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202122-686.Paper1Formative

**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.

72/100

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.x**

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.x**

(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.

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. x

(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. x
- (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. x

(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 suspendedx

(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.x

(d) A company can be put into insolvent liquidation even if its assets exceed its liabilities.
[9]

QUESTION 2

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

(3)

In terms of section 22 of the Insolvency Act, vi it is payable to the trustee. If payment is made to the insolvent, the obligation is not terminated unless the debtor involved can prove that he was *bona fide* and had no knowledge of the sequestration, Insolvency Act, s 22. vi

Debts payable to the insolvent are forthwith payable to the trustee. If payment is made to the insolvent, the obligation is not terminated unless the debtor involved can prove that he was *bona fide* and had no knowledge of the sequestration. vi[3]

QUESTION 3

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

1. *Advantage for creditors in voluntary surrender:*

Sequestration must be to the advantage of the general body of creditors. The same requirements must be met under voluntary surrender. Positive vi proof of advantage is required in voluntary surrender applications.

2. *Advantage for creditors in compulsory sequestration*

However, the burden of proof differs in applications for compulsory sequestration. Only a reasonable prospect vi that sequestration will be to the advantage of creditors is required. There is no principle that a debtor should not be sequestrated if it has only one creditor, but in such circumstances the potential advantages are inherently less and a case for insolvency correspondingly weaker. Compare s 6(1) with ss 10(c) and 12(1)(c). [2]

QUESTION 4

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

A witness may be subpoenaed for dispositions that are not in the ordinary course of business, such as:

1. deviation from the agreed method of payment

Although payment in terms of a valid contract between solvent persons and in accordance with the terms of the contract is usually viewed to be in the ordinary course of business, a deviation from the agreed method of payment can be indicative of the contrary.

2. A tripartite arrangement

A tripartite arrangement between the insolvent, one of his debtors and a creditor of the insolvent in terms of which the debtor makes a direct payment to the creditor of the insolvent (to the detriment of other creditors) can hardly be described as in the ordinary course of business.

3. registration of a mortgage bond

The registration of a mortgage bond, for a previously unsecured debt, just prior to the sequestration of the mortgagor's estate. But if this occurred in exchange for a postponement by the creditor or in case of a pledge as a counter-performance for an undertaking to serve as surety, then such transactions have been held to be in the ordinary course of business.

4. disposition must be legal

The disposition must be legal and valid to allow for it to be within the ordinary course of business. Dishonest, if not fraudulent, conduct cannot possibly be in the ordinary course of business. Dispositions during the operation of a pyramid scheme are illegal and therefore void. The need for a lawful disposition is uncontroversial. Ordinary, solvent people of business do not conclude unlawful agreements, or attempt to obtain unlawful dispositions. But there is no requirement that the disposition must be made in the course of a lawful business.

5. Not intended to prefer one creditor above another

The second part of the defence, namely that the debtor did not intend to prefer one creditor above the others, has to be proved by the beneficiary, independently from the first part of the defence. The test applied is a subjective one and is concerned with the subjective intention of the debtor which often, in the absence of direct evidence, has to be inferred from the surrounding circumstances. These circumstances may include situations where the insolvent makes the disposition whilst contemplating sequestration. A mere proposition that the debtor made the disposition with the hope to tide over his financial difficulties is not per se sufficient to discharge this onus of proof. The defendant can, however, convince the court that the dominant motive was not to prefer a creditor but rather to avoid, for example, criminal prosecution, or that the debtor, due to severe pressure, had no other choice but to pay the debt.⁴⁴⁵ It is essential "to weigh up all the relevant facts which prevailed at the time that the disposition was made in order to determine what, on a balance of probabilities, was the

Commented [CJ1]: Discuss the procedure?
See memo.

'Dominant, operative or effectual intention in substance and in truth' of the debtor for making the disposition". The insolvent, if shown to be a reliable witness, can also testify to the fact that he had no intention of preferring the defendant and, in the absence of any other circumstantial evidence such as friendship or family ties between the insolvent and the defendant, it might be sufficient to prove the absence of such intention. Insolvency Act, s 29(1).

ANSWER TOO LONG- BE GUIDED BY THE MARK ALLOCATION FOR EACH QUESTION.

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)

The 3 steps are:

1. Can the section apply to a winding-up? ✓

The first step is to determine whether the provision is capable of application in a winding-up. Provisions such as those dealing with rehabilitation and the exclusion of assets from an insolvent estate, can never apply to a company in winding-up.

2. Is the matter specially provided for by the Companies Act? ✓

The next step is to determine whether the matter is specially provided for by the Companies Act (see section 339 quoted above). An example of a situation where there was a difference of opinion on the application of this rule, was the provisions relating to the late proof of claims. ✓[3]

3. Does the provision apply to the mode of liquidation in question?

If the Companies Act does not specially provide for the matter in question and the company is unable to pay its debts, the provisions of the Insolvency Act (or the common law regarding insolvent individuals) applies with the necessary changes.

QUESTION 6

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

The effect of the sequestration of one partner's estate is that the partnership itself will terminate, and such partnership will be wound up. ✓[1]

QUESTION 7

Commented [CJ2]: Partner estate sequestrated simultaneously but separate from partnership estate

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

1. Stay of sales in execution. ✓
2. Appointment of a curator bonis (where appropriate). ✓
3. Publication of the notice constitutes an act of insolvency if the debtor does not continue with the application, fails to lodge a statement of affairs, or lodges an incomplete or incorrect statement of affairs. ✓[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)

In terms of section 23(7) of the Insolvency Act the insolvent may for her own benefit ✓ recover any pension to which she may be entitled for services rendered. The pension benefits to which Mrs A becomes entitled to will therefore not form part of the joint insolvent estate. ✓[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)

The entire sum of a life insurance policy is protected in terms of section 63 of the Long-Term Insurance Act 1998 if: ✓

1. the "protected person" or his or her spouse is the life insured. ✓
2. the relevant policy has been in force for at least three years; ✓ and
3. the policy does not serve as security for a debt of the debtor ✓

- during that person's lifetime; ✓ or upon his or her death, if he or she is survived by a spouse, child, stepchild or parent, provided that the policy benefits devolve upon the latter persons. Therefore, if the policy benefits are payable to them as nominated beneficiaries in terms of the relevant policy, section 63 does not apply - see *Pieterse v Shrosbee NO & Others*; *Shrosbree NO v Love and Others*. ✓

- The above-mentioned 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 must furthermore be able to prove, on a balance of probabilities, that the protection is afforded to him or her under this section.

- Policy benefits will not be protected as indicated above if it can be shown that the policy in question was taken out with the intention to defraud creditors. ✓[8]

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)

Effect on Judgements:

Section 20(1)(c) of the Insolvency Act ✓ provides that the execution of a judgment is stayed as soon as the sheriff concerned becomes aware of the sequestration, unless the court directs otherwise ✓. However, the court may order that execution be continued if this is expedient and necessary and the general body of creditors will not be prejudiced, but the proceeds must be paid to the Master or the trustee. ✓

Effects on Civil proceedings:

In terms of section 20(1)(b) ✓ of the Insolvency Act any civil proceedings instituted by or against the insolvent are stayed, until a trustee is appointed, except such proceedings as may in terms of section 23 ✓ be instituted by the insolvent for his own benefit or as may be instituted against the insolvent. The exceptions refer to proceedings that do not affect the insolvent estate, such as proceedings relating to status or assets that do not form part of the insolvent estate. Section 75 of the Insolvency Act provides that any civil legal proceedings instituted before sequestration shall lapse three weeks after the first meeting, unless the person who instituted those proceedings has given notice within that period to the trustee or, if no trustee has been appointed, to the Master, ✓ that he or she intends to continue the proceedings and after three weeks from the notice “prosecutes those proceedings with reasonable expedition”. The court may permit the continuation of the proceedings on such conditions as it may think fit if notice has not been given, if it is of the opinion that there was a reasonable excuse for such failure. ✓[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)

Practitioner’s remuneration in section 143. ✓

Section 143 deals with the business rescue practitioner’s remuneration. Section 135(3) of the Companies Act 2008 specifically provides that the first expenses to be paid in a business rescue proceeding are those of the business rescue

practitioner and the expenses arising from the business rescue proceedings itself.

Section 143(1)

The business rescue practitioner is entitled to charge an amount to the company for the remuneration and expenses of the practitioner in accordance with the tariff prescribed in terms of section 143(6). In addition, in terms of section 143(2), the practitioner may propose an agreement with the company providing for further remuneration, additional to that contemplated in section 143(1), to be calculated on the basis of a contingency related to - (a) the adoption of a business rescue plan at all, or within a particular time, or the inclusion of any particular matter within such a plan; or (b) the attainment of any particular result or combination of results relating to the business rescue proceedings.

Section 143(3) specifically requires an agreement for further remuneration to be approved "at a meeting called for the purpose of considering the proposed agreement". Without the approval at a meeting called for the purpose to approve the agreement, such a fee is invalid. The Minister may make regulations prescribing a tariff of fees and expenses for the purposes of section 143(1). Regulation 128 prescribes the tariff of fees for practitioners. It has been submitted that it would not be right for a business rescue practitioner, who although nominally in control was not truly in control of the affairs of the company, to charge the company for remuneration as business rescue practitioner.

In *Montic Diary (Pty) Ltd (In Liquidation) and Others v Mazars Recovery & Restructuring (Pty) Ltd and Others*¹⁷¹⁶ the High Court held that once a business rescue practitioner applies to court for an order discontinuing the business rescue proceedings and placing the company into liquidation, in the manner contemplated in section 141(2)(a) of the Companies Act 2008, any payment towards the fees or disbursements of a business rescue practitioner made subsequent to such application will be considered to be a void disposition in terms of section.

341(2) of the Companies Act 1973. The position, therefore, is that once an application for winding-up is presented to court, the company is precluded from making payments to third parties, including the business rescue practitioner. Any disposition made in such circumstances will be void, unless a court otherwise orders.

In *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*^{the} Supreme Court of Appeal was tasked with determining whether remuneration agreements, or so-called "success fee" agreements, concluded between business rescue practitioners and third parties (including creditors) outside the ambit of section 143, were prohibited, void for illegality, or otherwise contrary to public policy. The Supreme Court of Appeal held that section 143 only applies to the remuneration of business rescue practitioners by the company under business rescue and does not deal with fee arrangements concluded between practitioners and third parties. The court further held that there is nothing in section 143 that suggests that an agreement not falling within its ambit is void. Furthermore, the court noted that the Companies Act 2008 does not penalise the conclusion of

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Commented [CJ4]: Not applicable to question.

remuneration agreements with third parties and does not contain language entitling a court to draw an inference that the legislature intended to invalidate such fee agreements. v Accordingly, the Supreme Court of Appeal held that remuneration agreements, or co-called success fee or special fee agreements, concluded between business rescue practitioners and third-parties (including creditors), outside the ambit of section 143 are neither prohibited, illegal, nor contrary to public policy. v[10]

To the extent that the practitioner's remuneration and expenses are not fully paid during the course of business rescue proceedings, the practitioner's claim for those amounts will rank in priority before the claims of all other secured and unsecured creditors. The remuneration and expenses are not payable from the proceeds of a secured asset in terms of section 89(1) of the Insolvency Act or as cost of liquidation in terms of section 97 of the Insolvency Act. Section

135(4) of the Companies Act 2008 provides that if business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of section 135 will remain in force, except to the extent of any claims arising out of the costs of liquidation. The subsection must be read with section 97 of the Insolvency Act. That being the case, and as confirmed by the High Court in *Diener NO v Minister of Justice*,¹⁷¹⁸ the remuneration of the business rescue practitioner and the expenses incurred during business rescue proceedings, to the extent that it has not been paid during business rescue proceedings and during liquidation, can only be paid after the costs set out in section 97 have been paid. In *Diener NO v Minister of Justice And Correctional Services And Others*,¹⁷¹⁹ the Constitutional Court held that if business rescue proceedings are superseded by liquidation proceedings, the preferences created in terms of section 135 remain in force and will only be subordinate to the costs of liquidation arising out of the liquidation proceedings. The court further held that section 135(4), whether taken individually or in conjunction with section 143(5) does not create a "super preference" in liquidation and that the "super preference" interpretation contended by the appellant Diener undoubtedly favours practitioners and does not achieve a balance of the rights of all interested parties.

Section 135(4) provides to the business rescue practitioner, after the conversion of business rescue proceedings into liquidation proceedings, no more than a preference in respect of his remuneration to claim against the free residue after the costs of liquidation (but before claims of employees for post-commencement wages and claims), and ahead of those who have provided other post-commencement finance, whether those claims were secured or not, of any other unsecured creditors. Those who render services in connection with the sequestration proceedings and the administration of the insolvent estate are identified in section 97 of the Insolvency Act. A business rescue practitioner is not included in this list. The practitioner could not be included because of the distinction between business rescue proceedings and liquidation proceedings. As a result, a business rescue practitioner is a creditor of the insolvent estate and in respect of his remuneration and expenses he is required to prove his claim in terms of section 44 of the Insolvency Act.¹⁷²¹ The

Commented [CJ5]: Not applicable. Read question carefully. Answer too long.

effective date of liquidation for this purpose is the day the liquidation application was filed and not the date when the company filed its resolution to commence business rescue.

The rights of property owners during business rescue proceedings are dealt with in section 134 of the Companies Act 2008. Section 134 is geared at protecting the company's property once business rescue commences. Importantly, the rights of creditors that may hold security over the company's assets ought not to be interfered with without their consent.

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)

Partnership and partners separate entities

The Insolvency Act has departed from the common law position, and for the most part treats the estates of the partnership and its partners as separate entities. ✓ As such, a partnership is treated as a separate entity with an estate which may be sequestrated as if it were a natural person. The Master follows suit by opening separate files for each estate and making appointments, holding meetings, dealing with accounts, etc in each estate.

Partners' estate sequestrated if partnership sequestrated

Section 13(1) of the Insolvency Act provides that if the court sequestrates the estate of a partnership, it must simultaneously sequester the estate of every ✓ member of the partnership except those partners who are not liable to outsiders for partnership debts, or who have undertaken to pay the debts of the partnership and have given security for payment. The position is similar in the case of the voluntary surrender of a partnership estate. Certain partners may avoid sequestration on personal grounds, such as a partner who is protected under the Moratorium Act 1963.

It is important to note that if the estate of a person who is a partner is sequestrated, it does not necessarily follow that the partnership estate, ✓ or the individual estates of the remaining partners, need to be sequestrated. However, the effect of the sequestration of one partner's estate is that the partnership itself will terminate and, as such, the partnership will be wound up. Where a partnership is wound-up, the partnership assets are divided amongst the partners in terms of either the partnership agreement or the common law. Any partnership assets due to the insolvent partner pursuant to the termination of the partnership, vests in the trustee of the insolvent partner's estate. ✓[4]

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 terms of section 21 the solvent spouse^v may claim release if he or she is able to prove that the relevant property was acquired by the solvent civil partner by a title valid against the creditors of the estate. ^v According to case law this means that the transaction in terms of which the solvent civil partner acquired the property was not simulated or designed to defeat the rights of creditors. ^v

Donations between civil partner were legalized by section 22 of the Matrimonial Property Act. ^v A valid and real donation will therefore afford the solvent civil partner a legally valid title. The donation of the immovable property to Mr. Y appears to be a real donation and may thus be released. ^v However, the donation of the Land Rover Defender to Mr. Y shortly before sequestration of Mr. X's estate clearly does not constitute a real donation and can thus not be released. ^v It should be noted that any donation, even if the relevant property has been released, may still be set aside by the trustee as a voidable transaction in terms of the Insolvency Act. ^v[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)

The term "spouse" has an extended meaning, and includes a wife or husband **married** according to any law or custom, and also persons **living together** as husband and wife, though not legally married (section 21(13) of the Insolvency Act). ^v

The **Civil Union Act legalized civil unions between same-sex partners** which now 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. ^v

From the wording of section 21(13) (i.e., the mention of "a woman living with a man as his wife or a man living with a woman as her husband, although not married to each other") ^vit would appear that same-sex partners who are living together but are not parties to a civil union concluded in terms of the Act, will not be regarded as a "spouse" in terms of s 21(13). ^v[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)

Contracts of employment are suspended on commencement of sequestration / liquidation, meaning that the employees do not have to tender their services, but the contracts can ultimately be terminated by the trustee / liquidator or in terms of the statutory provision (section 38 of the Insolvency Act).

The effect will be that:

- The contract of employment will be suspended.
- Thabo will not be required to work during the period of suspension, but he will also not be remunerated.
- Thabo will be entitled to unemployment benefits during the period of suspension in terms of the Unemployment Insurance Act.
- Thabo's contract of employment may be terminated if the liquidator consults with employee representatives on measures to save the business or part thereof.
- If no agreement is reached on continued employment, Benny's contract may be terminated 45 days after the appointment of a final liquidator.

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)

Up to R12,000 they have a statutory preferential claim and for the balance (if any) a concurrent claim.

Thabo will be able to recover a maximum of 3 months' unpaid salary, subject to a maximum amount of R12,000. This claim is a statutory preferent claim in terms of section 98A of the Insolvency Act.

The balance of Thabo's unpaid salary will be a concurrent claim.

Thabo can recover the unpaid leave pay owing to him, subject to a maximum of R4,000. The claim is a statutory preferent claim in terms of section 98A of the Insolvency Act. The balance of Thabo's unpaid leave will be a concurrent claim. v[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 rescinding of the R50 000 loan for a payment of R45 000 was a write down of R5 000 on the loan to John. The difference of R 5000 was benefited to John in return of the generator with a value of R70 000 which returns to John's estate.

The trustee must prove but in order to pay Joe the R45 000, affected John's cash flow and solvency at the time and not the result of some other matters. Further, the returning of generator worth R70 000 may somewhat increase the value of John's estate positively.

So, although the payment was done just 20 days before John's estate was sequestrated, the trustee will not have a fair chance of setting aside the transaction since it appears the requirements for a voidable preference as prescribed by s 29 v of the Insolvency Act are present, namely:

- Although the disposition (settlement) was made by the insolvent within six months prior to his sequestration, the effect of the disposition was seemingly to have preferred the debtor's estate. v[2]

Commented [CJ6]: Clearly identify the remedy and discuss s 29.

TOTAL MARKS: [100]

*** End of assessment ***

GENERAL FEEDBACK:

o 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.