THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 2 December 2016

STATUS Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment.

Minister of Justice v The SA Restructuring & Insolvency Practitioners Association (693/15) [2016] ZASCA 196 (2 December 2016)

MEDIA STATEMENT

The Supreme Court of Appeal today dismissed an appeal against a judgment of the Western Cape Division of the High Court, Cape Town concerning the constitutionality of a policy that seeks to regulate the appointment of insolvency practitioners, primarily as provisional trustees and liquidators, but also as co-trustees and co-liquidators (and other comparable positions) under various statutes.

The policy was issued by the Minister of Justice and Constitutional Development in terms of s 18(1) of the Insolvency Act 24 of 1936 (the Act), pursuant to his powers in terms of s 158(2) of the Act and was to come into operation on 31 March 2014.

The challenge to the policy was made in two parts, ie, Part A was for an interim order restraining its implementation, and Part B, was to have it reviewed and set aside. In the Western Cape Division of the High Court, Gamble J dealt with the urgent application in respect of Part A and interdicted the appellants from implementing the policy.

The review application in Part B came before the court a quo, Katz AJ, in which the policy was challenged on four bases. These were that it infringed the right to equality provided for in s 9(3) of the Constitution; it unlawfully fettered the discretion of the Master; is ultra vires the Act; and was irrational. The court a quo largely upheld the respondents' contentions and granted the application. And acting in terms of s 172(1)*(a)* of the Constitution, declared the policy inconsistent with the Constitution and invalid.

The SCA, after reviewing clauses 6 and 7 of the policy, upheld the court a quo's finding that the policy is unconstitutional. The court held that clause 7.1 of the policy embodied strict allocation of appointments in accordance with race and gender, which were arbitrary, capricious and displayed naked preference, which is prohibited by s 9(3) of the Constitution. The court held that the policy's arbitrariness was not saved by clause 7.3 of the policy as it does not resolve the fact that clause 7.1 requires the Master to make an appointment in accordance with a rigid quota.

With regards to the question whether the Master's discretion was unlawfully fettered, the SCA held that there was a limited residual discretion left for the Master to exercise in making appointments in terms of clause 7.3 of the policy, and so the Master's discretion was not improperly fettered in that regard.

On the issue of the rationality of the policy, the SCA lamented the fact that there was no explanation by the Master for the basis upon which the policy was formulated. There was for instance no proper explanation regarding how the ratio in the policy was determined, and no proper figures to show the number of practitioners in each category. Thus, the court held that in the absence of proper information about the basis upon which the policy was formulated, and proper information concerning the current demographics of insolvency practitioners, it was not possible to say that the policy was formulated, on a rational basis properly directed at the legitimate goal of removing the effects of past discrimination and furthering the advancement of persons from previously disadvantaged groups.

In a concurring judgment, Wallis JA (Mpati P, Swain and Mathopo JJA concurring) held that given the purpose of the insolvency legislation, the actions of the Minister in determining the policy under s 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. And that 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 outside the legitimate powers vested in the Minister, and the promulgation thereof involved a breach of the principle of legality.

The SCA accordingly dismissed the appeal with costs.

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