IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT, PRETORIA

Case No: 28042/11

In the *ex parte* application of

THE MASTER OF THE HIGH COURT OF SOUTH AFRICA (NORTH GAUTENG)

DELETE
(1) REPL
(2)
27/6/11

JUDGMENT

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1. The Master of this court ("the Master") has applied for a declaratory order in the following terms:

'1.1 (T)he Master of the High Court of South Africa ("the Master") is the only person authorised to appoint

1.1.1 Trustees and provisional trustees of sequestrated and provisionally sequestrated estates;

1.1.2 Liquidators and provisional liquidators of companies in liquidation and provisional liquidation; and

1.1.3 Judicial managers and provisional judicial managers of companies in judicial management and provisional judicial management; and

1.2 no Judge of the High Court of South Africa has authority or jurisdiction to effect any appointment of any person to any of the positions referred to in paragraph 1.1"

2 The application has been necessitated by a practice that has developed over the past years that attorneys who apply for the sequestration of individuals or the liquidation of companies (or, for that matter, close corporations), of for judicial management of a company in terms of the 1973 Company Act, include a prayer in the notice of motion and draft order for the appointment of a specific individual as trustee or provisional trustee, as liquidator or as provisional liquidator or judicial manager or provisional judicial manager.

3 Advocates who are instructed to appear in these applications, usually in the unopposed motion court, move for orders in these terms and, as is apparent from a number of orders granted by judges of this court, do so successfully.

4 The Master contends that such orders are in conflict with the clear provisions of the relevant statutory provisions and that officers of the court should not apply for, and this court should not grant orders that interfere with the exercise of the applicant's functions.

5 The application was served upon the Association of Insolvency Practitioners of South Africa; the South African Institute of Chartered Accountants; the Law Society of the Northern Provinces; the Pretoria Society of Advocates; the Johannesburg Society of Advocates and the Independent Advocates' Association of South Africa.

6 The Johannesburg Society of Advocates, the Pretoria Society of Advocates and the Law Society of the Northern Provinces applied to be admitted as *amici curiae*, which applications were welcomed. The Court is indebted to the

amici for their assistance and research and is grateful for the thorough heads of argument and the lucid submissions made by Mr Suttner SC assisted by Ms Nkhuta and Ms Cirone on behalf of the applicant and Mr Hutton SC assisted by Mr Dewrance and Ms Manaka on behalf of the Johannesburg Society of Advocates. The Court is thankful for the very helpful heads of argument filed after the hearing by Mr Terblanche SC assisted By Mr A Badenhorst SC and Mr Ncongwane on behalf of the Pretoria Society of Advocates and Mr Lamey on behalf of the Law Society of the Northern Provinces.

THE STATUTORY FRAMEWORK

7 Since the promulgation of the Insolvency Act 32 of 1916 the administration of insolvent estates has been controlled by an act of Parliament.[1] The appointment of trustees and provisional trustees responsible for the administration of insolvent estates of natural persons, and the manner and fashion in which trustees and provisional trustees have to deal with such estates, is now arranged by the Insolvency Act 24 of 1936, as repeatedly amended.

[1] For an overview of the historical roots of the South African insolvency regime see Mars, *The law of Insolvency in South Africa*, 9th edition by Bertelsmann & others, pp 6-10.

8 The provisions of the Insolvency Act also apply in considerable measure, *mutatis mutandis*, to the winding-up of insolvent companies and to the appointment of, and control over, liquidators and provisional liquidators, as these are imported into the former Companies Act 61 of 1973 by s 339 thereof.[2] The new Companies Act 71 of 2008 expressly reserves the winding-up provisions of the 1973 Act in Item 9 of its Fifth Appendix. The 1973 Act also regulates the appointment of judicial managers and provisional judicial managers, an office that will gradually become obsolete in view of the Business Rescue provisions of the 2008 Companies Act.

9 Section 66 of the Close Corporations Act 69 of 1984 in turn adopts the principles applying to the winding–up of companies in respect of close corporations that are wound up, and sub-section (2) thereof expressly imports fundamental concepts of the Insolvency Act into the winding-up of close corporations.

10 For purposes of this judgment it is therefore necessary to consider the relevant provisions of the Insolvency Act; the previous Companies Act 61 of 1973 and the Close Corporations Act 69 of 1984 *in extenso*.

THE INSOLVENCY ACT 24 OF 1936

[2] It reads as follows: "In the winding–up of a company unable to pay its debts the provisions of the law relating to insolvency shall, insofar as they are applicable, be applied *mutatis mutandis* in respect of any matter not specifically provided for by this Act."

11. Section 18 of the Insolvency Act provides that the Master appoints provisional trustees and trustees to insolvent estates of individuals.[3]

12. While the Master may have the discretion to appoint a provisional trustee prior to the first and second meetings of creditors, her or his powers to appoint trustees are limited by the wishes of creditors of the insolvent. The Master is obliged to call a meeting of creditors in terms of section 40. [4]

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[3] 18. Appointment of provisional trustee by Master.—
(1) As soon as an estate has been sequestrated (whether provisionally or finally) or when a person appointed as trustee ceases to be trustee or to function as such, the Master may, in accordance with policy determined by the Minister, appoint a provisional trustee to the estate in question who shall give security to the satisfaction of the Master for the proper performance of his or her duties as provisional trustee and shall hold office until the appointment of a trustee.
(2) At any time before the meeting of the creditors of an insolvent estate in terms of section forty, the Master may, subject to the provisions of subsection (3) of this section, give such directions to the provisional trustee as could be given to a trustee by the creditors at a meeting of creditors.
(3) A provisional trustee shall have the powers and the duties of a trustee, as provided in this Act, except that without the authority of the court or for the purpose of obtaining such authority he shall not bring or defend any legal proceedings and that without the authority of the court or Master he shall not sell any property belonging to the estate in question. Such sale shall furthermore be after such notices and subject to such conditions as the Master may direct.
(4) When a meeting of creditors for the election of a trustee has been held in terms of section forty and no trustee has been elected, and the Master has appointed a provisional trustee in the estate in question, the Master shall appoint him as trustee on his finding such additional security as the Master may have required.

[4] 40. First and second meetings of creditors.—
(1) 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 for the proof of their claims against the estate and for the election of a trustee.
(2) The Master shall publish such notice on a date not less than ten days before the date upon which the meeting is to be held and shall in such notice state the time and place at which the meeting is to be held.
(3) (a) After the first meeting of creditors and the appointment of a trustee, the Master shall appoint a second meeting of creditors for the proof of claims against the estate, and for the purpose of receiving the report of the trustee on the affairs and condition of the estate and giving the trustee directions in

13. This section must be read together with section 54[5], which obligates the Master to appoint as trustee either the person elected by the creditors who hold the claims that constitute the majority in value, or the person who was

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connection with the administration of the estate.
(b) The trustee shall convene the second meeting of creditors by notice in the Gazette and in one or more newspapers circulating in the district in which the insolvent resides or his principal place of business is situate.
(c) Whenever the notice referred to in paragraph (b) is published in any newspaper, the publication shall take place simultaneously in the Afrikaans language and in the English language and in the case of each such language in a newspaper circulating in the district referred to in the said paragraph which appears mainly in that language and the publication in each such language shall as far as practicable occupy the same amount of space: Provided that where in the district in question any newspaper appears substantially in both such languages publication in both such languages may take place in that newspaper.

[5] 54. Election of trustee.—
(1) At the first meeting of the creditors of an insolvent estate the creditors who have proved their claims against the estate may elect one or two trustees.
(2) Any person who has obtained a majority in number and in value of the votes of the creditors entitled to vote, who voted at such meeting, shall be elected trustee.
(3) If no person has obtained such a majority of votes then—
(a) the person who has obtained a majority of votes in number, when no other person has obtained a majority of votes in value, or has obtained a majority of votes in value, when no other person has obtained a majority of votes in number, shall be deemed to be elected sole trustee:
(b) if one person has obtained a majority of votes in value and another a majority of votes in number, both such persons shall be deemed to be elected trustees, and if either person declines a joint trusteeship, the other shall be deemed to be elected sole trustee.
(4) For the purposes of this section "majority of votes in number" means a greater number of votes (apart from the value of the claims which they represent, but subject to the provisions of subsection (3) of section fifty-two) than has been obtained by any competitor and "majority of votes in value" means votes representing claims of a greater aggregate value than the votes obtained by any competitor.
(5) If at any meeting of creditors convened for the purpose of electing a trustee, no trustee is elected and the estate is not vested at the time of that meeting in a provisional trustee, the Master may, in accordance with policy determined by the Minister, appoint a trustee and if he or she does not so appoint a trustee, the Master or the insolvent with the Master's consent, may apply, at the cost of the estate, to the court by petition to set aside the sequestration and the court may make such order thereon as it thinks fit.

elected by the majority number of creditors, or both persons if two are elected in this fashion as joint trustees.

14. The Master must determine the amount of security that must be furnished by the person elected as trustee. Once security has been provided the trustee must be appointed, as decreed by s 56.

15. Although the trustee is not necessarily an officer of the court[6] there can be no shadow of doubt that the office is one of trust toward creditors and the insolvent, and also toward the Master and the court. It is also clear that a trustee must be scrupulously independent and may have no interest in the fate of the insolvent or the insolvent estate or any bias in favour of or against any of the creditors of the estate for the liquidation of which the trustee has been appointed. It is for this reason that section 55 lists a range of factors that disqualify a person from being appointed as trustee, either at all or in respect of the relevant estate.[7]

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6 For a discussion of this question see Mars, *op.cit.* p 293. See further *Gilbert v Becker & Another* 1984 (3) SA 774 (W) at 777F to 781G.

7 55. Persons disqualified from being trustees.—
Any of the following persons shall be disqualified from being elected or appointed a trustee:—
(a) any insolvent;
(b) any person related to the insolvent concerned by consanguinity or affinity within the third degree;
(c) a minor or any other person under legal disability;
(d) any person who does not reside in the Republic;
(e) any person who has an interest opposed to the general interest of the creditors of the insolvent estate;
(f) a former trustee disqualified under section seventy-two;
(g) any person declared under section fifty-nine to be incapacitated for election as trustee, while any such incapacity lasts, or any person removed by the court, on account of misconduct, from an office of trust;
(h) a corporate body;
(i) Any person who has at any time been convicted (whether in the Republic or elsewhere) of theft, fraud, forgery or uttering a forged document, or perjury and has been sentenced to imprisonment without the option of a fine, or to a

16. Section 57 is an important provision of the Insolvency Act. It clothes the Master with the power to set aside the appointment of a trustee who was not properly elected or is disqualified in terms of s 55 from being appointed. It further grants the authority to the Minister to set aside a decision by the Master to confirm or to refuse to confirm the election of a trustee. The section is worded as follows:

"(1) 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 if in the opinion of the Master the person elected as trustee should not be 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 confirm the election of a trustee because he is of the opinion that the person elected 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 elected should not be appointed as trustee to the estate in question.

(2) When the Master has declined to confirm the election of a trustee or to

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fine exceeding R2 000;
(j) any person who was, at any time, a party to an agreement or arrangement with any debtor or creditor whereby he undertook that he would, when performing the functions of a trustee or assignee, grant or endeavour to grant to, or obtain or endeavour to obtain for any debtor or creditor any benefit not provided for by law;
(k) any person who has by means of any misrepresentation or any reward or offer of any reward, whether direct or indirect, induced or attempted to induce any person to vote for him as a trustee or to effect or assist in effecting his election as trustee of any insolvent estate;
(l) any person who at any time during a period of twelve months immediately preceding the date of sequestration acted as the bookkeeper, accountant or auditor of the insolvent;
(m) any agent authorized specially or under a general power of attorney to vote for or on behalf of a creditor at a meeting of creditors of the estate concerned and acting or purporting to act under such special authority or general power of attorney.

appoint a person elected as a trustee, or the Minister has under subsection (9) set aside the appointment of a trustee, the Master shall in accordance with the provisions of subsections (1) and (2) of section forty convene a meeting of creditors of the estate in question for the purpose of electing another trustee in the place of the person whose election as a trustee the Master declined to confirm or whom the Master declined to appoint or whose appointment as trustee has been so set aside. In the notice convening the meeting the Master shall state that he has declined to confirm the election of the person previously elected as trustee, or to appoint the person so elected, and the reasons therefore (but subject to the proviso to subsection (11), or that the appointment of the person previously appointed as trustee has been set aside by the Minister, as the case may be, and that the meeting is convened for the purpose of electing another trustee. The Master shall post a copy of the notice to every creditor whose claim against the estate was previously proved and admitted.

(3) A meeting mentioned in subsection (2) shall be deemed to be the continuation of a first meeting of creditors held after an adjournment thereof.

(4) If the Master declines, for any reason mentioned in subsection (1), to confirm the election of a person who was elected as trustee at a meeting mentioned in subsection (2), or to appoint a person so elected, he or she shall act in accordance with the provisions of subsection (1) and thereupon, if the person whose election the Master declined to confirm or whom the Master declined to appoint, was elected as sole trustee, or if two trustees were elected and the Master did not appoint both or one of them, the Master shall, in accordance with policy determined by the Minister, appoint as trustee of the estate in question any other person who is not disqualified from being a trustee of that estate.

(5) Whenever the Master considers it desirable, he or she may, in accordance with policy determined by the Minister, appoint a person not disqualified from holding the office of trustee who has given the security mentioned in section 56 (2) as a co-trustee with the trustee or trustees of an insolvent estate.

(6) All the provisions of this Act, relating to a trustee shall apply to a trustee or a co-trustee appointed by the Master under this section.

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

(8) The Master shall within seven days of the receipt by him of the request referred to in subsection (7) submit to the Minister, in writing, his reasons for such appointment or refusal together with any relevant documents, information or objections received by him.

(9) The Minister may after consideration of the reasons referred to in subsection (8) and any representations made in writing by the person who made the

request referred to in subsection (7) and of all relevant documents, information or objections submitted to him or the Master by any interested person, confirm, uphold or set aside the appointment or the refusal by the Master and, in the event of the refusal by the Master being set aside, direct the Master to confirm the election of the trustee concerned and to appoint him as trustee to the estate in question.
(10) The decision of the Minister under subsection (9) shall be final."

17. It should be underlined that the Master has the power to set aside the purported election of a person who has been elected in a fashion not authorised by the statute, or who is disqualified from appointment for any reason. The fact that the court has the same power and may declare a person to be disqualified from appointment as trustee even before such person has been elected, as provided for in s 59, does not distract from this capacity. In addition, s 60 empowers the Master to remove a trustee on the grounds set out therein.[8] It is important to note that the original version of this section granted that power to the court, but in 1965 an amendment transferred this capacity "...fully and effectively ..." (per Coetzee J, as he then was, in *Gilbert, supra*, at 783 G) to the Master.

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

18. Once a trustee has been removed, has resigned or has passed away, the Master may convene a meeting of creditors to replace the former holder of the office, as set out in s 62.

19. The Master is in control of the entire process of administration and liquidation of insolvent estates, an important part of which consists of the oversight she or he exercises over the trustees in the performance of their functions as mandated by the Insolvency Act. The Master's functions and duties include:

a) Receiving applications for voluntary surrenders and calling for valuation of property owned by the applicant (section 4);

b) Appointing a *curator bonis* to the estate of a debtor who has caused a notice of voluntary surrender to be published (section 5);

c) Ensuring the payment of costs if an application for voluntary surrender is withdrawn, lapses or is dismissed (section 6(2));

d) Authorising the withdrawal of a notice of surrender (section 7);

e) Accepting security for the costs of launching an application for the sequestration of a debtor and accepting a copy of the application (section 9);

f) Receiving a statement of an insolvent's affairs after the latter's sequestration (section 16);

g) Receiving orders of sequestration and orders setting aside provisional orders of sequestration and publish these in the Gazette (section 17(4));

h) Authorising the registration of a *caveat* against transfer in the tile deed of immovable property belonging to an insolvent (section 18B);

i) Receiving an inventory of an insolvent's estate and all cash found therein (section 19);

j) Holding an insolvent's property until a trustee has been appointed and then vesting such property in the latter (section 21(1)) or holding it after the termination of the trustee's appointment until another has been appointed (section 25(2));

k) Issuing a certificate that property is claimable by the trustee from an insolvent by writ of execution (section 23(11);

l) Accepting notice by a third party of a claim of ownership of property held by an insolvent prior to sequestration, if no trustee has been appointed, and before such property is sold in good faith (section 36(5));

m) Determining the time and place of meetings of creditors (section 39);

n) Approving the trustees' remuneration which must be taxed (section 63);

o) Determination of dates of meetings of creditors and the summoning of witnesses to attend these meetings (sections 40, 41, 42, 64, 65 and 66);

p) Authorizing the late proof of claims against the insolvent estate (section 44(1));

q) Approving, reducing or disallowing any such claim (section 45(3);

r) Reporting offences committed by any person (section 67);

s) Overseeing trustees taking charge of estate property and having such property valued (section 69);

t) Opening of bank accounts (section 70);

u) Recording of receipts (section 71);

v) Reclaiming monies unlawfully retained by trustees (section 72);

w) Authorising the obtaining of legal advice (section 73);

x) Receiving notification of intention to continue civil legal proceedings against the estate (section 75);

y) Authorising arbitration proceedings or the compounding or compromising of claims by the estate (section 78);

z) Authorising the payment of a subsistence allowance to the insolvent and his family (section 79);;

aa) Authorising the continuation of the insolvent's business (section 80);

bb) Authorising the immediate sale of movable or immovable property prior to the finalisation of the sequestration process (section 80*bis*);

cc) Permitting the late delivery of a report to creditors (section 81(1));

dd) Authorising the realisation of the estate in the absence of creditor's directions (section 81(2));

ee) Giving directions for the sale of immovable property (section 82);

ff) Authorising the realisation of securities for claims (section 83);

gg) Receiving liquidation and distribution accounts (section 91) and interim accounts if necessary (section 92);

hh) Receiving trading accounts (section (93);

ii) Authorising the realisation of securities in favour of creditors who have failed to prove a claim (section 95);

jj) Authorising the late proof of claims (section 104);

kk) Granting extension for the submission of trustee's accounts (section 109);

ll) Compelling the submission of accounts (section 110);

mm) Dealing with objections to trustees' accounts (section 111);

nn) Confirming trustees' accounts (section 112);

oo) Receiving proof of payment of dividends and unpaid dividends (section 114);

pp) Receiving any surplus in an estate and paying the same into the Guardian's Fund (section 116);

qq) Enforcing the payment of contributions and identifying the creditors liable to effect such payment (section 118);

rr) Considering and confirming a composition between the insolvent and his creditors (section 119);

ss) Determining security for the taking over of the assets of the estate of a partner in an insolvent partnership who enters into a composition, by the trustee of the estate of another partner (section 121 (2));

tt) Reporting to the Court on applications for rehabilitation and to oppose such applications if necessary (sections 124 read with section 127);

uu) Considering allegations of false claims being made against an insolvent estate (section 136 (a));

vv) Requiring trustees to deliver documents to him or hold inquiries into the affairs of an insolvent's estate or affairs (section 152);

ww) Determining fees for services rendered and collecting the same (section 153);

xx) Exercising custody of all documents relating to insolvent estates and endorsing documents and certificates relating to them (section 154);

yy) Authorising the destruction of documents by trustees after the expiry of six months after the confirmation of the final account relating to an insolvent estate; and destroying documents in his own office relating to insolvent estates after five years have elapsed since the rehabilitation of an insolvent (section 155);

zz) Apply policy determined by the Minister (section 158 read with section 57(5)).

THE COMPANIES ACT 61 OF 1973

20. Although the 1973 Act has been repealed, Item 9 of the Fifth Schedule to the new Companies Act 71 of 2008 determines that chapter XIV of the former Act shall continue to apply until a date to be determined by the Minister when the new structures to deal with liquidations are in place.

21. Section 339 of the Companies Act (CA) provides that the law of insolvency applies *mutatis mutandis* to the winding-up of companies. Many of the functions the Master exercises in sequestration matters are mirrored in the administration of companies that are wound up. As is the case in sequestration proceedings, the Master has the power to appoint liquidators and to decline to appoint a liquidator, although s 379 (2) provides expressly that the court may do so if the Master fails to exercise this function.

22.) It is not necessary to list all the relevant provisions of the CA. It will be sufficient to deal with those sections that have no equivalent in the Insolvency Act but impose functions and duties upon the Master:

a) Section 343 CA provides that the Master may apply for the compulsory liquidation of a company that is wound up voluntarily;

b) Section 363 (3) CA allows the Master to exempt persons from filing a statement of affairs relating to companies under winding-up if such person is unable to provide any information;

c) Section 418 CA empowers the Master to appoint commissioners for confidential enquiries into the affairs of a company, a power that is granted to the court as well;

d) Sections 427 CA to 440 CA deal with judicial management, a process that is now replaced by the business rescue provisions of the 2008 Act. The Master's duties and functions regarding the appointment of and control over judicial managers and provisional judicial managers run parallel to those that apply to liquidators and provisional liquidators and need not be discussed separately for purposes of this judgment.

THE CLOSE CORPORATIONS ACT 69 OF 1984

23. Part IX of the Close Corporations Act, dealing with the liquidation of close corporations, contains provisions that are virtually identical to those that apply to the liquidation of companies and the sequestration of estates. Section 66 expressly imports Chapter XIV of the 1973 Companies Act into the Close Corporations Act, subject to some exceptions.

24. The Master's duties and functions in respect of insolvent close corporations do not differ in any essential respect from those he exercises in the case of companies and estates. It is therefore not necessary to deal with individual sections of Act 69 of 1984.

DISCUSSION

25. Every stage of the administration of insolvent estates and companies and close corporations under winding up, from the launching of the original sequestration or liquidation application to the rehabilitation of the insolvent or the deregistration of the corporate entity is controlled by the Master's office. Its duties include many specialised functions and administrative tasks that can only be carried out efficiently by a dedicated organisation that exists specifically for that purpose.

26. An organisation of this nature has the institutional knowledge and expertise to apply policy and to assess the ability and integrity of trustees and liquidators and is therefore able to judge whether or not individuals are duly qualified to be appointed, either at all or to a specific estate. In this respect *Lipschitz v Wattrus NO* 1980 (1) SA 662 (T), a Full Bench decision of this court, provides useful guidance. It upheld the Master's decision no longer to allow a particular individual to be appointed to any of the provisional offices under the former's control. In doing so, the court emphasized the intricacy and volume of work that the Master's office has to perform, and recognised that the Master keeps lists of the names of potential trustees, liquidators and judicial managers composed of persons who are *prima facie* qualified to be appointed. If the Master comes to the *bona fide* conclusion that a particular person is no longer fit to fulfil the role of provisional trustee, liquidator or judicial manager, he has the power, but also the duty to prevent such person's appointment. See further *Krumm & Another v The Master & Another* 1989 (3) SA 944 (D & CLD).

27. It is clear that the Master has knowledge concerning the ability, integrity, honesty and dedication of persons who may wish to be considered as

trustees, liquidators and judicial managers, whether provisional or otherwise. This enables the Master to carry out the policy to appoint persons from a previously disadvantaged background as additional trustees or liquidators in addition to those elected by the creditors. The Master's office is also more likely to be aware of any potential or actual conflict of interest a candidate might have in a particular instance that would prevent her or his appointment. This is information that is built up in the office dedicated to the administration and oversight of insolvencies and liquidations over a period of many years. It is information that the court simply does not possess and that does not form part of the facts that are disclosed to the court when application is made for a provisional sequestration or liquidation.

28. The South African insolvency system is creditor – driven. The majority of creditors in number or claims have the right to elect trustees and liquidators and to take decisions in respect of the manner in which assets falling into the estate or constituting property of a corporate body in winding-up should be dealt with.[9] Nonetheless, their choice of trustee is subject to the Master's approval and the exercise of their functions is subject to the Master's control.

29. In practice, individuals vying for the appointment to a provisional office present requisitions by creditors to the Master prior to a provisional appointment being made. The creditors are entitled to have their views recorded and considered, a process that by definition can only commence after the court has made a provisional order of sequestration or liquidation. By appointing an individual to the position the court pays heed only to the request

[9] Mars op.cit. p 3 and the authorities there cited

be the applicant creditor, who may turn out to be in a minority of both numbers and claims.

30. In venturing to appoint a provisional trustee or other officers, the court might therefore cause severe prejudice to interested parties such as creditors, members and directors of companies, the Master in the exercise if her or his duties and to the insolvent or the corporate entity being wound up.

31. The Legislature has over time given recognition to these considerations by incrementally reducing the court's involvement in the appointment of these officers. Prior to the promulgation of the 1916 Insolvency Act, the court was responsible for the appointment of trustees and exercised control over their activities – see *Goldseller v Hill* 1908 TS 822. The 1916 Act placed the duty upon the court to appoint a provisional trustee: *Ex parte Orkin Bros (Pty) Ltd* 1921 TS 466. (Similarly, the 1926 Companies Act (46 of 1926) vested the power to appoint a judicial manager in the court: See *Ex parte Morley & Cohen: In re Mining Material Merchants Ltd v Miodownik & Co (Pty) Ltd* 1940 WLD 95). The present Insolvency Act transferred this power to the Master – see the discussion of s 18 *supra* – but originally still vested the court with the power to remove trustees in terms of s 60. This section was amended in 1965, see par 17 *supra*. In *Goldfields Trading Co (Pty) Ltd v Schutte* 1956 (3) SA 1 (O) Potgieter J declared: *"The appointment of a provisional trustee is purely statutory and i cannot see how the Court has any inherent power where such power is vested in the Master by statute."* This is a succinct summary of the law since 1965.

32. The attempt to ensure the appointment of a particular individual by the court may have been driven not only by the wish to have someone perceived to be positively inclined toward the applicant creditor appointed to the relevant position, but also by real or perceived challenges that may be experienced in dealing with the administration of the Master's office. No such evidence has been presented to the court, nor could such considerations influence the outcome of the issue raised the Master. The relevant statutes contain sufficient provisions to enable creditors and other interested parties to hold the Master and his office to account. The Master performs administrative functions (see *Hartley NO v The Master* 1921 AD 403) and is therefore subject to the provisions of the Promotion of Administrative Justice Act 3 of 2000. The Insolvency Act in any event provides in section 151 that "... *any decision, ruling, order or taxation of the Master or by a decision, ruling or order of an officer presiding at a meeting of creditors..*" may be taken on review by any person aggrieved thereby.

33. It must therefore be held that, as a matter of law, the Master is the only functionary entitled to appoint provisional trustees, liquidators and judicial managers and, taking into account creditors' directives, trustees, liquidators and judicial managers

SHOULD A DECLARATORY ORDER BE ISSUED?

34. The Master and the *Amici Curiae* are all agreed that only the Master is entitled to effect appointments to the offices discussed in this judgment. Both the Law Society of the Northern Provinces and the Pretoria Society of Advocates argue, however, that it would be inappropriate to issue a declaratory order and that the court should rather refer the matter to the Honourable Deputy Judge President of this court with the request to consider the issuing of a practice directive to reflect the correct state of the law. They submit that the present application does not disclose sufficient grounds for the granting of a declaratory order as the court's finding would not relate to an existing dispute and would not affect a contingent, existing or prospective right.

35. The two *amici* submit that a declaratory order would therefore relate to future matters that might never occur and would be a *brutum fulmen*. Nobody would be directly affected or bound by the order, while, seen against the backdrop of the orders made by this court that clearly do not accord with the letter of the law a *declarator* would "*... in a way operate against itself...*" and would be "*... tantamount to a single Judge potentially binding all Judges of all courts in South Africa, including the Supreme Court of Appeal and the Constitutional Court.*"

36. These concerns can be laid to rest immediately. It is not uncommon for a single judge to hold that previous decisions by single judges were clearly incorrect on a particular point of law that has been placed before that single judge for decision. Such finding may either find favour with other courts and be followed, or, if not, the conflicting interpretations of the law will eventually have to be resolved by higher authority. No single judge can bind courts of other divisions, let alone the Republic's highest courts. If the interpretation of

the law in this case had been controversial, it might have been advisable to refer the issue whether the Master is the only functionary entitled to appoint officers dealing with insolvent estates and corporate entities in winding up to a full bench. As the Master and the *amici* are in agreement on how the law must be applied such referral is unwarranted.

37. The aforesaid *amici* raise the further argument that a declaratory order could affect orders made in the past. That fear is unfounded. Orders of court, whether they were issued correctly or incorrectly, remain valid and enforceable until they have been set aside by a competent court. The Master does not seek a retroactive order, but one that will lay existing problems to rest *ex nunc*.

38. Declaratory orders are only called for if an actual or potential controversy concerning an "... *existing, future or contingent right or obligation*"[10] has arisen that needs to be addressed in the interest of the party that has approached the court and others.[11] "*(Dit) moet wel as vereiste gestel word dat daar belanghebbendes is vir wie die verklarende bevel bindend sal wees.*"[12]

39. The Master is faced with the emergence of a practice that is in conflict with the applicable statutes and the positive law and that interferes with the proper exercise of his or her duties. This is a live issue that affects not only the Master's duty (and concomitant right) to ensure that the law is applied correctly, but also involves all insolvency practitioners who have a vital interest in the procedures that apply to their appointment to the various offices

[10] Section 19(1) of the Supreme Court Act 59 of 1959
[11] Durban City Council v Association of Building Societies 1942 AD 27;
[12] Per Steyn CJ in *Ex parte Neli* 1963 (1) SA 754 (A) at 760 C

referred to above. The same applies to the parties that become embroiled in insolvencies or liquidations as creditors or respondents. The present matter is therefore one that calls for a declaratory order to clearly interpret the law.

40. A practice directive does not bind either the court or the practitioners. It is no more than a guide to the way the court's business should be conducted in the interests of an efficient administration of justice, but by the very nature thereof it allows the court to deviate from the preferred approach in circumstances the court regards as appropriate. The Master's concerns do not relate to matters of practice or procedure, but to the correct interpretation of the law. The law cannot be established by practice directives, but only by binding judicial pronouncements.

41. The Pretoria Society of Advocates has suggested that the court should approve of a practice that would allow applicants to request the court to recommend the appointment of a particular individual, especially in intricate matters involving the liquidation of groups of companies. Much as one must appreciate the need to ensure that competent insolvency practitioners are appointed in every instance, and that such appointments are effected in a transparent and efficient fashion, the court must refrain from expressing a preference for any individual for exactly the same reasons that motivate the declaratory order the Master has sought. The practical effect of the formal expression of a judicial opinion would differ little from a direct appointment that is beyond the court's power. It is therefore objectionable to suggest to a court that an endorsement of a particular individual by way of a recommendation would be acceptable.

42. During argument it emerged that not all interested bodies were formally notified of the Master's intention to approach the court for a declaratory order. In particular, two bodies representing insolvency practitioners, the South African Insolvency Practitioners' Society and the Association for the Advancement of Black Insolvency Practitioners were not served with the papers. In the light of the importance of the issues raised by this application it is preferable to issue a rule *nisi* in order to ensure that every party that might potentially be interested in the outcome of the application is given the opportunity to engage the court on the return day.

THE ROLE OF OFFICERS OF THIS COURT

43. Both the Master and the Johannesburg Society of Advocates have expressed stern criticism of the conduct of counsel and attorneys who were responsible for moving orders for the provisional sequestration or liquidation of the relevant respondents that included prayers for the appointment of a particular individual to the office of provisional trustee or liquidator, without drawing the court's attention to the correct interpretation of the statute or the authorities that are against the granting of such relief. They emphasised that practitioners are obliged to keep themselves up to date with the recent authorities in their

field[13] and to point them out to the court, particularly if they do not support the result contended for by the practitioner. No attorney or advocate may ever knowingly mislead the court or withhold relevant information that may affect the court's decision: *Rondel v Worsley* [1966] 3 ALL ER 657 CA; *Toto v Special Investigation Unit & others* 2001 (1) SA 673 (ECD) at 683 A-G.

44. This court will refrain from expressing an opinion on the conduct of the practitioners involved in the matters referred to by the Master as they have had no opportunity to deal with any criticism that might be expressed of their conduct. It is regrettable however, that the courts that issued these orders were apparently neither informed of the correct interpretation of the statutes nor was their attention drawn to applicable authorities.

THE ORDER

A rule *nisi*, returnable on the 8/8/2011 is issued, calling upon all interested parties to show cause why the following *declarator* should not be confirmed:

1. It is declared that the Master of the High Court of South Africa is the only official authorised to appoint

   1.1.1 trustees and provisional trustees of sequestrated and provisionally sequestrated estates;

[13] *Ex parte Hoy Management Consultants (Pty) Ltd* 200 (3) SA 501 (W) at 506 and authorities there cited

1.1.2 liquidators and provisional liquidators of companies and close corporations in liquidation or provisional liquidation; and

1.1.3 judicial managers and provisional judicial managers of companies in judicial management and provisional management; and

1.2 No Judge of the High Court of South Africa has authority or jurisdiction to effect any appointment of any person to any of the positions referred to in par 1, nor to make any recommendations to the Master in respect of any appointment to any of these positions.

2. This order is to be served upon:

2.1 The Association for the Advancement of Black Insolvency Practitioners at c/o Lebogang Michael Moloto, 97 Michelle Avenue, Randhart, Alberton; and upon

2.2 The South African Insolvency Practitioners' Society at c/o Samanth Ponnen, Matasis House, 16 Eton Road, Parktown; and upon

2.3 All the parties that received service of the papers prior to the enrolment of the application;

3. The order is to be published in one edition of the Sunday Times and one edition of the Rapport within fourteen days of the date of this order.

4. Par 1 will be of immediate effect pending the return day.

Signed at Pretoria on this 27th day of June 2011.

E BERTELSMANN

Judge of the High Court