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DISPUTE RESOLUTION ALERT

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Affirmative action measures were introduced in South Africa to reconcile the injustices of the past. Although policies have been implemented for the achievement of equality for persons previously disadvantaged, at what point do these policies unjustifiably infringe the rights of persons affected by them?

The above question was recently dealt with by the Supreme Court of Appeal (SCA) in *The Minister of Justice v The SA Restructuring & Insolvency Practitioners Association* (693/15) [2016] ZASCA 196 (2 December 2016). The court declared a policy that seeks to regulate the appointment of insolvency practitioners intended to form the basis for the transformation of the insolvency industry, unconstitutional and irrational.

The impugned policy

The policy was introduced by the Minister of Justice and Constitutional Development in terms of s158(2) of the Insolvency Act, No 24 of 1936 (Act), which empowers the Minister to determine a policy for the appointment of a trustee by the Master of the High Court in order to promote consistency, fairness, transparency and the achievement of equality for previously disadvantaged by unfair discrimination.

The policy gave the Master the power to appoint an insolvency practitioner regarded as a 'previously disadvantaged individual' (as defined in the policy) to act as a co-trustee alongside an experienced practitioner so that he or she could learn from the experienced trustee how properly to administer an estate, in order to gain sufficient experience in the industry. The Master, in accordance with the policy, created a panel of insolvency practitioners divided into various categories based on, among other things, race, gender and seniority. The policy also set out a formula in terms of which the Master must appoint insolvency practitioners across the various categories, and the Master had no power to depart from this save for circumstances where the Master decides that an estate was a complex estate.

The policy was challenged on four bases. These were that:

(a) it infringed the right to equality provided for in s9 of the Constitution;

(b) it unlawfully fettered the discretion of the Master;

(c) it was *ultra vires* the Act; and

(d) it was irrational.

Case law on remedial action aimed at redressing past discrimination

In the landmark Constitutional judgment in *Minister of Finance & another v Van Heerden* 2004 (6) SA 121 (CC), Moseneke ACJ stated that 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 end. One form of arbitrariness, caprice or naked preference, Moseneke J stated, is the implementation of a quota system, or one so rigid as to be substantially indistinguishable from a quota.

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The SCA stated that the policy prescribes a strict allocation of appointments in accordance with race and gender, and was entirely arbitrary and capricious with no saving discretion.

Irrationality of the policy

In so far as the policy aimed to transform and make the insolvency industry accessible to previously disadvantaged individuals, the High Court in the case under consideration stated that the policy needed to do more than increase the numbers. The court took issue with what it found to be a mechanical application of the policy which failed to appreciate and provide any scope allowing the Master to take into account the skills, knowledge, expertise and experience of the practitioner when appointing a trustee.

The SCA, in agreement with the High Court, noted that remedial action intended to redress past discrimination must operate in a progressive manner assisting those who, in the past, were deprived, in one way or another, of opportunity to practice in the insolvency profession. The SCA further stated that the policy prescribes a strict allocation of appointments in accordance with race and gender, and was entirely arbitrary and capricious with no saving discretion.

Where to from here?

This judgment will intensify discussions on the efficiencies and shortcomings of certain affirmative action policies, particularly because practitioners regarded as 'previously disadvantaged' remain few and underrepresented in the insolvency industry and other related sectors. Although there is a need to implement policies aimed at redressing the imbalances of the past, policy-makers should find ways to ensure that there is a correlation between the individual's skill set and the requirements for the role, and the scope for the transfer of skills, within the system provided for by legislation.

As can be seen from the judgment, such policies should provide clear deliverable timelines or targets to determine whether they are likely to achieve the intended objectives within a clearly defined period. Policy makers should look beyond increasing the numbers.

The Minister and the Chief Master have applied for leave to appeal the SCA judgment to the Constitutional Court. The revelations to be brought about by the appeal and the ultimate decision by the Constitutional Court will soon become known.

Mongezi Mpahlwa and Johanna Lubuma

“TO SET-OFF OR NOT TO SET-OFF?”

The National Credit Regulator has asked the High Court for clarity on the meaning of s124 of the NCA.

Set-off allows the termination of obligations without an exchange of performance. Where parties are indebted to one another, set-off operates automatically under the common law when the requirements for set-off are satisfied. Under sections 90 and 124 of the National Credit Act (NCA), the process is not automatic and is more cumbersome and onerous on the credit provider.

Section 90(2)(n) of the NCA prohibits an automatic set-off without compliance with s124 of the NCA.

Whether credit providers are regulated by the common-law is uncertain and the National Credit Regulator has asked the High Court for clarity on the meaning of s124 of the NCA in this context.

The common law requirements for set-off are simple. Reciprocal debts must exist between the same parties in the same capacities (so a creditor cannot bring a claim in a representative capacity, such as a trustee). This is referred to as the “mutuality requirement”. The second requirement is that the debts must be of the same kind to be capable of set-off. Thirdly, both debts must be due and payable and therefore enforceable. Lastly, the debts must be liquidated; in other words, capable of speedy and easy proof. The contract between a bank and its customer includes an implied right of common law set-off with no requirement for express or written consent from the customer nor is the bank required to notify the consumer of the set-off in advance.

Section 90(2)(n) of the NCA prohibits an automatic set-off without compliance with s124 of the NCA. That section sets out the conditions for set off in terms of a credit agreement incorporating a clause authorising the appropriation of funds from a debtor’s account in set-off of a consumer’s obligation in terms of a credit agreement. Section 124 says that a creditor must get the customer’s authorisation, specifying:

1. the account from which the funds can be withdrawn;
2. the debt which is to be paid;
3. the amount which may be transferred; and
4. the date of the transfer.

The credit provider must also notify the customer of the intended set-off together with details of the transaction before collecting funds from the account in terms of the authorisation. The pending litigation is important to both customers and credit providers, particularly banks. If the court finds in favour of the National Credit Regulator, credit providers will face these restrictive requirements when using set-off to collect debts.

The litigation will make the position clear but if the NCA is found to trump the common law, credit providers may simply implement the NCA requirements or may opt for example to take additional security. An effect on the accessibility and cost of credit is probable.

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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