

**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**.

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 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)**

In respect of a natural person debtor, their estate will vest in the master and subsequently the trustee after his or her appointment. However, the insolvent debtor will still have an interest in their estate and will not lose all interest. They could litigate, as an example, so as to enhance the value of their estate where the trustee has decided not to take further steps. This is an interest in their estate and the value thereof.

**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)**

Firstly, the formalities (listed, not detailed) are namely that the Applicant **must** provide security to the master and obtain a certificate to that effect, must include a sworn statement where certain minimum information is required such as that the applicant is a creditor of the insolvent, details of the creditor and the respondent (debtor), details indicating the court’s jurisdiction, the nature and amount of the Applicant’s claim, details of security, an allegation that the debtor is actually insolvent and reasons therefore, or that the debtor has committed an act of insolvency, that the Application benefits the creditors and compliance with notification to interested parties. The Applicant must publish a notice in the Government Gazette and newspaper and give notice to the debtor, creditors, workers, unions and SARS.

These formalities are to ensure that all requisite parties, the debtors and creditors are notified that such an application will be brought and allow them to object/oppose to any such application should they so wish. These formalities must be strictly complied with. Failure to strictly comply with such formalities will bear consequences. The court may condone formal defects in terms of section 157(1) of the insolvency act where the mistake constitutes a formal defect.

However, where a mistake or failure to comply with the formalities prejudices either debtor or a creditor which cannot be condoned or corrected through an order of the court, this will not be condoned. The consequence is that the rule nisi will not be granted and any such Application dismissed. In the case of *Kolok (Pty) Ltd v Ahmed 2006 JDR 0051 (W)* Schwatzman J held that the court on the return date was not there to merely see that the formalities had been met and then without critical oversight simply authorize the final order. The judge quoted *Braithwaite v Gilbert 1984 (4) SA 717 (W)* that the court enjoyed a discretion under 12(1) of the insolvency act whether to grant or refuse the final order if the degree of proof or formalities had not been met.

In certain instances where insufficient information or defective applications have been presented to the court in which negligence is prevalent, practitioners may face rebuke and can be castigated in being reported to the Legal Practice Council for any such negligence.

**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 Insolvency Act will apply, and the life insurance policy will not form part of the insolvent estate. The policy benefits provided or to be provided to a person *inter alia* under a registered insurer, in which that person or their spouse has been insured and where such has been in place exceeding 3 years will be protected save for the payment of a debt secured by the policy. Section 63 states that the said policy benefit will not form part of the estate during the persons lifetime and upon death if survived by a spouse, will not be available for the purposes of payment of his or her debts.

**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 as the fiduciary being sequestrated, the property Mooikloof bequeathed to him from his deceased father, will vest in the insolvent estate. The trustee is entitled to realise the asset, the realisation of such an asset subject to the fideicommissary 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)**

A trustee is ordinarily bound by the conditions or directions in any bequest, which will also bind any insolvent heir. The case of *Badenhorst v Bekker N.O. 1994(2) SA 155 (N)* will apply in that the sequestration of the joint estate of spouses married in community of property will result in both spouses being insolvent.

Assets excluded fall within the ambit of section 20 of the insolvency act namely, 20(1)(a) and 20(2)(b), 20(2)(b) stating that:

“*for the purposes of subsection (1) the estate of an insolvent shall include – all property which the insolvent may acquire, or which may accrue to him during the sequestration, except as provided in Section 23.”*

The court also found that Section 21 of the insolvency act applies only to spouses married out of community of property. Spouses married in community of property are co-debtors to the creditors of the joint estate, in this instance the insolvent joint estate and the bequest may be utilized to satisfy any claims against the joint estate. The Badenhorst decision was confirm in *Du Plessis v Pienaar N.O. 2003 (1) SA 664 (SCA).* Therefore, as Mrs and Mr R are married in community of property the bequest to Mrs R will form part of the insolvent joint estate.

**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)**

Yes, unfortunately the trustee of the insolvent estate will be entitled potentially to a portion of his income. Whilst it is not clear from the question what portion of income, Section 20(2)(b) of the insolvency act states that all property the insolvent may acquire, or which may accrue to him during the sequestration will form part of the insolvent estate. The insolvent will be entitled to recover for his own benefit any renumeration for work done or professional services rendered in terms of section 23(9) of the insolvency act. However, the insolvent will only be entitled to retain any portion of his salary or income **necessary to support** the insolvent and his or her dependents. The trustee is entitled to the surplus upon the master’s certification that any such surplus in fact exists.

Therefore, contingent on what may be necessary to support Mr A and his dependents (if any) the trustee will be entitled to the surplus should the master certify that a surplus is in existence. Therefore, whilst we do not know whether there or dependents of Mr A, it is clear that potential exists for a portion of his income, namely any surplus, to be utilized by the insolvent estate.

**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)**

The insolvency act section 150(3) will apply to the insolvent winding up order of a company. Section 150(3) states that:

*“When an appeal has been noted (whether under this section or any other law), against a final order of sequestration, the provisions of this Act shall nevertheless apply if no appeal had been noted: provided that no property belonging to the sequestrated estate shall be realized without the written consent of the insolvent concerned.”*

Therefore, in terms of Section 150(3) of the insolvency Act, the noting of an appeal will not suspend the provisions of the insolvency act save that no property of the insolvent estate may be realized without the consent of the insolvent. Therefore, the liquidation process or proceedings are thus not suspended. No appeal is allowed against a provisional winding up order in terms of section 150(1) of the insolvency act. These provisions, namely that no property may be realized without written consent of the insolvent, will apply even if the company is unable to pay its debts.

Beira v Rahpaely Weiner & Others [1997] ZASCA 59; 1997 (4) 332 (SCA) held that:

*“The Respondent’s interest in the finality of the judgment is factor which weighs heavily with the court. And appeals against orders for sequestration should be prosecuted with due exception.”*

This aforementioned is so, as the Appeal does not suspend the provisions of the insolvency act and therefore expeditious finality a necessity.

**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)**

Either a local or provincial division of the high court would have jurisdiction to sequestrate Bunny’s estate. On the date of application jurisdiction will vest where she is domiciled, owns or is entitled to property located within that court’s specific jurisdiction or at any time 12 months preceding the date of the application was ordinarily resident or carried on business within the area of jurisdiction of any specific court. Therefore, the following High Courts will have jurisdiction to sequestrate:

1. The High Court of South Africa, North Gauteng High Court, Pretoria (Domiciled);
2. The High Court of South Africa, Western Cape High Court, Cape Town (carried on business);
3. The High Court of South Africa, Free State High Court, Bloemfontein (Property Ownership).

**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)**

Firstly, the requirements in terms of section 6 of the insolvency act, to be proved, succinctly are as follows:

1. Formalities must be complied with;
2. The Applicant must actually be insolvent;
3. Suffcient free residue to cover sequestration costs;
4. Sequestrtion must be advantageous to creditors.

When all 4 requirements in terms of section 6 are proved, the court will still hold a **discretion** as to whether or not to sequestrate the estate. The court will refuse the order where it feels there has been an abuse of process.

The case of *Ex Parte* Ford 2009 (3) SA 376 (WCC) bears reference, the judge therein surmised that some of the debts may amount to reckless credit whilst reinforcing that judicial discretion to grant the voluntary surrender remained intact. Specifically:

“*that the primary object of the machinery of voluntary surrender is not the relief of harassed debtors; see Ex parte Pillay; Mayet v Pillay*[*1955 (2) SA 309*](http://www.saflii.org/cgi-bin/LawCite?cit=1955%20%282%29%20SA%20309)*(N) at 311E (per Holmes J, as he then was). There is moreover a consonance between the objects of the relevant provisions of the NCA and the Insolvency Act; viz. not to deprive creditors of their claims but merely to regulate the manner and extent of their payment. On the (incomplete) facts disclosed in the current applications I have been left with the impression that the machinery of the NCA is the more appropriate mechanism to be used. For the reasons given I do not consider that it would be consistent with the identified public policy considerations - most particularly the purposes of the NCA expressed in s 3 thereof, and quoted in paragraph [4], above - to grant the applications for voluntary surrender*.”

The court refused to exercise its discretion in that the mechanisms under section 85 of the National Credit Act could have been more appropriately implemented rather than sequestration. In *Ex Parte* *Fuls 2016 (6) SA 128 (GP)* the Applicant was mandated to make full disclosure where credit agreements had been entered into, as to:

1. Whether or not the applicant availed themselves to the mechanisms afforded by the national credit act for debt review prior to the application proceeding and if not, full reasons therefore; and
2. A comprehensive report from the debt counsellor involved outlining what procedures were followed and whether the applicant complied with any debt restructuring arrangements.

Where an application lacks the averments as previously set out above, it is defective as it does not satisfy the court that it is in the interests of creditors and falls to be dismissed.

In the case of *Firstrand bank Ltd v Evans 2011 (4) SA 597 (KZD)* the court held that a debt rearrangement order providing for payments within a reasonable time, with proof of compliance, was a strong reason for the court to exercise discretion against sequestration.

In V v V [2018] ZAGPPHC 505 whilst the facts are not necessarily relevant, the court reiterated that judicial discretion taking into account all the facts as well as the history and circumstances, can be exercised in granting the provisional sequestration or not.

Therefore, in Dagny’s case above the failure by financial institutions to conduct affordability assessments would probably in this instance waylay or inhibit the granting of an application for voluntary sequestration. It is clear that potential for reckless credit exists and the judgment of *Ex Parte Ford* is likely to find applicability in that the court would likely exercise its judicial discretion against the granting of any sequestration against Dagny, preferring to explore debt relief mechanisms as per the national credit act.

**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)**

The effect of sequestration on a granted mandate will terminate the contract of mandate by the sequestration of the estate of the mandator. In this regard see *Goodricke & son v Auto Protection Insurance Co Ltd 1968 (1) SA 717 (A).*

**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)**

Firstly, ownership will pass on delivery of the thing or goods and receipt of the purchase price. If uncertainty is prevalent as to whether a purchaser purchased goods for cash or on credit, then it will be presumed that the sale was cash.

Thereafter, Section 36 of the insolvency act will apply. This obliges the seller to reclaim the goods within 10 days from delivery in order to retain ownership. More specifically, if the purchaser receives delivery prior to the purchase price being paid, or in this case being paid in full, and his estate is sequestrated then the seller will be able to reclaim moveable property only if they notify the purchaser, or the trustee, or the master within 10 days after date of delivery, that the seller is reclaiming this, irrespective as to whether the sequestration takes place within those 10 days and the proviso being that, the seller must return any art of the purchase price already received.

**QUESTION 11**

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

As a general rule, uncompleted or unexecuted contracts are not terminated or modified in any way by insolvency of one or both parties to the contract. Therefore, in essence the contract will survive sequestration or the supervening *concursus*. However, the contracts are modified in that the trustee has the right subsequent to sequestration to either elect to abide by the contract or whether to repudiate it. The general rule is that the trustee cannot be compelled to fulfil the contract. The trustee must perform the obligations of the insolvent which includes any contract, which may fall due to be performed between the date of sequestration and the date upon which the trustee makes his election as to whether to abide by the contract performing in terms thereof or repudiate it.

The case of *Ellerine Bros v McCarthy*(245/13) [[2014] ZASCA 46](http://www.saflii.org/cgi-bin/LawCite?cit=%5b2014%5d%20ZASCA%2046), at paragraph 11 thereof encapsulted the general rule and held:

*“that The intended aim of the concursus, or as it has also been described, the ‘community of creditors, created immediately upon the liquidation of the insolvent, is to give equal protection to all the creditors without undue preference and to preserve and distribute the estate to the benefit of all of them. To give effect to the concursus, the liquidator must decide whether it would be to the benefit of the community of creditors to continue to perform the inherited obligations of the insolvent under an uncompleted contract. He may elect not to do so. In that event a consequence of the concursus is that the other party to the contract cannot demand performance by the liquidator of the insolvent’s contractual obligations.”*

The *Ellerine Bros* case above, in addition referenced *Smith & another v Parton NO* [**1980 (3) SA 724**](http://www.saflii.org/cgi-bin/LawCite?cit=1980%20%283%29%20SA%20724) (D) at 728H-729A which equally succinctly stated the general rule, namely that:

*“there is really only one legal principle involved and that is that there is nothing in the law of insolvency which affects uncompleted contracts in general, the contract is neither terminated nor modified nor in any way altered by the insolvency of one of the parties except in one respect, and that is that, because of the supervening concursus, the trustee cannot be compelled to perform the contract. The existence of the concursus, does not, on this principle, in any way affect the continued existence of the rights and obligations of the respective parties to an uncompleted contract.”*

The trustee is making his or her election whether to perform or repudiate the contract should act in the best interests of the general body of creditors. The trustee must within a reasonable period of time make the election as to which course of action to adopt and must provide clear notice to the solvent party. Whether a liquidator or trustee has elected to abide by the terms of the contract is a question of fact and if the liquidator or trustee does not act or make their decision known within a reasonable period of time, there may very well be an assumption that they will perform in terms of the contract.

**QUESTION 12**

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

1. Destruction of documents;
2. The sale of Property before the second meeting of creditors;
3. Application to set aside directions by creditors; or
4. The entering of a caveat in the deeds offcie.

**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)**

When the estates of the partners and partnership are under sequestration simultaneously, the creditors of the partnership will prove their claim against the partnership estate only. In this regard Section 49(1) of the insolvency act will apply, the reasoning of Section 49(1) that the assets in a partnership should be applied to partnership debts, whilst the assets of an individual partner to be used for the separate estate debts. This is on the assumption that the creditors are creditors of the Partnership.

**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)**

Timeline: 12 July 2020 – mortgage bond registered in favor of T.

4 January 2021 – property let to B;

1 October 2021 – estate X sequestrated.

Section 88 of the insolvency Act will find Application in so far as the legal position is concerned. Namely section 88 invalidates certain mortgages and states as follows:

*“A mortgage bond, other than a kustingbrief, whether special or general passed for the purpose of securing the payment of a debt not previously secured, which was incurred more than two months prior to the lodging of the bond with the registrar of deeds concerned for registration or for the purpose of securing the payment of a debt incurred in novation of or substitution for any such first-mentioned debt, shall not confer any preference if the estate of the mortgage debtor is sequestrated within a period of six months after such lodging: Provided that a mortgage bond shall be deemed not to have been lodged as aforesaid, if it was withdrawn from registration.”*

Firstly, a preferential claim inherently means that any creditor with a preferent claim has the right to claim first from any insolvent estate or insolvent person. Section 88 was enacted so as to prevent any creditor from gaining an advantage in lieu of any anticipated sequestration by having a mortgage bond registered in their favor. The mortgage bond is not void but rather no preference will be recognized thereby if the debtor’s estate is sequestrated within 6 months of lodging of the bond.[[1]](#footnote-1)

In the case of Joint Liquidators of Glen Anil Development Corporation Ltd (in liquidation) v Hill Samuel (SA) Ltd (SA) Ltd 1982 (1) SA 103 (A), the court reiterated the principle stating that:

“A mortgage bond passed for the purpose of securing the payment of a debt not previously secured, which was incurred more than two months prior to the lodging of the bond, shall not confer any preference if the estate of the mortgage debtor is sequestrated within a period of six months after such lodging”

In the above case however, the court held that the debt secured by the bonds had not been incurred 2 months prior to the lodging and that the bonds as a result did not confer any preferent status.[[2]](#footnote-2)

The timeline is important above, namely, with the facts at hand, a mortgage was registered in July 2020 in favor of T. The lease was registered in the deeds office on 4 January 2021 and X is sequestration only 10 months later in October 2021. Therefore, if we look at the applicability of section 88 this means that the bank will have a preferent claim as X, the debtor, is sequestrated well after six months, after the lodgment and subsequent registration of the mortgage. In fact, X’s estate was sequestrated more than 6 months after the lodgment of the lease in the deed’s office too of B. Section 88 will therefore not apply and both the bank and Mr X will share a preferent claim against the estate of Mr X, in order of lodgment.

Therefore, to surmise, where the bond is registered, in this case in favor of T, and the debt arose more than 2 months prior to the date of lodging the mortgage bond at the deed office for registration and the estate of the debtor is sequestrated within 6 months calculated from date of lodgment, the bond will not provide security. X estate was sequestrated on 1 October 2021 whereas the lodgment of the mortgage bond in favor or T, was registered on 12 July 2020. Therefore, the mortgage will provide security to T as the debtor’s estate was sequestrated some 14 months after registration of the mortgage bond.

If the date in question is incorrect for hypothetical purposes and in fact the date of lodgment of the bond in favor of T should have been **12 July 2021**, then Section 88 will in fact find applicability namely that the estate of X was sequestrated within 6 months of lodgment, and in that case the bank or T will not find security from the mortgage registered whereas B would in fact be a preferent creditor.

**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)**

Firstly, the legal requirements for disposal of the mortgaged immovable property during business rescue are encapsulated in Section 134(3) of the Companies Act 2008, as follows:

*“134(3): If, during a company’s business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must:*

*(a) obtain the prior consent of that other person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person’s security or title interest; and*

*(b) promptly –*

1. *pay to that other person the sale proceeds attributable to that property up to the amount of the company’s indebtedness to that other person; or*
2. *provide security for the amount of those proceeds, to the reasonable satisfaction of that other person.”*

Therefore, XYZ properties, in this instance the company, would be required to obtain the consent of ABC Bank save in the situation where the proceeds of the sale of the immovable properties would be sufficient to fully discharge the indebtedness to ABC Bank, protected by their security. Thus, Mr Saunders would simply need to value the properties to ascertain whether the market price would cover the outstanding bonds. If so, the sale price can be fixed, or reserved, and consent would then not be necessary as such reserve price would satisfy the mortgage bonds. If it is unlikely that the sale price will meet the outstanding bonds, then consent would be necessary from ABC and likely consent will be given upon the provision of security as there would then be no prejudice to the potential sale. Once the proceeds of the sale have been realised, The BRP or the company must promptly pay the proceeds of the sale to the ABC Bank up to the indebtedness of XYZ Properties or must provide security for the amount of the proceeds to the reasonable satisfaction of ABC Bank.

The legal requirements met aforesaid Mr Saunders will be able to sell the immovable properties.

 **TOTAL MARKS: [100]**

1. <https://www.phinc.co.za/OurInsights/BlogDetail>: “The dangers of granting a home loan to a lender, before lodgment of a mortgage bond” [↑](#footnote-ref-1)
2. <https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/Real/real-estate-4-may-Preferance-of-security-in-terms-of-a-mortgage-bond-potential-impact-of-COVID-19-protocols.html>. [↑](#footnote-ref-2)