

Draft Chief Master's Directive 1 of 2006

The Appointment of Liquidators, Trustees, Curators Bonis and Judicial Managers

1. PREAMBLE

- 1.1. The primary function of the Master is to regulate the administration of estates. It is the duty of the Master to ensure that the legal and financial interests of those affected in the administration of an estate are taken care of in a compassionate manner.
- 1.2. The conduct of a Master must at all times assure the public that the manner in which estates are administered are –
 - 1.2.1. in compliance with the law; and
 - 1.2.2. that the financial and legal interests of all those who may be vulnerable will be protected.
- 1.3. The Chief Master recognizes that –
 - 1.3.1. the liquidations and insolvency industries needs to be transformed –
 - (a.) to ensure access to these industries by Black Practitioners, particularly Black Women Practitioners;
 - (b.) to eliminate all forms of corruption; and
 - (c.) to professionalize the industries.

2. Purpose

- 2.1. The purpose of this Directive is to direct all Masters in the performance of their functions *in order to bring about uniformity in practice and procedure*. This Directive is issued in terms of –
- 2.1.1. Section 14 (a) of the Judicial Matters Amendment Act, 2003 which entitles the Chief Master as the executive officer of the Master's offices to "*exercise such supervision over all the Masters*"; and
 - 2.1.2. Section 3 of the Judicial Matters Amendment Act, 2005 which requires the Chief Master to "*exercise control, direction and supervision over all the Masters*".
 - 2.1.3. In order for the Chief Master to exercise the above powers this directive replaces all previously issued directives and amendments thereto.

3. Scope

- 3.1. This Directive addresses the appointment of trustees liquidators, curatores bonis and judicial managers in terms of the
- 3.1.1. Insolvency Act, 1936 (Act No. 24 of 1936);
 - 3.1.2. Companies Act, 1973 (Act No. 61 of 1973); and
 - 3.1.3. Close Corporations Act, 1984 (Act No. 69 of 1984).
 - 3.1.4. All legal prescripts must be adhered to.

4. Objectives

- 4.1. This Directive seeks to achieve the following objectives:-
- 4.1.1. To ensure greater transparency and openness in the

- functions of the Master;
- 4.1.2. Compliance with the Promotion of Administration of Justice Act 3 of 2000;
- 4.1.3. Prevent abuse of the provisional appointments procedure;
- 4.1.4. **Ensure** that uniform, fair and transparent appointment procedures are used by Masters of the High Court in appointing liquidators;
- 4.1.5. To direct the Masters of the High Court with regard to the practice of making appointments of liquidators;
- 4.1.6. Increase the number of Black liquidators in South Africa;
- 4.1.7. Facilitate a real transfer of skills between liquidators; and
- 4.1.8. Eliminate corruption.
- 4.1.9. Exercise greater oversight over the fees of liquidators
- 4.1.10. Exercise greater oversight over the sale of property

5. Definitions

- 5.1. "**Black person**" means an African, Coloured or Indian person¹.
- 5.2. "**Chief Master**" means the person appointed as the Chief Master of the High Courts in terms of section 2(1) of the Administration of Estates Act, 1965.
- 5.3. "**Insolvent estate**" means (unless otherwise indicated) an estate sequestrated in terms of the Insolvency Act, 1936, or a company wound-up in terms of the Companies Act, 1973 or a close corporation liquidated in terms of the Close Corporations Act, 1984.
- 5.4. "**Liquidator**" is a natural person whose name appears on the

¹ This definition accords with the definition of Black People in the Employment Equity Act, 1998 (Act No. 55 of 1998).

National List of Liquidators and includes a trustee, curator bonis and judicial manager, "provisional trustee" and "provisional liquidator" and provisional judicial manager.

- 5.5. "**Master**" means the Master as defined in section 2(1) of the Administration of Estates Act, 1965.

6. Implementation

- 6.1 This Directive will be effective as from.....2006.

7. National List of Liquidators

- 7.1. Only liquidators enrolled on the National List may be appointed. There will be one National List of Liquidators which is compiled by the Chief Master.
- 7.2. The National List of Liquidators will be divided into the various provincial jurisdictions of South Africa and will consist of two parts. Part 1 of the list will contain the names of all experienced liquidators or liquidators who are in a position to take sole appointments. Part 2 will contain the names of Black liquidators who are not in a position to take sole appointments or lack sufficient experience.
- 7.3. All liquidators must renew their applications for enrolment annually.
- 7.4. Applications to be placed on the National List will only be considered once a year
- 7.5. A liquidator may only be enrolled on the National List in respect of one provincial area of jurisdiction in which that liquidator practices.
- 7.6. A person who applies for inclusion on the National List must select a Provincial jurisdiction in which such person wishes to carry on the business of a liquidator. A liquidator must have infrastructure within that particular provincial area of

jurisdiction.

- 7.7. The Chief Master, notwithstanding the choice of the particular Black liquidator, may place that liquidator on Part 1 or Part 2 of the List as he or she deems fit.

8. Application For Admission To The National List

- 8.1. All persons, including liquidators on the current Panels of Liquidators, who at the commencement date of this Directive, wish to be included on the National List, must apply to the Chief Master using Annexure A.

- 8.2. An application to be enrolled on the National List of Liquidators must contain the following information:-

8.2.1. Previously held appointments –

- (a.) A list of all the matters in which they held appointments over the past five years;
- (b.) the value of the assets in these estates; and
- (c.) the fees earned in these matters.

8.2.2. Current appointments –

- (a.) A list of all such matters;
- (b.) the status of such matters; and
- (c.) the value of the assets in these estates.

8.2.3. Motivation supporting enrolment on the National List.

8.2.4. Supporting evidence of infrastructure, resources and facilities to support an appointment as a Liquidator.

8.2.5. number of contemplated removals received;

8.2.6. number of final demands received; and

8.2.7. number of matters where removed as liquidator.

- 8.3. An applicant must be a fit and proper person and must not be disqualified from being a liquidator in terms of the legislation referred to in paragraph 3.

- 8.4. An applicant must :

- 8.4.1. be an admitted attorney or advocate or a registered chartered accountant, and must be in good standing with the professional body of which the applicant is a member
 - 8.4.2. have at least a 3 year tertiary legal or accounting qualification
 - 8.4.3. Where practitioners who are currently on any Master's Panel of Liquidators do not have a qualification, they shall be afforded a period of 4 years to obtain a qualification; as specified in 8.4.2. Where such a qualification is not obtained within such period, such practitioner shall not be allowed to practice as a liquidator.
 - 8.4.4. A fully compliant registered tax payer
 - 8.4.5. Must not have any criminal record or disciplinary or criminal matters pending
 - 8.4.6. No offences involving dishonesty, fraud or corruption in the last ten years
 - 8.4.7. Satisfy the Chief Master that he or she has the necessary facilities and infrastructure to administer insolvent estates in the required jurisdiction.
 - 8.4.8. An applicant must provide proof from an insurance company that he or she has sufficient facilities available to enable him or her to provide security to the satisfaction of the Chief Master for the performance of his or her duties.
- 8.5. The Chief Master may conduct an interview with the applicant to satisfy himself / herself that an applicant complies with all criteria.

9. Removal From National List

- 9.1. A Master may suspend or remove a liquidator appointed in an estate over which he / she has jurisdiction for good cause and must provide the Chief Master with the reasons for the suspension or removal. The Chief Master may , on receipt of

those reasons endorse the National List accordingly.

- 9.2. Good cause in this context may include, but is not limited to failure to comply with the relevant provisions of legislation relating to
- 9.2.1. the administration of liquidations;
 - 9.2.2. failure to comply with final demands issued by the Master;
 - 9.2.3. failure to reply to correspondence;
 - 9.2.4. fraud;
 - 9.2.5. theft;
 - 9.2.6. insolvency;
 - 9.2.7. corruption;
 - 9.2.8. removal from the roll of a professional body for misconduct;
 - 9.2.9. agreements made between liquidators or any other party which are contrary to public policy or immoral (*contra bonis mores*);
 - 9.2.10. persistent failure to participate actively in the administration of a liquidated estate by joint liquidators; and
 - 9.2.11. Removal by a Court or the Master in terms of the legislation referred to in paragraph 3.

10. Records Of Liquidators

- 10.1. A file must be opened and kept by the Master in respect of each liquidator appointed within their jurisdiction. Each file must contain but not be limited to the following records –
- 10.1.1. All personal particulars,
 - 10.1.2. copies of all final demands, contemplated removals, removals and complaints against a liquidator must be filed on his or her file to assess his or her suitability for further appointments.
 - 10.1.3. List of appointments

- 10.2. Copies of all records kept by a Master in respect of a liquidator must be made available to the Chief Master on request
- 10.3. The Chief Master may use the information contained in the file of a liquidator to consider whether to suspend or remove a liquidator from the National List and to draw up proper statistics for analysis.
- 10.4. The information may also be used by the Master when considering making an appointment or for purposes of quality assurance.

11. Requisitions²

The following basic and uniform rules for the consideration of requisitions will apply:

- 11.1 All requisitions must be submitted in the original, on the standard and uniform form by way of an affidavit as per Annexure A. No faxed copies will be accepted;
- 11.2 Requisitions must comprise of liquid claims (sounding in money) with a minimum value of R 1 000-00; and must not be comprised of administration costs such as the Taxed Bill of Costs or Section 89 costs (of the Insolvency Act).
- 11.3 Requisitions lodged by unions:
 - 11.3.1 Requisitions signed by Unions on behalf of workers will be considered only in instances where a letter from the registered trade union stipulating that it represents workers at a particular work place supports such requisitions. Priority should be given to a letter issued by the national office of a trade union, followed by a letter from a regional office, and lastly, a letter from the local office. This is to be accompanied by confirmation from the personnel section of the relevant Company or Close Corporation as to how many members of personnel belong to which unions in accordance with pay sheet deductions.

² The requisition system is already in use in the offices of the Master.

- 11.3.2 Requisitions made by Unions shall be signed by the Secretary-General of such Union supported by a resolution authorizing such person to sign such requisition. (Specimen signatures of Secretaries-General must be provided).
- 11.3.3 Trade unions must provide the number of employees that they represent, and confirm that each claim exceeds R 1 000. The cause of action must also be stated. Requisitions in respect of severance pay where employment contracts have not been terminated will be disregarded.
- 11.3.4 Union requisitions overrule individual requisitions lodged by workers who are not members of a Trade Union.
 - 11.4 In the case of workers not represented by a union and where the "closed shop" policy does not apply, it will suffice if the employee estimates the claim in the requisitions, as accurately as possible.
 - 11.5 Requisitions in respect of Directors/members loan accounts should be disregarded entirely.
 - 11.6 The Masters Offices should keep proper records of the date and time of receipt of requisitions.
 - 11.7 Requisitions, which are duplicated, i.e. two or more requisitions in respect of the same creditor nominating different liquidators, will be disregarded.
 - 11.8 The "48 hour period" from the date of granting of a liquidation order or date of registration of the resolution shall be assumed to be granted/registered at 12:00 on the day on which the liquidation order was granted or the resolution was registered.
 - 11.9 A random inspection must be conducted periodically and in cases of doubt, verify the authenticity of requisitions
 - 11.10 Alleged fraudulent requisitions should be referred to the Director of Public Prosecutions for further investigation and possible criminal prosecution.
 - 11.11 Requisitions by companies are to be signed by a director of the company or by a person authorised to do so, or in the case of a close corporation by the member or by any person authorised thereto. In the case of a partnership, the requisition is to be signed by a partner; and with a Trust the Trustee must also sign the requisition. Where there is more than one partner or trustee; all need to sign the requisitions, alternatively they must lodge a power of attorney from the other relevant parties.

- 11.12 Requisitions by companies or close corporations must include that entity's registration number.
- 11.13 The amount of the claim must be reflected in words and figures;
- 11.14 The full name, address (physical and postal) and telephone number of the creditor must appear on the face of the requisition.
- 11.15 The full cause of the debt must be specified.
- 11.16 The requisition must be signed and if signed in a representative capacity, such fact must be stated.
- 11.17 Requisitions based on conditional claims must be ignored.
- 11.18 Requisitions, which contain alternative nominations, must be rejected.
- 11.19 Requisitions by the Land Bank must not be considered if the Land Bank is not part of the Insolvency process in view of section 90 of the Insolvency Act.
- 11.20 Requisitions made by SARS are to be signed by the Commissioner or any person authorised thereto by the Commissioner. An official estimate issued by SARS may be accepted.
- 11.21 Creditors must see to it that their requisitions are correct. They cannot be afforded an opportunity *to* amend their incorrect requisitions after the expiration of the 48 hour period and after an appointment has been made.
- 11.22 Requisitions signed more than 30 days before the date of the Court Order are not acceptable and will be ignored. Undated requisitions will be disregarded.

12 Urgent Appointments³

12.1 An urgent appointment will only be made in exceptional circumstances.

12.2 In the event of an urgent appointment a black liquidator shall

³ This procedure is designed to eliminate the abuse of the appointment procedures by liquidators in urgent cases and to ensure that the Master is able to promote equity even in urgent matters

be appointed on a discretionary basis.

12.3 The Master must after 48 hours appoint an additional provisional liquidator in terms of paragraph 13.

12.4 The provisional liquidator must lodge a comprehensive report reflecting the assets and liabilities and any other relevant information pertaining to that estate with the Master within 48 hours of appointment.

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13 Appointment Of Provisional Liquidators

13.1 The appointment of provisional liquidators in each estate will be determined by one or more of the following factors:

13.1.1 The value of the assets.

13.1.2 The nature of the business and assets.

13.1.3 Requisitions by creditors.

13.1.4 Statistics of appointments during the preceding 12 months.

13.1.5 If necessary, the expertise and skill of the liquidator being considered for an appointment.

13.1.6 The extent of the liquidators impartiality in respect of the estate he/she is to be appointed in.

13.1.7 The Master may appoint a person on number and value as nominated by creditors.

13.1.8 Unless a Black liquidator has been appointed in terms of Paragraph 12, the Master must, in addition to the provisional liquidator appoint a Black person from Part 2 of the National List on a rotational basis. The person so appointed must also be appointed as a final liquidator by the Master after the first meeting of creditors⁴.

13.1.9 In cases where no requisitions are lodged the Master may make a discretionary appointment. In such cases Black persons

⁴ Whilst appointments made from Part 2 will be on a strict rotational basis, a person in Part 2 whose nomination is made by way of requisition will for the purposes of the rotational system be moved to the last position on the rotational system. Part 2 assumes that persons in Part 2 will not normally be appointed by way of requisition. It should further be noted that even where a person in Part 2 is appointed by way of requisition the Master will in addition make a discretionary appointment.

will receive preference.

13.1.10 In respect of appointments made in terms of paragraph 12.3 a roster system must be used in each office of the Master and must be strictly adhered to.

13.1.11 The Master must record reasons for the decisions made.

14 Active And Equal Participation By Liquidators

14.1 All liquidators must actively and equally participate in the administration of estates in order to facilitate the transfer of skills to black practitioners. Liquidators must furnish a certificate of their participation in each matter.

14.2 Upon the lodgement of the liquidation account, the liquidators must jointly certify in writing that the administration of that estate was carried out by all the liquidators appointed⁵, which certificate will, inter alia, form the basis of the assessment of the liquidator's fees and his / her standing on the Panel of Liquidators.

15 GENERAL MATTERS

15.1 Special fees in excess of R2000 may only be approved after consultation with the Chief Master. An application for special fees must be submitted to the Master's office concerned with sufficient motivation. The Master must submit this application with an appropriate recommendation for consideration by the Chief Master. The Master concerned shall keep statistics of all applications for special fees.

15.2 In all matters above R5million the Master shall first consult the Chief Master before an appointment is made. The Master shall, as soon as the papers are furnished, provide the Chief Master with a report covering the following :

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- 15.2.1 The name of the matter;
 - 15.2.2 The nature of the matter;
 - 15.2.3 Value of the assets
 - 15.2.4 List of requisitions lodged
 - 15.2.5 Steps taken to verify the requisitions
 - 15.2.6 Recommendations for the appointment of provisional liquidators
- 15.3 Masters shall as far as possible refrain from making multiple appointments in matters. Each matter should have a maximum of 4 liquidators appointed and only in exceptional circumstances shall more than 4 liquidators be appointed; after consultation with the Chief Master. The reasons for such appointment shall be fully recorded.
- 15.4 Masters shall submit the names of persons making appointments in their offices to the Chief Master for his approval. A profile of each person shall also be submitted.

Footnote 15.3: "Exceptional circumstances" are any circumstances which in the opinion of the Master merit the appointment of more than 4 liquidators.

ANNEXURE B

ASSESSING REQUISITIONS

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