

**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)**

[The insolvent does not lose all interest in their insolvent estate. The insolvent, for example, may continue to work or be employed however they shall receive a portion of his/her renumeration that is enough to cover their essential living expenses. This is also not true as the insolvent may continue to enter into contracts that benefit their estate, and may also contract with the permission of the trustee]

**QUESTION 3**

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

[A court has the discretion whether or not it will grant an order for sequestration. The Applicant bears the burden to satisfy the court and demonstrate, on the face of it, that it appears that the debtor is insolvent. Part and parcel of this, is proving that the applicant/creditor has complied with the formalities, failing which and in the exercise of its discretion, the court may refuse and not grant the application for sequestration. One of the main purposes of having such formal requirements – and enforcing them – is to safeguard the interests of third parties who may have an interest in the application before court and may wish to oppose such application. As sequestration has far reaching consequences on a person’s status, it is an issue that the court takes very seriously and judicial oversight is applied greatly therein. In instances where one fails to comply with the formal requirements, the matter may be dismissed]

**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)**

[The policy shall not form part of the insolvent estate, the policy is protected under section 63 because the insolvent – Mr. R – is the life insured, he is still alive, and the policy has been in effect for more than 3 years.]

**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)**

[This is known as a contingent interest of a fideicommissary heir. Such property will not form part of Mr. R’s insolvent estate and shall not vest with the master as it is exempt. The situation would have been different if Mr. R himself was the fideicommissary heir. In such an instance, and if Mr. R had been sequestrated after such contingent right had accrued to him, the property would have formed part of the insolvent estate. ]

**Question 4.3**

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

[If in a will the testator directs that an heirs inheritance shall not accrue or devolve upon them if they are unrehabilitated insolvent, such bequest shall be binding and the trustee will not have a claim to such inheritance provided that the testator diverts such inheritance to another person or leaves it at the discretion of the executors. However, such clause – as in this case – shall be invalid if the testator leaves such inheritance exclusively to their insolvent heir. Then such inheritance will form part of the insolvent’s 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)**

[The trustee will be entitled to Mr. A income only to the extent that Mr. A does not need it for his survival. This means that, simply, Mr. A is only entitled to a portion of his salary to allow him to make provisions for life’s necessities for him and his family. The remainder thereof shall vest with the trustee]

**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)**

[Where an appeal has been noted against a final sequestration order has been noted, the administration process may continue however no property of the estate may be sold and/or realized without the written consent of the insolvent. The same provisions apply in the instance of a winding-up of a company that is unable to pay its debts. However, in the case of a solvent company or one that is able to pay its debts, the execution and operation of the winding up order is suspended until the appeal has been finalized and judgment given. This also applies to the powers and appointment of the liquidator. In the matter of KNS construction the court did not consider whether the company was solvent or not, instead the court found that the company was able to enter into a contract between the date of the winding-up order and the date of its confirmation by the appeal court]

**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)**

[All three divisions would have jurisdiction to entertain the matter. In terms of the law, a High Court has jurisdiction to order a person’s sequestration if that person is domiciled, owns property, or anytime in the preceding 12 months carried on business or resided, within the geographical area of jurisdiction of that court. The High Court in Tshwane, Cape Town and Bloemfontein could sequestrate Seagull as they could each satisfy at least one of these requirements]

**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)**

[Type your answer here]

**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 mandate shall terminate on the sequestration of the mandator]

**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)**

[If there is any uncertainty as to whether the insolvent purchased the goods for cash of credit, the presumption will be that it was cash. The seller will only be able to reclaim the property if they notify the purchaser, trustee or master within 10 days of delivery that tthey will reclaim it. This does not take into account whether sequestration took place within those 10 days or not, and is conditional upon the seller refunding any perform that they received from the insolvent]

**QUESTION 11**

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

[Uncompleted contracts are submitted to the trustee or liquidator who has the discretion to accept such a contract or to repudiate it, the trustee in principle cannot be compelled to perform in terms of such a contract. If the trustee accept the contract, they are bound by it and they step into the shoes of the insolvent. The trustee must always be careful in this instance as they could be held personally liable for any losses suffered by the insolvent estate if the trustee was reckless. In considering these contracts, the trustee must always act in the best interest of the general body of creditors. The question of whether a trustee has accepted or rejected a contract is an issue of fact, and should they not communicate their decision within a reasonable time it may be assumed that they are not going to perform in terms of such a contract. In Bryants and Flannagan it was held that when a trustee repudiates a contract it may be regarded as breach, however the solvent party did not have the right to claim specific performance]

**QUESTION 12**

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

[Type your answer here]

**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)**

[Type your answer here]

**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 sequestration of any of the parties to a lease does not automatically terminate the lease. In terms of the alienation of land act, and should the property be sold, it shall be sold subject to the least agreement. The lease between X and B is a long term lease and has been registered with the deeds office, accordingly B could possible enjoy protection in terms of such act and any purchaser shall step into the shoes of the lessor and be bound by such lease. This is known as the Huur gaat voor koop principle. The terms of this principle further cover any terms of the lease, including the right to renew the lease and entitles the lessee to compensation for any improvements that have been effected on the property. However, B would not be protected in terms of this principle. The principle would apply on condition that B had leased the property before such bond was registered. Because the mortgage bond was registered first, the lease shall be subordinate to such bond. Our law recognizes and applies the principle that whoever is first in time is stronger in right. The mortgagee has the right to insist that the property should be sold lease free in an instance that the current offer is not enough toi discharge the outstanding amount and there is a better offer which could be obtained should the property be sold lease free. B would then have a claim for damages against the insolvent estate for breach of contract. ]

**QUESTION 15**

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

[the protection of property interest is governed by section 134(3) of the companies act, in terms of the section the business rescue practitioner must obtain the consent of the secured creditor unless the proceeds would be sufficient to fully discharge the outstanding amount owed to such secured creditor. The business rescue practitioner would also have to immediately pay – to the secured creditor – from the proceeds of the sale of such assets, an amount that is equal to the amount that is due and payable to them or provide security for the amount to the reasonable satisfaction of that creditor. This principle was adopted as being the proper position in our law in the Energy drive Systems case. ]

 **TOTAL MARKS: [100]**