

LAW OF INSOLVENCY & WINDING-UP OF COMPANIES

2014

Lecturer: ES Nwauche

1 INTRODUCTION

1.1 Acknowledgement

I am indebted to the previous lecturers of this course in compiling this course outline. This course outline is a revised version of previous outlines and includes the work of V. Heideman; S. Driver and Adv J McConnachie.

1.2 Overview

The Law of Insolvency is a compulsory final year LLB semester course. The major theme of the course are the legal principles applicable 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, as well as business rescue proceedings.

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.

2.2 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, liquidation and business rescue.

3. TEACHING METHODS

A detailed course outline with a comprehensive reading list 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 and then take their own notes during lectures. Lectures are conducted in a structured but discursive manner allowing for questions and discussion. Practical examples are routinely considered during lectures.

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 or court application 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 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 	<ul style="list-style-type: none"> • Class discussion and questioning (formative) • Problem and theory questions in test and examination (summative) • Draft a legal opinion or court application 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 2013.

Students are assessed for the class work component on the basis of one assignment and one test, each of which counts 15% of the final mark.

The dates of the test and assignment 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 describe, explain and critically evaluate the current law.

5. BIBLIOGRAPHY

The following book is prescribed for this course:

- Sharrock et al *Hockly's Insolvency Law* (2012), 9th 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 (among others):

Sharrock et al Hockly's Insolvency Law Casebook (1999), Juta & Co: 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.)

L 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

Reading

Hockly: Chapter 1

1.1 Options in debt recovery

1.2 Insolvency

1. 2.1. Historical development

1. 2.2. Definitions and purpose

1. 2.3. Jurisdiction

1.2.4. The Master

Ex parte The Master of the High Court South Africa (North Gauteng) 2011 (5) SA 311 (GNP)

1.2.5 The Impact of the Bill of Rights on Insolvency

TOPIC 2: VOLUNTARY SURRENDER

Reading

Hockly: Chapter 2

2.1. Procedural requirements

Ex parte Goldman 1930 WLD 158

Ex parte Barton 1926 CPD 252

2.2. Substantive requirements

Ex parte Van Heerden 1923 CPD 279

Ex parte Collins 1927 WLD 172

2.3. The courts' discretion

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

Ex parte Logan 1929 TPD 201 8

Ex Parte Ford and two similar cases 2009 (3) SA 376 (WCC)

TOPIC 3: COMPULSORY SEQUESTRATION

Reading

Hockly: Chapter 3

3.1. Requirements

(a) Locus Standi of applicant

(b) 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)

O'Shea NO v Van Zyl & others NNO 2012 (1) SA 90 (SCA)

Section 8(h):

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

(c) Advantage of creditors

Lotzof v Raubenheimer 1959 (1) SA 90 (O)

Ex Parte Ogunlaja & Others [2011] JOL 2709 (GNP)

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3.2 Friendly sequestration

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

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

3.3 Application procedure – Notice to debtor

Stride v Castelein 2000 (3) SA 662 (W) 9

3.4 Courts discretion

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

TOPIC 4: THE EFFECTS OF SEQUESTRATION

Reading

Hockly: Chapters 4, 5, 6, 7 and 21

4.1. The legal position of the insolvent

4.2. The assets of the insolvent

4.3. The assets of the solvent spouse

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)

Shrosbree NNO v Van Rooyen NO 2004 (1) SA 226 (SE)

RG Evans “Can an Inheritance Evade an Insolvent Communal Estate?” (2003) 15 S. Afr. Mercantile L.J. 228

4.4. Insolvent deceased estates

TOPIC 5: IMPEACHABLE DISPOSITIONS AND VOID TRANSACTIONS

Reading

Hockly: Chapter 12

5.1. Meaning of disposition

Wessels v De Jager 2000 (4) SA 924 (SCA)

5.2. Dispositions which can be set aside

Section 26:

CIR v Bowman 1990 (3) SA 311 (A)

Section 29:

Paterson v Trust Bank 1979 (4) SA 992 (A)

Gazit Properties v Botha NNO 2012 (2) SA 306 (SCA)

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) 10

5.3. Void transfer of a business

Ensor v Rensco Motors 1981 (1) SA 815 (A)

Gore v Saficon 1994 (4) SA 536 (W)

TOPIC 6: ADMINISTRATION OF INSOLVENT ESTATES

Reading

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

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

6.1. Taking charge of the estate

6.2. The trustee

6.3. Meetings of creditors and proof of claims

6.4. Interrogation of the insolvent and other witnesses

6.5. The duties of the insolvent

TOPIC 7: REALISATION AND DISTRIBUTION OF ASSETS

Reading

Hockly: Chapters 15, 16 and 17

7.1. Sale of property

7.2. Creditor's claims and their ranking

7.3. Trustee's liquidation and distribution accounts

TOPIC 8: COMPOSITION AND COMPROMISE

Reading

Hockly: Chapter 18

TOPIC 9: REHABILITATION

Reading

Hockly: Chapter 19

9.1 By effluxion of time

9.2 By the court

Ex parte Hittersay 1974 (4) SA 326 (SWA) 11

Ex parte Rupert 1947 (1) SA 147 (C)

Ex parte Roos 1955 (1) SA 572 (O)

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

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

9.3 Effect

Ex parte Van der Merwe 2008 (6) SA 451 (W)

TOPIC 10: WINDING-UP OF COMPANIES AND CLOSE CORPORATIONS

Reading

Hockly: Chapters 23 and 24

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

10.1 Winding-up by the court

10.2 Voluntary winding-up

10.3 The Liquidator

10.4 Interrogation

10.5 Personal liability and offences

10.6 Dissolution and deregistration

TOPIC 11: BUSINESS RESCUE PROCEEDINGS AND COMPROMISE

Reading

Hockly: Chapter 25

11.1 Aims and purpose

Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd 2012 (2) SA 423 (WCC)

11.2 Commencement

Firststrand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd 2012 (4) SA 266 (KZD)

Gormley v West City Precinct Properties (Pty) Ltd [2012] ZAWCHC 33

11.3 Effect of Business Rescue

11.4 The business rescue practitioner

11.5 The business rescue plan

11.6 Compromise

TOPIC 12: CROSS-BORDER INSOLVENCY

Reading

Hockly: Chapter 26

ES Nwauche

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