



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.

70/100

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.

(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.x

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.
- (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

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. x

- (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.
- (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.

[15]

QUESTION 2

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

All debts due to the insolvent, vests in the insolvent estate and must be paid to the trustee or Master if the trustee is not yet appointed. ✓ If a payment has been made to the insolvent, the insolvent must make payment to the trustee. This usually happens when a debtor is not aware of the insolvent's sequestration and the debtor makes a good faith payment ✓ to the insolvent instead of the trustee. The obligation will remain on the insolvent to make payment to the trustee. ✓ [3]

QUESTION 3

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

In a compulsory sequestration a reasonable prospect ✓ needs to be shown that the sequestration will be to the advantage of creditors, however, in a voluntary surrender the applicant must show that there will be a positive proof ✓ of advantage for the creditors. [2]

QUESTION 4

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

A master or court can at any time summon a person to testify into the trade, dealings, affairs and property of the company that has been liquidated. This is done after winding up on a company has taken place, in terms of section 417 of the Companies Act. For purposes of a confidential enquiry in terms of section 418 of the Act, a summons or subpoena is drafted by the liquidator's attorney and the commissioner (appointed by the master, could be a magistrate, counsel or retired Judge) issues same. This is thereafter served on the witness using the sheriff ✓ or the liquidator's clerk can attend to service and afterwards provide a service affidavit confirming service. ✓ [2]

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)

One would need to look at the following:

1. Whether the liquidation proceedings are applicable to a solvent or insolvent company; ✓
2. Is the company unable to pay its debts when they become due, this is also known as commercial insolvency; and
3. Does the company's liabilities exceed its assets, this is known as factual insolvency. It is possible that a company can be commercially and factually insolvent. [1]

Commented [CJ1]: Is matter provided for in CO Act and does the prov apply to the type of winding up. See memo.

QUESTION 6

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

Fortunately, a distinction is drawn between the actual partnership itself and the individual partners estates as separate entities. ✓ Due to the partnership being identified as a separate entity it would be treated the same as if it was a natural person and therefore will not affect the individual partners estates. [1]

Commented [CJ2]: Estate of partners sequestrated simultaneously but separate from partnership estate. See memo.

QUESTION 7

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

The publication of the notice will allow for a stay of all sales in execution. ✓ The sheriff will not be allowed to sell any property. If there is an element of urgency and a sale needs to take place, the master would need to consent to the sale, if the value of the goods is less than R5 000.00. A court order will be required to authorize the sheriff to sell goods where the value of the goods exceed R5 000.00. [1]

Commented [CJ3]: Appoint curator bonis + act of insolvency

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)

Due to Mrs. A taking early retirement after her estate was sequestrated, the pension benefits will not form part of the insolvent estate. ✓ Section 23(7) ✓ of the Insolvency Act makes provision for her benefit to be protected and that she will be able to recover any pension payout which she is entitled to, due to the fact that she rendered services to the University. [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 sequestered. **Write an essay** in which you analyse the relevant provision. Also refer to relevant case law. **(10)**

A pay out of a life insurance policy to the insolvent, as a general rule, will not vest in the insolvent's estate. In terms of section 63 of the Financial Services General Amendment Act of 2013, there is no limit or cap of the policy and therefore the insolvent will have full protection of the life insurance payout.

It is possible that part of the value of the policy / policies are protected. In such cases, the trustee would need to determine which policy should be realized wholly or partially. The unprotected portion of the policy then would fall part if the insolvent's estate and will not enjoy the protection as afforded section 63 of the Long Term Insurance Act.

It is important to note that the insolvent must have the policy for at least three years in order to reap the benefit of the protection. Upon the insolvent's death this amount will be paid out to the insolvent's beneficiaries and therefore will still not fall part of the insolvent's estate. The protection of the funds will remain in place if the funds are bequeathed to a spouse, child, stepchild or parent, essentially to a beneficiary. This position has been confirmed in the matter of Pieterse v Shrosbee NO and others.

Simply put, the insolvent will have the protection of the funds, by nominating beneficiaries and therefore the insolvent's creditors cannot benefit from said policy. If the policy was taken out with the intention to defraud creditors, there will be no benefit / protection afforded to the insolvent and these funds will form part of the insolvent estate.

In the matter of Malcolm Wentzel v Discovery Life Limited and others, the joint estate of spouses were sequestered prior to the death of Mrs. Wentzel. The court aqo was of the opinion that the policy benefits were not protected and therefore the funds fell part of the insolvent's (Mr. Wentzel's) estate for the benefit of the creditors. This matter was taken on appeal to the SCA and the position was confirmed that Mr. Wentzel's policy benefits were protected and should not form part of his insolvent estate.

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(1)(b) of the Insolvency Act ("Act") allows for the stay of any proceeding/s that have been instituted by or against the insolvent. The exceptions to this rule is stated in section 23 of the Act. For an exception to be applicable, these proceedings must not affect the insolvent estate. In certain circumstances, the trustee can abide by court decisions if the outcome of the matter will increase the value of the estate or reduce the liabilities of the estate.

Commented [CJ4]: See criteria in s 63 and mentioned in memo. When answering the question be very clear on the remedy available and the criteria in order to qualify for protection.

Upon sequestration of the insolvent's estate, all pending civil proceedings shall lapse three weeks after the first meeting of creditors are held, unless a notice has been provided to the trustee or Master advising that they (third party) wishes to proceed with the respective civil proceeding, after three weeks from when the notice has been given. The courts also have discretion in this regard. ✓

With regard to the effect of sequestration proceedings on execution of judgments, as the sheriff would have been notified once a sequestration order has been granted, any execution of a judgment will also be stayed in terms of section 20(1)(c) of the Act. ✓ A court order can order otherwise, if there is a sense of urgency however this in no way should prejudice the concursus creditorum. Any proceeds arising from the execution will fall within the insolvent estate and therefore must be paid to the Master or trustee appointed. ✓ If the value of the items are under R5 000.00 the master must consent to the sale or if the value is over R5 000.00 a court order would need to be obtained. [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 ("BRP") remuneration is covered in section 143✓ of the Companies Act ("Act"). In terms of section 135(3) of the Act all expenses arising out of the business rescue proceeding are the expenses of the BRP and same must be settled. The BRP is entitled to be reimbursed for any actual costs he incurred through the business rescue process in order to carry out his functions.

The BRP is entitled to remuneration due to his role of taking control of the financial distressed company and finding a way to rescue it or to provide a better return to creditors versus liquidation proceedings. The tariff for said remuneration is set out in section 143(1) of the Act, which allows for either the adoption of a plan within a specific time or including a specific matter with this plan or obtaining a specific result when it comes to the business rescue plan. Section 143(2) further allows for a BRP to propose an agreement with the company for further remuneration in addition to what has been stated above. ✓ This calculation is done on the basis of a contingency relating to what and how the BRP performed. Should there be an agreement between the BRP and the company ✓ for the BRP to receive additional remuneration, this must be approved at a meeting called specifically to be discussed the details surrounding this agreement. ✓ Section 143(3) of the Act makes provision for this.

There however needs to be certain checks and balances in place for an additional remuneration agreement. If the BRP was not competent and did not have true control over the company during the business rescue period, he cannot request for additional remuneration. This position was confirmed in the matter of Alderbaran (Pty) Ltd and another

v Bouwer and others. In the matter of Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd, the SCA had to determine if an additional remuneration agreement also known as a success fee agreement is what the legislature intended for under section 143 of the Act. The SCA noted that section 143 refers to additional fee agreements between the BRP and the company itself whereas a "success-fee" agreement is concluded between a BRP and a third party. The SCA came to the conclusion that despite the different contracting parties for an additional remuneration in favour of the BRP, success fee agreements between a BRP and a third party falls outside the ambit of section 143 and that these agreements are not prohibited, and neither is it illegal or contrary to public policy. This case therefore confirms that success fee agreements between the BRP and third parties may be concluded in order for the BRP to received additional remuneration. [8]

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)

If any individual partner to a partnership agreement had their individual estate sequestrated, this would result in the dissolution of the partnership. The dissolution of the partnership does not mean that the partnership's estate will be sequestrated. Under these circumstances, after the dissolution of the partnership, each partner becomes jointly and severally liable for the debts of the partnership. It must be kept in mind that the partnership creditors are entitled to prove claims against the estate of the insolvent partner, of which the trustee may have claims against the other individual partners in order to settle partnership debts. [2 ½]

Commented [CJS]: See memo.

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)

In this case Mr Y is referred to as the solvent spouse and he will be entitled to claim release of the immovable property ("property"), as the property was acquired during their marriage by means of a valid title against creditors. This position is confirmed as per section 21(2) of the Insolvency Act and in the matter of Hawkins v Cohen, this case makes reference to

an application being made by the solvent spouse for the release of assets should the trustee refuse to release same. The trustee will not be permitted to retain the property if he/she wants to investigate the property transaction. ✓ The trustee is permitted to release the property can claim same back if it is proven that the property belongs to the insolvent estate. Donations between spouses are permitted in terms of section 22 of the Matrimonial Property Act. If it can be proved ✓ by Mr. Y that the donation of the property was done in good faith, is real and was not intended to prejudice creditors, he will then have a valid title. If one has to look at when the donation of the property was made, it seems that the donation is real and therefore Mr. Y can claim for the release of the property. ✓ In terms of the vehicle, it seems that his donation by Mr. X was done in all likelihood to prejudice the creditors of his insolvent estate and therefore the trustee will not consent to the release of the vehicle. It however is important to note that despite ✓ Mr. X's donation and that the trustee may release the respective property to the solvent spouse, this does not prohibit the trustee from setting aside a specific transaction as a voidable disposition and claiming the property or vehicle back. ✓[7]

Question 13.2

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

Yes Mr. Y is regarded as the spouse of Mr. X. There is no form of discrimination in this regard and the term "spouse" is recognized in the Civil Unions Act. ✓ More so, the term "spouse" refers to husband and wife as well as couples/partners living together as husband and wife. ✓ Civil unions between same sex couples have the same recognition and benefit as any other marriage. This position is accepted in Insolvency Law as well. ✓[3]

Commented [CJ6]: Mention provision in the Act.

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)

Thabo's contract of employment will be suspended upon the liquidation of the company. ✓ During this suspension period, he will not receive any remuneration. ✓ Thabo will qualify to claim unemployment benefits for the specific period of the suspension as per the Unemployment Insurance Act. ✓

The liquidators will have a consultation with Thabo and employee representatives regarding his contract of employment and discussions held as to how to save the business. If an agreement cannot be reached regarding employment in the future, Thabo's employment can be terminated 45 days after a final liquidator has been appointed. ✓ [4]

Commented [CJ7]: LRA?

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)

Thabo has 2 claims, the first for his arrear $\frac{1}{2}$ salary and second for his unpaid leave. $\frac{1}{2}$ He will be able to recover up to three months' salary which would be capped at R12 000.00 as this is the maximum amount claimable in terms of section 98A of the Insolvency Act ("Act"). The R12 000.00 would be a preferent claim ✓ and the balance owing to Thabo on his salary would be a concurrent claim. ✓ With regards to Thabo's leave pay, this too would be subject to a maximum amount of R4 000.00. As Thabo's leave pay is R3 500.00, this will be a preferent claim. [3]

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)

The trustee would need to investigate and prove whether the disposition was made without value or if it was an under value transaction. The insolvent would need to prove that when he was repaying the loan to Joe, he was solvent at the time.

The trustee would also need to investigate whether at the time of the loan being advanced to the insolvent, whether the insolvent's estate was already insolvent at that time already, due to the disposition being made a few months before the insolvent's sequestration.

Commented [CJ8]: Be clear on the remedy available. Not a choice between 2 provisions. In this case s 29.

In terms of the trustee seeking to claim the R45 000.00 from Joe, the trustee will, in all likelihood be successful in setting aside the payment, since it would seem that the

transaction could constitute a voidable disposition. In terms of section 29 of the Insolvency Act, ✓the trustee would need to look at whether the payment of R45 000.00 was made six months before the insolvent's sequestration and does this disposition have the effect of preferring one creditor over other creditors. ✓

The defense which Joe has available to him in this case, would be that the repayment of the loan was done in the ordinary course of business and that he was not preferred over other creditors. There is a nexus for the payment which John made to Joe. ✓ [3]

Commented [CJ9]: Joe may claim indemnification before he repays the amount. See memo.

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.