

THE POLICY THE THIRD PROPOSAL – ONE LIST COMPUTER GENERATED

Introduction –

1. Definitions

Unless the context indicates otherwise, the following shall mean:

- “Chief Master”** is the Executive Officer of All Masters’ Offices and shall exercise control, direction and supervision over all the Masters;
- “Code”** means Code of Conduct under this Policy, **as per Appendix ?**;
- “Conflict”** means a situation that has the **potential** to undermine the impartiality of a person because of the possibility of a clash between the person’s self-interest and professional interest or public interest.
- “Estate”** means an estate or assets of any natural person, trust, partnership, company, close corporation, or any other body or entity in respect of which a practitioner holds an appointment by the Master;
- “Insolvency Practitioner”** means a natural person who is on the Chief Master’s National List of Liquidators and appointed by the Master as a *Curator Bonis*, Provisional Trustee, Trustee, Provisional Liquidator, Liquidator, Provisional Judicial Manager or Judicial Manager (judicial managers appointed before the repeal of Chapter 15 of the Companies Act 61 of 1973) – hereinafter also referred to as Practitioner;
- “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 of the Administration of Estates Act 66 of 1965, as amended, who has jurisdiction in respect of that matter, property or estate and who is subject to the control, direction and supervision of the Chief Master;
- “Mentor”** means an experienced and trusted Insolvency Practitioner “Mentorship” is the guidance provided by an Insolvent Practitioner to enable the Aspirant Insolvency Practitioner to develop skills and knowledge.
- “Minister”** means the Minister of Justice and Constitutional Development
- “Professional Body”** means an organisation with individual members practicing a profession or occupation in which the organisation maintains an oversight of the knowledge, skills, conduct and practice of that profession or occupation, eg: SARIPA, **ABRIPSA**, SAICA, LPC

“Services” includes all things done and work rendered and performed by a practitioner in the exercise of his or her duties and functions during the winding up and administration of an estate;

“Stakeholders” include the Master of the High Court having jurisdiction and the relevant Liquidators, Trustees, Estate’s Creditors, Insolvent Debtor and Directors and Members.

Insolvency Act 24/1936, as amended:

Section 5 (2) - the appointment of a curator bonis after a notice of voluntary surrender.

Section 18 (1) - the appointment of a provisional trustee by the Master.

Section 54 (5) - the appointment of a trustee where none is elected by the creditors and no provisional trustee is in office.

Section 57 (4) - the Master declines to appoint an elected trustee.

Section 57 (5) - the Master considers it desirable to appoint co-trustees.

Section 62 (2) - the appointment of a provisional trustee pending the election of a trustee to fill a vacancy.

Section 95(4) - the appointment of a trustee where there is no trustee to distribute proceeds due to a secured creditor who did not prove a claim previously.

Companies Act 61/1973 as amended:

Section 368 - the appointment of a provisional liquidator by the Master.

Section 370 (3) (b) - the Master again declines to appoint a person nominated at a further meeting.

Section 374 - the Master considers it desirable to appoint co-liquidator.

Section 377 (3) - the appointment of a provisional liquidator or liquidator for a vacancy or where a vacancy is not filled.

Close Corporations Act as amended:

Section 74(1) - the appointment of liquidator (similar to a provisional liquidator for a company)

Section 66(1) - read with section 374 of the Companies Act- the appointment of a co-liquidator.

Section 76(3) (b) - the appointment of a liquidator where the Master declines to appoint an elected liquidator.

Policy Objectives:

The objectives of this Policy are to promote:

- ❖ consistency, fairness, transparency and achievement of equality for persons previously disadvantaged by unfair discrimination;
- ❖ create a uniform procedure in all Master's Offices for the appointment of Insolvency Practitioners.

Scope:

This Policy:

1. replaces all previous policies, directives and guidelines related to the appointment of insolvency practitioners used in the Masters' offices; and
2. This Policy applies only in respect of appointments under the following provisions of the Insolvency Act, the Companies Act and the Close Corporations Act:

Policy Statements:

The Minister of Justice and Constitutional Development is committed to:

- ❖ addressing the imbalances of the past and transforming the insolvency industry;
- ❖ establishing uniform procedures for the appointment of insolvency practitioners;
- ❖ making the insolvency industry accessible to individuals from previously disadvantaged communities;
- ❖ preventing corruption and fronting;
- ❖ promoting transparency and accountability.

This Policy does not apply to the appointment of an Insolvency Practitioner for a solvent company wound up voluntary in terms of section 80 of the Companies Act, 2008 (Act No. 71 of 2008)

Circular/Directive/Guidelines/Regulation/Resolution

The Chief Master must issue Circular/Directive/Guidelines/Regulation/Resolution to be used by all Masters in order to implement and monitor the application of this Policy.

The List of Liquidators will be known as 'The Chief Master's National list of Insolvency Practitioners'

Chief Master's National list of Insolvency Practitioners:

Is a list of all Insolvency Practitioners that has complied with the Chief Masters Requirements and is deemed to be a suitable/fit and proper person to be considered for Insolvency Appointments.

Requirements to be placed on the Chief Masters National List of Insolvency Practitioners:

1. Qualifications:

Any person who has the following qualifications **or** is an admitted attorney, may apply to be considered for inclusion in the Chief Master's National list of liquidators:

- a) LLB
- b) B Proc
- c) B Com Law/Accounting

2. Proof of Mentorship – Written confirmation by the Mentor confirming a Mentorship period of at least two years.

3. Disqualifications:

Section 55 of the Insolvency Act - (Persons disqualified from being a Liquidator/Trustee):

Any of the following persons shall be disqualified from being elected or appointed as a trustee:

- (a) any insolvent;
- (b)...
- (c) a minor or any other person under any legal disability;
- (d) any person who does not reside in the Republic;
- (e)...
- (f) a former trustee disqualified under section 72;
- (g) any person declared under section 59 to be incapacitated for election as trustee, while any such incapacity lasts, or any person removed by the court, on account of misconduct, from an office of trust;
- (h) a corporate body;
- (i) any person who has at any time been convicted (whether in the Republic or elsewhere) of theft, fraud, forgery or uttering a forged document, or perjury and

has been sentenced to imprisonment without the option of a fine, or to a fine exceeding R2 000;

- (j) any person who was, at any time, a party to an agreement or arrangement with any debtor or creditor whereby he or she undertook that he or she would, when performing the functions of a trustee or assignee, grantor endeavour to grant to, or obtain or endeavour to obtain for any debtor or creditor any benefit not provided for by law;
- (k) any person who has by means of any misrepresentation or any reward or offer of any reward, whether directly or indirectly, induced or attempted to induce any person to vote for him or her as trustee or to effect or assist in effecting his or her election as trustee of any insolvent estate;
- (l)...

Section 372 of Companies Act, 1973: (Persons disqualified from appointment as liquidator/Trustee):

No person shall be qualified for nomination or appointment as the liquidator of a company, if he or she is -

- (a) an insolvent;
- (b) a minor or any other person under any legal disability;
- (c) a person declared under section 373 to be incapable of being appointed as a liquidator, while he or she remains so incapable;
- (d) a person removed from an office of trust by the court on account of misconduct or a person who is the subject of any order under this Act disqualifying him or her from being a director;
- (e) a corporate body;
- (f) any person who has at any time been convicted (whether in the Republic or elsewhere) of theft, fraud, forgery or uttering a forged document or perjury and has been sentenced therefor to imprisonment without the option of a fine or to a fine exceeding twenty rand;
- (g) any person who has by means of any misrepresentation or any reward, whether directly or indirectly induced or attempted to induce any person to vote for him or her in the nomination of a liquidator or to effect or assist in effecting his or her nomination or appointment as liquidator of any company;
- ...
- (j) any agent authorized specially or under a general power of attorney to vote for or on behalf of a creditor at a meeting of creditors of the company concerned and acting or purporting to act under such special authority or general power of attorney.

4. Conflict of Interest.

Conflict of Interest (Practitioners from the Same Firm)

(Assessments Dates and Centres to be determined by the Chief Master)

Assessment Criteria/Process

Intakes for new applicants will take place twice annually. The closing dates for submission of new applications will be published on the website.

Assessments of new applicants consist of a Written Test and/or an Oral Test as determined by the Chief Master as per Circular/Directive/Regulation/Resolution.

Candidates should have knowledge of the following in preparation of such assessment:

- a) Insolvency Act 24 of 1936;
 - b) Companies Act 61 of 1973;
 - c) Companies Act 71 of 2008;
 - d) Close Corporations Act 69 of 1984;
 - e) Relevant Case Law;
 - f) Latest developments in the insolvency and liquidation industry.
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1. All Applicants will be required to participate in a written test. The Pass Mark is 65% (60);
 2. Should an applicant obtain the pass mark of 65% (60) or more in his/her written/oral test, s/he qualifies to be placed on the Chief Masters List of Insolvency Practitioners;
 3. Where an applicant obtains a mark of 50% – 64% (50 – 59) in his/her written test, s/he will be required to undergo an Oral Test;
 4. Where an applicant obtains a mark of 65% (60) and above in his/her Oral Test s/he will qualify to be placed on the Chief Masters List of Insolvency Practitioners;
 5. Where an applicant obtains a mark below 50% (Written/Oral) s/he will be regarded as unsuccessful;

An Illustration of the Assessment Process is indicated below:

<u>Assessment Process</u>	
All Applicants will be required to participate in a Written Test. Based on his/her Mark in the Written Test, the following will apply	
Written Test	Oral Test
Where Applicant obtains a Mark of 65% and above, No further assessment will be required and Applicant qualifies to be placed on the Chief Masters List of Insolvency Practitioners.	Applicant must have obtained a Mark of 50% – 64% in the Written Test to qualify for Oral Test.
Where Applicant obtains a Mark of 50% – 64%, s/he qualifies for an Oral Test.	Applicant must obtain a Mark of at least 65% in the Oral Test to qualify to be placed on the Chief Masters List of Insolvency Practitioners.
Where Applicant receives a Mark below 50%, Applicant is unsuccessful.	Where Applicant obtains a Mark below 65%, Applicant is unsuccessful.

Where an Applicant is unsuccessful in a particular Intake Session, same shall not preclude him/her from applying at the Next Intake Session.

Provisional Appointment Procedure:

- 1) **Insolvent Estates & Companies in Liquidation** - Provisional Appointments will be made on a rotational basis from the Chief Masters National List of Practitioners – Computer Generated - **One List Countrywide where the Computer generates the Name of the Liquidator**
- 2) **Close Corporations** - Final Appointments will be made in a Close Corporation from The Chief Masters National List of Practitioners;
- 3) Any Practitioner who declines an appointment in three (3) matters countrywide, without a Valid/Legitimate (as determined by the Master) may be suspended from the list pending an investigation;
- 4) The practitioners appointed from The Chief Masters National List of Practitioners will remain on the matter until finalised, unless removed by Court/Master.

In terms of the attached Excel Spreadsheet the following can be concluded:

- The Masters Discretion to appoint is not fettered, as the Master decides who and when a Practitioner gets appointed on the Chiefs Masters National List;
- The Master appoints in an Alphabetical Manner, in this way everyone on the list receives an equal opportunity to be appointed, irrespective of value.
- The Chief Masters National list consists of 77% Previously Disadvantaged Individuals (PDI's) and 23% White Males, so in essence the Chief Masters National List still promotes the inequality of the past, but in a way that it does not discriminate or prejudice any practitioner as they all have an equal footing.

Appendix ?

CODE OF CONDUCT FOR INSOLVENCY PRACTITIONERS ON THE MASTER'S LISTS

1. General

Practitioners must, at all times, render and perform their services and conduct themselves in a competent, correct, professional, honourable and impartial manner. Practitioners may not engage in conduct which is-

- (a) dishonest or otherwise discreditable;
- (b) prejudicial to the administration of justice;
- (c) likely to diminish public confidence in practitioners as a profession or the administration of estates; or
- (d) likely to bring practitioners as a profession into disrepute.

2. Competence

2.1 Practitioners who in fact possess or ought to possess, a particular level of knowledge or skill must employ that level of knowledge or skill in the provision of services.

2.2 Practitioners may not undertake work requiring a certain expertise without possessing or being able to apply that expertise.

2.3 Practitioners may not declare or create the impression that they have specific expertise which they do not have or undertake any task which they know or ought to know that they are not competent to deal with.

2.4 Practitioners must ensure that they have sufficient knowledge of the applicable law to fulfill all professional engagements.

2.5 Practitioners have a continuing duty to maintain knowledge and skills for the purposes of rendering competent services, based on current developments in law and practice.

2.6 Practitioners must be able to deal with issues competently where time is of the essence and commercial considerations have to be balanced with legal requirements.

3. Correct conduct

3.1 Practitioners must comply with all statutory and other legal requirements, including orders of court and lawful instructions by the Master or any other regulatory authorities.

3.2 Practitioners may not, without lawful excuse, fail to make payment of monies to other parties within the time limits set out in legislation or, in the absence of such statutory provision, fail to make payment within a reasonable time from the date that such monies become due and payable.

3.3 Practitioners must employ individuals who, in their opinion, are of good moral character. Practitioners must, adequately and continuously, supervise and control their employees, representatives or agents. Except with the consent of the Chief Master, practitioners may not knowingly employ any person—

3.3.1 while such person is suspended or debarred by the court or the Master from acting as an insolvency practitioner; or

3.3.2 who has, at any time during the preceding ten years, been convicted, whether in the Republic or elsewhere, of theft, fraud, forgery or uttering a forged document or perjury and has served any sentence of imprisonment in connection with the conviction.

3.4 Practitioners must keep proper books of account and records in respect of all financial transactions relating to the administration of estates.

3.5 Practitioners must exercise the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.

3.6 Practitioners must exercise the general level of skill and diligence possessed and exercised by practitioners.

3.7 Practitioners may not, through the medium of another entity, do anything which would not be permissible for them to do.

3.8 Practitioners may not assist a breach or concealment of a breach of the law, which includes an agreement not to investigate and report any transactions or conduct or unjustified failure to investigate or report transactions or conduct which should be investigated or reported.

3.9 Practitioners must avoid any conduct or action which discredits or may discredit the insolvency profession. Practitioners must report conduct of joint appointees which could be to the detriment of an estate or the insolvency profession.

3.10 Practitioners may not enter into an agreement whereby they undertake that they will, in the performance of their services, grant or endeavour to grant to, or obtain or endeavour to obtain for any debtor or creditor any benefit or advantage not provided for by law.

4. Professional conduct

4.1 Practitioners must conduct themselves professionally and with the necessary courtesy and consideration towards all with whom they come into contact in the performance of their services and may not, in their conduct and performance of their services, discriminate against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

4.2 Practitioners must, within a reasonable time, answer or appropriately respond to and deal with any correspondence or other communications which reasonably require a reply or other response.

4.3 Practitioners must communicate with stakeholders in a manner that is accurate, honest, open, clear, succinct, and timely to ensure effective understanding of the processes, and the rights and obligations of stakeholders.

4.4 Practitioners must act in good faith to resolve concerns received from stakeholders about any matter affecting them.

4.5 When practitioners sell assets they must, subject to conflict with a legal or professional obligation, ensure that the processes are transparent, understandable and readily identifiable to all third parties who may be affected by any sale or proposed sale.

4.6 Practitioners must, in all correspondence, circulars and other written documentation used in the performance of their services, disclose their names and contact details where they are available to be contacted, which must include, at least a physical address, telephone or cell phone number, fax number and email address or P.O Box number.

4.7 Practitioners must observe the principles relating to good corporate governance as set out in the King III report.

4.8 Practitioners must respect the confidentiality of information acquired as a result of professional and business relationships and may not disclose any such information to third parties without proper and specific authority unless there is a legal or professional right or duty to disclose.

4.9 Practitioners may not use confidential information acquired as a result of professional and business relationships for the personal advantage of the practitioners or third parties.

5. Honourable conduct

5.1 Practitioners must conduct themselves with the highest degree of integrity.

5.2 Practitioners must be straightforward and honest in all professional and business relationships.

5.3 Practitioners may not, by means of misrepresentation, reward or benefit, or offer of any reward or benefit, whether directly or indirectly, induce or attempt to induce any person to vote for their appointment.

5.4 Practitioners must promote and advance transformation and empowerment of legitimate and sustainable Black-owned and female owned practices and may not make themselves guilty of fronting or failure to report cases of fronting which they are aware of.

5.5 Practitioners may not accept or express their willingness to accept from any auctioneer, agent, financial institution or any person engaged to render any services for or in connection with any estate, any share of the commission or remuneration of such auctioneer, agent or person or any other benefits.

5.6 Practitioners may not make a donation, contribution or payment in any form to a public official or public officer, which constitutes a bribe or is contrary to a Circular/Directive/Guideline/Regulation/Resolution by the Chief Master of the High Court.

Circular/Directive/Guidelines/Regulation/Resolution

(See Resolutions 5/2017 & 19/2017)

RESOLUTION: - 19/2017

- Pass rate on written in 65%. Candidate between 50 & 64% are allowed to do the oral. If 50% is achieved during the oral then the candidate is successful.

RESOLUTION: - 5/2017

- The first part of the interview will be the written exam and those who scored between 50-64 will be proceed to second part which is oral interview. The Passing Mark is 65%

Opening the Files – when do we start capturing of documents

Rotational Basis – Masters discretion not fettered by Alphabetical System – The Discretion is applied by placing the Practitioner on the List or not – The Alphabetical System is merely implemented to create Transparency and Uniformity Countrywide.

“Mentor” At least have 5 years’ experience in the Insolvency Industry and must still be on the National List)

An Insolvency Practitioner must lodge a Renewal Affidavit annually on or before the end of March of every year, failing to do so will result in his/her name been removed from the Chief Masters National List of Practitioners.

Disciplinary Procedures:

Non-compliance with the code of conduct may lead to disciplinary action been taken against a practitioner.