

**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)**

No. The natural person debtor (“the insolvent”) will not lose all interest in his/her estate. The estate vests in the Master and after his/her appointment the trustee but the insolvent still has an interest in their estate. For example the insolvent may litigate in order to enhance the value of their estate where the trustee decides not to take steps in the litigation and stated they would abide by the decision of the court.

**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)**

Broadly, estates may be sequestrated by the debtor themselves (i.e. a voluntary sequestration) or by a creditor of the debtor (i.e. a compulsory sequestration).

Section 9 of the Insolvency Act 24 of 1936 (“Insolvency Act”) prescribes the requirements for making application by a creditor for the sequestration of an estate (again, i.e for compulsory sequestrations).

A compulsory sequestration application must be made by a creditor with a liquidated claim (as prescribed in s 9(1) of the Insolvency Act).

The decision to grant a sequestration order is at the discretion of the court. Adherence to the formalities in general is viewed less stringently by a court in a compulsory sequestration than would be the case in a voluntary sequestration.

The purpose of the formalities preceding an application for the compulsory sequestration of an estate are primarily to:-

1. properly identify the debtor (section 9(3)(a) of the Insolvency Act);

2. provide security for the payment of fees and charges necessary for the prosecution of all sequestration proceedings and all costs of administration of the estate until a trustee has been appointed (s 9(3(b) of the Insolvency Act);

3. properly and effectively notify parties who may be affected by the sequestration, i.e. employees of the debtor (and their trade unions), SARS, the debtor etc. (s 9(4A)(a) of the Insolvency Act);

In terms of section 9(3)(b) The applicant must set security at the Master to defray all sequestration costs until a trustee is appointed. The applicant must obtain a certificate issued by the Master confirming that security has been given not more than 10 days before the application for sequestration. The certificate must be filed together with the application for sequestration.

In terms of section 9(4), before the application is made to the court, a copy of the application together with all confirmatory affidavits must be lodged with the Master (or if there is no Master at that seat of the court the prescribed officer) (hereinafter collectively “the Master”), and the Master may report to the court any facts ascertained by him to justify postponing the hearing or dismissing the application.

In terms of s 9(4A)(a) of the Insolvency Act, 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 in the prescribed manner unless the court at its discretion dispenses with the requirement of furnishing of a copy on the debtor (s 9(4A)(a)(iv). Section 9(4A)(b) states that the applicant must before or during the hearing file an affidavit by the person who furnished a copy of the application which sets out the manner in which s 9(4A)(a) was complied with.

The Courts in Standard Bank SA Ltd v Sewpersadh 2005 (4) SA 148 (C) decided that compliance with s 9(4A) is peremptory.

However, see *Candice Cabral v Dorian Cabral Case no 2019/27129 12 August 2020 (GJ )*at 47. where the court stated *“Wallis JA in EB Steam Company (Pty) Limited v Eskom Holdings SOC Limited 2015 (2) SA 526 (SCA) at para 16, 17 and 23 held that although it was peremptory that the employees be furnished a copy of the petition, that the modes of doing so as set out in sub-sections (aa) and (bb) are directory and that effective furnishing of the application can be achieved by other means. The court must be satisfied that that method adopted was reasonably likely to make the application papers accessible to the employees (EB Steam para 17).”*

The courts have held that non-compliance will not always render the granting of an order fatal but this should be in exceptional circumstances (see Stratford v Investec Bank Limited 2015 (3) SA 1 (CC). The Constitutional Court stated that failure to furnish employees with the application may not be relied upon by a debtor for opposing sequestration when the question to be answered was is the sequestration would be to the advantage of creditors.

The courts have stated (again in EB Steam company at paragraph 8) that the legislative purpose of those sections “*is not directed at providing a technical defence to the [respondent], invoked to avoid or postpone the evil hour when a winding up order or sequestration order is made*”. In EB Steam the solution of the courts was to grant a provisional order instead of a final order. Gilbert AJ in the Cabral case found that strict compliance with preceding formalities had not taken place (no affidavit in terms of s 9(4A)(b) was filed) and thus the application had not been effectively furnished on employees and as a result a provisional order not final order was granted.

**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)**

No, the life insurance policy will not form part of the insolvent estate. In terms of section 63 of the Long Term Insurance Act 52 of 1998 (“Long Term Insurance Act”) the entire sum of a life insurance policy is protected if the “protected person” or his or her spouse is the life insured, the relevant policy has been in force for at least three years and the policy does not serve as security for a debt of the debtor during that person’s lifetime. Note, the person claiming protection in terms of section 63 must be able to prove, on a balance of probabilities, that the protection is afforded to him or her under this

section.

Notwithstanding the aforesaid, the 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.

**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)**

In this instance, Mr R is the fiduciary and S is the fideicommissary, thus the farm will form part of the insolvent estate but the realisation of the property by the trustee will be 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)**

The inheritance in this case will fall into the insolvent estate. However it will only vest in the trustee on acceptance by the insolvent heir (in this regard see *Wessels NO v De Jager 2000 (4) SA 924 SCA*).

Notwithstanding Mr and Mrs R being married in community of property, in terms of section 15(3)(b)(iii) of the Matrimonial Property Act, inheritances are generally excluded from the joint estate unless Mrs R consents to it forming part of the joint estate. In this regard however see *Badenhorst v Bekker NO 1994(2) SA 155 (N)* where Mclaren J pointed out that assets excluded from community of property (“excluded assets”) clearly fell within the ambit of section 20(1) and 20(2)(b) of the Insolvency Act 24 of 1936 and that the spouse married in community of property was clearly a co-debtor of the creditors of an insolvent joint estate the “excluded assets” therefore could also be utilized to satisfy the claims against the joint estate. The inheritance of Mrs R will therefore vest in the trustee of the joint insolvent estate. The courts finding in *Badenhorst v Bekker NO* was approved by the SCA in Du Plessis v Pienaar 2003 (1) SA 664 SCA.

**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(9) of the Insolvency Act 24 of 1936 (“Insolvency Act”) Mr A may retain for his benefit the wages or remuneration for work done after sequestration insofar as it is necessary for his or his dependents.

However, in terms of section 23(5) of the Insolvency Act, the trustee is entitled to any surplus income which, in the opinion of the Master is not necessary for their support.

Mr 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.

**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)**

Section 150 of the Insolvency Act 24 of 1936 (“Insolvency Act”) applies to the appeal of the insolvent winding-up order of a company.

In terms of s 150(1) – “*any person aggrieved by a final order of sequestration or by an order setting aside an order of provisional sequestration may, subject to the provisions of section 20 (4) and (5) of the Supreme Court Act, 59 of 1959 appeal against such order*”.

The effect of this is that no appeal against a provisional winding-up order is allowed by section 150(1).

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 realized without the consent of the insolvent. Accordingly, the liquidation proceedings are not suspended.

Section 150 of the Insolvency Act does not apply to a solvent winding-up.

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.

**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)**

The following divisions of the High Court have jurisdiction:-

North Gauteng High Court, Pretoria;

Free State High Court, Bloemfontein;

Western Cape High Court, Cape Town

**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 order to succeed in an application for her sequestration, Dagney would need to prove (in terms of section 6 of the Insolvency Act 24 of 1936 (“Insolvency Act”) that on a balance of probabilities:-

1. all formalities had been complied with (supported with documentary proof);

2. that she is actually insolvent;

3. that there is sufficient free residue in her estate to cover sequestration costs; and

4. that her sequestration would be to the advantage of creditors.

Key here is that Dagney would have to prove that her sequestration is to the advantage to creditors as a group. It is ultimately for the court to decide if the advantage would be to the advantage of creditors as a group.

Where all four of the above aspects are proven the court still has the discretion not to sequestrate the estate. The court will refuse the order if the application constitutes an abuse of process.

The other legislation which would be applicable to Dagney in this instance as she was borrowing in her capacity as an individual is the National Credit Act 34 of 2005 (“NCA”) and more particularly Part D of the NCA.

Per s 78 of the NCA, Part D is applicable to Dagney as she is a natural person.

Dagney may certainly satisfies the requirements for being considered over-indebted as provided for in s 79 of the NCA as on the preponderance of available information it is unlikely she will be able to satisfy in a timely manner all the obligations under all the credit agreements to which the she is a party.

Given that for some of the loans she had taken no financial assessment was done on her by the banks, those banks would certainly have been providing Dagney with reckless credit under s 80(1)(a) of the NCA which states:-

*“80. (1) A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than 10 an increase in terms of section 119(4)-*

*(a) the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time;”*

This being so, Dagney would have access to fairly robust protections under the NCA.

In terms of s 83 the court has the power to suspend a reckless credit agreement:-

*“83. (1) Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, the court may declare that the credit agreement is reckless, as determined in accordance with this Part.*

*(2) If a court declares that a credit agreement is reckless in terms of section 80( l)(a)or 80(l)(b)(i), the court may make an order-*

*(a) setting aside all or part of the consumer’s rights and obligations under that agreement, as the court determines just and reasonable in the circumstances;*

*or*

*(b) suspending the force and effect of that credit agreement in accordance with subsection (3)(b)(i).”*

Under s 84 of the NCA:-

*“84. (1) During the period that the force and effect of a credit agreement is suspended in terms of this Act:-*

*(a) the consumer is not required to make any payment required under the agreement;*

*(b) no interest, fee or other charge under the agreement may be charged to the consumer; and*

*(c) the credit provider’s rights under the agreement, or under any law in respect of that agreement, are unenforceable, despite any law to the contrary.”*

The above being taken into account, it appears in fact the correct approach for Dagney to have taken would have been to approach the court under the protection of the NCA as opposed to applying for voluntary sequestration. However, s85 of the NCA states that despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer’s circumstances and make a recommendation to the court in terms of s86(7) (see s85(a)).

The above scenario was precisely considered in *Ex parte Ford* (“Ford”). Briefly in Ford “*three applications for voluntary surrender served before the unopposed motion court. It appeared that a major portion of each applicant's liabilities consisted of credit agreement debt to which the NCA applied. The court found this debt to be strikingly disproportionate in relation to the relatively modest income of each of the applicants. In each of the applications it was averred that the applicants had "become insolvent by misfortune and due to circumstances beyond their control, without fraud or dishonesty on their part". The court consequently indicated that grounds for cogent suspicion of at least some degree of reckless credit extension presented themselves strongly on the disclosed facts in each of the applications. It indicated that one of the objects of the NCA is to discourage reckless credit and referred to the provisions dealing with the same. The court then referred to its powers in terms of section 85 of the NCA and pointed out that an evaluation by a debt counsellor could lead to one or more of the consumers' credit agreements being declared reckless credit, resulting in the setting aside of the agreements or suspension of the force and effect thereof*”. (see also *The interaction between the debt relief measures in the National Credit Act*

*34 of 2005 and aspects of insolvency law* C van Heerden; A Boraine).

Ultimately in Ford the judge reasoned that some of the debts may have amounted to the reckless granting of credit. Thus, the court refused to grant sequestration due to the fact that the machinery under section 85 of the NCA would have been more appropriate than sequestration.

In *Ex parte Fuls* the court stated that where, in an application for voluntary surrender, it is required to show that there is advantage to creditors and the applicant has entered into credit agreements that on the face of it fall under the provisions of the NCA, it is incumbent on the applicant to make full disclosure of at least the following:-

1. whether or not the applicant availed themselves of the procedures afforded in the NCA for debt review prior to the application for sequestration and if not provide reasons for such failure.

2. a comprehensive report of the debt counsellor involved, explaining what procedures there followed and whether the applicant complied with any debt restructuring arrangements.

Where an application of this nature lacks the above averments, it does not comply with the requirement that the applicant should satisfy the court that it is in the interest of creditors that the estate should be surrendered and should accordingly be dismissed.

As Dagney failed to avail herself to the procedures afforded in the NCA, taking all of the above into consideration I find it unlikely that a court would grant her a sequestration order. She would be fortunate for the court to take the route followed in Ford.

**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 sequestration of the estate of the principal will terminate the mandate.

**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)**

In terms of section 36(4) of the Insolvency Act 24 of 1936 (“Insolvency Act”), the seller will not be able to reclaim the goods only because of the purchaser’s failure to pay. The seller will however have a right to reclaim the goods if they could prove they are still the owner of the goods, where for example the contract is subject to a reservation of ownership clause, see in this instance *SV Trading CC Virtual Production v Suliman and Another (19614/2021) [2021] ZAGPPHC 228* (10 May 2021).

However notwithstanding the above, in terms of section 36(1) of the Insolvency Act, in this precise scenario a seller can retain ownership of the goods. In order to retain ownership of the goods and reclaim such goods from the purchaser, in terms of section 36(1) of the Insolvency Act, the seller must within 10 days from delivery thereof notify the purchaser, the trustee or the Master that he reclaims the goods. Notwithstanding, if the trustee disputes the seller’s right to reclaim the goods, the seller shall not be entitled to reclaim them unless he institutes legal proceedings to enforce his right within 14 days of having received notice of the trustees dispute.

**QUESTION 11**

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

The general rule regarding the treatment of an uncompleted or unexecuted contract in insolvency is that the contract survives the sequestration in principle, they are neither terminated nor modified nor in any way altered by the insolvency of one of the parties. However, due to the supervening concursus, the trustee cannot be compelled to perform the contract.

The trustee has the right, under the direction of the creditors, to elect whether to abide by the contract or repudiate it. At all times when executing this right the trustee must act in the best interests of the general body of creditors.

Whichever direction the trustee elects to proceed in, they must give clear notice of their election to the solvent contracting party within a reasonable time. The courts have held in *Troskie v Liquidator of RSD Construction CC* (71322/2010)[2015] GP (8 May 2015) that the question as to whether of not a liquidator has elected to abide by a contract is a question of fact and if the liquidator does not make their decision known within a reasonable time, it may be assumed that they are not going to perform in terms of the contract.

Where the trustee has elected to abide by the contract they can demand specific performance from the solvent contracting party provided the trustee themselves tenders performance in terms of the contract and the solvent contracting party has the same rights against the trustee as it would have against the insolvent. The exception to this is that the trustee has other defenses such as stating the contract is an impeachable disposition in terms of the Insolvency Act 24 of 1936.

Earlier cases such as *Bryant & Flannagan (Pty) Ltd v Muller and Another 1978 (2) SA 807(A)* said that the trustee may terminate the contract, later cases such as *Thomas Construction (Pty) Ltd (in Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd 1988 (2) SA 546(A)* established that where the trustee elects not to perform in terms of the contract it constitutes a breach of contract in the form of repudiation in which case the solvent contracting party loses (generally) its right to claim specific performance.

The solvent contracting party has a right to either accept or reject the repudiation of the contract. If they accept the repudiation they are entitled to recover property handed over of which they still retain ownership. They also have an unliquidated concurrent claim in respect of payments made by them or damages suffered as a result of the breach.

Should they reject the repudiation, they have a concurrent claim for damages in lieu of performance but remain liable for their own counter performance.

**QUESTION 12**

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

1. application to set aside directions by creditors;

2. resignation or absence from the Republic for a period longer than 60 days;

3. the destruction of documents.

**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)**

The answer to this question is prescribed in section 49(1) of the Insolvency Act which 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.

Also in terms of s 49(1), the trustee of the estate of the partnership shall be entitled to any balance of a partner’s estate that may remain over after satisfying the claims of the creditors of the partner's estate in so far as that balance is required to pay the partnership's debts and the trustee of the estate of a partner shall be entitled to any balance of the partnership's estate that· may remain over after satisfying the claims of the creditors of the partnership estate, so far as that partner would have been entitled thereto, if his estate had not been sequestrated.

**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 insolvency of a lessor on the contract of lease is not dealt with in the Insolvency Act 24 of 1936 (“Insolvency Act”). Accordingly, in these circumstances, the general common law principles must apply.

At common law, the lease between X and B is not automatically terminated as a result of the sequestration of X’s estate. B retains their rights and must perform their contractual obligations in terms of the lease towards the trustee of X’s estate.

Ordinarily, the trustee of X’s estate is obliged to sell the farm as part of the insolvent estate, however, in the present case since B occupies the land and the lease is registered in the Deeds Office, the *huur gaat voor koop* doctrine is applicable and the trustee of X’s estate must in principle sell the land subject to the lease. Essentially, the purchaser of the farm will, in principle be bound by the terms of the lease and will be bound to allow B the use and enjoyment of the land as well as other terms such as an option for B to renew the lease (see for example *Uys v Sam Friedman Ltd 1935 AD 165*).

In this instance, however, the leased land is subject to a mortgage bond registered in favour of T in July of 2020, well before the lease was entered into between X and B in January of 2021. The rights of B are therefore subordinate to those of T unless T waive their rights over the land.

The leased land will only be sold free of the lease if the offer received for the land is inadequate to satisfy T’s claim in full (i.e. yield sufficient capital to repay the mortgage bond) and a better offer can be obtained if the land were to be sold free from the lease. If the land is sold free of the lease the lease terminates and B merely has a concurrent claim for damages for breach of contract against the insolvent estate.

**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)**

Mr Saunders will not be able to use the sale of the immovable properties to inject liquidity into the business.

In terms of section 134(3) of the Companies Act 71 of 2008:-

*“134. Protection of property interests*

*...*

*...*

*(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-*

*(i) 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*

*(ii) provide security for the amount of those proceeds, to the reasonable satisfaction of that other person.”*

Accordingly should Mr Saunders sell the immovable properties he will promptly have to repay ABC Bank in full. In fact per s 134(3) in order to sell the immovable properties in the first place Mr Saunders would require ABC Bank’s prior consent unless the proceeds of the disposal would be sufficient to fully discharge ABC Bank’s protected indebtedness. This position has also been confirmed by the courts, in this regard see *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd and Others 2017 (3) SA 539 (GJ)* where the court held that the rights of the third party remain intact pending full payment or provision of security by the practitioner.

To note though is that Mr Saunders only needs to repay ABC Bank up to the amount of the company’s indebtedness to ABC Bank, thus only in the scenario where Mr Saunders would be able to sell the immovable properties for a price in excess of what is owed to ABC Bank, he may be able to retain the surplus income to inject liquidity into the business after repaying ABC Bank.

 **TOTAL MARKS: [100]**