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Authority for the policy

- The Minister is empowered by the Insolvency Act and Close Corporations Act to determine policy for appointments “in order to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination”
- In terms of section 339 of the Companies Act 61 of 1973 the Policy applies to insolvent companies



STRATEGIC FOCUS – POLICY STATEMENT

CLAUSE 4 OF POLICY

- The focus of the Policy is to transform the insolvency industry.
- Policy seeks transformation insolvency industry by bringing into the appointment process all persons who qualify for such appointment but were previously excluded due to unfair discrimination of the past.
- This transformation will contribute to the National Development Plan by growing the economy transformation.
- It will bring equality and fairness in the manner in which industry practitioners are appointed.



REASONS FOR CHANGE OF NON-STATUTORY 2001 POLICY

- In 2001 Department circulated a “non-statutory ” Policy directing the Master’s offices with a view to transform the industry. There was doubt regarding authority for such Policy, in that the amendment granting such powers was not yet promulgated.
- The requisition system has yielded no transformation in the insolvency industry.
- The requisition system created an environment which became prone to serious malpractices in the insolvency industry.
- In terms of the Policy requisitions are abolished.



STRUCTURE/CONTENT OF POLICY

- Policy consist of seven(7) clauses.
- Clauses 1 defines essential words used in the Policy.
- Clause 2 presents the Policy objective, in similar terms as the empowering provisions in the Principal Acts.
- Promotion of consistency fairness, transparency and equality is a transformative cause in itself.

STRUCTURE/CONTENT OF POLICY (Cont)

Clause 3 –scope and application of Policy

- The Policy deals with matters where the Master exercises a discretion – mostly provisional appointments and joint appointments
- Creditors retain the right to nominate persons at a meeting – the person appointed provisionally will later be appointed jointly
- The Policy does not apply to appointments for a solvent company wound up voluntarily in terms of section 80 of the Companies Act 71 of 2008



STRUCTURE/CONTENT OF POLICY (Cont)

- The appointment of insolvency practitioners in insolvent estates happens in two phases:
- Phase 1- A provisional insolvency practitioner is appointed for the period between the provisional order and the conclusion of the first meeting of creditors.
- Phase 2- A final insolvency practitioner is appointed after being elected by creditors at the first meeting.



STRUCTURE/CONTENT OF POLICY (Cont)

- At phase 1, Masters is empowered by Law to appoint at his/her exclusive discretion while at phase 2 creditors elect an insolvency practitioner of their choice. Thus creditors choice largely influences who the Master ought to appoint.
- The scope of the Policy is confined to discretionary appointments made by Master.



POLICY CONTENT-POLICY STATEMENT

- Policy is aimed at transformation of the insolvency industry, to root out corruption and fronting and encourage transparent appointment process.
- There is consensus on the desirability to transform the insolvency industry.
- Policy emphasises advancements of women in the allocation of insolvency work.
- The latter is in sync with the national aspirations to advance women in every sector of the society.

POLICY CONTENT-IMPLEMENTATION

- Insolvency practitioners on every Master's list must be divided into the following categories:
 - Category A: Africans, Coloured, Indian and Chinese females;
 - Category B: Africans, Coloured, Indian and Chinese males;
 - Category C: White females;
 - Category D: White males

Only a person who was a citizen before 1994 or issue of such a person qualifies for the category of a Africans, Coloured, Indian or Chinese person.

- Practitioners added to the list after the compilation thereof must be added at the end of the relevant category.



POLICY CONTENT-IMPLEMENTATION

- A Master's List must distinguish between
 - “Senior practitioners” who have been appointed at least once every year within the last five years; and
 - “Junior practitioners” who have not been appointed once every year within the last five years but who satisfy the Master that they have sufficient experience to be appointed alone.
 - The Junior and Senior practitioners are arranged where they fit alphabetically on the same lists for Category A to Category D.



POLICY CONTENT-MASTERS DISCRETION

- Having regard to the complexity of the matter and the suitability of the next in line insolvency practitioner the Master may 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 therefore and, on request, provide the other insolvency practitioner therewith.



POLICY IMPLEMENTATION-BOND OF SECURITY

- If an insolvency practitioner due for appointment in accordance with the alphabetical list of names in a specific category -
 - fails to lodge a bond of security in time, the next person on the list is appointed and the person determined previously is moved to the back of the list.
 - satisfies the Master that he or she has a conflict of interest or a conflict of interest arises after the appointment the next-in-line insolvency practitioner is appointed and the person determined previously is considered for appointment when the next appointment in that category is made.



POLICY IMPLEMENTATION- Chief Master's Directives

- The Chief Master has issued Directives to be used by all Masters in order to implement and monitor the application of this Policy-
- Training has been given to all officials in Masters office who will be implementing Policy.



LITIGATION ON POLICY

- On 27/2/ 2014 an interactive meeting was held with stakeholders to determine if any common ground can be secured to avert litigation. In attendance were among others delegation from SARIPA ,SAICA; ABRISPA; DOJCD'sPEC and Justice College.
- Consensus was not reached and first action was instituted case no 17327/2014 at North Gauteng High Court by CIPA
- Second case was instituted at Western Cape Division of High Court case no 17377/14 by SARIPA
- Solidarity ; Die Vereeniging van Regslui vir Afrikaans ; and National Association of Managing Agent joined as co applicants in NG matter. ABRISPA joined in both division as a Respondent

LITIGATION ON POLICY (CONT)

- NG matter was enrolled on 25 March 2014 and was postponed pending outcome of WC matter
- WC matter was heard on 24 March 2014 and postponed to 27-28 March 2014 to allow joiner of ABRISPA.
- Interdict on implementing Policy was granted on 28/03/2014 at WC
- Policy interdict was largely influenced by concession agreed that certain group of persons were not covered in the categories. It was more persons born after 1994/04/27. This was pure error which was unintended.



LITIGATION ON POLICY (CONT)

- Both matters have since been transferred to one forum Western Cape.
- Argument on the merits will be heard in October 2014 , which imply that interdict will continue until then.
- Due to parties in both matters being 8 , argument is reserved for 4 days. Department has been advised that the amendment will cure Policy entirely



Tabling of the amended Policy

- Amendment to the Policy was approved by the then Minister but process could not be completed due to national elections
- Briefing of the Minister on the Policy development process and objectives thereof has just been completed
- Cabinet memorandum is currently under consideration of the Ministry
- Upon signature of Cabinet memo amendment will serve before relevant Cabinet Committee. Hopeful the amendment will be approved



Conclusion

THANK YOU

