SARIPA
South African Restructuring and Insolvency Practitioners Association NPC

MEDIA STATEMENT BY THE SOUTH AFRICAN RESTRUCTURING AND INSOLVENCY PRACTITIONERS ASSOCIATION

On 2 November 2017 the Constitutional Court of South Africa (Constitutional Court) heard an application by the Minister of Justice and Constitutional Development (Minister) and the Chief Master of the High Court of South Africa (Chief Master) for leave to appeal against an order of the Supreme Court of Appeal (SCA), confirming a decision of the Western Cape High Court (High Court), declaring the Policy on the Appointment of Insolvency Practitioners (Appointment Policy), promulgated by the Minister on 7 February 2014, unconstitutional and irrational.

The Appointment Policy superseded all earlier policies governing the appointment of insolvency practitioners to administer insolvent estates in accordance with the Insolvency Act, 1936, the Companies Act, 1973 and the Close Corporations Act, 1984. The Appointment Policy requires every Master attached to a High Court in South Africa to produce a list of insolvency practitioners from which an appointment will be made. The list must, in addition, separate insolvency practitioners according to age, race and gender, and arrange them alphabetically by surname. The various categories contemplated in terms of the Appointment Policy are as follows:

Category A :	African, Coloured, Indian and Chinese females who were South African citizens as at 27 April 1994
Category B :	African, Coloured, Indian and Chinese males who were South African citizens as at 27 April 1994
Category C :	White females who were South African citizens as at 27 April 1994
Category D :	African, Coloured, Indian and Chinese females and males, and White females, who became South African citizens after 27 April 1994 and White males who are South African citizens (irrespective of whether they were citizens before 27 April 1994 or became citizens after 27 April 1994)

The categorisation involved a 4-3-2-1 line of appointments. This means that for every10 insolvencies, the first four appointments would be made from Category A, the next three will come from Category B, followed by 2 from Category C and 1 from Category D.

SARIPA, acting on a mandate from it's over 650 members, opposed the implementation of the Appointment Policy.

The High Court held that the Appointment Policy unlawfully fettered the discretion of the Master because it limited the Master's discretion to deviate from the Appointment Policy. The Master, it held, was compelled to appoint the insolvency practitioner next-in-line with no regard to that person's skills, ability or experience, having regard to the complexity of the insolvency. The High Court also found the Appointment policy irrational because it had no regard to the demographics of the insolvency industry and how that would impact on the attainment of the objectives of the Appointment Policy. Also, the High Court found the Appointment policy ultra vires.

The SCA agreed, and also held that the Appointment Policy failed to meet the standard of a remedial measure under the Constitution. It did find that the Appointment Policy did not unlawfully fetter the Master's discretion on the appointment of an insolvency practitioner to administer an insolvent estate.

The Minister and the Chief Master challenged the conclusions of the High Court and the SCA. They argue that the Appointment Policy represents legitimate affirmative action which is both rational and in line with legislation empowering the Master to do so. They argued, as the SCA found, that the Appointment Policy does not unlawfully fetter the discretion of the Master in making an appointment of an insolvency practitioner.

SARIPA is not (and has never been) opposed to employment equity or affirmative action. It recognises the need for transformation across race and gender lines within the insolvency profession. SARIPA opposed the Appointment Policy as it will not achieve the objective of completely transforming the insolvency profession across race and gender lines. SARIPA is of the view that the Appointment Policy will not uplift and empower the very people, being black and female insolvency practitioners, it seeks to benefit.

What should lie at the heart of the Appointment Policy is real transformation across race and gender lines within the insolvency profession, and not a system that is likely to be discriminatory towards those that it sets out to advance and provide an opportunity to enter and upskill within a previously excluded profession.

SARIPA remains committed to race and gender transformation within the insolvency profession.

SARIPA, as the most relevant organisation within the insolvency profession in South Africa, with over 650 members and the 6th largest representative member of INSOL INTERNATIONAL (www.insol.org), a world-wide federation of international associations involving turnaround and insolvency specialists, remains open and available to engage with the Minister towards the development and implementation of a policy aimed at transforming the insolvency profession. There is without any doubt a critical need to implement an appointment policy aimed at redressing the injustice of our apartheid past, but a balance must be achieved between addressing that with the interests of various stakeholders, like creditors, and the skills, experience and knowledge required to serve as an insolvency practitioner. Real transformation is necessary. It needs to be done now, and not passed over to the next, and the next generations.

Judgment has been reserved.

South African Restructuring and Insolvency Practitioners Association (SARIPA)

13 November 2017