



UNIVERSITY OF JOHANNESBURG
KINGSWAY CAMPUS

FACULTY OF LAW
EXAMINATIONS 2016

SUBJECT NAME: INSOLVENCY LAW
SUBJECT CODE: INR0011 / LIN41B0

DURATION: 2 HOURS
MARKS: 70

EXAMINERS:
1) PROF JC CALITZ
2) MS S LAWRENSON
3) PROF M ROESTOFF (UP)

THIS PAPER RUNS TO 3 PAGES.

QUESTION 1:

BRIEFLY explain or discuss the legal principles/concepts:

- 1.1 Section 339 of the Companies Act 61 of 1973. (3)
 - 1.2 "Independent creditor" in terms of section 128 of chapter 6 of the Companies Act 71 of 2008. (3)
 - 1.3 "Financially distressed" in relation to a company and business rescue in terms of chapter 6 of the Companies Act 71 of 2008. (5)
 - 1.4 "Affected person" in terms of section 128 of chapter 6 of the Companies Act 71 of 2008. (4)
- [15]**

QUESTION 2:

A witness fails to answer a question legally put to him during an interrogation before a magistrate in terms of section 65 of the Insolvency Act 24 of 1936.

- 2.1 Which remedy is available to the presiding officer? (2)
 - 2.2 Would your answer to 2.1 above have differed if the Master was presiding at the interrogation? Refer to case law where possible. (4)
- [6]**

QUESTION 3:

"It is the Master who has the power, and who appoints the trustees to sequestrated estates. He or she enjoys discretion as to who to appoint as provisional trustees to insolvent estates. This is to be done in accordance with the Policy determined by the Minister in terms of section 158(2) of the Act." The Western Cape High Court in *The South African Restructuring and Insolvency Practitioners Association v The Minister of Justice and Constitutional Development* (4314/2014) [214] WCC (13 January 2015)

declared the Policy unconstitutional. Briefly discuss the mentioned judgement with specific reference to the court's view on whether the Policy unlawfully fetters the discretion of the Master. (In your answer you should also refer to the current legislative provisions and the practical application surrounding the appointment of insolvency practitioners). [10]

QUESTION 4:

Sections 129(3) and (4) of the Companies Act 71 of 2008 recently came under the spotlight in the case of *Panamo Properties (Pty) Ltd v Nel* 2015 (5) SA 63 (SCA) (27 May 2015). Briefly discuss the procedural requirements in terms of section 129 after a company has adopted and filed a special resolution to begin business rescue, as well as the consequences of non-compliance with such procedural formalities with reference to the abovementioned case.

[8]

QUESTION 5:

Name four (4) legal consequences of business rescue.

[4]

QUESTION 6:

Critically discuss the legal concept of "reckless trading" by referring to section 424 of the Companies Act 61 of 1973 as well as the "new approach" in section 22 read with section 77(3)(b) of the Companies Act 71 of 2008.

[7]

QUESTION 7:

Instructions regarding the writing of the essay:

1. Length: Maximum five (5) pages.
2. Please note that language and structure will be taken into account when evaluating the essay.
3. The essay must consist of an introduction and conclusion.
4. Allocation of marks:
 - Content (17 marks)
 - Language, structure, introduction, conclusion and "golden thread" (3 marks)

[20]

ANSWER ONLY ONE (1) OF THE FOLLOWING QUESTIONS:

QUESTION 7.1

"The courts have differed on the issue 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." Discuss the nature and goals of business rescue proceedings as set out in the definition of "business rescue" in terms of section 128 of the Companies Act 71 of 2008 as well as the different views echoed by the courts regarding the aim of business rescue.

OR

QUESTION 7.2

One of the burning issues currently in the context of successful business rescues is the regulation of business rescue practitioners. Write a short note on the role of the business rescue practitioner. Include in your essay the following:

- Qualifications of a practitioner
- General powers and duties of practitioners
- Fee structure of practitioners including the test to determine the business rescue practitioner's entitlement to reimbursement for expenses and disbursements (with reference to case law)
- The ranking and nature of practitioner's claim for remuneration in subsequent liquidation proceedings (with reference to case law)

TOTAL: [70]

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