The viability of reduced oversight by the Master of the High Court in insolvency proceedings

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Abstract

This study analyses the necessity of the involvement of the Master of the High Court, as the insolvency regulator of South Africa, in insolvency proceedings. The analysis is undertaken against the background of some of the delays experienced by the insolvency industry due to the oversight role of the Master of the High Court. These include delays with the appointment of trustees or liquidators; convening of the first creditors meeting and confirmation of the liquidation and distribution account. The study evaluates whether oversight is indeed necessary and considers the viability of existing solutions to oversight-related delays. The position in South Africa is benchmarked against the legal framework of Germany, in order to determine whether any lessons can be learned from foreign trends. The study finds that there is a dire need for reduced oversight by the Master. It concludes with solutions to enhance the legal framework in order to support the efficient resolution of insolvency proceedings.

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Chapter 1: Introduction

1.1. Background to the study

The Master of the High Court (the Master) has been a part of the South African legal framework in some manner or form since 1674,although its main function at that time excluded control over insolvent estates.[1] The first time that the Master surfaced as a role-player in insolvency law was in 1827 when the Supreme Court of the Cape of Good Hope replaced the Justice Council and made provision for the post of the Master of the Supreme Court.[2] The Master's role, as far as insolvency is concerned, was established by the Insolvency Act 32 of 1916.[3] Currently the Master of the High Court is a creature of statute[4] and various Acts regulate the duties and powers of the Master.[5]

In terms of the Administration of Estates Act,[6] the Master's Offices execute *inter alia* the functions of administrating deceased, liquidated and insolvent estates; the protection of the interests of minors and legally incapacitated persons; the administration of the Guardian's Fund; and the supervision of trusts. The execution of these functions is further regulated by the Insolvency Act,[7] the Companies Act,[8] the Close Corporations Act,[9] and the Trust Property Control Act.[10]

The role of the Master in insolvency proceedings is supervisory in nature,[11] and its tasks in this regard include:

[1] Boraine & Calitz "The role of the Master of the high court as regulator in a changing liquidation environment: a South African perspective" 2005 TSAR 728 at 728.
[2] Boraine & Calitz 2005 TSAR 729.
[3] *Ibid.*
[4] Department of Justice and Constitutional Development *The Master of the High Court,* available at https://www. justice. gov. za/master/about. htm (last accessed on 12 March 2023).
[5] Including the Administration of Estates Act 66 of 1965, the Insolvency Act 24 of 1936, the Companies Act 61 of 1973, the Close Corporations Act 69 of 1984 and the Trust Property Control Act 57 of 1988.
[6] 66 of 1965, hereafter the Administration of Estates Act.
[7] 24 of 1936, hereafter the Insolvency Act.
[8] 61 of 1973, hereafter the 1973 Companies Act. Item 9 of Schedule 5 (Transitional Arrangements of the Companies Act 71 of 2008) of the Companies Act 71 of 2008 provides that, despite the repeal of the previous Companies Act 61 of 1973 and until the date determined by the Minister responsible for companies, Chapter 14 of the previous Act continues to apply with respect to the winding-up and liquidation of companies under the Companies Act 2008, as if the previous Act had not been repealed.
[9] 69 of 1984, hereafter the Close Corporations Act.
[10] 57 of 1988, hereafter the Trust Property Control Act.
[11] Department of Justice and Constitutional Development *The Master of the High Court.*

- Establishing whether the security provided by the shareholders of a company, prior to the filing of a resolution that the company is to be wound-up, sufficiently provides for payment of the company's debts within a period of not more than 12 months after commencement of the winding-up procedures;[12]
- Issuing certificates in terms of sections 385 and 419 of the 1973 Companies Act pursuant to which the liquidator may cancel his bond of security, finalise a company's winding-up process, and be released from his office;[13]
- Appointing a *curator bonis* in terms of section 158(2) of the Insolvency Act;[14]
- Vesting of control of the insolvent estate in the Master when a notice of surrender is published after a sale in execution but before delivery;[15]
- Directing a debtor to have any property valued upon receiving the statement of affairs from the debtor in terms of section 4(3) of the Insolvency Act after the debtor published a notice of surrender;[16]
- Appointing provisional trustees or liquidators immediately upon the provisional (or final) sequestration or liquidation of an estate;[17]
- Confirming the appointment of the elected final trustees after the creditors meeting was concluded;[18]
- Permanently disqualifying a person from being appointed as a trustee;[19]
- Removing a trustee on various grounds;[20]

[12] Boraine *et al* (eds) Meskin's *Insolvency Law and its operation in winding-up* (Issue 58, the volume being up to date to August 2022) (hereafter Meskin) Paragraph 1. 3. 1. Similarly, section 9(3) of the Insolvency Act requires that "the Master issue a certificate that sufficient security has been given for payment of all fees and charges necessary for the prosecution of all sequestration proceedings".
[13] Meskin Paragraph 1. 7.
[14] *Idem* at Paragraph 3. 5.
[15] *Idem* at Paragraph 3. 7. 2. In terms of section 5(1) of the Insolvency Act the Master may allow the sale of assets which has been attached under writ of execution or other process to the value of up to five thousand Rand. In terms of section 5(2) of the Insolvency Act the Master may after publication of the notice to surrender, appoint a curator bonis to the debtor's estate. The effect of the sequestration of the estate of an insolvent is in terms of section 20(1)(a) to divest the insolvent of his estate and to vest it in the Master until the appointment of a trustee.
[16] *Idem* at Paragraph 3. 8 read with section 4(4) of the Insolvency Act.
[17] *Idem* at Paragraph 4. 1A read with section 18(1) of the Insolvency Act.
[18] *Idem* at Paragraph 4. 2 read with section 56 of the Insolvency Act.
[19] *Idem* at Paragraph 4. 5.
[20] *Idem* at Paragraph 4. 6 read with section 60 of the Insolvency Act.

- Issuing a certificate of appointment to a provisional trustee or liquidator once the requisite security has been given to the Master;[21]
- Providing consent to the provisional trustee to carry on with the insolvent's business;[22]
- Authorising the provisional trustee or the final trustee in terms of s80(bis) of the Insolvency Act prior to the second creditors' meeting, to sell property of the estate;[23]
- Authorising the provisional trustee to bring or defend legal proceedings on behalf of the insolvent estate;[24]
- Taxing the reasonable remuneration of a trustee in an insolvent estate;[25]
- Convening the first creditors' meeting in an insolvent estate or the winding-up of a company in order to enable creditors to prove their claims against the estate and elect a trustee;[26]
- Allowing the trustee to convene a special meeting for the purpose of interrogating the insolvent;[27]
- Presiding over insolvency meetings held in the district where there is a Master's Office or designation of an officer in the public service for the purpose of presiding over these meetings;[28]
- Ordering an enquiry to be held either before himself or a magistrate or an officer in the public service;[29]
- Admitting or rejecting a claim in a creditors' meeting where the Master is presiding.[30]

[21] *Idem* at Paragraph 4. 15, 4. 22 and 4. 23 read with section 56 of the Insolvency Act and section 368 of the 1973 Companies Act. Also note there is no appointment of a provisional liquidator in the winding-up of a close corporation, in practice the Master appoints a final liquidator after the provisional winding-up order (see Meskin Paragraph4. 23).
[22] *Idem* at Paragraph 4. 17 read with section 80(1) of the Insolvency Act.
[23] *Idem* at Paragraph 4. 17 also note similar authority in terms of section 386 of the 1973 Companies Act.
[24] *Idem* at Paragraph 4. 17 read with section 73(1)(a) of the Insolvency Act.
[25] *Idem* at Paragraph 4. 21 read with section 63(1) of the Insolvency Act.
[26] *Idem* at Paragraph 7. 1 read with section 40(1) of the Insolvency Act and section 364(1)(a) of the 1973 Companies Act.
[27] *Idem* at Paragraph 7. 4 read with section 42(1) of the Insolvency Act.
[28] *Idem* at Paragraph 7. 7 read with section 39(2) of the Insolvency Act.
[29] *Idem* at Paragraph 8. 51 read with section 152(2) of the Insolvency Act, section 66(1) of the Close Corporations Act and section 417 of the 1973 Companies Act.
[30] *Idem* at Paragraph 9. 25 read with section 44(3) of the Insolvency Act.

- Providing an extension for the lodgement of the liquidation and distribution account after six months from the date of appointment of the trustee or liquidator;[31]
- Considering any objections by an interested party to the liquidation and distribution account;[32]
- Ruling on the objection and giving direction to the trustee upon an objection to a liquidation and distribution account;[33] and
- Confirming the liquidation and distribution account.[34]

The delays experienced by the insolvency industry in 2022,due to a cyber-attack on the Department of Justice, is only the tip of the iceberg of incidences (whether caused by legislative process, incompetence, lack of integrity, or a combination thereof) that cause long delays when the Master of the High Court is involved in insolvency matters.[35] Notwithstanding that past delays have remained a topic of discussion for decades, no relief is forthcoming from the legislature.[36]

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[31] *Idem* at Paragraph 11. 2. 1 read with section 109 of the Insolvency Act, section 403(1)(a) of the 1973 Companies Act and section 66(1) of the Close Corporations Act.
[32] *Idem* at Paragraph 11. 5. 1 read with section 111 of the Insolvency Act and section 407(1) of the 1973 Companies Act.
[33] *Idem* at Paragraph 11. 5. 1 read with section 111 of the Insolvency Act and section 407(1) of the 1973 Companies Act.
[34] *Idem* at Paragraph 11. 5. 1 read with section 111 of the Insolvency Act and section 407(1) of the 1973 Companies Act.
[35] See Media Statement *Update on progress in restoring Justice services following ransomware attack _ Adv. D Mashabane Director General* 21 September 2021, available at https://www.justice.gov.za/m_statements/2021/20210921-IT-Systems-RestorationProgress.pdf (last accessed on 13 March 2023).
[36] This is evident from the following articles: Boraine and Calitz 2005 *TSAR* 728; Calitz "Developments in the United States' Consumer Bankruptcy law: a South African perspective" 2007 *Obiter* 397; Calitz "Some administrative law aspects of state regulation of insolvency law revisited *Musenwa v Master of the North Gauteng High Court* (Unreported 54849/10) [2010] ZAGPPHC 190 (5 November 2010)" 2011 *Obiter* 747; Calitz "Some thoughts on state regulation of South African insolvency law" 2011 *De Jure* 290; Calitz "System of regulation of South African Insolvency Law: Lessons from the United Kingdom" 2008 *Obiter* 352; Cassim *Regulation of insolvency law in South Africa: the need for reform* 2014 (unpublished LLM (Business Law) dissertation, University of KwaZulu-Natal).
This is further illustrated in the following sent from SARIPA to its members: The notice of motion dated 11 September 2023 in case number 3640/23 in the Mpumalanga Division of the High Court where an application was filed for a declaratory order confirming that the Master of the High Court Middelburg and the Master of the High Court Pretoria is in contempt of Court as it has failed to appoint a provisional liquidator in the liquidated estate of Simaz Group (Pty) Ltd; The Minutes of the Teams Meeting held between SARIPA and various Masters offices on 20 February 2023 outlining the frustrations incurred by insolvency practitioners due to the requirement that original requisitions must be filed and the validity of the requisitions being 30 days as well as the non-service at the Nelspruit and Middelburg Masters offices; The Media statement dated 30 January 2022 by the Ministry of Justice and Correctional Services "Deputy Minister conducts unannounced oversight visit to Pretoria Master's Office" – this statement confirms that complaints and concerns have been received regarding service delivery issues and backlogs at the various Master's offices; The letter dated 12 October 2021 from SARIPA addressed to

Poor service delivery in respect of any of the duties listed in this long list of tasks of the Master (in the various stages of an insolvent estate) has a domino effect on the finalisation of the administration of the estate. As an example, failure by the Master to convene the first creditors' meeting immediately upon receipt of the sequestration order,[37] due to non-payment of its account at the Gazette or any other delay experienced with the Government Printing Works, results in a delay in the final appointment of a trustee and the convening of a second meeting. As a result, the assets in the estate cannot be sold without receiving the consent of the Master to sell the assets, which is an additional step that delays the process but that must be taken due to the first-mentioned delay. Each delay prejudices creditors as assets deteriorate and section 89 costs increase, resulting in lower dividends. This is also to the detriment of solvent co-debtors as they remain liable for any shortfalls after the proceeds of the depreciated asset are distributed to creditors.

Some of these delays can be addressed through amendments to the legal framework, for example, amending the legislation to allow the trustee or liquidator, rather than the Master, to convene a meeting. Other delays are not due to legal constraints but have possible legal

the Deputy Minister of Justice and Constitutional Development as well as the Chief Master setting out further proposals after a Teams meeting was held on 6 October 2021 as to solving some of the delays; The media statement dated 10 October 2021 issued by the Department of Justice and Constitutional Development with an update on the progress in restoring justice services following a ransomware attack; The letter from Jaco Roos Attorneys Incorporated dated 1 October 2021 on behalf of SARIPA to the Chief Master confirming that the media statements released by the Department of Justice and Constitutional Development and the Chief Master does not indicate any alternative or manual process to be followed whilst the ransomware attack is resolved; The undated memorandum from the Chief Master received by SARIPA on 30 September 2021 "Wayforward – Masters services" setting out why manual appointments will be too risky for the Master, without any solution for the delays; The letter from Jaco Roos Attorneys Incorporated dated 20 September 2021 on behalf of SARIPA to the Chief Master confirming that the ransomware attack has resulted in the Master not attending to their functions at all including the issuing of letters of appointment, convening first creditors meetings, examining and issuing of query sheets for L & D Accounts, confirmation of L & D Accounts and reduction of bond of security; The email communication from SARIPA to the Chief Master dated 14 September 2021 with proposals to resolve the delays experienced due to the ransomware attack; The media statements dated 7 and 9 September 2021 issued by the Department of Justice and Constitutional Development confirming a ransomware attack; The email correspondence from SARIPA to their members requesting a schedule of estates where there is a delay with the Master convening the first creditors meeting in order for SARIPA to address this with the Master; The letter from Jaco Roos Attorneys Incorporated dated 1 October 2021 on behalf of SARIPA to the Minister of Home Affairs confirming that, although the legal gazettes have been timeously published since 19 March 2021, many notices which should have been contained therein are not included in the gazette; The communication sent to SARIPA members on 6 July 2018 advising them that the SARIPA Insolvency Liaison Committee met with the Master and that the delay in convening of first creditors meeting by the Master has been resolved and the Master is attending to the backlog;

[37] Requirement in terms of section 40 of the Insolvency Act.

solutions. Van der Meulen recommends that section 2(2) of the Administration of Estates Act be amended to ensure the appointment of competent individuals in the Master's office.[38]

It is therefore critical to consider whether legislative provisions, thus solutions based in law, affect the functioning (or lack thereof) of the Master's office. *Khammissa v Master, Gauteng High Court* is a case in point.[39] In this matter, the Master took a *Pontius Pilate* stance and, in the view of the court, tried to circumvent its responsibility despite being at the apex of the insolvency law and practice regulatory framework.[40] This points to a greater systemic issue.[41]

The appointment of trustees and liquidators has also been a point of contention as seen in *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association.*[42] In this case, the Supreme Court of Appeal found that "the policy adopted by the Minister of Justice and Constitutional Development to regulate the Master's powers to appoint trustees, was unconstitutional as the arbitrariness of the Policy is apparent from the failure by the Minister to provide reasons justifying why disadvantaged people should be treated differently, on account of the date on which they became citizens and that the failure to prove that the policy is reasonably likely to achieve equality must mean that there is no proof of a rational link between the Policy and the purpose sought to be achieved".

The public has arguably lost its trust in the Master due to the perceived incompetency and lack of integrity of some of the employees at the Master's Office.[43]

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[38] Van der Meulen *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* 2022 (unpublished LLM (Mercantile Law) mini-dissertation, University of Pretoria) 61; Administration of Estates Act.
[39] *Khammissa and Others v Master, Gauteng High Court and Others* 2021 (1) SA 421 (GJ).
[40] *Idem* at Paragraph13.
[41] Van der Meulen 1 and 32.
[42] *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* [2018] ZACC 20.
[43] See, for example, *The Report of the Public Protector of South Africa on an investigation into alleged maladministration by the Master of the South Gauteng High Court Report 26 of 2018/19;* Unnamed Author "Deputy Master of the High Court remanded in Custody" 11 November 2019 *Mpumalanga News*, available at https://mpumalanganews.co.za/368188/deputy-Master-high-court-remanded-custody/ (last accessed on 12 March 2023); Skiti "SIU targets 15 in master of high court" 22 April 2021 *Mail & Guardian*, available at https://mg.co.za/news/2021-04-22-siu-targets-15-in-Master-of-high-court/ (last accessed on 12 March 2023); Skiti "Two senior estates and insolvencies officials suspended pending probe" 10 September 2021 *Times Live*, available at https://www.timeslive.co.za/news/south-africa/2021-09-10-two-senior-estates-and-insolvencies-officials-suspended-pending-probe/ (last accessed on 12 March 2023); Skiti "SIU probes how master of the high court fleeces the poor" 9 April 2021 *Mail & Guardian*, available at https://mg.co.za/ news/2021-04-09-siu-probes-how-Master-of-the-high-court-fleeces-the-poor/ (last accessed on 12 March 2023).

1.2. Problem statement

The dissertation investigates the hypothesis that the legislative and regulatory framework pertaining to insolvency law and practice in South Africa is sub-optimal when considering the challenges faced by role-players such as creditors, insolvency practitioners, and the public. The study considers the criticisms levied against the current oversight model by academic scholars and insolvency practitioners, to name but a few. The lack of proper regulation may also have constitutional implications[44] and, as such, the study will contribute to finding solutions to enable the State to adhere to its constitutional duties.

Since 1980,there have been attempts by the South African Law Reform Commission to reform the current insolvency law framework.[45] In this time, six interim reports were submitted and seven working papers were published for comment.[46] In 1996,a draft Insolvency Bill and Explanatory Memorandum was published as Discussion Paper 66.In 1999,a further draft Insolvency Bill and Explanatory Memorandum was published as Discussion Paper 86.[47] The Project Committee published their latest report in April 2000.The review report outlines nine substantive changes of which four aim to attend to some of the root causes of the delays related to the Master's involvement, namely:

1. "Only a person who is a member of a professional body recognised by the Minister of Justice may be appointed as liquidator;
2. The discretion of the Master of the High Court to appoint a liquidator of his or her choice has been limited in cases where creditors nominate or vote for a liquidator.
3. Liquidators may preside at meetings unless questioning is to take place at the meeting or an interested party requests that the Master or a magistrate should preside.
4. Resolutions can be adopted at the first meeting which is now convened by the initial liquidator as soon as possible after his or her appointment and not by the Master."[48]

[44] Calitz 2011 *De Jure* 290.
[45] Voster *Re-evaluating Statutory Preferences in Insolvency Law* 2018 (unpublished LLM dissertation, University of Pretoria).
[46] Law Commission Project Committee *Report on the review of the law of insolvency* published April 2000.
[47] *Ibid*.
[48] *Ibid*.

Although some of the recommended changes address issues related to the Master, the report does not consider whether the framework of oversight itself is viable and sustainable. Calitz submits that, in order to guarantee the proficiency of office holders and to preserve the integrity of the system, the regulation of insolvency law is crucial.[49] The Master is presently the chosen creature of statute tasked with this regulatory function.[50] However, against the background of the challenges experienced by *inter alia* creditors-consideration of oversight by the Master should bear in mind that the basic concept of *concursus creditor* has always remained the common law principle entrenched in the successive statutes relating to insolvency law.[51]

Questioning the level of state oversight becomes even more relevant when comparing the regulation of insolvency practitioners to the level of oversight imposed on business rescue practitioners. As an example, a business rescue practitioner is appointed by the company once a resolution to enter business rescue has been taken and filed,[52] or by the Court upon granting a business rescue application.[53] The business rescue practitioner convenes and presides over creditors' meetings[54] without the need for advertisement in the Government Gazette. The business rescue plan is adopted through a vote of creditors,[55] and not subject to confirmation by any regulatory body.

1.3. Research questions

In light of the issues highlighted above, and the various stakeholders involved in the process, the question is whether reduced oversight by the Master in insolvency proceedings is necessary, possible, and to the benefit of parties who have vested interests in insolvent estates. The Department of Justice and Constitutional Development aims to introduce a Draft Insolvency Bill by 2024. Therefore, analysing the delays experienced by the insolvency industry and finding solutions are of vital importance. The dissertation will consider the following essential questions in consideration of the main topic:

[49] Calitz *A reformatory approach to state regulation of insolvency law in South Africa* 2009 (unpublished LLD thesis, University of Pretoria) chapter 1.
[50] See footnote 4 above.
[51] Boraine & Calitz 2005 TSAR 729 and *Richter v Riverside Estates (PTY) Ltd* 1946 OPD 209 at 223.
[52] Section 129(3) (b) of the 2008 Companies Act.
[53] Section 131(5) of the 2008 Companies Act – Court appointments to be ratified by an independent creditor vote in terms of section 131 (5).
[54] Sections 147(1) and 151(1) of the 2008 Companies Act.
[55] Section 152 of the 2008 Companies Act.

- Which delays in the insolvency process may be linked to the oversight of the Master of the High Court?
- What is the probable impact of these delays on creditors, insolvent debtors, and insolvency practitioners?
- Are solutions to oversight-related delays proposed by academic authors, and the substantive recommendations by the Project Committee for reform of the South African Insolvency Law workable and sufficient?
- How does the level of oversight by the Master of the High Court compare to oversight in business rescue processes?
- How does the level of oversight by the Master of the High Court in South Africa compare with trends in Germany? Which practices provide viable solutions to address oversight-related delays?
- What is the possible benefit of empirical research in the context of legal research for this research problem?
- Which solutions should be adopted in South Africa to remedy oversight-related delays in insolvency proceedings?

Against this background, the main questions are whether the *status quo* should be retained and, if not, which provisions should be included in (or excluded from) insolvency legislation in order to address the failures related to the oversight function of the Master. These research questions can be answered by establishing:

- The issues experienced in the industry due to the oversight-role of the Master – this is confirmed by anecdotal evidence.
- The extent to which these issues are based in law, and whether these issues are capable of being addressed through legislative amendments. This would entail a proper investigation of the legal framework relevant to the root causes of these challenges.
- Whether the proposed reform initiatives and academic scholarship address any of these issues in a comprehensive and viable manner.
- Whether any solutions are to be found in the business rescue process which can be adapted for the insolvency process.

- Whether there are solutions to the issues in German Law – this entails a proper investigation of the legal framework pertaining to insolvency regulation in Germany.
- How the South African legal framework can be enhanced to deal with the challenges identified above.

1.4. Significance of the study

A modern insolvency system is a key foundational element of sustainable economic development and is of significant importance as it relates to the confidence of the public in the insolvency system.[56] Unfortunately, delays experienced as a result of the involvement of the office of the Master for whatever reason, is not the only problem faced when attempting to deal with issues related to the Master. It has been well documented in the media that the public has lost its faith in the Master due to corruption linked to officials in the office of the Master.[57] The added benefit of the possible legislative solutions to reduce the oversight-role of the Master is the reduction of opportunities for corruption and the restoration of the confidence of the public in the insolvency system.

1.5. Methodology and choice of comparative jurisdiction

Desktop-research was undertaken, and anecdotal evidence was obtained whereafter the Report by the Project Committee and the substantive proposed changes were analysed against the background of the current legislative framework, case law, academic literature,[58] and other reformative proposals (such as the latest version of the Draft Insolvency Bill (2015)[59]).For example, the question that is asked is whether the proposal by the Project Committee, regarding the limitation of the discretion of the Master of the High Court to appoint a liquidator in cases

[56] Calitz 2011 *De Jure* 291; Van der Meulen 2.
[57] Such as: Skiti "SIU targets 15 in Master of High Court" 22 April 2021 Mail & Guardian available at https://mg.co.za/news/2021-04-22-siu-targets-15-in-master-of-high-court/ (last accessed on 12 March 2023); Skiti "SIU probes how master of the high court fleeces the poor" 9 April 2021 Mail & Guardian available at https://mg.co.za/news/2021-04-09-siu-probes-how-master-of-the-high-court-fleeces-the-poor/ (last accessed on 12 March 2023); Skiti "Two senior estates and insolvencies officials suspended pending probe" 10 September 2021 Times Live available at https://www.timeslive.co.za/news/south-africa/2021-09-10-two-senior-estates-and-insolvencies-officials-suspended-pending-probe/ (last accessed on 12 March 2023); Unknown Author "Deputy Master of the High Court remanded in Custody" 11 November 2019 Mpumalanga News available at https://mpumalanganews.co.za/368188/deputy-master-high-court-remanded-custody/ (last accessed on 12 March 2023).
[58] Such as Calitz 2011 *Obiter* 747; Calitz 2011 *De Jure* 290; Burdette *Framework for corporate insolvency law reform in South Africa* 2002 (unpublished LLD thesis, University of Pretoria).
[59] On file with author.

where creditors nominate or vote for a liquidator, is sufficient to address the various concerns related to the appointment of liquidators or trustees.

The differences between the oversight in insolvencies and business rescue will be studied. Chapter 6 of the 2008 Companies Act provides for, and regulates, various aspects of business rescue. Section 131 makes provision for the commencement of business rescue proceedings by way of a court order. An affected person may apply to a court for an order commencing business rescue proceedings;[60] and the court may grant such an application if it is satisfied that the company is financially distressed; or the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract with respect to employment-related matters; or it is otherwise just and equitable to do so for financial reasons; and there is a reasonable prospect for rescuing the company.[61] If the court grants the order, it may make a further order appointing an interim practitioner who has been nominated by the affected person/s who applied for the order, subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors.[62] Section 148 provides for the first creditors' meeting to be convened and presided over by the business rescue practitioner. In light of the question asked in the previous paragraph on the proposal by the Law Reform Commission, a further question would be whether an appointment process similar to that of the business rescue practitioner is desirable or whether there is a more preferred and efficient manner to attend to the appointments.

Germany was chosen as the foreign jurisdiction for the comparative study. The German *Grundgesetz* or Constitution is based upon the modern idea of a *Rechtsstaat*.[63] The concept of the *Rechtsstaat* is defined by Stern as the "exercise of state authority based upon statutes which are in line with the constitutional principles and strive to protect freedom, justice and legal certainty".[64] Venter submits that the concept of the *Rechtsstaat* was introduced to South Africa in the late 1970's by academic lawyers who had been exposed to German learning and visiting

[60] Section 131(1) of the 2008 Companies Act.
[61] Section 131(4)(a)(i) – (iii) of the 2008 Companies Act.
[62] Section 131(5) of the 2008 Companies Act.
[63] Blaauw-Wolf & Wolf "A Comparison between German and South African Limitation Provisions" 1996 *SALJ* 267.
[64] Stern *Das Staatsrecht der Bundesrepublik Deutschland* 1977 (vol 1) 615.

European scholars.[65] He further concludes that the interim Constitution expressly incorporated the concept of the *Rechtsstaat* into South African law and that "the Constitutional Court has indicated an ability and willingness to develop the notion of the *Rechtsstaat* in the South African context".[66]

The insolvency regime in Germany is governed by the Insolvency Act (InsO) which came into force in 1999 and has been amended as recently as May 2021.[67] InsO[68] is a perfect example of reduced governance by the Insolvency Court[69] and, therefore, the InsO will be discussed. It must also be noted that the legislation is made available in English by the German government.

In various jurisdictions, the law of insolvency and business rescue forms part of a larger harmonised insolvency law that includes processes similar to the South African business rescue process. It is therefore possible to include the comparison with South African business rescue practices as this process often features together with other insolvency processes in foreign jurisdictions.

1.6. Breakdown of Chapters

Chapter one of this dissertation explains the research problem and provides the background to the theme of this study. The research questions are set out and the significance of the study is explained. The methodology and choices for the comparative study are discussed.

Chapter two of this dissertation builds on the brief overview of the duties and functions of the Master during the sequestration and liquidation process in chapter one. This chapter further provides anecdotal evidence of the delays currently experienced in South Africa due to the Master. The aim of this chapter is to illustrate the vital role the Master is currently fulfilling in the liquidation and sequestration process as well as the delays experienced therein.

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[65] Venter "Aspects of the South African Constitution of 1996: An African Democratic and Social Federal Rechtsstaat?" Zeitschrift für auslandisches öffentliches Recht und Völkerrecht" 51, available at https://www. za oerv. de/57_1997/57_1997_1_a_51_82. pdf (last accessed on 14 March 2023).
[66] *Ibid.*
[67] The German Insolvenzordnung – InsO or The Insolvency Code of 5 October 1994 (Federal Law Gazette I, p. 2866), as last amended by Article 2 of the Act of 7 May 2021 (Federal Law Gazette I p. 850).
[68] *Ibid.*
[69] As an example – section 67 of InsO provides for the establishment of a creditors' committee that must support and monitor the insolvency administrator's execution of his duties and approval of the insolvency plan (equal to our liquidation and distribution account). See also Burdette 105 regarding the increased creditor independence brought about by InsO.

Chapter three consists of an internal comparative analysis with the South African business rescue process to determine what lessons can be learned for the insolvency process. This chapter deals with the following research question: "How does the level of oversight by the Master of the High Court compare to oversight in business rescue processes?"

Chapter four deals with the comparative study – the comparison with German law. The aim of this chapter is to establish which of their practices provide viable solutions to address the oversight-related delays we are experiencing.

Chapter five discusses empirical research in the context of legal research and the possible benefit thereof for this research problem.

Chapter six reflects on the analyses undertaken in chapters two to four and provides recommendations for reform related to the oversight of the Master in insolvency proceedings.

Chapter 2: The duties and functions of the Master during the sequestration and liquidation process

2.1. Introduction

This chapter deals with the duties and functions of the Master of the High Court during the sequestration and liquidation process. The history of the Master was discussed briefly in the first chapter together with a basic overview of the functions of the Master. This chapter deals with the various duties and functions in more detail in order to enable the reader to understand the background against which the challenges identified in the course of this study manifest.

The Master of the High Court is a creature of statute[70] and various Acts regulate the duties and powers of the Master.[71] The role of the Master in insolvency proceedings is supervisory,[72] and its duties and functions in this regard have been grouped together according to the type of oversight required.

2.2. Oversight regarding compliance with legislative provisions

2.2.1. Determining whether the security provided by an applicant-creditor is sufficient

The applicant creditor in any forced sequestration or liquidation application must give sufficient security for payment of all charges and fees necessary for the administration of the estate until the appointment of a trustee or liquidator or sufficient for the discharge of the sequestration or liquidation.[73] This certificate is a requirement for a forced sequestration

[70] As an example – section 67 of InsO provides for the establishment of a creditors' committee that must support and monitor the insolvency administrator's execution of his duties and approval of the insolvency plan (equal to our liquidation and distribution account). See also Burdette 105 regarding the increased creditor independence brought about by InsO.
[71] Including the Administration of Estates Act 66 of 1965, the Insolvency Act 24 of 1936, the Companies Act 61 of 1973, the Close Corporations Act 69 of 1984 and the Trust Property Control Act 57 of 1988.
[72] Department of Justice and Constitutional Development *The Master of the High Court.*
[73] Section 9(3) of the Insolvency Act requires that "the Master issue a certificate that sufficient security has been given for payment of all fees and charges necessary for the prosecution of all sequestration proceedings. Section 346(3) of the 1973 Companies Act requires that "every application to the Court for the winding-up of a company shall be accompanied by a certificate by the Master, issued not more than ten days before the date of the application, to the effect that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all winding-up proceedings and of all costs of administering the company in liquidation until a provisional liquidator has been appointed, or, if no provisional liquidator is appointed, of all fees and charges necessary for the discharge of the company from the winding-up. " Section 66 of the Close Corporations Act confirms that section 346(3) applies to the liquidation of a close corporation. Also see section 24(1) of the

application and the applicant has to provide security to the Master.[74] The provision in legislation and implementation in practice is similar for insolvency and liquidation.

2.2.2. Issuing a certificate for the cancellation of a bond of security

The Trustee or liquidator may apply to the Master for the reduction or cancellation of the required bond of security. This is usually done when some or all of the assets in the estate has been sold and advance dividends paid to the creditors.[75] The provision in legislation and implementation in practice is similar for insolvency and liquidation. The quicker this is attended to once the value of assets left in the estate has reduced, the lower the bond of security premium will be and this will result in higher dividends due to creditors and lower shortfalls payable by solvent sureties, guarantors and co-debtors.

2.2.3. Issuing a certificate of appointment to a trustee or liquidator

The Master must, if he is not of the intention to refuse the election of the trustee or liquidator,[76] issue a certificate of appointment of a trustee or liquidator upon provision of sufficient security by the trustee or liquidator.[77] The provision in legislation and implementation in practice is similar for insolvency and liquidation.

Insolvency Act in terms whereof the petitioning creditor must at his own costs prosecute all proceedings in the sequestration until a provisional trustee has been appointed.

[74] The Certificate of Tendered Security issued by The Master of the High Court is referred to as form J271, lists the names of the applicants and respondents and certifies in English and Afrikaans that "sufficient security has been given for payment of all fees and charges necessary for the prosecution of all *sequestration/winding-up proceedings in the above matter and of all costs of administering the *Estate/Company/Close Corporation until a *Provisional Trustee/Trustee/Provisional Liquidator/Liquidator has been appointed, or, if no * Provisional Trustee/Trustee/Provisional Liquidator/Liquidator is appointed, of all fees and charges necessary for the discharge of the *Estate/Company/Close Corporation from *sequestration/winding-up".

[75] Section 56(7) of the Insolvency Act requires the Master to issue a certificate pursuant to which the trustee may reduce (or cancel) the bond of security. Sections 385 and 419 of the 1973 Companies Act require the Master to issue a certificate pursuant to which the liquidator may cancel his bond of security, finalise a company's winding-up process, and be released from office. Section 66 of the Close Corporations Act confirms that sections 385 and 419 apply to the liquidation of a close corporation. See also Meskin Paragraph1. 7. ; Sharrock, Van der Linde and Smith *Hockly's Insolvency Law* (9th Edition)) (2012) Juta: South Africa (hereafter Hockly's) Paragraph 23. 11; and Henochsberg's *Henochsberg on the Companies Act 71of 2008* (Issue 31, the volume being up to date to May 2023) (hereafter Henochsberg) Vol 2 APPI 183.

[76] See Paragraph 2. 3. 3

[77] Section 56 of the Insolvency Act states that "the Master shall, when a person so elected has given security to his satisfaction for the proper performance of his duties as trustee, confirm his election and appoint him as trustee by delivering to him a certificate of appointment, which shall be valid throughout the Republic. " Section 375 of the 1973 Companies Act determines that, "when the person to be appointed to the office of liquidator of a company has been determined and when such person has given security to the satisfaction of the Master for the proper performance of his duties as liquidator, except where in the case of a members' voluntary winding-up the

2.2.4. Convening the first creditors' meeting

The Master must, upon the receipt of a final sequestration order, final order for the liquidation of a company or the special resolution for a creditors voluntary winding up of a company, convene the first creditors' meeting.[78] The purpose of the first creditors' meeting is for creditors to prove their claims against the estate and for the election of a trustee to take place.[79] In practice, this is rarely attended to immediately by the Master.[80] The implementation is similar for insolvency and liquidation of a company.

2.2.5. Presiding over creditors' meetings

The Master must either preside over all creditor's meetings in the district where there is a Master's office or the Master must designate an officer in the public service to do so on behalf of the Master.[81] The provision in legislation and implementation in practice is similar for insolvency and liquidation.

2.2.6. Confirming a liquidation and distribution account

The Master must confirm a liquidation and distribution account that has lain for inspection and if either no objection was lodged against the account or any objections lodged have been

company concerned has resolved that no security shall be required, the Master shall appoint him as liquidator of the company by issuing to him a certificate of appointment". Section 74 of the Close Corporations Act confirms that section 375 applies to the liquidation of a close corporation. See also Meskin Paragraph1. 7. ; Hockly's Paragraph 10. 1. 2; and Henochsberg Vol 2 APPI 163.

[78] Section 40(1) of the Insolvency Act states that "on the receipt of an order of the court sequestrating an estate finally, the Master shall immediately convene by notice in the Gazette, a first meeting of the creditors of the estate". Section 364(1)(a) of the 1973 Companies Act states that "as soon as may be after a final winding-up order has been made by the Court or a special resolution for a creditors' voluntary winding-up of a company has been registered in terms of section 200, the Master shall summon a meeting of the creditors of the company" The Master does not convene the first creditors' meeting in a Close Corporation Liquidation – the liquidator must do so in terms of section 78(1) of the Close Corporations Act.

[79] Section 40(1) of the Insolvency Act and section 364 of the 1973 Companies Act – the further purpose of the meeting for a company is to consider the statement of affairs of the company lodged with the Master. The Master does not convene the first creditors' meeting in a Close Corporation Liquidation – the liquidator must do so in terms of section 78(1) of the Close Corporations Act.

[80] Footnote 36 above regarding SARIPA correspondences to the Master.

[81] Section 39(2) of the Insolvency Act requires that all meetings of creditors held in the district where there is a Master's office, shall be presided over by the Master or an officer in the public service designated by the Master for that purpose. Section 364(2) of the 1973 Companies Act confirms that the above section 39(2) applies to the liquidation of a company and section 66 of the Close Corporations Act confirms that section 364(2) applies to the liquidation of a close corporation. See also Hockly's Paragraph 23. 5. 1; and Henochsberg Vol 2 APPI 130.

attended to (and the account has subsequently lain for inspection again without objection); or withdrawn or not sustained by the Master.[82]

2.2.7. Discussion

The above duties and functions listed are required of the Master without any discretion or decision authority – the Master must attend to it if certain requirements exist.

2.3. Oversight regarding administrative discretion of appointments and removals

2.3.1. Appointing a Curator Bonis

In order to prevent possible dissipating of assets by a debtor after the application of a notice to surrender, the Master may appoint a *Curator Bonis* to the estate prior to the sequestration order being granted by the Court.[83] This happens very seldom in practice and does not require an application by anyone. In the rare event of such an appointment, the estate will remain vested in the debtor, but the *Curator Bonis* will presume the role of a caretaker. There is no similar provision in the Companies Act or Closed Corporations Act.

2.3.2. Appointing provisional trustees or liquidators

The Master may appoint a provisional trustee or liquidator as soon as an estate has been liquidated or sequestrated (provisionally or finally) irrespective of voluntary or compulsory. The Master may also appoint a provisional trustee when a current trustee ceases to be a trustee or function as a trustee.[84] The provision in legislation and implementation in practice is similar

[82] Section 112 of the Insolvency Act requires the Master to confirm the account lodged by the trustee – if no objection has been lodged or any such objection has been delt with to the satisfaction of the Master or withdrawn. Section 408 of the 1973 Companies Act requires the Master to confirm the account lodged by the liquidator – if no objection has been lodged or any such abjection has been delt with to the satisfaction of the Master or withdrawn. Section 66 of the Close Corporations Act confirms that section 408 applies to the liquidation of a close corporation. See also Hockly's Paragraph 17. 7; and Henochsberg Vol 2 APPI 233.

[83]Section 5(2) of the Insolvency Act empowers the Master to "appoint a *curator bonis* to the debtor's estate, who shall forthwith take the estate into his or her custody and take over the control of any business or undertaking of the debtor, as if he or she were the debtor, as the Master may direct" See also Hockly's Paragraph2. 4. 2

[84] Section 18(1) of the Insolvency Act provides for the appointment of a provisional trustee by the Master as soon as an estate has been sequestrated, provisionally or finally. It further provides that the Master may appoint a provisional trustee when a person appointed as trustee ceases to be a trustee or to function as such. Section 368 of the 1973 Companies Act provides for the appointment of a provisional liquidator by the Master as soon as a winding-up order has been made in relation to a company, or a special resolution for a voluntary winding-up of a company has been registered. Section 74 of the Close Corporations Act provides for the appointment of a

for insolvency and liquidation. In practice, the Master issues a "48 Hour List" upon receipt of sequestration or liquidation orders or resolutions advising that requisitions must be filed within a certain period and that appointments will be made accordingly on a specific date (usually 2 days after the issuing of the list). The Master will then consider the requisitions filed and appoint a provisional trustee or liquidator based on a number of requisitions and value of requisitions. A co-trustee or liquidator will also be appointed from the Master's list of previously disadvantaged individuals (known as PDI's in the industry).The Master makes the appointments based on the Master's list of panel trustees or liquidators and this list is renewed annually.[85] The requisition must specify the type of claim, the name of the estate, who is nominated to be appointed, the authority of the person signing the requisition, the value and cause of action.

2.3.3. Confirming the appointment of final trustees or liquidators

The Master can confirm the appointment of the final trustee or liquidator as voted for at the first creditors meeting.[86] The Master may refuse the confirmation of the election of a trustee if not properly elected, disqualified from appointment, failed to provide security, or if in the opinion of the Master the person should not be appointed.[87] The provision in legislation and implementation in practice is similar for insolvency and liquidation.

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liquidator as soon as is practicable after a provisional winding-up order has been made, or a copy of a resolution for a voluntary winding-up has been registered. See also Hockly's Paragraph8. 4. 1; and Henochsberg Vol 2 APPI 153.

[85] See also Calitz & Burdette *The appointment of Insolvency Practitioners in South Africa: time for a change?* TSAR 2006. 4 729 for a detailed discussion regarding the current position and criticism thereof.

[86] Section 56(1) of the Insolvency Act determines that, if a trustee was elected at a meeting of creditors at which a person other than the Master presided, confirmation of the appointment is required by the Master for the appointment to be valid. Section 369(2)(b) of the 1973 Companies Act determines that, if at the creditors meeting a different liquidator from the provisional liquidator was nominated, the Master must decide on the difference and appoint all or any of the persons nominated as liquidator or liquidators. Section 66 of the Close Corporations Act confirms that section 369 applies to the liquidation of a close corporation. See also Hockly's Paragraph10. 1. 2; and Henochsberg Vol 2 APPI 156(1)

[87] Section 57(1) of the Insolvency Act determines "If a person who has been elected as trustee was not properly elected or is disqualified, under section fifty five, from being elected or appointed a trustee or is disqualified from being a trustee of the estate in question or has failed to give within a period of seven days as from the date upon which he was notified that the Master had confirmed his election, or within such further period as the Master may allow, the security mentioned in subsection (2) of section fifty six or in the opinion of the Master the person elected as trustee should not have been appointed as trustee to the estate in question, the Master shall give notice in writing to the person so elected that he declines to confirm his election or to appoint him as trustee and shall, in that notice state his reason for declining to confirm his election or to appoint him. Provided that if the Master declines to accept the nomination for appointment as liquidator because he is of the opinion that the person nominated should not be appointed as trustee, it shall be sufficient if the Master states, in that notice, as such reason, that he is of the opinion that the person nominated should not be appointed as trustee of the estate

2.3.4. Removing a trustee

The Master may remove a trustee or liquidator from office if not properly elected, is or has become disqualified from appointment, failed to perform any duty imposed by law, is mentally or physically unable to perform duties, the majority of creditors have requested the removal, or if in the opinion of the Master the person is no longer suitable to be a trustee in the relevant estate.[88] The provision in legislation and implementation in practice is similar for insolvency and liquidation.

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concerned. ". Section 370(1) of the 1973 Companies Act determines that, "If a person who has been nominated as liquidator by meetings of creditors and members or contributories of a company was not properly nominated or is disqualified from being nominated or appointed as liquidator under section 372 or 373 or has failed to give within a period of seven days as from the date upon which he was notified that the Master had accepted his nomination or within such further period as the Master may allow, the security mentioned in section 375(1) or, if in the opinion of the Master the person nominated as liquidator should not be appointed as liquidator of the company concerned, the Master shall give notice in writing to the person so nominated that he declines to accept his nomination or to appoint him as liquidator and shall in that notice state his reason for declining to accept his nomination or to appoint him: Provided that if the Master declines to accept the nomination for appointment as liquidator because he is of the opinion that the person nominated should not be appointed as liquidator, it shall be sufficient if the Master states, in that notice, as such reason, that he is of the opinion that the person nominated should not be appointed as liquidator of the company concerned. ". Section 66 of the Close Corporations Act confirms that section 370 applies to the liquidation of a close corporation. See also Hockly's Paragraph10. 1. 3; and Henochsberg Vol 2 APPI 156(2)

[88] Section 60 of the Insolvency Act allows the Master to remove a trustee from his office on the following grounds:

- The trustee was not qualified for election or appointment or such election or appointment was illegal, or the trustee has become disqualified from election or appointment as a trustee; or
- The trustee failed to perform any duty imposed by the Insolvency Act or demand by the Master in a satisfying manner; or
- The trustee is mentally or physically incapable of satisfactorily performing his duties; or
- The majority of creditors, reckoned in number and in value, has requested that the Master remove the trustee; or
- The Master is of the view that the trustee is no longer suitable to be a trustee in the relevant estate.

Section 379 of the 1973 Companies Act states that the Master may remove a liquidator from his office on the following grounds:

- "The liquidator was not qualified for nomination or appointment as liquidator or his nomination or appointment was for any other reason illegal, or he has become disqualified from being nominated or appointed as a liquidator or has been authorized, specially or under a general power of attorney, to vote for or on behalf of a creditor, member or contributory at a meeting of creditors, members or contributories of the company of which he is the liquidator, and has acted or purported to act under such special authority or general power of attorney; or
- He failed to perform any duty imposed upon him by this Act or to comply with a lawful demand of the Master or a commissioner appointed by the Court under this Act in a satisfying manner; or
- His estate has become insolvent or he has become mentally or physically incapable of properly performing his duties as liquidator; or
- The majority (reckoned in number and in value) of creditors entitled to vote at a meeting of creditors or, in the case of a members' voluntary winding-up, a majority of the members of the company, or, in the case of a winding-up of a company limited by guarantee, the majority of the contributories, has requested him in writing to do so; or
- In his opinion, the liquidator is no longer suited to be the liquidator of the company concerned. "

Section 66 of the Close Corporations Act confirms that section 379 applies to the liquidation of a close corporation. See also Hockly's Paragraph 10. 3. 2; and Henochsberg Vol 2 APPI 169.

2.3.5. Discussion

Calitz concluded that the Master, as a public body and organ of state, is bound by the provisions of the Promotion of Administrative Justice Act (PAJA).[89] There is a duty on the Master in terms of section 6(2) and 6(3) of the PAJA to act within the periods specified by the Insolvency Act and 1973 Companies Act and, if no period is stipulated, the Master must comply within a reasonable time.

The appointment and removal of trustees and liquidators have been a longstanding discussion point in South Africa and it has been clear from the decision by the Constitutional Court in *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others*[90] that there is a need for reform in the industry.

Unfortunately, the Insolvency Act and 1973 Companies Act stipulate a list of disqualifications for the appointment of a trustee or liquidator, however it fails to indicate who must indeed be appointed.

2.4. Oversight regarding administrative consent to the trustee or liquidator

2.4.1. Providing consent to carry on with business

The Master may authorise and provide directions to the trustee or liquidator to carry on the business of the insolvent or liquidated entity.[91] The provision in legislation and implementation in practice is similar for insolvency and liquidation. The consent is given on the Master's letterhead, addressed to the trustee or liquidator and confirms that the powers of the trustee or liquidator is extended in terms of the relevant sections of the Insolvency Act and 1973 Companies Act.

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[89] Act 3 of 2000; Calitz *A reformatory approach to state regulation of insolvency law in South Africa* 2009 (unpublished LLD thesis, University of Pretoria) chapter 4.
[90] [2018] ZACC 20.
[91] Section 80(1) of the Insolvency Act provides that the Master may, at any time, whether before or after the second creditors' meeting, authorise the trustee to carry on the business of the insolvent. Section 386 of the 1973 Companies Act provides that the Master may, at any time, provide directions to the liquidator to carry on the business of the liquidated entity. Section 66 of the Close Corporations Act confirms that the above section 386 applies to the liquidation of a close corporation. See also Hockly's Paragraph 11. 3; and Henochsberg Vol 2 APPI 183.

2.4.2. Providing authority to sell property of the estate

The Master may authorise the sale of any movable or immovable asset prior to the adoption of resolutions by the creditors allowing the trustee or liquidator to sell assets.[92] In practice the trustee or liquidator requests the recommendation of the secured creditor of the relevant asset to obtain the consent from the Master whereafter the trustee or liquidator requests the consent from the Master with their own motivation attached. The resolutions are usually adopted at the second creditors meeting in an insolvent estate and the general meeting in a liquidated estate. As these meetings are convened by the trustee or liquidator as soon as they have the minutes of the first creditors meeting, it is quicker for them to convene the meeting than to request consent to sell, in practice the consent is thus requested prior to the first creditors meeting in sequestration or liquidation of a company, where the Master has to convene the meeting. The provision in legislation and implementation in practice is similar for insolvency and liquidation. The consent is given on the Master's letterhead, addressed to the trustee or liquidator and confirms that the powers of the trustee or liquidator is extended in terms of the relevant sections of the Insolvency Act and 1973 Companies Act.

2.4.3. Consenting to the convening of a special creditors' meeting

Section 42 of the Insolvency Act enables the trustee to convene a special meeting of creditors for the purpose of proving of late claims and interrogating an insolvent, providing that the Master consents thereto. The liquidator of a company or close corporation may convene a general meeting for this purpose at any time without the consent of the Master.[93] The consent is given on the Master's letterhead, addressed to the trustee and confirms that the trustee may convene the meeting to approve specific claims and/or hold an interrogation.

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[92] Section 80(bis) of the Insolvency Act determines that the Master may authorise, upon receipt of a recommendation from the trustee, the sale of any movable or immovable property of the estate, prior to the second creditors' meeting. Section 386(2B) of the 1973 Companies Act provides that the Master may authorise, upon receipt of a recommendation from the liquidator, the sale of any movable or immovable property of the company, prior to the general creditors meeting. Section 66 of the Close Corporations Act confirms that the above section 386(2B) applies to the liquidation of a close corporation. See also Hockly's Paragraph 15. 1. 5; and Henochsberg Vol 2 APPI 184.

[93] Section 42(1) and (2) of the Insolvency Act. Section 386(1)(d) of the 1973 Companies Act provides that the liquidator in any winding-up shall have the power to summon any general meeting of the creditors for the purpose of obtaining their authority or sanction in respect of any matter or for such other purposes as he may consider necessary. Section 66 of the Close Corporations Act confirms that the above section 386(1)(d) applies to the liquidation of a close corporation. See also Hockly's Paragraph 9. 1. 4; and Henochsberg Vol 2 APPI 183.

2.4.4. Providing authority to act in legal proceedings

The Master may authorise the trustee or liquidator to act on behalf of the estate in any legal proceedings, engage the services of an attorney of counsel to perform specific legal work.[94] The Master may do so at any time during the administration of the estate, however in practice this is usually only required before the adoption of resolutions by creditors as the creditors resolve that the trustee or liquidator may do so.

2.4.5. Discussion

The majority of the above administrative consents are to be given where resolutions have not yet been given to the trustee or liquidator to do so by the creditors. As with the authority to appoint and remove trustees, the PAJA is applicable to any such decision made by the Master.

2.5. Oversight regarding the Liquidation and Distribution Account

2.5.1. Providing an extension for the lodgement of the liquidation and distribution account

When a trustee or liquidator is unable to submit the first liquidation and distribution account (L&D) within 6 months of their appointment, they may submit reasons to the Master in the form of an affidavit and request an extension to lodge the account.[95] It is seldom possible for

[94] Section 73(1)(a) of the Insolvency Act allows for the trustee to obtain authorisation from the Master to act in legal proceedings and engage the services of any attorney or counsel to perform legal work specified in the authorisation. Section 386(3) and (4) of the 1973 Companies Act provides that "the Master may, at any time, provide directions to the liquidator to bring or defend, in the name and on behalf of the company, any action or other legal proceeding of a civil nature and, subject to the provisions of any law relating to criminal procedure, any criminal proceedings: Provided that immediately upon the appointment of a liquidator and in the absence of the Master may authorise, upon such terms as he thinks fit, any urgent legal proceedings for the recovery of outstanding account. " Section 66 of the Close Corporations Act confirms that section 386 applies to the liquidation of a close corporation See also Hockly's Paragraph 11. 8; and Henochsberg Vol 2 APPI 184.

[95] Section 109 of the Insolvency Act allows the trustee to submit an affidavit with the reasons for the inability to submit an account on time. In terms of this section, the trustee must also inform the Master of the affairs, transactions or matters of importance that the Master may need to know about and the amount of money available for payment to creditors – or that there is no free residue available and the amount of contribution payable – whereafter the Master may extend the submission to a later date. Section 404 of the 1973 Companies Act allows a liquidator to lodge written reasons why he is not able to lodge an account in time with a statement of the grounds, if any, upon which he claims an extension of time within which to lodge such account. The Master may thereupon grant such an extension of time as he may in the circumstances think necessary. An affidavit setting out the amount of funds in hand available for distribution, a summary of the position in respect of the winding-up, and whether he has applied for an extension of time before, must also be provided. Each creditor of the company must receive a copy of this affidavit. Section 66 of the Close Corporations Act confirms that section 366 applies to the liquidation of a close corporation. See also Hockly's Paragraph 17. 2; and Henochsberg Vol 2 APPI 224(1).

the trustee or liquidator to submit their L&D accounts within 6 months as in the majority of estates the Master has not yet convened the first creditors meeting at that stage, thus in practice this is only required with the Master of the Western Cape, Cape Town and not monitored in any other office of the Master. The consent is given on the Master's letterhead, addressed to the trustee or liquidator and confirms that the trustee or liquidator is provided with an extension until a specific date to lodge the L&D. The provision in legislation and implementation in practice is similar for insolvency and liquidation.

2.5.2. Considering of objections to a liquidation and distribution account

Once a L&D has been lodged with the Master, the Master will either issue a "query sheet" with questions addressed to the trustee or liquidator or provide consent to advertise the laying for inspection of the account. Once the advertisement has been published the account will lay for inspection at the Master's office and relevant Magistrate Courts for a period of 14 days. Any interested party may lay an objection to the L&D with the Master at any time before the confirmation of the L&D.

The Master must consider the objection and decide if it is well founded or not. If it is a well-founded objection the Master must issue a "query sheet" to the trustee or liquidator for them to answer any questions or direct them to amend the L&D. If it is not a well-founded objection the Master must proceed to confirm the L&D.

Once the query sheet has been attended to by the trustee or liquidator to the satisfaction of the Master, the Master will instruct the trustee or liquidator to advertise the lying of inspection again.[96]

[96] Section 111(2) of the Insolvency Act states that, "[i]f the Master is of the opinion that any such objection is well founded or if, apart from any objection, he is of the opinion that the account is in any respect incorrect or contains any improper charge or that the trustee acted mala fide, negligently or unreasonably incurring any costs included in the account and that the account should be amended, he may direct the trustee to amend the account or give such other direction in connection therewith as he may think fit". Section 407(2) of the 1973 Companies Act states that, "[i]f the Master is of opinion that any such objection ought to be sustained, he shall direct the liquidator to amend the account or give such other directions as he may think fit. " Section 407(3) determines "[i]f in respect of any account the Master is of the opinion that any improper charge has been made against the assets of a company or that the account is in any respect incorrect and should be amended, he may, whether or not any objection to the account has been lodged with him, direct the liquidator to amend the account, or he may give such other directions as he may think fit". Section 66 of the Close Corporations Act confirms that section 407 applies to the liquidation of a close corporation. See also Hockly's Paragraph 17. 4-7; and Henochsberg Vol 2 APPI 229.

2.6. Miscellaneous oversight by the Master

2.6.1. Vesting of control of the insolvent estate in the Master

Section 5 of the Insolvency Act provides that, after the publication of a notice to surrender in the Government Gazette, it shall be unlawful to sell any property of the estate that has been attached under writ of execution or other process, provided that the Master may, if the value such property is R5 000 or less, order that the sale of the property proceed and direct how the proceeds shall be applied.

Upon granting of the sequestration or liquidation order the property of the estate is vested in the Master until the appointment of a provisional trustee or liquidator.[97] Evans and Steyn conclude that "that the status of property that forms part of an insolvent estate or which belongs to the solvent spouse at the time of sequestration is of considerable importance not only for all parties to a sequestration's proceeding, but also to third parties who have nothing to do with it, and worse, may not even be aware of being ensnared by the provisions of the Insolvency Act until it is too late".[98]

2.6.2. Valuating property

Section 4(4) of the Insolvency Act empowers the Master to exercise discretion when directing a debtor to have any property valued upon receiving the statement of affairs from the debtor after publishing a notice of surrender. This happens very seldom in practice.

[97] Section 20(1)(a) of the Insolvency Act provides "that the effect of the sequestration of the estate of an insolvent shall be to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee to vest the estate in him". Section 361 of the 1973 Companies Act provides that "[i]n any winding-up by the Court all the property of the company concerned shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office. " In addition, it is determined that "[i]n any winding-up of any company, at all times while the office of liquidator is vacant or he is unable to perform his duties, the property of the company shall be deemed to be in the custody and under the control of the Master. " Section 66 of the Close Corporations Act confirms that section 361 applies to the liquidation of a close corporation See also Hockly's Paragraph5. 1; and Henochsberg Vol 2 APPI 124. 9.

[98] Evans & Steyn "Property in insolvent estates – *Edkins v Registrar of Deeds, Fourie v Edkins, and Motala v Moller*" 2014 *PELJ* 2746 *et seq*.

2.6.3. Taxing of remuneration

The Master may reduce, increase, or disallow wholly or in part the remuneration of the trustee or liquidator.[99]

2.6.4. Ordering an enquiry

The Master may order an enquiry and summon any interested party to appear before the Master with relevant information and documentation.[100]

2.6.5. Admitting or rejecting a claim

The Master may, when presiding at a creditors' meeting, allow or reject a claim at a creditors meeting.[101]

2.7. Anecdotal evidence of delays experienced

The issues ranging from delays to corruption experienced in South Africa due to the oversight-role of the Master, are evident from various court applications brought against the Master (in its various functions including deceased estates), news articles, investigative reports and correspondence between SARIPA and the Master.

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[99] Section 63(1) of the Insolvency Act provides for the reasonable remuneration of a trustee provided that the Master may, on good cause shown, reduce, increase, or disallow wholly or in part such a remuneration. Section 384 of the 1973 Companies Act provides for the reasonable remuneration of a liquidator provided that the Master may, for good reason, reduce, increase, or disallow wholly or in part such a remuneration. Section 66 of the Close Corporations Act confirms that section 384 applies to the liquidation of a close corporation. See also Hockly's Paragraph 10. 7; and Henochsberg Vol 2 APPI 182.

[100] Section 152(2) of the Insolvency Act determines that the Master "may by notice in writing delivered to the insolvent or the trustee or such other person summon him to appear before the Master or before a magistrate or an officer in public service mentioned in such notice, at the place and on the date and hour stated in such notice, and to furnish the Master or other officer before whom he is summoned to appear with all the information within his knowledge concerning the insolvent or concerning the insolvent's estate or the administration of the estate". Section 417 of the 1973 Companies Act provides that, "in any winding-up of a company unable to pay its debts, the Master or the Court may, at any time after a winding-up order has been made, summon before him or it any director or officer of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person whom the Master or the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company". Section 152 of the Insolvency Act applies to the liquidation of a close corporation. See also Hockly's Paragraph10. 7; and Henochsberg Vol 2 APPI 182 and *Nedcor Bank Ltd v The Master* 2002 (5) SA 132 (SCA).

[101] Section 44 (3) of the Insolvency Act allows for the admission or rejection of a claim proved at a meeting of creditors by the officer presiding at that meeting. Section 366 of the 1973 Companies Act confirms that section 44 applies to the liquidation of a company and section 66 of the Close Corporations Act confirms that section 366 applies to the liquidation of a close corporation. See also Hockly's Paragraph9. 2. 3.

2.7.1. Court applications

There have been various court applications brought against the Master regarding the various duties of the Master. These applications vary from the setting aside decisions of the Master to remove trustees or liquidators to delays in appointment of liquidators, lack of response to requests, etc. Recent examples hereof:

- *Master of the High Court, Western Cape Division, Cape Town v Van Zyl*[102]
  The court reviewed and set aside the decision by the Master of the High Court, Cape Town, dated 31 August 2017, to remove Mr. Van Zyl from office as liquidator of ten specified entities as well as any other matter under her jurisdiction in which he held an appointment as liquidator. The Master's decision was due to the liquidator negligently omitting to check fees charged by a financier and fully record the fees and funds invested on a fixed deposit account in the Liquidation and Distribution accounts of 10 insolvent estates. Judge Binns-Ward criticized the Master's actions and decision in the judgement:

  > "*The fact that certain of the liquidation and distribution accounts lodged by Van Zyl and his co-liquidators were defective, which resulted in the liquidators falling short in the discharge of their duties in terms of s 403 of the 1973 Companies Act, was inextricably bound up in their conduct of the Corporate Saver investment accounts, and properly fell to be addressed by the Master as an incidence of that conduct, and not something discrete from what she chose to deal with as contraventions of s 394 of the Act. It was not suggested that Van Zyl and his co-liquidators had been guilty of any deliberate misrepresentation in the accounts that were lodged, or that Van Zyl's accompanying verifying affidavits in terms of s 403(2) had been made perjuriously. The Master's statement that if she could not rely upon the word of a liquidator given under oath the entire integrity and efficacy of the system would break down was inappropriately hyperbolical in the circumstances."*[103]

[102] (A276/2018) [2019] ZAWCHC 23; [2019] 2 All SA 442 (WCC) (6 March 2019).
[103] *Idem* paragraph 104.

And "*In my judgment the Master's decision to remove Van Zyl from office as liquidator in the ten identified corporations was wrong. It is liable to be set aside on various grounds in terms of s 6(2) of PAJA; viz. that it was not supported by, and therefore not rationally connected either to the information before her, or the purpose of the empowering provision; it so was so unreasonable that no reasonable functionary in her position would have made it; she had not properly taken relevant considerations into account and she had acted arbitrarily*."[104]

- *Murray N.O and Others v Master of the High Court, Pretoria and Others*[105]

  The court reviewed and set aside the decision of the Master to remove the liquidators from office in the liquidated estate of JAB Dried Fruit Products (Pty) Ltd upon the request of one of the creditors without providing the liquidators the opportunity to state their case or on any other grounds that the creditor making the request is the major creditor – thus there was no indication that the liquidators failed to perform their duties. Judge Holland-Muter criticized the Master's (delayed) actions and decision in the judgement:

  "*The Master removed the applicants from office as liquidators in terms of section 379(1)(d) of the Act but there is no indication why the Master did not inform the applicants of the request before making his decision. There is also no indication why it took the Master from 28 March 2022 until 15 March 2023 to take the decision. There is further no indication what transpired between the lodging of the removal application and the actual removal decision was taken*."[106] ;and

  "*The Master has to consider the request by the majority of creditors to call for the removal from office of the liquidator. Does this imply that the Master is bound to the request of the majority of creditors? The wording in section 379(1)(d) is clear and unambiguous. The Master* ***may remove*** *a liquidator from office at the request of the majority of creditors and not* ***shall*** *remove the liquidator from office. As is, the section confers a discretion on the Master and he is not a rubber stamp in the hands of the*

[104] *Idem* paragraph 122.
[105] (2023/016586) [2023] ZAGPPHC 457 (9 June 2023).
[106] *Idem* paragraph 12.

majority of creditors. In exercising his discretion, the Master should consider all considerations, which will include the applicants right to be heard as provided for in section 3 of Promotion of Administrative Justice Act,3 of 2000 ('PAJA')."[107]

- *NSP Bundgaard (Pty) Ltd v Master of the High Court, Cape Town and Another*[108]

  The court reviewed and set aside the decision of the Master of the Master of the High Court, Western Cape, in relation to the pre-liquidation set off entered into between the applicant, NSP Unsgaard (Pty) Ltd, and Green Tissue (Pty) Ltd. The Master granted permission to the liquidators to disregard the set off that was made in favour of NSP without providing any reasons or providing NSP an opportunity to make representations before making the decision. Judge Savage criticized the Master's actions and decision in the judgement:

  "Our law does not countenance either an abuse of discretionary power or arbitrary decision making in the exercise of public power. Without any reasons it is not possible to determine whether the decision taken by the Master was arbitrary or not, nor what considerations were taken into account by her in coming to the decision that she did or what were not. It follows in these circumstances that the decision made cannot be said to have been one that was either reasonable or rational. The decision of the Master therefore falls to be reviewed and set aside on the grounds that it was both procedurally and substantively unfair."[109]

- *Bester N.O v Master of the High Court and Another*[110] (17428/2021) [2023] ZAWCHC 208 (16 August 2023)

  The court reviewed and set aside the Master's failure to decide in response to the applicant's request for approval under section 47 of the Administration of Estates Act 66 of 1965.

- *National African Federated Chambers of Commerce and Industry Free State Province and Another v The Master of the High Court and Others; National African Federated*

[107] *Idem* paragraph 23.
[108] (11371/2022) [2023] ZAWCHC 223 (28 August 2023).
[109] *Idem* paragraph 22.
[110] (17428/2021) [2023] ZAWCHC 208 (16 August 2023).

Chambers of Commerce and Industry, Free State Province and Others v The Master of the High Court, Pretoria and Others[111]

The court reviewed and set aside the Master's decision to issue letters of authority to the second to eighth respondents authorising them to act as trustees of the NAFCOC Free State Investment Trust (IT: 1885/05) based on a fraudulent affidavit without affording the beneficiaries or existing trustees the opportunity to make representations. Judge Vos criticized the Master's actions and decision in the judgement:

> "*It is abundantly clear from the evidence before me that the Master acted upon the strength of this information received from Konziwe and his group, along with other false documents, to issue the 2018 letters of authority. The Master did so without affording the applicants in the second review, as the beneficiary of the trust and the existing trustees - the right to make representations and acted in breach of the Master's own undertaking. (See annexure HM31 pages 285-286) and the provisions of the Free State High Court order which required the "judicial determination" of which individuals should be authorised by the Master as the trustees of the trust."*[112]

- *Standard Bank of South Africa Limited v Master of The High Court, Johannesburg and Others*[113]

The court reviewed and set aside the Master's decision in terms of which the Master disallowed a claim upon a request by a creditor after the claim was proven at a creditor's meeting and included in the liquidation and distribution account by the liquidator and without giving reasons for the decision. Judge Twala criticized the Master's actions and decision in the judgement:

> "*By implication, the Master, as an administrative authority, who is duty bound to give reasons for his decision that affects the rights and interests of any person. It is my respectful view therefore that, whether the dispute or objection to the applicant's claim 61 was lodged in terms of s45(3) of the Insolvency Act or 407(1) of the Companies Act, the Master failed in*

[111] (74936/2016; 12167/2019) [2022] ZAGPPHC 425 (17 June 2022).
[112] *Idem* paragraph 26.
[113] ((012167/2022) [2023] ZAGPJHC 981 (1 September 2023).

his duty to furnish any or adequate reasons for his decision to disallow and or to expunge claim 61 of the applicant"[114]

- *Khammissa and Others v Master, Gauteng High Court and Others*[115]

  The court reviewed and set aside the Master's decision to overrule a decision made by another Master and to appoint two of the original liquidators as co-liquidators, after an order to convert the winding up by special resolution to a winding up by court was granted. Judge Iwundu criticized the Master's lack of participation in the proceedings:

  "the Points 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 seats 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."[116] ;and

  "Serious allegations of an unlawful appointment in respect of the estate they oversee points a finger at the internal workings of the Master's office. The allegations were not opposed by the Master. They have not been explained. While the applicants do not have the right to stop a legitimate appointment in accordance with the law and the rules, I find the decision giving rise to the grievance, as well as the nature of the grievance, legitimate. It pertains to allegations of an unlawful decision and action by the Master in respect of the estate they are administering. They are not busy bystanders or strangers to the issue."[117]

- *Tshishonga v Minister of Justice and Constitutional Development and Another*[118]

  Although this is not an application brought against the Master, it sets out details of whistleblowing by Mr. Tshishonga regarding corruption in the office of the Master that he witnessed whilst in the employ of the Master.

[114] *Idem* paragraph 8. 19.
[115] 2021 (1) SA 421 (GJ).
[116] *Idem* paragraph 13.
[117] *Idem* paragraph 26.
[118] (JS898/04) [2006] ZALC 104; [2007] 4 BLLR 327 (LC); 2007 (4) SA 135 (LC); (2007) 28 ILJ 195 (LC) (26 December 2006).

2.7.2. News articles and media statements

The delays experienced in the office of the Master as well as perceived corruption has been aired in various news articles as well as media statements made by the Department of Justice and the Master. Recent examples hereof:

- *Ensor "Law Society sounds alarm over dysfunction at master's office"* [119]
  The author indicates that "The office of the master of the high court is in such disarray that the Law Society of SA has pleaded with parliament to intervene after appeals to the justice ministry were ignored". The article confirms that the Law Society has presented to parliament a list of challenges with the Master in a presentation, namely:
    - Lack of service-delivery.
    - Correspondence unanswered/long delays.
    - Email correspondence not utilised.
    - Phones not answered.
    - Officials cannot be reached.
    - Files are misplaced.
    - Queues not sufficiently managed.
    - Insufficient staff/vacancies unfilled.
    - Allegations of bribery.
    - Directives issues without consultation.
    - Section 18(3) estates – lack accountability.
    - Insolvency examinations – no transparency.
- *Ellis "Challenges at the Master of the High Court for deceased estates"* [120]
  The author lists the following challenges with the Master regarding deceased estates:

[119] Available at https://www.businesslive.co.za/bd/national/2023-10-23-law-society-sounds-alarm-over-dysfunction-at-masters-office/ (last accessed on 1 November 2023). Also see the presentation available at https://appleton.com/wp-content/uploads/2023/10/LSSA_Presentation-Parliament-_Office_of_the_Master_of_the_High_Court.pdf (last accessed on 1 November 2023).
[120] Available at https://www.smartaboutmoney.co.za/hot-topics/challenges-at-the-master-of-the-high-court-for-deceased-estates/ (last accessed on 1 November 2023).

- "Loadshedding, particularly in Johannesburg, one of the biggest and busiest Master's Offices which has no backup power.
- Long queues. Some members of the public and practitioners travel long distances, only to be turned away because of the queues.
- Staff shortages. Cape Town, for example, currently has a 35% vacancy rate for estate controllers.
- Systems to manage cases and link to the Department of Home Affairs are often down and printing and scanning facilities are often offline.
- Lack of bandwidth in Master's Offices, resulting in the scanning of some new estates taking hours.
- A lack of functioning hardware such as copiers and scanners.
- After queries about new estates are addressed, it can take six to 10 weeks to get Letters of Executorship issued. This is mainly due to excessive workloads and poor filing systems.
- Estate files and documents get lost or misplaced and executors must provide duplicate files, sometimes numerous times.
- Registration of immovable property, such as house or farm, in an estate requires the Master's consent.
- A copy of the last valid will certified by the Master is required to transfer fixed property to an heir or heirs who agree to redistribute the assets."

- *Media Statement on the fraudulent disbursement of Guardian's Fund Moneys at Master's Office (Pietermaritzburg)*[121]

  The media statement confirms that the Department of Justice discovered an illegal breach of the Guardian Fund System in April 2023 and it found that in excess of R17 000 000.00 has been lost from the fund. Their preliminary investigation found that the system was breached internally by certain officials who have since been placed on precautionary suspension pending finalisation of the investigations.

- *Visser "Inside the mess of the master's office"* [122]

[121] Issued by the Department of Justice and Constitutional Development 23 June 2023 available at https://www.justice.gov.za/m_statements/2023/20230623-GuardiansFund. html (last accessed on 1 November 2023).
[122] Available at https://www.businesslive.co.za/fm/features/2022-11-10-inside-the-mess-of-the-masters-office/ (last accessed on 1 November 2023).

The author indicates that "Across South Africa, offices of the master of the high court are buckling, and attorneys who must deal with them daily are at their wits' end."

- *Morrison "Lawyers fed-up with shambles in Master's Offices"* [123]

  The author confirms that "Lawyers say that the Master's Office is causing months, even years long delays for crucial legal administrative procedures that should take weeks". Many of the delays are caused by poor digitisation, a lack of properly functioning systems and cyber security. The Information Regulator fined the Department of Justice R5 000 000.00 for violations due to the 2021 hack. Other causes for concern listed includes bribery and corruption.

- *Owen "'Absolutely dishonest' liquidator Enver Motala makes questionable comeback"*[124]

  The author confirmed that Mr. Enver Motala, who was removed from the master's list of eligible practitioners in 2011 due to his lying under oath about a previous fraud conviction in 1978 in excess of 90 counts when he was still known as Enver Dawood, has been appointed as liquidator of various liquidated companies linked to the insolvent estate of Mr. Mario Rocha. This appointment was made despite the fact that Mr. Motala is not on the master's list of practitioners. It is prudent to mention, although this is not part of the article, Mr. Motala and pressure to appoint him as liquidator was an integral part of the whistleblowing of Mr. Tshishonga.[125]

- *Skiti "SIU targets 15 in Master of High Court"*[126]

  The article confirms that "The justice department has, for years, received complaints about the master of the high court, which deals with deceased estates, insolvencies, registration of trusts and curators. The situation has become so bad, the report said, that some of the 15 referred for possible criminal and disciplinary action were senior in the section."

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[123] Available at https://www.groundup.org.za/article/long-delays-in-core-legal-services-caused-by-shambolic-mastersoffices/#:~:text=Lawyers%20complain%20that%20the%20offices, estates%20among%20other%20legal%20procedures. (last accessed on 1 November 2023).

[124] Available at https://www.news24.com/news24/Investigations/exclusive-absolutely-dishonest-liquidator-enver-motala-makes-questionable-comeback-20230928?utm_source=24.com&utm_medium=email_sub&utm_campaign=weekend_wrap_up_2_oct_2023_sub&utm_term=https%3A%2F%2Fwww.news24.com%2Fnews24%2FInvestigations%2Fexclusive-absolutely-dishonest-liquidator-enver-motala-makes-questionable-comeback-20230928 (last accessed on 1 November 2023).

[125] Footnote 110 above.

[126] 22 April 2021 Mail & Guardian available at https://mg. co. za/news/2021-04-22-siu-targets-15-in-master-of-high-court/ (last accessed on 12 March 2023).

- *Skiti "SIU probes how master of the high court fleeces the poor"*[127]

  The article states that the Master's offices are "allegedly a hotbed of corruption — thousands of case files or dockets go missing or are stolen and the poor and desperate are either fleeced out of their inheritances or made to pay hundreds of rands for assistance in deceased estates. The numerous complaints about these offices include maladministration, allegations of corruption and other malfeasance. These include the destruction or theft of 45 000 files at the master's office in Pretoria and the Cape Town office has backlogs in processing the registration of trusts. In the Mthatha master's office, there is apparently little compliance oversight on millions of rands in trusts emanating from medico-legal and Road Accident Fund litigation."

- *Skiti "Two senior estates and insolvencies officials suspended pending probe"* [128]

  The author confirms that the Special Investigating Unit has reported that it "has received up to 150 allegations from members of the public against officials of the master's offices, and the profiling of persons of interest is ongoing," and that "Most complaints related to deceased estates, while the second most complaints related to the appointment of liquidators, including the appointment process, and alleged interference of officials in favouring specific liquidators."

- *Unknown Author "Deputy Master of the High Court remanded in Custody"* [129]

  The article published in the Mpumalanga News, confirms that "Deputy Master of the High Court, Bina Masuku and her boyfriend Pule Elvis Kgosiemang were remanded in custody" and that "According to the Hawks, it was established that the official allegedly directed claimants to her "lawyer" boyfriend to process their claims. Some never received their funds. Instead, the funds were shared between the two of them. About R1.7 million has not been received by the eight families."

2.7.3. SARIPA correspondence

The South African Restructuring and Insolvency Practitioners Association NPC (SARIPA) was formed in 1986 and then known as AIPSA. Currently its members include insolvency

[127] 9 April 2021 Mail & Guardian available at https://mg.co.za/news/2021-04-09-siu-probes-how-master-of-the-high-court-fleeces-the-poor/ (last accessed on 12 March 2023).
[128] 10 September 2021 Times Live available at https://www.timeslive.co.za/news/south-africa/2021-09-10-two-senior-estates-and-insolvencies-officials-suspended-pending-probe/ (last accessed on 12 March 2023).
[129] 11 November 2019 Mpumalanga News available at https://mpumalanganews.co.za/368188/deputy-master-high-court-remanded-custody/ (last accessed on 12 March 2023)

practitioners and business rescue practitioners who are involved in the liquidation, insolvency and restructuring industries. SARIPA attained accreditation by South African Qualifications Authority (SAQA) as the national professional regulatory body for Insolvency Practitioners and Business Restructuring Professionals in 2018.As such, SARIPA is frequently in contact with the Master on behalf of its members to address issues, concerns and delays. SARIPA further communicates matters of interest to its members. Examples hereof:

- The notice of motion dated 11 September 2023 in case number 3640/23 in the Mpumalanga Division of the High Court was sent by SARIPA to its members, where an application was filed for a declaratory order confirming that the Master of the High Court Middelburg and the Master of the High Court Pretoria is in contempt of Court as it has failed to appoint a provisional liquidator in the liquidated estate of Simaz Group (Pty) Ltd;
- The Teams Meeting held between SARIPA and various Masters offices on 20 February 2023 outlining the frustrations incurred by insolvency practitioners due to the requirement that original requisitions must be filed and the validity of the requisitions being 30 days as well as the non-service at the Nelspruit and Middelburg Masters offices;[130]
- The letter from SARIPA dated 13 September 2022 to the Minister of Justice and Constitutional Development highlighting the daily challenges faced by insolvency practitioners, *inter alia*:
    - Delays caused due to the requirement to advertise matters in the Government Gazette;
    - Delays caused due to the requirement to send reports via registered post to creditors and the South African Post Office being under provisional liquidation; and
    - The lack of a policy on the appointment of insolvency practitioners.[131]
- The letter from Jaco Roos Attorneys Incorporated (Jaco Roos) dated 4 May 2022 on behalf of SARIPA to the State Attorney, Pretoria who represents the Minister of Home

[130] https://www.saripa.co.za/news-2023-02-requisitions-mpumalanga-masters (last accessed on 17 November 2023) and minutes on file with writer.
[131] https://www.saripa.co.za/downloads/220913-SARIPA-letter-to-Minister-Justice-13Sep22%20.pdf (accessed on 17 November 2023).

Affairs confirming that, on 1 July 2021 Justice Mosopa ordered the Minister of Home Affairs to publish the Legal Gazettes every Friday without interruption. The letter further confirmed that Jaco Roos addressed various letters regarding repeated service failures during February 2022 and further failures to publish gazettes timeously during April 2022.[132]

- The Media statement dated 30 January 2022 by the Ministry of Justice and Correctional Services "Deputy Minister conducts unannounced oversight visit to Pretoria Master's Office" sent by SARIPA to its members – this statement confirms that complaints and concerns have been received regarding service delivery issues and backlogs at the various Master's offices;[133]
- The media statement dated 10 October 2021 issued by the Department of Justice and Constitutional Development with an update on the progress in restoring justice services following a ransomware attack sent by SARIPA to its members;[134]
- The undated memorandum from the Chief Master received by SARIPA on 30 September 2021 "Way forward – Masters services" setting out why manual appointments will be too risky for the Master, without any solution for the delays;[135]
- The media statements dated 7 September 2021 issued by the Department of Justice and Constitutional Development confirming a ransomware attack;[136]
- The email correspondence from SARIPA to their members requesting a schedule of estates where there is a delay with the Master convening the first creditors meeting in order for SARIPA to address this with the Master;[137]

[132] Available at https://www.saripa.co.za/downloads/220504-SARIPA-Letter-to-State-Attorney.pdf (accessed 17 November 2023).
[133] Available at https://www.saripa.co.za/downloads/220131-Justice-media-statement.pdf (accessed 17 November 2023).
[134] Available at https://www.saripa.co.za/downloads/211010-DoJ-Media-Statement-Ransomware-Attack.pdf (last accessed on 17 November 2023).
[135] Available at http://saicanews.co.za/admin/click.php?url=aHR0cHM6Ly9zYWljYW5ld3MuY28uemEvYWRtaW4vc291cmNlLzIwMjElMjBGb2xkZXIvU3RkTGVnL01hc3RlcnMlMjBvZmZpY2UvV0FZRk9SV0FSRCUyMC0lMjBNQVNURVJTJTIwU0VSVklDRVMlMjAtJTIwMzAtMDktMjAyMS5wZGY=&id=730&subscriber=9915 (last accessed on 17 November 2023).
[136] Available at https://www.saripa.co.za/downloads/210907-Min-Justice-Media-Statement.pdf (accessed 17 November 2023).
[137] Dated 26 September 2021, available at https://www.saripa.co.za/saripa-resources/resources-archives-2021 (last accessed 17 November 2023).

2.7.4. Academic works

The South African Law Commission has been attempting to reform our insolvency law since the late 1980's. Since then, various academics have written about the inadequacies of the current legislation. Criticism included the function of the Master, unfortunately it has not resulted in any changes as yet, in fact the performance of the Master has deteriorated even further as is evident from the above news articles and SARIPA correspondence. Some examples of recent academic works wherein the Master was criticised:

- *Cassim* "*Regulation of insolvency law in South Africa: the need for reform"*:[138]
  "Criticisms of the Master's office include the lack of resources and institutional capacity, the lack of sufficient investigative powers and insufficient guidelines for the Master when applying their administrative discretion when appointing provisional insolvency practitioners. However, nothing significant has been done to improve the lack of resources and institutional capacity of the Master's office, nor has there been an endeavour to increase the investigative powers of the Master. It is submitted that failure to take into account these criticisms is a major setback for the reform of South African insolvency law." [139]

- *Calitz "Some thoughts on state regulation of South African insolvency law"*:[140]
  "In recent years there has been a great deal of debate surrounding the Master's reputation as insolvency regulator, which in turn has led to this field of law increasingly being the subject of scholarly articles, reflection and debate. On a larger scale the present predicament is that the Master is burdened with the task of preserving the integrity of the law relating to insolvency matters without having the necessary legal and infrastructural resources and institutional capacity to support this undertaking.

  The legal framework within the South African insolvency law results in the Master being involved and entangled in various technical issues relating to the administration of the insolvent estate. Consequently, the Master does not prioritise matters of a public

[138] 2014 unpublished LLM (Business Law), University of KwaZulu-Natal.
[139] *Idem* at Paragraph 5. 1.
[140] 2011 *De Jure* 290.

nature, such as the investigative aspect of the cause of insolvency or being involved in the development of general insolvency policies and law reform, as these represent matters which fall outside the Master's statutory agenda. Due to its multifarious character, the Master finds itself in the midst of certain challenges relating to the regulation of insolvency law. This state of affairs is not only unproductive but also in direct contrast to the government's skills development policies. In a recent keynote address the acting Chief-Master acknowledged the following:

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

The lack of specialisation in the office of the Master combined with the lack of resources not only has an impact on service delivery, but also prevents the Master from effectively acting out the Constitution's commitment to 'an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public'. A good illustration of this allegation can be found in the case of *Moseneke v The Master*, where the Master opposed the application on considerations which included:

> *(a) The lack of human resources, infrastructure, training and finance to administer the intestate estates of Blacks.*
> *(b) The current workload of the masters of the high court which already provides substantial pressure and managerial problems.*
> *(c) The transferral of intestate Black estates from the magistrate's to the master's office would create chaos"* [141]

- *Van der Meulen* "*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"*:[142]

[141] *Idem* at 298 paragraph 3. 2.
[142] 2022 unpublished LLM (Mercantile Law) dissertation, University of Pretoria.

"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.

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." [143]

2.7.5. Parliamentary Monitoring Group

The Parliamentary Monitoring Group is an information service that was established in 1995 as a partnership between Black Sash, Human Rights Committee and the Institute for Democratic Alternatives in South Africa. The aim of the service is to provide a type of Hansard for the proceedings of the South African Parliamentary Committees as there is no official record publicly available of the committee proceedings. Examples of where the Master has been discussed:

[143] *Idem* at 33 paragraph 2. 8

- *Unrevised Hansard Mini Plenary - National Assembly Tuesday,17 May 2022 Vote No 25 – Justice and Constitutional Development (Page 28 – 29)*: [144]

  "The service delivery of the department is left wanting on so many levels. We are constantly inundated with complaints and requests for assistance with services or lack thereof from the Master's offices countrywide, and oversight visits made it very clear just how shocking the service delivery is. Long queues form from the early hours in the morning, elderly people and pregnant women are forced to stand on pavements for hours, often repeatedly, before they are fortunate enough to be attended to. The systems are down more days than they work, and the offices are closed to the public from one o'clock daily. It is simply untenable that citizens are treated in this fashion. While the oversight visits also revealed some very pleasant surprises of outstanding service delivery, these were very limited and isolated. Generally speaking, the visits revealed crumbling infrastructure, total lack of maintenance, poor accommodation and a sad lack of the tools of trade, poor or no stakeholder management and shockingly inadequate contract management. Court staff and officials are literally left to their own devices, with no functioning landlines, no internet access, none or very limited access to proper libraries and law reports and inadequate support staff. The department is quite frankly a rather depressing mess."

- *Unrevised Hansard National Council of Provinces Thursday,9 June 2022 (Page: 120 – 121)*:[145]

  "The wheels of justice are not turning slowly anymore. For some they are not turning at all. The hard lockdown imposed by the ANC government in March 2020 has had many unintentional repercussions not least on the justice system where the Master's Office and Deeds Offices are seemingly still struggling to get ahead of the backlog that was built up. The thing is, during Covid people did not stop dying. On the contrary, the estates started piling up, economic activity had to continue, properties had to be sold, new trusts created and guarding fund payments had to be paid. The government in some instances might have come to a complete standstill, but the people of this country did not have a choice. We had to carry on. Add to this the massive cyber- attack that hit the Masters Integrated Case Management System on 5 September last year which connects

[144] Available at https://pmg. org. za/hansard/34942/ (last accessed on 1 November 2023).
[145] Available at https://pmg. org. za/hansard/35192/ (last accessed on 1 November 2023).

more than 400 magistrate's offices and the Master's Office and endless delays were the result. House Chairperson, I am sure we all would agree that the last thing a grieving family would need is for a bank account of a deceased loved one to be frozen and the state not being able to make any progress unnecessarily. Funeral costs, day to day expenses, bills, all of these on top of having to deal with their loss. In cases where the spouse dies a few months after the initial deceased without the first estate being finalised it further adds to the legal complications."

2.7.6. Professional experience

The author of this dissertation has been working in the insolvency industry, albeit as an employee of financial institutions who are creditors in insolvent and liquidated estates, since 2012.In this period the decline in service delivery and increase in delays caused by the Master were witnessed first-hand to the detriment of creditors and related parties. The vast majority of delays observed relates to the following:

- Appointing a provisional liquidator or trustee (also highlighted in paragraph 2.7.1 above);
- Convening the first creditors meeting (also highlighted in paragraph 2.7.1 above);
- Authorising the sale of property (also highlighted in paragraph 2.7.2 above);
- Issuing final certificates of appointment;
- The requirement for original documents to be lodged with the Master (also highlighted in paragraph 2.7.1 above);
- The lack of a trustworthy electronic system (also highlighted in paragraph 2.7.1 above);
- The place where creditors meetings must be held and whom must be presiding over it;
- The requirement that creditors meetings have to be advertised in the Government Gazette (also highlighted in paragraph 2.7.1 above); and
- The perusal and confirmation of the Liquidation and Distribution Account.

2.8. Conclusion

This chapter dealt with the various duties and functions of the Master in detail to enable the reader to understand the background against which the challenges identified in the course of this study manifest. The role of the Master in insolvency proceedings is supervisory, and its

duties and functions in this regard have been grouped together according to the type of oversight required.

The Master of the High Court is, legally speaking very involved in the day to day administration of an insolvent or liquidated estate. This leaves much scope for delays in the finalisation of such an estate if there are delays experienced that are associated with the office of the Master as confirmed by the anecdotal evidence.

In the next chapter the business rescue process of South Africa and the proposals of the latest unofficial Draft Insolvency Bill of 2015 will be analysed.

Chapter 3: An analysis of the business rescue process of South Africa and the proposals of the Draft Insolvency Bill of 2015

3.1. Introduction

In various jurisdictions, the law of personal and corporate insolvency, and business rescue, forms part of a larger harmonised insolvency law framework.[146] Harmonised statutes deal with all aspects of insolvency including processes similar to the South African business rescue process contained in Chapter 6 of the Companies Act. Therefore, an internal comparison with the South African business rescue process is valuable when seeking solutions to enhance the legal framework in order to enable efficient insolvency proceedings.

The South African Law Reform Commission has been attempting to reform the current insolvency law since 1980.[147] The latest report was published in April 2000 by the Project Committee and although some of the recommended changes address issues with the Master, it does not consider whether the framework of oversight itself is viable and sustainable.

In this chapter, the problematic legislative provisions identified in the previous two chapters will be compared, where possible and relevant, to the correlating provisions in Chapter 6 of the 2008 Companies Act and the Draft Insolvency Bill.[148] In order to orient the reader, a basic overview of the aims of the business rescue process, as well as the process itself, will be given.

3.2. Overview of business rescue

Business rescue is defined in section 128 of the 2008 Companies Act as "proceedings to facilitate the rehabilitation of a company that is financially distressed". One of the purposes of the 2008 Companies Act is to "provide for the efficient rescue and recovery of financially distressed companies whilst balancing the rights and interests of all relevant stakeholders." [149]

[146] See Burdette *Framework for Corporate Insolvency Law Reform in South Africa 2002* unpublished LLD thesis, University of Pretoria Chapter 4; Unknown Author "*Bankruptcy & Restructuring 2017 Virtual Round Table*" 8-11.
[147] Vorster *Re-evaluating Statutory Preferences in Insolvency Law* 2018 (unpublished LLM dissertation, University of Pretoria) page 41 paragraph 4. 4.
[148] Take note that there is no reference to a trustee or sequestration in the Draft Insolvency Bill. The term liquidator and liquidation are used throughout.
[149] Section 7(k) of the 2008 Companies Act.

The business rescue process has various similarities with that of liquidation such as: both can be initiated by either a resolution by the directors[150] or by court application (voluntarily or forced application);[151] both have an appointed administrator[152] to take control of the affairs of the entity;[153] both have creditors' meetings;[154] the administrator can in both instances sell assets of the entity under certain circumstances;[155] and the administrator must draft an account in liquidation reflecting what has transpired in the liquidation and in business rescue a plan similar to the account, but as a forecast of what may happen if the company is placed in formal liquidation, must be drafted.[156] The main difference between business rescue and liquidation is that in liquidation the aim is to dissolve the entity; and in business rescue it may only be dissolved where there is no possibility of continuation of business, but the prospect of a better return to creditors than in liquidation.[157]

3.3. Specific matters related to delays in the insolvency process

3.3.1. Appointing a liquidator or trustee

In the insolvency process, the Master appoints the provisional trustee or liquidator as soon as an estate has been sequestrated or liquidated and confirms the appointment of a final trustee or liquidator elected at a creditors meeting.[158]

In the business rescue process, the company must appoint a business rescue practitioner who satisfies the requirements for the appointment and who has consented in writing to accept the appointment.[159] In addition, this appointment must occur within five business days after a company has adopted and filed a resolution to commence business rescue.[160] When the court grants an order placing a company in business rescue, the court may make a further order appointing an interim practitioner, who will be a person who has been nominated by the

[150] Section 129 of the 2008 Companies Act and section 349 of the 1973 Companies Act.
[151] Section 131 of the 2008 Companies Act and sections 341 and 346 (1) of the 1973 Companies Act.
[152] The liquidator in a liquidated estate administrates the liquidated estate and the business rescue practitioner administrates the entity under business rescue therefore the combined term for both will be administrator herein.
[153] Sections 129(3) and 131(5) of the 2008 Companies Act and section 368 of the 1973 Companies Act.
[154] Section 147 of the 2008 Companies Act and section 364 of the 1973 Companies Act.
[155] Section 134 of the 2008 Companies Act and section 386 of the 1973 Companies Act.
[156] Section 150 of the 2008 Companies Act and section 403 of the 1973 Companies Act.
[157] See section 128(1)(b)(iii) of the 2008 Companies Act.
[158] See Paragraph 2. 3. 3 above.
[159] Section 129(3) of the 2008 Companies Act.
[160] *Ibid.*

affected person who applied for the business rescue, subject to ratification by the holders of a majority of creditors at the first creditors' meeting.[161]

There are no similarities when it comes to the actual appointment of the administrators. However, due to the similarity in mechanisms to initiate the liquidation of an entity and the placement of an entity under business rescue, it can be a viable solution for the delays experienced in the appointment of trustees and liquidators.

The proposed Draft Insolvency Bill still provides for the appointment to be made by the Master and fails to regulate the time period within which the Master must do so.[162] Although it is clear that the proposed Bill retains the Master as the official appointer, it is at the very least, submitted that it is of cardinal importance that viable, and practically achievable, timelines be set in the legislation in order to guide the Master as to an acceptable timeline within which to appoint a liquidator. The proposed Draft Insolvency Bill does not adequately address this delay.

3.3.2. Authorising the sale of property

In the insolvency process, the trustee or liquidator may not sell property – movable or immovable – prior to the second creditors' meeting in sequestration or general creditors' meeting in liquidation, and without the authorisation of the Master.[163]

The company (under the control of the business rescue practitioner),may dispose or agree to dispose of property in the ordinary course of business, in a *bona fide* transaction that is at arm's

[161] Section 131(5) of the 2008 Companies Act.
[162] Clause 37 of the Draft Bill determines the following: "(1) The Master must as soon as possible after receipt of the first liquidation order, or, in the case of a voluntary liquidation by resolution in terms of section 8, after receipt of a duly adopted liquidation resolution in terms of section 8(2)*(b)*, or after the time when a liquidator ceases to function as liquidator according to section 73, appoint a liquidator in accordance with policy determined by the Minister. (2) No person may be appointed as liquidator unless he or she has given security to the satisfaction of the Master for the proper exercise of his or her powers and performance of his or her duties as liquidator and has lodged an affidavit stating that he or she is not disqualified in terms of section 69. (3) A liquidator appointed in terms of subsection (1) is, before the first meeting of creditors of the insolvent estate, obliged to give effect to any direction given to him or her by the Master. **"** See also clause 68(4): "If it is necessary for the proper administration of an insolvent estate the Master may at any time, in accordance with policy determined by the Minister, appoint one additional liquidator after 48 hours direct notice to each liquidator appointed or to be appointed in terms of subsection (2) or (3) giving the reasons for an additional appointment. " Clause 71(1) determines that, "[w]hen a final liquidation order has been made and a person elected as liquidator has given security to the satisfaction of the Master for the proper performance of his or her duties and lodged an affidavit stating that he or she is not disqualified in terms of section 69, the Master must, subject to section 70, appoint him or her as liquidator and issue him or her with a letter of appointment, which is valid throughout the Republic. "
[163] See Paragraph 2. 4. 2 above.

length and for fair value with the advance written consent of the business rescue practitioner or as provided for in the approved business rescue plan.[164] Should the property be subject to any security or title of interest, prior consent of the security or title holder must be obtained, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest.[165]

In both the business rescue and insolvency processes, consent is required for the sale of assets. Although it is rare to sell assets in an insolvent estate for more than the indebtedness to the secured creditor, it is viable to amend insolvency legislation to merely require before or after the second creditors meeting, that assets be sold with the consent of the secured creditor.

Unfortunately, the proposed Draft Insolvency Bill generally still requires directions from the Master prior to the first creditors meeting being convened per clause 37(3).[166] In respect of the alienation of property, clause 45(4)(g) of the Bill reads as follows: "The liquidator may, if authorised thereto by the Master or by resolution of a meeting of creditors of the estate … sell or alienate property of the insolvent estate, subject to the directions of the Master or the creditors of the estate: Provided that if such property or a portion thereof is subject to rights of a secured creditor the secured creditor must give his or her consent in writing; provided further that the liquidator must attempt to sell assets as a going concern if at all appropriate". However, obtaining the consent of the Master causes a vast delay in the sale of property and further increases the realisation costs, which results in reduced dividends payable to creditors. Therefore, the proposed Draft Insolvency Bill does not provide a solution this delay.

3.3.3. Convening a first creditors' meeting

In the sequestration of a debtor's estate or the liquidation of a company, the Master has to convene the first creditors' meeting by notice the Government Gazette.[167] In the liquidation of a closed corporation, the liquidator must convene the first creditors' meeting.[168]

[164] Section 134(1) of the 2008 Companies Act.
[165] Section 134(3) of the 2008 Companies Act.
[166] See footnote 149 above for the wording of clause 37(3).
[167] See Paragraph 2. 2. 4 above.
[168] Section 78(1) of the Close Corporations Act.

The business rescue practitioner must convene and preside over a first creditors' meeting within 10 business days of his or her appointment.[169]

The business rescue process is similar to that in the liquidation of a closed corporation as the administrator may convene the meeting. However, the business rescue process does not require advertisement in the Government Gazette and has a quick timeline for the first creditors meeting. This is a viable option where sequestration and liquidation orders are granted by the court and when a company is voluntarily liquidated by way of a resolution. The quick timeline will also aid to reduce the concerns of creditors if the liquidator where to be appointed by the company when resolving to commence liquidation as they would be able to vote for another liquidator within a very short period.

The proposed Draft Insolvency Bill does allow for the meeting to be convened by the liquidator.[170] However, a number of the provisions require further attention. First, the time

[169] Section 147(1) of the 2008 Companies Act.

[170] Clause 1 of the Draft Insolvency Bill defines "liquidator's notice as ""liquidator's notice" means a notice sent or delivered by the liquidator by - (i) registered mail, (ii) fax, (iii) e-mail, (iv) personal delivery, or any other form of delivery approved by the Master." Clause 46 of the Draft Insolvency Bill states the following: "(1) A liquidator appointed in terms of section 37 must by notice in the *Gazette*, convene a first meeting of creditors to be held within 60 days of his or her appointment. (2)The notice referred to in subsection (1) must state the time and place of the meeting and the matters that will be dealt with and must be published in the *Gazette* not less than 14 days before the date fixed for the meeting. (3) The liquidator must at least 14 days before the date determined in the *Gazette* for the holding of the first meeting of creditors of the estate – (a) give notice to the employees – (i) by affixing a copy of the notice to any notice board to which the employees have access inside the debtor's premises; or (ii) if there is no access to the premises by the employees, by affixing a copy to the front gate of the premises, where applicable, failing which to the front door of the premises from which the debtor conducted any business immediately prior to the date of the application (b) send by liquidator's notice to every creditor whose name and address are known to him or her or which he or she can reasonably obtain and to the head office of every registered trade union which has notified the liquidator that it represents employees of the debtor – *(aa)* a copy of the notice of the meeting; *(a)* a copy of the report contemplated in section 42(1); *(b)* a copy of the inventory contemplated in section 38(4); *(c)*a copy of the valuation contemplated in section 38(11); *(d)* a written draft of any resolution or direction which in his or her opinion should be taken or given at that meeting; *(e)* a copy of the notice contemplated in subsection (2); *(f)* a copy of any composition which is to be considered. (4) The liquidator must lodge with the Master or magistrate who is to preside at the meeting on or before the second working day before the date determined for the meeting of creditors – *(a)* a copy of the report contemplated in section 42(1)*(a)*; *(b)* a copy of the documents contemplated in subsection (3)*(b), (c), (d)* and *(e)*; and *(c)* an affidavit containing a list of the names and addresses of the creditors to whom the documents referred to in subsection (3) have been sent. (5) The meeting may deal[…] with – *(a)* the proof of claims against the estate; *(b)* the questioning of any person in terms of the Act; *(c)* the considering of the report of the liquidator; *(d)* the nomination and appointment of one or more co-liquidators; *(e)* the considering of a composition; *(f)* the giving of directives to the liquidator with regard to any matter affecting the liquidation of the estate. (6) If the first meeting of creditors is held before a final liquidation order is given, the question whether the liquidation of the debtor's estate is likely to be to the advantage of his or her creditors must be considered at the said meeting or at a subsequent meeting of creditors, and the liquidator must send a report by direct notice to the court and the applicant on this question before the court considers whether a final liquidation order should be made. (7) If the liquidator is unable to convene a meeting in the manner contemplated in subsection (1) he or she must obtain the Master's permission to convene the meeting within the time determined by the Master. (8) If the liquidator fails to convene a meeting as contemplated

between appointment and convening the meeting has been notably extended – the meeting must be convened within a period of 60 days.[171] This is in sharp contrast to the current provision that requires the Master to convene a meeting immediately and publish the notice convening the meeting in the Government Gazette, at least ten days prior to the meeting.[172] Compared to the 10 business days of business rescue,[173] the timeline seems excessive. Second, the liquidator must send various documents by personal notice to every creditor known or reasonably obtainable.[174] This seems to place the cart before the horse as the liquidator usually only becomes aware of the majority of creditors at the first creditors' meeting when they prove claims against the estate. Most likely the only creditors whom would receive such notices would be an applicant creditor and a creditor who has a mortgage bond registered over an asset of the estate. Third, the liquidator must submit various documents to the Master or presiding magistrate in anticipation of their presence at the first meeting, including an affidavit containing a list of the names and addresses of the creditors to whom the documents have been sent.[175] There is no indication whether the consent of such creditors must be obtained to share their details or whether there are any restrictions as to what the Master would be allowed to do with the information (or which decisions may be based on the information),and for how long the Master would keep the information. Fourth, if the liquidator is unable to convene the meeting within the manner required, the liquidator has to approach the Master as to the convening of the meeting within a timeline set by the Master.[176] This adds yet another function to the Master that would cause even further delays in the estate.

Although the liquidator may convene the meeting, it is clear that the procedure to do so and the involvement of the Master in the process will delay the convening of the meeting. In addition, it seems as if the Draft Bill places a heavier burden on the liquidator to obtain information about, and inform interested parties, than the burden currently placed on the Master in terms of the Insolvency Act. The Master must merely publish a notice in the Government Gazette but

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in subsections (1) or (7), the Master may take any steps he or she considers necessary to force the liquidator to convene a meeting of creditors of the insolvent estate. (9) If the majority in value or number of creditors voting at the meeting rejects the liquidator's report the liquidator must submit a report to an adjourned or subsequent meeting or refer the report to the Master who may give such directions with regard to the report as the Master considers appropriate. "

[171] Clause 46(1).
[172] Section 40(1) and (2) of the Insolvency Act.
[173] Section 147(1) of the 2008 Companies Act.
[174] Clause 46(3)(b).
[175] Clause 46(4).
[176] Clause 46(7).

the liquidator must publish a notice and send out notifications to certain persons such as employees, trade unions and creditors.[177]

3.3.4. Requiring original documents

The requirement for original requisitions, claim documents, L & D Accounts, etc. to be lodged physically at the Master's office is not a statutory requirement, but a requirement set by the Master and not enforced consistently by the different offices of the Master throughout the country.

There is no legislative requirement for any documentation to be lodged in original format or physically when it comes to business rescue. In practice, the majority of practitioners accept claims submitted electronically and publishes the plan to creditors electronically.

The Draft Bill has no specifications regarding the manner in which documents should be lodged (such as allowing the electronic lodging of documents). Therefore, the proposed Draft Insolvency Bill does not take the matter further.

3.3.5. Place for the convening of creditors' meeting and requirements regarding the presiding officer

All creditor meetings are presided over by the Master or an officer in public service designated by the Master for that purpose.[178] The place where the meetings are held must be accessible to the public,[179] and usually it is held at the Master's office or a Magistrates' Court.

In respect of business rescue, there is no legislative requirement set for the place of creditor meetings or for the presence of a specific presiding officer. The business rescue practitioner must notify the creditors of the date, time and place of the meeting.[180] In practice, the majority of practitioners convene the meetings electronically and preside over the meetings themselves. The process followed in sequestration and liquidation would definitely benefit of this practice were to be implemented.

[177] See clause 46(3) read with section 40 of the Insolvency Act.
[178] See Paragraph 2. 2. 5 above.
[179] Section 39(6) of the Insolvency Act.
[180] Section 147(2) of the 2008 Companies Act.

The proposed Draft Insolvency Bill generally requires the Master or an official from his office to preside over meetings but also allows for meetings to be convened at any place within the magisterial district and presided over by the liquidator unless questioning must take place – then the Master or a magistrate must preside over the meeting.[181] This is viable but does not make provision for electronically-convened meetings. Therefore, the proposed Draft Insolvency Bill does not adequately solve this delay in its entirety.

3.3.6. Confirming the Liquidation and Distribution Account

The trustee or liquidator must submit a liquidation and distribution account within 6 months from the date of their appointment, or such extended period agreed to by the Master, to the Master.[182] In practice, the Master will then examine the account and if necessary, issue a query sheet to the trustee or liquidator with explanations, documents or amendments required in order to give consent to advertise the L & D account to lie open for inspection. Once the Master has given consent to advertise, the trustee or liquidator will advertise where and when the account will lie open for inspection by creditors.[183] Any interested party may object to the Master in writing for the Master to reconsider the account. The Master may then give direction to the trustee or liquidator to amend the account or confirm the account. If direction to amend was given, the amended account will be advertised and lie for inspection again until such time as it is confirmed by the Master.[184]

The business rescue practitioner prepares a business rescue plan that is published to the affected parties.[185] Within 10 days after the publishing of the plan, a creditors' meeting is convened and presided over by the business rescue practitioner for the purpose of considering the plan.[186] During this meeting the business rescue practitioner must, *inter alia*, introduce the plan for consideration and call for a vote to amend the proposed plan, approve the proposed plan, or reject the proposed plan.[187] If the plan is rejected, the business rescue practitioner (or if they fail to do so, any affected party) may seek a vote for the publishing of a revised plan or apply

[181] Clause 48(2) and (4) of the Draft Insolvency Bill.
[182] See Paragraph 2. 5 above and sections 91 and 109 of the Insolvency Act.
[183] See Paragraph 2. 5 above and section 108 of the Insolvency Act.
[184] See Paragraph 2. 5 above and sections 111 and 112 of the Insolvency Act.
[185] Section 150 of the 2008 Companies Act.
[186] Section 151 of the 2008 Companies Act.
[187] Section 152 of the 2008 Companies Act.

to court to set aside the result of the vote on the grounds of it being inappropriate.[188] Although the time allowed for the plan to be published in business rescue would be an unrealistic time for a trustee or liquidator to draft a L & D, the voting on the plan by the creditors would be viable for adoption in sequestration and liquidation.

The proposed Draft Insolvency Bill still provides for the current process in the drafting, advertisement and confirmation of the L & D.[189] However, in practice the Master causes vast delays in the confirmation of the L & D and therefore causes delays in payment of final dividends to creditors. Therefore, the proposed Draft Insolvency Bill does not adequately solve this delay.

3.4. Conclusion

This chapter compared the problematic legislative provisions identified in the previous two chapters, where possible and relevant, to the correlating provisions in Chapter 6 of the 2008 Companies Act and the Draft Insolvency Bill. In order to orient the reader, a basic overview of the aims of the business rescue process, as well as the process itself, were given.

There are definite viable solutions to some of the delays due to the Master to be found in the South African business rescue legislation.

Although the latest report and proposed draft bill of the Project Committee is a step in the right direction, it will not address the delays currently experienced in the finalisation of an insolvent estate sufficiently.

The next chapter will compare the South African position with German law in order to establish which of their practices provide viable solutions to address the oversight-related delays we are experiencing.

[188] Section 153 of the 2008 Companies Act.
[189] See chapter 18 of the Bill.

Chapter 4: An overview of the insolvency system of Germany

4.1. Introduction

The similar principles in the South African Constitution and the German *Grungesetz* as well as the recently amended German InsO makes for the ideal comparative example of reduced governance.

The German insolvency law is governed by the Insolvency Code (InsO) and is similarly to the South African Draft Insolvency Bill applicable to individuals and legal entities.[190] Insolvency proceedings are divided into two stages, namely the preliminary insolvency proceeding and the final insolvency proceeding.[191] Insolvency proceedings commences with the filing of an application by either the insolvent itself or the creditors of the insolvent.[192] The preliminary insolvency proceeding refers to the interim period between the filing of the application and a decision by the Insolvency Court to open final insolvency proceedings.[193] During the preliminary proceedings, the Insolvency Court determines if there are grounds for insolvency. During this period Insolvency Court will appoint a preliminary insolvency administrator and usually also order that all or certain transactions require the consent of the preliminary insolvency administrator.[194] The Insolvency Court has the discretion to grant further powers to the preliminary insolvency administrator. The preliminary insolvency administrator will assess the estate and if there is an insolvency ground and sufficient assets to cover at the least the costs of the insolvency proceedings.[195] If both exist, the Insolvency Court will open final insolvency proceedings.[196] Upon the opening of final insolvency proceedings, the court usually appoints a final insolvency administrator.[197] The preliminary and final insolvency administrator are under

[190] DLA Piper "Summary of German Insolvency Law" May 2012 available at www.dlapiper.com (on file with author) page 4. Also see sections 11 and 15 of InsO for applicability of InsO and section 12 for exclusions of applicability such as public entities.
[191] Section 13 of InsO.
[192] DLA Piper "Summary of German Insolvency Law" May 2012 available at www.dlapiper.com (on file with author) page 8. Also see section 21 of InsO for the provisional measures the insolvency court may take and section 27 for the process when the insolvency court opens insolvency proceedings.
[193] Mayer Brown "German Insolvency Law – an overview" last available at https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2016/08/german-insolvency-law--an-overview/files/get-the-full-report/fileattachment/german_insovency_oct_14_a4. pdf and on file with author page 4.
[194] Section 21 of InsO.
[195] Section 22 of InsO.
[196] Section 26 of InsO.
[197] Section 27 of InsO.

the supervision of the Insolvency Court.[198] The creditors meeting has the authority to either confirm or exchange the final insolvency administrator. The final insolvency administrator may reorganise the company's business (similar to our business rescue).[199]

4.2. A comparison of specific matters related to delays in the insolvency process in South Africa

4.2.1. Appointing a liquidator or trustee

The Insolvency Court appoints a provisional insolvency administrator whom will continue the business of the insolvent and provide a report to the Insolvency Court summarising their financial position, if the necessary criteria have been met to proceed with the insolvency proceedings and if their assets are sufficient to cover the costs of insolvency.[200]

After consideration of the report, the Insolvency Court will decide whether to open insolvency proceedings or to refuse to do so due to a lack of assets. If insolvency proceedings are opened, the Insolvency Court will appoint a (final) administrator.[201] If a creditors' committee was appointed, the Insolvency Court will consider their nominated administrator, but need not appoint their nominee.[202]

In South Africa, the court does not appoint the trustee as this function is the responsibility of the Master of the High Court.[203] However, sequestration proceedings, and certain liquidation proceedings, commence by way of court order.[204] It seems as if the decision to grant a sequestration order, based on advantage to creditors (usually determined by the value of assets) and assets to cover the costs of sequestration (in voluntary surrender applications),[205] are similar to the considerations of the Insolvency Court in Germany. However, at this stage, it

[198] Section 58 of InsO.
[199] Section 156 of InsO and Mayer Brown "German Insolvency Law – an overview" last available at https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2016/08/german-insolvency-law--an-overview/files/get-the-full-report/fileattachment/german_insovency_oct_14_a4. pdf and on file with author.
[200] Section 21 of InsO.
[201] Section 27 of InsO.
[202] In terms of section 27(2)(4) of InsO, reasons for not appointing the nominated administrator must be given in the order opening insolvency proceedings.
[203] See Paragraph 1. 1 above.
[204] See Paragraph 2. 1 above.
[205] See sections 6, 9 and 10 of the Insolvency Act.

must be noted that advantage to creditors is not a requirement for liquidation proceedings to be successful in respect of a company or close corporation.

It is also not a requirement for the South African court to be provided with a report from an individual on whether the insolvency order should be granted. Roestoff and Coetzee are of the opinion that it should become a requirement for a first meeting of creditors to be held prior to the finalisation of the sequestration or liquidation order, to allow for consideration by the creditors if the sequestration or liquidation will be to the advantage of creditors.[206]

The German position regarding appointment of an administrator by the Court would be viable for implementation in South Africa for the appointment of a provisional trustee or liquidator with the provisional sequestration or liquidation order. The conundrum faced with so-called friendly sequestrations resulting in contribution payable by creditors instead of receiving a dividend,[207] can also be limited by allowing for the provisional trustee or liquidator to investigate the affairs of the debtor and provide a report regarding the prospect of dividends available to creditors should the order be made final. It would then also be viable and possible for the Court to appoint a final trustee or liquidator upon granting the final order if there is indeed advantage to creditors.

4.2.2. Authorising the sale of property

Prior to the report meeting, the administrator must obtain consent from the creditors' committee or if no committee has been established, from the creditors' assembly, if they intend to sell property.[208]

This would be viable for implementation in South Africa and is similar to the requirement to obtain consent from a secured creditor prior to selling an encumbered asset in business rescue.[209]

[206] Roestoff & Coetzee "Consumer debt relief in South Africa; lessons from America and England; and suggestions for the way forward" 2012 SA Merc LJ 53 paragraph 2. 2.
[207] *Idem*
[208] Section 160 of InsO.
[209] See paragraph 3. 3. 2.

4.2.3. Convening a first creditors' meeting

The creditor's assembly is convened by the Insolvency Court.[210] The meeting is to be convened between six weeks and three months after the date of the granting of the insolvency order.[211]

In South Africa, the requirement is for the Master to convene the first creditors meeting immediately upon receipt of the final sequestration or liquidation order for a company.[212] The liquidator must convene the first creditors meeting within 30 days of the liquidation of a closed corporation.[213] The German timeline of between six weeks and three months is definitely more viable and would be viable for the South African Court to convene the first meeting upon the granting of the final order.

4.2.4. Requiring original documents

Creditors may file their claims by transmitting an electronic document if the administrator has explicitly consented thereto.[214] The insolvency plan (similar to our business rescue plan) has to be lodged with the insolvency court.[215]

In South Africa, the requirement by the Master for lodgement of original documents is not based in law as it is not imposed by legislation. The German InsO provides for electronic lodgement of claims by creditors. This is a viable option for South African but would have to be addressed through legislative amendments in order to ensure that the Master is properly enabled to allow electronic correspondence.

4.2.5. Place for the convening of creditors' meetings and requirements regarding the presiding officer

There is no legislative requirement for the place of the creditor meetings or of a specific presiding officer. The time, place and agenda of the creditor's assembly must be published.[216]

[210] Section 74 of InsO.
[211] Section 29(1) of InsO.
[212] See paragraph 2. 2. 4.
[213] *Idem.*
[214] Section 174(4) of InsO.
[215] Section 218(1) of InsO.
[216] Section 74(2) of InsO.

In South Africa there is constraints as to the place of the creditor meeting and who may preside over it in insolvency. The German position is viable for implementation in South Africa and similar to the process of convening creditors meetings in our Business Rescue.[217]

4.2.6. Confirming the Liquidation and Distribution Account

After the general verification of claims meeting, the insolvency administrator may distribute funds among the insolvency creditors whenever sufficient cash is available in the estate, however lower-ranking creditors are not considered for such advance distributions.[218] The insolvency administrator must, prior to distribution, draw up a record of the claims to be considered in respect of distribution. This record must be deposited with the registry of the insolvency court for inspection by the interested parties. The insolvency court is required to publish the total amount of the claims and the amount available for distribution from the estate.[219]

The South African position is similar as the German position in that the trustee or liquidator must draft the account, submit it to the Master, upon consent of the Master advertise in the Gazette that it will lie for inspection and if no objections is received, it is confirmed by the Master for distribution by the trustee or liquidator.[220] However, the German position would not reduce the delays currently experienced in South Africa.

4.3. Conclusion

This chapter compared the problematic legislative provisions identified in the previous chapters, where possible and relevant, to the correlating provisions in the German InsO. In order to orient the reader, a basic overview of the German insolvency law was given.

The German InsO provides possible viable solutions for the delays experienced with the appointment of trustees or liquidators, the sale of property, the time and place for the convening of creditors meetings and the requirement of original documents.

[217] See paragraph 3. 3. 5.
[218] Section 187 of InsO.
[219] Section 188 of InsO.
[220] See paragraph 3. 3. 6.

Chapter 5: Suggested empirical framework

5.1. Introduction

"A feature of every truly successful intellectual movement is the ability to communicate its core ideas and methods, and the nature and significance of its achievements, to a wide audience beyond the movement's active practitioners."[221] Empirical legal research (ELS) has become an integral part of legal research across the world and is seen as the key to obtaining this ability.

This chapter deals with the value of empirical research in the context of legal research. It will aim to answer the question if empirical legal research is necessary and what it could contribute to this topic of research.

5.2. The definition of empirical legal research

Cane and Kritzer defines empirical research as "the systematic collection of information ("data") and its analysis according to some generally accepted method."[222] Argyrou confirms that "ELS comprises of an empirical part and a legal part, legal inquiry requires a combination of the application of classical legal research methods (black letter law research) as well as non-doctrinal research." [223] In simpler terms, ELS is a combination of research conducted on the law as well as the operation of the law and legal institutions in practice. It therefore answers questions that cannot merely be answered by studying the letter of the law.

5.3. Empirical legal research internationally

In the last 20 years ELS has become an acknowledged form of legal research predominantly in the United States of America and the United Kingdom.[224] However, ELS have been conducted in numerous countries including Australia, the Netherlands, Germany, Belgium, Spain, Israel,

[221] Lawless and Warren "Bankruptcy and Insolvency" in Cane and Kritzer *The Oxford Handbook of Empirical Legal Research* (2012) Oxford Handbooks Online: United States of America available at https://edisciplinas.usp.br/pluginfile.php/6653646/mod_resource/content/1/430687391-The-Oxford-Handbook-of-Empirical-Legal-Research-pdf.pdf 8.
[222] Lawless and Warren 8.
[223] Argyrou "Making the Case for Case Studies in Empirical Legal Research" 2017 *Utrecht Law Review* 95 Paragraph 1. 2.
[224] Lawless and Warren 8.

Russia and Japan.[225] The World Bank and other international organisations have, in the pursuit of improving legal systems as a means of encouraging economic investment and reducing poverty, sponsored ELS in countries such as Argentina, Bangladesh and Brazil.[226] Unfortunately, very little has been written on this subject in South Africa.

5.4. Possible impact of empirical research

ELS enables the legal scholar to raise problems that are currently affecting the law, it captures the law in practice, the observations and experiences of people.[227] An example in the field of insolvency is the ELS performed by Stanley and Girth between 1965 and 1972 in America called the Brookings Report. It included interviews with 400 individual debtors and analysis of case files from eight judicial districts. The Brookings Report's findings that the American bankruptcy system was ill-suited to serve the needs of businesses and individuals and eventually lead to the overhaul of the bankruptcy laws.[228] The Brookings report was the first of many in the insolvency field in America and further ELS studies lead to the 2005 changes in the bankruptcy law.[229]

5.5. Proposed framework for empirical research based on analytical framework of this dissertation

It would be assumed, for purposes of the study, that the majority of insolvency practitioners are unwilling to confirm the daily delays experienced in the industry due to the Master in fear of retaliation by the employees of the Master. A survey implemented via a body such as SARIPA, anonymously completed by their members who are insolvency practitioners, would be of great value.

In the undertaking of the study there must be compliance with ethical processes and safeguarding of data including adherence to the Protection of Personal Information Act.[230] In this proposed framework the technical aspects will not be discussed, the focus being on the

[225] *Idem.*
[226] *Idem.*
[227] Argyrou 2017 *Utrecht Law Review* Paragraph1. 2
[228] Lawless and Warren 8-10.
[229] *Idem.*
[230] Act No. 4 of 2013.

empirical work. It is recommended that a web-based software such as Qualtrics be utilised as it enables the researcher to create surveys and generate reports without the need for previous programming knowledge. Results can also be viewed in downloadable reports.

By obtaining this valuable data from the practitioners it will be possible to determine if the most frequent delays are due to the failures of the regulatory framework, or whether these are due to criminal behaviour, a lack of capacity or administrative issues. The following preliminary survey is proposed:

Preliminary industry survey questions:

The survey will start with general survey questions such as whether the person is a junior or senior and length of practice followed by part A and B and limiting to proceeding to the next part without completion of the first to avoid influence of answers.

Part A

In this section questions are asked in order to establish the percentage of practitioners experiencing delays in the administration of insolvent estates and of those who experience delays the percentage of delays due to the Master. The participant is then requested to describe the delays experienced that is indeed due to the Master and those not due to the Master to establish if it is viable for solving by reduced oversight of the Master.

Please indicate the extent to which you agree with the following statements:

1 – strongly disagree	2 – disagree	3 – neither agree nor disagree	4 - agree	5 – strongly agree
I experienced delays in the administration of insolvent or liquidated estates on a regular basis				
I experienced delays in the finalisation of insolvent or liquidated estates on a regular basis				
These delays are due to the involvement of the Master of the High Court in insolvency proceedings				

Please answer the following questions as detailed as possible:

Please describe the delays, if any, that you experience on a regular basis:
Please describe the delays, if any, that you experience on a regular basis due to the involvement of the Master of the High Court in insolvency proceedings:
Please describe the delays, if any, that you experience on a regular basis that are not due to the involvement of the Master of the High Court in insolvency proceedings:

Part B

In this section questions are asked in order to establish the most frequent and most likely delay experienced due to the Master as well as the possible repercussions of each delay. This will enable the conductor of the survey to prioritise the importance of possible solutions for each delay.

Please rank the following from 1 – 5 (1 being the least likely and 5 being the most likely) according to delays experienced due to the involvement of the Master of the High Court:

Delay	Ranking	Please provide some details on each delay and indicate what, in your opinion, is the root cause of the delay.
Appointment of a provisional liquidator or trustee		
Issuing of a s80(bis) certificate		
Convening of a first creditors meeting		
Issue of final certificate of appointment		
Original requisition/claim documents requirement		

Requirement that meetings must be held at the Master or Magistrate's office		
Technology constraints such as online submission of claims, requisitions, L&D accounts or online meetings, etc.		
Requisition renewal requirements		
Issue of query sheet		
Confirmation of L&D account		
Other		

Please identify the repercussion or combination of repercussions of each delay:

Delay	Repercussion 1	Repercussion 2	Repercussion 3	Other (please specify)
Appointment of a provisional liquidator or trustee	Assets remain vested in the Master.	Assets at risk of being vandalised or stolen	Creditors suffer losses, sureties face larger shortfalls due to creditors	
Issue of a s80(bis) certificate	Unable to sell immovable asset	Asset deteriorates	Creditors suffer losses, sureties face larger shortfalls due to creditors	

Convening of a first creditors meeting	Unable to sell immovable assets without s80(bis)	Estate can't be finalised even if assets were sold with s80(bis)	Creditors suffer losses, sureties face larger shortfalls due to creditors	
Issue of final certificate of appointment	Unable to convene second meeting to obtain resolutions of creditors	Estate can't be finalised even if assets were sold with s80(bis)	Creditors suffer losses, sureties face larger shortfalls due to creditors	
Original requisition/claim documents requirement	Insufficient timelines for corporate creditors to provide original documents	Need to convene a special meeting to prove claims - more costs	Creditors suffer losses, sureties face larger shortfalls due to creditors	
Requirement that meetings must be held at the Master or Magistrate's office	Lack of knowledge at remote magistrates' courts	Unavailability of rooms or staff members on a specific day or documents lost	Creditors don't participate because it is time constraining	

Technology constraints such as online submission of claims, requisitions, L&D accounts or online meetings, etc.	Vast time delays	Documents are lost and requires the need of 'dummy files'	Creditors don't participate because it is time constraining	
Requisition renewal requirements	Inconsistency between Master's offices create risk of rejection of requisition	Waste of paper and time of creditors	Creditors don't participate because it is time constraining	
Issue of query sheet	Delay in finalisation of the estate	Additional bond of security costs	Creditors suffer losses, sureties face larger shortfalls due to creditors	
Confirmation of L&D account	Delay in finalisation of the estate	Additional bond of security costs	Creditors suffer losses, sureties face larger shortfalls due to creditors	
Other				

5.6. Conclusion

In this chapter it was confirmed that ELS has the ability to combine traditional legal research with empirical research resulting in law reform that will be effective and to the benefit of the citizens of the specific country.

If ELS were to be conducted on the delays experienced in South Africa due to the Master of the High Court, the study could confirm the veracity of such delays and the impact thereof on the debtors, solvent sureties, creditors, the insolvency practitioners and indirectly the economy of South Africa. This could possibly lead to legal reform as it did in America by confirming if possible solutions listed in this dissertation could work in practice.

Chapter 6: Conclusion and recommendations

6.1. Overview of dissertation

This dissertation investigated the hypothesis that the regulation of insolvency law in South Africa is sub-optimal when considering the challenges faced by role-players such as creditors, insolvency practitioners and the public.

At the outset of this dissertation, the research questions were outlined in consideration of the main topic.[231]

The first question inquired into the delays linked to the oversight of the Master. The functions of the Master were set out in detail creating a clear picture of the oversight of the Master and the possible impact any delay in such functions may cause.[232] Anecdotal evidence was provided as to which delays were experienced in practice.

A comparison between the oversight of the Master and the oversight in business rescue and German insolvency law was made in chapters 3 and 4 relating to the delays identified with the anecdotal evidence. It was also compared to the latest draft bill.

In chapter 5 empirical legal research was discussed and the possible impact thereof was highlighted.

Based on the research findings, conclusions can now be drawn as to the extent to which these issues are based in law and if they are capable of being addressed through legislative amendments. If it is capable of being addressed through legislative amendments, recommendations for reform can be made to enhance the existing framework for the benefit of the role-players such as creditors, insolvency practitioners and the public.

[231] Paragraph 1. 3.
[232] Paragraph 2. 2.

6.2. Findings

6.2.1. Appointing a liquidator or trustee

The appointment of a liquidator or trustee is based in law as it is a function of the Master imposed by legislation.[233]

The proposed Draft Insolvency Bill still provides for the appointment to be made by the Master and stipulates the very short timeline within which the Master must do so.[234] However, as is clearly seen in the anecdotal evidence, the Master is not capable of adhering to these timelines in practice. Therefore, the proposed Draft Insolvency Bill does not adequately solve this delay.

The German InsO provides for the appointment of a provisional administrator by the Insolvency Court at granting of the sequestration order.[235] This is a viable option where sequestration and liquidation orders are granted by the court and can be addressed through legislative amendments. Prior to the current Insolvency Act of 1936, appointments of liquidators or trustees in South Africa were also made by the courts who considered the wishes of the majority of creditors.[236]

The South African business rescue process provides for the appointment of a business rescue practitioner by the Court at granting of the business rescue order and by the company where a resolution is adopted to commence business rescue proceedings.[237] This is a viable option where sequestration and liquidation orders are granted by the court and when a company is voluntarily liquidated by way of a resolution. This can be addressed through legislative amendments.

6.2.2. Authorising the sale of property

The authority of the trustee or liquidator to sell property is based in law as it is a function of the Master imposed by legislation.[238]

[233] Paragraphs 2. 2. 6, 2. 2. 7. and 4. 2. 1.
[234] Paragraph 4. 2. 4.
[235] Paragraph 4. 2. 2.
[236] Boraine & Calitz "The role of the Master of the high court as regulator in a changing liquidation environment: a South African perspective" 2005 TSAR 733 and Insolvency Act 32 of 1916.
[237] Paragraph 4. 2. 3.
[238] Paragraphs 2. 2. 11. and 4. 3. 1.

The proposed Draft Insolvency Bill still requires directions from the Master prior to the first creditors meeting being convened.[239] Obtaining the consent of the Master causes a vast delay in the sale of property and causes further increased realisation costs which results in reduced dividends payable to creditors.

The German InsO provides for the administrator to obtain consent from the creditors.[240] This is a viable option if this can be obtained by way of written consent of the secured creditor or by way of round-robin of unsecured creditors if the asset is unencumbered. This can be addressed through legislative amendments.

The South African business rescue process requires the consent of the secured creditor unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness of the secured creditor.[241] This is a viable option, although it is rare to sell assets in an insolvent estate for more than the indebtedness to the secured creditor. This can be addressed through legislative amendments.

6.2.3. Convening a first creditors' meeting

The convening of the first creditors meeting by the Master is based in law as it is a function of the Master imposed by legislation.[242]

The proposed Draft Insolvency Bill does allow for the meeting to be convened by the trustee or liquidator. However, the following further requirements are set:

- The liquidator must send various documents by personal notice to every creditor known or reasonably obtainable.[243] This seems to place the cart before the horse as the liquidator usually only become aware of the majority of creditors at the first creditors meeting when they prove claims in the estate. Most likely the only creditors whom would receive such notices would be an applicant creditor and a creditor who has a mortgage bond registered over an asset of the estate.

[239] Paragraphs 4. 2. 4. and 4. 3. 4.
[240] Paragraph 4. 3. 2.
[241] Paragraph 4. 3. 3.
[242] Paragaphs 2. 2. 16. and 4. 4. 1.
[243] Paragraph 4. 4. 4.

- The liquidator must submit various documents to the Master documents, including an affidavit containing a list of the names and addresses of the creditors to whom the documents have been sent. There is no indication as to if the consent of such creditors must be obtained to share their details or the reason why the Master would need it, what the Master would do with the information and for how long the Master would keep the information.
- If the first creditors meeting is held before the final liquidation order is granted the liquidator must submit a report to Court confirming if the liquidation would probably be to the advantage of creditors. As previously stated, the liquidator would at this stage not know who all of the creditors are as yet, it would be mere speculation to aver it would be to the benefit of creditors or not.

The German InsO provides for the Insolvency Court to convene the first creditors meeting when granting the liquidation order.[244] This is a viable option where the sequestration or liquidation order is granted by a court. This can be addressed through legislative amendments.

The South African business rescue process provides for the convening of a meeting by the business rescue practitioner without the additional requirements set by the Draft Insolvency bill.[245] This is a viable option where sequestration and liquidation orders are granted by the court and when a company is voluntarily liquidated by way of a resolution. This can be addressed through legislative amendments.

6.2.4. Requiring original documents

The requirement by the Master for lodgement of original documents is not based in law as it is not a function of the Master imposed by legislation. However, the possible solutions can be addressed through legislative amendments.

The proposed Draft Insolvency Bill has no specification regarding the electronic lodgement of documents.

[244] Paragraph 4. 4. 2.
[245] Paragraph 4. 4. 3.

The German InsO provides for electronic lodgement of claims by creditors. This is a viable option and can be addressed through legislative amendments.[246]

The South African business rescue process is in practice implemented with electronically submitted documents.[247]

6.2.5. Place for the convening of creditors' meetings and requirements regarding the presiding officer

The place of and presiding over the first creditors meeting by the Master is based in law as it is a function of the Master imposed by legislation.[248]

The proposed Draft Insolvency Bill allows for meetings to be convened at any place within the magisterial district and presided over by the liquidator unless questioning must take place.[249] This is viable but does not make provision for electronically convened meetings.

The German InsO does not stipulate the place of creditors meeting or whom the presiding officer must be.[250]

The South African business rescue process is in practice implemented with electronically convened meetings presided over by the business rescue practitioner.[251] This is a viable option and can be addressed through legislative amendments.

6.2.6. Confirming the Liquidation and Distribution Account

The confirmation of the L & D by the Master is based in law as it is a function of the Master imposed by legislation.[252]

The proposed Draft Insolvency Bill still provides for the current process in the drafting, advertisement and confirmation of the L & D.[253] The anecdotal evidence made it clear that the

[246] Paragraph 4. 5. 2.
[247] Paragraph 4. 5. 3.
[248] Paragraphs 2. 2. 16. and 4. 6. 1.
[249] Paragraph 4. 6. 4.
[250] Paragraph 4. 6. 2.
[251] Paragraph 4. 6. 3.
[252] Paragraphs 2. 2. 21. and 4. 7. 1.
[253] Paragraph 4. 7. 4.

Master causes vast delays in the confirmation of the L & D and therefore causes delays in payment of final dividends to creditors.

The German InsO provides for the lodgement of a record of the claims to be considered in respect of distribution that lie for inspection by interested parties.[254] There is no confirmation by the court. This is a viable solution for the liquidator to submit the L & D to the Master for record keeping and can be addressed through legislative amendments.

The South African business rescue process allows for voting on the plan by the creditors.[255] This is a viable option and can be addressed through legislative amendments.

6.3. Recommendations

As submitted by Calitz, it is inevitable that the state should be involved in the regulatory process of South African insolvency.[256] It is clear from the anecdotal evidence that the assumption that the public has lost its trust in the Master due to the perceived incompetence and lack of integrity of the employees of the Master,[257] is shared by the insolvency profession. The comparisons made in Chapter 4 confirms that reduced oversight by the Master in insolvency proceedings is necessary, possible and to the benefit of parties who have vested interest in insolvent estates.

The following recommended legislative[258] amendments in order to reduce the oversight by the Master are founded in the principles of effective insolvency systems as confirmed by the World Bank.[259]

6.3.1. Appointing a trustee or liquidator

Allowance for the appointment of a trustee or liquidator by the Court at granting of the liquidation or sequestration order and by the company where a resolution is adopted to commence liquidation. To ensure the interest of creditors are protected, voting must still take

[254] Paragraph 4. 7. 2.
[255] Paragraph 4. 7. 3.
[256] Calitz "Some thoughts on state regulation of South African insolvency law" 2011 *De Jure* 310.
[257] Paragraph 1. 1. and footnote 42.
[258] Currently the Insolvency Act, 1973 Companies Act and Closed Corporations Act. To include any future Draft Insolvency Bill to be published.
[259] Paragraph 4. 1.

place at the first creditors meeting to appoint a final trustee or liquidator and strict timelines kept for the convening of the first creditors meeting.

This would ensure that all provisionally liquidated or sequestrated estates vest in a liquidator immediately and minimise the losses of creditors (and therefor minimise liability of sureties and guarantors). It will also avoid the necessity of obtaining consent from the Master to convene the first creditors meeting, where a close corporation is liquidated and the liquidator is unable to convene a first creditors meeting within one month of the final liquidation date.[260]

6.3.2. Authorising the sale of property

Allowance for the sale of any assets after a final sequestration or liquidation order has been granted, by the trustee or liquidator, with the consent of the secured creditor, or if the asset is not encumbered, the consent of the concurrent creditors. In the interest of saving time, such consent will be sufficient if in writing and signed by the creditor or their representative.

This would ensure that there are no delays in selling assets of the estate and therefore minimising section 89 costs, depreciation of the value of the asset and increasing dividends payable to creditors.

6.3.3. Convening a first creditors' meeting

Allowance for the court to convene the first creditors meeting when granting the liquidation or sequestration order without publication in the Government Gazette. As the applicant would not necessarily know all the creditors, a publication in a national newspaper should be required.

Where liquidation is initiated by a resolution, to allow for the liquidator to convene the first creditors meeting without publication in the Government Gazette. A further requirement for such a resolution should be that the directors must attach a complete creditors list with contact details to the resolution when filing same. The liquidator must then publish a notice of the meeting in a national newspaper and advise each creditor on the list provided by the directors.

[260] See *Jonker and Others v Myobizi N. O and Others (*3076/2021) [2022] ZAFSHC 62 regarding the requirements of the convening of a first creditors meeting of a close corporation.

This would ensure that there are no delays in convening the first creditors meeting and that there is no reliance on the Government Printing Works that experienced technical difficulties in issuing of legal gazettes for the period of February 2021 until May 2022.[261]

6.3.4. Requiring original documents

The allowance for all documentation that needs to be submitted to the liquidator (such as claims) or by the liquidator to be electronically signed and submitted. The current online system of the Master can be enhanced to allow for documents to be submitted online by liquidators. This would ensure a more efficient process with electronic records available on all matters. It will also reduce storage costs of the Master and printing costs of the liquidator and creditors. In light of the cyber-attack experienced last year,[262] it would be imperative that any such system be secured by the correct anti-virus, anti-spyware, firewalls etc.to protect the data of creditors, liquidators and insolvents that is not in the public domain. Consideration could be given to include cyber safety insurance in the bond of security requirements.

6.3.5. Place for the convening of creditors' meetings and requirements regarding the presiding officer

The legislation must make allowance for the creditor meetings to be convened electronically or any other place in the magisterial district and presided over by the liquidator. This would ensure higher attendance rate by creditors and other affected parties at reduced costs and minimise delays due to availability of the Master or Magistrate to preside.

6.3.6. Confirming the Liquidation and Distribution Account

Allowance for a separate meeting to be convened for consideration and voting on confirmation of the L & D by creditors. This would be similar to that of the adoption of the business rescue plan. The trustee or liquidator will draft the L & D, publish it by sending it (electronically) to all proven creditors, convening a meeting for the consideration and voting within 14 days of publishing. The creditors will at the meeting be able to direct the liquidator as to amendments

[261] See paragraphs 1. 1 and 2. 7.
[262] *South African Restructuring and Insolvency Practitioners Association NPC v Chief Executive Officer: Government Printing Works and Others* (27628/2021) [2021] ZAGPPHC 717 (1 July 2021) and also letter from Jaco Roos Attorneys acting on behalf of SARIPA addressed to the State Attorney dated 7 February 2022 (on file with author).

required or confirm the L & D. Should the trustee or liquidator and creditors not be able to agree on amendments or confirmation, the matter should be referred to the Master to decide. Once the account is confirmed the trustee or liquidator must submit a copy to the Master for record keeping and distribute in terms thereof.
This would ensure awareness of the creditors of the contents of the L & D, reduce the time for confirmation and reduce costs involved with advertisement and to lie for inspection.

6.4. Empirical framework

The benefits of empirical research were discussed in chapter 5 and it is recommended that this dissertation be used as an analytical framework to conduct an empirical study with the protocol suggested in chapter 5.

6.5. Conclusion

In this chapter, conclusions were drawn regarding the extent to which the identified delays caused by the Master are based in law and if they are capable of being addressed through legislative amendments.

Where it is capable of being addressed through legislative amendments, recommendations for reform were made to enhance the existing framework for the benefit of the role-players such as creditors, insolvency practitioners and the public.

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