

BEE policy for estate trustees ruled invalid

An affirmative action policy for the appointment of provisional trustees to insolvent estates was declared invalid by the High Court in Cape Town earlier this week because it was too rigid and used race- and gender-based quotas.



Image: www.freedigitalphotos.net

The aim of the policy was to address the fact that the lucrative liquidation industry remains largely a white and male enclave.

It also sought - by providing for uniform measures - to prevent corruption and fronting in the industry, widely acknowledged to be a pervasive problem.

Acting Judge Anton Katz said the goal of the policy was "admirable".

"However, a policy cannot pass constitutional muster on good intentions alone."

In terms of the policy, the Master of the High Court would appoint the trustees on a rota system based on race and gender. Under the system, white men would be appointed to one out of 10 positions - limiting them to about 10% of the work.

Judge Katz said Parliament had in legislation given the Master of the High Court discretion on who to appoint as a provisional liquidator.

Looking at the legislative scheme, he said appointment decisions had to be made first and foremost by the master, not the justice minister.

Even if the policy was interpreted generously, it went beyond the setting of guidelines and intruded "impermissibly into the master's ability to apply his mind in the making of each appointment". The "rigid and inflexible regime" set out in the policy in effect turned the master into a "rubber stamp", he said.

Judge Katz also found that the prohibition in the Employment Equity Act of the use of race and gender quotas - as opposed to numerical targets - had wider application. Though quotas are not defined in the act, the Constitutional Court, remarking in passing, said employers could not place absolute barriers to the employment or promotion of men or white people.

Judge Katz quoted the Constitutional Court's remark that the primary distinction between targets and quotas "lies in the flexibility of the standard". In this case, the policy could not be implemented in a way that was not mechanical and rigid.

"While the constitution is a transformative one and... remedial action to address past injustices is a required and indeed lawful imperative, such measures must be nuanced," he said.

Judge Katz also briefly addressed the controversial argument made by trade union Solidarity: that categorising people according to race was "legally impossible".

He said he accepted that racial classification - "divorced from other contextual factors" - was an arbitrary threat to the dignity and autonomy of individuals.

But the categories referenced in the policy were "utilised throughout what can loosely be termed SA's affirmative action legislation".

"It is not open to this court to determine that the categories used are themselves arbitrary and irrational," he said.

He said while white males might "decry" affirmative action, carefully crafted affirmative action policies were necessary to overcome "the stark disparities between those on the different sides of the colonial and apartheid divide".

Justice spokesman Mthunzi Mhaga said the department would reflect on the judgment and decide how to proceed further.

For more, visit: <https://www.bizcommunity.com>