CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 13/17

In the matter between

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Applicant
CHIEF MASTER OF THE HIGH COURT OF SOUTH AFRICA	Second Applicant
and	
SOUTH AFRICAN RESTRUCTURING AND INSOLVENCY PRACTITIONERS ASSOCIATION	First Respondent
CONCERNED INSOLVENCY PRACITTIONERS ASSOCIATION	Second Respondent
NATIONAL ASSOCIATION OF MANAGING AGENTS	Third Respondent
SOLIDARITY	Fourth Respondent
VEREENIGING VAN REGSLUI VIR AFRIKAANS	Fifth Respondent

Neutral Citation:	*Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* [2018] ZACC 20
Coram:	Zondo ACJ, Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ.
Judgments:	Jafta J (majority): [1] to [60] Madlanga J (dissenting): [61] to [104]

Heard on: 2 November 2017

Decided on: 5 July 2018

Summary: Section 9(2) of the Constitution — remedial and restitutionary equality — *Van Heerden* test — arbitrariness and rationality as separate requirements — rule of law

Van Heerden test — reasonably capable of attaining desired outcome of transformation of the insolvency industry — facts on record do not show policy is reasonably likely to achieve equality

Insolvency Act 24 of 1936 — section 158 — policy for the appointment of provisional trustees — ultra vires — displacement of the Master's discretion

Insolvency Act 24 of 1936 — section 158 — policy for the appointment of provisional trustees — arbitrary — exclusion of citizens born on and after 27 April 1994 — no reasons justifying exclusion

Insolvency Act 24 of 1936 — section 158 — policy for the appointment of provisional trustees — irrational — failure to show policy is reasonably capable of achieving equality

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Western Cape Division, Cape Town):

1. Leave to appeal is granted.
2. The appeal is dismissed with costs, including the costs of two counsel where applicable.

JUDGMENT

JAFTA J (Zondo ACJ, Cameron J, Kathree-Setiloane AJ, Mhlantla J, Theron J and Zondi AJ concurring)

Introduction

[1] Restitutionary measures are a vital component of our transformative constitutional order. The drafters of our Constitution were alive to the fact that the abolition of discriminatory laws and the guarantee of equal rights alone would not lead to an egalitarian society envisaged in the Constitution. Something more had to be done in order to dismantle the injustices and inequalities arising from the apartheid legal order.[1] Hence the Bill of Rights, which is a cornerstone of our democratic order, includes remedial measures.[2]

[2] Section 9(2) of the Constitution is one of the provisions that authorises the adoption of remedial measures to address inequality and advance persons who were disadvantaged by unfair discrimination. This section provides:

> "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."

[3] At the heart of this matter is the policy adopted by the Minister of Justice and Constitutional Development which regulates the Master's powers to appoint trustees

[1] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 74.

[2] Section 7(1) of the Constitution provides:

> "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

under the Insolvency Act.[3] This policy was also designed to govern the appointment of provisional liquidators in terms of the Companies Act and liquidators in terms of the Close Corporations Act.[4]

Background

[4] Acting in terms of section 158 of the Insolvency Act, section 10(1A)(a) of the Close Corporations Act and section 339 of the Companies Act read with section 158(2) of the Insolvency Act, the Minister determined the impugned policy. Section 158(2) mandates the Minister to determine policy for the appointment of trustees by the Master "in order to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination".[5] Upon learning about the policy and before it was implemented the South African Restructuring and Insolvency Practitioners Association and the Concerned Insolvency Practitioners Association instituted separate review applications in the Western Cape Division of the High Court.

[5] The National Association of Managing Agents, Solidarity and the Vereeniging Van Regslui vir Afrikaans joined the Associations as applicants in the High Court. All these parties will be referred to as the Associations in this judgment. They cited the Minister and the Chief Master of the High Court as the respondents. By agreement the two applications were heard together and a single judgment was produced by the High Court.

[6] The Associations divided the relief they sought into two parts. With regard to the first part they obtained an interdict restraining the applicants from implementing the policy in question pending a finalisation of the review application. The second part

[3] 24 of 1936.

[4] 61 of 1973 and 69 of 1984 respectively.

[5] The same wording is provided in relation to the appointment of liquidators in terms of section 10(1A)(a) of the Close Corporations Act and incorporated into the operation of the Companies Act through a reading of section 339 of that Act read with section 158(2) of the Insolvency Act.

comprised a claim for the review and setting aside of the policy[6] which was impugned on these grounds—

a. the Minister exceeded his powers in making the policy which also fettered the Master's discretion;
b. the policy was irrational;
c. the policy violated the right to equality; and
d. the Minister failed to afford relevant stakeholders an opportunity to make representations before adopting the policy.

[7] With regard to the Minister's alleged failure to afford stakeholders a hearing in Parliament, the High Court held that the enabling provision did not oblige the Minister to do more than follow the consultation process which had been undertaken before the adoption of the policy.[7] The High Court dismissed this ground on the basis that it lacked substance.

[8] However, the other grounds were upheld. Relying on *Van Heerden*,[8] the High Court reformulated the rationality test. It stated that "a measure must be rationally related to the information available to its designer/formulator at the time of making his/her decisions" and "must bear a rational relationship to its objectives".[9]

[9] Following its formulation of the rationality test, the High Court reviewed the statistical information relied upon by the applicants for the proposition that the insolvency industry needed to be transformed. Upholding the construction that the information was inaccurate and insufficient, the High Court held:

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[6] See [19] to [25] for the terms of the policy.

[7] *South African Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development; In Re: Concerned Insolvency Practitioners Association NPC v Minister of Justice and Constitutional Development* [2015] ZAWCHC 1; 2015 (2) SA 430 (WCC); 2015 (4) BCLR 447 (WCC) (High Court judgment) at para 223.

[8] *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) (*Van Heerden*).

[9] High Court judgment at para 165.

> "It is not for a court to interfere with the Minister's decision to adopt a particular ratio against any other. That lies firmly within the executive power. However, there must be at least some evidence that whatever scheme he adopts is done so on a rational basis. It is difficult to understand how a proper determination of an appropriate policy could be made with significant gaps in the information considered by the Minister."[10]

[10] In relation to whether the policy met the requirements of section 9(2) of the Constitution, the High Court considered it necessary to determine whether the impugned policy established quotas and whether it catered for the interests of creditors. The Court concluded that the ratios provided for in the policy were rigid and amounted to quotas which were not permitted under section 9(2).[11]

[11] Regarding the omission in the policy to promote the interests of creditors the High Court stated:

> "The policy cannot, in forming the basis for 'transformation of the insolvency industry', change a feature of the industry's regulatory framework which requires a proper match between liquidator/trustee and a particular estate."[12]

[12] Consequently, the policy was declared invalid for being inconsistent with the Constitution. Dissatisfied with this declaration of invalidity, the Minister and the Chief Master appealed to the Supreme Court of Appeal. That Court upheld the High Court's conclusion to the effect that the policy does not meet the requirements of section 9(2) of the Constitution.[13]

[10] Id at para 177.

[11] Id at para 231.

[12] Id at para 156.

[13] *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* [2016] ZASCA 196; 2017 (3) SA 95 (SCA) (Supreme Court of Appeal judgment) at para 38.

[13] The main reason advanced in support of this conclusion was that, owing to its rigidity, the policy was arbitrary and capricious. The Supreme Court of Appeal reasoned:

> "In an endeavour to overcome the rigidity of clause 7.1 counsel for the Minister and Chief Master argued that the requisite flexibility was to be found in the Master's powers under clause 7.3. She submitted that this vested the Master with a discretion in every case. I disagree. Clause 7.3 does not permit a departure from the appointment process prescribed in clause 7.1 of the policy. It provides the Master with a mechanism, in an ill-defined range of cases, to compensate to some degree for the fact that the policy dictates the appointment of someone not qualified to undertake the task, either because of its complexity, or because of their unsuitability – the two are not mutually exclusive. This power of appointment does not resolve the fact that clause 7.1 requires the Master to make an appointment in accordance with a rigid quota. After all the unqualified person is still to be appointed and to have their share in the fees accruing from the administration of the estate, even though the reason for invoking clause 7.3 is that they are not qualified or unsuitable to perform that task. The Master's ability to insert a backstop into the process does not detract from the need in every case to comply with clause 7.1. The system is arbitrary and capricious."[14]

[14] Notably, the Supreme Court of Appeal held that remedial measures, like the policy we are dealing with here, must be implemented progressively. The Court stated:

> "Remedial measures must therefore operate in a progressive manner assisting those who, in the past, were deprived, in one way or another, of the opportunity to practise in the insolvency profession. Such remedial measures must not, however, encroach, in an unjustifiable manner, upon the human dignity of those affected by them. In particular, as stressed by Moseneke J in para 41 of *Van Heerden*, when dealing with remedial measures, it is not sufficient that they may work to the benefit of the previously disadvantaged. They must not be arbitrary, capricious or display naked preference. If they do they can hardly be said to achieve the constitutionally authorised

[14] Id at para 34.

> end. One form of arbitrariness, caprice or naked preference is the implementation of a quota system, or one so rigid as to be substantially indistinguishable from a quota."[15]

[15] In the second concurring judgment, the Supreme Court of Appeal added a further ground for holding that the impugned policy was invalid. It was held that the policy was defective because it omitted to cater for the wishes and interests of the creditors and as a result the policy did not serve the purpose of the relevant legislation, which is to promote the interests of creditors. It was declared that as a consequence of the omission, the Minister had exceeded his power in promulgating the policy.

[16] The Court proceeded to conclude:

> "In their legitimate desire to address past discrimination and disadvantage, the Minister and the Chief Master have overlooked the fundamental purpose of the legislation that governs the sequestration of estates and the winding-up of companies and close corporations, which is to serve the interests of creditors as conceived by the creditors themselves. The policy that has been promulgated is not directed at that purpose and disavows the need for the process of appointment that it governs to have regard to the views or interests of creditors. That is an exercise of power for a purpose other than any for which it was bestowed. It should not be difficult for the Minister and the Chief Master to devise a policy that serves both purposes instead of trying to serve one at the expense of the other."[16]

Leave to Appeal

[17] The Minister and the Chief Master seek leave to appeal the order issued by the Supreme Court of Appeal. The matter raises important constitutional issues. It concerns the exercise of a public power to determine policy designed to transform and redress the inequality in the insolvency industry. In defending the impugned policy the Minister and the Chief Master invoked section 9(2) of the Constitution. Therefore, jurisdiction is established.

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[15] Id at para 32.

[16] Id at para 65.

[18] What remains for consideration is whether it will be in the interests of justice to grant leave. The legal conclusions reached by the Supreme Court of Appeal are at the centre of this enquiry. Those conclusions impose conditions under which the relevant power may be exercised in the context of section 9(2). Some of those conditions appear to have been imposed in error. There are reasonable prospects of success which warrant the granting of leave.

The policy

[19] Before I analyse the conclusion and reasoning of the Supreme Court of Appeal it is necessary to set out the impugned policy. Of the seven clauses in the policy, the Associations attacked only two clauses, namely the sixth and seventh clauses. These clauses are essential to the structure and implementation of the policy. Clause 6 requires that insolvency practitioners who become eligible to be appointed as trustees must appear on a Master's list. This list must be divided into four categories. category A must comprise African, Coloured, Indian and Chinese females who became South African citizens before 27 April 1994. This being the date on which democracy was established and a constitutional order came into existence. Notably the category does not include people who became citizens on or after 27 April 1994 who belong to these groups which were disadvantaged by the discriminatory laws and practices of the apartheid era.

[20] Category B consists of African, Coloured, Indian and Chinese men who became South African citizens before 27 April 1994. Category C must reflect white women who became citizens before 27 April 1994. Curiously category D comprises white men irrespective of when they became citizens. Additionally African, Coloured, Indian and Chinese practitioners who became citizens on or after 27 April 1994 fall under this category regardless of whether they are men or women. White women who gained citizenship on or after that date also come under this category. For undisclosed reasons,

there is no distinction drawn between men and women falling under the previously disadvantaged groups.

[21] The names of practitioners in each category must be "arranged in alphabetical order according to their surnames". But the names that are added to the list after its completion do not have to be arranged in this order. They must simply be added at the end of the relevant category. The list must also distinguish between senior and junior practitioners within each category. A senior practitioner is defined as a practitioner who has been appointed as a trustee at least once in each year of the preceding five years.

[22] The list is crucial to the implementation of the policy. Clause 7 regulates the appointment of trustees. It reads:

> "Appointment of insolvency practitioners by Masters of High Courts
>
> 7.1 Insolvency practitioners must be appointed consecutively in the ratio A4: B3: C2: D1, where—
>
> 'A' represents African, Coloured, Indian and Chinese females who became South African citizens before 27 April 1994;
>
> 'B' represents African, Coloured, Indian and Chinese males who became South African citizens before 27 April 1994;
>
> 'C' represents White females who became South African citizens before 27 April 1994;
>
> 'D' represents African, Coloured, Indian and Chinese females and males, and White females, who have become South African citizens on or after 27 April 1994 and White males who are South African citizens,
>
> and the numbers 4: 3: 2: 1 represent the number of insolvency practitioners that must be appointed in that sequence in respect of each such category.
>
> 7.2 Within the different categories on a Master's List, insolvency practitioners must, subject to paragraph 7.3, be appointed in alphabetical order.
>
> 7.3 The Master may, having regard to the complexity of the matter and the suitability of the next-in-line insolvency practitioner but subject to any applicable law, appoint a senior practitioner jointly with the junior or senior

> practitioner appointed in alphabetical order. If the Master makes such a joint appointment, the Master must record the reason therefor and, on request, provide the other insolvency practitioner therewith."

[23] In mandatory terms, this clause obliges the Master to appoint practitioners "consecutively in the ratio A4: B3: C2: D1". This means that, when the Master needs to appoint a trustee, she must first look at the practitioners in category A, before she can proceed to the other categories. She may not appoint from the other categories until four practitioners from category A have been appointed. Their appointment must be made in alphabetical order. The clause does not tell us what order must be followed in respect of practitioners who are added to the list after its compilation. It will be recalled that their names are simply added at the end of the list.

[24] Once the Master has appointed four practitioners from category A, she may proceed to the next category, namely category B. She is required to appoint at least three practitioners from this category before she can go to category C in which she may appoint a minimum of two practitioners before proceeding to category D. In the latter category she may appoint only one practitioner and must then move back to category A. This is the position despite the fact that category D is probably the biggest as it consists of all races.

[25] Clause 7 does not permit the Master to deviate from the method of appointment outlined above. But if the estate to be managed is complex and the practitioner next-in-line for appointment is not suitable, the clause mandates the Master to appoint a suitably qualified senior practitioner in addition to the unsuitable practitioner. This is the only occasion where the Master is allowed to depart from the alphabetical order of appointments.

[26] It is now convenient to consider the legal conclusions and reasoning of the Supreme Court of Appeal.

Ultra Vires

[27] In simple terms the concept means that a functionary has acted outside her powers and as a result the function performed becomes invalid. The rule forms part of the principle of legality which is an integral component of the rule of law. In *Affordable Medicines* this Court affirmed the principle in these terms:

> "The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power."[17]

[28] Ordinarily, the *ultra vires* principle applies where the repository of the public power performs a function outside of the scope of the power conferred. If the functionary had no power at all, then the validity of the relevant action is not impugned with reference to this principle. It has to be challenged on other grounds. In applying the principle in *Affordable Medicines* the Court stated:

> "In exercising the power to make regulations, the Minister had to comply with the Constitution, which is the supreme law, and the empowering provisions of the Medicines Act. If, in making regulations the Minister exceeds the powers conferred by the empowering provisions of the Medicines Act, the Minister acts *ultra vires* (beyond the powers) and in breach of the doctrine of legality. The finding that the Minister acted *ultra vires* is in effect a finding that the Minister acted in a manner that is inconsistent with the Constitution and his or her conduct is invalid. What would have been *ultra vires* under common law by reason of a functionary exceeding his or her powers, is now invalid under the Constitution as an infringement of the principle of legality. The question, therefore, is whether the Minister acted *ultra vires* in making

[17] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines*) at para 49.

> regulations that link a licence to compound and dispense medicines to specific premises. The answer to this question must be sought in the empowering provisions."[18]

[29] Here it is not disputed that the Minister was mandated by section 158(2) of the Insolvency Act to promulgate the impugned policy. It will be recalled that this provision authorises the Minister to determine policy for the appointment of trustees. Therefore, he would have acted *ultra vires*, if, in doing so, he had exceeded the conferred power. Before the Supreme Court of Appeal, the Associations had contended that by obliging the Master to appoint a practitioner who is next-in-line on the list, the policy does not regulate the exercise of a discretion by the Master but completely erodes the discretion. Section 18 of the Insolvency Act confers the power of appointing provisional trustees on the Master and not the Minister. This appointment is however subject to the policy determined by the Minister in terms of section 158. The contention made was that in effect the policy appoints the trustees.

[30] The Minister and the Chief Master countered this argument by submitting, with reference to clause 7.3 of the policy, that the Master has a discretion to exercise where the matter is complex and the next-in-line practitioner is not suitable. From a close examination of this clause, it appears that the discretion enjoyed by the Master relates to the appointment of a senior practitioner to join the unsuitable one. The clause stipulates that the Master may appoint a senior practitioner "jointly with the junior or senior practitioner appointed in alphabetical order". What emerges from the text of the clause is that the Master has no power to exclude the unsuitable practitioner. Even if the unsuitable practitioner is senior, the Master may only pair her with the second senior, brought in by reason of the complexity of the matter.

[31] Although, on the face of it, there is merit in the argument that the Master's discretion is dislodged in respect of the practitioner appointed according to the alphabetical order, the Supreme Court of Appeal did not address this argument. That

[18] Id at para 50.

Court evaluated an allied submission to the effect that the policy impermissibly fettered the Master's discretion. The Court rejected this point on the ground that by subjecting the exercise of power by the Master to the Minister's policy, section 18 of the Insolvency Act fetters the Master's discretion. Therefore, the Master did not have an unfettered discretion.[19] While accepting that "there is a considerable restriction informed by clause 7.1" on the Master's discretion, the Court held that "some discretion remains in terms of clause 7.3".[20]

[32] While it is true that clause 7.3 retains "a limited residual discretion for the Master",[21] this clause does not apply to the bulk of appointments which are made in terms of clause 7.1. In respect of those appointments, it appears that the Master has no discretion but to appoint whoever is next-in-line, even if the practitioner is unsuitable. Clause 7.3 is triggered only if two conditions are present. These are: a complex estate and the unsuitability of the next-in-line practitioner. In that event, the Master is free to appoint a suitable senior practitioner to partner with the unsuitable one. Accordingly, clause 7.3 is no answer to the displacement of the Master's discretion in respect of appointments to which clause 7.1 applies.

Legality

[33] In the second concurring judgment, the Supreme Court of Appeal held that the impugned policy was in "breach of the principle of legality" because it omitted to direct the Master to promote the interests of the creditors when appointing provisional trustees. It was stated that this duty flows from the fact that the overarching purpose of the Insolvency Act is to protect and advance the interests of creditors. While accepting that the Minister formulated and designed the policy to achieve transformation, which is one of the objects of section 158(2), the Supreme Court of Appeal held that the Minister

[19] Supreme Court of Appeal judgment at para 44.

[20] Id at para 45.

[21] Id.

acted in violation of the principle of legality by not adopting a policy that is consistent with the overall purpose of the Insolvency Act.

[34] In support of this conclusion that Court reasoned:

> "Given the purpose of the legislation with which we are concerned, it seems to me that the actions of the Minister in determining the policy under section 158 of the Act, and the actions that the Master must undertake in terms of that policy, must be in accordance with the interests of creditors in the liquidation of the estate or the winding-up of the company or close corporation. As the policy was formulated on the basis that those interests were irrelevant, and on its face it does not recognise or serve those interests it was in my view outside the legitimate powers vested in the Minister and its promulgation involved a breach of the principle of legality."[22]

[35] I disagree for two reasons. First, the expressly stated objectives of the policy are "to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination". The attainment of some of these objectives, especially fairness, would advance the interests of creditors. The policy seeks to achieve fairness to creditors by requiring that the alphabetical list contains only appropriately qualified insolvency practitioners and, where a complex matter arises, and the appointed practitioner is inappropriate to manage the estate, the Master may then also appoint a suitable senior practitioner. In addition, the policy requires that every practitioner appointed must timeously lodge a bond of security with the Master and it disqualifies a practitioner who has a conflict of interest from appointment in respect of the estate where a conflict arises. This illustrates the synergy between the overall objective of the Insolvency Act and section 158(2) which sets out the purposes for the policy the Minister is mandated to make.

[36] Second, when the Master appoints provisional trustees under section 18 of the Insolvency Act, the objective is to protect the interests of creditors. While the process

[22] Id at para 63.

of appointment must accord with the policy determined by the Minister, the overarching purpose is to preserve the assets of the insolvent estate for the benefit of creditors. Before the first meeting of creditors, the Master steps into their shoes and is authorised to give directions to the provisional trustee, which could be given by creditors at a meeting.[23] In addition, a provisional trustee may not sell the assets of the estate without authorisation by the Master. Therefore, the scheme of appointment created by the Insolvency Act and the policy made by the Minister are in line with the overarching purpose of the Insolvency Act.

[37] The Supreme Court of Appeal relied on *Gauteng Gambling Board* for the proposition that the impugned policy should have required the Master to have regard to the wishes and interests of creditors.[24] But that case does not support this proposition. It addressed the issue of professing to exercise power for the attainment of the purpose for which the power was conferred, while in fact exercising it to achieve a different purpose. This was not the position here. The Minister exercised power to attain the purpose of the empowering provision. Accordingly, reliance on *Gauteng Gambling Board* was misplaced.

Section 9(2)

[38] This section of the Constitution insulates from attack measures adopted to protect or advance people who were disadvantaged by unfair discrimination. In *Van Heerden* this Court construed the provision as laying down three requirements which must be met by a restitutionary measure for it not to constitute unfair discrimination.[25] The first is whether the measure targets people or a category of people who had been disadvantaged by unfair discrimination. The second is whether the measure is designed

[23] Section 18(2) of the Insolvency Act provides:

> "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."

[24] *Gauteng Gambling Board v MEC for Economic Development, Gauteng Provincial Government* [2013] ZASCA 67; 2013 (5) SA 24 (SCA) at paras 46-7.

[25] *Van Heerden* above n 8 at para 37.

to protect and advance such people. The third is whether the measure promotes the achievement of equality.

[39] For a restitutionary measure to comply with section 9(2) of the Constitution, it must be reasonably capable of achieving equality. Formulating this requirement in *Van Heerden*, the Court said:

> "The second question is whether the measure is 'designed to protect or advance' those disadvantaged by unfair discrimination. In essence, the remedial measures are directed at an envisaged future outcome. The future is hard to predict. However, they must be reasonably capable of attaining the desired outcome. If the remedial measures are arbitrary, capricious or display naked preference they could hardly be said to be designed to achieve the constitutionally authorised end. Moreover, if it is clear that they are not reasonably likely to achieve the end of advancing or benefiting the interests of those who have been disadvantaged by unfair discrimination, they would not constitute measures contemplated by section 9(2)."[26]

[40] While the policy targets persons who were disadvantaged by unfair discrimination, it does not appear from the information on record that the policy is likely to transform the insolvency industry. Vital to its success is the Master's list from which appointments are to be made. But there is no clarity on whether a single list would be applied throughout the country or each Master would have their own list. If a single list were to apply it is not clear how it would be applied by each Master. In light of the paucity of information on the implementation of the policy, it cannot be said that the policy is likely to achieve the goal of equality.

[41] But the most serious defect in the policy is to be found in category D. It will be recalled that this is the largest category because it does not only include white male practitioners but also practitioners from other races if they became citizens on or after 27 April 1994. Here lies the problem. On the Minister's version, the purpose of the

[26] Id at para 41.

policy is to address the inequality created by the racist practices of apartheid which resulted in the current situation of white males constituting a majority among practitioners. The implementation of category D is unlikely to achieve equality in the future. This is because appointing one practitioner in alphabetical order from this category entrenches the status quo. Since white males are in the majority, most appointments would go to them.

[42] Therefore category D perpetuates the disadvantage which the policy seeks to eradicate. It lumps African, Coloured, Indian and Chinese practitioners with the advantaged white males who dominate the entire industry in terms of numbers and affords everybody in this category an equal opportunity of being appointed. Moreover, the category impermissibly discriminates against other races on the ground that they became citizens on or after 27 April 1994. To this extent the policy does not constitute a restitutionary measure envisaged in section 9(2) of the Constitution. A section 9(2) measure may not discriminate against persons belonging to the disadvantaged group whose interests it seeks to advance.

[43] As observed in *Van Heerden*, the section 9(2) remedial measures are "directed at an envisaged future outcome".[27] By placing all those who became citizens on or after 27 April 1994 in category D, the policy effectively punishes all young practitioners who were born on or after that date. This undermines in a serious manner the progressive realisation of equality which the other parts of the policy are designed to achieve.

[44] It is apparent from the statement quoted in paragraph 41 that there is an overlap between the second and the third requirements laid down in *Van Heerden*. While addressing the second requirement which demands that the restitutionary measure be designed to protect and advance those who were disadvantaged by unfair discrimination, Moseneke J stated that such measure "must be reasonably capable of

[27] Id.

attaining the desired outcome".[28] The outcome referred to here is the achievement of equality.

[45] And later when dealing with the third requirement Moseneke J said:

> "The third and last requirement is that the measure 'promotes the achievement of equality'. Determining whether a measure will in the long run promote the achievement of equality requires an appreciation of the effect of the measure in the context of our broader society. It must be accepted that the achievement of this goal may often come at a price for those who were previously advantaged. Action needs to be taken to advance the position of those who have suffered unfair discrimination in the past."[29]

[46] What is common to both the second and third requirements is the reasonable likelihood that the restitutionary measure concerned would achieve the purpose of equality. It is important to note that during the implementation of such measures, it is inevitable that those who were previously advantaged would be affected adversely. This is the price demanded by the Constitution to remedy the injustices of the past order and to attain social justice.

[47] In the course of articulating the second requirement, reference was also made to arbitrariness and capriciousness. It was stated that measures that are arbitrary, capricious or display naked preference could not be said to be designed to achieve a constitutionally authorised purpose. While this is correct, the statement must not however be read as incorporating into the second requirement the demand that a restitutionary measure should not be arbitrary or capricious. These are separate requirements of the Constitution which are not restricted to restitutionary measures

[28] Id.

[29] Id at para 44.

contemplated in section 9(2) but apply to the exercise of public power generally. Just as the exercise of such power must meet the rationality standard.[30]

[48] The facts placed on record by the applicants do not show that the policy is likely to achieve equality. Therefore, the second and third requirements stipulated in *Van Heerden* were not satisfied.

Arbitrariness

[49] The Constitution proscribes arbitrary action and requires that every action taken in the exercise of public power must be underpinned by plausible reasons. Such reasons must justify the action taken. If action is taken for no reason or no justifiable reason it is arbitrary.[31] In *Makwanyane* Ackerman J stated:

> "We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where state action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the precepts or principles of the Constitution."[32]

This statement was later affirmed by this Court in *Pharmaceutical Manufacturers*.[33]

[50] Although the policy we are concerned with here was adopted in pursuit of a laudable purpose of transforming the insolvency industry, which everyone agrees needs

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[30] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241(CC) (*Pharmaceutical Manufacturers*).

[31] *Kadiaka v Amalgamated Beverage Industries* (1999) 20 ILJ 373 (LC); *Bernberg v De Aar Licensing Board* 1947 (2) SA 80 (C) at 92; *Beckingham v Boksburg Licensing Court* 1931 TPD 280 at 282-3; Baxter *Administrative Law* (Juta & Co Ltd, Cape Town 1989) at 521-2.

[32] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para ….

[33] *Pharmaceutical Manufacturers* above n 30 at para 84.

to be transformed, the implementation of the policy contains arbitrary terms. The policy differentiates between people who were disadvantaged by discriminatory laws and practices of the past era. Those who became citizens before 27 April 1994 enjoy the benefits flowing from the policy. It will be recalled that during the apartheid era millions of black people were stripped of their South African citizenship and were declared to be citizens of the so-called independent homelands. For no apparent reason, and the applicants have provided none, the policy restricts its application to disadvantaged people, who became citizens before 27 April 1994. This was the date on which South Africa became a democracy.

[51] Disadvantaged people who became citizens on 27 April 1994 are denied the benefits of the policy. And the policy also does not apply to those who became citizens after that date. Instead, the policy places all these people in the same category as white males and affords them the same benefits. Again, no reasons were advanced for treating previously disadvantaged people in the same manner as those who were advantaged, in a measure designed to eliminate consequences of unfair discrimination and achieve equality.

[52] In the absence of reasons justifying it, the unequal operation of the policy is arbitrary and leads to impermissible differentiation. *Makwanyane* informs us that:

> "Arbitrariness must also inevitably, by its very nature, lead to the unequal treatment of persons. Arbitrary action, or decision making, is incapable of providing a rational explanation as to why similarly placed persons are treated in a substantially different way. Without such a rational justifying mechanism, unequal treatment must follow."[34]

[53] It is apparent from this statement that arbitrariness inevitably leads to unequal treatment proscribed by the Constitution. I have already illustrated how unequally the policy treats previously disadvantaged people purely on the basis of the date on which

[34] *Makwanyane* above n 32 at para 156.

they became citizens. While it is permissible for the state to differentiate between people, it may not do so in an arbitrary fashion. In *Prinsloo* this Court held:

> "In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation."[35]

[54] 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, establishes the arbitrariness of the policy. Every action or decision taken in the exercise of public power must be supported by plausible reasons. Those reasons must show that power was exercised to achieve a legitimate government purpose, for which that specific power was conferred. It is those reasons which may insulate the exercise of power against a challenge on the ground of arbitrariness.

Rationality

[55] While there may be an overlap between arbitrariness and rationality these are separate concepts against which the exercise of public power is tested. Arbitrariness is established by the absence of reasons or reasons which do not justify the action taken. Rationality does not speak to justification of the action but to a different issue. Rationality seeks to determine the link between the purpose and the means chosen to achieve such purpose. It is a standard lower than arbitrariness. All that is required for rationality to be satisfied is the connection between the means and the purpose. Put differently, the means chosen to achieve a particular purpose must reasonably be

[35] *Prinsloo v Van der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 25.

capable of accomplishing that purpose. They need not be the best means or the only means through which the purpose may be attained.

[56] The discretion to choose suitable means is that of the repository of public power. The exercise of that discretion is not susceptible to review on the ground of irrationality unless there is no rational link between the chosen means and the objective for which power was conferred. In *Albutt* this Court formulated the rationality test in these terms:

> "The executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the ground of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if objectively speaking they are not, they fall short of the standard demanded by the Constitution."[36]

[57] Here the primary purpose of the impugned policy is the transformation of the insolvency industry. This is one of the purposes of section 158 of the Insolvency Act which empowers the Minister to make policy. In other words, the impugned policy constitutes the means adopted by the Minister to achieve transformation and equality in an industry dominated by white males. What needs to be determined is whether there is a rational link between the policy and transformation towards equality in the industry concerned.

[58] I have already found that the policy is not reasonably capable of achieving equality. The reasons supporting this finding are equally applicable to the rationality

[36] *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 51.

enquiry. This is so because 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. Accordingly, I hold that the impugned policy is also irrational. Consequently, the appeal must fail.

Costs

[59] Since the Minister and the Chief Master have failed in their appeal, they are liable for costs.

Order

[60] In the result the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs, including the costs of two counsel where applicable.

MADLANGA J (Kollapen AJ and Froneman J concurring):

> "What happens to a dream deferred?
>
> Does it dry up
> like a raisin in the sun?
> Or fester like a sore—
> And then run?
> Does it stink like rotten meat?
> Or crust and sugar over—
> like a syrupy sweet?
>
> Maybe it just sags
> like a heavy load.
>
> *Or does it explode?*"[37] (Emphasis in the original)

[37] Hughes, "Harlem" from *Montage of a Dream Deferred* (Holt, 1951) in Rampersad & Roessel (eds) *The Collected Poems of Langston Hughes* (Vintage Classics, New York 1995). Langston Hughes was an African-American author and acclaimed poet. Such was his acclaim that in 1981 his home in Harlem, New York City, was awarded New York City Landmark status and in 1982 it was included in the National Register of Places (see https://www.biography.com/people/langston-hughes-9346313). The focus of his writings was the oppression of African-Americans in the United States of America.

[61] Throughout the many many years of the struggle for freedom, the greatest dream of South Africa's oppressed majority was the attainment of equality. By that I mean remedial, restitutionary or substantive equality, not just formal equality. Pronouncing itself on the content of this equality, this Court held:

> "[P]ersons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied."[38]

[62] Contrasting this with formal equality, Currie and De Waal say:

> "Formal equality simply requires that all persons are equal bearers of rights. On this view, inequality is an aberration that can be eliminated by extending the same rights and entitlements to all in accordance with the same 'neutral' norm or standard of measurement. Formal equality does not take actual social and economic disparities between groups and individuals into account. Substantive equality, on the other hand, requires an examination of the actual social and economic conditions of groups and individuals in order to determine whether the Constitution's commitment to equality is being upheld."[39]

[63] Has the dream for substantive equality been attained, or does its attainment continue to be deferred? In the lives of nations the 24 years of South African freedom is a very short time. It does not require rocket science to realise that at the dawn of our constitutional democracy virtually all meaningful fields of human activity would be dominated by white people. That was because white people were disproportionately better qualified. That, as a result of black people being blatantly and unashamedly

[38] *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 60.

[39] Currie and De Waal *The Bill of Rights Handbook* 6 ed (Juta & Co Ltd, Cape Town 2013) at 213.

denied equal opportunities. Even where miraculously black people would have worked themselves up and attained equal qualifications, white people would still be preferred for selection to any meaningful area of human endeavour through naked racial and racist preference. Therefore, the reason white people were – and continue to be – disproportionately better qualified and more experienced is a function of the subjugation of black people and their exclusion from accessing equal opportunities through centuries of colonialism and apartheid.

[64] The impugned policy is one of many steps taken by the state in the tortuous, long road towards the attainment of substantive equality. The question is whether – in terms of constitutional prescripts – the policy is a misstep. The majority judgment by Jafta J says it is; I say it is not. Why do I say so?

[65] I agree with the majority judgment's conclusion that the view that the policy breaches the principle of legality for failing to cater for the interests of creditors cannot be upheld. But I agree for different reasons. On what is before us it is uncontested that appointments are on the basis that all practitioners who make it to Masters' lists are suitably qualified to practise as insolvency attorneys. The very fact that each practitioner on the list is suitably qualified does cater for the interests of creditors. In the case of complex insolvencies that cannot be handled by a practitioner appointed for being the next-in-line (junior practitioner), clause 7.3 of the policy makes provision for a senior practitioner to be appointed jointly with the junior practitioner. Clause 7.3 provides:

> "The Master may, having regard to the complexity of the matter and the suitability of the next-in-line insolvency practitioner but subject to any applicable law, appoint a senior practitioner jointly with the junior or senior practitioner appointed in alphabetical order. If the Master makes such a joint appointment, the Master must record the reason therefor and, on request, provide the other insolvency practitioner therewith."

[66] Crucially, nothing in this says the appointment of the senior practitioner must be subject to the alphabetical order of practitioners on a Master's list. What is subject to the list is the appointment of the junior who gets paired with the senior practitioner.[40] Thus in selecting the senior practitioner, the Master is at liberty to select a practitioner that she or he is satisfied will be suitably qualified to handle the complex insolvency. This too does ensure that the interests of creditors are protected.

[67] If the interests of creditors will be said to have been taken into account only if the views of creditors have been solicited, that has the potential of disadvantaging section 9(2) beneficiaries.[41] Largely capital is in the hands of white people. It follows that preponderantly it will be them and their entities who will be owed money and thus be major players in the insolvency industry. Experience has shown – and this is something that is so in the public domain or "notorious" as to entitle this Court to take judicial notice of it[42] – that white people and their entities tend to appoint white professionals for all manner of activity. So, factoring the views of creditors at this stage may well have the effect of skewing the appointment patterns and watering down what the policy seeks to achieve.

[68] Of importance, there is no statutory requirement that the input of creditors be solicited on the selection of *provisional* trustees, which is the only stage to which the impugned policy applies.[43]

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[40] See what was held by the Supreme Court of Appeal quoted at [75] below.

[41] Section 9(2) of the Constitution provides:

> "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."

[42] On circumstances under which courts may take judicial notice, see *S v Mthimkulu* 1975 (4) SA 759 (A) at 765D-E, where it was held:

> "In my view, a court is entitled to take judicial notice of a process as notorious and straightforward as weighing on a scale. No evidence was necessary to explain this process or to attest its reliability."

[43] That the policy applies only to the appointment of provisional trustees is provided for in section 18(1) of the Insolvency Act, which reads:

[69] In this discussion and elsewhere in this judgment I consciously choose to use "section 9(2) beneficiaries" because those that section 9(2) of the Constitution seeks to uplift largely continue to be disadvantaged. And – although commonly used, including in statutes[44] – the term "previously disadvantaged" is a misnomer.

[70] I also agree with the majority judgment that the lumping with white men in category D of all practitioners – regardless of race or gender – who attained citizenship on or after 27 April 1994 is constitutionally invalid. And I agree with this for the reasons given in the majority judgment. However, the invalidity does not affect the policy as a whole. The policy is invalid to the extent that it places in category D citizens who – but for having attained citizenship on or after 27 April 1994 – would otherwise have qualified to be in other categories.

[71] As for the rest, I disagree with the majority judgment.

Lack of discretion

[72] The majority judgment holds that in appointments made under clause 7.1[45] the policy constitutes a "displacement" of the discretion conferred on the Master[46] by section 18 of the Insolvency Act and is, as a result, *ultra vires* and inconsistent with section 18.

[73] Section 18(1) of the Insolvency Act confers the power on the Master to appoint a provisional trustee. It provides:

> "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."

[44] See, for example, section 2(1)(e) of the Skills Development Act 97 of 1998; section 4(2)(d) and (e) of the Marketing of Agricultural Products Act 47 of 1996; and section 10(1A) of the Close Corporations Act 69 of 1984.

[45] These are appointments in terms of which the practitioner next-in-line on the list is appointed.

[46] See [32].

> "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." (Emphasis added.)

The words "in accordance with policy determined by the Minister" were inserted in section 18(1) by section 3 of the Judicial Matters Amendment Act.[47]

[74] Section 18 itself subjects the Master's appointment to the policy determined by the Minister. That is important. Mathopo JA writing for the Supreme Court of Appeal held, correctly:

> "Section 18(1) confers on the Master a power to make appointments of provisional trustees 'in accordance with the policy determined by the Minister'. The Master does not have an unfettered discretion. That may have been the case in the past before the amendments to the Act brought about in 2003, but it is no longer the case. The Master's discretion is now to make appointments in accordance with the policy. So the existence of the policy cannot be taken as unduly fettering the Master's discretion, because the Master only has a discretion to exercise in accordance with the policy."[48]

[75] In addition, I accept what he held to the effect that a discretion remains, albeit curtailed. Here is what he held:

> "I accept for the purposes of argument that the provisions of section 18 do not mean that the Minister is entitled to remove all discretion from the Master. It merely means that the Minister may circumscribe the parameters within which the Master exercises the discretion. Viewed in that light there is a considerable restriction imposed by clause 7.1, but some discretion remains in terms of clause 7.3. If the Master decides that an estate is a complex estate, or that the next in line practitioner is unsuitable, they are

[47] 16 of 2003.

[48] Supreme Court of Appeal judgment above n 13 at para 44.

> accorded the power to exercise their discretion by making an additional appointment of a senior practitioner to supplement the appointment made in terms of clause 7.1. In doing so the Master is not bound by the requirements of clause 7.1 and may simply appoint a senior practitioner who the Master believes will remedy the deficiency. The Master is left to determine what is a complex estate and may exercise judgement in regard to the capabilities of different insolvency practitioners. There is a limited residual discretion left for the Master to exercise in making these appointments. That suffices to hold that the Master's discretion is not improperly fettered."[49]

[76] The majority judgment rejects the idea of looking at clauses 7.1 and 7.3 conjointly for purposes of determining whether a discretion exists. Whilst accepting that clause 7.3 retains a limited residual discretion, it holds that this clause "does not apply to the bulk of appointments which are made in terms of clause 7.1". It adds that clause 7.3 is triggered only when – because of the complexity of an estate – it becomes necessary to appoint a senior practitioner in addition to a junior practitioner. It then concludes that clause 7.3 is no answer to the displacement of the Master's discretion in respect of appointments under clause 7.1.[50] For me, there is no reason why the appointment process should be compartmentalised into discrete components. What we should consider is what the Act that introduces the policy seeks to achieve and whether the process as a whole is consonant with that.

[77] Leaving complex matters aside for a moment, if all practitioners on Masters' lists are suitably qualified to handle insolvencies, what do the respondents want flexibility for? Is it a for-the-sake-of-it insistence on flexibility? It is exactly flexibility that may lead to undue preferences of some and the disadvantaging of others. Indeed, the stated objectives of the policy are "to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination". The possibility of unfair, unjustified preference is eliminated by this transparent and consistent process. Just what is wrong with that? In my book, nothing whatsoever.

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[49] Id at para 45.

[50] See [32].

[78] Practitioners on Masters' lists are all suitably qualified. "Suitably" is a conscious choice of word. This is not necessarily about experience. With regard to experience, white people, in particular white men, are disproportionately more experienced. And that is a function of previous naked racist preferences and the exclusion of other groups from acquiring skills and opportunities. It makes sense then that no for-the-sake-of-it advantage should be enjoyed by white people as a result of their unfairly obtained disproportionate experience. If we take the evil that the policy is seeking to address seriously, nothing clamantly demands that at times a suitably qualified practitioner should be skipped for another in the exercise of a discretion. Other than the unfairly obtained disproportionate experience, what more does that other practitioner have that the one being skipped does not have? A simple practical formula that eliminates any possibility of undue preference and – at the same time – does not expose creditors to practitioners that are not suitably qualified eminently commends itself. After all, it is a requirement of the policy that only suitably qualified practitioners should be on Masters' lists.

Quotas, impermissible rigidity and arbitrariness

[79] Despite what it held with regard to the argument on lack of a discretion, the Supreme Court of Appeal held that clause 7.1 requires that appointments be made in accordance with a rigid quota. For a variety of reasons, it held that this was constitutionally impermissible. This Court has in the past pointed towards the possibility of the use of quotas being constitutionally impermissible under certain legislation.[51] I do not find it necessary to engage in a debate whether – under section 9(2) – quotas are similarly outlawed. What I will do instead is to remind us of the words of Moseneke J who said in *Van Heerden*:

[51] In *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23; 2014 (6) SA 123 (CC); 2014 (10) BCLR 1195 (CC) (*Solidarity*) at para 54 Moseneke ACJ, writing for the majority, made the point that the Employment Equity Act 55 of 1998 prohibits quotas.

> "It is . . . incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but 'situation-sensitive' approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society."[52]

[80] Thus before invalidating a measure meant to achieve substantive equality for being rigid, it must be looked at in context or in a "situation-sensitive" manner. It can never be a one-size-fits-all. Take the example of *Van Heerden*; for those members of Parliament who had served even during apartheid, their pensions – like those of new members – were funded only by employer and employee contributions. Likewise, in *Solidarity*, for appointments to the Department of Correctional Services there was no avenue other than the one governed by the policy that was the subject of the litigation. This must be contrasted with the present scenario. The impugned policy applies only to provisional sequestrations. That means if, as it is not disputed, the entire industry – at the provisional and final stages – was hugely dominated by white people, they will continue to disproportionately command more work in the final stage. So, by contrast to the *Van Heerden* and *Solidarity* scenarios and to scenarios that the proscription of true quotas seeks to address, here – in addition to what is governed by the policy – there is another significant source for white insolvency practitioners to earn a living.

[81] Effectively, we are being told to shut our eyes to the indisputable reality of the domination of the final stage by white practitioners; that work is theirs only. And it should not be factored into the question of the validity of the policy. They are entitled to fight for something more than what the policy gives them at the provisional stage. That is downright outrageous. The provisional and final stages make up one area of practice – insolvency practice. Whatever perceived disadvantage white people may seem to suffer under the policy is compensated for by their undeniable continued

[52] *Van Heerden* above n 8 at para 27.

dominance at the final stage. I say "perceived" because in a normal society, which South Africa with its pervading, painful inequality is yet to become, there can never be any justification for white people, a small minority, to disproportionately dominate most professions and industries, including insolvency practice, as they do. Unsurprisingly, upon being engaged during oral argument, counsel for the first respondent could not justify why appointments at the final stage should not come into the equation.

[82] For these reasons the policy takes heed of the words of Moseneke ACJ writing for the majority in *Solidarity* that remedial measures "must not unduly invade the human dignity of those affected by them, if we are truly to achieve a non-racial, non-sexist and socially inclusive society".[53]

[83] It was suggested that some white practitioners are to close their practices because of the policy. What about black insolvency practitioners who cannot even begin truly to make a living in this area of practice because of its unfair, disproportionate dominance by white practitioners? What about black would-be insolvency practitioners who cannot even make a break into this area of practice because of this dominance? If, for the practices of white insolvency practitioners to continue in existence, it is necessary that white people as a group must not only continue to disproportionately dominate insolvency practice at the final stage but must also derive more benefit than what the policy has given them, then tough luck. After all, *Van Heerden* has held that remedial measures will have casualties or result in "hard cases". Lest redress towards the attainment of substantive equality will move at such a snail pace that the dream for equality will be as good as not being realised, it just cannot be business as usual. *Van Heerden* held:

> "The starting point of equality analysis is almost always a comparison between affected classes. However, often it is difficult, impractical or undesirable to devise a legislative scheme with 'pure' differentiation demarcating precisely the affected classes. Within each class, favoured or otherwise, there may indeed be exceptional or 'hard cases' or

[53] *Solidarity* above n 51 at para 32.

> windfall beneficiaries. That however is not sufficient to undermine the legal efficacy of the scheme. The distinction must be measured against the majority and not the exceptional and difficult minority of people to which it applies."[54]

[84] The Court quoted *Thibaudeau* with approval. There the Canadian Supreme Court said "[t]he fact that [a measure] may create a disadvantage in certain exceptional cases while benefiting a legitimate group as a whole does not justify the conclusion that it is prejudicial".[55]

[85] For these same reasons, I thus cannot agree even with the Supreme Court of Appeal's approach on arbitrariness. In that approach the Supreme Court of Appeal nit-pickingly deals with the turns of members in the various groups to be appointed. First, it concludes that because category A comprising African, Coloured, Indian and Chinese women is the smallest group, the turn of each member in that category will come round relatively rapidly (four in every ten appointments). Second, it concludes that the turn of white men and practitioners of every race and gender born after 27 April 1994, all of whom are in category D and whose group is larger, will come around but rarely.

[86] I am not aware that there is evidence before us that gives statistics on the numbers of practitioners of every race and gender born after 27 April 1994 who thus fall under category D. But surely these practitioners are much fewer than white men. This follows because – relative to their national demographics – white men disproportionately dominate South African legal practice. If – as I hold – the other practitioners are to be taken out of category D, only white men will remain. What is the problem with them getting one in ten appointments? They should not, of necessity, benefit because of being a larger group. They are a larger group exactly because racism and patriarchy placed them at the top of the pile. Conversely and by comparison, the women in category A were – and continue to be – at the bottom. It only makes sense then that redress must

[54] *Van Heerden* above n 8 at para 39.

[55] *Thibaudeau v Canada* [1995] 2 S.C.R 627 at 696.

disproportionately afford advantage to those most affected by racism, patriarchy and, in the case of women, even misogyny. This follows only logically. Otherwise things would stay the same. It thus makes perfect sense that white men should receive the least amount of work. As I said, their situation is ameliorated by the fact that they continue to dominate appointments at the final stage.

Van Heerden

[87] In *Van Heerden* this Court held:

> "When a measure is challenged as violating the equality provision, its defender may meet the claim by showing that the measure is contemplated by section 9(2) in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination. It seems to me that to determine whether a measure falls within section 9(2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality."[56]

[88] The majority judgment holds that the second and third of these requirements have not been met. On the second it holds that "it does not appear from the information on record that the policy is likely to transform the insolvency industry". In substantiating this it says:

> "While the policy targets persons who were disadvantaged by unfair discrimination, it does not appear from the information on record that the policy is likely to transform the insolvency industry. Vital to its success is the Master's list from which appointments are to be made. But there is no clarity on whether a single list would be applied throughout the country or each Master would have their own list. If a single list were to apply it is not clear how it would be applied by each Master. In light of the

[56] *Van Heerden* above n 8 at para 37.

> paucity of information on the implementation of the policy, it cannot be said that the policy is likely to achieve the goal of equality."[57]

[89] I will assume for a moment that the view that it does not appear from the information on record that the policy is likely to transform the insolvency industry is pegged on what follows it in the quotation. On that assumption, this view must fall on the same basis that I think the rest of what is quoted must fall. I deal with that basis shortly. But if this view is independent of what follows it, here is my response. Manifestly in time the measure must, and will, transform the insolvency industry. It affords section 9(2) beneficiaries significant advantage, albeit in varying degrees. Properly applied I do not see how that significant advantage cannot eventually uplift these beneficiaries to a point where the industry will be transformed. That to me is so plain as to require no explanation from the applicants. Once equality has been attained, there will no longer be a need to retain the policy. In the event that the Minister does not withdraw it, any person adversely affected by the continued application of the policy may well be entitled to bring an equality challenge to invalidate the policy. None of this affects the validity of the policy today.

[90] The future cannot always be predicted with precision; and that is an understatement. As *Van Heerden* tells us, "the future is hard to predict".[58] And "[t]o require a sponsor of a remedial measure to establish a precise prediction of a future outcome is to set a standard not required by section 9(2)**.** Such a test would render the remedial measure stillborn and defeat the objective of section 9(2)."[59] Courts must exercise caution before knocking down measures calculated to redress the inequality of the past. Of course, a measure that does not meet the requirements of section 9(2) or any other constitutional prescripts must be declared invalid.

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[57] See [40].

[58] *Van Heerden* above n 8 at para 41.

[59] Id at para 42.

[91] Moving to the other parts of the quotation from the majority judgment set out in paragraph 88, I disagree that there is no clarity on whether each Master is to have her or his own list. In so many words, the very clause that is at the centre of the attack – clause 7 – makes plain that each Master has her or his list. Clause 7.2 refers to "different categories on *a Master*'s list" (emphasis added). The article "a" and singular "Master" followed by an apostrophe suggest that reference is to a list of an individual Master, or a list of the Master concerned. Also, the impugned policy stipulates that "insolvency practitioners on *every* Master's list must be divided into" the relevant race and gender categories (emphasis added). This is supported by the definition of "Master" in clause 1 of the policy. That definition says "'Master' means a Master, Deputy Master or Assistant Master *of a High Court* as referred to in the definition of 'Master' in section 1 of the Administration of Estates Act (Act No. 66 of 1965)" (emphasis added). Section 1 of the Administration of Estates Act provides that "'Master', in relation to any matter, property or estate, means the Master, Deputy Master or Assistant Master of a High Court appointed under section 2, who has jurisdiction in respect of that matter, property or estate". Section 2 of that Act provides that the Minister shall appoint a Master in respect of the area of jurisdiction of each division of the High Court. Therefore, reference to a "Master's list" can only be reference to the list of an individual Master.

[92] Therefore, the conclusion in the majority judgment that "[i]f a single list were to apply it is not clear how it would be applied by each Master" falls away.

[93] The majority judgment's view that there is paucity of information on the implementation of the policy appears to be based on the conclusions: that there is no clarity on whether a single list would be applied throughout the country or each Master would have her or his own list; and that if a single list were to apply it is not clear how it would be applied by each Master. I have shown that those conclusions cannot stand. That must mean the conclusion on paucity of information cannot stand as well. I do not see what more can lead to the conclusion reached by the majority judgment. Thus it cannot be said that the policy is not likely to achieve the goal of equality. As I say, properly applied, the policy quite plainly does advantage – and justifiably so – those

that must be uplifted from the continuing inequality wrought by the legacy of colonialism and apartheid.

Rationality

[94] The majority judgment holds that the policy is irrational for the same reasons on which it bases its conclusion that the policy is not reasonably capable of achieving equality. I counter this by equally relying on my reasons for disagreeing with that conclusion.

[95] The respondents raised a few arguments around the numbers. For example, it was contended that the 4:3:2:1 formula[60] in accordance with which the policy must be applied was a thumbsuck. Also, a suggestion was made that the formula ought to have had a bearing on the statistics of practitioners involved in insolvency practice.

[96] To justify the numbers, the applicants relied on a policy dated February 2013. That policy explains that the point of reference was the State Attorneys' target of 75% for allocating work to section 9(2) beneficiaries. But – instead of using 75% – numbers that work with ease in practice (4:3:2:1) were opted for. This policy also sets out the 2011 population estimates by Statistics South Africa by population group. According to these: black women made up 47% of the population; black men 44.1%; white women 4.6%; and white men 4.4%. The policy notes that the "percentages for whites according to the policy allocations are considerably higher than the percentages for population estimates". For instance, the policy allocates white women who make up only 4.6% of the population 20% of the work. The Minister – moving from national demographics as a point of reference – adjusted the total of 91.1% for black people downwards to a 70% allocation of work. This had the effect of allowing white people proportionally more work than their 9% national demographic. If anything, the respondents appear to be criticising the policy on whatever basis they can think of, no matter how unfounded.

[60] The ratio of appointments is, respectively, 4:3:2:1 for the A:B:C:D categories.

[97] Still in the line of throwing any criticism they could muster, the respondents argued that the policy says nothing about what should happen if the section 9(2) beneficiaries have more work than they can handle. The suggestion was that the beneficiaries would continue taking work with no regard for the fact that they might be overstretching themselves. This is downright patronising. In legal practice it happens all the time that some practitioners will be inundated with work. Most know what to do when they have enough. Why the respondents suggest that section 9(2) beneficiaries will not know what to do and, instead gluttonously chew more than they can swallow escapes me. Yes, human beings being what they are, there may be some section 9(2) beneficiaries who may take more work than they can handle. That would not be anything new. And the normal legal rules that apply to practitioners who do not carry out their mandate will apply. I do not understand why the respondents want the policy to cater for every possible eventuality. This is unlike the launching of a rocket into space where, if you lack the necessary precision, the rocket may explode, killing the crew and those watching the launch or veer off in a wrong direction with all the hazards that this may entail. The policy is but a measure meant to address socio-legal ills which, although it must comply with constitutional prescripts, should not be expected not to have a few shortcomings.

[98] I see no irrationality in distributing work in a way that uses the demographic make-up of South Africa as a point of departure in order to promote equality. To the extent that there is a "discrepancy" in the numbers, that works to the advantage of white people. Add to that the work that is unaffected by the policy and which white people continue to dominate.

[99] If the current make-up of the profession were to be the guiding standard, the policy would not be transformative at all – it would simply entrench the status quo. The demographics of the profession are what they are exactly because of the discriminatory policies of colonialism and apartheid. To use them has the potential of perpetuating the very imbalance sought to be corrected.

[100] Quite conceivably, a number of people could come up with a variety of other suggested policies, including formulae. Some could even be better than the Minister's policy. But that is beside the point because that is not what rationality is about. In *Democratic Alliance* this Court held:

> "[R]ationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional."[61]

[101] Here there definitely is a rational connection between the means (that is, the policy) and the purpose of achieving equality. Therefore, the differentiation made by the policy is not one reached irrationally. I might add that in fact, the Minister's policy choice is not even arbitrary.

[102] Without derogating from the point I have just made above, I can think of only one concrete suggestion that the respondents made on how the plight of the section 9(2) beneficiaries could be addressed. The suggestion was that an earlier 2001 policy – Procedures for Appointment of Liquidators and Trustees – should have been retained. In terms of that policy a section 9(2) beneficiary was appointed as a co-provisional trustee. What that policy meant in practical terms was that white practitioners continued to dominate the industry and section 9(2) beneficiaries were appointed as mere appendages to them. I need not dignify this outrageous suggestion with much of a counter. Suffice it to say that it is not only outrageous but also patronising of section 9(2) beneficiaries.

[61] *Democratic Alliance v President of South Africa* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) at para 32.

Conclusion

[103] The policy meets the requirements of section 9(2) and thus, rather than constituting unfair discrimination, promotes the achievement of equality. Also, it is neither irrational nor arbitrary.

[104] I would grant leave and uphold the appeal except insofar as the policy relates to citizens who have been placed on category D for no reason other than the fact that they became citizens on or after 27 April 1994. I would invalidate the policy to the extent of this placement.

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