



INSOL
INTERNATIONAL



**PROGRAMME IN SOUTH AFRICAN INSOLVENCY LAW AND
PRACTICE 2022**

Practice Assessment: Paper 1

Date: 6 - 7 October 2022

Time limit: 24 hours (from 13:00 on 6 October to 13:00 on 7 October 2022)

EXAMINERS

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It is imperative that all candidates read and take cognisance of the examination instructions on the next page.

All candidates are expected to comply with ALL the instructions.

INTRUCTIONS

1. This assessment paper will be made available at **13:00 (1 pm) SAST on Thursday 6 October 2022** and must be returned / submitted by **13:00 (1 pm) SAST on Friday 7 October 2022**. Please note that assessments returned late will not be accepted.
2. All assessments must be submitted electronically in Microsoft Word format, using a standard A4 size page and an 11-point Avenir Next font (if the Avenir Next font is not available on your PC, please select the Arial font). This document has been set up with these parameters - **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. Please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case). Candidates who include very long answers in the hope it will cover the answer the examiners are looking for, will be appropriately penalised.
4. You must save this document using the following format: **studentID.Paper1Formative**. An example would be something along the following lines: 202122-336.Paper1Formative. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. The assessment can be downloaded from your student portal on the INSOL International website. The assessment must likewise be returned via your student portal as per the instructions in the Course Handbook for this course. If for any reason candidates are unable to access their student portal, the answer script must be returned by e-mail to david.burdette@insol.org.
6. Due to the high incidence of load shedding currently taking place across South Africa, candidates are required to determine whether any load shedding is scheduled during the examination period and, if so, to make alternative arrangements to write elsewhere if at all possible.
7. Enquiries during the time that the assessment is written must be directed to David Burdette at david.burdette@insol.org or by WhatsApp on +44 7545 773890. Please note that enquiries will only be responded to during office hours.
8. While the assessments are open-book assessments, it is important to note that candidates **may not receive any assistance from any person** during the 24 hours that the assessment is written. **Answers must be written in the candidate's own words; answers that are copied and pasted from the text of the course notes (or any other**

source) will be treated as plagiarism and persons who make themselves guilty of this will forfeit the assessment and disciplinary charges will follow. When submitting their answers, candidates will be asked to confirm that the work is their own, that they have worked independently and that all external sources used have been properly cited.

9. Once a candidate's assessment has been uploaded to their student portal (in line with the instructions in the Course Handbook), a confirmatory e-mail will be auto-generated confirming that the assessment has been uploaded. If the confirmatory e-mail is not received within five minutes after uploading the assessment, candidates are requested to first check their junk / spam folders before e-mailing the Course Leader to inform him that the auto-generated e-mail was not received.
10. If a candidate is unable to complete this practice assessment, please note that the practice assessments (mock examinations) are not compulsory and no further opportunity will be provided to complete it. The marking guide for the two practice assessments (Paper 1 and Paper 2) will be uploaded to the course pages after Paper 2 has been written and submitted.
11. You are required to answer this paper by typing the answers directly into the spaces provided (indicated by text that states [Type your answer here]). For multiple-choice questions, please highlight your answer in yellow, as per the instructions included under the first question.
12. Unless otherwise indicated, all references to sections are references to sections of the Insolvency Act 1936.
13. Prior to being populated with your answers, this assessment consists of **15 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1

Questions 1.1 – 1.20 are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

In terms of the Insolvency Act, “property” of an insolvent estate includes:

- (1) Immovable property situated in the Republic of South Africa.
- (2) Movable property situated in the Republic of South Africa.
- (3) Immovable property situated outside the Republic of South Africa.
- (4) Movable property situated outside the Republic of South Africa.
- (5) The contingent right of a fideicommissary heir or legatee.

Select the correct answer:

- (a) (1) and (2) are correct ✓**
- (b) (1), (2), (3), (4) and (5) are correct.
- (c) (1), (3) and (4) are correct.
- (d) (1), (2), (3) and (4) are correct.

Question 1.2

Select the correct answer:

The effect of the sequestration of the estate of a natural person debtor is that:

- (a) the debtor remains owner of his or her property and only the control of his or her estate passes to the Master and then to the trustee.

(b) the debtor is divested of his or her estate, which estate vests in the Master until a trustee has been appointed, whereupon the estate will vest in the trustee. ✓

(c) the debtor is divested of his estate which estate will vest in the Master until the final liquidation and distribution account has been approved.

(d) The debtor is divested of his estate which estate will vest in the division of the High Court that granted the sequestration order.

Question 1.3

Select the correct answer:

Section 12 of the Trust Property Control Act 1988 provides that trust property -

(a) forms part of the trustee's insolvent estate.

(b) does not form part of the trustee's personal estate. x

(c) does not form part of the trustee's personal estate, save as far as the trustee is also a trust beneficiary.

(d) vests in the Master and, after their appointment, in the trustee of the insolvent estate.

Question 1.4

The following assets **will** form part of the insolvent estate of a natural person debtor:

(1) The family home.

(2) Clothing and bedding of the insolvent.

(3) Household furniture.

(4) Antique furniture.

(5) Property of third parties.

(6) Tools and other means of subsistence as the creditors or the Master determine.

Select the correct answer:

(a) (1), (2), (3), (4) and (6) are correct.

(b) (2), (3), (5) and (6) are correct.

(c) (1), and (4) are correct. ✓

(d) (1), (4) and (5) are correct.

Question 1.5

Indicate which of the following estates **cannot** be sequestrated:

- (a) The insolvent estate of a deceased person.
- (b) The estate of an individual incapable of handling their own affairs;
- (c) A partnership.

(d) A company. ✓

Question 1.6

Which of the following courts **has jurisdiction** to issue a sequestration order?

- (a) A Magistrate's Court.
- (b) A Small Claims Court.

(c) A High Court. ✓

(d) A Criminal Court.

Question 1.7

Indicate the **incorrect** statement:

(a) A provisional sequestration order may not be appealed.

(b) A provisional sequestration order may not be rescinded. ✓

(c) An order refusing acceptance of a voluntary surrender of an estate may not be appealed.

(d) There is no provision for the suspension of a provisional sequestration order by the court.

Question 1.8

Indicate the **correct** statement:

- (a) The grounds for setting aside a sequestration order or a winding-up order are found in the common law.
- (b) A sequestration order may be set aside based on the common law, but a final winding-up order may be set aside only on statutory grounds contained in the Companies Act 2008.
- (c) A sequestration order may be set aside on the grounds contained in the Insolvency Act but the grounds for setting aside a final liquidation order are found in the common law.
- (d) The grounds for setting aside a sequestration order or a winding-up order are contained in the Insolvency Act and the Companies Act 1973, respectively. ✓

Question 1.9

Select the **correct** answer:

Claims submitted for proof against an insolvent estate must-

- (a) Be liquid. x
- (b) Be proved before the estate can be finally distributed.
- (c) Be secured claims
- (d) Only be proved at the first meeting of creditors.
- (e) Both (a) and (b) are correct.
- (f) Both (c) and (d) are correct.

Question 1.10

Indicate whether the following statement is **true or false**:

Section 44(7) of the Insolvency Act provides for the examination of a claim before it is proved.

- (a) True
- (b) False x

Question 1.11

Indicate whether the following statement is **true or false**:

Only the Master of the High Court may preside at a section 417 (of the Companies Act 1973) enquiry.

(a) True

(b) False ✓

Question 1.12

A common requirement for all the prescribed statutory voidable dispositions is that a disposition of his or her property by a debtor will become voidable where one creditor is preferred above others.

Select the **correct** answer:

(a) The statement is correct, since sections 26 to 31 of the insolvency Act prescribe this requirement in all instances.

(b) The statement is correct since the requirement is limited to only one preferred creditor.

(c) The statement is not correct since the preference of one creditor above others is not prescribed in the case of dispositions for value, as dealt with in section 26 of the Insolvency Act. ✓

(d) The statement is correct since this requirement is also prescribed for the common law *actio Pauliana* and was taken up as such in the Insolvency Act.

Question 1.13

Where the court orders the setting aside of a statutory voidable disposition, such as a disposition without value or a voidable preference, the court will order restitution of the disposed property and, where it is no longer available in the hands of the recipient, the court may order the recipient to return the value of such property as it was on the date of the disposition by the debtor.

Select the **correct** statement:

(a) The statement is correct since section 32 of the Insolvency Act provides for the return of the value of the property at the date of the dispositions, as mentioned in the statement above.

(b) The statement is not correct since the court may only order the return of the disposed property.

(c) The statement is not correct since section 32 of the Insolvency Act provides for the return of the value of the property at the date of the court order setting aside the disposition.

(d) The statement is not correct since section 32 of the insolvency Act requires that the court must declare that the trustee is entitled to recover the property itself, or the value thereof at the date of disposition, or at the date on which the disposition was set aside, whichever is the greater. ✓

Question 1.14

Where the trustee or liquidator of an insolvent estate decides not to continue with an unexecuted / uncompleted contract entered into by the insolvent party prior to commencement of sequestration or liquidation, the solvent party may, in terms of the general rule applicable to this situation, claim specific performance against the insolvent estate.

Select the **correct** statement:

(a) The statement is not correct since in terms of the general rule specific performance cannot be claimed in such an instance, even though the trustee or liquidator's repudiation of the contract amounts to breach of contract. ✓

(b) The statement is correct since specific performance is always available to the solvent party in a case of breach of contract by the trustee or liquidator.

(c) The statement is correct since case law has confirmed that the solvent party may claim specific performance in these circumstances.

(d) The statement is correct since the election of the trustee or liquidator in fact amounts to cancellation of the contract.

Question 1.15

X purchases a car from W on 10 May 2022 in terms of an ordinary credit sale agreement. Although the last instalment is only due to be paid on 10 November 2022, by agreement ownership in the car had already passed on delivery. The estate of X is sequestrated on 7 July 2022.

Select the **correct** answer:

(a) W may reclaim the car if he has not been paid in full.

- (b) W has lost ownership of the car since it is a credit sale in terms of the common law. ✓
(c) W enjoys a tacit hypothec that secures the balance of this claim.

(d) W enjoys a preferential claim against the estate of X regarding any damages that he may have suffered.

Question 1.16

Alpha Limited has recently been placed under business rescue in terms of an order of court as contemplated in section 131 of the Companies Act 2008. Mr Thobejane is an employee of Alpha Limited (in business rescue). He is concerned that his employment with Alpha Limited is about to come to an end by virtue of the commencement of business rescue proceedings. He approaches you for advice.

Which of the following statements **correctly** describes the position of employees during business rescue proceedings?

- (a) During a company's business rescue proceedings, employees of the company immediately before the beginning of those proceedings continue to be so employed on the same terms and conditions, except to the extent that changes occur in the ordinary course of attrition, or the employees and the company agree on different terms and conditions of employment, in accordance with applicable labour laws. ✓
- (b) During a company's business rescue proceedings, the business rescue practitioner can unilaterally vary the employment terms and conditions of the employees of the company immediately before the beginning of those proceedings, subject to the approval of the company's creditors at the first meeting of creditors
- (c) During a company's business rescue proceedings, all employment contracts that existed immediately before the beginning of those proceedings are automatically suspended
- (d) All of the above

Question 1.17

Which of the following statements is / are **correct** in relation to compromises between a company and its creditors in terms of section 155 of the Companies Act 2008?

- (a) A proposal for a compromise in terms of section 155 is adopted by the creditors of the company, or a class of creditors, if it is supported by a majority in number representing at least 75% in value of the creditors or class present and voting in person or by proxy.
- (b) Section 155 does not apply where a company is under business rescue proceedings.

(c) A liquidator, where a company is being wound up, may propose an arrangement or a compromise of the company's financial obligations.

(d) All of the above statements are correct. ✓

Question 1.18

Select the **correct** answer:

What are the aims or goals of the business rescue process as set out in Chapter 6 of the Companies Act 2008?

(a) The development and implementation of a business rescue plan to rescue the financially distressed company, which plan has the aim of allowing the company to continue in existence on a solvent basis.

(b) To provide a better return for the financially distressed company's creditors or shareholders than would result from the immediate liquidation of the company.

(c) Both statements (a) and (b) are correct. ✓

(d) None of the above statements are correct.

Question 1.19

Select the **correct** answer:

(a) Only the provisions of the Companies Act 2008 apply to the liquidation of solvent companies. x

(b) Only the provisions of the Companies Act 2008 and the Companies Act 1973 apply to the liquidation of solvent companies.

(c) Some provisions of the Insolvency Act also apply to the liquidation of solvent companies.

Question 1.20

Select the **correct** answer:

(a) A voluntary winding-up by the company is possible only if the company has no unpaid debts.

(b) In a solvent voluntary winding-up by the company, the shareholders have the right to appoint the liquidator.

(c) From the moment of commencement of a solvent voluntary winding-up by the company, the company stops being a juristic person.

(d) A company can be put into insolvent liquidation even if its assets exceed its liabilities.

✓

[16]

QUESTION 2

What is the legal position after sequestration regarding debts that were due to an insolvent debtor before their sequestration? (3)

The trustee has the right to recover payments of all debts owing to the insolvent in respect of transactions subsequent to sequestration unless such debts were contracted in the course of the insolvent following his profession or calling or in the performance of any contract of service, or in the carrying on of a duly authorised trade. ✓ Consequently, the payment of such a debt to the insolvent is no defence to a claim of payment made by the Trustee, unless it seems the debtor can satisfy the court that he was ignorant of the sequestration at the time of making payment. ✓ [2]

Commented [CJ1]: Bona fide payment. See memo.

Mars: The law of Insolvency in South Africa pages 203 - 204

QUESTION 3

Explain the difference between the "advantage for creditors" requirement in voluntary surrender and compulsory sequestration. (2)

Voluntary surrender - There is an advantage to creditors when a calculation of the expected dividend is done and that dividend would be adequate if it is 20 cents in the rand or more.

Commented [CJ2]: Positive proof necessary

Compulsory sequestration - The applicant must prove that the sequestration is to the advantage of the creditors as a group. Evidence is required that property of the respondent can be realised and that there is a reasonable prospect ✓ of payment of a dividend to proven creditors. It has been held that an applicant may establish advantage on other grounds, such as the avoidance of unfair distribution of the respondent's assets, interrogation or the respondent, investigation of his affairs, coupled with a not unreasonable prospect that assets may be revealed or recovered as a result of investigation. [1]

QUESTION 4

Write a short note on the different manners in which a witness to an insolvency enquiry may be subpoenaed. (5)

In terms of Section 64 - 66 of the Insolvency Act - for a public interrogation;
In terms of Section 414 - 416 of the Companies Act - for a public interrogation;
In terms of Section 152 of the Insolvency Act - for private interrogation;
In terms of Section 417 & 418 of the Companies Act - for private interrogation;
Subpoena to produce books and relevant documents. [0]

Commented [CJ3]: Process or manner of which subpoena may be served? See memo.

QUESTION 5

List the three steps that must be taken to determine whether a specific provision of the Insolvency Act applies to the liquidation of a company. (3)

1. Can the section apply to a winding-up? ✓
2. Is the matter specially provided for by the Companies Act? ✓
3. Does the provision apply to the mode of liquidation? ✓ in question? [3]

QUESTION 6

What is the effect of the sequestration of a partnership estate on the individual partners in their personal capacities? (2)

Not only the partnership is sequestrated, but at the same time the estate of every member of that partnership, ✓ other than a partner *en commandite* or a special partner who has not held himself out as an ordinary or general partner, or a partner exempted because of military or police service. [1]

Mars: The Law of Insolvency in South Africa page 657

Commented [CJ4]: Each partner sequestrated simultaneously but separate from estate.

QUESTION 7

Briefly explain the effects of the publication of a notice of surrender (in the voluntary surrender of a debtor's estate). (3)

Stay of sale and execution - it is unlawful to sell any property in the estate which has been attached under a writ of execution or other similar process. ✓

Curator bonis may be appointed - the debtor is still at liberty to deal with his property as he chooses, but as a save guard against the debtor dissipating his assets after a notice of surrender, the Master may appoint a *Curator bonis*. ✓

A potential compulsory sequestration - after publishing a notice of surrender and a number of other requirements the notice of surrender may be an act of insolvency which entitles a creditor to apply for compulsory sequestration. ✓ [3]

QUESTION 8

Mrs A was an employee of the Vaal University. On 1 September 2022 her estate was sequestrated. A month later she took early retirement and became entitled to an amount of R2 million as pension in return for the services she provided to the University. **Advise Mrs A**, who approaches you for legal advice. She wants to know whether the pension she became entitled to will fall into her insolvent estate. (2)

Her pension will not fall into her insolvent estate as provided for in Section 23(7) of the Insolvency Act.^[2]

QUESTION 9

Section 63 of the Long-Term Insurance Act 1998 affords protection of policy benefits under life insurance policies where the protected person's estate is sequestrated. **Write an essay** in which you analyse the relevant provision. Also refer to relevant case law. (10)

In terms of Section 63 (1) of the Long-Term Insurance Act 1998, "subject to the provisions of subsections (2) and (3), policy benefits provided or to be provided to a person under one or more assistance, life, disability or health policies in which that person or the spouse of that person is the life insured and which has or have been in force for at least three years (or the assets acquired exclusively with those policy benefits), shall other than that for a debt secured by the policy - (a) during his or her lifetime, not be liable to be attached or subjected to execution under a judgement of a court or form part of his or her insolvent estate, (b) upon his or her death, if he or she is survived by a spouse, child, stepchild or parent, not be available for the purpose of the payment of his or her debts.

Until the Financial Services General Amendment Act of 2013 came into operation on 28 February 2014, the protection under Section 63 was limited to an aggregate amount of R 50 000.00. The amended Section 63 removed this limit, and now protects the full value of the policy benefit.

The protection applies to policy benefits and assets acquired solely with the policy benefits for a period of five years from the date when the policy benefits were provided. A person claiming protection in terms of Section 63(1) must be able to prove, on a balance of probabilities, that the protection is afforded to him or her under the section.

In the case of *Pieterse v Shrosbee NO & Others; Shrosbee NO v Love and Others 2005 (1) SA 309 (SCA)* it was decided by the Supreme Court of Appeal that section 63 does not regulate the payment of the proceeds of the insurance policies *in casu*, since the appointment of a beneficiary has the effect that payment of the proceeds will be made directly to the beneficiary and not to the estate of the deceased. The insolvent estate will have no claim to those policy proceeds as it is directly paid to the beneficiaries, and has the effect that all benefits under policies can be protected against creditors of an insolvent estate. In the case of *Pieterse* the protection in terms of Section 63 did not kick in as the relevant policy was in force less than three years at the time of the deceased death. In the

Commented [CJ5]: Protection applies for period of 5 years to benefits and assets acquired. See memo.

case of *Love*, although the policy was in force for a period in excess of three years, the nominated beneficiaries were not “protected persons” in terms of the section

Where the estate of the holder of a policy is sequestrated before acceptance of the policy benefits, the beforementioned case is not applicable, and was it decided by the court in the case of *Malcolm Wentzel v Discovery Life Limited and Others: In Re Botha and Others NNO v Wentzel 1001/19 [2020] ZASCA 121 (2 October 2020)*, where the appellant, Mr Wentzel was married in community of property and where he concluded a contract of insurance in terms of which his wife’s life was insured. In terms of the contract Mr Wentzel was appointed as the beneficiary of the proceeds payable upon her death. In terms of the same policy Mr Wentzel’s life was also insured and was his wife the beneficiary of the proceeds upon his death. The estate of the Wentzels was finally sequestrated in April 2012, and Mrs Wentzel passed away in April 2017. The question before court was whether a unrehabilitated insolvent, who is the nominated beneficiary in terms of a life insurance policy, be entitled, to the exclusion of the trustees for the purposes of realisation and distribution for the benefit of the creditors of the joint insolvent estate. The court did not refer to Section 63 of the Long-Term Insurance Act, but rather Section 20(2) and 23 of the Insolvency Act and it was decided that the proceeds of the policy fell into his insolvent estate for the benefit of his creditors and that the proceeds vested in the trustees despite the fact that the first and final liquidation and distribution account was already filed and confirmed by the Master. It is said that the court failed to take into consideration the application of Section 63(1), as the policy benefits *in casu* was in terms of Section 63(1) “provided or to be provided to a person”, in this case Mr Wentzel, who was the appointed beneficiary in the event of his wife’s death, and “in which that person or the spouse of that person is the life insured”, in this case the life of both the husband and wife was insured. Mr Wentzel, as the policy holder was the “protected person” and was entitled to protection under the Long-Term Insurance Act. The policy was in force for at least three years and did not serve as security for any debts of the policyholder, and it is thus submitted that the provisions of Section 63(1) kicked in and the policy benefits were protected in Mr Wentzel’s hands and should during his lifetime, not form part of his insolvent estate. ✓ [7]

Commented [CJ6]: See memo. No fraud.

QUESTION 10

With reference to the relevant provisions of the Insolvency Act, **write an essay** in which you discuss the effect of sequestration on the execution of judgments and other civil proceedings. (6)

Section 20 ✓ of the Insolvency Act states that the estate of the insolvent, including property under attachment, vests in the trustee. Upon receipt of the sequestration order, the sheriff is required to attach and make an inventory of the movable property of the estate which is in the Sheriff’s district and which is not in possession of a person who claims to be entitled to retain in under a right of pledge or a right of retention. Section 20(1)(b) provides the stay of any civil proceedings instituted by or against the insolvent, except such proceedings as

may in terms of Section 23 be instituted by the insolvent for their own benefit or as may be instituted against the insolvent. ✓ Exceptions refers to proceedings that do not affect the insolvent estate, such as proceedings that relates to status or assets that do not form part of the insolvent estate. If a claim in respect of which proceedings were stayed is subsequently proved against the estate or is compromised by the trustee after being tendered for proof, the claimant may also prove a claim for their taxed costs incurred in connection with those proceedings before sequestration. ✓ Section 20(1)(c) provides that the execution of a judgement is stayed as soon as the sheriff concerned becomes aware of the sequestration, unless the court directs otherwise. ✓ The court may order that the execution be continued if it is expedient and necessary and the general body of creditor will not be prejudiced, however the proceeds must be paid to either the Master or the Trustee. It can also be in the best interest to proceed with a sale in execution, where the auction has already been arranged and the advertisements placed and a fair price is obtained at the auction. ✓ The publication of a notice of surrender can effectively stop a sale in execution that has not taken place, but not the transfer of the property after the sale had taken place. ✓ [6]

QUESTION 11

Write an essay on the remuneration of business rescue practitioners, making specific reference to the issue of remuneration agreements (sometimes referred to as “success fee” or “contingency fee” agreements) concluded between business rescue practitioners and third parties, and provide insight, with reference to case law, as to whether such agreements are prohibited or contrary to public policy. (10)

A business rescue practitioner's remuneration is dealt with in Section 143 ✓ of the Companies Act 2008. Section 135(3) of the same Act provides that the first expenses to be paid is that of the business rescue practitioner and the costs of the proceedings. Section 143(6) provides that the practitioners may charge remuneration and expenses in accordance with the tariff prescribed in said section. For the purposes of Section 143(1), the Minister may make regulations prescribing a tariff of fees and expenses and Regulation 128 prescribes the tariff of fees for practitioners.

Section 143(2) provides that the practitioner may enter into an agreement ✓ with the company for further remuneration, based on a contingency related to, firstly, adoption of a business plan, at all, or within a particular time, or the inclusion of any particular matter within such plan, or secondly, the attainment of any particular result or combination of results. Such agreement for further remuneration, must in accordance with Section 143(3) of the Act be approved “at a meeting called for the purpose of considering the proposed agreement”. Without such approval, such a fee is invalid. ✓

In the case of *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd 2020 (5) SA 35 (SCA)*, ✓ the applicable Court was tasked with determining whether remuneration agreements or so-called “success fee” agreements, concluded between business rescue practitioners and third parties (such as creditors) outside of the working of Section 143, were prohibited, void ✓ for illegality, or otherwise contrary to public policy. It was held by the Court that Section 143 only applies to the remuneration of business rescue practitioners by the

Commented [CJ7]: Not applicable to this question.

company under business rescue and it does not deal with any fee agreements concludes between such practitioners and any third parties. It was held that nothing in Section 143 suggests that any agreement which falls outside of the section is void, and that the Companies Act 2008 does not penalise the conclusion of remuneration agreements with third parties and that the section also does not contain any wording that suggests that the Courts may interfere or that the legislature intended to invalidate such remuneration agreements. The Supreme Court of Appeal concluded that remuneration agreements, or "success fee" or "contingency fee" agreements, between practitioners and third parties, outside of the ambit of Section 143 are neither prohibited, illegal, nor contrary to public policy. ✓ [7]

QUESTION 12

Write a brief note on what happens to the solvent partners' estates and the partnership estate where the estate of a partner is sequestrated? (4)

It is not necessary for the partnership estate or the private estates of other partners to be sequestrated. ✓ Sequestration of the partner's estate, *ipso iure*, terminates that partnership which must, as a result be wound up. It is of course possible for the remaining partners to form a new partnership in the place of the old one. ✓ The partnership dissolves, ✓ and the creditor of the partnership is entitled to sue the remaining partner for the whole of his claim without joining the insolvent partner as co-defendant. 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. The insolvent partner's share of the partnership assets vests in the trustee of his insolvent estate. ✓ [4]

Hockly's Insolvency Law: Chapter 20

QUESTION 13

In 2010, Mr X and Mr Y entered into a civil partnership in terms of the Civil Union Act 2006. On 1 March 2011, Mr X donated certain immovable property to Mr Y. Soon thereafter, the property was registered in Mr Y's name in the Deeds Office. On 1 February 2022, Mr X's estate was finally sequestrated. Two months before his sequestration, Mr X donated his Land Rover Defender to Mr Y. Mr Y approaches you for advice.

Answer the questions below.

Question 13.1

What is the legal position in regard to the immovable property and the Land Rover Defender? Will the assets fall into X's insolvent estate? Refer to the relevant provisions of the Insolvency Act and other relevant legislation in your answer. (10)

A debtor may in principle enter into any valid transaction with another person with a view to disposing of his rights in property. Transactions, such as the donations of the immovable property and the Land Rover Defender may however cause the value of the estate to diminish, and when they are entered into under insolvent circumstances, or when the debtor is already factually insolvent at the time of such transaction, they may impact negatively on the *concursum creditorum* should the estate of the debtor be sequestrated. Insolvency law takes note of certain transactions that took place even before the *concursum creditorum* commenced. ✓

Section 21 ✓ of the Insolvency Act deals with the position in respect of a marriage out of community of property and it provides for the additional effect of the sequestration of the separate estate of one of two spouses and which shall vest in the Master, ✓ upon appointment, in the trustee. All the property of the spouse whose estate has not been sequestrated, or the "solvent spouse" will vest in the trustee as if it were the property of the sequestrated estate. ✓ A trustee cannot simply dispossess a solvent spouse of their property and has to in terms of Section 69(1) take into possession all movable property "belonging to the estate", but not before the sheriff has made an inventory in terms of Section 19. ✓ The trustee must obtain a warrant in terms of section 69(3) from a Magistrate in order to take possession of the property of the spouse. In accordance with Section 21(2) the burden of proving that he or she is entitled to the property is on the solvent spouse, and shall property be released to the solvent spouse if it is proved that (a) the property was the property of the spouse before the marriage, (b) that the property was acquired under a marriage settlement, (c) that it was property acquired during the marriage by a title valid against creditors, (d) that it is property protected under the long term Insurance Act 52 of 1998, or (e) that it was acquired with property under the before mentioned (a) to (d) or the income or proceeds thereof.

In accordance with Section 27 of the Act. No immediate benefit, being a benefit transferred or delivered, before three months after marriage, under a duly registered antenuptial contract, given in good faith by a man to his wife (or husband), shall be set aside as a disposition without value, unless the husband's estate was sequestrated within two years of the registration of the antenuptial contract. If the contract is not duly registered in the deeds office it is binding on the spouses but not on their creditors.

Section 22 of the Matrimonial Property Act provides that ✓, subject to the provisions of the Insolvency Act, no transaction effected before or after the commencement of the Act, is void or voidable merely because it amounts to a donation between spouses, and may a donation provide a valid title. The requirements of good faith remain, and will only a real donation, and not a simulated donation, provide a valid title. ✓ The onus is on the solvent spouse to prove the true transaction and that it is a valid one such as may confer a valid title. A real donation or any other transaction between spouses may be challenged in terms of Section 26, 30 and 31 of the Insolvency Act, or in terms of the action Pauliana, provided that the invalidity of donations between spouses is not relied upon. ✓ [8]

Question 13.2

Commented [CJ8]: Not applicable to question. See memo.

Advise Mr Y regarding the question as to whether he will be regarded as a "spouse" in terms of the Insolvency Act. (4)

Mr Y will be regarded as a "spouse" in terms of the Insolvency Act, as Section 21 of the Act provides that the term "spouse" has an extended meaning and includes a wife or husband married according to any law or custom, ✓ and also to persons living together as husband and wife, though not legally married. The Civil Union Act legalized civil unions between same sex partners which has the same legal ✓ consequences as any marriage in any other law, including the common law. ✓ The term "spouse" therefore includes a "civil union partner" in terms of the Civil Union Act. ✓ [4]

QUESTION 14

Generators Africa (Pty) Ltd, a company that manufactures generators for the lucrative South African market, is placed in liquidation by an order of the High Court on 3 May 2022. One of the company's employees, Thabo Kekana, approaches you for advice on the effect that the liquidation of the company will have on his contract of employment. Thabo has not been paid since the end of January 2022, his salary being an amount of R10,000 per month. In addition, he has R3,500 leave pay owing to him for the preceding year.

Advise Thabo Kekana regarding the questions below.

Question 14.1

What effect will the liquidation of the company have on Thabo's contract of employment? (5)

In terms of Section 38(4) of the Insolvency Act, a liquidator appointed in terms of Section 375 of the Companies Act, 1973, remains in office after the first meeting, may terminate the contracts of service of employees, subject to subsections (5) and (7) of the Insolvency Act. ✓

In terms of Section 38(5) a contract of service may not be terminated as consultation first needs to take place with any person as required by the Labour Relations Act, 1995 ✓ and any registered trade unions whose members are likely to be affected by the termination of the contract of service. ✓ The consultation referred to in Subsection (5) must be aimed at reaching consensus on appropriate measures to save or rescue the whole or part of the business of the insolvent employer. ✓

In terms of Subsection (7) if any party in terms of Subsection (5) wishes to make proposals concerning any matter, that party should do so in writing to the liquidator within 21 days of his or her appointment in terms of Section 375 of the Companies Act, 1973.

In terms of Subsection (9), unless the liquidator and an employee have agreed on continued employment of the employee, all suspended contracts of service shall terminate 45 days

✓after the date of appointment of a liquidator in terms of Section 375 of the Companies Act, 1973.[5]

Question 14.2

What possible claims does Thabo have against the insolvent company? Thabo also wants you to explain to him what the nature of these claims will be. (3)

In terms of Section 98(A)(1), an employee who was employed by the Insolvent is entitled, subject to certain maximum amounts determined by the Minister of Justice by notice published in the Government Gazette from time to time and will Thabo have a claim for salary or wages, for a period not exceeding three months, up to a maximum of R 12 000.00 and any payment in respect of any period of leave in the year of insolvency or the previous year, whether or not the payment thereof is due at date of sequestration up to a maximum of R 4 000.00. Thabo will thus have a claim for R 15 500.00. ✓ [1]

Commented [CJ9]: Nature of claims? Thus preferent claims and concurrent claims.

QUESTION 15

Joe Bond made a loan of R50,000 to his friend, John Jack. As security, John put up his generator (worth approximately R70,000) as a pledge. The generator was delivered to Joe who kept it on his premises. A few months later, John repaid the remaining balance of the loan (being R45,000) and Joe handed back the generator, the loan now having been settled. However, John's estate was sequestrated 20 days after he settled the loan with Joe. The trustee appointed in John's estate now claims the payment of R45,000 back from Joe as a voidable disposition.

Indicate whether the trustee will succeed with his claim against Joe. (8)

Disposition means any transfer or abandonment of rights to property. This includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract providing therefor. The main types of voidable transactions provided for by the Insolvency Act are based on dispositions that were effected under prescribed conditions, and are dispositions without value dealt with in Section 26 of the Act, voidable an undue preferences provided for in Section 29✓ and 30 respectively, and collusion provided for by Section 31. Debt collection and insolvency law in South Africa still make use of the common law remedy in the form of *actio Pauliana*, and in terms of this action "fraudulent" alienations may be voided and can any transaction by the debtor aimed at defrauding the creditors by putting them out of pocket through the alienation of assets without receiving adequate value in return, be set aside by the *action Pauliana*. The transaction must however indeed "defraud" the creditors in that the assets of the person alienating the property are diminished by such alienation.

Commented [CJ10]: Be very clear which remedy will be applicable. See memo. S 29 of the Act.

The *action Pauliana* ✓can be instituted where the debtor has been sequestrated or where the debtor has not been sequestrated and It has to be proven that (a) the alienation must have diminished the debtor's assets, (b) the recipient must not have received his or her own

Commented [CJ11]: Extra mark.

property, being property that he or she is entitled to under say a settlement of a due debt, (c) the debtor-alienator must have had the intention to defraud the creditor, but if he or she received value, though inadequate, in return for the alienation, the recipient must have been aware of such intention to defraud, and (d) the fraud must have caused the detrimental consequences for the creditors, and must the alienation have caused a lack of available assets to meet the debts of the debtor. Should these elements be proven, the alienation of the property should be voided and the trustee will be entitled to claim restitution of the alienated property.

The trustee will most probably not succeed with a claim on the grounds of voidable disposition, even though the alienation has diminished the debtor's assets, as the recipient received the money that he loaned to the debtor and there was no intention by either party to defraud. ✓ [3]

TOTAL MARKS: [100]

***** End of assessment *****

GENERAL FEEDBACK:

- **ESSAY QUESTIONS:**
 - Is my answer too long or too short? Be guided by the mark allocation and at least ensure that if you have a 10-mark allocation you mention 10-15 facts in your answer.
 - Structure your answer: A clear and specific thesis sentence stated up top will help you to organize and tie together the various parts of your answer. The content of your answer should be integrated to form a logically cohesive whole. Eg Introduction → discuss SA law eg case law and provisions in the Act → conclusion.
 - When answering an essay type question - the essay should properly describe key legal principles. Read question and identify the key legal principles and then discuss the relevant case law and provisions in the Act connected to the principles.
- **QUESTION 4- "different manners"** refers to the procedural law regarding the *manner in which a subpoena is issued*. A witness is compelled to attend an enquiry subject to procedural requirements being met.