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LAW OF INSOLVENCY & WINDING-UP OF COMPANIES



2011

PART-TIME LECTURER: ADV JOCK MCCONNACHIE

1 INTRODUCTION

1.1 Acknowledgement

This study guide is used with the permission of Ms Sarah Driver who compiled it and presented the course previously. However, a few changes have been made to the structure of the course outline.

1.2 Overview

The *Law of Insolvency* is a compulsory final year LLB semester course. The course will facilitate a systematic study of the law of insolvency, focusing on the legal principles which apply to insolvent individuals and corporate entities.

The purpose of the course is to familiarise students with the scope, procedure and effects of insolvency and winding-up.

1.3 Credit value

10 credits

1.4 Assumptions of prior learning

Students would need to know and be able to do the following in order to benefit from this course:

- Be capable of communicating in written and spoken English;
- Be capable of critically analysing and extracting relevant legal principles from case law, legislation and other source material;
- Have a working knowledge of matrimonial property law and corporate law; and
- Be capable of independent learning.

2 OUTCOMES

2.1 Critical cross-field outcomes

It is intended that successful participation in the course will assist students in developing the following competencies:

- Identifying and solving problems;
- Organising and managing themselves;
- Collecting, analysing and evaluating information;
- Communicating effectively;
- Participating as responsible citizens.

1.5 Intended specific outcomes

It is intended that students will be able to do the following on successful completion of the course:

- Apply the relevant legal principles applicable to insolvency and winding-up;
- Communicate the legal position as well as their own point of view;
- Demonstrate an understanding of the procedural aspects applicable to sequestration and liquidation.

3. TEACHING METHODS

A detailed course outline including a reading list (cases and relevant articles) and bibliography are provided for this course. Students are expected to read ahead of the next lecture in order to acquire a basic familiarity with the relevant topic.

There are no tutorials in this course and there are two compulsory lectures per week for the duration of the semester, although students may be absent without leave for a total of three lectures during the course.

4. STUDENT ASSESSMENT

Specific Outcomes	Assessment criteria	Assessment tasks
<ul style="list-style-type: none">• Apply the relevant legal principles applicable to insolvency and winding-up	<ul style="list-style-type: none">• Identify and distinguish between the legal principles applicable to insolvency and winding-up with reference to factual situations• Apply statutory and common law principles to given sequestration and winding-up issues	<ul style="list-style-type: none">• Class discussion and questioning (formative)• Problem and theory questions in test and examination (summative)• Draft a legal opinion as an assignment (summative)
<ul style="list-style-type: none">• Communicate the legal position as well as their own point of view	<ul style="list-style-type: none">• Demonstrate the ability to critically reflect on what has been read and learnt with reference to a	<ul style="list-style-type: none">• Class discussion and questioning (formative)• Problem and theory questions in test and

	<p>given context</p> <ul style="list-style-type: none"> • Describe, explain and argue the relevant legal principles with reference to case law and legislation in a given context • Critically evaluate the current law of insolvency and winding-up with reference to a given context 	<p>examination (summative)</p> <ul style="list-style-type: none"> • Draft a legal opinion as an assignment (summative)
<ul style="list-style-type: none"> • Demonstrate an understanding of the procedural aspects applicable to sequestration and liquidation 	<ul style="list-style-type: none"> • Describe and explain the statutory procedures followed in liquidation and sequestration 	<ul style="list-style-type: none"> • Class discussion and questioning (formative) • Problem and theory questions in test and examination (summative)

The class work component for the course amounts to 30% of the final mark and the remaining 70% comprises a two-hour examination which will be written in November 2011.

Students are assessed for the class work component on the basis of two tests each of which counts 15% of the final mark.

The dates of the tests and the prescribed work for each will be announced in due course.

The test and examination will contain:

- problem questions which require the application of statute and common law to solve practical issues; and
- theory-type questions in which students are required to define and describe fundamental concepts in the law of insolvency as well as to explain and critically evaluate the current law.

5. BIBLIOGRAPHY

The following book is **prescribed** for this course:

- Sharrock *et al Hockly's Insolvency Law* (2006), 8th ed, Juta & Co: Cape Town

This text contains the Insolvency Act as well as precedents of documents and liquidation and distribution accounts which you will need to have at hand throughout the course.

The following books are highly recommended and will be referred to during the course:

- Sharrock *et al Hockly's Insolvency Law Casebook* (1999) Juta Cape Town
- Meskin on *Insolvency Law* (looseleaf), Butterworths: Durban (This is the leading work on the Law of Insolvency in South Africa. The full text is available on the *My LexisNexis* database on the RU Library webpage under electronic information resources.)
- Loubser *Casebook on the Law of Partnership, Company Law and Insolvency Law* (1992) Juta, Cape Town
- Gering *Leading Cases on Insolvency* (1994) Butterworths, Durban
- Meyerowitz on *Administration of Estates and Estate Duty* (2004) The Taxpayer CC, Cape Town

COURSE OUTLINE

TOPIC 1: INTRODUCTION

Hockly Chapter 1

- 1) Historical overview
- 2) Object of *Insolvency Act*
- 3) Core concepts – meaning of insolvency
 - meaning of debtor
 - meaning of estate
 - *concursum creditorum*
 - advantage of creditors
- 4) Jurisdiction of the court
- 5) Condonation of irregularities/non-compliance with formalities

Case law

Walker v Syfret 1911 AD 141

Miller v Janks 1944 TPD 127

Magnum Financial Holdings (Pty) Ltd (in Liquidation) v Summerly and another
NNO 1984 (1) SA 160 (W)

Ex parte Slabbert 1960 (4) SA 677 (T)

TOPIC 2: VOLUNTARY SURRENDER

Hockly Chapter 2

- 1) Who may be considered a debtor?
- 2) Meaning of - free residue
 - advantage of creditors
- 3) Formalities/ procedural requirements
- 4) Effect of notice of surrender
- 5) Court's discretion

Case law

Ex parte Harmse 2005 1 SA 323 (N)

Ex parte Ford and others Case No 21084/0899 (see www.saflii.org)

Ex parte Alberts 1937 OPD 2

Ex parte Goldman 1930 WLD 158

Ex parte Barton 1926 CPD 252

Ex parte Van Heerden 1923 CPD 279

Ex parte Henning 1981 (3) SA 843 (O)

Ex parte Van den Berg 1950 (1) SA 816 (W)

Ex parte Logan 1929 TPD 201

Articles

Roestoff, M and Burdette, D 'Premature publication of a notice of surrender of an insolvent estate – is it fatal to the application? *Ex parte Harmse* 2005 1 SA 323 (N)' 2005 (4) *THRHR* 681-686.

TOPIC 3: COMPULSORY SEQUESTRATION

Hockly Chapter 3

1) Requirements for sequestration

- (i) *locus standi* of applicant
- (ii) acts of insolvency

Section 8(a):

Estate Salzman v Van Rooyen 1944 OPD 1

Abell v Strauss 1973 (2) SA 611 (W)

Bishop v Baker 1962 (2) SA 679 (D)

Section 8(b):

Nedbank v Norton 1987 (3) SA 619 (N)

Rodrew v Rossouw 1975 (3) SA 137 (O)

Section 8(c):

De Villiers v Maursen Properties 1983 (4) SA 670 (T)

Nahrungsmittel GmbH v Otto 1991 (4) SA 414 (C)

Section 8(e):

Joosub v Soomar 1930 TPD 773

Laeveldse Kooperasie v Joubert 1980 (3) SA 1117 (T)

Section 8(g):

Court v Standard Bank 1995 (3) SA 123 (A)

Section 8(h):

SA Spice Works v Spies 1957 (1) SA 679 (T)

(iii) Advantage of creditors

Absa Bank Ltd v De Klerk and related cases 1999 (4) SA 835 (E)

Hillhouse v Stott (1990 (4) SA 580 (W).

2) Friendly sequestration

Craggs v Dedekind 1996 (1) SA 935 (C)

Esterhuizen v Swanepoel 2004 (4) SA 89 (W)

Epstein v Epstein 1987 (4) SA 606(C)

3) Application procedure – Notice to debtor

Stride v Castelein 2000 (3) SA 662 (W)

4) Court's discretion

Amod v Kahn 1947 (2) SA 432 (N)

Articles

Evans, R and Haskins, ML 'Friendly sequestrations and the advantage of creditors' 1990 (2) *SA Mercantile Law Journal* 246-251.

Smith, A "Cast a cold eye' Some unfriendly views on friendly sequestrations' 1997 *JBL* 50.

TOPIC 4: THE EFFECTS OF SEQUESTRATION

The legal position of the insolvent and vesting of assets of the insolvent

Hockly Chapters 4 and 5

Primary focus: which property/assets fall into the estate of the insolvent and which are excluded?

The vexed question of insurance policies

Case law

Vorster v Steyn NO en Andere 1981 (2) SA 81 (O)

Warricker and Another NNO v Liberty Life Association of Africa Ltd 2003 (6) SA 272 (W)

Du Plessis v Pienaar NO and Others 2005 (1) SA 309 (SCA)

Love and Another v Sanlam Life Insurance Ltd and Another 2004 (3) SA 445 (SEC)

Shroobree NO v Love & Others 2005 (1) SA 309 (SCA)

Brink v Kitshoff NO 1996 (4) SA 197 (CC)

Articles

Evans, R 'Can an inheritance evade an insolvent estate?' (2003) 15 SA *Mercantile Law Journal* 228-236.

Evans, R and Boraine, A 'Considerations regarding a policy for the treatment of certain beneficiaries of life insurance policies in the law of insolvency' 2005(2) *De Jure* 266-294.

Smith, A 'The protection of insurance policies from insolvency under Section 63 of the Long-term Insurance Act 52 of 1998' 2000(12) SA *Mercantile Law Journal* 94-108.

TOPIC 5: THE EFFECTS OF SEQUESTRATION (CONT)

Vesting of the assets of the solvent spouse

Hockly Chapter 6

Case law

Harksen v Lane 1998 (1) SA 300 (CC)

Chaplin v Gregory 1950 (3) SA 555 (C)

Janit v Van den Hever 2001 (1) SA 731 (W); 2001 (1) SA 1062 (W)

Articles

Evans, R 'Release of a solvent spouse's property under section 21(2)(c) of the Insolvency Act 24 of 1926' 2004 (1) *Stellenbosch Law Review* 193-200.

Evans, R 'A critical analysis of section 21 of the Insolvency Act 24 of 1926' Parts 1 and 2 in 1996 (59) *THRHR* 613 and 1997 (60) *THRHR* 72.

TOPIC 6: THE EFFECTS OF SEQUESTRATION (CONT)

Uncompleted contracts

Hockly Chap 7

Case law

Ndima v Waverley Blankets Ltd; Sithukuza v Waverley Blankets Ltd 1999 20 ILJ 1563 (LC)

Articles

Hutchinson, D and Reid, F 'The exercise of contractual rights or powers against an insolvent estate' 2003 *SALJ* 776-785

Pappadopoulos, S and Roestoff, M 'The effect of recent amendments to the Insolvency Act and Labour Relations Act on employment contracts – a new era; or is it?' 2004 (67) *THRHR* 302-311

TOPIC 7: IMPEACHABLE DISPOSITIONS AND VOID TRANSACTIONS

Hockly Chapter 12

Sections 26-31 of the *Insolvency Act*

- 1) Meaning of disposition
Wessels v De Jager 2000 (4) SA 924 (SCA)
- 2) Dispositions which may be set aside
Galaxie Melodies (Pty) Ltd v Dally, NO 175 (4) SA 736 (AD)
Section 26 - *CIR v Bowman* 1990 (3) SA 311 (A)
Section 29 - *Paterson v Trust Bank* 1979 (4) SA 992 (A)
Section 30 - *Pretorius v Stock Owners Co-op* 1959 (4) SA 462 (A)
Section 31 - *Meyer v Transvaal Lewendehawe* 1982 (4) SA 746 (A)
Gert de Jager v Jones 1964 (3) SA 325 (A)
- 3) Void transfer of a business
Ensor v Rensco Motors 1981 (1) SA 815 (A)
Gore v Saficon 1994 (4) SA 536 (W)

TOPIC 8: ADMINISTRATION OF INSOLVENT ESTATES/COLLECTION OF ESTATE ASSETS

Hockly Chapters 8, 9, 10, 11, 13 and 14

- 1) Taking charge of the estate
- 2) The trustee
- 3) Meetings of creditors and proof of claims
- 4) Interrogation of the insolvent and other witnesses
- 5) The duties of the insolvent

Case law

Cooper NO v FNB 2001(3) SA 705 (SCA)

TOPIC 9: REALISATION AND DISTRIBUTION OF ASSETS

Hockly Chapters 15-17

Focus on creditors' claims and their rankings

Case law

Snyman v The Master 2003 (1) SA 239 (T)

Potgieter NO v Daewoo Heavy Industries (Edms) Bpk 2003 (3) SA 98 (SCA)

Articles

Knobel, I 'The tacit hypothec of the lessor; *Eight Kaya Sands v Valley Irrigation Equipment* 2003 2 SA 495 (T)' 2004 (67) *THRHR* 687-697.

TOPIC 10: COMPOSITION AND REHABILITATION

Hockly Chapters 18 and 19

- 1) Automatic rehabilitation
- 2) Rehabilitation by court
- 3) Courts' discretion
- 4) Effect of rehabilitation

Case law

Ilic v Parginos 1985 (1) SA 795 (AD)

Ex parte Hittersay 1974 (4) SA 326 (SWA)

Ex parte Parker 1946 CPD 536

Ex parte Goshalia 1957 (2) SA 182 (D)

Ex parte Porritt 1991 (3) SA 866 (N)

Ex parte Le Roux 1996 (2) SA 419 (O)

TOPIC 11: WINDING-UP OF COMPANIES, JUDICIAL MANAGEMENT AND WINDING-UP OF CLOSE CORPORATIONS

Hockly Chapters 23, 24 and 25

- 1) Winding-up by the court
- 2) Voluntary winding-up
- 3) The Liquidator
- 4) Interrogation
- 5) Liquidation and distribution accounts
- 6) Dissolution

Case law

ABSA Bank Ltd v Rhebokskloof (Pty) Ltd 1993 (4) SA 436 (1)

Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd 1985 (2) SA 345 (W)

**See Companies Act 71 of 2008 for the important new issue of business rescue.
In particular, chapter 6 (sections 128-154).**

These sections deal with the following issues:

Requirements for business rescue;

Commencement of business rescue;

Effect of business rescue;

The business rescue plan.

TOPIC 12: CROSS-BORDER INSOLVENCY

Hockly Chapter 26

Article

Smith, A and Ailola, DA 'Cross-border insolvencies; an overview of some recent developments' 1999 (11) *SA Mercantile Law Journal* 192-209

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JULY 2011