ASSIGNMENT 1 – SEMESTER 1 – 2017:

1. The legislator has designated certain acts or omissions by a debtor as “acts of insolvency.”
2. A concurrent creditor does not enjoy any advantage over other creditors of the insolvent.
3. Once the new Companies Act 2008 came into effect, the law was divided. Since then, the winding-up of solvent companies is dealt with in terms of the Companies Act 2008.
4. With regard to a close corporation, there are several important differences between payments by reason of membership, and salaries or remuneration. The all-important difference is the difference of capacity.
5. A voluntary business rescue starts with a resolution by the directors of the juristic person concerned.
6. As a rule, only a Provincial or Local Division of the High Court may adjudicate upon an insolvency matter.
   6.1. True.
7. For sequestration to be to the advantage of creditors it must “yield at the least, a not negligible dividend.”
   7.1. True.
8. If a trustee vacates his office, is removed from office, or dies, the estate revests in the insolvent until a new trustee is appointed.
   8.1. False: Correct Statement: the estate revests in the Master until a new trustee is appointed.
9. As a general rule, sequestration suspends or puts an end to a contract.
   9.1. False: Correct statement: As a general rule, sequestration does not suspend or put an end to the contract.
10. A minor is an example of a person absolutely disqualified from being a trustee.
   10.1. True.

ASSIGNMENT 1 – SEMESTER 2 – 2017:

1. An application for compulsory sequestration brought by a creditor who is not arm’s length is generally referred to as a friendly sequestration.
2. A landlord who is owed rent has a hypothec over movable property brought on to the leased premises for use by the tenant.
3. Once the new Companies Act 2008 came into effect, the law was divided. Since then, the winding up of solvent companies is dealt with in terms of the Companies Act 1973.
4. With regard to a close corporation, there are several important differences between payments by reason of membership, and salaries or remuneration. The all-important difference is the difference of capacity.
5. A compulsory business rescue starts with an application to court.
6. The Notice of surrender (and consequently the debtor’s application for surrender) never lapses, even if the court does not accept the surrender.
6.1. **False**: Correct statement: A notice of surrender lapses if the court does not accept the surrender when the application is made, or, if the notice of surrender is properly withdrawn in terms of the act, or, if the debtor fails to make the application for surrender within days after the date advertised as the date of hearing of the application.

7. **An insolvent who brings an action in the magistrate court is obliged to give security for the costs of the action if the defendant requests it.**

7.1. **True.**

8. **Where the joint estate of spouses married in community of property is sequestrated, both spouses become insolvent and s21, accordingly, has no application.**

8.1. **True.**

9. **A special meeting may be called for either of the following purposes: (i) Proof of claims and (ii) to elect a trustee.**

9.1. **False**: Correct statement: (i) proof of claims and (ii) Interrogation of the insolvent.

10. **The Master may remove a trustee from office on the ground that the majority of creditors has requested in writing that he be removed.**

10.1. **True.**

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**EXAM: OCTOBER/NOVEMBER 2016:**

**QUESTION 1:**

(a) The terms "sequestration" and "sequestration order" should strictly be used only with references to a **PERSON'S** estate. (2)

(b) In *Ex parte Henning*, the statement of affairs that lay for inspection did not contain the **PERSONAL** information (Annexure VIII). (2)

(c) According to section **8(G)** of the Insolvency Act it is an act of insolvency if a debtor gives notice in writing to a creditor that he is unable to pay one or more of his debts. (2)

(d) A debtor may not, without the **WRITTEN** consent of the trustee, enter into a contract which adversely affects his estate. (2)

(e) The property of the spouse of the insolvent, where the marriage is out of community of property, also vests in the trustee of the insolvent estate, until it is **RELEASED** by the trustee. (2)

(f) Section 23(8) allows the insolvent to recover for his own benefit compensation for any loss or damage which he may have suffered, whether before or after sequestration of his estate, by reason of **DEFAMATION** or personal injury. (2)
(g) The trustee is obliged to release property which was acquired by the solvent spouse during her marriage with the insolvent by a valid TITLE against creditors of the insolvent. (2)

(h) The SEQUESTRATION of an employer’s estate suspends the employment contract between him and his employees with immediate effect. (2)

(i) If the insolvent has carried out his side of the contract and only the other party’s performance is outstanding, the right to that performance is an ASSET in the insolvent estate and vests in the trustee.

(j) After receiving a final sequestration order the Master must immediately convene (cause to come together) a FIRST meeting of creditors by notice in the Government Gazette. (2)

(k) A nurse who has treated the insolvent’s deceased wife or MINOR CHILD may have a preferent claim against the insolvent estate if further requirements are met. (2)

(l) Note that as a result of a relative ground for disqualification such a person cannot be a trustee of a specific insolvent estate. This prohibition differs from the ABSOLUTE grounds for disqualification where such a person may not be a trustee of any insolvent estate whatsoever. (2)

(m) The term "disposition" does not include a disposition made in compliance with an ORDER OF COURT / COURT ORDER. (2)

(n) A valid PLEDGE is constituted where there is delivery of movable property to a creditor on the understanding that it will be retained by him until his claim has been satisfied. (2)

(o) Interest due on a secured claim for a period not exceeding TWO years immediately preceding the date of sequestration is secured as if it were part of the capital sum. (2)

(p) The rehabilitation of an insolvent is a matter which lies solely within the discretion of the COURT. (2)

(q) The human beings (the natural persons) who administer the business of the company are its DIRECTORS. (2)

(r) When a partnership is dissolved because the estate of one of the partners has been sequestrated, the partnership assets are divided among the partners in terms of the partnership contract or the COMMON-LAW. (2)

(s) Rehabilitation has the effect of putting an end to the SEQUESTRATION. (2)

(t) Employees are "preferred UNSECURED creditors" for unpaid but due and payable sums of remuneration, reimbursements for expenses, or other employment-related money before the business rescue proceedings began.
**QUESTION 2:**

Indicate whether the following statements are true or false. **DO NOT** give a written explanation: use only the letters **T** or **F**.

1. In common parlance, a person is insolvent when he is unable to pay his debts. But the legal test of insolvency is whether the debtor’s liabilities, fairly estimated, exceed his assets, fairly valued. (2)
   **TRUE** – Hockley’s 1.1

2. Publication of the notice in the Gazette and a newspaper must take place not more than 30 days and not less than 18 days before the date stated in the notice as the date for the hearing of the application. (2)
   **FALSE** – Hockley’s 2.3.1

3. Section 9(1) allows proceedings for the compulsory sequestration of a debtor’s estate to be instituted by two or more creditors (or their agents) who have liquidated claims against the debtor amounting, in aggregate, to not less than R200. (2)
   **TRUE** – Hockley’s 3.1.3.

4. If the trustee elects to set aside a contract, he may not recover any performance rendered by the insolvent. (2)
   **FALSE** – Hockley’s 4.1.3.

5. The Insolvency Act deprives a debtor of his contractual capacity and the debtor generally has no competency to make binding agreements. (2)
   **FALSE** – Hockley’s 4.1.

6. It has been held by a majority of the Constitutional Court that section 21 of the Insolvency Act does not impair the fundamental dignity of solvent spouses. (2)
   **TRUE** – Hockley’s 6.1.

7. As far as ranking is concerned, a secured creditor (e.g., a mortgage bondholder) is in the strongest position, because his or her claim is paid first out of the proceeds of a certain asset which serves as security for that claim. (2)

8. Because of the principle of “huur gaat voor koop”, the trustee cannot, as a rule, repudiate a lease of immovable property concluded by the insolvent as lessor and must realise the property subject to the lease. (2)
   **TRUE** – Hockley’s 7.2.7 (i)

9. An insolvent estate, for purposes of distribution, consists of the proceeds of both the encumbered and unencumbered assets. (2)
   **TRUE** – Hockley’s 16.3

10. One effect of the principle of the separate legal personality of the company is that the assets and liabilities of the company are the assets and liabilities of the company, and not of the members of the company. (2)
    **TRUE** – MO Page 75
11. If the insolvent has been convicted of a fraudulent act in relation to his insolvency, he may apply for rehabilitation after two years have elapsed from the date of his conviction. (2)
   FALSE – Hockley’s 19.2.1 (ii)

12. An application to surrender a partnership estate must, as a rule, be brought by only one partner. (2)
   FALSE – Hockley’s 20.1

13. A concurrent creditor enjoys advantage over other creditors of the insolvent. (2)
   FALSE – Hockley’s 16.1.1.

14. Unlike in the case of a company, no provision is made for the appointment of a provisional liquidator for a close corporation. (2)
   TRUE / FALSE – MO 243 Page 90

15. The application for compulsory business rescue suspends any liquidation proceedings involving the company.
   TRUE – MO 25.1.1 (iii) Page 101

QUESTION 3:

A. You are the trustee of Tenza’s insolvent estate. You have discovered that Tenza paid Bobby, Cynthia, and Donald within six months of the sequestration of his estate, for reasons that remain unclear. You wish to question Bobby, Cynthia, and Donald about these payments. On what occasions could they be questioned?

   Hockly’s 9.1.3(ii)

   Because a trustee has been appointed in respect of Tenza’s insolvent estate (1 mark) the first meeting of creditors (at which the trustee is elected) has already been held (1 mark) (see Hockly’s 9.1.1). Bobby, Cynthia, and Donald could still be interrogated at a second meeting (1 mark) or a general meeting of creditors (1 mark) (s 65(1) (1 mark)). But they could not be questioned at a special meeting called for the sole purpose of interrogating Tenza (1 mark). (5)

B. Please read these instructions before you start to answer this question. This question is in a framework format. Each of the ten questions appears in the left column named “Question”. The space for your answers is in the right column named “Answer”. Thus, answer each question in the opposite space provided in the right column. So, for example, your answer to question (1) must appear in the space provided for answer (1). (10)

<table>
<thead>
<tr>
<th>QUESTION:</th>
<th>ANSWER:</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) What principle of insolvency law was discussed in Magnum Financial Holdings Ltd (Pty) Ltd (in Liquidation) v Summerly &amp; another NNO 1984 (1) SA 160 (W)?</td>
<td>The question whether a trust could, at law, be sequestrated / whether a trust can qualify as a debtor for sequestration purposes.</td>
</tr>
<tr>
<td>Question</td>
<td>Answer</td>
</tr>
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<td>----------</td>
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</tr>
<tr>
<td>(2) If it is clear that the free residue is insufficient, what must the court do when it hears the debtor's application for voluntary surrender?</td>
<td>Refuse the application / dismiss the application. Hockly’s par 2.2.2.</td>
</tr>
<tr>
<td>(3) For the purposes of section 9(1) of the Insolvency Act, a claim for the payment of an untaxed attorney and client bill of costs is an example of which type of claim?</td>
<td>An unliquidated claim. Hockly’s 3.1.1.</td>
</tr>
<tr>
<td>(4) For sequestration to be to the advantage of creditors, what dividend must it yield at the least?</td>
<td>A not-negligible dividend / 50 cents in a rand. Hockly’s 3.1.3; Study Guide study unit 4, activity 4, feedback.</td>
</tr>
<tr>
<td>(5) May an insolvent be a registered credit provider?</td>
<td>No. Hockly’s 4.4, fifth bullet.</td>
</tr>
<tr>
<td>(6) If the trustee wishes to continue the hire of property, what is the period of time within which he must notify the lessor?</td>
<td>Three months after his appointment. Hockly’s 7.2.3(ii).</td>
</tr>
<tr>
<td>(7) One purpose of a special meeting of creditors is the proof of claims. Which is the other purpose of a special meeting of creditors?</td>
<td>Interrogation of the insolvent. Hockly’s 9.1.3(ii).</td>
</tr>
<tr>
<td>(8) What is the name of the common law action by which a creditor may have a disposition set aside?</td>
<td>Actio Pauliana. Hockly’s 12.2.5; Study Guide, study unit 14, activity 2.</td>
</tr>
<tr>
<td>(9) If the proceeds of the encumbered property are insufficient to cover the secured creditor’s claim, which type of claim does this creditor have for the balance?</td>
<td>A concurrent claim. Hockly’s 16.1.2.</td>
</tr>
<tr>
<td>(10) If the insolvent applies for rehabilitation within two years of the date of his sequestration, whose recommendation is required for this application?</td>
<td>The Master’s recommendation. Hockly’s 19.2.1(ii), third bullet.</td>
</tr>
</tbody>
</table>

C. Provide reasons why an insolvent person is prohibited from holding certain offices. (4)

An insolvent is prohibited from holding some offices if there is a possibility of prejudice to the public interest (1 mark), if a great amount of trust and responsibility is required (1 mark), or if the possibility of dishonest business practices exists. The common denominators in these offices are honesty and trust (1 mark). Sometimes there is an accumulation of circumstances over which the debtor had no control which led to his insolvency (1 mark). But very high expectations are placed on members of the National Assembly, and it is therefore reasonable to prohibit a person who is insolvent from serving as a member. (1 mark) - Study guide page 63 activity 9

D. Explain the difference between a secured claim and a preferent claim. (5)

A secured claim is paid out of the proceeds of a specific encumbered asset (1 mark). (If those proceeds are insufficient, the unpaid balance is paid as a concurrent claim from the free...
residue (1 mark), unless the creditor has waived the unsecured balance of his claim (1 mark.)
A preferent claim is paid out of the free residue (1 mark) (the proceeds of the unencumbered
assets (1 mark)), but enjoys preference over concurrent claims (1 mark). (If only part of a claim
enjoys preference (1 mark), the balance is also treated as a concurrent claim (1 mark.).)
NOTE: Students are to be awarded a mark if they indicate that a secured claim is a claim where
a creditor has some form of security from an asset (1 mark) OR it ranks higher than a preferent
claim (1 mark). - Study guide page 158, 159; study unit 17, self-test question 2.

E. D’s estate was sequestrated in 2014. His concurrent creditors received no dividend and even
had to pay contributions. D has not yet been rehabilitated. He has just won a motorcar to the
value of R150 000 in a competition. The trustee of D’s insolvent estate has heard about his
good fortune and claims delivery of the car. Explain whether D has to deliver the car to the
trustee. (6)
All assets of the insolvent estate at the time of sequestration (1 mark), and all assets that the
insolvent acquires during sequestration (1 mark), that is before rehabilitation, fall into the
insolvent estate (1 mark) (section 20 of the Insolvency Act) (1 mark), unless the property is
specifically excluded (1) in terms of section 23 of the Insolvency Act (1 mark). The car that D
has won is not excluded by the Insolvency Act and thus forms part of the insolvent estate (1
mark). Even on rehabilitation the assets in the insolvent estate do not (subject to one
exception) pass to the insolvent again (1 mark).
(6)
NOTE: Students are to be awarded a mark if they mention declaratory order (1 mark) OR If
the student mentions that the trustee can waive his right (1 mark) OR if the student mentions
that formalities have to be met (1 mark) - Study guide page 180; study unit 20, self-test
question 1

EXAM MAY/JUNE 2016:

QUESTION 1:

(a) Although sequestration was not designed to alleviate the position of the debtor, it
inevitably has this effect because it relieves him from legal proceedings by creditors and
allows him, through REHABILITATION to free himself from all unpaid pre-sequestration
debts.

(b) The purpose of a notice of surrender is to alert CREDITORS as to the intended application,
in case they wish to oppose.

(c) An application for COMPULSORY sequestration brought by a creditor who is not at arm’s
length is generally referred to as a “friendly sequestration.”

(d) A debtor may not, without the WRITTEN consent of the trustee, enter into a contract
which adversely affects his estate.
(e) The property of the spouse of the insolvent, where the marriage is out of community of property, also vests in the trustee of the insolvent estate, until it is released by the trustee.

(f) Only if there is the required opinion by the master is the insolvent divested of the relevant portion of her earnings.

(g) The trustee is obliged to release property which was acquired by the solvent spouse during her marriage with the insolvent by a valid title against creditors of the insolvent.

(h) Although concurrent creditors rank equally, they do not necessarily receive the same amounts when the free residue of the estate is distributed. The dividend payable to concurrent creditors amounts to a certain proportion/percentage of cents in the rand.

(i) If the insolvent has carried out his side of the contract and only the other party’s performance is outstanding, the right to that performance is an asset in the insolvent estate and vests in the trustee.

(j) After receiving a final sequestration order the master must immediately convene a first meeting of creditors by notice in the Government Gazette.

(k) A nurse who has treated the insolvent’s deceased wife or minor child may have a preferent claim against the insolvent estate if further requirements are met.

(l) Note that as a result of a relative ground of disqualification such a person cannot be a trustee of a specific insolvent estate. This prohibition differs from the absolute grounds for disqualification where such a person may not be a trustee of any insolvent estate whatsoever.

(m) The term ‘disposition’ does not include a disposition made in compliance with an order of court.

(n) A valid pledge is constituted where there is delivery of movable property to a creditor on the understanding that it will be retained by him until his claim has been satisfied.

(o) A company is a juristic person that has a legal personality separate from the members of the company.

(p) A private company has a name that must end with the words “pty / proprietary limited.”

(q) The name of a public company must end with the word “ltd / Limited.”

(r) A close corporation must have at least one member but not more than 10 members.

(s) Rehabilitation has the effect of putting an end to the sequestration.
You must clearly distinguish between two types of business rescue proceedings: voluntary business rescue and **COMPULSORY** business rescue.

**QUESTION 2:**
Indicate whether the following statements are true or false. DO NOT give a written explanation: use only the letters T or F.

1. A debtor is sequestrated, not the estate itself.  
   **False.**

2. The court may accept the surrender of a debtor’s estate only if it is satisfied that the debtor’s estate is, in fact, solvent.  
   **False.**

3. The fact that there will be a significant amount for distribution after the costs of sequestration have satisfied does not necessarily mean that sequestration will be to the advantage of the creditors.  
   **True.**

4. If the trustee elects to set aside a contract, he may not recover any performance rendered by the insolvent.  
   **False.**

5. The insolvent may not recover for his own benefit any pension to which he may be entitled for services rendered by him.  
   **False.**

6. It has been held by a majority of the Constitutional Court that s21 of the Insolvency Act does not impair the fundamental dignity of solvent spouses.  
   **True.**

7. As far as ranking is concerned, a secured creditor (e.g. a mortgage bondholder) is in the strongest position, because his or her claim is paid first out of the proceeds of a certain asset which serves as security for that claim.  
   **True.**

8. Where the insolvent contracted to acquire immovable property and the property has not been transferred to him, the trustee must make his election to uphold or repudiate the contract within six months after receiving written notice from the other party calling upon him to do so.  
   **False.**
9. A debtor whose estate has been sequestrated finally may obviate the usual process of liquidation of the estate assets and shorten the period of his insolvency by making a compromise with his creditors in terms of s120 of Insolvency Act.  
**False.**

10. One effect of the principle of the separate legal personality of the company is that the assets and liabilities of the company are the assets and liabilities of the company, and not of the members of the company.  
**True.**

11. As a general rule, a member of a close corporation must be a juristic person (a human being).  
**False.**

12. The rehabilitation of an insolvent is a matter which lies solely within the discretion of the court.  
**True.**

13. A concurrent creditor enjoys advantage over other creditors of the insolvent.  
**False.**

14. A partner en commandite, like an ordinary partner, participates in the management and business of the partnership.  
**False.**

15. One method of obtaining business rescue is compulsory business rescue by means of an application by an affected person to court.  
**True.**

**QUESTION 3:**

a. The requirements for voluntary surrender are stricter than those for compulsory sequestration. Explain why. (5)

In voluntary surrender, the court will accept the voluntary surrender of a debtor’s estate only if it is satisfied that sequestration will be to the advantage of creditors (s 6(1)). Whereas in an application for compulsory sequestration, the creditor has to show merely that there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated (s 12(1)). The onus, in other words, is more strenuous in voluntary surrender than in compulsory sequestration. The reason for this is that the debtor can normally be expected to provide a detailed account of his own financial position, whereas a sequestrating creditor would generally not have access to this information. Another reason is to reduce the risk of the debtor abusing the sequestration procedure and resorting to sequestration when it holds little or no real benefit for creditors and simply gives the debtor a means of escaping his liabilities.
### QUESTION: | ANSWER:
---|---
1. Which case dealt with the question whether the solvent wife could be compelled to work so that her contribution to her insolvent husband’s monthly payments could be taken into account? | Ex parte Henning
2. Had the debtor in Epstein v Epstein engaged in transactions which required investigation? | Yes, he committed an act of insolvency.
3. Name the case in which the sequestration of the debtor’s estate was applied for so that the debtor’s claim against a relative of the applicant would be extinguished. | Amod v Khan
4. May the trustee demand payment of money that is owed to the insolvent under a post-sequestration partnership which the insolvent has entered into with the trustee’s consent? | Yes
5. State the general rule at common-law regarding the contribution of a contract not completed by the insolvent. | Generally sequestration does not suspend or end a contract.
6. How did the court in Estate Wege v Strauss define the word “value”? | Need not to be tangible or reciprocals... being a member of the Tatterstall was defined as value...
7. In which case did the insolvent expect to stave off insolvency if he could obtain an extension of time in which to dispose of his main asset? | Pretorius Trustee v van Blommenstein
8. In Ensor NO v Rensco Motors, Illings Acceptances appointed Mackenzies Garage (Pty) Ltd to sell Mazda vehicles and spare parts. Which type of contract was the contract between these two contracting parties? | Franchise Agreement.
9. Which case dealt with the question of when a conditional or contingent debt could be regarded as being incurred in order to establish whether two months had expired before the bond was lodged? | Joint Liquidators of Glen Anil Development
10. What did the presiding officer record as having been accepted at the meeting of creditors in Prinsloo en ander v van Zyl? | Offer of composition.
C. Provide reasons why an insolvent person is prohibited from holding certain offices? (4)

An insolvent is prohibited from holding some offices if there is a possibility of prejudice to the public interest, if a great amount of trust and responsibility is required, or if the possibility of dishonest business practices exists. The common denominators in these offices are honesty and trust. Sometimes there is an accumulation of circumstances over which the debtor had no control which led to his insolvency. But very high expectations are placed on members of the National Assembly, and it is therefore reasonable to prohibit a person who is insolvent from serving as a member.

D. Discuss *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC) in respect of the question whether business rescue proceedings may be used to secure a better return for creditors or shareholders where there is no clear prospect of the company continuing to operate on a solvent basis or being restored to solvency. (5)

This aspect of the case deals with the meaning of “rescuing the company” in business rescue. Rescuing the company in this context means achieving the goals set out in the definition of “business rescue”. These goals are to facilitate the rehabilitation of a company or corporation in financial distress through-

- the temporary supervision of the company and the management of its affairs, business and property;
- a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
- the development and implementation of a plan to rescue the company and by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximizes the likelihood of it continuing in existence on a solvent basis or; if this is not possible, that results in a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company.

In this case Zoneska Investments (ZI) applied to court for the winding-up of Midnight Storm (MS) because it could not pay its debts. Southern Palace (SP) then applied to court for MS to be placed in business rescue proceedings. In respect of whether business rescue proceedings may be used to secure a better return for creditors-

- the court held that, it regarded that goal as an independent alternative goal that may be pursued for its own sake.
- it further held that if that goal was simply to secure a better return for creditors, it must be made clear what resources will be made available to the company and on which terms because, in the absence of such information, it would be mere speculation to say that creditors will be better off than they would have been with immediate liquidation.

In the present case the second alternative goal, to implement a business rescue plan that would yield a better return for the creditors and shareholders than would result from immediate liquidation, was not sought. The court exercised its discretion and rejected the application for business rescue, and placed MS in provisional liquidation.
E. D’s estate was sequestrated in 2005. His concurrent creditors received no dividend and even had to pay contributions. D has not yet been rehabilitated. He has just won a motorcar to the value of R150 000 in a competition. The trustee of D’s insolvent estate has heard about his good fortune and claims delivery of the car. Explain whether D has to deliver the car to the trustee. (5)

Study guide page 180 activity
All assets of the insolvent estate at the time of sequestration, and all assets that the insolvent acquires during sequestration, that is before rehabilitation, fall into the insolvent estate (section 20 of the Insolvency Act), unless the property is specifically excluded in terms of section 23 of the Insolvency Act. The car that D has won is not excluded by the Insolvency Act and thus forms part of the insolvent estate. Even on rehabilitation the assets in the insolvent estate do not (subject to one exception) pass to the insolvent again.

EXAM OCTOBER/NOVEMBER 2015:

QUESTION 1:

(a) Mr and Mrs Van Tonder were married in community of property in 2001 and are now insolvent. Voluntary surrender may be sought by MR AND MRS VAN TONDER / BOTH SPOUSES / BOTH DEBTORS. (2)

(b) If it is uncertain whether the free residue is sufficient, the court may grant the application for voluntary surrender, provided a guarantee for COSTS / SECURITY, to the satisfaction of the Master, has been furnished. (2)

(c) That portion of the insolvent estate which is not subject to any right of preference by reason of any special mortgage, legal hypothec, pledge or right of retention, is also known as the FREE RESIDUE. (2)

(d) On the application of the debtor, the court may anticipate the return day of the rule nisi for the purpose of discharging the provisional order, provided a period of 24 HOURS notice of the application has been given to the sequestrating creditor (s 11(3)). (2)

(e) Section 21 of the Insolvency Act applies only where there is, indeed, a SOLVENT spouse. (2)

(f) Only if there is the required opinion by the MASTER is the insolvent divested of the relevant portion of her earnings. (2)

(g) Another category of property which the trustee must release is that acquired by the solvent spouse under a marriage settlement (s 21(2)(b)). The solvent spouse need not prove that the settlement was BONA FIDE (2)
(h) Although concurrent creditors rank equally, they do not necessarily receive the same amounts when the free residue of the estate is distributed. The dividend payable to concurrent creditors amounts to a certain **PROPORTION / PERCENTAGE** of cents in the rand. (2)

(i) When an employment contract between an employer and employee is suspended in terms of section 38(1) of the Insolvency Act, amongst other things, no **EMPLOYMENT** benefit accrues to the employee in terms of the contract.

(j) The Supreme Court of Appeal has now laid down authoritatively that the beneficiary in this type of case merely has a **COMPETENCE** or power to accept the inheritance or benefit in question and that, until he does so, it does not form part of his estate (Wessels NO v De Jager en ’n ander NNO 2000 (4) SA 924 (SCA) 928). (2)

(k) A nurse who has treated the insolvent’s deceased wife or **MINOR CHILD** may have a preferent claim against the insolvent estate if further requirements are met. (2)

(l) It is an **CRIMINAL** offence for a person to accept a benefit as consideration for agreeing to, or for not opposing, a composition (s 141). (2)

(m) Examples of dispositions not for **VALUE** are a donation and a payment for a promise which the promisor cannot be compelled to carry out. To qualify as “value”, the reciprocal benefit need not be a monetary or tangible one. (2)

(n) A valid **PLEDGE** is constituted where there is delivery of movable property to a creditor on the understanding that it will be retained by him until his claim has been satisfied. (2)

(o) A company is a **JURISTIC** person that has a legal personality separate from the members of the company. (2)

(p) A private company has a name that must end with the words “**(PTY / PROPRIETARY) Limited**”. (2)

(q) The name of a public company must end with the word “**LTD / LIMITED**”. (2)

(r) A close corporation must have at least **ONE MEMBER** but not more than 10 members. (2)

(s) Rehabilitation has the effect of putting an end to the **SEQUESTRATION**. (2)

(t) You must clearly distinguish between two types of business rescue proceedings: voluntary business rescue and **COMPULSORY** business rescue. (2)
QUESTION 2:

Indicate whether the following statements are true or false. DO NOT give a written explanation: use only the letters T or F.

1. In an application for voluntary surrender, it is possible to infer that the debtor is insolvent merely because he asked the creditor for time to pay the debt. (2)
   False (Hockly 3.1.2(ii))

2. If a court is satisfied that all requirements have been met and that the preliminary formalities have been observed, it has no discretion to reject the voluntary surrender of the debtor’s estate. (2)
   False (Hockly's 2.6)

3. A debtor may arrange with a friend to whom he owes a debt and whom he is unable to pay, that he (the debtor) will commit an act of insolvency and the friend will then apply for voluntary surrender on the strength of this act of insolvency. (2)
   False (Hockly’s 3.1.4)

4. ABC Bank registered the first mortgage over Fred’s farm and Ella registered the second mortgage over the farm. The bank and Ella may regard the farm as “disposable property” for the purposes of section 8(b) of the Insolvency Act. (2)
   False (Hockly 3.1.2(i)(b))

5. A liquidated claim is a claim for money, the amount of which is fixed by agreement, judgment, or otherwise. (2)
   True (Hockly 3.1.1; Study guide Page 44 and 45)

6. It has been held by a majority of the Constitutional Court that section 21 of the Insolvency Act does not impair the fundamental dignity of solvent spouses. (2)
   True (Hockly 6.1, last bullet)

7. Kelly has purchased the insolvent Lisa’s land under the Alienation of Land Act and may arrange payment of the relevant amounts to the satisfaction of the trustee of Lisa’s insolvent estate within 21 days. (2)
   False (Hockly 7.2.7(ii))

8. Where the insolvent contracted to acquire immovable property and the property has not been transferred to him, the trustee must make his election to uphold or repudiate the contract within six months after receiving written notice from the other party calling upon him to do so. (2)
   False (Hockly’s 7.2.3)

9. Under section 34(3) of the Insolvency Act, Ilse’s transfer of her jewellery business in July is void as against Jack, who sued Ilse in the Magistrate’s Court in June for the purchase price of diamonds that he delivered to her for that business. (2)
   True (Hockly 12.7; 12.6)
10. One effect of the principle of the separate legal personality of the company is that the assets and liabilities of the company are the assets and liabilities of the company, and not of the members of the company. (2)
   True (MO (printed version) Page 75)

11. As a general rule, a member of a close corporation must be a juristic person (a human being). (2)
   False (MO (printed version) Page 89)

12. One month after Dee’s estate was sequestrated, the trustee hired X Protection Services Ltd to guard Dee’s house, and X Protection Services Ltd is entitled to vote at a meeting of creditors. (2)
   False (Hockly 9.1)

13. A concurrent creditor enjoys advantage over other creditors of the insolvent. (2)
   False (Hockly’s 16.1.1)

14. The free residue must be applied, in the first place, to defray funeral expenses. (2)
   True (Hockly’s 16.3.2)

15. One method of obtaining business rescue is compulsory business rescue by means of an application by an affected person to court. (2)
   True (MO (printed version) Page 101)

QUESTION 3

(a) Explain the concept “concursus creditorum” as well as what it presupposes. (5)

The legal machinery that comes into operation on sequestration is designed to ensure that whatever assets the debtor has, are liquidated and distributed among all his creditors in accordance with a predetermined (and fair) order of preference. The term “concursus creditorum” means that upon the granting of a sequestration order (or provisional order) “coming together of creditors” is established, and the interests of creditors as a group enjoy preference over the interests of individual interests. The debtor is divested of his estate and cannot burden it with any further debts. A creditor’s rights to recover his claim in full by judicial proceedings is replaced by the right, on proving a claim against the insolvent estate, to share with all other proved creditors in the proceeds of the estate assets. Apart from what is permitted by the Insolvency Act, nothing may be done which would have the effect of diminishing the estate assets or prejudicing the rights of creditors. Walker v Syfret NO 1911 AD 141.

(b) The requirements for voluntary surrender are stricter than those for compulsory sequestration. Explain why. (5)

In voluntary surrender, the court will accept the voluntary surrender of a debtor’s estate only if it is satisfied that sequestration will be to the advantage of creditors (s 6(1)). Whereas in an application for compulsory sequestration, the creditor has to show merely that there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated (s 12(1)). The onus, in other others words, is more strenuous in voluntary
surrender than in compulsory sequestration. The reason for this is that the debtor can normally be expected to provide a detailed account of his own financial position, whereas a sequestrating creditor would generally not have access to this information. Another reason is to reduce the risk of the debtor abusing the sequestration procedure and resorting to sequestration when it holds little or no real benefit for creditors and simply gives the debtor a means of escaping his liabilities.

(c) Discuss *Amod v Kahn* 1947 (2) SA 432 (N). (6)
Casebook page 172
This was an appeal from an order dismissing an application for compulsory sequestration and setting aside the provisional order of sequestration. The debt owed by the respondent represented the taxed costs of the action in the Magistrate Court and the taxed costs of the same case on appeal. The appellant issued a writ of execution in respect of each case and in both cases there was a *nulla bona* return. It was clear that the respondent committed an act of insolvency in terms of s 8(b) of the Insolvency Act. When a creditor applies for the compulsory sequestration of a debtor’s estate, the court needs to be satisfied that there is reason to believe that sequestration of the debtor’s estate will be to the advantage of his creditors, before granting a final sequestration order. However, in the case of a voluntary surrender, s 6 places a heavier burden of proof on the applicant, being the debtor himself, in that he has to satisfy the court that sequestration of his estate will be to the advantage of creditors. The court drew attention to and explained this difference in the burden of proof required, and held that even when all the requirements of the respective sections were complied with, the court retained its discretion to refuse a sequestration order. In this case it exercised its discretion by refusing an application for compulsory sequestration because the applicant was clearly abusing the process.

(d) Provide reasons why an insolvent person is prohibited from holding certain offices. (4)
Study guide page 63 activity
An insolvent is prohibited from holding some offices if there is a possibility of prejudice to the public interest, if a great amount of trust and responsibility is required, or if the possibility of dishonest business practices exists. The common denominators in these offices are honesty and trust. Sometimes there is an accumulation of circumstances over which the debtor had no control which led to his insolvency. But very high expectations are placed on members of the National Assembly, and it is therefore reasonable to prohibit a person who is insolvent from serving as a member.

(e) Discuss *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC) in respect of the question whether business rescue proceedings may be used to secure a better return for creditors or shareholders where there is no clear prospect of the company continuing to operate on a solvent basis or being restored to solvency. (5)
This aspect of the case deals with the meaning of “rescuing the company” in business rescue. Rescuing the company in this context means achieving the goals set out in the definition of “business rescue”. These goals are to facilitate the rehabilitation of a company or corporation in financial distress through-

- the temporary supervision of the company and the management of its affairs, business and property;
- a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
- the development and implementation of a plan to rescue the company and by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximizes the likelihood of it continuing in existence on a solvent basis or; if this is not possible, that results in a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company.

In this case Zoneska Investments (ZI) applied to court for the winding-up of Midnight Storm (MS) because it could not pay its debts. Southern Palace (SP) then applied to court for MS to be placed in business rescue proceedings. In respect of whether business rescue proceedings may be used to secure a better return for creditors-
- the court held that, it regarded that goal as an independent alternative goal that may be pursued for its own sake.
- it further held that if that goal was simply to secure a better return for creditors, it must be made clear what resources will be made available to the company and on which terms because, in the absence of such information, it would be mere speculation to say that creditors will be better off than they would have been with immediate liquidation.

In the present case the second alternative goal, to implement a business rescue plan that would yield a better return for the creditors and shareholders than would result from immediate liquidation, was not sought. The court exercised its discretion and rejected the application for business rescue, and placed MS in provisional liquidation.

(f) D’s estate was sequestrated in 2005. His concurrent creditors received no dividend and even had to pay contributions. D has not yet been rehabilitated. He has just won a motorcar to the value of R150 000 in a competition. The trustee of D’s insolvent estate has heard about his good fortune and claims delivery of the car. Explain whether D has to deliver the car to the trustee. (5)

Study guide page 180 activity
All assets of the insolvent estate at the time of sequestration, and all assets that the insolvent acquires during sequestration, that is before rehabilitation, fall into the insolvent estate (section 20 of the Insolvency Act), unless the property is specifically excluded in terms of section 23 of the Insolvency Act. The car that D has won is not excluded by the Insolvency Act and thus forms part of the insolvent estate. Even on rehabilitation the assets in the insolvent estate do not (subject to one exception) pass to the insolvent again.

SUMMARY OF PRINSLOO V VAN ZYL
Prinsloo v Van Zyl 1967 (1) SA 581 (T)

Facts:
(a) This case deals with a composition in terms of section 119 of the Insolvency Act. An offer of composition by the insolvent (Prinsloo) had been accepted by a simple majority in value of creditors, but not by a three fourths majority in number or in value.
(b) The presiding officer at the meeting of creditors erroneously noted the composition as having been accepted, resulting in the insolvent being reinstated with his assets, and certain further consequences.

Judgment:
(a) The requirement of the acceptance of composition by three fourths in value and in number is regulated by s 119 of the Insolvency Act.

(b) This acceptance is required to render it valid and enforceable.

(c) This is an absolute requirement and no composition can be valid unless it has been so accepted.

EXAM OCTOBER / NOVEMBER 2014:
(a) Insolvency law provides a procedure for dealing fairly with the claims that the unpaid CREDITORS of the insolvent person have against the insolvent estate. Insolvency law also protects the debtor from being harassed by his or her creditors. (2)

(b) The terms ‘sequestration’ and ‘sequestration order’ should strictly be used only with reference to a PERSON’S estate. A debtor’s estate is sequestrated, not the debtor himself. (2)

(c) The court may accept the surrender of a debtor’s estate only if it is satisfied that the debtor’s estate is in fact insolvent, that the debtor own realizable property of sufficient value to defray all the costs of the sequestration which will, in terms of the act be payable out of the free residue of his estate. It must also be shown that sequestration will be to the ADVANTAGE of creditors. (2)

(d) In Ex parte Harmse, the applicant’s statement indicated an excess of ASSETS over liabilities, but the only evidence that he adduced to prove otherwise were certain letters written by estate agents or valuers. (2)

(e) The sequestrating creditor has to approach the court twice; once to obtain a provisional order and the second time to have the provisional order CONFIRMED and made final. (2)

(f) An act of insolvency need not be committed vis-à-vis the SEQUESTRATING creditor. (2)

(g) Only a HIGH COURT has jurisdiction to wind up a company. (2)

(h) Another category of property which the trustee must release is that acquired by the solvent spouse under a marriage settlement (s 21(2)(b)). The solvent spouse need not prove that the settlement was BONA FIDE. (2)

(i) Tenza sells his car to Bobby. The parties do not specifically agree on when the purchase price is to be paid. Tenza delivers the car to Bobby, and Bobby hands Tenza a cheque for the
purchase price. Bobby’s estate is sequestrated two days later. The bank refuses to pay the cheque, because there is not enough money in Bobby’s bank account. Suppose that in the above example of the sale of the car you are the seller, Tenza, and the buyer is Bobby. The sale and delivery took place on 14 August in Bloemfontein in the Free State. The purchase price was R1 000, and Bobby handed you a cheque as payment. The cheque remains unpaid, because of lack of funds in Bobby’s account. You have photocopied the details of the car sold from your records. Bobby’s estate was sequestrated on 16 August. You have 10 days from the date of delivery (14 Aug), not 10 days from the date of the SEQUESTRATION of Bobby’s estate (16 Aug) to reclaim the property. (2)

(j) The question whether the trustee has elected to abide by the contract is one of FACT, not law. (2)

(k) Broadly speaking, a party (Ben), has a right of RETENTION over specific property belonging to another if he (Ben) has expended labour or incurred expenses in respect of the property. (2)

(l) There may be various reasons why an interested person wishes to apply for an order that automatic rehabilitation should not take place after the lapse of 10 years. It may, for example, happen that only just before the completion of the 10-year period the trustee becomes aware of some possible IMPEACHABLE dispositions. (2)

(m) However, by electing to uphold the contract, the trustee becomes liable to perform only what is RECIPROCALLY due to the other party. (2)

(n) The Supreme Court of Appeal has now laid down authoritatively that the beneficiary in this type of case merely has a COMPETENCE or power to accept the inheritance or benefit in question and that, until he does so, it does not form part of his estate (Wessels NO v De Jager en ’n ander NNO 2000 (4) SA 924 (SCA) 928). (2)

(o) It is not necessary to establish whether or not the insolvent INTENDED to prejudice creditors by making the disposition: the object of s 26 is simply to prevent a person in insolvent circumstances from impoverishing his estate by giving away assets without receiving any appreciable advantage in return (cf Estate Wege v Strauss 1932 AD 76 84). (2)

(p) Concurrent creditors are paid out of the free residue after any PREFERENT creditors have been paid. (2)

(q) As a rule, an insolvent must wait for a certain period of time before he may apply for his rehabilitation. However, where an offer of COMPOSITION has been accepted, the insolvent may be entitled to apply for his rehabilitation immediately. (2)

(r) It is a CRIMINAL offence for a person to accept a benefit as consideration for agreeing to, or for not opposing, a composition (s 141). (2)

(s) The insolvency of a party comes to an end when he is rehabilitated. Although a person’s estate is sequestrated, his PERSON is rehabilitated. (2)
(t) The basis for a declaratory order is that the creditors have **WAIVER** their rights with respect to the property. (2)

**QUESTION 2**

Indicate whether the following statements are true or false. DO NOT give a written explanation: use only the letters T or F.

1. Mr and Mrs Jones were married in community of property in 1999, and are now insolvent. Only Mr Jones has to apply for the voluntary surrender of the joint estate. (2)  
   **False** (Hockly 2.1)

2. The debtor must apply for voluntary surrender within the period of 10 days after the advertised date. (2)  
   **False** (Study guide p 30)

3. In an application for compulsory sequestration, it is possible to infer that the debtor is insolvent merely because he asked the creditor for time to pay the debt. (2)  
   **False** (Hockly 3.1.2(ii))

4. Brian commits an act of insolvency when he sends his Rolex watch to his sister in Australia so that it will not be available to pay the R200 000 that he owes Carl. (2)  
   **True** (Hockly 3.1.2(i)(d))

5. The sequestration of an employer’s estate does not suspend the employment contract between him and his employee. (2)  
   **False** (Hockly 7.2.6(i))

6. The notice of the second meeting of creditors in English and in Afrikaans in the newspaper must, as far as practicable, occupy the same amount of space. (2)  
   **True** (Hockly 9.1.2)

7. The Master must accept as trustee the person whom the creditors have elected. (2)  
   **False** (Hockly 10.1.2)

8. A ‘disposition’ includes an arrangement by which a party who has agreed to lend money to the insolvent is required to pay the amount of the loan into the bank account of a third person for the purpose of channelling the amount to a creditor of the insolvent. (2)  
   **True** (Hockly 12.1)

9. A concurrent creditor enjoys advantage over other creditors of the insolvent. (2)  
   **False** (Hockly 16.1.1)

10. A valid pledge is constituted where there is delivery of immovable property to a creditor on the understanding that it will be retained by him/her until the claim has been satisfied. (2)  
    **False** (Hockly 16.2.3)
11. In Prinsloo en 'n ander v Van Zyl NO 1967 (1) SA 581 (T), the offer of composition was accepted only by a majority in value, and so there was no valid acceptance, and thus no valid composition. (2)
   True (Study guide p 176)

12. The sequestration of a partner’s estate does not terminate the partnership. (2)
   False (Hockly 20.3)

13. The court may wind up a solvent company that is in business rescue if the business rescue practitioner concludes that there is no reasonable prospect of the company’s being rescued. (2)
   True (Hockly 23.2.2(viii))

14. The business rescue practitioner can set aside a voidable preference under section 29 of the Insolvency Act 24 of 1936. (2)
   False (Hockly 25.1.4)

15. Only a magistrate’s court has jurisdiction to wind up a close corporation. (2)
   False (Hockly 25.2.1)

QUESTION 3

(a) In terms of the Insolvency Act, all property belonging to the insolvent at the date of sequestration and all property which the insolvent acquired during sequestration forms part of the insolvent estate. However, there are certain exceptions to this rule. List the property that forms part of the exceptions. (8)

Choose any eight of the below.

Hockley 5.3

- Wearing apparel, bedding, household furniture, tools and some form of subsistence;
- Remuneration or reward for work done or professional services rendered by the insolvent;
- Pension the insolvent may be entitled to for services rendered;
- Compensation for defamation or personal injuries for loss or damage suffered;
- Compensation for occupational injuries or disease;
- Benefits or gratuity or money payable to miner;
- Unemployment Insurance benefits which insolvent may be entitled to;
- Insurance policies which may include policies covering liability to third parties, and life policies;
- Share in accrual in a marriage of the insolvent which is subject to Accrual system;
- Trust property/ funds (in terms of Trust Property Control Act);
- Right of labour tenant to land or right in land;
- Friendly society moneys and assets.
(b) In terms of a written contract of sale, Sarah sold Peter 500 valuable books from her library. A month later, after Peter had already paid the full purchase price but before Sarah had delivered the books, Sarah estate was sequestrated. Advise Peter on the effect of the sequestration of Sarah’s estate on this contract. (9)

As regards this contract which has not been completed by the insolvent, Sarah, at the time of the sequestration of her estate, the general rule is that the contract is not terminated by sequestration. The trustee may elect whether to perform in terms of the contract or not. The other party to the contract may not, however, claim specific performance of the obligation to deliver the books. The trustee’s power to repudiate the contract must be exercised in the interests of the concursus creditorum. He must therefore seek and adopt the instructions of the general body of creditors, and must not choose a course of action that harms the interests of the concursus. Here the concursus would instruct the trustee to repudiate the contract with Peter, so that the valuable books may be sold and the proceeds may thereby increase the free residue. Peter will then be left with a concurrent claim for repayment of the purchase price, and for damages. Once he has decided to uphold or to repudiate the contract the trustee may not change his mind. If he does not make his decision within a reasonable time he is assumed to repudiate the contract.

(c) You are the trustee to Sarah’s insolvent estate. You have discovered that Sarah paid Bobby, Cynthia and Donald within six months of the sequestration of her estate, for reasons that remain unclear. You wish to question Bobby, Cynthia and Donald about these payments. On what occasions could they be questioned? (5)

Because a trustee has been appointed in respect of Sarah’s insolvent estate the first meeting of creditors (at which the trustee is elected) has already been held. Bobby, Cynthia, and Donald could still be interrogated at a second meeting or a general meeting of creditors. But they could not be questioned at a special meeting called for the sole purpose of interrogating Sarah.

(d) Discuss Estate Wege v Strauss 1932 AD 76 in respect of dispositions that can be set aside by a court after the sequestration of a debtor’s estate. (8)

Two dispositions that can be set aside by the court after the sequestration of a debtor’s estate were discussed in this decision.

The first was a disposition without value (in terms of section 26 of the Insolvency Act and here the court held that although a betting transaction was an invalid agreement and thus unenforceable in a court of law, payment of such a wagering debt was not a disposition without value. The court pointed out that the object of the relevant section was not to prevent a person in insolvent circumstances from engaging in ordinary transaction, but to prevent such person from impoverishing his estate by giving away his assets without receiving any advantage in return.

The second type of disposition examined by the court was the so called “undue preference” in terms of section 29 of the Insolvency Act. In particular, the court dealt with the defence of ordinary course of business and the fact that one had to look at the particular type of business involved, namely that of bookmakers.