

**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 natural person debtor will not lose all interest in his or her estate. The reasons thereto are explained hereunder.

In accordance with the provisions of the Insolvency Act, 24 of 1936 (“Insolvency Act”), the effect is that the insolvent person is divested of their estate. Their estate vests in the Master until a trustee has been appointed to take control of the administration and sequestration of the estate for the benefit of the creditors. Once a trustee has been appointment the estate vests in the trustee.

Nevertheless, and with that being said, the insolvent still has an interest in the estate and may litigate to enhance the value of the estate where the trustee decided not to take steps in the litigation and stated that they would abide by the decision of the Court. This has been highlighted in the case*Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Anther v Mulaudzi* ***[2017] 3 All SA 520 (SCA).***

**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)**

At the outset it is imperative to note that compulsory sequestration results when a creditor, *inter alia*, can prove that the liquidity of a natural person’s estate is less than his/her immediate indebtedness, or where a individual has committed an act of insolvency. This explained in great detail in Section 9 of the Insolvency Act. To get proceedings commenced the said creditor of an estate would need to bring an application to Court by way of Notice of Motion supported by a Founding Affidavit.

With that in mind, in a compulsory sequestration there are formalities that need to be complied with. There are both formal requirements and substantive requirements. Each will briefly be discussed below.

FORMAL REQUIREMENTS

The applicant must set security at the Master to defray all sequestration costs until a trustee is appointed;

Thereafter 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. It is vital that the certificate is filed with the application for sequestration. This is dealt with in terms of sub Section 9(3), (4), (5) and 14(1) of the Insolvency Act;

There is also an unconditional requirement that when the application is presented to Court, that the application is served on registered trade unions, employees in the prescribed manner and in accordance with Section 9(4A)(a0(ii) of the Insolvency Act. In amplification hereof, when serving on employees a notice should be posted on a notice board which is accessible to the employees, or, if there is no access to the premises, at the main entrance or main entrance door. Other organisations/persons to be notified on the pending application include SARS (as confirmed in the case of *Chiliza v Govender* ***2016 (4) SA 397 (SCA*)**) and the debtor with the proviso that the Court may dispense with the notice to the debtor. Lastly an affidavit is to be filed by the person who served/furnished a copy of the application entailing the manner in which the copies were served/ furnished. This affidavit should comply with the requirements set out in Section 9(4A) of the Insolvency Act.

SUBSTANTIVE REQUIREMENTS

In terms of the substantive requirements it is important to note that there should be *prima facie* evidence in seeking a provisional order and *reason to believe* in seeking a final order that:-

* the applicant qualifies as a creditor;
* there is acutal inslvency or an act of insolvency; and
* there is reason to beleive that sequestration will be to the benefit of crediotrs as a group.

FAILURE TO STRICTLY ADHERE TO THE FORMALITIES

There is various case law and commentary which deals with consequences of a failure to strictly adhere to the aforementioned. Only the whole, a failure to strictly adhere to the formalities is somewhat less stringent to that of a voluntary surrender. Certain aspects will be briefly discussed hereunder.

The Courts have held the failure to furnish employees with the petition may not be relied upon by the debtor for opposing the sequestration when the question to be decided is whether sequestration is to the advantage of creditors. The reason for the formentioned is that the Supreme Court of Appeal (“SCA”) has indicated that the purpose is not to provide a “*technical defense to the employer, invoked to avoid or postpone the evil hour when a winding-up or sequestration order is made*.”

There are also circumstances where a provisional order may be granted, despite non-compliance, to avoid the concealing of assets or for other urgent reasons in circumstances where a delay would be substantially prejudicial to creditors.

Lastly, it has also be held that there are circumstances where noncompliance will not always render the granting of an order fatal, but this will only be in exceptional circumstances.

**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)**

To answer this question a number of aspects need to be considered. As a starting point it is important to note that in accordance with Section 63 of the Long Term Insurance Act 1998 (“Long Term Insurance Act”) the entire sum of a life insurance policy is protected under the following circumstances :-

* the “protected person” (i.e. Mr R) or his spouse is the life insured;
* the relevant policy has been in force for at least three (3) years;
* the policy does not serve as security for a debt of the debtor - during that person’s lifetime; alternatively - upon his or her death, if he or she is survived by a spouse, child, stepchild or parent, provided that the policy benefits devolve upon the latter persons. Having the above in mind, if the policy benefits are payable to them as nominated beneficiaries in terms of the relevant policy, Section 63 of the Long Term Insurance Act will not apply. The case *of Pieterse v Shrosbee NO & Others; Shrosbree NO v Love and Others* ***2005 (1) SA 309 (SCA)*** expands on this in great detail.

In addition thereto, the above-mentioned protection applies to policy benefits and assets acquired solely with the policy benefits for a period of five (5) years from the date when the policy benefits were provided.

A person claiming protection in terms of Section 63 of the must furthermore be able to prove, on a balance of probabilities, that the protection is afforded to him or her under this section.

Lastly, if it can be shown that the policy in question was taken out with the intention of Mr R to defraud creditors the policy benefits will not be protected as indicated above. From the scenario it does not appear as if this is the case.

I thus believe Mr R’s life insurance policy has met the aforementioned criteria to be protected in terms of Section 63 of the Long Term Insurance Act and will not form part of the insolvent estate.

**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)**

Based on the above scenario, Mr R is the fiduciary and Mooikloof will thus form part of Mr R’s insolvent estate however the realisation of Mooikloof will be subject to the fideicommissary burden. In other words the trustee will be allowed to realise Mooikloof for the benefit of the creditors of the insolvent estate but the realisation should be subject to the fideicommissary burden and discussed.

Lastly factors such a if there is a mortgage bond registered over Mooikloof may need to be taken into account if applicable. For purposes of this question I presume there is no mortgage bond.

**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)**

Based on the above scenario, there are several aspects that need to be taken into account amongst others the manner in which Mrs R is married to Mr R (i.e. in community of property).

Having the formentioned in mind, it is vital to note that if an inheritance accrues before rehabilitation of an insolvent, the inheritance will fall into the insolvent estate. Nonetheless it will only vest in the trustee on acceptance by the insolvent heir. Reference to the case *Wessels NO v De Jager* ***2000 (4) SA 924 (SCA)*** should be taken into account.

In addition thereto and vitally essential, in the case of *Badenhorst v Bekker NO* ***1994 (2) SA 155 (N)*** (and approved in *Du Plessis v Pienaar NO* ***2003 (1) SA 664 (SCA)***), the Court held that the property which was bequeathed exclusively to one of the spouses (i.e. Mrs R) in terms of a marriage in community of property, falls into the joint insolvent estate.

Thus based on Mr R and Mrs R martial regime, the inheritance of Mrs R will thus vest in the trustee of the joint insolvent 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, in certain circumstances the trustee may entitled to a portion of Mr A’s monthly income. This is explained in greater detail hereunder.

In terms of Section 23(9) of the Insolvency Act, Mr A may retain for his benefit the salary he receives from ABC Bank post his sequestration insofar as it is necessary for his and if applicable his dependent’s. However in accordance with 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 Mr A’s support. Thus Mr A’s salary will not for part of the insolvent estate unless the Master on the request of the trustee certifies that there is available surplus income.

It is important to note that, an insolvent’s surplus income cannot establish advantage to creditors as envisaged in Section 6(1) of the Insolvency Act. In regards hereto reference should be had to the case *Ex Parte van Dyk (****1869/2015 ZAGPPH 154 (26 March 2015****).*

**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)**

At a high level an application for leave to appeal will automatically suspend the sequestration proceedings. This is unlike an application for rescission of the order which does not suspend the proceedings.

In terms of the appeal of the insolvent winding-up order of a company the following should be noted. The Insolvency Act applies to the appeal of the insolvent winding-up order of a company. In terms of Section 150(3) of the Insolvency Act, the noting of an appeal does not suspend the provisions of the Act except that no property of the insolvent estate may be realised without the consent of the insolvent. The liquidation proceedings are thus not suspended.

No appeal against a provisional winding-up order is allowed by Section 150(1) Insolvency Act. 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.

The above is succinctly summarized hereunder.

* Effects of appeal against final order

When the appeal against a final sequestration order has been noted, the administration of the estate continues but no property of the estate may be realised without the written consent of the insolvent. Reference should be had to Section 150(3) of the Insolvency Act. It is important to note that these provisions apply to a company unable to pay its debts even where the Master is unaware of these provisions. In this regard reference should be had to the case of *Slabbert, Verster & Malherbe v Die Assistent-Meester en Andere* ***1997 (1) SA 107 (NC).***

* Effects of appeal against winding-up order of a solvent company

The aforementioned scenario somewhat differs in that in this case the provisions of the Insolvency Act cannot be invoked. Once an application for leave to appeal has been made, the winding-up order both in respect of its operation and its execution is suspended pending the judgement on appeal.

**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 courts will have jurisdiction to sequestrate Bunny Seagull’s (“Bunny”) estate:-

* North Gauteng High Court, Pretoria – due to the fact Bunny is domiciled within the area of jurisdiction of the court (i.e. Tshwane);
* Free State High Court, Bloemfontein – due to the fact Bunny owns property (her farm) near Bloemfontein; and
* Western Cape High Court, Cape Town – due to the fact during the 12 months preceding the date of application Bunny carried on business within the area of jurisdiction of the court. (I am presuming this. In the event she did not – this Court would not have jurisdiction).

**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)**

The financial institutions’ failure to conduct financial assessments on Dagny Taggart (“Dagny”) prior to granting her loans is expected to have dire consequences for her application for sequestration.

Having the aforementioned in mind, it is critical to note that a Court has a discretion not to sequestrate an estate even when all aspects / grounds for sequestration can be proven. One of the said grounds for refusal of a Court to grant a sequestration is in the event a Court constitutes the application an abuse of the process.

By way of the example and in Dagny’s scenario reference should be had to the case *of Ex parte Ford* ***2009 (3) SA 376***. In this case, the Court ruled that some debts of the insolvent may have amounted to the reckless granting of credit. Based on the facts at hand this appears to be a like for like basis to that of Dagny’s case. The Court in all likelihood are going to refuse to exercise their discretion and grant Dagny her order owing to the fact that the mechanisms under Section 85 of the National Credit Act 34 of 2005 (“National Credit Act”) would of been likely to have been more appropriate than sequestration.

It is indispensably important for both Dagny and the lenders to note that the National Credit Act objectives is to promote responsibility in the credit market by stimulating responsible borrowing, avoidance of over-indebtedness, the fulfilment of financial obligations by consumers like Dagny. Furthermore it strives to discourage reckless credit granting by credit providers and to regulate aspects of contractual default by consumers. In other words, it attempts to address over-indebtedness by providing for debt relief which is accessed by means of the mechanism of debt review.

Thus there is no doubt that the reckless lenders have placed Dagny in a precarious position. The fact that no suitable contemplation had been given in the context of debt-counselling to any other possibility beyond administered debt collection for instance the likelihood of declaring the credit agreements to be reckless credit in terms of the National Credit Act before Dagny applying for voluntary surrender is going to play a substantial role in the Court’s decision and in all probability the Court will not grant the sequestration order.

In summary of the formentioned, and my reasoning for stipulating that the Court will refuse to grant Dagny’s a sequestration for voluntary surrender is owing to the fact it appears that the bulk of her debt arose from credit agreements regulated by the National Credit Act. The fact that Dagny did not apply for debt review in terms of the National Credit Act before applying for voluntary surrender will play a significant role in the Court's decision not to grant the order.

**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)**

As per the case of *Goodricke & Son v Auto Protection Insurance Co Ltd* ***1968 (1) SA 717 (A)***, a contract of mandate is terminated by the sequestration of the estate of the mandator / principal.

**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 accordance with Section 36 of the Insolvency Act, in the event the seller would like to reclaim the goods, he/she/it is obliged within ten (10) days from delivery to notify the purchaser, or the trustee or the Master of his/her/its intention to collect the goods. This is irrespective of whether sequestration takes place within those days or later and provided that the seller returns any part of the purchase price already received. In regards hereto Section 36(1) and (3) of the Insolvency Act have reference.

Lastly what is important to take into account is that delivery in this scenario means delivery with the objective of passing ownership against payment. In the event the trustee tenders the full purchase price instead of the goods, the seller is obligated to accept the purchase price. This is expanded on in the case of *Allan & David (Pty) Ltd v Ingram* ***1989 3 SA 333 (C)*** *at para 340 – 341.*

**QUESTION 11**

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

At a very high level, the contract survives sequestration in principle but the trustee has the right to elect whether to abide by it or to repudiate it. In expansion thereof and in greater detail, the general rule relating to uncompleted contracts in insolvency is that the trustee will retain a right to elect as to whether or not he/she should continue with contract or not. In other words, they are neither terminated nor in any way altered or modified by the insolvency of one of the parties to such contract with the exception of the supervening *concursus* the trustee cannot in principle be compelled to perform the contract.

That being the case, there is on the whole nothing that excuses the trustee from performing the insolvent’s obligations which fall due to be performed between the date of sequestration and the date upon which the trustee makes his/her lection to abide by the contract alternatively to repudiate it. In regards hereto reference should to made to the case of *Ellerine Brothers (Pty) Ltd v McCarthy Ltd* ***2014 (4) SA 22.***

If the trustee elects not to continue with the contract, it will amount to a breach of contract and the other party will have the normal remedies for breach of contract. In this case any claim by the other party against the estate will be concurrent. The other party is permitted to demand the trustee in writing to exercise his/her election within a reasonable period of time in terms of Section 35 of the Insolvency Act.

Where the trustee fails to exercise this right within a period of six (6) weeks, the other party can bring an application to Court asking for the cancellation of the contract.

Having the aforementioned in mind, the trustee should always act in the best interests of the general body of creditors in making their election.

**QUESTION 12**

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

* Destruct documentation;
* The entering of a caveat in the Deeds Office; and
* The sale of property before the second meeting

**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 applicable section to answer this question is Section 49(1) of the Insolvency Act.

This section stipulates that when the estate of a partnership and the estates of the partners are under sequestration simultaneously, the creditors of the partnership must solely prove their claims against the estate of the partnership.

The personal creditors of a partner must prove claims against the personal estate of such a partner.

The reason for this is because the partnership assets are to be applied for purposes of paying partnership debts whilst the assets of an individual partner’s separate estate shall be used for the payment of separate estate debts.

**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)**

At the outset it is imperative to note that there is no provision in the Insolvency Act that deals with the effect of the sequestration of the lessor’s estate on the contract of lease. Thus to deal with this situation the general common law principles become applicable.

Having regard to the facts at hand the lease between X and B will not automatically terminated as a result of the sequestration of X’s estate. In expansion thereof, B will retain his rights and ought to perform his contractual obligations in terms of the lease towards the trustee of X’s estate. The trustee will become obliged to sell the farm as part of the insolvent estate.

It must also be noted that the *huur gaat voor koop* doctrine will become applicable in the above scenario due to the fact B occupies the land and the lease is registered in the Deeds Office and the trustee of X’s estate must in principle sell the land subject to the lease.

The new owner is bound by the terms of the lease, and he/she/it is in particular bound to allow T to the use and enjoyment of the land.

Delving deeper, in the given scenario, it must be noted that the leased land is subject to a mortgage bond which was registered prior to the lease being entered into between X and B. Thus the rights of B are therefore subordinate to those of T. In the event the land is sold free of the lease where it cannot yield adequate capital to repay the mortgage bond subject to the lease, the lease terminates and the lessee 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)**

To provide Mr Saunders with sound advice, he would need to have regard to Section 134(3) of the Companies Act 71 of 2008 (“New Companies Act”). At a high level Section 134(3) states that if during a company’s (i.e. XYZ Proprietary Limited (“XYZ”)) business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest (as in this scenario), the company must:-

* attain the prior consent of that other person (i.e. ABC Bank (“ABC”)), unless the disposal would be sufficient to fully discharge the indebtedness protected by that person’s security or title interest; and
* promptly:
	+ pay to that other person (i.e. ABC Bank) the sale proceeds attributed to that property up to the amount of the company’s (i.e. XYZ) indebtedness to that other person (i.e. ABC); or
	+ provide security for the amount of those proceeds, to the reasonable satisfaction of that other person (i.e. ABC). In regards hereto Mr Saunders must keep in mind the Court’s decision in the case of *Redpath Mining South Africa (Pty) Ltd v Marsden NO and Others* ***(18486/2013) [2013] ZAGPJHC****.* In this case it was held that in business rescue proceedings secured creditors (i.e. ABC) stand on the same footing during its subsistence as other creditors. The common purpose, desire and objective is that each creditor ultimately receives everything owing to it. This differs from a liquidation. In the event the business rescue plan runs into difficulties and the liquidation of assets becomes necessary, Section 134(3) of the New Companies Act serves as a safeguard and assurance that the interests of secured creditors especially are protected.

Thus in conclusion, if Mr Saunders proceeds with the disposal of certain of XYZ’s immovable properties he would need to ensure that there is prompt payment by XYZ of the proceeds of the disposition to ABC and moreover the payment must fully discharge the indebtedness of XYZ to ABC.

 **TOTAL MARKS: [100]**