhibiting the Master's Office to pursue compliance with its roles, functions, and powers.

1.2. Problem statement

It is concerning that the Master did not participate in a complex case, notwithstanding that it is the institution which is responsible for insolvency regulation in South Africa.[4] In *Khammissa*, the Master was arguably statutorily obliged to do so and it is worrisome that this duty was not fulfilled.[5] This then begs the question of whether the Master's Office is suitably placed and empowered to fulfil its fundamental statutory and constitutional duties.

1.3. Research questions

Against this background, the key issue that arises is whether the current regulatory regime empowers the Master's office to fulfil its various roles, functions, and powers. The following research questions subsequently arise:

1. What are the roles, functions and powers associated with the Master's Office within the South African insolvency law regime?
2. Which legal and non-legal challenges arise in relation to research question 1?
3. Which internal bodies are comparable with regard to the legislative and practical reality of the Master's Office?
4. Based on the research findings and legal conclusions drawn in respect of questions 1 to 3, which recommendations for reform can be made to enhance the existing framework?

1.4. Significance of the study

Public confidence in systems established by the State for insolvency law is extremely important.[6] Without public confidence in the institution that regulates and oversees

[4] Jooste at 2.
[5] *Ibid*.
[6] Calitz "System of regulation of South African insolvency law: Lessons from the United Kingdom" 2008 *Obiter* 371 352.

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insolvency law and practice, economic activity and innovation may be impaired.[7] Insolvency law plays an important role in economic activity because it provides individuals and companies with the opportunity to take risks that are in the interest of financial growth and to the benefit of society.[8] An effective insolvency law regime sets a predictable framework in place to deal with failures, and ultimately encourages certainty of lenders and investors as to their recourse where defaults and insolvency acts present themselves.[9]

The Master's Office is a core component of the insolvency framework in South Africa. Calitz and Boraine have both pointed out that:

> "[F]undamentally the Master is at present ordained with the daunting task of preserving the integrity of the law relating to insolvency matters"[10]

It goes without saying that a legal framework that is not conducive to the success of the Master's Office, threatens the sanctity of the insolvency regime. Hence, identifying the regulatory shortcomings of the Master's office is of utmost importance because the success of the insolvency regime relies on its proper functioning. A regulatory analysis focusing on the legal framework, due to the fact that legal and non-legal challenges may be identified, is necessary in order to recommend solutions to the legal challenges so that true change may occur.

1.5. Methodology and choice of comparable institutions

Desktop-research considering primary and secondary sources. The primary sources that will be consulted consist of various pieces of legislation, such as: the Insolvency Act 24 of 1936;[11] the Companies Act 61 of 1973;[12] the Companies Act 71 of 2008;[13] and the Administration of Estates Act 66 of 1965.[14] These pieces of legislation

[7] Calitz 2008 *Obiter* 369-370.
[8] Calitz 2008 *Obiter* 370.
[9] The World Bank *Report on doing business in 2004 – understanding regulation* (2004) 64, available at https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB04-Full Report.pdf (laccessed on 15 November 2022) (hereafter "World Bank Report 2004").
[10] Calitz & Boraine "The role of the Master of the High Court as regulator in a changing liquidation environment: A South African perspective" 2005 *TSAR* 742 728.
[11] Hereafter "Insolvency Act of 1936".
[12] Hereafter "Companies Act of 1973".
[13] Hereafter "Companies Act of 2008".
[14] Hereafter "Administration of Estates Act of 1965".

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specifically relate to the Master's office and form a vital part of the Chapter two discussion. Moreover, a number of key cases that fall within the scope of this dissertation will be referenced as primary sources of the insolvency law and, by extension, the position of the Master's Office.

The secondary sources that will be consulted include articles from law journals and legitimate websites, books by learned scholars, LLD theses, conference presentations, and reports by international and internal bodies. All these sources deal with the insolvency law sphere and the Master's Office, directly and indirectly.

Two internal institutions will be explored for the comparative analysis portion of this dissertation. The Deed's Office (hereafter "DO") and Companies and Intellectual Property Commission (hereafter "CIPC") will make up the discussion. These comparative institutions were chosen for three reasons, namely: each one plays a vital role in its respective regime; both are also empowered by statute,[15] similarly to the Master's Office; and each one falls within a different Department.[16]

Therefore, a comparison of the Master's Office and the DO and the CIPC provides one with an opportunity to consider the regulations pertaining to these internal institutions and where the insolvency regulations relating to the Master's Office can be adapted to mirror these other regulations in the interest of public confidence and sanctity of procedure. It is also a vital comparison because it allows one to conceptualise what a truly South African revision of the Master's Office position in insolvency law might look like.

1.6. Important concepts

Throughout this dissertation the following important terms and concepts will be used. Below is an indication of each concept and term's meaning as well as those terms which may be used interchangeably.

1. The term "Master's Office" refers to the institution itself, as provided for in the Administration of Estates Act of 1965. It should be read to mean the Master's

[15] Deeds Registries Act 47 of 1937 (hereafter "Deeds Registries Act of 1937") and Companies Act of 2008, respectively.
[16] The DO falls within the Department of Agriculture, Land Reform and Rural Development (hereafter "DALRRD") and the CIPC falls within the Department of Trade Industry and Competition (hereafter "DTIC").

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Office as an administrative and supervisory structure in the insolvency law regime, and its personnel (including the Chief Master, Masters, Deputy Masters, Deputy Assistant Masters, and Assistant Masters).

2. The terms "regulatory" and "regulation" refer to both legal and non-legal systems in place that bind or otherwise set out how an institution and other involved parties should conduct themselves.
3. The term "legal", whilst referring directly to statutory and other practice directives, will be used interchangeably with the above two terms. For purposes of this dissertation, it will mean those statutes, directives, and legislative network that apply to the Master's Office and the two comparative institutions, being the DO and CIPC.
4. The concept "referral provisions" refers to provisions which empower creatures of statute to correspond with other vital institutions for the fulfilment of its roles, functions, and powers.
5. The concept "legislative framework" refers to the overarching matrix in which the Master's Office operates in relation to insolvency matters. This phrase is also used interchangeably with "regulatory framework" and "regulatory regime" throughout.

1.7. Breakdown of chapters

Chapter one of this dissertation provides background to the topic addressed in the study and explains the overarching problem at hand. It sets out the research questions that arise from the problem and determines why the study is significant. The methodology and choice of comparable institutions are discussed before providing this overview of the chapters.

Chapter two investigates the Master's Office. It provides a historical overview of the development of the Master's Office in order to understand why the institution performs the functions that it does and discusses why certain empowering provisions were established over time. The study continues to provide a legal-technical breakdown of the roles and functions of the Office during the sequestration and liquidation processes in order to illustrate the vital role of Master's Office these processes. Following this, the *Khammissa*-case is discussed to serve as a case study. The case study demonstrates regulatory and practical challenges that the Master's Office has been

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experiencing when it comes to the insolvency framework. Preliminary conclusions in respect of possible improvements are made insofar as these relate to the Master's Office and the legal framework.

Chapter three consists of an internal comparative analysis of two South African regulatory bodies, namely the Deeds Office and the Companies and Intellectual Property Commission. It is aimed at understanding the regulatory framework for these two bodies and what lessons can be learned from other regulatory spheres. In doing so, the dissertation sets out the roles and functions of both bodies and concludes with preliminary observations to conceptualise recommendations for reform relating to the Master's Office.

Chapter four of this dissertation analyses the Master's Office against the background of chapters two and three. Legislative shortcomings are identified, and the resultant impact of informal decisions taken when insolvency practitioners (hereafter "IPs") are appointed due to the lack of legislative guidance and clarity in legislation are discussed. I also deal with the issue of little to no objective oversight when it comes to decision-making. I consider to which extent there are legal solutions to human resource and other practical challenges experienced by the Master's Office.

Chapter five reflects on the analyses and provides recommendations to mitigate the identified shortcomings.

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Chapter 2: The Master of the High Court

2.1. Introduction

This chapter deals with the Master's Office as it features in the South African legal framework, with a specific focus on its role, functions, and powers within the insolvency law sphere. The purpose of this chapter is to discuss the framework for the Master's Office's involvement in insolvency proceedings, and explain the value of its roles and functions. The discussion emphasises why there must be a conscious acknowledgement of the Master's role in these processes and questions whether the Office is rightly placed for the effective administrative and practical implementation of these roles and functions.

The history of the Master as a creature of statute is discussed because the historical establishment of an administrative body informs future conduct and explains the overarching empowering provisions of the body. I then turn to deal with the current role and function of the Master before analysing *Khammissa* as a case study.

2.2. The historical foundations of the Master of the High Court

The Master's Office (then referred to as the Masters' division) existed in certain European countries before Jan van Riebeeck's arrival in the Cape in 1652.[17] It is widely accepted that the Masters' division was only conceptualised within South Africa around 1674.[18] Initially, the Masters' division formed part of the judiciary as insolvency procedures were controlled by the courts.[19] This meant that, at this point in time, there was not yet a clear Masters' "division" in the form of an administrative body that functioned separately from the judiciary.

The supervision and administration of insolvent estates fell within the auspices of the "Sequester", who was tasked was carrying out the administrative function of the judiciary.[20] Furthermore, the Sequester was administrating around 400 estates while

[17] Calitz & Boraine 2005 *TSAR* 728. See also Burdette *A framework for corporate insolvency law reform in South Africa* 2002 LLD thesis University of Pretoria chapter 2.
[18] *Ibid.*
[19] Calitz & Boraine 2005 *TSAR* 728 at fn 3.
[20] Calitz & Boraine 2005 *TSAR* 729.

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it was also involved in the execution of civil sentences. What this effectively meant was that the sequester administered justice and then had to enforce the law.[21]

The governor of the *Kaap de Goede Hoop* subsequently decided that this setup was not conducive to effective judicial governance. In 1803, the *Desolate Boedelkamers* was established – a chamber consisting of three commissioners and a secretary for administration.[22] This chamber was responsible for numerous administrative duties which included duties related to insolvent estates.[23] It managed the administration of insolvent estates up until 1827 when the British government established the Supreme Court of the Cape of Good Hope and established the Master of the Supreme Court.[24] The Supreme Court was set up following the British Settlers' arrival in the 1820's, with the intention of converting the Cape into a British Colony that exhibited British governance, law and spirit.[25] To this end, the Charter of Justice of 1827 was issued which affirmed the decision to retain the Roman-Dutch common law in South Africa.

This was an important change because the First and Second Charters created an independent, impartial and competent judiciary similar to what exists today.[26] The Master effectively took over the functions of the Sequester and was established in the form and style still in existence.[27]

South African insolvency legislation incorporated and thus reflects the common law.[28] The legal framework was also shaped by English bankruptcy law, where the courts were actively involved in the administration of insolvent estates.[29]

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[21] *Ibid*.
[22] Calitz & Boraine 2005 *TSAR* 729.
[23] *Ibid*; see also Smith *The law of Insolvency* (1988) 5. This chamber was established in *lieu* of De Mist's (the newly stationed governor) ordinance issued in terms of principles found in the Ordinance of Amsterdam of 1777.
[24] Walker *Lord De Villiers and his times: South Africa 1842-1914* (1925) 68.
[25] Devenish "Our legal heritage: Lord de Villiers and the Cape Colony 1828-1910" 1978 *De Rebus Procuratoriis* 485.
[26] Devenish 1978 *De Rebus Procuratoriis* 485.
[27] Calitz & Boraine 2005 *TSAR* 729. This was effected through the provisions of the Insolvency Act of 1916 which preceded the Insolvency Act of 1936.
[28] See Calitz & Boraine 2005 *TSAR* 729 referring to Smith (1988).
[29] Calitz & Boraine 2005 *TSAR* 729.

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2.3. The role and function of the Master of the High Court

2.3.1. Introduction

For the sake of clarity, it must be understood that when it comes to the Master, this refers to a person who holds that particular office. The Master's Office, however, has multiple layers of delegatory positions. Hence, the term Master is used to, at some points, refer to Deputy Masters, as well as assistant Deputy Masters, and assistant Masters. Each of these delegatory positions fall within the Master's Office and derive their power to act from delegations made by either the Chief Master or Master of the specific Master's Office in question.

Over the years, the Master's role within the insolvency law regime has varied from extreme versions of supervision (being part-and-parcel of the court structure) to an administrative body empowered by statute.[30] The various roles of the Master have influenced the functions of the Master's Office. At present, the Master is a creature of statute which means that it can only carry out functions ascribed to its Office by the legislature.[31] More specifically, the Master cannot issue court judgments or orders that can be enforced similar to court orders.[32]

I now turn to discuss the various roles and functions of the Master's Office insofar as these relate to insolvency matters. The Master's functions within the insolvency regime are (in)directly determined by the broadly defined "roles" assigned to it. The discussion will then turn to an investigation the members of the Master's Office responsible for executing the duties of the Office. This is an important consideration because the success of the Master's Office depends on those in core positions. If, for example, the staffing complement is not made up of well-versed and competent civil servants with sufficient training and experience, there is a chance of maladministration.

2.3.2. The roles of the Master of the High Court

The Master functions under the auspices of the Department of Justice and Constitutional Development and is not a formal part of the judiciary – it acts as the

[30] *Ibid*.
[31] *The Master v Talmud* 1969 1 SA 236 (T) 690.
[32] Calitz & Boraine 2005 *TSAR* 730.

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administrative conduit between the judiciary and the public.[33] The Master's Office serves the public in relation to deceased estates; liquidations (insolvent estates); trusts; and the registration of trusts', tutors' and curators' administration of the Guardian's Fund.[34] This dissertation will only deal with the functions of the Master's office as it pertains to the role of the Master in liquidation matters.

The Master's role and corresponding functions are determined by different pieces of legislation, namely the Insolvency Act of 1936, the Companies Act,[35] and the Close Corporations Act.[36] The administration of insolvent estates of individuals and juristic persons such as companies is supervised by the Master of the High Court.[37] This broad function includes providing directions, as and when needed, pertaining to the administration of insolvent estates, and confirming the formal estate accounts.[38] The Master also fulfils an integral role when it comes to the appointment of trustees and liquidators – the appointment process is one of the main steps in the process that the Master needs to oversee.

The Master's office must supervise this process within the confines of its legislative duties but this discussion will show that there are instances where the Master must be involved but where common practices result in informal appointments. In other words, legislative provisions are not always formally adhered to because the circumstances are different to what the legislature anticipated. This problem will be discussed in Chapter four.[39]

I turn to deal with the functions of the Master when it comes to the sequestration of an individual's estate and the liquidation of company's estate. The discussion provides a macro-view of where the Master is involved within the insolvency regime and ultimately informs an understanding of the overarching regulatory approach.

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[33] *Ibid*.
[34] Department of Justice and Constitutional Development *Administration of justice*, available at https://www.gov.za/about-government/government-system-justice-system/administration-justice (last accessed on 21 February 2022).
[35] As it still applies by virtue of item 9 of schedule 5 of the Companies Act 71 of 2008 (hereafter "Companies Act of 1973").
[36] 69 of 1984 (hereafter "Close Corporations Act of 1984"); Calitz & Boraine 2005 *TSAR* 731 in fn 30.
[37] Boraine "A perspective on the doctrine of voidable dispositions in South African insolvency law" 2000 *International Insolvency Review* 65.
[38] Boraine 2000 *International Insolvency Review* 67.
[39] See section 4.2.3. of this dissertation.

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2.3.3. The functions of the Master in respect of sequestration proceedings

A debtor includes a person (an individual) or a partnership, or the estate of a person or partnership, which is a debtor in the usual sense of the word.[40] In the case of an individual debtor, a trustee is appointed to take charge of the insolvent estate and administer the estate.[41] The trustee should theoretically be elected at the first meeting of creditors by those creditors who have proved claims against the insolvent estate.[42]

The election of a trustee by the creditors does not equate to an appointment because the Master has the overarching responsibility of appointing a duly elected trustee.[43] The word 'theoretically' is used because, in practice, the creditors nominate a person before the first meeting of creditors has been convened and who takes up the position of the trustee.[44] The Master subsequently considers this nomination of a provisional trustee and exercises its discretionary statutory authority to appoint this person as the provisional trustee.[45]

Upon the commencement of the insolvency procedure the property of the individual debtor vests in the Master.[46] The property remains vested in the Master up until the trustee has been appointed and subsequently vests in the trustee.[47]

2.3.3.1. The appointment of the trustee

The appointment of the trustee consists of two steps. After the sequestration order is granted, the Master may exercise its statutory discretion and appoint a *provisional* trustee.[48] Following the first meeting of creditors, the Master is responsible for appointing the *final* trustee as nominated by the creditors at the first meeting.[49] Provision is made for a petitioning creditor to proceed with the sequestration process

[40] S 2 of the Insolvency Act of 1936. It should also be noted that s 2 specifically excludes a body corporate or company or other association of person which may be placed in liquidation under a law relating to companies from the definition of a debtor.
[41] S 20 of the Insolvency Act of 1936.
[42] S 54(1) of the Insolvency Act of 1936.
[43] S 18(4) of the Insolvency Act of 1936.
[44] Calitz & Boraine 2005 *TSAR* 733.
[45] S 18(4) of the Insolvency Act of 1936.
[46] S 20(1)(*a*) of the Insolvency Act of 1936.
[47] It is important to note that the Master does not administer the insolvent estate as this is the duty of the trustee or liquidator concerned.
[48] S 18(1) of the Insolvency Act of 1936.
[49] S 56(2) of the Insolvency Act of 1936. The Master must confirm the *final* elected trustee's appointment by issuing an appointment certificate.

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until the trustee is appointed.[50] The Insolvency Act of 1936 provides that, up until when a provisional trustee is appointed or where no provisional trustee has been appointed and before the final trustee has been appointed, the petitioning creditor may carry out the administrative duties but must meet the associated costs.[51]

During the appointment process there may be instances where the trustee was not properly elected or is disqualified from being appointed as a trustee.[52] Section 57 of the Insolvency Act of 1936 provides that the Master has the power to notify the person elected as the trustee in writing notice that he or she will not confirm the election or appoint of that person as the trustee.[53] This notice must include reasons for the refusal to confirm the appointment and the Master must believe that the person is not suitable for appointment.[54] The Master must subsequently convene a meeting of creditors of in order to elect a new trustee.[55] Should no suitable person be elected during this meeting, the Master becomes entitled to appoint any other person not disqualified to serve as a trustee.[56]

Where only one trustee was appointed and this trustee vacates the office or is removed from office by the court, the Master must convene a meeting of creditors to elect a new trustee.[57] Before the new trustee is elected, the Master may appoint a *provisional* trustee with the aim of preserving the insolvent estate.[58]

2.3.3.2. Sales of assets, taxation and the remuneration of the trustee

The appointment process is not the only functional area in which the Master is involved. During the administration process, the Master is empowered to consent to

[50] S 14(1) of the Insolvency Act of 1936.
[51] *Ibid*; the petitioning creditor is the person upon whose petition the order for sequestration has been granted.
[52] S 57(1) of the Insolvency Act of 1936; see also s 55 of the Insolvency Act of 1936 for disqualified persons.
[53] S 57(1) of the Insolvency Act of 1936.
[54] *Ibid*.
[55] S 57(2) of the Insolvency Act of 1936. During this meeting, the Master is expected to provide all the reasons for the declination and should also post a copy of their notice to all creditors who have a proven claim against the insolvent estate.
[56] S 57(4) of the Insolvency Act of 1936.
[57] S 62(2) of the Insolvency Act of 1936; see also Boraine *et al Meskin's Insolvency Law* (2008) Last updated: August 2022 Service issue: 58 at 4.6.
[58] *Ibid*; see also s 62(3) which provides with the Master with the discretion to convene a meeting of creditors when one of two joint trustees has vacated or been removed from office, for purposes of electing a new trustee.

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the urgent sale of assets.[59] Hence, where the creditors do not provide adequate directions, the Master may fill the void and provide guidance to the trustee or provisional trustee.[60]

The Master acts as the taxing Master when it comes to the remuneration of the trustee, which is determined by statutory tariff.[61] The Master has the discretion to reduce, increase, or even disallow, the statutory remuneration normally due to the trustee if the Master believes that there is cause to do so.[62]

2.3.3.3. *Confirmation of accounts*

The Master has various administrative duties which it must carry out during the insolvency process. One of these include the confirmation of the trustee's accounts. The Master is required to confirm the account of the trustee once the account has been availed for inspection by the creditors and there are no objections.[63] As part of the statutory duties, the Master must peruse the various accounts submitted by the trustee in accordance with the timelines prescribed by legislation, such as the liquidation and distribution account submitted by the trustee six months after his or her appointment.[64] During the perusal of the accounts, the Master is empowered to raise questions, and request that amendments be made should the need arise.[65]

2.3.3.4. *Enquiries during the administration of sequestrated estates*

When it comes to meetings of creditors, the Master has the responsibility of presiding over the first, second, and general meetings of creditors.[66] There may be instances where enquiries are held and the Master may sit as the presiding officer at these enquiries.[67] During enquiries, the trustee and creditors are able to investigate the affairs of the insolvent debtor and determine the true financial position of the estate.[68] The presiding officer (usually the Master) is empowered to summon numerous

[59] S 80*bis* of the Insolvency Act of 1936.
[60] Calitz & Boraine 2005 *TSAR* 731.
[61] S 63(1) of the Insolvency Act of 1936.
[62] *Ibid*.
[63] S 112 of the Insolvency Act of 1936; see also Boraine *et al Meskin's Insolvency Law* (2008) Last updated: August 2022 Service issue: 58 at 15.1.2.
[64] S 91 read with s 112 of the Insolvency Act of 1936; see Boraine *et al Meskin's Insolvency Law* (2008) Last updated: August 2022 Service issue: 58 at 15.1.5.2; see also Calitz & Boraine 2005 *TSAR* 731.
[65] *Wilkens v Potgieter* 1996 (4) SA 396 (T) at 940I; see also S 45(3) of the Insolvency Act of 1936.
[66] Ss 40 & 41 of the Insolvency Act of 1936.
[67] Ss 65 & 152 of the Insolvency Act of 1936.
[68] Ss 64(1) & 65 of the Insolvency Act of 1936.

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persons to provide information at the enquiry: persons who are known to have, or on reasonable grounds are believed to have, or have been in possession of property before or after the sequestration of the insolvent estate, belonging to the insolvent estate or the insolvent spouse's estate; a person indebted to the estate; or persons who, in the opinion of the Master, may have information that is material to the insolvent and the affairs of the estate.[69]

The Master may also summon those persons who are known to have, or on reasonable grounds are believed to have, any book or document in their possession containing information that is considered material in relation to the insolvent's affairs.[70] The enquiry process involves questioning the debtor and other witnesses.[71] The Master is expected to document the statement of every person giving evidence in terms of section 65 of the Insolvency Act of 1936.

2.3.4. The functions of the Master in relation to liquidation proceedings

In many instances, the Master's responsibilities insofar as it relates to insolvent debtors are the same in respect of insolvent companies. The Master's responsibilities are, however, found in the Insolvency Act of 1936 as well as the Companies Act of 1973.[72] For the sake of brevity, this sub-section will deal with the Master's role when it comes to the appointment of a liquidator. This is important because of the upcoming case study that exposed potentially systematic shortcomings when it comes to the appointment process and the Master's involvement in the insolvency process.

[69] S 64(2) of the Insolvency Act of 1936. It should be noted that s 67(2) provides that where a meeting is held and there is a presiding officer present, who is not the Master, any reasonable grounds for suspecting that the insolvent has contravened sections of the Insolvency Act of 1936 should be sent to the Master for purposes of bringing these issues to the official's attention.
[70] S 64(3) of the Insolvency Act of 1936; see also Boraine *et al Meskin's Insolvency Law* (2008) Last updated: August 2022 Service issue: 58 at 15.1.5.2.
[71] S 65(1) of the Insolvency Act of 1936; see also Sharrock, Smith and van der Linde *Hockley's Insolvency Law* (2012) 133.
[72] See Delport *et al Henochsberg on the Companies Act 61 of 1973* (2011) Last updated: June 2011 Service Issue: 33 for a comprehensive commentary on the provisions of the Companies Act of 1973. Item 9 of schedule 5 of the Companies Act of 2008 determines that chapter 14 of the Companies Act of 1973 still applies to those companies that are insolvent and are being wound-up as such. S 339 of the Companies Act of 1973 provides that, where the Companies Act of 1973 does not give guidance in respect of a particular matter, the Insolvency Act of 1936 will apply *mutatis mutandis* in respect of the winding-up of a company liquidated under the Companies Act of 1973 for being unable to pay its debts.

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2.3.4.1. The appointment of the liquidator

At the commencement of the winding-up process, control of the property falls to the Master until the liquidator has been appointed.[73] This is unlike the position in personal or consumer insolvency where the estate vests in the Master and then in the trustee. Following the granting of a winding-up order, the Master has the discretionary power to appoint a *provisional* liquidator to administer the estate.[74] However, after the first meeting of creditors, the Master must appoint the nominated final liquidator unless there are grounds not to appoint the nominated person.

Where a person was not properly nominated or is disqualified in terms of sections 372 or 373;[75] has failed to give an acceptance notice within 7 days of the Master's notification;[76] or failed to give section 375(1) security; the Master may decline to appoint the nominated person as liquidator.[77] In addition, should the Master be of the opinion that the person nominated as liquidator should not be appointed, the Master must inform the nominated person in writing that the nomination or appointment has been declined.[78] This notice must contain reasons as to why the Master rejected the nomination.

When it comes to the rejection of the nomination by the Master, it is sufficient that the notice merely reflects that the Master is of the opinion that the person nominated should not be appointed as liquidator of the company concerned.[79] Hence, the Companies Act of 1973 does not explicitly provide for who should or should not be appointed by the Master.[80] It merely provides for disqualifications of persons in certain instances.[81]

[73] S 361 of the Companies Act of 1973.
[74] S 368 of the Companies Act of 1973.
[75] See Boraine *et al Meskin's Insolvency Law* (2008) Last updated: August 2022 Service issue: 58 at 4.32.
[76] The Master must provide the appointed liquidator with a notification letter for acceptance purposes.
[77] S 370(1) of the Companies Act of 1973.
[78] See Boraine *et al Meskin's Insolvency Law* (2008) Last updated: August 2022 Service issue: 58 at 4.28.
[79] Kunst *et al Meskin Insolvency Law and its Operation in Winding-Up* (loose-leaf edition) at 4.1.
[80] Calitz "Some administrative law aspects of state regulation of insolvency law revisited – Musenwa v Master of the North Gauteng High Court (unreported 54849/10) ZAGPPHC 190 (5 November 2010)" 2011 *Obiter* 758 748.
[81] *Ibid*; see also S 374 of the Companies Act of 1973.

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In terms of section 370(2)(*a*), and if the Master has either declined a nomination or set aside an appointment in terms of section 371(3), a meeting of creditors and members, or contributories of the company concerned must be convened. This is for purposes of nominating another person. In accordance with section 370(2)(*b*), the notice for convening the meeting must set out the reason for the meeting (i.e. that it is for purposes of obtaining a new nomination after the initial nomination was declined or set aside). Furthermore, in terms of sub-section 2(*c*), the Master is expected to post a copy of the notice to every creditor whose claim against the company was previously proved and admitted.

In terms of section 370(3), and if the Master again declines to appoint the persons nominated as such at the meeting, the Master must provide a reasoned written notice to the nominated person informing him or her of the decision. Thereafter, the Master may appoint a liquidator or liquidators for the company concerned.[82]

It should be noted that section 371 provides recourse to persons aggrieved by the appointment process set out in section 370. Section 371(1) determines that any person who is grieved by the appointment or rejection of the nomination, may request the Master to provide reasons for the appointment or refusal. This request must be submitted to the Minister of Justice within a period of seven days from the date of appointment or refusal and must be in writing.[83]

In response, the Minister must refer the matter to the Master and the Master must submit reasons for the appointment or refusal to the Minister. This must be done within seven days of receipt of the request from the Minister, and must be writing, coupled with any relevant documents or information in possession of the Master.[84]

The Minister may, but is not obligated to, confirm, uphold, or set aside the appointment or refusal by the Master after considering of the reasons and documents received from the Master and the written representations received from the person who referred the matter to the Minister.[85] Should the Minister decide to set aside a refusal by the Master,

[82] S 370(3) of the Companies Act of 1973.
[83] S 371(1) of the Companies Act of 1973.
[84] S 371(2) of the Companies Act of 1973.
[85] S 371(3) of the Companies Act of 1973.

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he must direct the Master to accept the nomination and appoint that person as the liquidator of the company concerned.[86]

2.4. The Master's Office staffing complement

The upcoming discussion deals with the empowering provisions related to officials of the Master's Office, but will also deal with some external factors that affect the implementation of the various provisions relating to the functions of the Master in insolvency proceedings. As the Master is involved in numerous stages of the administration of the insolvency process by virtue of its statutory mandate, it inherently relies on the people working in the Master's office to execute its duties.

The appointment of Masters, Deputy Masters and Assistant Masters falls within the portfolio of the Minister of Justice and Correctional Services.[87] In terms of section 2(1)(*a*) of the Administration of Estates Act, the Minister is responsible for the appointment of a Chief Master of the High Courts;[88] a Master of the High Court within each jurisdiction of a division of the High Court; and one or more Deputy Masters and Assistant Masters within each jurisdiction of a division of the High Court.[89] Assistant Masters function under the control, direction, and supervision of the Master and may act in accordance with the powers ascribed to the Master by the legislature.[90] When it comes to the appointment of Masters, Deputy Masters, or Assistant Masters, candidates must hold a diploma *iuris* or an equivalent as determined by the Minister of Public Services and Administration.[91]

Section 1A of the Administration of Estates Act, where the Minister believes that there is a need for more than one Master, Deputy Master, or Assistant Master within the jurisdiction of a specific division of the High Court, he or she may appoint another Master, Deputy Master or Assistant Master for administrative purposes. It is

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[86] *Ibid*.
[87] S 2(1)(*a*) of the Administration of Estates Act 66 of 1965 (hereafter "Administration of Estates Act); proclamation 47 in *Government Gazette* 37839 on 15 July 2014 entrusted the administration, powers, and functions to the Minister of Justice and Correctional Services.
[88] The position of the Chief Master will be explained below.
[89] S 2(1)(*a*)(*i*)-(*iii*) of the Administration of Estates Act.
[90] *Ibid*.
[91] S 2(2) of the Administration of Estates Act; the diploma *iuris* (D.*Iuris*) is an NQF level 6 qualification. The modern-day equivalent of the *diplona iuris* is a diploma in law, which is also an NQF level 6 qualification. The credits of this qualification are not, however, substantive enough to translate into a degree in law.

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conceivable that this provision is aimed at ensuring that the Master's office is properly staffed with authorised personnel in order to actively fulfil its administrative duties without delay.

The Chief Master serves as the executive officer of all Masters' offices and, by virtue of this position, should exercise control, direction, and supervision over all the Masters in South Africa.[92] The Chief Master only reports to the Minister.[93]

With the above in mind, it is preliminarily observed that the qualification requirements stipulated in section 2(2) of the Administration of Estates Act for Master's Office officials are particularly lacklustre and, as will be shown,[94] should be revised, with emphasis on further training protocols being set-out.

2.5. Administrative law and the Master's Office

It is trite law that the introduction of the constitutional democracy has shifted the manner in which legal thought and decision making is carried out in South Africa.[95] This is an important consideration given the number of discretionary decisions the Master's Office is empowered to make in terms of the Insolvency Act of 1936, Companies Act of 1973, Companies Act of 2008, and the Close Corporations Act of 1984. Regardless of the lack of precedent relating to the impact of the Constitution's administrative law requirements on the insolvency law regime, and by extension the Master's office decisions, the law of insolvency will not remain untouched by these constitutional provisions.[96]

The enactment of the Promotion of Justice and Administration Act[97] was a direct consequence of South Africa's shift from a culture of authority to one of justification and accountability, informed by the Constitution.[98] The Master's Office, as an

[92] S 2(1)(*b*)(*ii*)-(*iii*) of the Administration of Estates Act.
[93] S 2(1)(*b*)(*i*) of the Administration of Estates Act.
[94] See section 3.4.2. of this dissertation for a discussion on proposed changes to the qualification standards for DO officials, amongst other things.
[95] *Holomisa v Argus Newspaper Limited* 1996 (6) BCLR 836 (W) at 836J; see also Botha *Administrative justice and interpretation of statutes: a practical guide* in Lange and Wessels (eds) *The right to know* (2004) 14.
[96] Calitz 2012 *Obiter* 459.
[97] 3 of 2000 (hereafter "PAJA")
[98] See Calitz 2012 *Obiter* 460.

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administrative body, is expected to make decisions that are inferred from a legal source, which includes legislation.[99]

These decisions must be lawful, reasonable, and procedurally fair.[100] Lawfulness means that the decision should be in accordance with an empowering provision.[101] When it comes to reasonableness, there is an essential test that enquires into the rational connection between the decision taken, the facts of the case, and the reasons provided for the decision.[102] Hence, the reasonableness of a decision is usually to be determined on a case-by-case basis.[103] The nature of the decision, the identity and competence of the decision-maker, the nature of the competing interests, and the impact of the decision on the stakeholders involved must be considered.[104] Section 33(1) of PAJA determines that everyone is entitled to administrative action that is procedurally fair. This provision should also be read with section 3(1) which provides that any administrative action that would or does materially and adversely affect rights or legitimate expectations of anyone must be procedurally fair. Essentially then, an affected person must be afforded the opportunity to be heard and must be given all the necessary information and access to an unbiased and impartial hearing.[105]

With the above said, it follows that there may indeed be instances where a complainant wishes to have a Master's decision reviewed by the courts.[106] It remains to be seen whether PAJA or the Insolvency Act of 1936 will offer the best option for a complainant.[107] What is clear is that, regardless of precedent, the Master's Office is

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[99] Calitz 2012 *Obiter* 468.
[100] S 33 of PAJA.
[101] *Fedsure Life Insurance (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at para 58; see also Calitz 2012 *Obiter* 468.
[102] *Nieuwoudt v Chairman, Amnesty Committee, Truth and Reconciliation Committee* 2002 (2) SA 143 (C) at para 155; see also Calitz 2012 *Obiter* 468.
[103] *Bato Star Fishing (Pty) Ltd v Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para 22 (hereafter "*Bato*").
[104] *Bato* at para 45.
[105] *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A); see also Calitz 2012 *Obiter* 470.
[106] See section 2.7. of this dissertation for a *Khammissa* case-study which directly involved a decision taken by the Master's Office; see also Calitz 2012 *Obiter* 476; see also Prinsloo v The Master of the High Court and Others (unreported 28039/2017) ZAGPJHC 594 (3 November 2021) for another example of an instance where an applicant wished to have a decision taken by the Master's Office reviewed.
[107] Calitz 2012 *Obiter* 477; see also *Ex parte: Master of the High Court of South Africa (North Gauteng)* 2011 (5) SA 311 (GNP) at para 32 which recognised that decisions taken by the Master in relation to appointment were liable for review in accordance with both PAJA and s 151 of the Insolvency Act of 1936; see further *Master of the High Court, Western Cape Division, Cape Town v Van Zyl* 2019 (2) SA

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bound by the provisions of PAJA and should make every effort to ensure that it is making decisions that are lawful, reasonable, and procedurally fair.[108]

However, with all the discourse that has come before, it is becoming clear that the Master's office is not provided with a fair chance at making decisions in line with PAJA. The provisions pertaining to the Master's Office must be harmonised insofar as the provisions of the insolvency law and administrative law is concerned.[109]

2.6. Commentary

There has been some rigorous debate amongst scholars in relation to the appointment of trustees and liquidators.[110] In reality, creditors rarely attend the statutorily prescribed meetings of creditors.[111] This is a concerning phenomenon because creditors are essential to the process and central to the appointment of the trustee and liquidator.[112] The perceived lack of interest may largely be attributed to the creditors' reliance on the Master, and the trustees or liquidators to consider their best interests.[113]

In the premises, the Master's Office is purposefully or incidentally 'coronated' as the lead role player in the majority of insolvency processes. I submit that, because the Master assumes an active role in the insolvency sphere, there may be room for regulatory adjustments and additional empowering provisions to aid the Master in fulfilling its current functions. I discuss this in more detail below. It is nevertheless important to highlight that, because of the Master's practical involvement, the constraints of a developing but struggling economy, and increasing numbers of insolvencies and liquidations, there is a case to be made for improvement.[114] Statistics

442 (WCC) at para 122 which recognised that the Master's appointment decision was liable to be set aside on numerous bases under s 6(2) of PAJA

[108] Calitz 2012 *Obiter* 480; see also *Constantia Insurance Co Ltd v Master of the High Court, Johannesburg and Others* 2016 (6) SA 386 (GJ) at para 38 which specifically highlights that decisions taken in terms of s 45(3) of the Insolvency Act of 1936 are considered as administrative action, which means that the process under s 45(3) needs to be procedurally fair.

[109] *Ibid*.

[110] See South African Law Reform Commission "Review of the Law of Insolvency" Project 63 (2000) at 3.1.

[111] Calitz & Boraine 2005 *TSAR* 732.

[112] *Ibid*.

[113] *Ibid*.

[114] Statistics South Africa "Statistics of liquidations and insolvencies (preliminary) – June 2020", available at http://www.statssa.gov.za/publications/P0043/P0043June2020.pdf (last accessed on 15 November 2022).

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South Africa has recorded that as of June 2020, there had been 134 liquidations,[115] and as of May 2020 there had been 42 insolvencies ongoing.[116]

2.6.1. Commentary on human resources at the Master's Office

It is important to consider personnel issues relating to competencies, training procedures, and the overarching minimum qualification requirements for appointments within the Master's Office. In other words, the fulfilment of the Master's Office's functions is not purely based on the empowering provisions within the Insolvency Act of 1936 but is also linked to the people who need to actively act in accordance with these provisions. It follows that, regardless of the potential legislative deficiencies, there may also be personnel issues which exacerbate problems relating to the functioning of the Master's Office.

The competencies of personnel within the Master's Office is directly reliant on factors such as training and qualification requirements. In dealing with this complex topic, reference will be made to the Parliamentary Monitoring Group's (hereafter "PMG") report on the briefing on the Master's Office and Guardians Fund.[117] The report comes out of the PMG research unit led by Mr Nesbitt.[118] This report specifically refers to problems arising in the Master's Office as per Chief Master reports and meetings of the committee of the DOJ & CD. For the sake of brevity, the problems primarily include staffing matters in relation to uncertainty regarding temporary staffing, skills development, capacity and a lack of human resources development.[119] According to the PMG report, the Chief Master at the time had pointed out in 2006 that, while there was no shortage of qualified candidates, there was a substantive lack of literacy and numeracy skills which impacted the competency of qualifying candidates.[120] By virtue of this, the Chief Master reported that the cumulative effect of these issues was an erosion of existing capacity within the Master's Office.

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[115] *Ibid*.
[116] *Ibid*.
[117] The PMG is a non-profit organisation which provides information on all South African parliamentary committee proceedings.
[118] PMG Research Unit *Brief on the Master's Office and Guardians Fund*, available at https://pmg.org.za/files/docs/080827nesbitt.rtf (accessed on 12 July 2022).
[119] *Ibid*.
[120] *Ibid*.

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With the above in mind, the PMG Research Unit noted that crucial staffing matters were preventing the Master's Office from fulfilling its core functions, with the aim of serving the public.[121] Interestingly, the report also specifically indicates that the Select Committee on Security and Constitutional Affairs held a meeting where it was confirmed that emphasis was being placed on the training and hiring of competent candidates.[122] The efficacy of these training programmes remains to be seen, especially when one considers news reports which highlight crisis management being carried out relating to the staffing complement of the Master's Office.[123] According to a news article dated April 2022, one of the key problems encountered throughout 2020 and 2021 was the inconsistency of processes in the various Master's Offices coupled with a lack of consequence management.[124]

The above factors point to a lack of competent personnel and inadequate oversight when it comes to the various processes that involve the Master's Office. It is submitted that a strategic and operational policy needs to be developed by the Master's Office, with the emphasis on the re-evaluation of the qualification requirements for candidates and a rigid training protocol for those candidates who are appointed.[125] It is also important that there is consistent oversight over the work of the Master's Office. This is particularly important when one considers that the Master's Office's service rating of "extremely poor" almost doubled from 18 percent in quarter one of 2018 to 33 percent in quarter one of 2021, according to the Fiduciary Institute of South Africa (hereafter "FISA").[126]

In passing, it should be noted that FISA has expressed its commitment to continue collaborating with the Chief Master to ensure that the interests of the public are served in good faith.[127] This goal is unfortunately being hampered by the lack of communication on the part of the Chief Master.[128]

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[121] *Ibid*.
[122] *Ibid*.
[123] Van Vuren "Update on the Master's Office" 2022 *Without Prejudice*, available at https://www.withoutprejudice.co.za/free/article/7476/view (last accessed on 14 April 2022).
[124] *Ibid*.
[125] The World Bank *Report on the observance of standards and codes – insolvency and creditor rights* South Africa (2012) (hereafter "World Bank Report") 10.
[126] *Ibid*.
[127] *Ibid*.
[128] *Ibid*.

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The above highlights two issues: the Master's Office is struggling to identify competent candidates and training these candidates; and finding it difficult to oversee the functioning of the Office in a consistent manner. This is cause for concern when one considers the extent of the involvement of the Master in insolvency proceedings.

There is another consideration that needs to be contemplated in order to determine whether it needs to be addressed to ensure that the Master functions properly. This is the possibility of practical challenges arising out of its regulatory position. I deal with one challenge here – the lack of referral provisions in the legislation.

2.6.2. Commentary on the lack of referral provisions

Legislative referral provisions directly empower an authority or entity to correspond or consult with another key entity.[129] The Insolvency Act of 1936 does not provide for these empowering provisions. The only comparable provision, in the style of the Companies Act of 2008, is where the Insolvency Act of 1936 provides for lateral referrals between a trustee and a Master, the insolvent debtor and trustee, the Master and creditors, or between the Master and the Minister.[130] In other words, legally speaking there is only provision made for correspondence to be had directly between parties involved in insolvency proceedings, which leaves the Master's Office in a difficult position. This is especially true because laterally speaking these parties do not have the requisite authority to change the legislative framework through which the Master's Office operates. Meaning that without a higher body (i.e., a vertical authority) the Master's Office is limited in its recourse when it comes to the current regulatory position. It is also particularly interesting to note that the Insolvency Act of 1936 does not provide the Master's Office with the authority to refer practical problems linked to its statutory position to the Minister.[131] Essentially then leaving the Master's Office up the creek with no paddle.

It is submitted that the lateral form of empowering provisions is not as powerful, when considering how the Master's Office fulfils its functions, as a regulatory regime that would also empower the Master's Office to actively consult with key bodies when it

[129] The way in which the Companies Act of 2008 has been reformulated to encourage this practice will be touched on in chapter 5 which deals with recommendations for regulatory reform.
[130] Ss 56(1), 44(4), 64(1), 56(5), 53(5), & 81(1) of the Insolvency Act of 1936.
[131] *Ibid*.

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relates to its regulatory position. It should be noted that the Master's Office is not effectively empowered to engage with authorities which have the power and capacity to effect systematic changes that could reform the impact of the Master's Office in the insolvency law space. As an example of how this current position could be improved, there is room for a committee to be provided for in the insolvency regime which has specific oversight of the Master's Office and is able to keep abreast of impracticalities arising out of the Master's functions.[132] This would have the effect of maintaining consistent oversight of the Master's Office, administratively, legislatively, and practically, and make regulations which mitigate these problems or propose legislative amendments to the Minister.

The discussion of the roles and functions of the Master's office within the field of insolvency showed that the Master is supposed to take an active administrative part in these processes. As such, it is concerning when statutorily prescribed functions are performed in a mechanical manner and without due regard for the intricacies of each matter. As an example, reference is made to the *Khammissa* case.

2.7. *Khammissa* case study

2.7.1. Introduction

The *Khammissa* case study is an example of the shortcomings of the regulatory and legislative framework and the effects of these shortcomings on the efficiency of the administration of insolvency procedures from the perspective of the Master's Office. The discussion introduces, and contextualises, the question of whether the current regulatory regime is conducive to enable the Master's Office to fulfil its various roles, functions, and powers, as efficiently as possible. The discussion is based on the premise that the Master's Office should be aided to ensure that its main role, to serve the public, is preserved and executed properly.

2.7.2. The facts of the case

For reading purposes, it should be noted that the applicants in this case are the joint liquidators of Duro Pressing (Pty) Ltd (hereafter "Duro") originally appointed as

[132] See sections 3.2.2. and 3.3.4. of this dissertation which highlight legislative interventions that provide for oversight bodies of the DO and CIPC.

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provisional liquidators of Duro by the Master on 8 April 2014.[133] The first respondent is the Master of the Gauteng High Court local division. The second respondent is Mr Gert de Wet, brother of Mr CF de Wet.[134] Moreover, the third respondent is a Mr Engelbrecht.

Khammissa involved the winding up of a private company, namely Duro. Duro was wound up by special resolution on 27 February 2014.[135] The applicants were originally appointed as the provisional liquidators of Duro by the Master on 8 April 2014.[136] Procedurally, the winding-up was made by court order on 25 July 2014. In terms of section 344(*a*) of the Companies Act of 1973, a company may be would up by the court if the company already has a special resolution (which in this case was present) specifying that it be wound up by the courts. Hence, seeing as Duro had entered into a special resolution for winding-up, the court utilised its position in terms of section 344(a) of the Companies Act of 1973. Unfortunately, one of the initial joint liquidators, Mr CF de Wet,[137] passed away on 23 May 2017 while the process was still ongoing.[138] This necessitated the convening of a creditors meeting on the part of the Master on 24 August 2017.[139]

The meeting convened in the light of Mr de Wet's passing was later reconvened on 29 August 2017, and the second and third respondents' appointments were declined by Assistant Deputy Master, Ms Dube, on 31 August 2017.[140] This decision was reversed by Deputy Master, Mr Maphaha, on 25 October 2017.[141] For the sake of brevity, Mr Maphaha justified his revocation of Ms Dube's decision on the basis that the original refusal was made in error.[142] Ms Dube's decision was made in accordance with section 370(1) of the Companies Act of 1973,[143] but Mr Maphaha believed that Ms Dube had

[133] *Khammissa* at para 3.
[134] *Ibid*.
[135] *Ibid*.
[136] *Ibid*.
[137] CF de Wet is the brother of Mr Gert de Wet, the second respondent.
[138] *Khammissa* at para 3.
[139] *Ibid*; see also s 377(1) of the Companies Act of 1973 which specifically obliges the Master to convene a creditors' meeting where there is a vacancy in the office of the liquidator.
[140] *Khammissa* at para 4
[141] S 370(1) of the Companies Act of 1973 was used as the empowering provision for the decision taken by Ms Dube.
[142] *Khammissa* at para 2.
[143] S 370(1) of the Companies Act of 1973 provides the Master's office with the power to decline the nomination of a liquidator on several bases, such as: disqualifications under ss 372 & 373; failures to provide securities; or if the Master is not of the opinion that said liquidator should be appointed or nominated.

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erred in her interpretation and use of the section. Section 370(1), as specified in footnote 109 below, provides for a declination of appointment of a nominated liquidator by the Master. Amongst other things, in so far as the Master is of the opinion that a nominated liquidator was not properly nominated, is disqualified from being appointment in terms of sections 372 and 273, or has failed to provide notice of acceptance of appointment with a seven-day period of notification, the Master may decline said nomination. It should be noted that whilst Mr Maphaha alleged an error in law and interpretation on Ms Dube's part, there were no reasons provided for this allegation.[144] As a result of the original refusal by the Assistant Deputy Master, there was a letter submitted to the Master's Office that indicated that the creditors were materially affected by the refusal to appoint the second and third respondents as liquidators. As such, reasons for the decision were requested on behalf of the unnamed creditors.[145]

2.7.3. Submissions by the respective parties

2.7.3.1. Applicants' submissions

The applicants contended that the appointment of the respondents was *ultra vires* on numerous interrelated grounds.[146] They further contended that the second decision to revoke the original refusal to appoint the second and third respondents was invalid because a decision not to appoint these persons as liquidators had already been taken.[147] It was argued that there was no empowering provision that allowed a further appointment once the original decision had been made.[148] Only the Minister could validly appoint another liquidator by following the prescribed procedure once section 371 had been invoked.[149] The applicants also claimed that the appointments made by Mr Maphaha was not carried out in accordance with a legitimate nomination process and that it was not based on information given to Mr Maphaha by the creditors.[150] It

[144] *Khammissa* at para 10.
[145] *Khammissa* at para 4; the request for reasons was sent on 22 September 2017.
[146] *Khammissa* at para 9.
[147] *Khammissa* at para 7.
[148] *Khammissa* at para 9.
[149] *Ibid*. S 371(1) determines that any person who is aggrieved by the appointment or otherwise the rejection of a nomination by the Master may request the Master to submit reasons for the appointment or refusal. The respondents based this submission on the fact that the applicants were contemplating an order requesting that the court fees be shared with the respondents.
[150] *Ibid*.

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was argued that the decision itself was arbitrary, capricious, irrational and procedurally unfair.[151]

2.7.3.2. Respondents' submissions

The only input on the part of the respondents was by way of a notice in terms of Rule 6(5)(*d*)(iii).[152] The questions of law raised included that the applicants lacked the *locus standi* to seek relief; that section 151 of the Insolvency Act of 1936 and Promotion of Administrative Justice Act[153] did not apply to this scenario; and that the applicants had disregarded section 371 of the Companies Act of 1973.

2.7.3.3. Assistant Deputy Master and Deputy Master submissions

In response to a request submitted by counsel for the applicants,[154] the assistant Deputy Master indicated that[155]

> "De Wet did not enjoy support from the majority of creditors … Engelbrecht was appointed by creditors who had not proved their claims … [and] [t]he Administration of the estate was at its final stages."

The reasons provided by the Assistant Deputy Master were not challenged.[156] Ms Dube indicated that, once a decision by the Office of the Master is taken, the Office became *functus officio* and such a decision taken, in this case a refusal to appoint, could not be overruled by another official. In addition, duties at the Office of the Master were assigned to, and performed by, *all* officers appointed in terms of the Administration of Estates Act.[157] This meant that should an officer (i.e., Ms Dube as an assistant Deputy Master) of the Master's Office take a decision, it cannot be reversed by another officer of the Master's Office, but only by way of review in court.

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[151] *Ibid.*
[152] This notice in terms of the Uniform Rules of Court is usually made use of when there are questions of law involved.
[153] 3 of 2000 (hereafter "PAJA")
[154] Reasons for the refusal were provided in response to the request on 28 September 2017.
[155] *Khammissa* at para 6.
[156] *Khammissa* at para 12.
[157] *Khammissa* at para 7.

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In contrast, the Deputy Master never provided reasons for the acceptance of the nomination of the second and third respondents.[158]

2.7.4. Legal issues

2.7.4.1. Locus standi

The High Court had to consider whether the applicants in this case had the necessary *locus standi* before deciding upon the fundamental legal issues.

Counsel for the second and third respondents submitted that the applicants, as liquidators, had no legal rights or interest to challenge their appointments. It was submitted that they did not fall into the category of "aggrieved persons" referred to in section 371(1) of the Companies Act of 1973. Reliance was placed on the decision in *Janse van Rensburg v The Master and Others* (hereafter "*Van Rensburg*"),[159] which held that an "aggrieved person" should be read to mean a person with a legitimate grievance. Hence, when considered within the context of section 371, it means a creditor and not an "…[i]nterested, disappointed, or disgruntled person…" specifically because the decision may affect a benefit that a creditor may have received.[160]

Moreover, counsel for the respondents also relied on the distinction made in *Van Rensburg* between an appointment based on the Master's discretion in terms of section 374,[161] and an appointment which is the result of a nomination process in terms of section 371. This distinction implied that only where there is an appointment or non-appointment of a person nominated within the meaning of section 371, does the remedy for a grievance in terms of section 371 apply.[162] Hence, the respondents were implying that because this was a case of non-appointment, they should indeed have a remedy as set out in section 371.

Counsel for the applicant contended that *Van Rensburg* was incorrectly decided, and that the case itself was different because it did not deal with an unlawful administrative

[158] *Khammissa* at para 12.
[159] 2004 (5) SA 173 (T) at para 23.
[160] *Khammissa* at paras 17 and 23.
[161] S 374 provides that, where a Master believes it to be desirable, a co-liquidator may be appointed. This is only permissible where the person is not disqualified and has provided security to the satisfaction of the Master.
[162] *Khammissa* 29.

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action.[163] It was contended that the decision in *Geduldt v The Master and Others* (hereafter "Geduldt") should be followed.[164] In *Geduldt*, Davis J noted that the *Van Rensburg* dictum was not *necessarily* correct and that the interpretation of "aggrieved persons" was not as restrictive as held in *Van Rensburg*.[165]

In *Khammissa* it was held that, regardless of the legal cause, an undue emphasis on the identity of the complainant could not be the sole determining factor of whether the complainant was an "aggrieved person".[166] Placing a strong emphasis on the person of the complainant would unduly exclude a wide range of persons who might have a legitimate legal grievance and be affected by the decision, notwithstanding not being a creditor or nominated as a liquidator.[167] Moreover, it was held that *Van Rensburg* was decided before the current company law dispensation, which considers the interests of a range of stakeholders, came into existence and taking heed of this decision would be inconsistent with the prevailing regime.[168]

In the premises, the court held that the grievance revolved around a perceived unlawful, arbitrary, and capricious revocation followed by an unlawful appointment.[169] The applicants' contentions had not been opposed by the Master nor had any explanation been forthcoming from the Master's Office.[170] The court acknowledged that the applicants did not have the right to stop a legitimate appointment.[171] It held that the contentions pertained to an unlawful decision of the Master in respect of an estate in relation to which the applicants had direct administrative dealings.[172] By virtue of this, the court had the authority to review the appointment.[173] The court acknowledged the seriousness of the allegations relating to an unlawful appointment in respect of an estate that the applicants were supposed to oversee and noted that

[163] *Khammissa* at para 18.
[164] 2005 (4) SA 460 (C).
[165] *Geduldt* at para 11. This observation of a non-restrictive interpretation was based on Davis J's understanding of Hoexter JA's analysis of the phrase "person's aggrieved" in *Francis George Hill Family Trust v South African Reserve Bank and Others* 1992 (3) SA 91 (A).
[166] *Khammissa* at para 23.
[167] *Ibid*.
[168] *Khammissa* at para 24.
[169] *Khammissa* at para 30.
[170] *Khammissa* at para 32.
[171] *Ibid*.
[172] *Ibid*.
[173] *Khammissa* at para 26.

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this occurrence pointed directly to a potential issue regarding the workings of the Master's office.[174]

2.7.4.2. Relief for the applicants

As the applicants had the necessary *locus standi* to pursue the review of Mr Maphaha's decision, the court looked to section 371 to decide whether this was the only means of relief available to the applicants. Counsel for the respondents also looked to dispose of the review by arguing that that section 371 was the only means by which the applicants could oppose the decision and, by virtue of this, section 151 of the Insolvency Act was not an avenue available to the applicants.[175]

The respondents' second assertion related to the correct manner to challenge the decision. Counsel for the respondents argued that section 151 of the Insolvency Act of 1936 was not available to the applicants because, according to section 339 of the Companies Act of 1973, recourse under the Insolvency Act of 1936 is only available where the Companies Act of 1973 does not provide for relief in a specific instance. The correct course of action for the applicants was section 371 of the Companies Act of 1973.[176] Reliance was placed on *Patel v Master of the High Court,*[177] which effectively held that, if the applicants had the necessary *locus standi* to seek the review of an appointment, section 371 of the Companies Act of 1973 was the only means to do so.[178]

The court highlighted that neither the applicants nor the respondents had negated the importance of section 151 of the Insolvency Act of 1936.[179] However, both parties had agreed that section 371 applied to a decision taken by the Master insofar as the decision related to the nomination of a liquidator at a meeting of creditors.[180] The court determined that this section applied in those instances where a dispute had arisen due

[174] *Khammissa* at para 13.
[175] S 151 of the Insolvency Act of 1936 provides that a court may review a matter after notice has been given to the Master or presiding officer, and by any person who is aggrieved by any decision or, *inter alia*, appointment of the Master, or by a decision, ruling or order of a presiding officer at a meeting of creditors. In terms of this provision, if all or most of the creditors are affected, notice to the trustee of the estate shall be deemed to be notice to all the creditors.
[176] This is because the Companies Act of 1973 already provided for this.
[177] 2014 JDR 0346 (WCC). This case specifically dealt with a review and setting aside of an appointment of a co-liquidator.
[178] *Khammissa* at para 29.
[179] *Ibid*.
[180] *Ibid*.

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to the appointment or non-appointment of a person duly nominated in terms of the Companies Act of 1973.[181] This section became applicable where parties such as the respondents and creditors were at odds, which in this case they were not.[182] In *Khammissa*, the particular grievance was not concerned with the nomination or failure to appoint the liquidators but rather with the legal validity of the second appointment by Mr Maphaha.[183]

The court held that section 371 was not the only provision available when disputes arose due to the appointment or non-appointment of a liquidator.[184] This view is well-placed because the objection in this case was not aimed at the appointment or non-appointment *per se* but at the two conflicting decisions and appointment certificates. The applicants were disputing the legal validity of the second appointment by Mr Maphaha *after* a decision had already been made on the same issue.[185]

The court noted that section 339 of the Companies Act of 1973 applied.[186] The recourse provided for in terms of section 151 of the Insolvency Act of 1936 was available to the applicants.[187] Section 151 provided the applicants (as "aggrieved persons") to bring take the decisions of the Master's Office on review.[188]

2.7.5. Decision

The court held that the Master was not impowered in terms of the Administration of Estates Act to revoke a decision already taken and, once the decision is communicated to interested and affected parties, it is considered final and irrevocable.[189]

The court further held that the Companies Act of 1973 was not the only applicable legislation and the applicants had rightly invoked section 151 of the Insolvency Act of

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[181] *Ibid.*
[182] *Ibid*.
[183] *Khammissa* at para 30.
[184] *Ibid*.
[185] *Khammissa* 30.
[186] S 339 of the Companies Act of 1973 provides that, where the Act itself does not provide for recourse in the procedures relating to the winding up of a company, the Insolvency Act of 1936 should apply *mutatis mutandis*.
[187] *Khammissa* at para 30.
[188] It must be noted that the word "decisions" is used here to mean decisions, rulings, orders, appointments, or taxations of the Master.
[189] *Nkosi v Khanyile NO and Another* 2003 (2) SA 63 (N) at 70F; see also *Khammissa* at para 33.

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1936 to challenge the second decision of Mr Maphaha to appoint the second and third respondents.[190] In doing so, the matter was entered *de novo* and the second decision taken by Mr Maphaha was reviewed and set aside as administrative action in respect of which no power had been given to the Master's Office – it did not have the authority to revoke or amend its own decision, once communicated, or issue the appointment certificate dated 25 October 2017.[191] Therefore, Ms Dube's certificate of appointment dated 31 August 2017 was declared valid.[192]

2.7.6. Commentary

Khammissa raises questions fundamental to the functioning of the Master's Office.

One of the key questions raised by the court was why the Master had effectively assumed a *Pontius Pilate* outlook when it came to the issue at hand.[193] Using this metaphor, the court indicated that it believed that the Master was trying to circumvent its responsibility. The mistakes that had been made in relation to the nomination process, when viewed in light of the provisions of the Administration of Estates Act, were concerning. The Master was criticised for not furnishing reasons for Mr Maphaha's decision and only choosing to abide by the outcome of the review application.[194] This observation by the court was also echoed by Jooste who finds it troublesome that the Master did not get involved in a complex case.[195] The facts of the case were not so irregular to imply that a similar situation could not arise again, or had not already arisen – thus whether this was an isolated incident or a regular occurrence.

2.8. Conclusion

This chapter traversed the Master's Office position within the insolvency law sphere. To start it provided a historical overview of the development of the Master's Office in order to understand why the institution functions in the way that it does and discussed

[190] *Khammissa* at para 32.
[191] *Khammissa* at para 33.
[192] *Khammissa* at para 34.1-34.3.
[193] Pontius Pilate was a Roman official in St Matthew's gospel who after ordering the crucifixion of Jesus Christ was recorded to have washed his hands, a symbol of washing himself of responsibility for ordering the death of Jesus Christ.
[194] *Khammissa* at para 10.
[195] Jooste at 2.

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why certain empowering provisions were established over time. Following which, critical legislative observations were made in relation to the Master's Office, to establish an understanding of the roles and functions of the institution within insolvency proceedings. It is worthwhile noting that the Master's Office has a key role to play, in both sequestrations and liquidations, and it follows that its operations are important to bolster and preserve for the sake of public confidence as well as the sanctity of insolvency procedures.

This chapter also touched on three key factors which frustrate the efficacy of the Master's Office as it relates to its functions within the insolvency regime.

The first problem that seems to be preventing the Master's Office from properly fulfilling its functions is the legislative framework, which currently lacks certainty, referral provisions, and is causing informal common practices to manifest in ways which may become more and more concerning in due course. These issues are creating unwarranted procedural problems for the Master's Office. Furthermore, the Master's Office may be (in)directly compensating for the lack of guidance from the legislative framework by taking informal decisions.[196]

The second issue pertains to the staffing complement of the Master's Office. Competent personnel are in short supply and this problem is exacerbated by the lack of adequate training procedures, oversight and co-operation between the Master's Office and other regulatory bodies.

Lastly, there are also practical issues arising at the appointment stages of IPs. These issues are attributable to the legislative framework at large which is not keeping up to date with macro socio-economic changes. In other words, it remains to be seen whether or not the legislature is being informed of the current economic and social dispensation following a significant downturn in economic activity that directly affects the social reality of South Africans, and by extension the Master's ability to maintain some form of administrative and supervisory power, in line with its legislative position. The effect currently is practical compromises by the Master's Office as an attempt to continue functioning.

[196] The World Bank *Report* 13.

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Clearly reform of the legislative framework within which the Master's Office functions is needed. Without this, there will likely be further maladministration which threatens the sanctity of the public service that the Master's Office is supposed to provide.

In addition to this, the *Khammissa*-case was discussed. The case study demonstrates regulatory and practical challenges that the Master's Office has been experiencing when it comes to the insolvency framework. With this being said, it is conceivable that there should be attention paid to how the Master's Office operates and where problems are arising in practical scenarios, given the *Khammissa*-case study.

The next chapter will take the form of a comparative analysis of two internal institutions which both also have key roles to play and operate by virtue of statutes, similar to the Master's Office. This is carried out with the aim of identifying common-ground, whilst also looking to other pieces of legislative networks which may provide reform takeaways that could be transplanted into the insolvency framework, for the benefit of the Master's Office regulatory position.

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Chapter 3: Legal and regulatory analysis of comparable bodies

3.1. Introduction

In the previous chapter, I dealt with the powers and functions of the Master, and highlighted a number of challenges experienced by the Master's Office. In order to contextualise and benchmark the authority and challenges experienced by the Master's Office, it is necessary to investigate selected South African bodies which, in some way, mirror the operations and regulatory positioning of the Master's Office. This will enable one to understand whether there are ways in which the insolvency regime could be enhanced to assist the Master's Office to effectively fulfil its statutory duties.

This chapter consists of a legal and regulatory analysis of comparable South African bodies. It will analyse the DO and the CIPC.[197] These entities were selected for the comparative study because both are creatures of statute,[198] fall within different Departments,[199] and *prima facie* play vital roles in their respective spaces.

The aim of this chapter is to compare the empowering provisions and structures of the selected entities with those of the Master's office. This analysis will highlight the similarities and differences to determine whether there are any considerations that may be translated into recommendations for reform in respect of the position that the Master's Office fulfils within the insolvency regime.

3.2. The Deeds Office

The DO acts as an entity of the DALRRD. The DO is a creature of statute, just like the Master of the High Court, and is regulated by numerous pieces of legislation, such as the Deeds Registries Act of 1937. The Deeds Registries Act of 1937 provides for the appointment of a Registrar and Assistant Registrar of Deeds (where necessary), mirroring the Master's Office in respect of its appointed official – the Master, Deputy Master, and Assistant Master.[200]

[197] Note that "DO" and "CIPC" refer to the Deeds Office and Companies and Intellectual Property Commission as specified in Chapter one at 4.5.
[198] Meaning they both derive their roles, functions, and powers from legislation.
[199] The DO falls within the DALRRD and the CIPC falls within the DTIC.
[200] S 2 of the Deeds Registries Act of 1937.

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The DO is responsible for the registration, management, and maintenance of the property registry of South Africa.[201] The DO is an entity that acts as a public office, meaning that all information contained within the deed's registry should always be accessible to the general public.[202] The purpose of the DO is to ensure that all title deeds to property are registered, processed, and stored.[203] The duties of the DO inform the functions of the entity.

3.2.1.1. Introduction to the functions of the Deeds Office

The aforementioned roles that the DO fulfils fall into three distinct categories, namely: the registration of title deeds to property; the management of title deeds to property; and the maintenance of the property registry which records title deeds to property. From these core roles, it is clear that the DO is responsible for a key part of the human experience – ownership of property. It is even more important when one considers that section 25 of the Constitution of the Republic of South Africa, 1996 (hereafter the "Constitution") specifically provides that no one may be deprived of their property unless a law of general application applies. Moreover, no one may be arbitrarily deprived of their property unless it is for a public purpose or in the public's interest.[204] This inherent right contained within the Bill of Rights in chapter 2 of the Constitution, emphasises the importance of the functions of the DO because its responsibility is to ensure that a title to a property is recorded so that unlawful deprivation of property (in this instance land) does not occur.

Against this background, the functions of the DO will be discussed in the order that they appear within the Deeds Registries Act of 1937.[205] It should be noted that, for the sake of brevity, this dissertation will not detail every function, but only selected functions that are comparable to those of the Master and highlights how important it is that the DO executes its responsibilities effectively.

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[201] DALLRD *Deeds Office*, available at https://www.deeds.gov.za/ (last accessed on 25 July 2022).
[202] *Ibid*.
[203] Note that title deeds are documents that confirm ownership of immovable property that is land.
[204] S 25(2) of the Constitution.
[205] Note that these functions will also take account of all amendments that have been made in terms of the various amendment acts promulgated throughout history.

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3.2.1.2. Functions relating to the maintenance of the deeds registry

Section 3 of the Deeds Registries Act of 1937 sets out the duties of the Registrar, whose position is akin to the Master. As previously mentioned, Registrars are appointed by the Minister of Agriculture, Land Reform and Rural Development (hereafter "Minister of ALRRD") to each of the eleven regional offices.[206] Each regional office is responsible for the title deeds of the properties which are situated within its regional jurisdiction. Within these regional offices, the Registrars (and their deputies and/or assistants), and by extension the DO, are expected to ensure that the Office preserves all property records that existed before the commence of the Deeds Registries Act of 1937.[207] In addition to this, the DO is expected to preserve all those property records which were generated after the commencement of the Deeds Registries Act of 1937.[208]

The DO must examine all deeds and corresponding documents submitted to it for execution or registration, and reject deeds where it is not permitted by the Deeds Registries Act of 1937 to accept same or if other valid objections exist.[209]

Furthermore, the DO must ensure that all the registers' of deeds are kept safe, which are necessary for meeting the objectives, and complying with the provisions, of the Deeds Registries Act of 1937, and for maintaining an efficient and effective registration system that affords security of title.[210] Moreover, a Registrar is also expected to implement any practice and procedural directives issued by the Chief Registrar (CR).[211]

From the above, it is clear that the maintenance of the deeds registry is a key function that must be carried out to ensure that there are no discrepancies which arise in relation to ownership of, or titles to, land.

[206] Note that a Registrar is not the Chief Registrar, just like a Master is not the Chief Master.
[207] S 3(1)(*a*) of the Deeds Registries Act of 1937; note also that s 3(2)(*a*) of the Deeds Registries Act of 1937 empowers the DO to transfer any records that have become dilapidated, or have deteriorated substantially, to the Director of Archives at the DO for proper restoration and preservation.
[208] *Ibid*.
[209] S 3(1)(*b*) of the Deeds Registries Act of 1937.
[210] S 3(1)(*y*) of the Deeds Registries Act of 1937.
[211] S 3(1)(*z*) of the Deeds Registries Act of 1937.

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3.2.1.3. Functions relating to the registration of title deeds

During the process of transfer of land, the DO is responsible to attest to, execute, and register the deeds of transfer of land or certificates of titles to land.[212] The DO is also required to register those deeds of transfer of initial ownership in accordance with section 62 of the Development Facilitation Act.[213] In relation to immovable property, the DO must attest to, and register, mortgage bonds, cessions of mortgage bonds and, where necessary, register the cancellation of these cessions where they were used as security.[214]

While these are the core functions of the DO in relation to titles to property, there are also various additional functions related to registrations and in respect of which the DO bears the responsibility to execute. For example, the DO must register waivers of preference pertaining to registered mortgage and notarial bonds in relation to the whole or part of the hypothecated property.[215] The DO is responsible for registering waivers of preference in relation to reals rights in land in favour of mortgage bond holders.[216] Moreover, the DO must register notarial bonds and, where necessary, record the cancellation and cessions of notarial bonds.[217] The DO should also ensure that notarial deeds which reference people and property within the regional jurisdiction of the DO in question are duly registered.[218]

It is interesting to note that the DO is involved in the family law sphere when it comes to registration functions. Section 3(1)(*k*) of the Deeds Registries Act of 1937 provides that the DO must register antenuptial contracts and orders as contemplated in sections 20 and 21 of the Matrimonial Property Act.[219]

[212] S 3(1)(*d*) of the Deeds Registries Act of 1937.
[213] 67 of 1995. See S 3(1)(*d*)*bis* of the Deeds Registries Act of 1937; note that the Development Facilitation Act has since been repealed and s 3(1)(*d*)*bis* was inserted by s 68 of the repealed Act.
[214] Ss 3(1)(*e*) & 3(1)(*f*) of the Deeds Registries Act of 1937.
[215] S 3(1)(*h*) of the Deeds Registries Act of 1937; note that a notarial bond is essentially a mortgage over the tangible movable property of a debtor in favour of the creditor as a security for a debt or obligation.
[216] S 3(1)(*i*) of the Deeds Registries Act of 1937.
[217] S 3(1)(*j*) of the Deeds Registries Act of 1937.
[218] S 3(1)(*k*) of the Deeds Registries Act of 1937.
[219] 88 of 1984.

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The DO is further involved in the registration of servitudes, whether personal or praedial,[220] and ensuring that any modification or extinction of a registered servitude is recorded.[221] In addition to this, any real rights to property must be registered and, where a real right has been modified or extinguished, the DO must record this change.[222] Moreover, any general plans relating to erven or subdivisions of land must be registered.[223] The Office must further ensure that the registry is opened and record any conditions which relate to the erven or subdivision of the land.[224] In other words, the Office must ensure that where there are conditions in relation to a specific piece of property and/or land or conditions for subdivision, the deeds registry must reflect such conditions. The registry must be used to record these conditions and other necessary specifications, and it acts as a record of security of title, even where subdivision is involved.

3.2.2. The Regulations Board

The Regulations Board is empowered to draft regulations relating to, *inter alia*, the manner and form in which endorsements or entries into the deeds registry should be effected, and how information should be furnished to a Registrar and subsequently recorded.[225] This is a particularly relevant legislative intervention because it provides for an oversight body which has the ability to consider issues presenting at the Deeds Office, and make regulations which aid the functioning of the Deeds Office.

3.3. The Companies and Intellectual Property Commission

The CIPC acts as an entity of the Department of Trade, Industry, and Competition (hereafter "DTIC"). The CIPC was established as a juristic person in terms of the Companies Act of 2008.[226] It was intended to function as an organ of state for the

[220] Mostert *et al The principles of the law of property in South Africa* (2017) 239 – a personal servitude is a limited real right that can exist over both land and movable property whilst a praedial servitude is a limited real right that can only exist over land in favour of a specific plot of this land.
[221] S 3(1)(*o*) of the Deeds Registries Act of 1937.
[222] S 3(1)(*r*) of the Deeds Registries Act of 1937.
[223] S 3(1)(*t*) of the Deeds Registries Act of 1937; note that "erven" means plots of land/s.
[224] *Ibid*.
[225] Ss 10(1)(*e*) & 10(1)(*j*) of the Deeds Registries Act of 1937.
[226] S 185(1) of the Companies Act of 2008; see also Delport *Henochsberg on the Companies Act 71 of 2008* (2020) Last Updated: May 2022 Service Issue at pg 607-608 (hereafter "Henochsberg on the Companies Act of 2008").

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public administration of matters relating to companies and intellectual property.[227] As the CIPC is considered an organ of state, and the legislation requires it to be impartial and act without fear, favour, or prejudice, it follows that it must serve the public in the execution of its duties.[228] Unlike the Master's office and the DO, the position of the CIPC within the regulatory framework is explicitly bolstered by the Companies Act of 2008 – the legislation requires that each organ of state must assist the CIPC where its independence and impartiality may be affected, or it requires assistance to execute its functions.[229] This nuanced difference in *position* is an important consideration because theoretically neither the DO nor the Master's office enjoy explicit statutory protection through the assistance available from other organs of state.

3.3.1. Introduction

The objectives of the CIPC are clearly defined in the Companies Act of 2008.[230] There are numerous roles that the CIPC must fulfil including: registering companies, relevant juristic persons, and intellectual property rights in an effective and efficient manner;[231] maintaining accurate and relevant information in relation to internal and external companies, applicable juristic persons, and intellectual property rights;[232] ensuring the promotion of education relating to company and intellectual property laws;[233] encouraging compliance with the Companies Act of 2008;[234] and ensuring the optimal enforcement of the Companies Act of 2008.[235]

In order to duly exercise its duties, the CIPC is empowered to consult, as needed, with any person or entity, and have regard to international trends in corporate and

[227] *Ibid*; it must be noted that whilst the CIPC is considered an organ of state for public administration, it does not constitute an institution within the public service. Section 185(1) provides: "[T]he Commission is hereby established as a juristic person to function as an organ of state within the public administration, but as an institution outside the public service". See also s 185(2)(*b*) of the Companies Act of 2008 which provides that the CIPC is only subject to the Constitution, the law, and any policy, directive, or request issued by the Minister of Finance in terms of the Companies Act of 2008.
[228] S 185(2)(*c*) of the Companies Act of 2008.
[229] S 185(3) of the Companies Act of 2008.
[230] S 186(1) of the Companies Act of 2008.
[231] S 186(1)(*a*)(*i*)-(*iii*) of the Companies Act of 2008.
[232] S 186(1)(*b*) of the Companies Act of 2008.
[233] S 186(1)(*c*) of the Companies Act of 2008.
[234] S 186(1)(*d*) of the Companies Act of 2008.
[235] S 186(1)(*e*) of the Companies Act of 2008.

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intellectual property law.[236] Neither the Master's Office nor the DO has the authority to obtain information or assistance in this regard.

As indicated above, the functions of the CIPC is clearly defined in the Companies Act of 2008.[237] This feat results in greater certainty as it pertains to the CIPC effectively fulfilling its functions. The CIPC explains its functions as follows:[238]

> "…registration of companies, co-operatives and intellectual property rights and maintenance; business registry information disclosure; promotion of education and public awareness of company and intellectual property law; compliance with legislation; proper enforcement of legislation; monitoring compliance and contraventions of financial reporting standards; business rescue practitioner licensing; and reporting, researching and advising the Minister on matters relating to national policy on company and intellectual property law."

Furthermore, it also stands to reason that, because these functions are set out in black and white, there should be less room for procedural and practical errors. It is clear that the legislature recognised the key role of the CIPC and opted to draft legislation to provide for well-defined and robust functions.

I now turn to discuss section 187 and parts of section 188 of the Companies Act of 2008. It must be noted that the functions are considered in the order that they appear in the Act.

3.3.2. Functions as per section 187 of the Companies Act of 2008

The first key function of the CIPC is the enforcement of the Companies Act of 2008 insofar as the matter falls within the jurisdiction of the CIPC.[239] The Companies Act of 2008 provides that the CIPC may ensure compliance by encouraging the voluntary

[236] S 186(2)(*a*)-(*b*) of the Companies Act of 2008.
[237] S 187 of the Companies Act of 2008.
[238] CIPC *CIPC functions*, available at https://www.cipc.co.za/?page_id=685 (last accessed on 2 August 2022).
[239] S 187(2) of the Companies Act of 2008; see also Henochsberg on the Companies Act of 2008 at pg 609. It should be noted that there are other bodies that are established in accordance with the Companies Act of 2008, such as the Takeover Regulation Panel, which each have specific functions and are required to regulate their respective subject areas.

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resolution of disputes;[240] actively monitoring compliance;[241] accepting or initiating complaints and investigating the complaint in question;[242] taking direction from the Minister concerning alleged contraventions of the Companies Act of 2008 and conducting investigations where warranted;[243] making sure all contraventions are adequately investigated;[244] concluding undertakings in accordance with sections 169(1)(*b*) and 173 of the Companies Act of 2008;[245] issuing and enforcing compliance notices;[246] referring certain alleged offences to the National Prosecuting Authority;[247] and, where necessary, by referring disputes or contraventions to a court, or appearing before the Companies Tribunal as provided for by the Companies Act of 2008.[248]

The CIPC must ensure that the financial statements of companies are reliable.[249] In order to execute this function, the CIPC may monitor compliance patterns and any contraventions of financial reporting standards.[250] The CIPC may consider reliability and compliance across the board and, where necessary, make recommendations to the Financial Reporting Standards Council as it pertains to potential amendments of the financial reporting standards that companies need to comply with.[251]

Furthermore, the CIPC is responsible for ensuring that the registration of companies and intellectual property is properly recorded.[252] The Companies Act of 2008 prescribes that it should establish and maintain a register of companies, and any other

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[240] S 187(2)(*a*) of the Companies Act of 2008; this section contemplates voluntary resolution where it involves a company and its shareholders as provided for in Part C of Chapter 7 of the Companies Act of 2008. The aim of these voluntary resolutions is to have disputes resolved without the CIPC having to intervene or adjudicate a dispute.
[241] S 187(2)(*b*) of the Companies Act of 2008.
[242] S 187(2)(*c*) of the Companies Act of 2008.
[243] S 187(2)(*d*) of the Companies Act of 2008; these circumstances are provided for in s 190 of the Companies Act of 2008.
[244] S 187(2)(*e*) of the Companies Act of 2008.
[245] S 187(2)(*f*) of the Companies Act of 2008; s 169(1)(*b*) relates to situations where the CIPC is investigating a matter and believes a resolution would be best managed by the Companies Tribunal or other accredited agencies; s 173 relates to situations where a dispute has been resolved and the CIPC then records a consent order.
[246] S 187(2)(*g*) of the Companies Act of 2008.
[247] S 187(2)(*h*) of the Companies Act of 2008.
[248] S 187(2)(*i*) of the Companies Act of 2008.
[249] S 187(3) of the Companies Act of 2008.
[250] S 187(3)(*a*) of the Companies Act of 2008.
[251] S 187(3)(*b*) of the Companies Act of 2008. The Financial Reporting Standards Council, as per section 204 of the Companies Act of 2008, is tasked with receiving and considering information that is relevant to compliance and the reliability of financial reporting standards. In doing so, it may also consider adapting international reporting standards for purposes of local reporting standards, as well as considering information provided to it by the CIPC for these purposes.
[252] S 187(4) of the Companies Act of 2008.

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relevant registries that the CIPC may be responsible for in terms of other legislation.[253] With these registries in mind, the CIPC is expected to receive and deposit any relevant documents into the registry.[254] These registries must be made available to the public and organs of state.[255] The CIPC should ensure that all registrations and deregistrations are carried out in accordance with the relevant legislation.[256] The CIPC's functions in relation to these registries also mean that any other ancillary responsibilities must be performed in accordance with the applicable legislation, or where required to effectively execute its registration functions.[257]

In tandem with the above functions, the CIPC is directly involved where documents are inspected.[258] This inspection function is nevertheless not always implemented as parts of a document that a person wishes to view may be confidential.[259]

3.3.3. Functions as per section 188 of the Companies Act of 2008

Section 188 of the Companies Act of 2008 prescribes the functions of the CIPC when it comes to reporting, research, public information, and its relations with other regulators.[260] First, the CIPC must ensure that it actively advises the Minister on national policies relating to company and intellectual property law, which includes recommending changes to bring the law, and administration of the Companies Act of 2008, in line with international best practices.[261] Second, the CIPC is required to provide yearly reports to the Minister on the nature and volume of registrations, and the enforcement of the Companies Act of 2008.[262] Third, its reporting functions relate to any investigations conducted in respect of the purposes of the Companies Act of 2008 and advice on any other matter where asked to do so by the Minister.[263]

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[253] Ss 187(4)(*a*)-(*b*) of the Companies Act of 2008.
[254] S 187(4)(*b*) of the Companies Act of 2008.
[255] S 187(4)(*c*) of the Companies Act of 2008.
[256] S 187(4)(*d*) of the Companies Act of 2008; registrations and deregistrations include those of companies, directors, names of businesses, and intellectual property rights.
[257] S 187(4)(*e*) of the Companies Act of 2008.
[258] S 187(5) of the Companies Act of 2008.
[259] S 187(6) of the Companies Act of 2008. S 212 provides any person with the option to deem all or part of the information as confidential once written reasons have been provided regarding confidentiality and these claims have been considered and confirmed confidential by the relevant agencies, such as the CIPC or the Companies Tribunal.
[260] See Henochsberg on the Companies Act of 2008 at pg 612(1).
[261] S 188(1)(*a*) of the Companies Act of 2008.
[262] S 188(1)(*b*) of the Companies Act of 2008.
[263] S 188(1)(*c*) of the Companies Act of 2008.

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Section 188 provides for the active promotion of public awareness in relation to company and intellectual property law.[264] The legislation guides the CIPC in this regard. In order to increase the public's understanding, the CIPC should consider possible education and information channels, specifically with the aim of advancing the purposes of the Companies Act of 2008.[265] The CIPC should further provide guidance to the public via explanatory notes – which explain the procedures of the CIPC or which outline its non-binding opinions in respect of the interpretation of the Act – or by approaching the court for a declaration order on the interpretation of the Companies Act of 2008.[266] Research on its mandate and activities should be undertaken and published.[267] Further to the public awareness function, the CIPC must review the legislation and public regulations pertaining to company and intellectual property law and submit its observations and recommendations to the Minister.[268]

Within section 188, the CIPC is also afforded discretionary powers.[269] The first discretionary power relates to cooperation with other regulatory authorities on matters that are common to both entities.[270] This power includes the passing of information and the negotiation of agreements aimed at coordinating and harmonising the CIPC's jurisdiction over company and intellectual property matters.[271] The CIPC may take part in the proceedings of any other regulatory body and advise, or receive advice, from another regulatory authority.[272] The legislation authorises the CIPC to liaise with foreign authorities which have similar functions and powers.[273]

The CIPC may refer any conduct that it believes to be prohibited or regulated under the Competition Act[274] to the Competition Commission.[275] It may also pass on any concerns regarding statutorily regulated conduct to the South African Revenue

[264] S 188(2) of the Companies Act of 2008.
[265] S 188(2)(*a*) of the Companies Act of 2008.
[266] S 188(2)(*b*)(*i*)-(*ii*) of the Companies Act of 2008.
[267] S 188(2)(*c*) of the Companies Act of 2008.
[268] S 188(2)(*d*) of the Companies Act of 2008; see also Henochsberg on the Companies Act of 2008 at pg 615.
[269] Ss 188(3), 188(4) & 188(5) of the Companies Act of 2008.
[270] S 188(3)(*a*) of the Companies Act of 2008.
[271] S 188(3)(*b*)(*i*) of the Companies Act of 2008. S 188(3)(*b*)(*ii*) provides that these negotiations may be undertaken when it concerns the consistent application of the principles of the Companies Act of 2008.
[271] Ss 188(3)(*c*) & 188(3)(*d*) of the Companies Act of 2008.
[272] Ss 188(3)(*c*) & 188(3)(*d*) of the Companies Act of 2008.
[273] S 188(4) of the Companies Act of 2008.
[274] 89 of 1998.
[275] S 188(5)(*a*) of the Companies Act of 2008.

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Service;[276] the Independent Regulatory Board for Auditors;[277] any other regulatory authority insofar as the regulation of the conduct is within that authority's jurisdiction.[278]

3.3.4. The specialist committee

The Minister may assign specific powers to members of a specialist committee.[279] The purpose of the specialist committee is to advise the Minister and the Commissioner of the CIPC on matters relating to company and intellectual property law, and to aid with the management of the CIPC's resources.[280] This provision is remarkable because the legislature provided mechanisms to bolster effective administration by the CIPC.

3.4. Preliminary observations and conclusion

3.4.1. Introduction

This chapter considered two internal bodies with administrative and supervisory roles similar to the Master's Office. The purpose of the discussion was to understand the position and functions of these entities within their respective regulatory frameworks, in order to draw comparisons and assess whether lessons can be learnt from these entities to aid with reform of the legislative framework pertaining to the Master of the High Court. As such, I respectively compare the Deeds Office and CIPC with the Master of the High Court.

3.4.2. Observations from the discussion on the Deeds Office

The legislative articulation of the responsibilities and duties of the DO is similar to the Master's Office. The Deeds Registries Act of 1937 and the Insolvency Act of 1936 were drafted in the same historical period. Similar trends are observed – for example, these Acts determine the functions of the DO and the Master's Office respectively but neither do so concisely and comprehensively. The roles and functions are dispersed throughout various Acts, necessitating numerous cross-references and increasing the

[276] S 188(5)(*b*) of the Companies Act of 2008.
[277] S 188(5)(*c*) of the Companies Act of 2008. Conduct in this context would refer to behaviour regulated by the Auditing Profession Act 26 of 2005.
[278] S 188(5)(*d*) of the Companies Act of 2008.
[279] S 191(1) of the of Companies Act of 2008 – there may be more than one specialist committee where necessary.
[280] Ss 191(1)(*a*) & 191(1)(*b*) of the Companies Act of 2008. A specialist committee is expected to act impartially without fear, favour or prejudice and may not consist of more than eight members, all of whom must be independent of the CIPC – see s192(1) of the Companies Act of 2008.

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likelihood of conflicting provisions. This, in turn, increases the risk of error on the side of the officials empowered by, acting in accordance with, and enforcing the relevant laws.

The DO is clearly an important entity because it is directly involved in the registration and management of, *inter alia*, immovable property rights.[281] With these responsibilities in mind, the legislative provisions which speak to the functions that must be carried out by the DO are objective, short, and to the point. This affects the manner in which the officials of the DO interpret and execute these functions.[282] It is submitted that there is little guidance on how these officials must carry out their duties and no requirement to act proactively because the Deeds Registries Act of 1937 does not provide any subsequent provisions which contextualise the relevant functions.

There are no empowering provisions which provide the DO with the ability to actively consult the Minister on practical issues arising in relation to the DO's functioning, and this is linked to the manner in which the Deeds Registries Act of 1937 frames the DO's duties and powers.[283] The DO is a creature of statute, bound to its empowering provisions, which means that it is unable to adjust to changing circumstance and act proactively. A similar observation can be made when it comes to the Master's Office.

Notwithstanding the above, the establishment of the Regulations Board by the Deeds Registries Act of 1937 is of particular importance when it comes to the ability of the DO to adapt in order to fulfil its role.[284] When one considers the role of the Regulations Board, it appears that this kind of structural body is a worthwhile regulatory intervention because it has the power to actively consider the position of the DO and to prescribe procedural practices which may assist the DO to execute its duties effectively.

[281] See *Marneweck and Others v Shabalala and Others* case no A5030/13 (GJ) (unreported) at para 4. On file with author (hereafter "*Marneweck*").
[282] *Marneweck* at paras 15-17. The Judge in this instance highlighted his concern relating to not only the conduct of key role players (i.e., conveyances, attorneys, and notary publics) but also the Registrar's lack of participation in the proceedings which *prima facie* contained serious allegations of misconduct and maladministration. The Judge was of the opinion that the evidence showed *prima facie* dereliction of duties by the Deeds Office.
[283] For context purposes, one should consult s 188(2) of the Companies Act of 2008 for an example of guiding provisions.
[284] S 9 of the Deeds Registries Act of 1937.

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It is further worth mentioning that a Deeds Registries Amendment Bill was published for public comment in July 2021.[285] The Amendment Bill aims to enhance the Deed Registries Act of 1937 by catering for the amendment and the augmentation of the relevant provisions.[286] These include stipulating additional qualifications for Registrars, Deputy Registrars and Assistant Registrars;[287] establishing the position of a Chief Registrar of Deeds; and regulating the duties, constitution,[288] voting powers, and remuneration of members of the Regulations Board.[289]

The above demonstrates that the legislature is aware of challenges which require attention in relation to the hierarchical and competency-based areas of the DO and is attempting to mitigate functional or practical errors by the DO.

3.4.3. Observations from the discussion on the CIPC

It is submitted that the CIPC's role, functions and authority are more conducive to effective regulation than those of the Master's Office or the DO.

The CIPC differs from the Master's Office and the DO because it is established by the Companies Act of 2008 as a juristic person and acts as a hybrid-like organ of state for public administration.[290] Although the CIPC is a creature of statute, the legislative framework provides for discretionary powers and guides the CIPC in the execution of its functions.

One of the key observations is the manner in which the Companies Act of 2008 provides the CIPC with nuanced *guiding* provisions that are not found in the Insolvency Act of 1936, the Companies Act of 1973, or the Deeds Registries Act of 1937. As creatures of statute are limited by their empowering provisions and their jurisdiction prescribed by legislation, a thoughtless and narrow framework reduces the ability of a regulator to execute its functions effectively. The CIPC relies on the empowering provisions in the Companies Act of 2008, which provides much more *guidance* on how the CIPC should carry out its numerous functions. An example of this is section 188(2)

[285] Deeds Registries Amendment Bill of 2020 (hereafter "Amendment Bill").
[286] LSSA *Comments by the Law Society of South Africa on the Deeds Registries Amendment Bill* (2020).
[287] S 2(*a*)-(*b*) of the Amendment Bill.
[288] The Amendment Bill looks to situate the Chief Registrar as the chairman and executive officer of the Regulations Board who should then supervise all deeds registries in order to bring about uniformity.
[289] Memorandum on the objects of the Amendment Bill at paras 2(*a*), (*b*), (*c*) & (*i*).
[290] See section 3.3. of this dissertation.

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which provides various manners in which the CIPC may fulfil its public awareness duties.[291]

Another noteworthy observation is the manner in which the Companies Act of 2008 provides for the CIPC to actively refer concerns relating to regulated conduct to the relevant authorities. It is submitted that the way in which these provisions are framed actively promotes proactivity.

The Companies Act of 2008 promotes active communication between the CIPC and the Minister. This is vital because it encourages consultation with members of government who have the power to suggest amendments to Parliament in order to enhance the framework of entities such as the CIPC.

Lastly, it should be noted that the specialist committee provides the CIPC with the necessary assistance and holds it to account. The committee may theoretically "track" the CIPC by observing its actions, and its resources would be conserved and managed.

3.4.4. Conclusion

Having outlined some key legislative interventions and their benefits in relation to the DO and CIPC, the next chapter will analyse the Master's office with the aim of identifying regulatory and legislative obstacles that affect the functionality of the Master's Office.

[291] See section 3.3.3. of this dissertation.

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Chapter 4: Analysis of the Master's Office

4.1. Introduction

The Master's Office executes numerous functions such as the administration of the estates of deceased and insolvent persons; the protection of the interests of minors; the supervision of the administration of companies and close corporations in liquidation; and safeguarding all documents received by the Master in respect of estates, insolvencies, liquidations, and trusts.[292] As an administrative body, the Master's Office is involved in various processes which are regulated by various pieces of legislation,[293] and must ensure the administration of these processes is efficient and expeditious.[294]

Scholars are of the opinion that there is a risk of excessive administrative burdens and challenges relating to the regulation of insolvency law.[295] The reasoning is based on the fact that supervision of the South African insolvency law is not the only discipline that the officials of the Master's Office have to contend with.[296] The competence of office holders and other participants are key to an effective and efficient system.[297]

In chapter two, I discussed the various functions and duties of the Master's Office when it comes to sequestrations or liquidations. The Master's Office is a key part of the insolvency framework and poor performance would result in prejudicial delay of insolvency procedures and possible maladministration. As such, the legislative framework must be robust in order to ensure that the role, status and performance of the Master's Office is preserved and strengthened.[298]

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[292] Department of Justice and Constitutional Development "*About the Master of the High Court*", available at https://www.justice.gov.za/Master/about.htm (accessed on 5 May 2022).
[293] The relevant laws include, but are not limited to, the Administration of Estates Act, the Insolvency Act of 1936, the Companies Act of 1973, the Close Corporations Act of 1984, and the Trust Property Control Act 57 of 1988.
[294] See note 34 above.
[295] Calitz "Historical overview of State regulation of South African Insolvency law" 2010 *Fundamina* 2; see also Calitz "Some thoughts on state regulation of South African Insolvency law" 2011 *De Jure* 298 290; see also Calitz & Boraine 2005 *TSAR* 739; see also Smith "Problem Areas in Insolvency Law" 1989 *SA Merc LJ* 114 104.
[296] *Ibid*.
[297] Calitz 2010 *Fundamina* 3.
[298] This is especially important when one considers that the Master's office garners its powers from the empowering provisions in the legislation.

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In this chapter, I consider whether poorly drafted legislative provisions are the cause of some of the errors made by officials of the Master's Office. Thereafter, I consider whether the Master's office is affected by shortcomings related to appointed officials. Lastly, I discuss a number of practical issues. The purpose of this three-fold analysis is to determine areas in need of reform.

4.2. The legal framework

4.2.1. Introduction

Calitz correctly observes that the historic incorporation of the office of the Master, inherently an administrative body, into the (in)formal court structure influenced how regulatory practice has evolved.[299] By extension, this highlights how inadequate the attention to policy development has been in light of the "merger" and when considering the different objectives of the two structures.[300] As past developments conceptualise the role of the Master when it comes to matters relating to insolvency law,[301] no substantial deviation from the above can be achieved without reconsidering and transforming the policies that underscore the legislative framework as it applies to the Master's Office.

It is also true that public confidence in the system remains paramount.[302] The public must remain reassured that there are reliable systems in place, for example at the stage of the appointment of the trustee or liquidator.[303]

Scholars have highlighted the inadequacies insolvency regulation in South Africa. Evans writes that numerous challenges have arisen due to the intricate balance between the legislation that governs the insolvency process – and, by extension, the insolvent debtor and the property in the insolvent estate – and case law which

[299] Calitz 2010 *Fundamina* 26.
[300] *Ibid*. The "merger" refers to the Master's Office becoming an essential extension (i.e. regardless of the formal distinction between the two) of the court structure as the administrative arm of the judiciary.
[301] See section 2.1. of this dissertation.
[302] Joyce "The role of Insolvency regulators in the past and in the future" 2003 *International Insolvency Conference* (unpublished) 4.
[303] This example relates to the *Khammissa* case study.

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formulated rules through the interpretation of the legislation.[304] In turn, these challenges affect the policies that are arise to inform legislative provisions.[305]

4.2.2. The legislative provisions

The interpretation of legislation is not a mechanical exercise, because the structure of the legislation and language used need to be considered together with the relevant substantive values.[306] The interpreter of the law needs to have sufficient linguistical capabilities, know where to find the law, and be able to understand the intention of the legislature when it comes to a specific provision.[307] As such, poor drafting could easily prevent those working in the Master's Office from executing their duties without error.[308] For example, as the Insolvency Act of 1936 does not generally provide guidance other than setting out the Master's functions, it is plausible that the lack of guidance exacerbates the issues that arise during insolvency procedures.[309]

The need for, if any, (in)formal appointment decisions on an *ad hoc* basis by the Master is not addressed – section 18(1) of the Insolvency Act of 1936 merely stipulates that the appointments may be made and provides vague grounds on which the appointment can be refused. There is a clear lack of guidance when it comes to the execution of its duties during insolvency proceedings.[310]

Prior to 1936, the appointment of trustees and liquidators was made by the courts on the request of creditors supported by the majority of the body of creditors.[311] Nowadays, the Insolvency Act of 1936 makes provision for a requisition system which allows the creditors to request, before the first meeting, the appointment of a particular insolvency practitioner as the provisional trustee or liquidator.[312] When considering the creditor body's request, the Master is expected to exercise his or her discretion in a

[304] Evans *A critical analysis of problem areas in respect of assets of insolvent estates of individuals* LLD thesis, 2008, University of Pretoria iii.
[305] *Ibid*.
[306] Botha *Statutory Interpretation: An Introduction for Students* (2012) (hereafter "Botha") 7; substantive considerations include constitutional and fundamental rights.
[307] Botha 8.
[308] Botha 9.
[309] Calitz & Boraine 2005 *TSAR* 733.
[310] *Ibid*.
[311] See the Insolvency Act 32 of 1916; see also Calitz & Boraine 2005 *TSAR* 735 at fn 57.
[312] Calitz & Boraine 2005 *TSAR* 735.

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lawful manner.[313] The provisional trustee or liquidator must take instructions from the Master while the final trustee or liquidator, elected at the first meeting of creditors and duly confirmed by the Master, is not expected to do so.[314]

Following the amendment to section 18 of the Insolvency Act of 1936,[315] the Master must consult any policies issued by the Minister. In February 2014, the Minister promulgated a policy on the appointment of provisional trustees,[316] which was disputed by practitioners on constitutional grounds.[317]

The policy promulgated by the Minister was found to be defunct on numerous bases.[318] This decision was based on the following reasons: the records did not show that the policy was reasonably likely to achieve equality;[319] the policy was *ultra vires* by virtue of displacement of the Master's discretion;[320] the policy was arbitrary due to the exclusion of citizens born on and after 27 April 1994 without providing any reasons to justify such exclusion;[321] and the policy was irrational by virtue of failing to show that the policy was reasonably capable of achieving equality.[322]

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[313] See *Prosch v Standard Bank of South Africa Ltd* case no 14279/90 (W) (unreported). On file with author.
[314] For example, the provisional trustee or liquidator may be authorised by the Master or the court to sell property belonging to the estate.
[315] See the Judicial Matters Amendment Act 16 of 2003.
[316] Promulgated in accordance with s 158 of the Insolvency Act of 1936. See *Government Gazette* 37287 at no 77. The objective of this policy was intended to promote consistency, fairness, transparency and the achievement of equality in relation to those who previously experienced unfair discrimination, as per para 2 of the policy. Moreover, in terms of para 4 of the policy, the Minister looked to, *inter alia*, establish a uniform procedure for the appointment of IPs. In doing so, the policy, at para 5, provided for directives relating to the different categories of IPs, and was supplemented by para 7, which set out how the appointment of IPs should be carried out. The directive specifically provided for a ratio, in which the order set out should have been followed by the Master's Office. The ratio was set at A4: B3: C2: D1, where A represented African, Coloured, Indian and Chinese females, B represented African, Coloured, Indian and Chinese males, C represented White females, and D represented White males. Hence, the Master was expected to appoint those IPs in the ratio sequence, whilst having regard for the complexity of the matter and a potential senior IP being appointed jointly with the IP appointed in the sequence.
[317] See *Minister of Justice & Another v SA Restructuring and IPS Association & Others* 2017 (2) SA 95 (SCA); see also *Minister of Justice & Another v South African Restructuring and IPs Association & Others* 2018 (5) SA 349 (CC) (hereafter "*Minister of Justice v SA Restructuring and IPS Association*").
[318] It must be noted that since this decision by the Constitutional Court, there has been no further developments as it relates to a policy dealing with the appointment of provisional trustees and liquidators.
[319] *Minister of Justice v SA Restructuring and IPS Association* at para 40.
[320] *Minister of Justice v SA Restructuring and IPS Association* at para 32.
[321] *Minister of Justice v SA Restructuring and IPS Association* at para 54.
[322] *Minister of Justice v SA Restructuring and IPS Association* at para 58.

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This issue illustrates that ill-founded policies, in this case an attempt at endorsing equality when it comes to the appointment of IPs, affect the Master's ability to execute its duties – especially if there is some form of discretion allowed in respect of the duty to be executed. On the one hand, this problem is exacerbated by poor drafted legislative provisions in that the relevant insolvency legislation does not contain any formal criteria determining how IPs should be appointed, but only disqualifications.[323]

On the other hand, a lack of guiding provisions does not necessarily translate into deficiencies when it comes to the regulatory process, but it does increase the risk of procedural and substantive errors.[324] This sentiment is echoed by Burdette who states that the interaction between the statutory limitations on the Master and the practical reality of having to appoint the right person to administer an insolvent estate, could present constitutional challenges.[325]

The use of the requisition system for the appointment of IPs by creditors illustrates a law-based process that may circumvent the authority of the Master by providing creditors with significant power. Within the requisition system, there are a number of inherent weaknesses, such as the fact that these requisitions are not made under oath.[326] This means that many of the creditors that vote for the provisional and/or final liquidator may not yet have proven their claims against the estate in accordance with section 44 of the Insolvency Act of 1936. The likelihood that the person chosen by the "creditors" and endorsed by the Master, is not the choice of the majority of the proven creditors increases. The appointment of provisional IPs, which was supposed to be extraordinary in nature,[327] are being normalised in a manner that undermines the right of the creditors, who have a real stake in the administration of the estate, to choose the insolvency practitioner.[328]

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[323] Calitz "System of regulation of South African insolvency law: lessons from the United Kingdom" 2008 *Obiter* 352 368.
[324] Procedurally it is conceivable that appointments are not carried out correctly and substantively it is possible that the wrong person for the job is chosen.
[325] Burdette "Reform, regulation and transformation: the problems and challenges facing South African insolvency industry" 2005 *Commonwealth Law Conference* 6-9.
[326] Calitz & Boraine 2005 *TSAR* 733.
[327] These appointments are seen as extraordinary because they are only supposed to occur when there would be severe lapses in time, or the matter is urgent.
[328] Burdette & Calitz 2006 *TSAR* 736.

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There is no system that enables the Master to record the submissions of requisitions in order to determine the legitimacy of the appointment that he or she endorses.[329] Whilst there is no provision which provides for the Master's ability to do so, it is submitted that there should be an empowering provision to do so. It also seems as if the gravity of the situation and the counterproductive effect on the creditor-focused regime that prevails in South Africa, has not yet been grasped – in *Khammissa*, the Deputy Master never provided reasons for the provisional appointment the second and third respondents as joint-liquidators.

4.2.3. The practical implications of the legislative provisions

In this section, I consider the practice of appointing IPs. The Master's office must supervise this process within the confines of its legislative duties but this discussion will show that there are instances where the Master must be involved but where common practices result in informal appointments. In other words, legislative provisions are not always formally adhered to because the circumstances are different to what the legislature anticipated.

This dissertation has previously outlined issues which arise at the appointment stages of a trustee or liquidator.[330] These issues were shown to be linked to the lack of clear empowering provisions which actively guide the Master during this stage. It is submitted that the ability of the Master to execute this duty is determined by three factors: one, the clarity of the empowering provision in section 18(1) of the Insolvency Act of 1936; two, the discretion bestowed on the Master; and three, the proper exercise of that discretion.

Insofar as the provision is concerned, the wording of section 18(1) of the Insolvency Act of 1936 does not contemplate the variety of scenarios in which the Master will have to consider a provisional appointment. Legally, the Master needs to consider whether the practitioner is a fit and proper person,[331] and whether the provisional appointment is necessary, or rather, whether it is urgent.[332] These two considerations are particularly tenuous because it is within the discretion of the Master to endorse the

[329] Burdette & Calitz 2006 *TSAR* 735.
[330] See section 4.2.2. of this dissertation.
[331] *Lipschitz v Wattrus* 1980 (1) SA 662 (T) at page 668.
[332] Calitz & Boraine 2005 *TSAR* 732.

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appointment on these grounds. This is where the second factor becomes troublesome. Seeing as the Master is empowered to decide whether or not to appoint a provisional practitioner, it will have to consider numerous factors such as whether the situation calls for the appointment and the needs of the stakeholders.[333] In the premises, the decision becomes exponentially more difficult.

As to the third consideration, the exercise of the discretion is bound to vary from one Master to another - especially in the absence of ministerial policies,[334] clear guidelines for the exercise of the discretion and careful exercise of the discretion.[335]

With the above in mind, it is also true that the Master's discretionary powers are not the only reason as to why practical issues may arise at the appointment stage. A common practice has been established out of necessity. Creditors and commerce at large require insolvency proceedings to be dealt with expeditiously and with some urgency in order to provide creditors with a dividend from assets (some of which may depreciate or fetch a low value at a public auction).[336] It has become common practice for the Master to take control of appointments before the first meeting of creditors to deal with matters expeditiously and because creditors generally do not attend the first meeting of creditors.[337]

The implications are that the Master's Office has essentially become the pillar of this stage of the insolvency process and is making decisions *in lieu* of the above without necessarily receiving input from the body of creditors. This means that informal decisions are being taken outside of the legislative regime, which can undoubtedly lead to incorrect decisions or potential maladministration when there is little to no oversight. It should be noted, however, that the development of this common practice is also attributable to the insolvency sphere at large. At present there is a substantial push for the harmonisation of insolvency regulations, so that there are better chances

[333] Calitz & Boraine 2005 *TSAR* 733.
[334] See section 4.2.2. of this dissertation.
[335] It should be noted that, in terms of the Draft Insolvency Bill of 2000 published by the South African Law Reform Commission, there is a provision in clause 32 that would allocate more responsibility to the creditors to elect a practitioner of their choice. This may be an attempt to alleviate the Master of the discretionary role and responsibilities – see also Calitz & Boraine 2005 *TSAR* 733.
[336] Calitz & Boraine 2005 *TSAR* 733.
[337] Calitz & Boraine 2005 *TSAR* 732.

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for predictability and efficiency.[338] Without this, as has been previously alluded to,[339] there is a greater probability of informal decision being taken *in lieu* of lacking procedural and substantive empowering provisions within a dispersed system.[340] These practices may impede the certainty of procedure needed to ensure that insolvency law keeps abreast of external factors and makes changes that adequately account for these shifts in perspective, which include a culture of justification and accountability.[341]

[338] The World Bank *Report on the observance of standards and codes – insolvency and creditor rights* South Africa (2012) 13 (hereafter "World Bank Report").
[339] See section 2.4. of this dissertation.
[340] World Bank Report 14.
[341] Burns and Beukes *Administrative law under the 1996 Constitution* (2006) 49; see also Calitz "State regulation of South African insolvency law – an administrative law approach" 2012 *Obiter* 457 460.

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Chapter 5: Recommendations and conclusion

5.1. Introduction

This dissertation analysed the role, functions, and powers of the Master's Office and compared these provisions to other similar internal bodies to gain an understanding of how the Master's Office is positioned as an insolvency regulator in comparison to these regulatory bodies. In addition, non-legal facets were also considered because the research showed that the Master's Office was a product of its legislative framing and the practical execution of its responsibilities. With the above in mind, the goal of this final chapter is to provide recommendations for reform that takes cognisance of the Master's Office's current position and the implications of its decisions as an administrative body.

At the outset of this dissertation, research questions were outlined.[342] The first question inquired into the roles, functions and powers associated with the Master's Office within the South African insolvency law regime. In short, it was shown that the Master's Office is a vital part of the process in relation to the administration as well as supervision of both individual and corporate insolvency procedures.[343] Next, the question of what legal and non-legal challenges arise by virtue of the Master's Office involvement in these processes. In doing so, it was revealed that legislatively the Master's Office was being stifled by a lack of referral provisions and on a practical level, less than optimal human resource qualification requirements and training were exacerbating issues of efficiency and effectiveness. In addition to this, it was also shown that at the appointment stage for IPs, the Master's Office was essentially acting informally and appointing IPs without creditor input by virtue of its assumed status and common practice occurring over the years. This issue was linked to the Master's Office legislative position and regulatory impracticalities.[344]

With these factors having been identified, the third question revolved around an internal comparative analysis of the DO and CIPC with the view of identifying commonalities and potential advantageous legislative interventions that could benefit

[342] See section 1.3. of this dissertation.
[343] See sections 2.3.2., 2.3.3., and 2.3.4. of this dissertation.
[344] See section 2.6. of this dissertation.

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the Master's Office regulatory position.[345] In doing so, it was highlighted that the DO and the CIPC have certain legislative interventions at their disposal to act efficiently and effectively, namely: proposed amendments of stricter personnel qualification requirements and training, referral provisions (i.e., both laterally and vertical) to oversight bodies, and discretionary guidance provisions under the Companies Act of 2008 for the CIPC.[346]

Based on the research findings and legal conclusions drawn in respect of questions 1 to 3, recommendations for reform are now considered which can be made to enhance the existing framework for the benefit of the Master's Office.

Another important observation made under Chapter two was the Pontius Pilate reference had in the *Khammissa*-case study. For recollective purposes, it was noted:

> "[T]he Pontius Pilate posture adopted by the Master is baffling. I agree with Mr Suttner SC, on behalf of the applicants, that it cannot be gainsaid that the matter is serious because the Master sits at the apex of insolvency law and practice, presides over important decisions affecting the appointment of liquidators and governs the custody of large assets. Which decision and appointment certificate prevails in this case involves important questions of law and is of importance to insolvency law practitioners and liquidators."[347]

This reference points to a need for accountability at the Master's Office, especially in relation to decisions it takes and the way in which it exercises statutory discretion, which are rooted in administrative law. The link between administrative law and the Master's Office was touched on in Chapter two.[348] In highlighting the need for accountability at the Master's Office, certain additional recommendations are provided below.[349]

[345] See sections 3.2., 3.3., 3.4.2., and 3.4.3. of this dissertation.
[346] See sections 3.4.2. and 3.4.3. of this dissertation.
[347] *Khammissa* para 13.
[348] See section 2.5. of this dissertation.
[349] See section 5.2.2.4. of this dissertation.

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5.2. Recommendations

5.2.1. Introduction

The recommendations refer to issues that were highlighted in chapters two, three and four. In respect of the chapter two, the recommendations refer to the need for stronger human resources protocols for training together with stricter qualification requirements, and the need for vertical referral provisions in terms of insolvency legislation. In respect of chapter three, the recommendations pertain to the need for encouragement of cooperation as well as the establishment of oversight bodies specifically dedicated to the operation of the Master's Office and the provision for discretionary guidance amendments of the insolvency framework. In chapter four, the assessment of the comparable internal bodies form the foundation for the recommendations.

The recommendations are founded in the realisation that Master's Office needs to be provided with all the necessary regulatory and practical tools to ensure that it is able to fulfil its duties, act in accordance with public interests, and operate in a manner that adheres to good administrative practices.

5.2.2. Recommendations to increase legislative certainty

5.2.2.1. Discretionary guidance

The Insolvency Act of 1936 was drafted during a different era in South African history. The population size was much smaller than it is today. On a macro-level, the number of companies that are established and people who take financial risks are increasing. South Africa has also experienced global financial stressors, which has affected economic growth and prompted a downturn in economic activity.[350] It follows that the Master's Office will become involved in more insolvency and liquidation procedures. The first point of departure is thus the re-evaluation of the Insolvency Act of 1936.

Reforming the Insolvency Act of 1936 should place emphasis on procedural efficiency and anticipate the decisions that the Master must make during insolvency

[350] Statistics South Africa "Economic growth", available at https://www.statssa.gov.za/?page_id=735&id=1 (last accessed on 12 July 2022).

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proceedings. For example, section 18(1) of the Insolvency Act of 1936 provides the Master with the discretion to appoint a provisional insolvency practitioner. This discretion, however, needs to be exercised with the urgency of the case in mind. Seeing as how the discretion is guided by the case at hand, it is conceivable that each Master will exercise this discretion differently. As previously mentioned, oftentimes in practice, the creditors indicate which practitioner they would like to administer the insolvency process. Hence, the provisional appointment of an IP may take place solely by virtue of the Master's decision, or the Master might be prompted by the creditor body. It is submitted that this is undesirable and to ensure certainty in the process, the Insolvency Act of 1936 should guide the Master as to how and when the appointment of a provisional IP is necessary and requires discretionary input. The wording of section 18(1) does not aid the Master in exercising its discretion. It merely states:[351]

> "As soon as an estate has been sequestrated (whether provisionally or finally) or when a person appointed as a trustee ceases to be trustee or function as such, the Master may appoint a provisional trustee…"

Hence, there should be subsequent provisions which better detail the situations where this appointment is necessary. This will curb informal decision making, expedite the process and ensure certainty of outcomes. It would also ensure that the Master's Office's decisions are not trespassing on the tenets of the administrative law. In other words, there would be more decisions that are lawful, reasonable, and procedurally fair – especially in the context of taking decisions that are rationally connected to the purpose of the provision. A further benefit of this change would be economic activity. If there is comprehensive institutional regulation, there is a chance of greater economic activity because society would have confidence in the insolvency regime to provide redress in the unfortunate event of illiquidity.

5.2.2.2. Consolidation and harmonisation

The Master's Office, as an insolvency regulator, is directly impacted by the overarching insolvency regime. It follows that, without the overarching harmonisation and consolidation of the insolvency law legislation, there will continue to be inconsistencies in procedure. This is particularly relevant to the Master's Office because it would follow

[351] S 18(1) of the Insolvency Act of 1936; own emphasis.

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that an overhaul of the insolvency regime would likely see welcomed changes in relation to its position as the apex insolvency regulator. Harmonisation of the various elements of insolvency processes, such as business rescues, liquidations, and insolvencies, would likely increase predictability and ease of use of the system, which directly benefits the Master's Office.[352]

5.2.2.3. Recommendations to curb personnel issues

There are indications that qualification requirement re-evaluations are underway within the DO.[353] It is submitted that the same re-evaluations should be occurring in respect of the Master's Office.[354] Section 2(2) of the Administration of Estates Act should be amended to ensure that competent individuals are being employed by the Master's Office. This viewpoint is also supported by the World Bank Report, which identified that there is currently no formal set of criteria that can be used to validate the qualification requirements, accreditation process, or the supervision of IPs in South Africa.[355] It is conceivable that the same issues exist as it pertains to the Master's Office's personnel.

Another manner in which personnel competency can be increased is the establishment of rigorous training protocols for new intakes at the Master's Office. The World Bank Report indicated that, at present, there is no formal set of training protocols for IPs.[356] It is contended that the same problem exists in relation to Master's Office personnel. There needs to be protocols and accreditation processes developed to ensure the competency of those who take up office in the Master's Office. The Chief Master should also opt for a directive delineating how one can be accredited and employed by the Master's Office.[357] In doing so, the Chief Master can consult with the Minister to develop a comprehensive framework for new intakes.[358]

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[352] World Bank Report 14-16; see also Uniform Insolvency Bill of 2003, available at https://www.justice.gov.za/master/m_docs/insolve-unified-insolvency-bill-july2003.pdf (accessed 29 October 2022) which has been in the pipeline for some time now. It looks to unify and harmonise the insolvency framework into one key piece of legislation. In other words, it looks to unify processes relating to individual and corporate insolvencies and liquidations.
[353] See section 3.4.2. of this dissertation.
[354] World Bank Report 15.
[355] World Bank Report 10.
[356] *Ibid*.
[357] S 2(1)(*b*)(*ii*)-(*iii*) of the Administration of Estates Act.
[358] S 2(1)(*b*)(*i*) of the Administration of Estates Act provides that the Chief Master is only answerable to the Minister. This provision seems to anticipate instances where correspondence between the Chief

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5.2.2.4. Additional recommendations

Practical issues presenting themselves at the Master's Office are essentially a culmination of the various issues identified above. Without clear and concise legislative empowering provisions, the consolidation and harmonisation of the various laws regulating insolvency in South Africa, and rigorous personnel requirements or training protocols, the Master's Office is less likely to perform properly.

It has been observed that the Master's Office acts informally in order to meet its responsibilities. In other words, the Master's Office makes practical compromises to deal with the inadequacies of other facets of the overarching framework. To remedy this, there would need to be a concerted effort to establish oversight entities, such as the Regulations Board or specialist committee in the case of the DO and CIPC. I deal with this in more detail below when I draw recommendation from the comparison with the DO and the CIPC.

Consideration needs to be given to the administrative law tenets, relating to accountability and transparency. As previously mentioned,[359] FISA has attempted to maintain communication with the Chief Master, who is responsible for the supervision of all the Master's Offices, but there has been little response from the Chief Master. It is submitted that the vital concepts of accountability and transparency should be emphasised to those in positions of power, such as the Chief Master. Without communication, there cannot be key information channels established for the benefit of the Master's office. There needs to be a strong institutional framework based on procedural fairness, accountability, and transparency if public confidence in the system is to flourish.[360] This starts with the top officials when they embrace an openness to discuss issues and receive input. It is submitted that the duty to communicate should be legislated in order to ensure that officials take it seriously – although constructive communication is consensual in nature, it is difficult to hold officials to account if there is no legislative foundation to communicate.

Master and Minister is necessary, which would likely apply to the establishment of a directive to this effect.

[359] See section 2.5. of this dissertation.

[360] World Bank Report 16.

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5.2.3. Recommendations linked to observations from the DO and CIPC

5.2.3.1. Regulatory board

One of the key regulatory interventions by the Deeds Registries Act of 1937 is the establishment of the Regulations Board. The Regulations Board has the propensity to change the way in which the DO operates, especially procedurally. This is important because the DO, as a regulatory body, needs to have clear and concise empowering provisions and a strong underlying policy to act efficiently. The Deeds Registries Act of 1937 allows the Regulations Board to consider the DO's regulatory position and create regulations that make the DO's functions procedurally efficient. The Board is able to address new challenges expeditiously, which is an advantage over the traditional legislative process.

It is submitted that, because the Master's Office plays a similar supervisory and administrative role as the DO albeit in different spheres, provision should be made for a similar body to deal with regulatory shortcomings in terms of the procedural efficiency and efficacy of the Master's Office.

5.2.3.2. Qualification requirements re-evaluation

The qualifications required for those who would take up positions at the DO recently received renewed attention, especially when it comes to officials such as the Registrar or Deputy Registrars. The proposals embodied in the Amendment Bill is welcomed and would be conducive to the Master's Office, with the necessary changes made to adapt the requirements to officials in the insolvency sphere. This is a pressing issue, given earlier discussions on the need for, and lack of, well-trained personnel at the Master's Office.

It follows that section 2(2) of the Administration of Estates Act should be amended to align with the qualification framework set out within the Amendment Bill. Raising the qualification standards enables the establishment of suited training protocols as officials enter the regulatory sphere with prior knowledge.

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5.2.3.3. Co-operation and referrals

The CIPC is an important statutory body. The Companies Act of 2008 has clearly taken a co-operative approach through its establishment of communication channels with various regulatory authorities.[361] It seems as though the legislature intended to leverage co-operative provisions to ensure proper enforcement of the Companies Act of 2008 and other intersecting pieces of legislation.[362] The provisions within the Companies Act of 2008 ensures that its provisions can be enforced, which necessitated the establishment of the CIPC.[363]

The effect of this concerted effort at enforcement is that where a regulatory body such as the CIPC finds itself dealing with an issue which also falls within the jurisdiction of another authorities, they are expected to enter into consultations with one another.[364] These consultations include the passing of information between these bodies and encourages active participation in matters that are of common interest.[365] Moreover, this also ensures that there is consistency in the manner that the Companies Act of 2008 is applied notwithstanding that there may be various entities involved.

It is submitted that there needs to be a protocol on who the Master's Office must co-operate with during insolvency proceedings. This may entail the establishment of other regulatory bodies in insolvency or related areas which are able to consult with the Master's Office, as well as in the converse.[366] As the Master's Office also deals with companies, clear guidelines should be drafted on communication and collaboration between the CIPC and the Master's Office.

5.2.3.4. Guiding provisions

Another key regulatory intervention relates to *guiding* provisions for the benefit of the CIPC's operations. The Companies Act of 2008 provides the CIPC with various

[361] Just from the perspective of the Companies Act of 2008 itself, there are other regulatory authorities such as the Takeover Regulation Panel; the Financial Reporting Standards Council; and the Companies Tribunal.
[362] Farisani "The potency of co-ordination of enforcement functions by the new and revamped regulatory authorities under the new Companies Act" 2010 *Acta Juridica* 433 444.
[363] *Ibid*.
[364] *Ibid*.
[365] S 188(3)(*a*) of the Companies Act of 2008; see also Farisani 2010 *Acta Juridica* 445.
[366] The Master's office needs to be able to consult with other bodies where necessary, in the interests of the public as well as the pursuit of transparent administrative action.

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nuanced *guidelines* following the provision of the CIPC's functions. Section 188 is a perfect example of forward-thinking legislation – the CIPC is given various examples of how it can go about fulfilling one of its functions, namely ensuring public knowledge and awareness of company and intellectual property law.[367]

I submit that the Insolvency Act of 1936 should be amended to provide the Master's Office with guiding provisions which suggest out how the Master could effect its roles and functions. This is an important recommendation because, as previously outlined, there is little to no provisions that guide the Master on how certain duties that require discretionary or merit-based decisions should be approached.

5.2.3.5. Specialist committee

The Companies Act of 2008 provides for a specialist committee that may be assigned by the Minister.[368] It is intended to operate as a supervisory tool for the CIPC. It may, for example, oversee how the CIPC manages its resources and step in where change is needed to preserve the functions of the CIPC. In other words, it should act as a structural regulatory tool to ensure that the CIPC executes its functions as efficiently as possible.

With this in mind, provision should be made for a committee similar to the specialist committee that the Minister may elect for the benefit of the Master's Office. This would ensure that the Master's Office's resources are preserved and would encourage consistent oversight of the management of the Master's Office.

5.3. Conclusion

In this chapter, recommendations linked to observations from the DO and CIPC were proposed. The DO-linked recommendations were the establishment of a Regulatory Board, similar to the one provided for in the Deeds Registries Act of 1937, and qualification requirements as set out in the Deed Registries Amendment Bill. The CIPC-linked recommendations proposed that the co-operative spirit of the Companies Act of 2008 should be used as inspiration for the amendment of the Insolvency Act of 1936 to establish communication protocols with other entities. I emphasised the need

[367] S 188(2) of the Companies Act of 2008; see also section 3.3.3. of this dissertation.
[368] S 191(1) of the Companies Act of 2008; see also section 3.3.4. of this dissertation.

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for guiding provisions as seen in relation to the CIPC, and the provision for a specialist committee that would manage the resources of the Master's Office similar to the committee that assists the CIPC.

I further proposed that there should be legislative certainty created through discretionary guidance provisions in the Insolvency Act of 1936, and, moreover, the consolidation and harmonisation of the various pieces of insolvency law should be encouraged in order to establish a seamless system which would benefit the Master's Office in executing its functions.

Personnel issues at the Master's Office could be addressed by the establishment of formal qualification requirements, through an amendment of section 2(2) of the Administration of Estates Act, along with rigorous accreditation and training protocols established in collaboration with the Chief Master and the Minister. The personnel making administrative decisions within the Master's Office also need to be considered and supported, through the establishment of adequate qualification requirements, training protocols, and oversight bodies who are able to consistently keep abreast of new issues that arise. In addition to this, discretionary guidance that anticipates situations that may arise in insolvency matters should be included in the legislation. Without these interventions, the Master's office is left in a position where it needs to make compromises for the sake of efficiency and efficacy. Many of the practical challenges that arise are a direct consequence of the legislative inadequacies aggravated by the competence of Master's Office personnel.

Lastly, the chapter proposed recommendations to mitigate practical issues arising at the Master's Office. It highlighted that the practical issues presenting themselves at the Master's Office are essentially a culmination of the various other issues before it. I recommended that clear and concise empowering provisions and the establishment of oversight bodies as a concerted effort towards a harmonisation of the insolvency regime are needed. This includes the establishment of rigorous personnel requirements or training protocols for the Master's Office which will curb practical challenges.

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It is no secret that the success of the insolvency law regime is fundamentally linked to the Master's Office functioning properly.[369] In light of this, it follows that there needs to be a revised regulatory structure that actively supports the Master's Office as the central structure of insolvency proceedings. Outdated provisions relating to the Master's Office need to be re-evaluated and amended to ensure public service rooted in accountability and transparency. Cognisance must be taken of how administrative law implores administrative bodies to act in the interests of lawfulness, reasonableness, and procedural fairness when making decisions.

At the foundation of these recommendations lies an awareness of the importance of a strong institutional framework based on procedural fairness, accountability, and transparency.

[369] Calitz & Boraine 2005 *TSAR* 742.

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