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

<table>
<thead>
<tr>
<th>Specific Outcomes</th>
<th>Assessment criteria</th>
<th>Assessment tasks</th>
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<tbody>
<tr>
<td>• Apply the relevant legal principles applicable to insolvency and winding-up</td>
<td>• Identify and distinguish between the legal principles applicable to insolvency and winding-up with reference to factual situations</td>
<td>• Class discussion and questioning (formative)</td>
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<td>• Apply statutory and common law principles to given sequestration and winding-up issues</td>
<td>• Problem and theory questions in test and examination (summative)</td>
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<td>• Draft a legal opinion as an assignment (summative)</td>
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<tr>
<td>• Communicate the legal position as well as their own point of view</td>
<td>• Demonstrate the ability to critically reflect on what has been read and learnt with reference to a</td>
<td>• Class discussion and questioning (formative)</td>
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<td>• Problem and theory questions in test and</td>
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given context
- 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

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<tr>
<th>Examination (summative)</th>
<th>Draft a legal opinion as an assignment (summative)</th>
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- Demonstrate an understanding of the procedural aspects applicable to sequestration and liquidation
- Describe and explain the statutory procedures followed in liquidation and sequestration
- 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
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
   - concursus 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 (0)

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

*Ex parte Logan* 1929 TPD 201

Articles


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
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)
Shrosbree NO v Love & Others 2005 (1) SA 309 (SCA)
Brink v Kitshoff NO 1996 (4) SA 197 (CC)

Articles

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.

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 souse’s property under section 21( 2) (c) of the Insolvency act 24 of 1926’ 2004 (1) Stellenbosch Law Review 193-200.


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

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