



**INSOL**  
INTERNATIONAL



# **PROGRAMME IN SOUTH AFRICAN INSOLVENCY LAW AND PRACTICE**

**Comment and Feedback on Self-  
Assessment Questions 2022**





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## HOW TO USE THIS DOCUMENT

The purpose of this document is to provide comment and feedback on the self-assessment questions contained in the SARIPA Course Notes 2022. Please bear in mind that the primary purpose of the self-assessment questions is to assist you, as a candidate on the SARIPA Programme in South African Insolvency Law and Practice, to understand the various parts of the work as covered in the prescribed notes for the course.

The questions and answers provided in this document follow the same sequence as the notes, so the questions and answers have been arranged by Chapter.

Some of the self-assessment questions have mark allocations and some do not. Likewise, some of the answers indicate the mark allocation and some do not. The underlying idea is not to ensure that the mark allocation (for questions and / or answers) is displayed but to provide you with questions that will test your knowledge of the content of the course notes. As a result, please do not focus on the mark allocation but on the work that the self-assessment questions cover.

Please note that in addition to the self-assessment questions, you will also receive at least one set of past examination papers for this course. These two papers will be made available as separate documents and will be uploaded to the course portal in due course.

**CHAPTER 1 - INTRODUCTION****Self-Assessment Questions****Question 1**

**Briefly discuss the important concept of concursus creditorum and its impact on the claims of individual creditors against a debtor (individual or company). (5)**

**Answer**

Any of the following (or similar):

- *Walker v Syfret* 1911 AD 141;
- Sequestration / liquidation order crystallises the insolvent's position and the hand of the law is laid upon the estate;
- the rights of the general body of creditors must be taken into consideration;
- the general interest of the creditors as a group ranks in priority over the interests of the individual creditor;
- the realisation of the insolvent's assets and the distribution of the realisation amounts among creditors must be carried out in accordance with the order of preference laid down by the law of insolvency;
- once sequestration / liquidation has commenced, one creditor cannot, through the process of execution, receive full payment of its claim at the expense of the claims of other creditors.

**Question 2**

**True or False: The primary aim of South African insolvency law is to afford individual debtors a "fresh start" and a discharge of pre-sequestration debts, by way of the sequestration procedure. (1)**

**Answer**

False. It is not a prime object of our insolvency law to afford an individual debtor a discharge of pre-sequestration debts. It is merely one of the consequences of rehabilitation. South African insolvency law is largely creditor orientated, and the sequestration procedure is by and large for the benefit of creditors.

**PART B - SEQUESTRATION AND WINDING-UP PROCEDURES**

**CHAPTER 2 - WINDING-UP AND SEQUESTRATION**

There are no self-assessment questions for this Chapter.

**CHAPTER 3 - SEQUESTRATION****Self-Assessment Questions**

Study the basic principles pertaining to estates that can be sequestrated, jurisdiction, voluntary surrender, and compulsory sequestration.

**Question 1**

State whether the following statement is true or false and provide a reason for your answer. A debtor may apply for his own sequestration by way of a compulsory sequestration. (2)

**Answer**

False. (1) A debtor may apply for his own sequestration by way of a voluntary surrender. (1)

**Question 2**

State whether the following statement is true or false and provide a reason for your answer. A body corporate of a sectional title scheme is included in the definition of "debtor" in section 2 of the Insolvency Act 1936 and can therefore be sequestrated. (2)

**Answer**

False. (1) A body corporate of a sectional title scheme is excluded from the definition of "debtor" in section 2 of the Insolvency Act 1936 and cannot be sequestrated. (1)

**Question 3**

State whether the following statement is true or false and provide a reason for your answer. Insolvent deceased estates may be sequestrated in terms of the Insolvency Act 1936 but may also be administered as insolvent in terms of the Administration of Estates Act 1965. (2)

**Answer**

True. (1) Refer to section 34 of the Administration of Estates Act 1965 (1)

**Question 4**

State which court has jurisdiction to make sequestration and rehabilitation orders and explain why. (2)

**Answer**

Only the High Court (1) because such orders influence a person's status. (1)

**Question 5**

**Explain which division of a court has jurisdiction to sequester an estate. (3)**

**Answer**

A local or provincial division has jurisdiction to sequester an estate if the debtor, on date of the application:

- (a) is domiciled within the area of jurisdiction of the court; or (1)
- (b) owns or is entitled to property located within the area of jurisdiction of the court; (1) or
- (c) at any time during the 12 months preceding the date of application, ordinarily resided, or carried on business within the area of jurisdiction of the court. An application for rehabilitation must, in principle, be brought in the same division where the debtor was sequestered in the first place. (1)

**Question 6**

**Describe the instances in which a magistrate's court has jurisdiction in matters pertaining to the sequestration of insolvent estates. (2)**

**Answer**

A magistrate's court has jurisdiction regarding aspects that normally fall within its jurisdiction, (1) for example hearing a criminal matter, the impeachment of voidable transactions or actions in terms of sections 72(2), 73(1), 76, or 78(3) of the Insolvency Act 1936. (1)

**Question 7**

**Explain the consequences of the publication of a notice of surrender to a client. (3)**

**Answer**

Stay of sales in execution (1)

Appointment of a *curator bonis* (where appropriate) (1)

Publication of the notice constitutes an act of insolvency if the debtor does not continue with the application, fails to lodge a statement of affairs, or lodges an incomplete or incorrect statement of affairs. (1)

**Question 8**

You act on behalf of Dagny Taggart, an insolvent debtor, who duly published a notice of surrender in the *Government Gazette* and in a newspaper circulating in the magisterial district where she resides. However, Dagny failed to notify all her creditors. Advise Dagny as to whether this omission can be condoned. (4)

**Answer**

The general formalities for a voluntary surrender must be strictly complied with. (1) However, where a mistake or omission constitutes a formal defect, it may be condoned in certain instances. (1) Where the mistake does not prejudice creditors or where prejudices can be corrected by means of a court order, it may be condoned. (1) Nevertheless, the court rarely condones the mistake that creditors were not notified personally. (1)

**Question 9**

Compare and distinguish between the formal and substantive requirements pertaining to applications for voluntary surrender and compulsory sequestration. (20)

**Answer****Formal requirements*****Voluntary surrender***

1. The applicant must, no more than 30 days and no less than 14 days before the application, publish a notice of surrender in the *Government Gazette* and in a newspaper circulating in the magisterial district where he resides or where his principal business is located.
2. Within 7 days from date of publication of the notice of surrender, the applicant must send a copy of the notice to all known addresses of creditors, furnish a copy to the South African Revenue Services, every registered trade union applicable and to employees.
3. The applicant must prepare a statement of affairs and send two copies to the Master's office where the debtor resides or does business. If there is no Master's office, two copies must be sent to the provincial Master's office and one to the magistrate's office of the particular district.

***Compulsory sequestration***

1. The applicant must set security at the Master to defray all sequestration costs until a trustee is appointed.
2. The applicant must furnish interested parties, including the debtor, registered trade unions, employees, and the South African Revenue Service with a copy of the application.



**Substantive requirements*****Voluntary surrender***

On a balance of probabilities:

1. That the formalities were complied with;
2. Actual insolvency;
3. Sufficient free residue to cover costs of sequestration;
4. Advantage to creditors.

***Compulsory sequestration***

*Prima facie* (provisional order) and reason to believe (final order)

1. That the applicant qualifies as a creditor;
2. Actual insolvency or an act of insolvency;
3. That there is reason to believe that sequestration will be to the benefit of creditors as a group.

## CHAPTER 4 - WINDING-UP OF OTHER ENTITIES

There are no self-assessment questions for this Chapter.

## CHAPTER 5 - DATE OF SEQUESTRATION

There are no self-assessment questions for this Chapter.

**CHAPTER 6 - SETTING ASIDE OF ORDERS, APPEAL AND REVIEW****Self-Assessment Questions****Question 1**

**List three differences between the setting aside and the appeal of a sequestration order.**

**Answer**

1. A provisional sequestration order may not be appealed but an application for rescission of a provisional order is allowed.
2. Leave of the court is required to appeal a sequestration order but not to apply for the rescission of an order.
3. An application for leave to appeal will automatically suspend the sequestration proceedings, but an application for rescission of the order does not suspend the proceedings.

**Question 2**

**ABC (Pty) Ltd was placed in winding-up because it was unable to pay its debts. This was due to the fact that most of its work was done for government departments who failed to pay the company within a reasonable time.**

**Shortly after a final liquidation order was issued, two government departments unexpectedly paid their substantial debts to the company. Although the company would still not be able to pay all its debts in full, the directors believe that the company now has enough money and contracts to continue its business. How can this be achieved?**

**Answer**

The liquidator should be requested to approach the creditors of the company with an offer of compromise in terms of section 155 of the Companies Act 2008. One of the conditions of the compromise should be that if it is accepted, the liquidator may apply for the setting aside of the liquidation order and that creditors will not oppose the application.

If the compromise is accepted by the required majority of creditors, all creditors will be bound to a reduced amount payable in terms of the compromise. These debts will then be discharged. The liquidator must then apply for the setting aside of the liquidation order in terms of section 354(1) of the Companies Act 1973 on the grounds of supervening events that now make the liquidation order unnecessary or undesirable.

**Question 3**

**When a winding-up order is appealed, does it make any difference whether the winding-up order was made because the company was unable to pay its debts (i.e., an insolvent winding-up) or whether it was a solvent winding-up?**

**Answer**

The Insolvency Act applies to the appeal of the insolvent winding-up order of a company. In terms of section 150(3) of the Insolvency Act, the noting of an appeal does not suspend the provisions of the Act except that no property of the insolvent estate may be realised without the consent of the insolvent. The liquidation proceedings are thus not suspended. No appeal against a provisional winding-up order is allowed by section 150(1).

Where an application for leave to appeal is made in the case of a solvent winding-up, the winding-up proceedings are suspended in terms of section 18(1) of the Superior Courts Act 2013 until the court has issued its judgment on the appeal. Since section 150 of the Insolvency Act does not apply to a solvent winding-up, an appeal against a provisional winding-up order is allowed.

## PART C - EFFECTS OF SEQUESTRATION AND WINDING-UP

## CHAPTER 7 - VESTING OF THE ESTATE AND EXCLUDED ASSETS

## Self-Assessment Questions

**Question 1**

Explain the difference between the consequences of winding-up of a company and sequestration of the estate of a natural person "debtor" in respect of the property of the company and the natural debtor respectively. (2)

**Answer**

In terms of section 361(1) of the 1973 Companies Act, the company remains owner of its property and only the *control* over the company goes to the Master and then the liquidator. (1) In terms of section 20(1)(a) the insolvent natural person debtor loses control of his or her estate. The property of the estate vest in the Master and, after his appointment, in the trustee. (1)

**Question 2**

In terms of the Insolvency Act 24 of 1936, what is regarded to be "property" of the insolvent estate? (2)

**Answer**

"Property" in terms of section 2 of the Insolvency Act includes all movable and immovable property wherever situated in the Republic, (1) but the contingent right of a fideicommissary heir or legatee is excluded. (1)

**Question 3**

Indicate whether the following remarks are TRUE or FALSE:

**"In case of a natural person debtor, the estate assets vest in the Master and, after his or her appointment, in the trustee of the insolvent estate. Consequently the insolvent debtor loses all interest in the estate."** (2)

**Answer**

False. (1) The insolvent debtor still has an interest in the estate and may, for example, litigate in order to enhance the value of the estate where the trustees decided not to take steps in the litigation (1) (see the Notes para 10.13 for further examples).

**Question 4**

Indicate whether the following statement is TRUE or FALSE:

**“The trustee of an insolvent estate will not be able to gain control over movable property of the insolvent situated in a foreign country, unless the trustee obtains recognition of his or her appointment as trustee from the foreign court.” (4)**

**Answer**

False. (1) Movable property of the insolvent in a foreign country will, according to the common law, vest in the insolvent estate if the estate is sequestrated by the court where the insolvent is domiciled. It is not necessary that the trustee obtain recognition of his appointment. (1)

**Question 5**

Indicate whether the following statement is TRUE or FALSE:

**“Section 12 of the Trust Property Control Act 57 of 1998 provides that trust property forms part of the trustee’s insolvent estate.” (2)**

**Answer**

False. (1) Section 12 of the Trust Property Control Act 57 of 1988 provides that trust property does not form part of a trustee’s personal estate, save as far as the trustee is also a trust beneficiary. (1)

**Question 6**

Indicate whether the following statement is TRUE or FALSE:

**“Debts which were due to an insolvent debtor before his or her sequestration, will, after his or her sequestration, be payable to the insolvent personally.” (2)**

**Answer**

False. (1) In terms of section 22 of the Insolvency Act, it is payable to the trustee. If payment is made to the insolvent, the obligation is not terminated unless the debtor involved can prove that he was *bona fide* and had no knowledge of the sequestration (1)

**Question 7**

Explain the legal position in respect of the protection of policy benefits under a life-insurance policy where the protected person's estate is sequestrated:

while he or she is still alive; and

after his or her death. (10)

**Answer**

- The **entire sum** of a life insurance policy is protected in terms of **section 63** of the Long-Term Insurance Act 1998 if: (1)
- the "protected person" or his or her spouse is the **life insured**; (1)
- the relevant policy has been in force for at least **three years**; (1) and
- the policy does not serve as **security** for a debt of the debtor (1)
  - during that person's *lifetime*; (1) or
  - upon his or her *death*, if he or she is survived by a spouse, child, stepchild or parent, provided that the policy benefits *devolve* upon the latter persons. (1) Therefore, if the policy benefits are payable to them as nominated beneficiaries in terms of the relevant policy, section 63 does not apply - see *Pieterse v Shrosbee NO & Others; Shrosbree NO v Love and Others*. (1)
- The above-mentioned protection applies to policy benefits and assets acquired solely with the policy benefits for a period of **five years** from the date when the policy benefits were provided. (1)
- A person claiming protection in terms of section 63 must furthermore be able to **prove**, on a balance of probabilities, that the protection is afforded to him or her under this section. (1)
- Policy benefits will not be protected as indicated above if it can be shown that the policy in question was taken out with the intention to **defraud** creditors. (1)

**Question 8**

Mr S was married out of community of property to Mrs S in 2017. On 1 October 2021 Mr S's estate was finally sequestrated. Mr S is the owner of a business which manufactures and sells window blinds. The couple has two minor children. You are the trustee of the insolvent estate. The following assets, amongst others, were listed in the statement of affairs:

- Immovable property situated in London, United Kingdom. (2)
- The married couple's family home situated in Johannesburg, South Africa. (2)
- A life-insurance policy in terms of which Mr S is the life insured. The surrender value of the policy is R30,000 and the policy has been in force from 1 January 2021. (2)
- Antique furniture to the value of R300,000. (2)



- The delivery vehicle used in Mr S's business. (3)
- A farm in Mpumalanga, South Africa. The farm has been bequeathed to Mr S, subject to the condition that it must pass to C, Mr S's son, after Mr S's death. (2)

**Explain which of the above-mentioned assets will or will not fall into the insolvent estate of Mr S.**

**Answer**

- Section 2 - definition of "property" only includes property situated in the Republic. (1) The trustee will however be able to gain control of the immovable property in the UK if he or she obtains recognition of his or her appointment as trustee from the relevant foreign court in terms of the relevant principles of the said foreign country. (1)
- The family home will form part of Mr S's insolvent estate. (1) However, under certain circumstances the insolvent and / or his or her dependants may enjoy protection under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act - see *Mayekiso and Another v Patel and Others* and the discussion in para 10.15.10. (1)
- The surrender value will form part of the assets of the insolvent estate. (1) The policy will not be protected in terms of section 63 of the Long-term Insurance Act as the latter section requires that the policy must have been in force for at least three years prior to sequestration. (1)
- Clothing, bedding and household furniture, tools and other means of subsistence as the creditors or the Master determine, does not fall into the insolvent estate (section 82(6) of the Insolvency Act. (1) However, luxuries such as antique furniture, are clearly not included. (1)
- It may be argued that a motor vehicle falls under "tools and other essential means of subsistence" in terms of section 82(6), (1) and that it would thus be excluded from the insolvent estate. (1) However, this exception is subject to the determination of creditors or the Master. (1)
- In this instance, Mr S is the fiduciary - the farm will thus form part of Mr S's insolvent estate (1) but the realisation of the property will be subject to the fideicommissary burden. (1)

**CHAPTER 8 - PROPERTY IN POSSESSION OF INSOLVENT AFTER SEQUESTRATION****Self-Assessment Questions****Question 1**

Explain the general rule in respect of property acquired by the insolvent after sequestration of his or her estate. (1)

**Answer**

Apart from certain exceptions, property acquired after the sequestration order forms part of the insolvent estate (see ss 20(2)(b), 23(1) and 24(2) of the Insolvency Act. (1)

**Question 2**

Indicate whether the following statement is TRUE or FALSE:

**"If a will merely directs that a bequest shall not form part of an insolvent estate without further direction that on the beneficiary's insolvency the bequest shall pass to some other person, the direction is of no effect in law."**

**Answer**

True. Such a bequest is known as a *nudum praeceptum*.

**Question 3**

Indicate whether the following statement is TRUE or FALSE:

**"If an insurer is obliged to indemnify a third person in respect of any liability incurred by the insured against such third party, the third party may claim damages directly from the insurer on sequestration of the insurer's estate."**

**Answer**

True. See section 156 of the Insolvency Act.

**Question 4**

Mr A was married in of community of property to Mrs A in 1980. On 1 February 2021 the married couple's joint estate was finally sequestrated. On the date of sequestration Mr A was an employee of ABC Bank and earned R50,000 per month. Mrs A was an employee of the University of South Africa and earned R30,000 per month. On 1 March 2021 Mrs A inherited R1 million from her father, which inheritance she accepted on 1 June 2021. She also took early retirement and became entitled to an amount of R1 million as pension in return for the services she provided to the University. You are the trustee of the insolvent estate. Answer the following questions:

- Will the salaries of Mr and Mrs A vest in the insolvent estate? (3)

**Answer**

In terms of section 23(9) the insolvent may retain for his or her benefit the wages or remuneration for work done after sequestration insofar as it is necessary for his or her or his or her dependants. (1) However, the trustee is in terms of section 23(5) entitled to any surplus income which, in the opinion of the Master is not necessary for their support. (1) Mr A and Mrs A's salary will therefore not form part of their joint insolvent estate unless the Master, on request of the trustee, certifies that there is available surplus income. (1)

- Will the R 1 million which Mrs A inherited, vest in the insolvent estate? (4)

**Answer**

An inheritance, if it accrues before rehabilitation of an insolvent, will fall into the insolvent estate. (1) However it will only vest in the trustee on acceptance by the insolvent heir - see *Wessels NO v De Jager*. (1) In *Badenhorst v Bekker* (approved by the SCA in *Du Plessis v Pienaar*) the court held that property which was bequeathed exclusively to one of the spouses in terms of a marriage in community of property, did indeed fall into the joint insolvent estate. (1) The inheritance of Mrs A will therefore vest in the trustee of the joint insolvent estate. (1)

- Explain what the legal position would have been if Mrs A decided to repudiate the inheritance. (3)

**Answer**

In *Wessels NO v De Jager* the court held that prior to the acceptance of an inheritance or insurance benefits, the beneficiary had no rights to the benefits but merely a "competence" to inherit. (1) The inheritance will therefore not vest in the trustee of the joint insolvent estate. (1) Mrs A's refusal to accept the benefits can furthermore not be set aside as a voidable disposition. (1)

- **Explain whether the pension which Mrs A became entitled to will fall into the joint insolvent estate. (2)**

**Answer**

In terms of section 23(7) of the Insolvency Act the insolvent may for his own benefit recover any pension to which he may be entitled for services rendered. (1) The pension benefits to which Mrs A becomes entitled to will therefore not form part of the joint insolvent estate. (1)

- **What would the position in the previous question have been if the pension benefit paid out before sequestration of the joint estate? (6)**

**Answer**

The pension benefit paid out to Mrs A will form part of the joint insolvent estate. (1) Section 37B of the Pension Funds Act 1965 provides, *inter alia*, that if the estate of any person *entitled to a benefit* payable in terms of the rules of a registered fund (including an annuity purchased by the said fund from an insurer for that person) is sequestrated or surrendered, such benefit shall not be deemed to form part of the assets of the insolvent estate of that person. (1) In *M and Another v Murray NO and Others* the SCA found that section 37B established an exception to the provisions of s 20(1)(a) of the Insolvency Act. Therefore, while in the hands of a pension fund, an insolvent's pension interest cannot be attached by his or her trustee on the basis that it formed part of the assets of his or her insolvent estate. (1) However, s 37B only applies in respect of pension benefits of a person whose estate was already under sequestration when he or she received the benefit. (1) As soon as the benefit was paid, the beneficiary ceased to be a "member" of the pension fund and the money ceased to be a "benefit" in terms of the Act. (1) The court found that a benefit paid out before sequestration of an insolvent's estate did not enjoy protection in terms of s 37B. (1)

**CHAPTER 9 - EFFECT OF SEQUESTRATION ON INSOLVENT'S SPOUSE****Self-Assessment Questions****Question 1**

**What is the effect of sequestration of the estate of an insolvent debtor on his or her spouse to whom he or she is married out of community of property? (2)**

**Answer**

The position in respect of a marriage out of community of property is dealt with in section 21 of the Insolvency Act. (1) It provides that the additional effect of the sequestration of the separate estate of one of two spouses shall be to vest in the Master, and upon appointment in the trustee, all the property of the spouse whose estate has not been sequestrated as if it were property of the sequestrated estate. (1)

**Question 2**

**Explain the meaning of "spouse" for the purposes of section 21 of the Insolvency Act. (3)**

**Answer**

The term "spouse" has an extended meaning, and includes a wife or husband married according to any law or custom, and also persons living together as husband and wife, though not legally married (section 21(13) of the Insolvency Act) (1). The Civil Union Act legalised civil unions between same-sex partners which now has the same legal consequences as any marriage in any other law, including the common law. The term "spouse" therefore includes a "civil union partner" in terms of the Civil Union Act. (1) From the wording of section 21(13) (i.e., the mention of "a woman living with a man as his wife or a man living with a woman as her husband, although not married to each other") it would appear that same-sex partners who are living together, but are not parties to a civil union concluded in terms of the Act, will not be regarded as a "spouse" in terms of s 21(13). (1)

**Question 3**

**Indicate the grounds on which the solvent spouse may in terms of section 21 of the Insolvency Act, claim a release of assets. (5)**

**Answer**

In terms of section 21(2), the trustee shall release property to the solvent spouse if it is proved:

- that it was the property of the spouse before the marriage; (1)
- that it is property acquired under a marriage settlement; (1)

- that it was property acquired during the marriage by a title valid against creditors; (1)
- that it is property protected under the Long Term Insurance Act 52 of 1998; (1)
- that it was acquired with property under (a) - (d) above or the income or proceeds thereof. (1)

#### Question 4

Indicate whether the following statement is TRUE or FALSE:

**“The Constitutional Court held that section 21 violates the equality clause of the Interim Constitution 200 of 1993 but does not violate the property clause in terms the Interim Constitution.” (1)**

#### Answer

False. The Constitutional Court held that section 21 does not violate the equality clause or the property clause in terms of the Interim Constitution. (1)

#### Question 5

**Mr B was married out of community of property to Mrs B in 1980. On 1 March 1990, Mr B donated certain immovable property to Mrs B. Soon thereafter, the property was registered in Mrs B’s name in the Deeds Office. On 1 February 2021 Mr B’s estate was finally sequestrated. One month before his sequestration, Mr B donated his silver Porsche motor vehicle to Mrs B. After sequestration Mrs B claimed release of the immovable property as well as the silver Porsche motor vehicle from you, the trustee of Mr B’s insolvent estate. Will you release the said assets? Motivate your answer. (7)**

#### Answer

In terms of section 21 the solvent spouse may claim release if he or she is able to prove that the relevant property was acquired by the solvent spouse by a title valid against the creditors of the estate. (1) According to case law this means that the transaction in terms of which the solvent spouse acquired the property was not simulated or designed to defeat the rights of creditors. (1) Donations between spouses were legalised by section 22 of the Matrimonial Property Act. (1) A valid and *real* donation will therefore afford the solvent spouse a legally valid title. (1) The donation of the immovable property to Mrs B appears to be a real donation and may thus be released. (1) However, the donation of the Porsche shortly before sequestration of Mr B’s estate clearly does not constitute a real donation and can thus not be released. (1) It should be noted that any donation, even if the relevant property has been released, may still be set aside by the trustee as a voidable transaction in terms of the Insolvency Act. (1)

**CHAPTER 10 - EFFECT OF SEQUESTRATION ON INSOLVENT PERSONALLY****Self-Assessment Questions****Question 1**

**Explain the legal position in respect of an unrehabilitated insolvent's capacity to conclude valid contracts. (3)**

**Answer**

- In terms of section 23(2) of the Insolvency Act an insolvent may conclude any contract except: (a) a contract by which he purports to dispose of any property of his estate; (b) a contract by which his estate is, or is likely to be, adversely affected, unless he concludes it with the written consent of his trustee; (c) and a contract by which any contribution to his estate which he is obliged to make is, or is likely to be, adversely affected unless he concludes it with such consent. (1)
- If the insolvent fails to obtain the required consent, the contract is voidable at the option of the trustee. (1)
- If an insolvent purports to alienate, for valuable consideration, without the consent of the trustee any property acquired after the sequestration of the estate or any right to such property to a person who proves that he or she was not aware and had no reason to suspect that the estate of the insolvent was under sequestration, the alienation is nevertheless valid (section 24(1)). (1)

**Question 2**

**Briefly explain the legal position in respect of an unrehabilitated insolvent's ability to hold certain positions and to be employed. (4)**

**Answer**

- In terms of section 23(3) the insolvent may follow any profession or occupation or enter into any employment, (1) but he may not, without the written consent of his trustee carry on business or be employed in any capacity in the business of a trader who is a general dealer or manufacturer. (1) Where the trustee refuses to give his or her consent, the insolvent or his or her creditors may appeal to the Master. (1)
- An unrehabilitated insolvent is disqualified from holding several positions and from being a member of several statutory boards or bodies (1) - see the discussion in para 13.1 of the Notes.

**Question 3**

**Name six obligations of the insolvent during insolvency. (6)**

**Answer**

- Keep trustee informed of residential and postal addresses;
- Deliver business records;
- Lodge statement of affairs;
- Attend first and second meetings;
- Deliver assets to trustee;
- Assist trustee in collecting, taking charge of and realising property against payment of an allowance in money or goods.



**CHAPTER 11 - EFFECT OF INSOLVENCY ON THE EXECUTION OF JUDGMENTS AND  
OTHER CIVIL PROCEEDINGS****Self-Assessment Questions****Question 1**

Indicate whether the following statement is TRUE or FALSE:

**“In terms of the Insolvency Act attachment in execution of any judgment does not confer any preference after sequestration except for costs on those proceedings.”**

**Answer**

True. See section 98(2) of the Insolvency Act.

**Question 2**

**Is a liquidator or trustee entitled to institute or defend proceedings on behalf of or against the insolvent estate or company? (1)**

**Answer**

Yes, in terms of section 73 he or she may do so with the prior written authorisation of the creditors.

**Question 3**

**Briefly explain what the effect of sequestration is on the execution of judgments. (2)**

**Answer**

Section 20(1)(c) of the Insolvency Act provides that the execution of a judgment is stayed as soon as the sheriff concerned becomes aware of the sequestration, unless the court directs otherwise. (1) However, the court may order that execution be continued if this is expedient and necessary and the general body of creditors will not be prejudiced, but the proceeds must be paid to the Master or the trustee (1) - see the discussion in para 14.4 of the Notes.

**Question 4****Question 4.1**

**Briefly explain the effect of sequestration on pending civil legal proceedings. (4)**

**Answer**

In terms of section 20(1)(b) of the Insolvency Act any civil proceedings instituted by or against the insolvent are stayed, until a trustee is appointed, except such proceedings as may in terms of section 23 be instituted by the insolvent for his own benefit or as may be instituted against the insolvent. (1) The exceptions refer to proceedings that do not affect the insolvent estate, such as proceedings relating to status or assets that do not form part of the insolvent estate. (1) Section 75 of the Insolvency Act provides that any civil legal proceedings instituted before sequestration shall lapse three weeks after the first meeting, unless the person who instituted those proceedings has given notice within that period to the trustee or, if no trustee has been appointed, to the Master, that he or she intends to continue the proceedings and after three weeks from the notice "prosecutes those proceedings with reasonable expedition". (1) The court may permit the continuation of the proceedings on such conditions as it may think fit if notice has not been given, if it is of the opinion that there was a reasonable excuse for such failure. (1)

**Question 4.2**

**What is the effect of a winding-up order on civil proceedings? (1)**

**Answer**

Section 359(1)(a) of the Companies Act provides that the making of a winding-up order suspends all civil proceedings until the appointment of a liquidator. (1)

**Question 5**

**Indicate whether the following statement is TRUE or FALSE:**

**"The rules regarding the effect of insolvency on civil proceedings apply to arbitration proceedings."**

**Answer**

True. Unless the agreement provides otherwise, an arbitration agreement or the appointment of an arbitrator or umpire thereunder is not terminated by sequestration or liquidation

**CHAPTER 12 - IMPEACHABLE DISPOSITIONS AND RELATED REMEDIES****Self-Assessment Exercise 1**

Study the basic principles dealt with in this Chapter.

**Question 1**

What are the main legal sources for setting impeachable transactions / dispositions aside under South African insolvency law? (2)

**Answer**

Sections 26 to 33 (statutory grounds) of the Insolvency Act (1) and the *actio Pauliana* of the common law. (1)

**Question 2**

Indicate the main difference between the *actio Pauliana* and the statutory voidable dispositions provided for by the Insolvency Act 24 of 1936. (2)

**Answer**

The *actio Pauliana* may be instituted when the debtor's estate is not sequestrated yet (1) but sequestration is a pre-requisite for the statutory impeachable transactions to apply. (1)

**Question 3**

How is the term "disposition" defined in the Insolvency Act 24 of 1936? (4)

**Answer**

"Disposition" means any transfer or abandonment of rights to property. (1) This includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract providing therefor (2) - excluding a disposition following a court order is excluded and is therefore not a "disposition". (1)

**Question 4**

Name the main voidable dispositions provided for in the Insolvency Act 24 of 1936. (4)

**Answer**

Disposition without value (1)  
Voidable preference (1)  
Undue preference (1)  
Collusion (1)

**Question 5**

**Indicate two remedies / provisions in the Insolvency Act that are related to voidable dispositions. (2)**

**Answer**

Any 2 of the following (1 mark each):

Section 21  
Section 34  
Section 46  
Section 84(2)  
Section 88

**Question 6**

**How and under what conditions may a creditor institute a proceeding to void a disposition in terms of the insolvency Act 24 of 1936? (3)**

**Answer**

Where the trustee fails to do so (1) (but in name of trustee (1) and indemnifying him / her against costs. (1)

**Question 7**

**What is the main difference in principle between a disposition without value and a preferential disposition of property by a debtor? (3)**

**Answer**

In case of preference there is a pre-existing liability that is settled (1), so the estate is not financially worse off (1) but in case of disposition without value the assets are diminished. (1)

**Question 8**

**In what respect does collusion as a voidable disposition differ from dispositions without value and preferences as to their respective consequences, if set aside by the court? (2)**

**Answer**

The person who colluded with the debtor can be called upon to pay damages and a kind of punitive damages (1) and, if a creditor, s/he loses all claims against estate. (1)

**Question 9**

**Under what conditions may the Master of the High Court order the setting aside of set-off that occurred between the insolvent and another person prior to the sequestration of the insolvent's estate? (2)**

**Answer**

If it happened within a six or 12 month period prior to sequestration (1) and if not in the ordinary course of business. (1)

**Question 10**

**Does the Companies Act 61 of 1973 or the Companies Act 71 of 2008 have its own provisions to deal with voidable dispositions following the liquidation of a company that is unable to pay its debts? (2)**

**Answer**

No, the insolvency law applies - hence statutory and common law provisions will apply. (1)

**Self-Assessment Exercise 2****Question 1 (20)**

**A sells his Porsche to B for R100,000. At the time of the sale the car is valued at R700,000. Since A owes money to various creditors, it seems he sold the car to B in order to obtain some cash to pay creditor C who exerted severe pressure on A to settle a debt of R100,000 owing by A to C.**

**Answer the following questions:**

**Question 1.1**

**A's estate is sequestrated five months after A sold and transferred the Porsche to B. (At the time of sequestration A could not meet his debts as they became due since he already experienced severe cash flow problems at that time.)**

**Advise A's trustee if she has grounds to try and impeach the sale of the Porsche. (If so indicate clearly what requirements she has to meet.) (3)**

**Answer**

Sale was a disposition without value (1/2) / under-value transaction (1/2) that trustee must prove (1) but in order to keep car, B must prove that A was still solvent at the time of the disposition. (1)

**How would your answer to the question above differ if the sale took place 26 months prior to the sequestration of A's estate? (3)**

**Answer**

Then the trustee must prove that the estate of A was insolvent after the sale (1) [onus of proof (1)] due to the disposition being made more than 24 months prior to sequestration. (1)

**Question 1.2**

**For the purposes of this question accept that A has settled his debt of R100,000 towards C about three months prior to the sequestration of A's estate. Advise the trustee as to her chances to set the settlement of the debt aside. (3)**

**Answer**

The trustee will have a fair chance of setting aside the settlement of the debt (1/2) since it appears the requirements for a voidable preference as prescribed by s 29 of the Insolvency Act are present (1/2), namely:

- A disposition (settlement) was made by the insolvent within six months prior to his sequestration; (1/2)
- The effect of the disposition was seemingly to have preferred one creditor above the others; (1/2)

- In view of the dire financial position of the A at the time of the settlement (1/2) it should be reasonably possible to prove that immediately after such disposition the debtor's liabilities exceeded the value of his assets (that is, the value at date of the disposition). (1/2)

**Assume that the trustee has firm grounds to impeach the payment of R100,000 to C. Indicate if C will have any statutory defence to raise in such circumstances and also indicate the elements of the defence. (2)**

**Answer**

Payment was done in ordinary course of business (1) and not with intent to benefit C. (1)

**Question 1.3**

**Briefly indicate whether the *actio Pauliana* will be an appropriate action to institute against B and / or C in view of the facts as set out above. (5)**

**Answer**

Against B since: A alienated property (1); to which B was not entitled in terms of prior agreement (settlement of debt) (1); must prove that B had intent (1) and that creditors were defrauded (put out of pocket). (1) Against C as rule, no, because he was entitled to payment. (1)

**Question 1.4**

**It now turns out that A, B and C co-operated in the sale of the car to B with a view to settling the debt with C. (The three of them are in fact friends.) Advise the trustee as to her remedy in relation to the sale of the car and the settlement of the debt with C. (4)**

**Answer**

Collusion; (1) disposed of assets; (1) active co-operation between parties (1) to prejudice creditors. (1)

**Question 2 (10)**

A is a trader in second-hand motor vehicles. She runs her business on a sole proprietor basis. The business used to be quite profitable but due to the downturn in the economy she battles to keep the sales up and decides to take early retirement in spite of the fact that she has a number of outstanding debts. She advertises the business for sale and B offers her R2 million for the business. She accepts his offer and transfers the business to him. However, her estate is sequestrated upon application by one of her trade creditors three months after she has transferred the business to B. It now turns out that due to an oversight by her attorney, the notice regarding the transfer of the business did not take place within the prescribed time period. The trustee now claims the business from B.

**Question 2.1**

Advise the trustee of B as to his legal position under the circumstances. (5)

**Answer**

Since the business was transferred without notice (1) and the estate sequestrated (1) within six months after transfer (1), transfer is void (1). Trustee may treat as unexecuted contract (1).

**Question 2.2**

For the purposes of this question, accept that A owed R500,000 to one of her trade creditors, C. C was also one of her friends when he made the loan to her on 15 January 2020. Two months prior to her sequestration she agreed to register a mortgage bond to secure the loan over her seaside property in the Western Cape. C started to pressurise her to get the mortgage bond registered in the deeds registry when he sensed that A may experience cash flow problems. In the end, the documentation to register the mortgage bond was lodged at the deeds office on 1 October 2021 and it was registered three weeks after it was so lodged for registration, on 21 October 2021. Unfortunately, A's estate was sequestrated three months after the bond was lodged for registration. Advise the trustee as to the legal position of B in relation to the registered mortgage bond as well as to his claim against A's estate. (5)

**Answer**

Where the bond is registered but the debt arose more than two months (1) prior to date of lodging the mortgage bond at the deeds office for registration (1) and the estate of the debtor is sequestrated within six months (1) calculated from date of lodgement, (1) the bond will not provide security. (1)



**CHAPTER 13 - EFFECT OF SEQUESTRATION ON UNCOMPLETED CONTRACTS****Self-Assessment Exercise 1**

Study the basic principles dealt with in this chapter.

**Question 1**

**What is the general rule regarding the treatment of uncompleted contracts after sequestration of one of the parties to the contract? (3)**

**Answer**

The contract survives sequestration in principle (1) but the trustee has the right to elect whether to abide by it (1) or to repudiate it. (1)

**Question 2**

**What is the general effect of repudiation by the trustee of an uncompleted contract? (5)**

**Answer**

The solvent party to the contract may accept it, (1) cancel the contract, (1) reclaim property delivered (1) (if still the owner) (1) and claim damages. (1)

**Question 3**

**What statutory duty must the seller of goods, sold on a cash basis, comply with in order to reclaim such goods if the purchaser did not pay the purchase price at delivery? (2)**

**Answer**

Section 36 of the Insolvency Act obliges the seller to reclaim such goods within 10 days from delivery (1) in order to retain ownership. (1)

**Question 4**

**What is the legal position concerning the ownership of goods sold and delivered by means of an instalment sales agreement in terms of the National Credit Act on sequestration of the estate of the purchaser (the consumer)? (4)**

**Answer**

Although ownership is usually reserved until payment of the last instalment by the purchaser, (1) section 84(1) of the Insolvency Act grants the seller / credit provider a hypothec over the thing sold / financed (1) and the implication of this is that the seller / credit provider loses his / her / its ownership in the thing sold (1) but acquires a real right of security instead. (1)

**Question 5**

**Under what circumstances will the purchaser of land on instalments be entitled to claim transfer of the land where the seller has been sequestered or liquidated? (4)**

**Answer**

The purchaser will be able to rely on the right to claim ownership if the land sold is intended for residential purposes (1), registrable (1) and the instalments are to be paid for a year or longer (1) on condition that the purchaser meet the statutory obligations to pay certain prescribed amounts. (1)

**Question 6**

**How does the Alienation of Land Act of 1981 purport to protect the purchaser of unregistered land in the case of sequestration or liquidation of the seller? (2)**

**Answer**

The seller may as a rule not accept any of the purchase price (1) except where the repayment of such amounts are guaranteed as per section 26 of the Alienation of Land Act. (1)

**Question 7**

**What is the legal position of a lessee who rents an apartment for three years in the case of sequestration of the estate of the lessor ? (2)**

**Answer**

In principle the contract of lease may continue (1) and where the *huur gaat voor koop* rule applies, the apartment must be sold subject to the lease. (1)

**Question 8**

**May the trustee or liquidator continue with a contract of lease entered into between the lessor and the now insolvent lessee after the sequestration of the lessee's estate? (3)**

**Answer**

Yes, the liquidator may do so (1) since the liquidator has a discretion in terms of section 37 of the Insolvency Act (1) to either continue with it, or to terminate it (1).

**Question 9**

**Explain the general rule pertaining to the effect of the sequestration or liquidation of the employer on contracts of employment with his or her employees? (3)**

**Answer**

Contracts of employment are suspended on commencement of sequestration / liquidation (1), meaning that the employees do not have to tender their services (1) but the contracts can ultimately be terminated by the trustee / liquidator or in terms of the statutory provision (section 38 of the Insolvency Act). (1)

**Question 10**

**What type of claims will the employees have against the insolvent estate of their employer regarding salaries in arrears? (2)**

**Answer**

Up to R12,000 they have a statutory preferential claim (1) and for the balance (if any) a concurrent claim. (1)

**Self-Assessment Exercise 2****Question 1**

On 1 May 2021 Alex agrees to sell his motor vehicle to his neighbour, Bernd, for an amount of R150,000. Bernd does not have all the cash available, and promises to pay Alex the full purchase price on 5 June 2021 when he expected to have received a performance bonus for his employer. Alex agrees, delivers the vehicle to Bernd and hands Bernd the keys of the motor vehicle. (These were the full terms of the agreement.)

**Question 1.1**

Before Bernd can make any payment to Alex, his (Bernd's) estate is sequestrated by an urgent court order of the High Court. (Alex was totally unaware of this application, the application being issued on 3 May 2021.) Advise Alex regarding this transaction in view of the intervening sequestration of Bernd's estate. (5)

**Answer**

The sale referred to was a credit sale of movable property (1) but since the transaction is not an instalment agreement in terms of the National Credit Act, section 84 of the Insolvency Act does not apply. (1) The transaction is therefore a normal credit sale in terms of the common law. (1) In terms of a credit sale ownership of the property passes to the purchaser upon delivery and the vehicle therefore belongs to Bernd's insolvent estate. (1) Alex merely has a concurrent claim for the outstanding purchase price owing to him. (1)

**Question 1.2**

**How would your answer to the previous question have differed if the motor vehicle had been sold to Bernd under an instalment agreement in terms of the National Credit Act? (4)**

**Answer**

If the property had been sold to Bernd under an instalment agreement in terms of the National Credit Act, then section 84 of the Insolvency Act would find application. (1) Section 84 provides that where the purchaser under an instalment agreement in terms of the National Credit Act is sequestrated, then the seller obtains a hypothec over the property (1) securing the outstanding purchase price owing in terms of the transaction. (1) The seller would therefore be treated as a secured creditor, becoming entitled to the proceeds of the motor vehicle for the preferential payment of his claim. (1)

**Question 2**

**Alain Ahmed signs a contract of sale for the purchase of an immovable property in Cape Town for R750,000,00 - the full purchase price to be secured by a mortgage bond against registration in the Deeds Registry. However, before the transaction could be registered in the Deeds Registry, Alain's estate is sequestrated by an order of the High Court. Discuss the position of the seller and the trustee in respect of this transaction. (6)**

**Answer**

In accordance with the general rule relating to uncompleted contracts in insolvency, the trustee will retain a right to elect as to whether or not he should continue with sale or not. (1) If the trustee elects to continue with the sale, transfer must be given against registration of the bond for the purchase price. (1) If the trustee elects not to continue with the sale, it will amount to a breach of contract and the seller will have the normal remedies for breach of contract (excluding the right to claim specific performance), (1) In which case any claim by the seller against the estate will be concurrent. (1) The seller is entitled to request the trustee in writing to exercise his election within a reasonable period of time in terms of section 35 of the Insolvency Act. (1) Where the trustee fails to exercise this right within a period of six weeks, the seller can bring an application to court asking for the cancellation of the contract. (1)

**Question 3****Question 3.1**

Your client, Mrs Ndlovu, bought a vacant stand from her uncle, Mr Sithole, by way of a written instalment sale agreement. The stand is situated in a small village in the Drakensberg. The uncle had a 4-hectare property in the Drakensberg which he informally "divided" into four portions of one hectare each, and sold it to his two cousins and two nieces. Mrs Ndlovu, one of the nieces, bought one of these "sub-divided" stands and she has been paying the purchase price by way of three-monthly instalments of R5,000 every third month. (The total price for the stand is R50,000.)

Mrs Ndlovu also bought a house from Mr Sithole on a similar instalment-based agreement, and the property is registered in Mr Sithole's name. She paid the purchase price in monthly instalments of R5,000 per month. (The total purchase price for the house was R150, 000. Currently she still owes Mr Sithole R50,000 and she now wants to claim registration although the contract states that she is only entitled to registration after she has paid the full purchase price.)

**Advise Mrs Ndlovu as to her prospects in recovering her instalments already paid over to Mr Sithole, or claiming ownership of the stand and the house respectively, in the event of the estate of Mr Sithole being sequestrated. (10)**

**Answer**

This stand is not registrable yet, since it was only "informally" subdivided. (1) The sale amounts to the sale of unregistered immovable property (1) and Mr Sithole was not supposed to have taken any portion of the purchase price (1) before it became registrable land (1) - unless he could provide Mrs Ndlovu with a guarantee (1) that the payments made would be refundable should his estate be sequestrated. (1)

The house is registrable and sold for residential purposes by means of an instalment sale agreement for longer than a year. (1) In principle the protection of the Alienation of Land Act in sections 18 to 22 would apply (1), allowing Ms Ndlovu to claim transfer under the circumstances (1) if she makes the required payments of costs of registration etc as prescribed by the Alienation of Land Act. (1)

**Question 3.2**

Mr Andrews sold a stand with a hotel on it, including all movable assets such as furniture, to Ms Bass. In terms of the contract of sale Ms Bass had to pay a R500,000 deposit immediately on signing the contract and registered a mortgage bond over the immovable property to secure the payment of the balance of the purchase price. Since they were good friends, Mr Andrews transferred the property to Ms Bass before the mortgage bond had been registered. Shortly thereafter, Ms Bass's estate was placed under sequestration. Explain the legal position to the trustee. (3)

**Answer**

Since the property was transferred in the name of the insolvent, Ms Bass, it will now vest in her insolvent estate, (1) leaving the seller, Mr Andrews, with a concurrent claim for the balance of the purchase price (1) since the mortgage bond has not been registered yet. (1)

**Question 4****Question 4.1**

On 4 January 2021 Joe lets his farm to Jane for a period of 10 years at an annual rental of R120,000. Jane occupies the land immediately and the lease is registered in the Deeds Office. However, on 12 July 2020 a mortgage bond was registered over the property in favour of the B Bank. Discuss the legal position if the estate of Joe is sequestrated on 1 October 2021. (13)

**Answer**

The Insolvency Act does not contain any provision with regard to the effect of the sequestration of the lessor's estate on the contract of lease. (1) The general common law principles therefore apply to this situation. (1)

The lease between Joe and Jane is not automatically terminated as a result of the sequestration of Joe's estate. (1) Jane retains her rights and must perform her contractual obligations in terms of the lease towards the trustee of Joe's estate. (1)

The trustee is obliged to sell the farm as part of the insolvent estate. (1) The *huur gaat voor koop* doctrine is applicable in the present case since Jane occupies the land and the lease is registered in the Deeds Office (1) and the trustee of X's estate must in principle sell the land subject to the lease. (1) The new owner is bound by the terms of the lease, and he or she is in particular bound to allow B to the use and enjoyment of the land. (1)

In this instance, however, the leased land is subject to a mortgage bond which was registered before the lease was entered into between Joe and Jane. The rights of Jane are therefore subordinate to those of the B Bank. (1) If the land is sold free of the lease (1) where it cannot yield sufficient capital to repay the mortgage bond subject to the lease (1), the lease terminates (1) and the lessee merely has a concurrent claim for damages for breach of contract against the insolvent estate. (1)

#### **Question 4.2**

**Accept for the purposes of this question that the estate of Jane was sequestrated. Advise the trustee if the termination of the contract of lease is possible. (2)**

#### **Answer**

The trustee may, in terms of section 37 of the Insolvency Act, give a notice of termination (1) to the lessor within three months of his or her appointment. (1)

#### **Question 5**

**Aircraft Spares (Pty) Ltd, a company that manufactures spare parts for small aircraft, is placed in liquidation by an order of the High Court on 3 June 2021. One of the company's employees, Benny Bosielo, approaches you for advice on the effect that the liquidation of the company will have on his contract of employment. Benny has not been paid since the end of April 2021, his salary being an amount of R10,000 per month. In addition, he has R3,500 leave pay owing to him. Advise Benny regarding the following questions directed at you:**

#### **Question 5.1**

**What effect will the liquidation of the company have on Benny's contract of employment? (5)**

#### **Answer**

The effect will be that:

- The contract of employment will be suspended; (1)
- Benny will not be required to work during the period of suspension, but he will also not be remunerated; (1)
- Benny will be entitled to unemployment benefits during the period of suspension in terms of the Unemployment Insurance Act; (1)
- Benny's contract of employment may be terminated if the liquidator consults with employee representatives on measures to save the business or part thereof; (1)
- If no agreement is reached on continued employment, Benny's contract may be terminated 45 days after the appointment of a final liquidator. (1)

**Question 5.2**

**What amounts will Benny be able to claim from the estate in terms of salary and leave pay if his contract is not terminated? He also wants to know what the nature of these claims will be. (8)**

**Answer**

The various claims will be as follows:

Benny will be able to recover a maximum of 3 months' unpaid salary, (1) subject to a maximum amount of R12,000. (1) This claim is a statutory preferent claim in terms of section 98A of the Insolvency Act. (1)

The balance of Benny's unpaid salary will be a concurrent claim. (1)

Benny can recover the unpaid leave pay owing to him, (1) subject to a maximum of R4,000. (1) The claim is a statutory preferent claim in terms of section 98A of the Insolvency Act. (1) The balance of Benny's unpaid leave will be a concurrent claim (1)

**Question 5.3**

**If his contract of employment is terminated, what additional amounts, if any, will he be able to recover from the estate? (2)**

**Answer**

The following amounts are claimable:

In terms of section 38 read with section 98A of the Insolvency Act, Benny will become entitled to severance benefits should his contract of employment be terminated by the liquidator. (1) Benny will also become entitled to an unliquidated concurrent claim for damages due to the early termination of his contract. (1)



**PART D - ADMINISTRATION**
**CHAPTER 14 - PROVISIONAL TRUSTEE AND LIQUIDATOR**
**Self-Assessment Questions**
**Question 1**

**“It would be fair to state that the appointment of insolvency practitioners in insolvent estates in South Africa is a controversial subject to deal with..”**

**Assume that you have been appointed to investigate the possible amendment of the manner in which practitioners have been appointed. Briefly set out what your findings would be. (In your answer you should also refer to the current legislative provisions; recent legal developments in this field as well as all relevant case law). [15]**

**Answer**

- Mention sections in Act;
- Refer to amendment of the recent policy;
- Discuss briefly the procedure of appointing a liquidator;
- Also see *Standard Bank v The Master of the High Court* 2010 (4) SA 405 (SCA) at para 1 in which the SCA held that liquidators occupy a position of trust towards creditors and companies in liquidation, that they are required to be independent and to regard equally the interests of all creditors, and are expected to carry out their duties without fear, favour or prejudice. Although this decision dealt with the office of liquidator, the same principles apply in relation to trustees of insolvent estates;
- Also important - *The South African Restructuring and Insolvency Practitioners Association v The Minister of Justice and Constitutional Development* (4314/2014) [214] WCC (13 January 2015) declared the policy unconstitutional;
- Discussion of the SCA judgment *Minister of Justice and Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* (693/15) [2016] ZASCA 196; Court found that remedial measures may not display “naked preference”;
- The judges held that the implementation of a racial quota system is one such form of “naked preference”;
- SCA found there was no flexibility in the policy ruling the appointment of insolvency practitioners. Such rigidity is frowned upon and runs contrary to s 9(2) of the Constitution. The Constitutional Court has already prohibited such rigidity;
- SCA also found that, in its current format, the appointment policy could result in a person who is unsuitable and unqualified for such an appointment being appointed as liquidator.
- Discuss CC case
- Include your own suggestions as conclusion

**Question 2**

**In terms of section 55 of the Insolvency Act, the Act declares when a person is disqualified from being appointed as a trustee. Critically discuss the purpose of this provision as well as mention and explain four such disqualifications. [8]**

**Answer**

Mention four (4) disqualifications.

Purpose: to protect the integrity of process as well as the independency of individual appointed.

Explain and discuss the content of the specific provision.

**Question 3**

**Critically discuss the power of the Master of the High Court to remove a trustee or liquidator from office. [8]**

**Answer**

The Master may remove a trustee from office in the following circumstances:

- the trustee or liquidator was not qualified for appointment;
- become disqualified from appointment;
- acted on authority of a power of attorney to vote on behalf of a creditor;
- has failed to perform satisfactorily any duty imposed upon him by the Act;
- comply with a lawful demand of the Master;
- opinion of the Master the trustee or liquidator is no longer suitable to be the trustee of the estate concerned;
- Also discuss *Motala v Master of the North Gauteng High Court* 2019 (6) SA 68 (SCA) (17 May 2019).

**CHAPTER 15 - APPOINTMENT AND POWERS OF FINAL TRUSTEE****Self-Assessment Question****Question 1**

**Mention four powers a trustee may not exercise without the consent of the Master. (4)**

**Answer**

You could mention any four of the following:

- the entering of a caveat in the Deeds Office;
- application to set aside directions by creditors;
- resignation or absence from the Republic for a period longer than 60 days;
- payment of an allowance to the insolvent and the family of the insolvent before the second meeting;
- the sale of property before the second meeting; and
- the destruction of documents.

**CHAPTER 16 - POWERS OF FINAL LIQUIDATOR****Self-Assessment Question****Question 1**

In terms of section 387(4) "any person aggrieved by any act or decision of the liquidator may apply to the court after notice to the liquidator and thereupon the court may make such order as it thinks just". What factors do you consider might influence the willingness of the court to remove the trustee from office? (6)

**Answer**

The words "the court may make such order as it thinks just" in section 387(4), give the courts an unfettered judicial discretion. In the absence of fraud or a failure to act in good faith, the court will not interfere in the day-to-day administration of the company's estate unless the liquidator has acted in a way in which no reasonable liquidator would have acted, or it is shown that the liquidator, though acting in good faith, did "something so utterly unreasonable and absurd that no reasonable man would have done it". The test is an objective one, the question being how a reasonable liquidator would have acted in the circumstances prevailing at the time.

**CHAPTER 17 - GENERAL DUTIES OF TRUSTEE OR LIQUIDATOR****Self-Assessment Questions****Question 1**

**Write a brief note on the purpose of a search warrant in terms of section 69 of the Insolvency Act. (5)**

**Answer**

The trustee or provisional trustee, who has reason to believe that any movable property, book or document belonging to the estate is being concealed or otherwise unlawfully withheld, may apply in terms of section 69 for a search warrant to a magistrate with jurisdiction. The purpose of this provision is to enable the trustee to obtain the speedy possession of goods which the trustee believes on reasonable grounds to be assets of the estate.

**Question 2**

**Critically discuss whether it is legal for a trustee to pay creditors by electronic fund transfer (EFT). (6)**

**Answer**

Critically discuss: see sections 70 and 394 - do not make provision for EFT? Give your own opinion on practicality and legality of the abovementioned statement. The Chief Master has issued a directive which contains the following:

Payment by an Estate Representative (defined to include a trustee and a liquidator) other than by cheque (for instance EFT), is accepted subject to the following:

- The Estate Representative is responsible for ensuring that all payments made are lawful;
- Every payment must contain the name of the payee, the cause of payment and other requirements specific to that payment, for example the reference number and the name of the Master's Office in respect of Masters Fees;
- Payments may only be made to a bank account designated by the payee;
- An affidavit contemplated by section 35(12) of the Administration of Estates Act 1965 by the Estate Representative, in which he or she declares that a creditor was paid or that an heir received his share, may be accepted by the Master in lieu of a receipt by the beneficiary;
- Discuss the legality of this directive.

**Question 3**

**On 1 August 2020 J Smith receives a letter of appointment as provisional trustee in the estate of Goodmeat Butchery. He realises that he urgently needs to sell the meat as it might get spoiled if not sold within the next few days. Discuss the procedure the provisional trustee must follow to sell the property of the estate. (5)**

**Answer**

A provisional trustee may not without the authority of the Master sell property of the estate.

The Master may at any time before the second meeting of creditors authorise the sale of property on such conditions and in such manner as the Master may direct.

If the Master is approached, section 18(3) must be read with section 80*bis* and if the Court is approached in terms of section 18(3) for the sale of property of the insolvent estate, "such sale shall furthermore be after such notices and subject to such conditions as the Master may direct."

**CHAPTER 18 - MEETINGS****Self-Assessment Questions****Question 1**

**For various reasons, the second meeting of creditors is probably the most important meeting to be held in an insolvent estate. Give a detailed exposition of the following aspects of the second meeting:**

- **Explain who convenes the second meeting as well as how it is convened. (3)**
- **Explain what documents must be provided to creditors on the one hand, and the presiding officer on the other, before a second meeting can validly take place. (5)**

**Answer**

Section 40(3)(a) states that the Master shall appoint a second meeting. However, in practice the trustee convenes the meeting. The meeting is convened by notice in the Government Gazette and a notice published simultaneously in an English and Afrikaans newspaper.

In terms of S81(1)*bis* the trustee must at least 14 days before the date advertised send a copy of the following documents by registered post to each creditor known to the trustee:

- His report;
- Report and inventory submitted by the sheriff;
- Valuation in terms of S69;
- Resolutions and directions;
- 24 hours before time advertised the trustee must submit to the presiding officer an affidavit with names and addresses of creditors to whom copies have been sent.

**Question 2**

**At the first meeting of creditors Credit Bank proves the only claim against the insolvent estate and votes for the appointment of J Smith as final trustee. The Master declines to appoint J Smith as trustee and appoints D Beckham with immediate effect. What advice would you give to Credit Bank with regard to the conduct of the Master? (8)**

**Answer**

If the Master declines to appoint the elected person trustee for one of the above reasons, the Master must give the person notice in writing of the Master's refusal and the reason therefore. If the reason is that the Master is of the opinion that the person should not be appointed, the Master need not, in terms of section 57(1), give further particulars.

There is a special procedure for persons aggrieved by the appointment of a trustee by the Master, or the Master's refusal to appoint a person as trustee, to appeal to the Minister of Justice and provision is made for a further meeting to elect a trustee. This procedure does not apply to appointments outside the nomination process at meetings, such as provisional appointments or joint appointments by the Master in the exercise of his discretion. No new claims can be submitted for proof at this meeting.

### Question 3

**Jason Smith has been appointed as the final trustee of an insolvent estate. He urgently needs to sell the assets in the insolvent estate, claiming that the sale cannot wait until he receives instructions from the creditors at the second meeting. Explain to Jason the steps he needs to take in order to sell the assets prior to the second meeting of creditors. Support your answer by referring to the necessary statutory provisions. (4)**

### Answer

Jason cannot sell the assets without the prior permission of the Master.

An application to sell the assets must be made to the Master in terms of section 80*bis* of the Insolvency Act.

If the property is subject to the rights of a secured creditor, permission by such creditor to sell the property must accompany the application.

If the Master grants permission to sell the property, he may lay down conditions in connection with the sale and determine the manner in which the sale must take place.



**CHAPTER 19 - PROOF OF CLAIMS****Self-Assessment Questions****Question 1**

**Study the basic aspects of the proof of claims in an insolvent estate. You are required to write a brief essay on the process on how to lodge a claim and explain the difficulties in attempting to do so during the COVID-19 pandemic and include some law reform proposals on how to make the system more efficient. (10)**

**Answer**

Discuss the form for proof of claims; discuss section 44 of the Insolvency Act. Discuss and provide your own opinion as to challenges during COVID, eg Master's office closed etc. Include recommendations.

**Question 2**

**Briefly explain the legal concept of a "liquidated claim". (3)**

**Answer**

A liquidated claim is a claim for an amount that is determined or certain, whether the determination is the result of an agreement, a judgment of a court or otherwise.

**Question 3**

**Briefly state what the outcome would be if a secured creditor (other than a secured creditor upon whose request the estate was sequestrated) states in his affidavit in support of his claim that he relies solely on the proceeds of his claim for satisfaction of his claim. (5)**

**Answer**

The creditor is usually not liable for a contribution towards the costs of sequestration payable out of the free residue. A secured creditor who relies solely on his security is not entitled to a concurrent claim. Once the creditor has made his election he is not entitled to change his mind.

**Question 4**

**In terms of section 45(3) of the Insolvency Act a trustee can dispute a claim after it has been proved. Briefly discuss such mentioned legal proceedings. (4)**

**Answer**

If the trustee disputes a claim he must report it to the Master stating the reasons. The trustee must furnish the creditor with a copy of the reasons and notify the creditor that he or she has 14 days, or such longer period allowed by the Master, to furnish reasons why the claim should not be disallowed or reduced. The trustee must certify that he has complied with this requirement and the creditor must furnish the trustee or liquidator with a copy of documents submitted to the Master. The trustee must then submit his remarks on the reasons submitted by the creditor to the Master.

## CHAPTER 20 - INTERROGATIONS

### Self-Assessment Questions

#### Question 1

You have just been appointed as the provisional Insolvency Practitioner in Fairmax (Pty) Ltd (In Liquidation). Creditors are phoning you every five minutes with information that suggests that the assets of the insolvent estate have been moved to another entity shortly before liquidation. Advise the creditors on the two types of enquiries available and the pros and cons they each attract.

#### Answer

1. The first type of enquiry available to investigate the alleged transfer of assets is the public enquiry that can be held at a postponed meeting of creditors.
2. The first meeting of creditors is not the best choice as the final appointment of the Insolvency Practitioner is made once the first meeting of creditors is closed.
3. This leaves the second / general meeting of creditors which is the best option.
4. The Presiding Officer at a postponed meeting of creditors is either a Magistrate or an Assistant Master; no cost for the venue or the Presiding Officer.
5. The disadvantage of waiting to hold an enquiry at a postponed meeting of creditors is the period; six months may pass before the witnesses are interrogated.
6. If the assets have been secured and there is no concern that assets will be dissipated, then the delay will be of no consequence.
7. A further disadvantage is the fact that witnesses may sit in and listen to one another's evidence in a public enquiry.
8. The other alternative is a confidential enquiry; an application may be brought to the Master of the High Court or the High Court for an order convening a commission of enquiry and the appointment of a commissioner.
9. High risk assets - money / bitcoin - can be dealt with swiftly after the provisional order has been granted.
10. The disadvantage is the additional fee for the commissioner.

#### Question 2

Give a short summary of the clauses of the Constitution that were attacked in *Bernstein v Bester*.

#### Answer

1. The right to freedom and security of a person (Section 11(1)).
2. The general right to personal privacy (Section 13).

3. The aspect of the right to personal privacy not to be subject to seizure of private possessions or the violation of private communications.
4. The mechanism violates Section 24 in that it permits an administrative interrogation.
5. An implied constitutional right to fairness in civil litigation.
6. The guarantee of equality in terms of Section 8.

**CHAPTER 21 - SECURED CREDITORS****Self-Assessment Questions****Question 1**

**Explain the difference between secured, statutory preferent and concurrent creditors.**

**Answer**

A secured creditor is a creditor who holds a recognised security right in an asset of the estate. A statutory preferent creditor is a creditor who does not hold a security right in a specific asset but who is granted a special preference in the distribution of the free residue, that is, before concurrent creditors are paid. A concurrent creditor is a creditor with no security right or special statutory preference.

**Question 2**

**What is the difference between special and general notarial bonds? Also explain how they are dealt with in terms of the Insolvency Act.**

**Answer**

A special notarial bond covers a specific asset or assets, while a general notarial bond covers all of the debtor's movable property in general. According to the definition of "security", the holder of a special notarial bond will be a secured creditor provided that the bond complies with the Security by Means of Movable Property Act 1993 or the Notarial Bond (Natal) Act 1932. The holder of a general bond is not a secured creditor, unless the bond has been perfected, in which case the creditor will have a pledge. The holder of an unperfected general bond, however, is a statutory preferent creditor.

**Question 3**

**What are the requirements that a special notarial bond must comply with in order for the bondholder to be a secured creditor upon the debtor's insolvency?**

**Answer**

According to the Security by Means of Movable Property Act 1993, the bond must be registered in terms of the Deeds Registries Act, it must cover corporeal movable property, and the property must be specified and described in a way that makes it readily recognisable.

**Question 4**

**What is the difference between a mortgage bond and a notarial bond?**

**Answer**

A mortgage bond is used to create a security right in immovable property, while a notarial bond is used for movable property.

**Question 5**

**What does it mean when a creditor relies on his security?**

**Answer**

If a secured creditor relies on its security, it means that, should there be a shortfall when the proceeds of the security is distributed, the secured creditor will not have a concurrent claim for the shortfall. In effect, the shortfall (the part of the claim not paid from the security) is forfeited.

**Question 6**

**How is interest payable on secured claims treated in insolvency law?**

**Answer**

Section 89(3) of the Insolvency Act provides that interest due on a secured claim in respect of any period not exceeding two years immediately preceding the date of sequestration is likewise secured as if it were part of the capital sum. Interest for a period for more than two years before sequestration is not secured (but is still claimable as a concurrent claim). Section 95(1) of the Insolvency Act provides that the proceeds of a security, after deduction of the costs mentioned in section 89(1), must be applied in satisfying the claims secured by the property in their order of preference with interest thereon from the date of sequestration to the date of payment. The interest payable on a secured claim after the date of sequestration, as provided for in section 103(2) read with section 95(1), is simple interest and not compound interest. In terms of section 103(2) the rate of interest is 8% or a higher rate of interest by virtue of a lawful stipulation in writing.

**Question 7**

**Regarding each of the following statements, indicate whether or not it is true reflection of the legal position. If it is correct, briefly explain the relevant legal principle or rule. If it is incorrect, briefly explain why it is incorrect and indicate what the correct position is.**

**7.1 M did work on a motor vehicle belonging to A. Two weeks have passed since A collected his vehicle from M, but A has still not paid M for the work done. M is a secured creditor because he has a right of retention over the vehicle.**

**Answer**

The statement is false. M does not have a right of retention anymore because he is no longer in possession of the property. Possession is a requirement of the existence of a right of retention.

**7.2 Kate borrowed R1 million from John. As security, Kate pledged her farm to John by giving John possession of the farm. The agreement is that, after Kate has repaid the R1 million, she will be able to re-occupy the farm. Therefore, John is a secured creditor.**

**Answer**

John is not a secured creditor. The only way to create a security right in immovable property is through the registration of a mortgage bond. Pledging the land to the creditor by giving the creditor possession, does not create an effective security right.

**7.3 Mary rents an apartment from Philip. Mary's estate was sequestrated and therefore Philip claims to have a hypothec over Mary's movable property present in the apartment. However, because the hypothec has not yet been perfected (for example, through attachment or an interdict), Philip will not be a secured creditor under the Insolvency Act.**

**Answer**

Philip is a secured creditor even though the hypothec was not perfected prior to insolvency. In non-insolvency law, perfection of the hypothec is required for the landlord to have a security right enforceable against third parties. However, this is not necessary in the case of insolvency. All movables present on the leased premises on the date of sequestration will automatically form part of the landlord's security under the hypothec.

**7.4 Paul is the holder of a general notarial bond over all the movable property belonging to Jessica. Due to this, Paul will be a secured creditor in the event that Jessica's estate is sequestrated.**

**Answer**

Paul is not a secured creditor merely by virtue of holding a registered general notarial bond. Only if the bond had been perfected prior to sequestration, would he have been a secured creditor (as pledgee). If not, he is only a statutory preferent creditor.

**7.5 Tonya has a secured claim of R20,000 against the insolvent estate of John. However, because the encumbered property is sold for only R15,000, Tonya will only receive R15,000 and will lose the remaining R5,000.**

**Answer**

Tonya will not necessarily lose the shortfall of R5,000. She will have a concurrent claim for this amount, and thus will likely lose a large portion of it due to only receiving a dividend from the free residue. However, if she had relied on her security, she would effectively would have given up the claim for the R5,000.

**7.6 Jay concluded an instalment agreement with MM Motors, in terms of which MM Motors will remain owner of the purchased motorcycle until Jay has paid the final instalment. Jay's estate was sequestrated before payment of the final instalment. Because the motorcycle still belongs to MM Motors, the motorcycle does not form part of Jay's insolvent estate.**

**Answer**

The statement is false. Under section 84 of the Insolvency Act, in the case of an instalment agreement (assuming it complies with the relevant definition in the National Credit Act), the creditor's ownership of the property will automatically pass to the estate. In return, the creditor is granted a hypothec as security for the remaining purchase price.

**7.7 Benny took out a home loan and registered a mortgage bond over his house in favour of ABC Bank who gave him the loan. Therefore, until Benny has repaid the loan in full, ABC Bank will be the owner of the house.**

**Answer**

The statement is false. The registration of a mortgage bond does not make the creditor the owner of the property in South African law. The creditor merely has a limited real right (security right) in the property until the debt is repaid and the bond cancelled.

**7.8 X Bank holds a special notarial bond (which complies with Act 57 of 1993) over a motor vehicle. The vehicle is currently in the possession of a mechanic who did work on it in terms of a contract with John (the owner). John's estate has been sequestrated. The trustee sells the vehicle and decides to pay X Bank first and thereafter to pay the surplus to the mechanic.**



**Answer**

The statement is correct. There are two security rights over the property: the special notarial bond and the right of retention. Since, the right of retention in this case is a debtor-creditor lien, the creditor technically only has a personal right. Therefore, the special bondholder is paid first, after which the lienholder is paid. Note that, if this had been an enrichment lien, the lienholder would have had a real right and thus would have been paid before the special bondholder.

**7.9 Megan's estate has been sequestrated. As part of the process, the trustee has sold Megan's land for R1,000,000. The trustee paid the estate agent a commission of R50,000. He also paid R10,000 to Peter who painted the house to get it in a good condition before the sale. Furthermore, he paid Jeff R12,000 for his services as security guard, since he guarded the house for the two weeks before the sale to protect it against vandals. The local authority also claims R70,000 for outstanding rates and taxes for the previous three years. The trustee therefore decides to pay R70,000 to the local authority and R50,000 to the estate agent. He subtracts these amounts from the R1,000,000 and pays the surplus to ABC Bank who holds a mortgage bond over the land. The trustee decides to treat the amounts owing to Peter and Jeff as concurrent claims.**

**Answer**

There are a number of problems with the way that the trustee treated the different claims: Firstly, the municipality is only entitled to outstanding taxes for two years prior to sequestration as part of the costs of realising the property, so it should not receive the full R70,000. Secondly, the claims of Peter and Jeff must also form part of the costs of realising the property and therefore their claims are not concurrent claims but must be paid before anything is paid to the bank.

**Question 8**

**Jessy is in possession of jewellery that was pledged to her by Cady as security for a loan Jessy made to Cady. Before the loan could be repaid and while Jessy was still in possession of the jewellery, Cady's estate was sequestrated. Jessy therefore decides to sell the jewellery as a way to settle the debt owed to her. However, while she is still waiting for a buyer to come forward, the trustee of Cady's estate demands that the jewellery should be handed over to him so that it can be sold as part of the estate. Jessy fears that she will lose her right of security if she hands over the jewellery to the trustee and, therefore, she rather wants to sell it herself or simply keep it as payment of the debt. Advise her about the legal position.**

**Answer**

The realisation of movable assets is regulated by section 83 of the Insolvency Act. Firstly, the Jessy (as creditor) may sell the jewellery, but it must be by public auction and after affording the trustee a reasonable opportunity to inspect it and after giving such notice of the time and place of the sale as the trustee directed. If Jessy realises the jewellery in this manner, she cannot just keep the proceeds but must forthwith pay the net proceeds to the trustee or the Master. Also, as soon as possible after the realisation, Jessy must prove a claim, attaching a statement of the proceeds of the realisation to his claim.

If Jessy does not realise the jewellery before the commencement of the second meeting of creditors, she must as soon as possible thereafter deliver the property to the trustee. If she does not do so after a demand by the trustee, the Master may direct the sheriff to attach the jewellery and deliver it to the trustee. It is an offence if a person fails to deliver property that belongs to the estate to, or place it at the disposal of, the trustee.

Jessy will not lose her security if she hands over the jewellery to the trustee. As pledgee, she is a secured creditor and will be paid accordingly from the proceeds.

**CHAPTER 22 - APPLICATION AND DISTRIBUTION OF THE FREE RESIDUE**
**Self-Assessment Questions**
**Question 1**

Jacob's estate has been sequestrated. You are instructed to assist the trustee by organising these expenses in the correct sequence in which they must be paid from the free residue:

- a) Income tax owing to SARS;
- b) Customs and excise payable to SARS;
- c) An amount owing to the sheriff for attaching the insolvent's property;
- d) Funeral expenses;
- e) An amount owed to the holder of a special mortgage bond;
- f) The taxed legal fees for bringing the sequestration application;
- g) A contribution payable to the employees' pension fund;
- h) A credit card bill;
- i) The trustee's remuneration;
- j) Outstanding value added tax;
- k) Repair costs with respect to an unencumbered asset;
- l) The Master's fees;
- m) An amount owed to the holder of a general notarial bond;
- n) An amount in severance pay owed to an employee.

**Answer**

- (d) - funeral expenses;
- (c) - an amount owing to the sheriff for attaching the insolvent's property;
- (l) - the Master's fees;
- (f) - the taxed legal fees for bringing the sequestration application;
- (k) - repair costs with respect to an unencumbered asset;
- (i) - the trustee's remuneration;
- (f), (k) and (i) - rank equally, after (c) and (l);
- (n) - an amount in severance pay owed to an employee;
- (j) - outstanding value added tax;
- (b) - customs and excise payable to SARS;
- (g) - a contribution payable to the employees' pension fund;
- (j), (b) and (g) - rank equally;
- (a) - income tax owing to SARS;
- (m) - an amount owed to the holder of a general notarial bond;
- (h) - a credit card bill (concurrent creditor);
- Not paid from free residue: (e) an amount owed to the holder of a special mortgage bond.

**Question 2**

**An insolvent owes outstanding wages of R40,000 each to three of his employees. To one of them, he also owes R20,000 in severance pay. How will you treat these claims in the distribution of the funds available in the free residue?**

**Answer**

Of the R40,000 owed to each employee, only R12,000 for each will enjoy a preferent status. The rest will be a concurrent claim. After R12,000 x 3 is paid from the free residue (ranking equally), the next is the severance pay, of which R12,000 is a preferent claim (the rest concurrent).

**Question 3**

**Otto is the holder of a general notarial bond as security for R100,000 owed to him by Jenny, whose estate has been sequestrated. After all secured and other statutory preferent creditors have been paid, there is R80,000 remaining that must be divided between Otto and a number of concurrent creditors. The R80,000 represents the proceeds of both movable and immovable property. R50,000 comes from immovable property and R30,000 from movable property. How will you distribute the R80,000?**

**Answer**

Otto will only receive R30,000 under his general bond preference, since the bond only grants a preference to proceeds in the free residue deriving movable property. The rest of his claim (R70,000) is a concurrent claim. Therefore, the remaining funds (R50,000) must be divided between the concurrent claims, which include the concurrent part of Otto's claim.

**CHAPTER 23 - CONTRIBUTION BY CREDITORS****Self-Assessment Questions**

In regard to each of the following scenarios, explain how the trustee should approach the contribution to the costs of sequestration payable by creditors:

**Question 1**

The estate has two creditors: a) John, who painted the insolvent's house to get it ready for sale; and b) ABC Bank, which proved a claim for an outstanding credit card bill.

**Answer**

John's claim forms part of the costs of sequestration and therefore he does not have to contribute (unless he was the petitioning creditor). ABC is a concurrent creditor and therefore must contribute.

**Question 2**

The estate has three creditors, each of which are secured creditors who relied on their security.

**Answer**

Each of the three creditors must contribute in proportion to the size of their claims.

**Question 3**

The estate has four creditors: a) a secured creditor who did not rely on its security (its claim was for R50,000 but it only received R40,000 from the proceeds of the security); and b) three concurrent creditors.

**Answer**

All four creditors will contribute, but the secured creditor only for the portion of his claim that is concurrent.

**Question 4**

The estate has three creditors: a) a secured creditor who relied on its security; b) a creditor who holds a general notarial bond; and c) an employee to whom R18,000 is owed but who did not prove a claim.

**Answer**

The general bondholder will be the sole contributor. The employee with an unproven claim does not have to contribute. The secured creditor relied on its security and thus does not have a concurrent claim. There are no other concurrent creditors liable to contribute. Therefore, the general bondholder (as statutory preferent creditor) must contribute.

**Question 5**

**The estate has five creditors: a) a secured creditor who relied on its security; b) a creditor who holds a general notarial bond; and c) three concurrent creditors.**

**Answer**

Only the three concurrent creditors must contribute. The secured creditor who relied on its security does not have to. The statutory preferent creditor also does not have to contribute because there are concurrent creditors who will have to do so.

**Question 6**

**The estate has two creditors: a) the body corporate of the sectional title in which the insolvent's house is situated. This creditor applied for the sequestration order but did not prove a claim for payment of the outstanding amount in levies owed to it and that must be paid as part of the costs of realising the sectional title unit; and b) a creditor with a mortgage bond over the abovementioned sectional title unit. This creditor relied on its security.**

**Answer**

Only the body corporate must contribute. Even though it did not prove a claim, the creditor who applied for the sequestration order will have to contribute if the only other creditor is a secured creditor that relied on its security.

**CHAPTER 24 - COMPOSITIONS****Self-Assessment Questions****Question 1**

**Briefly discuss the two forms of composition (or compromise) and list the key features of each. (10)**

**Answer**

Common law composition;  
Statutory composition in terms of the Insolvency Act, 1936;

Common law composition -

- takes place in circumstances not provided for in the Insolvency Act and is rooted in an agreement (contract) and typically requires the approval of all creditors;
- the agreement will usually provide that the insolvent will pay certain dividends on creditors' claims, on condition that the insolvent will be released from his or her debts and on the further condition that the provisional order of sequestration be discharged; and
- a common law composition binds only the creditors who have agreed to it.

Statutory composition -

- operates via statutory mechanisms, as set out in the Insolvency Act;
- the purpose of the composition contemplated in the Insolvency Act is to provide the insolvent with a special ground for rehabilitation and a release of his or her debts;
- does not depend on the participation of all the insolvent's creditors, as once the required majority of creditors have approved the composition, the dissenting minority are bound to it; and
- does not result in the discharge of the sequestration order, with the result that the insolvent remains unrehabilitated, albeit with the opportunity to apply for early rehabilitation in certain instances.

**Question 2**

**True or False: An offer of composition may not be accepted if it contains a condition whereby any creditor would obtain a benefit, as against another creditor, which benefit the creditor would not have been entitled to upon the distribution of the estate in the ordinary way. (2)**

**Answer**

True. See section 119(7) of the Insolvency Act, 1936.

**Question 3**

**Briefly discuss the binding effect of an approved composition and its impact on the claims of creditors. (3)**

**Answer**

- The effect of an approved composition extends to all concurrent creditors, without exception, and becomes binding on all such creditors, whether proved or unproved;
- A composition is therefore best described as a statutory novation that discharges the claims of the concurrent creditors whose rights must thereafter be determined by reference to the provisions of the composition itself; and
- Once the composition is accepted, the rights and duties of the insolvent and creditors are determined by the composition itself, within the framework of the Insolvency Act.



**CHAPTER 25 - REHABILITATION****Self-Assessment Questions****Question 1**

**Briefly discuss the two ways in which the rehabilitation of an insolvent natural person can occur under South African Insolvency law. (2)**

**Answer**

- Rehabilitation can occur automatically purely by the effluxion of time; or
- By order of the court pursuant to an application for rehabilitation brought prior to the expiry of the prescribed period (10 years).

**Question 2**

**True or False: The concept of automatic rehabilitation does not exist under South African Insolvency law. (2)**

**Answer**

False. "Automatic" rehabilitation is provided for in section 127A of the Insolvency Act. Any insolvent not rehabilitated by the court within a period of ten years from the date of (provisional) sequestration, is deemed to be rehabilitated after the expiry of that period unless a court upon application by an interested person orders otherwise before the expiration of the ten years.

**Question 3**

**Briefly discuss the effect of rehabilitation and its impact on an insolvent person's pre-sequestration debts. (3)**

**Answer**

- The rehabilitation of an insolvent person brings the insolvency of such person to an end;
- The sequestrated person's status as an insolvent is terminated and all the restrictions placed upon him or her are removed; and
- Rehabilitation results in the release of an insolvent person from his or her pre-sequestration debts.

**CHAPTER 26 - PARTNERSHIPS****Self-Assessment Questions****Question 1**

**Briefly discuss the way in which a partnership and its partners are treated in terms of the Insolvency Act, 1936. (2)**

**Answer**

- The Insolvency Act, for the most part, treats the estates of the partnership and its partners as separate entities;
- Accordingly, a partnership is treated as a separate entity with an estate which may be sequestrated as if it were a natural person.

**Question 2**

**True or False: The effect of the sequestration of one partner's estate is that the partnership itself will terminate, and such partnership will be wound up. (2)**

**Answer**

True. The insolvency of one of the partners of a partnership dissolves the partnership, but it does not cause the partnership estate to be sequestrated.

**Question 3**

**Briefly discuss the proof of claims in the context of an insolvent partner / partnership, with reference to the relevant provision(s) of the Insolvency Act, 1936. (2)**

**Answer**

- Section 49(1) of the Insolvency Act provides that when the estate of a partnership and the estates of the partners are under sequestration simultaneously, the creditors of the partnership must prove their claims against the estate of the partnership only, whilst the personal creditors of a partner must prove claims against the personal estate of such a partner;
- The rationale behind this is simply that partnership assets are to be applied for purposes of paying partnership debts, and the assets of an individual partner's separate estate shall be used for the payment of separate estate debts.

**CHAPTER 27 - LIQUIDATION OF COMPANIES AND CLOSE CORPORATIONS****Self-Assessment Questions****Question 1**

**Explain the differences in respect of the moment of commencement between winding-up by the court of a solvent and an insolvent company.**

**Answer**

The commencement of a winding-up by the court of a solvent company depends on the applicant and grounds on which it was commenced.

In terms of section 81(4) of the Companies Act 2008, the winding-up of a solvent company by the court begins when the court grants the winding-up order as applied for, except in three instances where it commences when the application is made to court (i.e. when the application is filed with the Registrar of the court).

The three exceptions are when the application is made -

- by the company, after a special resolution was taken by shareholders or members that the company must apply for winding-up by the court;
- by the company, to have its voluntary winding-up continued by the court; or
- by the business rescue practitioner because there is no reasonable prospect of the company being rescued.

This is not a deeming provision as discussed below in the case of an insolvent winding-up by the court, and it must be assumed that the winding-up commences immediately when the application is filed with the court.

The winding-up of an insolvent company by an order of court is in all cases deemed to commence at the time of presentation to the court of the winding-up application, in other words when the application is filed with the Registrar of the Court. However, this is a deeming provision which means that it only applies after a provisional liquidation order has been issued (section 348 of the Companies Act 1973).

**Question 2**

**ABC (Pty) Ltd was placed in business rescue by a resolution of its board. After investigation of the company's affairs, the business rescue practitioner has reached the conclusion that there is no reasonable prospect for the company to be rescued because there is no longer a market for its products, and it has a lot of debts but owns very few assets of any value. He suspects that the directors decided on business rescue to hide the fact that they have been selling company assets and misappropriating company funds for their own benefit. Should the practitioner apply to court for the liquidation of the company in terms of the Companies Act 2008 or the Companies Act 1973?**

**Answer**

Section 141(2)(a) of the Companies Act 2008 provides that if the practitioner concludes that there is no reasonable prospect for a company to be rescued, he must apply to court for an order to discontinue the business rescue and placing the company into liquidation.

Section 81(1)(b) of the Companies Act 2008 provides that the business rescue practitioner of a company may apply for the liquidation of the company in terms of section 141(2)(a) on the grounds that there is no reasonable prospect of the company being rescued. However, this company is clearly unable to pay its debts and should be wound up as an insolvent company in terms of the Companies Act 1973 since section 81 expressly applies only to solvent companies.

Furthermore, it is clear that in this case the liquidator will have to investigate the affairs of the company to determine whether there are dispositions that should be set aside in terms of section 340 of the Companies Act 1973, or whether it is necessary to have an examination in terms of section 417. These sections apply only to insolvent liquidations.

**Question 3**

**Discuss, with reference to judgments of our courts, how it should be determined whether a company must be wound up as a solvent company or as an insolvent one.**

**Answer**

In *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* the Supreme Court of Appeal held that for purposes of the Companies Act 2008 a solvent company is one that is commercially solvent, in other words, one that can pay its debts when they are due. The fact that a company may be factually solvent will not prevent the insolvent winding-up of such a company in terms of the 1973 Companies Act if it is unable to pay its debts.

This was confirmed in *Murray and Others v African Global Holdings (Pty) Ltd* where the Supreme Court of Appeal held that where a company was unable to pay its debts because its banking facilities had been terminated and it could therefore not access its liquid assets to pay its debts, the company was commercially insolvent and therefore had to be wound up under the Companies Act 1973. It was irrelevant that its assets possibly exceeded its liabilities.

According to the judgment in *Standard Bank of South Africa Limited v R-Bay Logistics CC*, the deeming provisions concerning the inability to pay its debts contained in section 345 of the 1973 Act, may be used to establish the insolvency of a company. The court also held that a commercially solvent company (whether factually solvent or insolvent) may be wound up in terms of the 2008 Act only.

#### Question 4

**The Companies Act 2008 does not contain any provisions regarding the procedures and requirements that must be followed after commencement of winding-up and therefore the Companies Act 1973 applies. Explain whether it makes any difference after commencement whether it is an insolvent or solvent winding-up.**

#### Answer

It remains important to distinguish between a solvent and an insolvent winding-up after its commencement because several provisions contained in the Companies Act 1973 apply only to a company that is unable to pay its debts. These provisions must now be assumed to apply to insolvent liquidations but not to any winding-up under the Companies Act 2008. In terms of section 339 of the Companies Act 1973, provisions of the Insolvency Act will also apply to insolvent liquidations where the Companies Act 1973 does not provide for a particular matter.

#### Question 5

**An application for the winding-up of XYZ (Pty) Ltd was filed at the High Court on 30 August 2021. A provisional liquidation order was granted on 14 September 2021 and a final winding-up order was issued by the Court on 26 October 2021.**

**On 2 September XYZ (Pty) Ltd paid R1 million to one of its creditors and on 2 October XYZ (Pty) Ltd paid this creditor the balance of the debt it owed him, namely R750,000.**

**The creditor is not sure whether the winding-up order was issued in terms of the Companies Act 1973 or the Companies Act 2008 and wants to know whether he will be allowed to keep these payments or whether he will have to return the money to XYZ (Pty) Ltd. Explain his legal position depending on whether it was a solvent or insolvent winding-up.**

**Answer**

If this was an insolvent winding-up, section 341(2) of the Companies Act 1973 will apply. In terms of this provision, every disposition of its property by a company unable to pay its debts made after commencement of its winding-up is void unless the Court directs otherwise. An insolvent winding-up is deemed to commence on the date when the application was filed at court. In this case it would be 30 August 2021. Both payments to the creditor were thus made after commencement and are void unless a court orders otherwise.

However, in *Pride Milling Company (Pty) Ltd v Bekker NO* it was held by the Supreme Court of Appeal that only dispositions made after commencement of winding-up but before a provisional order was issued may be validated in terms of section 341(2). The first payment could therefore possibly be validated by the court, but not the second one because it took place after a provisional winding-up order had been issued and the *concursum creditorum* came into effect.

Section 341(2) does not apply to a solvent winding-up because the company is able to pay its debts. However, section 361(1) has not been excluded from application to a solvent winding-up, and in terms of this section all the property of the company shall be deemed to be in the custody and control of the Master until a provisional liquidator has been appointed. The directors no longer have the right to deal with company assets and this would presumably include payment of debts, although the company is commercially solvent.

If the winding-up of XYZ (Pty) Ltd had already commenced at the time of payment to the creditor the payments would be void. Although it is clear that winding-up had already commenced by the time the second payment was made, the question whether winding-up had already commenced when the first payment was made will depend on who the applicant for the winding-up order was and on what grounds it was made. If the applicant was the company or the business rescue practitioner on the grounds stipulated in section 81(1)(a) or (b), the winding-up commenced when the application was filed with the court on 30 August. In all other cases, winding-up commenced on 14 September when the provisional order was issued, and the first payment was then made before commencement of the winding-up and thus valid.

**CHAPTER 28 - BUSINESS RESCUE AND COMPROMISES****Self-Assessment Questions****Question 1**

**Briefly discuss the two ways in which business rescue proceedings may commence (that is, the two entry routes into the business rescue process), and list the individual requirements that must be satisfied for each. (8)**

**Answer**

Section 129 of the Companies Act - voluntary commencement via company resolution;  
Section 131 of the Companies Act - compulsory commencement via formal court application by an affected person;

Voluntary commencement - the board has reasonable grounds to believe that -

- the company is financially distressed, and
- there appears to be a reasonable prospect of rescuing the company;

Compulsory commencement -

- that the company is financially distressed; or
- the company has failed to pay over any amount in respect of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or
- it is otherwise just and equitable to do so for financial reasons; and
- there is a reasonable prospect for rescuing the company;

**Question2**

**Briefly discuss the general moratorium on legal proceedings, as contemplated in section 133 of the Companies Act 2008. (2)**

**Answer**

Any two of the following points (or similar):

- the general moratorium offers a distressed company some breathing space to allow its affairs to be restructured;
- section 133 - during business rescue proceedings, no legal proceedings, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except with, *inter alia*, the written consent of the practitioner or with the leave of the court and in accordance with any terms the court considers suitable;
- the moratorium is necessary for the effectiveness of the business rescue procedure;

- the moratorium does not apply to property not in the lawful possession of the company;
- the moratorium envisaged by section 133 is in place for the duration of the business rescue proceedings.

### Question 3

**Briefly discuss the requirements for the adoption (or approval) of a business rescue plan in terms of section 152 of the Companies Act, 2008. (2)**

#### Answer

A business rescue plan is adopted by creditors (subject to approval by holders of securities if their interests are affected) if –

- it is supported by the holders of more than 75% of the creditors' voting interests that were voted; and
- the votes in support of the proposed plan included at least 50% of the independent creditors' voting interest, if any, that were voted.

### Question 4

**True or False: An application to commence business rescue proceedings suspends liquidation proceedings that have already been commenced by or against the company. (1)**

#### Answer

True.

### Question 5

**Briefly discuss post-commencement finance, and its significance to the business rescue process. (6)**

#### Answer

- Post-commencement finance is the life-blood of the company while it is undergoing its restructuring process under business rescue;
- post-commencement finance is funding that is provided to the company after the date of commencement of business rescue proceedings;
- the Companies Act 2008 provides statutory protection and elevates the status of such funding above the claims of the company's pre-business rescue creditors;
- the ranking of claims is set out in terms of section 135;
- employment related post-commencement finance – any remuneration, reimbursement for expenses or other amount of money relating to employment that became due and payable after business rescue proceedings began, but that is not paid to the employee;



- post-commencement finance - financing obtained by the company during its business rescue proceedings.

**Question 6**

**True or False: A business rescue practitioner may not suspend a contractual obligation of the company, during business rescue proceedings. (1)**

**Answer**

False.

## CHAPTER 29 - OFFENCES

There are no self-assessment questions for this Chapter.

**CHAPTER 30 - ESTATE ACCOUNTS****Self-Assessment Questions****Question 1**

**When is a trustee or liquidator obliged to submit an estate account after appointment?**

**Answer**

The trustee must within six months from the date of (final) appointment submit an estate account to the Master (Insolvency Act, section 91; Companies Act 1973, section 403(1)). If this account is not a final account the trustee must submit further accounts every six months (after lodging the previous account) until a final account has been lodged (Insolvency Act, section 92(4); Companies Act 1973, section 403(1)(b)). The Master may at any time direct the trustee to submit an account if, in the opinion of the Master, funds in hand ought to be distributed to creditors (Insolvency Act, section 110; Companies Act 1973, 403(1)(b)).

**Question 2**

**Explain the procedure to be followed by a trustee or liquidator if the estate account cannot be submitted to the Master within the prescribed time limits.**

**Answer**

If the trustee of an insolvent estate is unable to submit an account within the prescribed period the trustee must, before the period has expired, submit an affidavit to the Master which states -

- the reasons why an account cannot be lodged;
- any information regarding the affairs of the insolvent required by the Master; and
- the amount of money available for payment to creditors.

The affidavit must be sent to each proved creditor by registered post. The trustee should provide proof that the affidavit has been posted to creditors by registered post. The Companies Act contains similar provisions in respect of the liquidator of a company.

**Question 3**

**Describe the procedure to be followed by the Master and the trustee / liquidator when an objection to an estate account is submitted by an interested party.**

**Answer**

Any interested person may at any time before the confirmation of the account submit an objection (with reasons for the objection) to the Master in writing (Insolvency Act, section 111(1); Companies Act, section 407(1)). A copy of the objection and supporting documents must be sent to the trustee and the trustee has 14 days to submit remarks thereon to the Master, who may refer the remarks to the person objecting (Insolvency Regulations, reg 6; Winding-Up Regulations, reg 6).

Insolvency Regulation 6 provides that the Master may refer the trustee's remarks to the person objecting or may require the attendance, personally or by agent, of the trustee or the person objecting. There is no similar provision in Winding-up Regulation 6, but it is submitted that this provision in Regulation 6 should be applied to a company unable to pay its debts in terms of section 339 of the Companies Act.

The Master may direct the trustee to amend the account or may refuse to sustain an objection. The trustee, or any person aggrieved by the direction or refusal of the Master to sustain the objection, may apply to court within 14 days from the date of the Master's direction (or intimation to the objecting party of the Master's refusal to sustain the objection) for an order to set aside the Master's decision (Insolvency Act, section 111(2); Companies Act, section 407(4)). Any person with a legal interest in the matter and not only creditors may apply to review the decision of the Master (*Tongaat Paper Co (Pty) Ltd v The Master* 2011 (2) SA 17 (KZP)).

**Question 4**

**When can an estate account be said to have been "duly confirmed"? Provide authority for your answer.**

**Answer**

In *Gilbey Distillers & Vintners (Pty) Ltd v Morris* 1991 (1) SA 648 (A) at 656C-656E the appeal court gave the following exposition of the meaning of "duly confirmed":

- the account must have been open for inspection by creditors under section 108;
- objections (if any) must have been dealt with in terms of section 111; and

- confirmation must have taken place by the Master (consequent upon the Master honestly applying their mind to the matter) and not, say, by an imposter.

### Question 5

**Describe the circumstances in which a confirmed estate account can be re-opened by the court.**

#### Answer

Section 112 of the Insolvency Act provides that confirmation of an account by the Master “shall be final save as against a person who may have been permitted by the court before any dividend has been paid under the account, to reopen it”. Section 408 of the Companies Act 1973 provides that confirmation of the account “shall have the effect of a final judgement”, subject to a similar provision in respect of the reopening of the account.

#### ***Re-opening the account before dividends have been paid***

The court may reopen a confirmed account before any dividends have been paid under it. A person who applies to have a confirmed account reopened must indicate a ground for *restitutio in integrum* (return to the previous legal position) such as fraud or *justus error* and that the person has some prospect of success having the account varied or corrected. No purpose would be served in reopening an account if it is likely to remain in the same form.

#### ***Re-opening the account where a dividend has already been paid***

In cases where a dividend has been paid, the Appeal Court (*Gilbey Distillers & Vintners v Morris* 1991 (1) SA 648 (A) 659) has expressed doubt whether the court may review the confirmation of the account on the ground of *justus error* or even on the ground of fraud. However, the court noted that fraud was a special case and that it had been said that “fraud unravels everything”. In the unreported decision of *Sequera v Hodgson* Eloff JP held that once the account had been confirmed and distribution had ensued, even fraud would not entitle a creditor to ask for the account to be set aside and the best the creditor could do was to sue the liquidator for damages.

**PART E - MISCELLANEOUS****CHAPTER 31 - ETHICS****Self-Assessment Questions****Question 1**

Write a brief note on each of the following aspects of ethics dealt with in the Chapter above:

- Impartiality, objectiveness and independence

**Answer**

Your answer should be a brief exposition of paragraph 31.2 of the Course Notes. Reference should be made to the general principles surrounding impartiality, objectiveness and independence, as well as, more specifically, what the SARIPA Code of Conduct states in regard to this topic. References to examples in case law will strengthen your answer in this regard.

- Integrity

**Answer**

Your answer should be a brief exposition of paragraph 31.3 of the Course Notes. Reference should be made to the general principles surrounding integrity, as well as, more specifically, what the SARIPA Code of Conduct states in regard to this topic. References to examples in case law will strengthen your answer to this question.

- Professionalism

**Answer**

Your answer should be a brief exposition of paragraph 31.4 of the Course Notes. Reference should be made to the general principles surrounding professionalism, as well as, more specifically, what the SARIPA Code of Conduct states in regard to this topic. References to examples in case law will strengthen your answer to this question.

**CHAPTER 32 - CROSS-BORDER INSOLVENCY****Self-Assessment Questions****Question 1**

**Briefly discuss the aims of the Cross-Border Insolvency Act 2000, as well as its current status. (3)**

**Answer**

- One of the main aims of the Cross-Border Insolvency Act is to provide for easy and speedy access and recognition of foreign representatives or creditors, while retaining measures to curb abuse;
- The Cross-Border Insolvency Act provides for the equal treatment of ordinary creditors, whether local or foreign, but safeguards the rights of local secured and preferent creditors;
- The Cross-Border Insolvency Act is in force, but will only become effective once foreign states, in respect of which the Act will apply, have been designated by the Minister of Justice (which has not yet occurred).

**Question 2**

**True or False: The common law relating to cross-border insolvency is no longer relevant in South Africa following the introduction of the Cross-Border Insolvency Act 42 of 2000. (2)**

**Answer**

False. Whilst the relevance of the common law relating to cross-border insolvency may change with respect to foreign states designated in terms of the Cross-Border Insolvency Act, the common law will continue to be of relevance and will apply in respect of states that have not been so designated (in terms of section 2 of the Act) and will also apply to matters not dealt with in the Act.



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