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**PROGRAMME IN SOUTH AFRICAN INSOLVENCY LAW AND PRACTICE 2022**

**Summative Assessment (Examination): Paper 1 Date: 24 – 25 November 2022**

**Time limit: 24 hours (from 13:00 on 24 November to 13:00 on 25 November 2022)**

**EXAMINERS**

**Ms R Bekker Prof A Boraine Prof J C Calitz Prof H Coetzee Ms Nastascha Harduth Dr E Levenstein Prof A Loubser Dr M Roestoff**

**MODERATORS**

**Dr D Burdette Mr Z Cassim**

**It is imperative that all candidates read and take cognisance of the examination instructions on the next page.**

**All candidates are expected to comply with ALL the instructions.**

**INTRUCTIONS**

1. This assessment paper will be made available at **13:00 (1 pm) SAST on Thursday 24 November 2022** and must be returned / submitted by **13:00 (1 pm) SAST on Friday 25 November 2022**. Please note that assessments returned late will not be accepted.

2. All assessments must be submitted electronically in Microsoft Word format, using a standard A4 size page and an 11-point Avenir Next font (if the Avenir Next font is not available on your PC, please select the Arial font). This document has been set up with these parameters – **please do not change the document settings in any way**. **DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. Please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case). Candidates who include very long answers in the hope it will cover the answer the examiners are looking for, will be appropriately penalised.

4. You must save this document using the following format: **studentID.Paper1Summative**. An example would be something along the following lines: 202122-336.Paper1Summative. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. The assessment can be downloaded from your student portal on the INSOL International website. The assessment must likewise be returned via your student portal as per the instructions in the Course Handbook for this course. **If for any reason candidates are unable to access their student portal, the answer script must be returned by e-mail to** [**david.burdette@insol.org**](mailto:david.burdette@insol.org).

6. Due to the high incidence of load shedding currently taking place across South Africa, candidates are required to determine whether any load shedding is scheduled during the examination period and, if so, to make alternative arrangements to write elsewhere if at all possible.

7. Enquiries during the time that the assessment is written must be directed to David Burdette at [david.burdette@insol.org](mailto:david.burdette@insol.org) or by WhatsApp on +44 7545 773890. Please note that enquiries will only be responded to during UK office hours (which are 9 am to 5 pm GMT, or 11 am to 7 pm SAST).

8. While the assessments are open-book assessments, it is important to note that candidates **may not receive any assistance from any person** during the 24 hours that the assessment is written. **Answers must be written in the candidate’s own words; answers that are copied and pasted from the text of the course notes (or any other source) will be treated as plagiarism and persons who make themselves guilty of this will forfeit the assessment and disciplinary charges will follow**. When submitting their answers, candidates will be asked to confirm that the work is their own, that they have worked independently and that all external sources used have been properly cited. If you submit your assessment by e-mail, a statement to this effect should be included in the e-mail.

9. Once a candidate’s assessment has been uploaded to their student portal (in line with the instructions in the Course Handbook), a confirmatory e-mail will be auto-generated confirming that the assessment has been uploaded. If the confirmatory e-mail is not received within five minutes after uploading the assessment, candidates are requested to first check their junk / spam folders before e-mailing the Course Leader to inform him that the auto-generated e-mail was not received.

10. If a candidate is unable to complete this summative assessment (examination), please note that a re-sit assessment will only be given if there are exceptional circumstances that prevent the candidate from completing or submitting it (such as illness). Feedback on the final assessment will be provided within four weeks of the paper having been written – please do not enquire about your marks before four weeks have elapsed.

11. You are required to answer this paper by typing the answers directly into the spaces provided (indicated by text that states [Type your answer here]). For multiple-choice questions, please highlight your answer in yellow, as per the instructions included under the first question.

12. Unless otherwise indicated, all references to sections are references to sections of the Insolvency Act 1936.

13. Prior to being populated with your answers, this assessment consists of **15 pages**.

**ANSWER ALL THE QUESTIONS**

**QUESTION 1**

Questions 1.1 – 1.20 are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question. Each of the 20 questions count 1 mark.

**Question 1.1**

**Select the correct statement**.

Property acquired by an insolvent after sequestration of his estate:

1. generally forms part of the insolvent estate.
2. does not form part of the insolvent estate.
3. vests in the division of the High Court that granted the sequestration order.
4. vests in the Master and, after his or her appointment, in the trustee of the insolvent estate until an offer of composition has been accepted.

**Question 1.2**

**Select the correct statement**.

Which of the following generally forms part of the insolvent estate of a natural person debtor?

1. The insolvent’s income which he / she requires for the maintenance of him- / herself and his / her dependants.
2. A right of inheritance.
3. Pension received in return for services.
4. Damages for defamation suffered by the insolvent.
5. Damages for personal injury suffered by the insolvent.

**Question 1.3**

**Select the correct statement**.

The property of the insolvent’s spouse, married out of community of property to the insolvent –

1. vests in the Master and thereafter in the trustee after his or her appointment as such.
2. does not vest in the Master or the trustee of the insolvent.
3. vests in the division of the High Court that granted the sequestration order.
4. only vests in the trustee when the High Court, on application by a creditor of the estate, grants an order for the vesting of the property.

**Question 1.4**

Indicate the **incorrect** statement regarding the capacity of the insolvent to enter into contracts after the sequestration of the estate.

1. The insolvent is not entitled to enter into contracts after sequestration.
2. The insolvent may, with the written consent of the trustee enter into a contract by which he or she disposes of property of his or her estate.
3. The insolvent may enter into an engagement contract after sequestration.
4. The insolvent may enter into a contract if it does not affect his estate negatively.

**Question 1.5**

Which of the following statements **does not** constitute an element that must be proved in an application for the compulsory sequestration of a debtor’s estate?

1. the debtor is actually insolvent or has committed an act of insolvency;
2. There is reason to believe that the sequestration would be to the benefit of the creditors;
3. The applicant qualifies as a creditor who may bring the application. Thus, the applicant has a liquidated claim of at least R100 or, where more than one creditor applies for the order, the total of their claims in aggregate is at least R200; or
4. The free residue will be sufficient to cover the costs of sequestration.

**Question 1.6**

Which one of the following statements **does not** qualify as an act of insolvency?

1. Where the debtor applies for debt review in terms of the National Credit Act 34 of 2005;
2. Where the debtor leaves South Africa, with the intent to evade payment of his or her debts;
3. Where the debtor makes a disposition of his or her property that has the effect of prejudicing his or her creditors; or
4. Where the debtor arranges with any of his or her creditors to discharge him or her of his or her debts.

**Question 1.7**

Indicate the **correct** statement:

1. A provisional winding-up order may not be appealed.
2. A provisional winding-up order may not be rescinded.
3. A voluntary winding-up may not be set aside by the court.
4. There is no provision for the suspension of a provisional winding-up order by the court.

**Question 1.8**

**Select the correct statement**.

The granting of a winding-up order –

1. suspends all civil proceedings until the appointment of a liquidator.
2. has no effect on pending civil proceedings.
3. suspends all civil proceedings until the winding-up process has been completed.
4. immediately ends all pending civil proceedings which must be instituted again after the winding-up process has been completed.

**Question 1.9**

**Choose the correct statement**.

1. The trustee's remuneration is determined by a tariff which is laid down by statute, but which must thereafter taxed by the Master or the Registrar.
2. The trustee's remuneration is determined by a tariff which is laid down by statute, but which must thereafter taxed by the Registrar.
3. The trustee's remuneration is determined by a tariff which is laid down by statute, but which must thereafter taxed by the Master.
4. The trustee's remuneration is determined by a tariff which is laid down by statute, but which must thereafter taxed by the Master or the Court.

**Question 1.10**

**Select the correct statement**.

In terms of section 44 of the Insolvency Act, the presiding officer will admit a claim to proof if –

1. it was submitted for proof more than 48 hours before the meeting commenced.
2. the cause of action arose before the sequestration of the estate.
3. it was made under oath.
4. Both A and B are correct
5. Both B and C are correct

**Question 1.11**

Indicate whether the following statement is **true** or **false**:

Confidentiality is a defence that can be raised by a witness who has been subpoenaed to an enquiry.

1. True
2. False

**Question 1.12**

Indicate whether the following statement is **true** or **false**:

An enquiry in terms of section 152 of the Insolvency Act is referred to as the “Master’s enquiry”.

1. True
2. False

**Question 1.13**

The statutory voidable dispositions as prescribed by sections 26 to 31 of the Insolvency Act are useful remedies to creditors, since they may not only be applied by the trustee during the administration of a sequestrated estate, but also by a single creditor before such estate has been sequestrated where the assets of the debtor are insufficient to meet the debt of such creditor.

1. This statement is correct, since the Insolvency Act defines the disposition of property as to cover both instances, where the debtor’s estate has been sequestrated and where it has not been sequestrated.
2. The statement is not correct since the definition of the disposition of property refers only to the instance where the estate of the debtor has not yet been sequestrated.
3. This statement is not correct since the definition of the disposition of property does not provide that the statutory remedies may be used where the debtor’s estate has not yet been sequestrated; in fact, sections 26 to 31 clearly require sequestration as a prerequisite for instituting any of these remedies.
4. The statement is correct since sections 26 to 31 of the Insolvency Act make it clear that it applies in both instances.

**Question 1.14**

It is said that prescription may start to run against the claim of a trustee or liquidator of an insolvent estate to set a statutory voidable disposition aside, as from the date of the disposition.

1. The statement is correct, since the cause of action arises on the date of the disposition.
2. The statement is not correct since prescription will only start to run on the commencement date of sequestration or liquidation.
3. The statement is not correct since prescription will only start to run on the date on which the trustee or liquidator sends a letter of demand to the recipient to return the disposed of property.
4. The statement is not correct since the Supreme Court of Appeal ruled that prescription will only start to run as from the date of appointment of the trustee or liquidator.

**Question 1.15**

A purchases an apartment for R500,000 from B. A pays a deposit and agrees to pay the balance of the purchase price in 10 monthly instalments of R40,000 each. Registration in A’s name will take place as soon as the purchase price has been paid in full. After A has paid the deposit and four instalments, B’s estate is sequestrated.

**Indicate the correct statement**.

1. The apartment vests in the insolvent estate of A after the sequestration of B’s estate.
2. The trustee cannot be compelled to effect transfer of the farm to A and the trustee may elect to abide by the contract or to repudiate it;
3. If the trustee elects to repudiate the contract, A may cancel the contract and claim restitution of the full portion of the purchase price paid to date as well as the damages against the insolvent estate of B.
4. A has a statutory right to claim transfer of the property in the circumstances since the apartment is intended to be used for residential purposes.

**Question 1.16**

X purchases a car from W on 10 May 2022 in terms of an instalment sales agreement as defined in section 1 of the National Credit Act. By agreement, ownership in the car will pass to X on payment of the last instalment. X still owes a substantial amount on the purchase price when his estate is sequestrated.

**Indicate the correct statement below**.

1. W may reclaim the car from X if he is not paid in full since he remains the owner of the car after the sequestration of X’s estate.
2. W retains ownership of the car since the agreement stipulates that he would remain owner of the car until payment of the last instalment.
3. W lost ownership of the car on the date of sequestration of X’s estate, but enjoys a tacit hypothec that secures the balance of the purchase price in terms of section 84 of the Insolvency Act.
4. W enjoys a statutory preferential claim against the estate of X regarding any damages that he may suffer, and this claim would as such rank directly after the preferential claim for the costs of sequestration.

**Question 1.17**

Rainbow Proprietary Limited is a creditor of Sunshine Holdings Limited. On 10 May 2022, Rainbow Proprietary Limited instituted a liquidation application against Sunshine Holdings Limited. On 10 June 2022, the board of directors of Sunshine Holdings Limited approach you for advice. The board would like to know whether they may voluntarily commence business rescue proceedings by adopting a resolution in terms of section 129 of the Companies Act 2008, notwithstanding that the liquidation application has been served on Sunshine Holdings Limited and filed at court. How would you advise them?

**Select the correct answer**:

1. In terms of the Companies Act 71 of 2008 and reported case law, the resolution to commence business rescue may be adopted even though liquidation proceedings have been initiated against Sunshine Holdings Limited.
2. The resolution to commence business rescue may not be adopted by the board, as liquidation proceedings have been initiated against Sunshine Holdings Limited.
3. Whether the board may adopt the resolution to voluntarily commence business rescue will depend on Sunshine Holdings Limited's annual turnover and public interest score.
4. None of the above.

**Question 1.18**

**Select the correct answer**:

1. A voluntary winding-up by the company is possible only if the company has no unpaid debts.
2. In a solvent voluntary winding-up by the company, the shareholders have the right to appoint the liquidator.
3. From the moment of commencement of a solvent voluntary winding-up by the company, the company stops being a juristic person.
4. A company can be put into insolvent liquidation even if its assets exceed its liabilities.

**Question 1.19**

**Select the correct answer:**

1. A winding-up by creditors requires an application to court by a creditor or creditors of the company.
2. A winding-up by creditors requires a resolution taken by the majority in value of the company’s creditors.
3. A winding-up by creditors is used if the company is unable to pay its debts or provide security for payment of its debts.
4. The shareholders of a company are not in any way involved in a winding-up by creditors.

**Question 1.20**

**Select the correct answer:**

1. A voluntary winding-up by the company is possible only if the company has no unpaid debts.
2. In a solvent voluntary winding-up by the company, the shareholders have the right to appoint the liquidator.
3. From the moment of commencement of a solvent voluntary winding-up by the company, the company stops being a juristic person.
4. A company can be put into insolvent liquidation even if its assets exceed its liabilities.

**QUESTION 2**

Briefly discuss whether a natural person debtor whose estate is sequestrated by an order of court will, after sequestration, lose all interest in his or her estate. **(2)**

Section 20 determines that the estate of the insolvent will vest in the Master until a trustee has been appointed however, the insolvent will keep an interest in the estate. The insolvent may institute litigation to recover debts to the benefit of the estate if the trustee decides against it.

**QUESTION 3**

Write a brief note in which you discuss the purpose of the formalities preceding an application for the compulsory sequestration of an estate and the consequences of a failure to strictly adhere thereto. **(6)**

A creditor should always view a compulsory sequestration as a form of final execution and must have exhausted all other possible remedies. In terms of Section 129(1) of the National Credit Act 34 of 2005, a formal notice must be delivered to a consumer before the creditor may approach court to enforce an agreement ect.

This will afford the consumer an opportunity to remedy his default instead of having to incur unnecessary legal cost to defend a pre-mature liquidation application.

As such a creditor should also deliver with registered post a formal demand in terms of Section 345 to ensure that the debtor is aware of the demand and must respond within 3 weeks from date of delivery.

If the debtor fails to comply with the demand the creditor may proceed to provide security to the Master to defray all sequestration cost until a trustee is appointed and file, the issued certificate with application. The application should also be accompanied by an affidavit stating the parties, purpose, indebtedness, jurisdiction ect.

The application must be issued and served on all interested parties to give all parties a reasonable opportunity to respond thereto.

If the formalities are not adhered to the respondent may be prejudiced as a premature application has certain negative consequences for the debtor such as credit facilities that may be blocked ect.

The court may also find that the applicant creditor abused the court proceedings to the detriment of the debtor and may be faced with a cost order.

**QUESTION 4**

Mr and Mrs R were married in community of property on 1 March 2010. On 1 March 2022 the couple consulted you regarding their financial difficulties. After considering all possible possibilities, you have advised the couple to apply for the sequestration of their joint estate. In consequence of this, the court granted a sequestration order on 1 June 2022.

**Answer the questions below taking into consideration the above facts.**

**Question 4.1**

One of the assets listed in the statement of affairs is a life insurance policy with Old Mutual in accordance whereof Mr R’s life is insured. The policy is four years old, and the cash value thereof amounts to R60 000. Explain whether the life insurance policy will form part of the insolvent estate. **(3)**

Section 63 of the Long-Term Insurance Act will be applicable in this instance. The Act provides protection to a policyholder and determines that the benefit will not form part of the insolvent estate if certain requirements are met:

* The policy should be in force for more than 3 years;
* If the insolvent (Mr R) is survived by a child, spouse or parent;
* Where the beneficiary is any of the abovementioned people.

In this instance the policy is in force for 4 years and will most probably pay out to the beneficiary if the nominated person is one of his children or parents, because his wife is also sequestrated.

**Question 4.2**

The farm “Mooikloof” is also listed in the statement of affairs. However, it now appears that the farm was bequeathed by Mr R’s deceased father (V) to Mr R on condition that the farm will, upon Mr R’s death, pass to Mr R’s son (S). Will the farm form part of the insolvent estate?

**(3)**

Mr R’s son “S” is in this instance a fideicommissary heir and will his interest in the farm only vest in his personal insolvent estate if the actual right accrues to him if he is insolvent.

Mr R is the fiduciary and due to his sequestration, the property will vest in the insolvent estate. The effect will be that the trustee will have to sell the farm subject to the fideicommissary of Mr S, unless the trustee can proof actual damage to the insolvent estate due to the burden.

**Question 4.3**

A month after the sequestration of the joint estate, Mrs R’s mother calls her with the news that her father has passed away. Mrs R’s mother also informs her that her father has bequeathed an amount of R1,000,000 (one million rand) to her and that his will states that the bequest accrues solely to her and will consequently not form part of the joint estate. Advise Mrs R as regards the question of whether the bequest forms part of the insolvent estate. **(5)**

If a joint estate is sequestrated it should be noted that the individual estates of both spouses will be sequestrated.

Since Mrs R is not rehabilitated when the right of inheritance accrues, the benefit will form part of the insolvent estate.

The fact that the will of Mrs R’s father had a mere condition that the inheritance would not form part of the joint will, is not sufficient to exclude the inheritance from the insolvent estate. The matter of Vorster v Steyn 1981(2) SA 831(O) concludes that if a will merely directs what happens to the inheritance and not what happens in the event where the beneficiary is unrehabilitated, as is applicable in this instance, the inheritance will vest in the insolvent estate.

The direction of the will constitutes a *nudum praeceptum.*

**QUESTION 5**

Mr A is an employee of the ABC Bank and earns R30,000 per month. His estate was sequestrated on 1 September 2022. Advise Mr A, who approaches you for advice. He wants to know whether the trustee of his insolvent estate will be entitled to any portion of his monthly income. **(3)**

In terms of Section 23(3) the insolvent is allowed to follow any profession or occupation except to have direct or indirect interest in the business of a general dealer, manufacturer or trader. The Trustee must however, consent to the contract of employment.

In terms of Section 23(5) the trustee shall be entitled to any moneys received that is in the opinion of the master in excess of what is needed to take care of himself and his dependents ect. In this regards the insolvent will have to deliver weekly income and expenditure statements and would the trustee be able to lay claim on any surplus of the income generated.

In general trustees do not enforce this principle to the letter and do I foresee that the trustee will only claim if there is a large surplus.

**QUESTION 6**

What are the effects on the continued sequestration of an estate or the winding-up of a company if an appeal has been filed against the order commencing these proceedings? **(7)**

In terms of Section 150(3) of the Act the administration of the insolvent estate will continue as normal however, no property vested in the estate may be sold or dealt with without the prior consent of the insolvent. The matter of Choice Holdings Ltd v Yabeng Investment Holding Co Ltd 2001 (2) SA 768 (W) confirms that the noting of the appeal does not suspend the operation of the final sequestration order.

When a final liquidation order is given, you must identify if you are dealing with a company able or unable to pay its debts.

If we deal with a company unable to pay its debts Section 150(3) will apply mutatis mutandis to an appeal noted against a final sequestration order (Section 339 of the Companies Act).

If we deal with a “solvent” company the noting of the appeal will have an effect on the powers of the liquidators as they will be suspended pending the judgement of the appeal. This will also apply on the liquidation order and its administrative powers. This suspension of the order normally has a detrimental effect on the administration of the insolvent estate.

If the appeal is opposed, it will also have extra cost of administration that would be to the detriment of the concurrent creditors.

**QUESTION 7**

Bunny Seagull is a 45-year-old property developer who lives in Tshwane. She has a farm near Bloemfontein and her business is run from Cape Town. Which divisions of the High Court have jurisdiction to sequestrate her estate? **(3)**

* Gauteng Division, Pretoria (where she is domiciled);
* Free State Division, Bloemfontein (owns property);
* Western Cape Division, Cape Town (carries on business).

**QUESTION 8**

Dagny Taggart owns two beauty salons in Johannesburg. During the lockdown period in South Africa, she ran into financial difficulties and could not service her debt. Consequently, she took out several unsecured loans from various financial institutions. She alleges that, for some of the loans, no financial assessment was done before the banks extended the credit to her. Unfortunately, Dagny has no other option than to apply for sequestration. With reference to case law, explain how the financial institutions’ failure to conduct financial assessments would affect Dagny’s application for sequestration. **(9)**

In terms of Section 6 the applicant (Dagny Taggart) must on a balance of probabilities prove the following:

1. Proof that she complied with all the formalities;
2. That she is actually insolvent;
3. There is enough Free residue for the cost of sequestration;
4. The voluntary sequestration will be to the advantage of the body of creditors.

It is possible that even if complied with the above that the court can refuse a sequestration order due to the possibility of reckless credit lending to the applicant, as was the case In Ex Parte Ford 2009 (3) SA 376 (WWC). This could be seen as an abuse of the process.

Further to the above Ex Parte Fuls 2016 (6) SA 128 (GP), set certain requirements that need to be adhered to if a voluntary sequestration is subject to the National Credit Act, as follows:

1. Did the application exhaust all other remedies like debt review and what the reasons for failure were;
2. A report of a debt counsillor and if it was complied with.

If these requirements are not met the court would not be likely to grant an order in the circumstances of possible reckless credit lending.

In this regard it is safe to the say that the court will find that Dagny Taggart does not currently comply with the requirements and especially that the sequestration is not in the best interest of creditors.

This will most likely result in an unsuccessful application, or the court will postpone the matter that will further delay the proposed administration of the estate.

The fact that several financial institutions are involved in this estate could raise a bona fide dispute about claims based on reckless credit as was the case in the matter of Star Trading v No 11 Flamboyant Edleen 2011 (2) SA 266 (SCA).

**QUESTION 9**

Indicate the effect of the sequestration of the estate of a principal who granted a mandate to a person to represent him in a commercial transaction on the granted mandate. **(2)**

Although the commercial transaction was concluded by a representative the principal will still be seen as the contracting party to the transaction and as such the general rule of uncompleted contracts will apply.

The mandate of the representative will be terminated, and the appointed trustee will have the option to abide or repudiate.

**QUESTION 10**

When may the seller of goods, who sold such goods on a cash basis and delivered them to the purchaser prior to the sequestration of his estate, reclaim such goods from the purchaser if the purchase price is not paid in full by the time the purchaser’s estate is sequestrated? **(5)**

The seller may in terms of the provisions of Section 36 of the Act reclaim goods in certain instances as will be discussed below:

* Sec36(1): determines that where a purchaser receives goods that was purchased without paying the full amount prior to his sequestration the seller will be able to reclaim the goods if he within 10 days after delivery of the goods to the purchaser, gave notice to the purchaser, trusteer or Master that he reclaims the goods. If the trustee disputes the sellers claim the seller must within 14 days institute action;
* Sec36(3): Trustee not obliged to return or restore any property, unless the seller refunds him in full;
* Sec36(4): seller not entitled to recover any property just because the purchaser failed to pay the purchase price;
* The seller must accept if the trustee tenders the full purchase price, this will be cost in the administration.
* Sec36(6): if the trustee sold the property as part of the insolvent estate the former owner may before the confirmation of the estate account claim the nett proceeds of the property from the trustee however, he shall lose any right to recover the property himself.

**QUESTION 11**

Write an essay on the general rule concerning the treatment of an uncompleted or unexecuted contract in insolvency? **(8)**

*Concursus creditorium* places the hand of the law upon the estate however, the hand known as the general rule, is simultaneously placed on uncompleted contracts.

An uncompleted contract occurs when performance has not yet been affected by one of the contracting parties on date of sequestration or liquidation. Although the trustee plays a vital role in overseeing the process of uncompleted contracts, the general rule crystallizes the trustee’s position.

Insolvency will not terminate such a contract that is still ongoing at the time of sequestration however, the trustee will step into the shoes of the insolvent party and acquire certain rights and obligations from the existing contract. This does not make the trustee the *King of the Castle*, but rather vulnerable for personal liability as stated in Kerbels Flooring & Carpeting (PTY) Ltd v Shrosbree 1994 (1) SA 655 (E). The trustee will always have the option to abide by or repudiate a contract and must consider which option will be in the best interest of the whole body of creditors. The trustee must give clear notice of his intention within a reasonable time and may the solvent party withhold performance until the trustee performs.

In terms of the common law repudiation amount to breach of contract in which case the remedies will be to claim for specific performance, cancellation of the contract or a claim for damages however, in insolvent circumstances the solvent party will not be able to claim specific performance.

It would be wise to carefully consider each contract and the outstanding performance in each estate to ensure that as a general rule the hand is not pointed at the trustee for personal liability.

**QUESTION 12**

Mention any three (3) powers that the trustee may not exercise without the consent of the Master. **(3)**

In terms of Section 18(3) of the Act:

1. Not bring or defend any legal proceeding;
2. Sell any property belonging to the estate;
3. Appoint legal representation/counsel.

**QUESTION 13**

Against which estate do creditors prove a claim if the estate of the partnership and the estate of the partners are under sequestration simultaneously? **(3)**

Section 49(1) of the Insolvency Act determines that in the above situation the creditors of the partnership must prove their claims against the estate of the partnership only and the creditors of the individual partners against the estate of that specific partner.

It is possible in terms of Section 49 to proof claims in both estates if the claims are based on different causes of action and in law maintainable against both estates.

**QUESTION 14**

On 4 January 2021, X let his farm to B for a period of 10 years at an annual rental of R500,000. B 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 T. Discuss the legal position if the estate of X is sequestrated on 1 October 2021. **(13)**

The effect of the sequestration of the lessor has no provisions in the Insolvency Act that deals with the situation and as such the common law is applicable.

The term lease includes immovable property as stated in the case of Zitonix v K201250042 (29/2017) [2018] ZASCA 63 and does the general rule apply that sequestration does not automatically terminate a lease agreement/ contract of lease.

If a mortgage bond was registered over the immovable property prior to the lease the property will be sold subject to the lease due to the “*huur gaat voor koop*” principle. This is especially applicable when a long-term lease was concluded for 10 years as defined in Section 102 of the Deeds Registries Act 1937.

When the “*Huur gaat voor koop”* is applicable the purchaser steps into the shoes of the lessor and is bound by all the stipulations of the current lease agreement, including compensation for improvements, as is stated in Uys v Sam Friedman Ltd 1935 AD 165.

In this instance if the trustee intends to sell the farm, he will have to present the farm for sell with and without the lease agreement to determine if the estate will suffer damages if the property is sold subject to the lease agreement.

This view is because when a mortgage bond is registered the rights of the mortgagee is preferent to those of the lessee and as such the property can only be sold free of the lease if over received is insufficient to satisfy the mortgagee’s claim and a higher offer was tabled without the lease.

According to Becker’s Trustee v Laruffa 1921 TPD 457 the lessee will have a concurrent claim for damages suffered due to the sale free of the lease.

Taking the above in consideration the position of B will be determined when the property is presented for offers and could the long-term lease agreement be cancelled or kept in force.

**QUESTION 15**

Mr Saunders is appointed as the business rescue practitioner of XYZ Proprietary Limited (in business rescue). During the course of the business rescue proceedings of XYZ Proprietary Limited, it became evident that it would be necessary for the company to dispose of certain of its immovable properties, for purposes of injecting liquidity into the business. The immovable properties that Mr Saunders wishes to dispose of have mortgage bonds registered over them in favour of one of its creditors, ABC Bank, as security for working capital facilities made available by ABC Bank. Mr Saunders approaches you for advice as to the legal requirements for the disposal of property over which another person has a security interest, during the business rescue process. How would you advise Mr Saunders? **(5)**

The legal requirements to dispose of immovable property in this instance is regulated by Section 134(3) of the Companies Act 71 of 2008 and is as follows:

* Obtain the prior consent of the secured creditor however, if the if the proceeds are sufficient to settle the indebtedness of the security, prior consent is not needed.
* After the sale the company must pay the secured creditor the proceeds up to the amount of the company’s indebtedness to the creditor.
* Provide security for the claim amount to the approval of the creditor.

The main aim is to protect the secured creditor from any prejudice that may flow from the proposed sale and will the sale be null and void if not complied with the above requirements.

**TOTAL MARKS: [100]**