

**DRAFT COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA)**  
**ON THE POLICY ON APPOINTMENT OF INSOLVENCY PRACTITIONERS BY THE MASTER**  
**OF THE HIGH COURT (OCTOBER 2011)**

The following comments flow from a review of the Policy and the Extracts from the Policy that accompanied the Policy document.

The comments are intended as preliminary comments and refer to the Extracts.

**1. INTRODUCTION**

The LSSA notes the comments.

**2. BACKGROUND**

The LSSA agrees that a lack of uniformity is undesirable, not only in respect of the practice and procedure to be followed, but also regarding the application of the law by different Masters, as this creates conflict and uncertainty. It believes that one uniform set of rules should be applicable in all Masters' offices.

**3. NEED FOR CHANGE**

The efforts to promote consistency in appointments and to ensure an equitable distribution of work are applauded. However, inasmuch as the requisition system can be manipulated, abolishing it completely will not address the problem. We are of the view that there should be an external auditing process to ensure that the appointments are done in a fair and transparent manner.

While the LSSA agrees that it is undesirable that the Master has a wide discretion and is of the view that such discretion should be constrained by the auditing (monitoring) committee, the provisions of the Insolvency Act, 24 of 1936, as amended, will have to be considered.

#### **4. PROVISIONS OF THE POLICY**

The LSSA notes the objectives of the policy and its scope and application.

#### **5. DIRECTIVES**

Please see our comments under 14.1.

#### **6. MASTERS' LISTS OF INSOLVENCY PRACTITIONERS**

The LSSA has no comment on this paragraph.

#### **7. REQUIREMENTS TO BE PLACED ON A MASTER'S LIST**

In terms of the Attorneys' Act 53 of 1979 the statutory law societies are the regulatory bodies of attorneys, with the authority to issue certificates of good standing. The policy document should accordingly be amended to, instead of referring to the Law Society of South Africa, refer to "any of the following statutory law societies: Cape Law Society; Law Society of the Northern Provinces, KwaZulu-Natal Law Society; Law Society of the Free State."

#### **8. DIVISION OF THE MASTERS' LISTS**

The policy does not give sufficient clarity as to how appointments relating to the various divisions will be applied, taking into consideration the arrangement of the lists according to the categories in 9 below. It should be clearly spelt out how this would work in practice. It is also uncertain whether this will give effect to the objective of the policy.

**9. ARRANGEMENT OF LISTS ACCORDING TO BBBEE CATEGORIES**

The LSSA submits that the percentages referred to in this paragraph should not be advised by the demographics of the country, but rather by the demographics of persons who qualify as insolvency practitioners.

We suggest that the issue of the division of the Masters' lists as well as the arrangement of the lists according to categories should further be interrogated to ensure that it passes constitutional muster.

**10. LAPSING OF REGISTRATION, REMOVAL FROM AND PUBLICATION OF THE LIST**

The content of this paragraph is noted.

**11. APPOINTMENT OF INSOLVENCY PRACTITIONERS BY MASTERS OF HIGH COURTS**

The content of this paragraph is noted.

**12. RECORDS TO BE KEPT BY MASTERS OF HIGH COURTS**

The content of this paragraph is noted.

**13. ACTIVE AND EQUAL PARTICIPATION BY LIQUIDATORS**

We suggest that the word "equally" be replaced by "jointly" as equal participation is often impractical. Practitioners should have the right to arrange among themselves how the work is divided.

It is unclear what action will be taken against a practitioner who fails to comply with the provisions of this paragraph and how disputes between practitioners will be resolved.

Furthermore, it is not clear who will do the assessment of the liquidators' fees. This needs to be clarified.

We submit that this entire paragraph is vague and needs further explanation.

#### **14.1 CHIEF MASTER'S DIRECTIVES**

We request that the input of the profession be obtained before a directive is issued. The LSSA has specialist committees dealing inter alia with deceased estates, trusts and insolvency matters and will be willing to contribute in this regard. The practitioners are involved with the Masters' Offices on a daily basis and therefore understand the practical implications.

#### **14.2 PROCEDURE TO BE FOLLOWED BY THE MASTER WHEN APPOINTMENTS ARE MADE**

With reference to paragraph (e)(viii) it is uncertain why the registered trade unions should have the privilege to have an insolvency practitioner appointed from their nominations. This contradicts the spirit of the policy.

We believe that no organisation or person should be able to influence the appointments and that any provision making this possible, negates paragraphs 8 (division of lists) and 9 (categories) above.

We believe that careful consideration should be given to deleting this paragraph.

Consideration must also be given to the fact that the right of the liquidator/creditor to appoint a liquidator or trustee of their choice is disregarded until the first meeting of creditors. During that period the assets are in the hands of firstly, the master and thereafter, the appointed

liquidator/trustee. The Master is thus exposed to action for the negligence of the appointed liquidator/trustee during this period.

The insurance Companies' reaction to inexperienced liquidators/trustee will also be cautious.

There will also be a huge administrative burden on the Masters Office at the first meeting of creditors when creditors will have to appoint the final liquidator/trustee.

## **CONCLUSION**

The LSSA is not convinced that the policy will address the issues it needs to address and believe it needs further careful consideration.

Should the policy be implemented, we suggest that a phase in period be determined in order to test its application in practice.