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**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)**

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**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.**

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## 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.

#### 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.

- (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.

v[20]

## QUESTION 2

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

Section 22 of the Insolvency Act 24 of 1936 (hereinafter referred to as “the Insolvency Act”) sets out the legal position regarding payment of debts due to the insolvent after sequestration. v In terms of section 22 of the Insolvency Act, debts payable to the insolvent will instead be payable to the trustee of the insolvent’s estate. v If the payments are made to the insolvent after sequestration (instead of to the trustee), the payments will be void unless the debtor proves that the payments were made in good faith without knowledge of the sequestration. v[3]

## QUESTION 3

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

The difference is in the burden of proof. In a voluntary surrender, there is a greater risk of abuse than in a compulsory sequestration, therefore the applicant when applying to court must show on a balance of probabilities that the sequestration would result in an advantage to creditors if the debtor as a group. v In a compulsory sequestration, the applicant creditor must in terms of section 10 of the Insolvency Act prove *prima facie* that there is reason to believe v that the sequestration would be to the advantage of creditors of the debtor.[2]

Commented [CJ1]: Positive proof

## QUESTION 4

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

An insolvency enquiry may be convened in relation to the affairs of an individual in terms of section 152(2) or of section 65 as read with 64 of the Insolvency Act, and into the affairs of a company in terms of sections 417 and 418 of the Companies Act 61 of 1973 (hereinafter referred to as “the Companies Act of 1973”).

In terms of section 152(2) the Master (not the magistrate or other officer) may by notice in writing delivered to the witness to appear before him/her at the place and on the date and hour stated in the notice to furnish the Master (or other officer before whom the witness is summoned to appear) with all the information within his/her knowledge concerning the insolvent or their estate or the administration of the estate. Section 65 (as read with 64) of

the insolvency Act empowers the presiding officer of a meeting of creditors to summon a witness (in terms of 64(2)).

In terms of section 417(1) of the Companies Act of 1973, the Master of the Court may summon a witness to appear before him/her should the Master be of the view that the witness can give information concerning the trade, dealings, affairs or property of the company, either on oath or affirmation, orally or on written interrogatories, by way of either or both a subpoena by way of notice in writing to the witness for the witness to produce documents or evidence relevant to the proceeding (i.e. a subpoena *duces tecum*) displaying the date upon which to produce such documents or evidence or subpoena by way of written notice delivered to the witness to appear in person and give oral evidence (i.e. a subpoena *ad testificandum*), the subpoena must set out the date, place and time upon which the witness must appear. In terms of section 418(2) of the Companies Act of 1973 a commissioner has the same powers of summoning and examining witnesses and of requiring the production of documents as the Master or Court which appointed him/her.

The above subpoenas/summonses must conform to Form 24 prescribed in Annexure 1 of the rules issued in terms of the Magistrates Court Act. ✓

Summonses/subpoenas must be served by the sheriff of the court, ✓the insolvency practitioner or his clerk by personal delivery. ✓[3]

#### 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 three steps are as follows:

The first step is to determine whether the provision is capable of application in a winding up. ✓

The second step is to determine whether the matter is specifically provided for by the Companies Act of 1973. ✓

The third step is that taking cognizance of steps one and two above, if the Companies Act of 1973 does not specifically provide for the matter in question and the company is unable to pay its debts the provisions of the Insolvency Act apply. ✓[3]

#### QUESTION 6

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

Commented [CJ2]: Discuss procedure not substantive law.

In terms of section 13(1v) of the Insolvency Act if the court sequestrates the estate of a partnership it shall simultaneously sequester the estate of every member of that partnership other than a partner *ven commandite*, provided that if a partner has undertaken to pay the debts of the partnership within a period determined by the court and has given security for such payment to the satisfaction of the registrar the separate estate of that partner shall not be sequestered by reason only of the sequestration of the estate of the partnership. [2]

### QUESTION 7

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

In terms of section 5 of the Insolvency Act:-

-All sales in execution are stayed and the sheriff may not pay any proceeds from such sales to judgement creditors. Where the estate is sequestered, the sheriff must hand over all goods or proceeds of sales from goods to the trustee. Transfer of property sold before the publication of the notice is not stayed.

- The Master may (in accordance with policy determined by the Minister) at their discretion appoint a *curator bonis* (and decide who the *curator bonis* will be) to temporarily control the estate who shall take the estate into their custody and take control of any business or undertaking of the debtor as if they were the debtor subject to the provisions of section 70 of the Insolvency Act.

It must be noted that publication of the notice constitutes an act of insolvency. [3] 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 creditors can apply for the compulsory sequestration of the estate within 14 days from the date of application for voluntary surrender.

### QUESTION 8

Mrs A was an employee of the Vaal University. On 1 September 2022 her estate was sequestered. 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)

No, in accordance with section 3 of the General Pensions Act 29 of 1979 the annuity received by a person, under any pension law, whose estate is sequestered does not form part of the assets in the insolvent estate. [1]

## 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 of the Long Term Insurance Act 58 1998 ("Long Term Insurance Act"), the entire sum of a life insurance, disability or health policy ("the policy") will be protected under certain prescribed circumstances as discussed below. ✓

As above, the policy benefits provided to a protected person shall be protected, if, (in terms of 63(1)) the protected person or their spouse is the life insured ✓ and the relevant policy has been in force for at least three years, ✓ or, (in terms of section 63(2)), the assets and/or benefits acquired exclusively with those policy benefits for a period of five years from the date when the policy benefits were provided. ✓

Should the aforesaid pre-requisites be in place then, other than for a debt secured by the policy, the policy benefits, shall:- ✓

1. not be liable during the protected person's lifetime to be attached or subjected to execution under a judgement of a court or form part of part of their insolvent estate (section 63(1)(a); or ✓
2. upon their death, if they were survived by their spouse, child, stepchild or parent, not be available for the payment of their debts (63(1)(b). ✓

The protection in terms of section 63(2) above is limited to policy benefits and assets so acquired to an aggregate amount of R50 000 (in terms of the Lon Term Insurance Act) or another amount prescribed by the minister.

The person claiming protection in terms of section 63 must be able to prove on, a balance of probabilities, that under section 63(1)(a) and (b) and/or section 63(2) (as the case may be), the protection is afforded to them. ✓

Notwithstanding the provisions of section 63(1)(b) set out above, In *Pieterse v Shrosbree and Others*, *Shrosbree v Love and Others* (146/02, 435/03)[2004] ZASCA 129; [2006] 3 All SA 343 (SCA) (23 September 2004) the SCA held that section 63 of the Long Term Insurance Act does not purport to regulate the payment of the proceeds of a life policy. The court held that:- ✓

*"In the ordinary course the proceeds of an insurance policy will go directly to a nominated beneficiary. Absent s 63, on the death of the policy holder, the trustee of such person's insolvent estate would not have any claim to those policy proceeds. Nothing to the contrary is*

*provided in s 63. Section 63 does not purport to divert the proceeds of an insurance policy from a nominated beneficiary to the insolvent estate of a deceased policy holder. Nor, for that matter, does such a trustee, by virtue of s 63, become a creditor of the nominated beneficiary. Section 63 does not vest either trustee in each of these two cases with any interest in and to the proceeds of the policies."*

It must also be noted that policy benefits will not be protected as discussed above if it can be shown that the policy was taken out with the intention to defraud creditors. **v[10]**

#### **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)**

In terms of section 20(1)(b) **v** of the Insolvency Act, any civil proceedings instituted by or against the insolvent are stayed until the trustee of the estate is appointed, **v**except such proceedings as may in terms of section 23 of the Insolvency Act be instituted by the insolvent for their own benefit or as may be instituted against the insolvent. **v**

The exceptions refer to proceedings that do not affect the insolvent estate such as proceedings related to status or assets that do not form part of the insolvent estate. **v**

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 the proceedings has given notice within that period to the trustee or to the Master (if no trustee has been appointed) that they intend continuing with the proceedings and after three weeks from the notice prosecutes those proceedings with reasonable expedition. If the court is of the opinion that there is a reasonable excuse for the failure of the person who instituted proceedings to notify the trustee or Master, the court may in any event permit the continuation of the proceedings on such conditions as it may think fit.

The trustee is entitled under section 73 of the Insolvency Act to institute or defend legal proceedings on behalf of or against the insolvent estate.

Section 20(1)(c) of the Insolvency Act 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. **v** The court may however, order that the execution be continued if this is expedient and necessary and the general body of creditors will not be prejudiced but the proceeds of the execution must be paid to the Master or the trustee. **v[5]**

In terms of section 98 of the Insolvency Act, If the above property is still under attachment or the proceeds of the sale in execution thereof are still in the hands of the sheriff or their messenger at the time of sequestration of the insolvent estate then the attachment of any



property in execution of any judgement shall, after the sequestration of the estate of the judgement debtor, not have the effect of conferring upon the judgement creditor any preference other than for costs in the sequestration proceedings.

#### 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)**

By way of background, the remuneration of BRPs is governed in terms of section 143 of the Companies Act 2008. In terms of section 143(1), the BRP is entitled to charge an amount to the company for their remuneration and expenses in accordance with the tariff prescribed in section 143(6). The tariff is prescribed in Regulation 128 to the Companies Act 2008. In practice the tariff is woefully inadequate. For this reason, under section 143(3) BRPs are entitled (subject to 143(4)) to negotiate and agree further remuneration with the company calculated on a contingency for *inter alia* the successful adoption of a business plan and for achieving certain milestones in the business rescue (“remuneration agreement”).

This agreement with the company becomes final and binding if, at a meeting called for the purpose of considering the proposed remuneration agreement, it is voted on and agreed by the holders of a majority of creditors voting interests and the holders of the majority of voting rights attaching to shares which would receive residual value in the case of a winding up.

In terms of section 143(4) a creditor of shareholder of the company who voted against the remuneration agreement proposal as contemplated in section 143(3) may apply to court within 10 business days after the date of voting on the proposal for an order setting aside the remuneration agreement on the grounds that the agreement is not just and equitable; and/or the remuneration provided for in the agreement is unreasonable having regard to the financial circumstances of the company.

Importantly, section 143(5) states that to the extent that the BRP’s remuneration and expenses are not paid in full, the BRP’s claim for those amounts will rank in priority before the claims of all other secured and unsecured creditors. This is reinforced by section 135(3) which preferentially ranks the payment of the BRP’s remuneration and expenses in the business rescue above all other secured and unsecured creditors (be they secured post commencement or pre commencement of the business rescue) including the employees of the company.

This preferential ranking for a BRPs remuneration, expenses or claims together with the sometimes exorbitant amounts agreed to in some remuneration agreements has proved to be a contentious issue.

In addition, there is sometimes a perception that certain BRPs occasionally purposefully drag on or conduct business rescues with the intention of continuing to receive inflated remunerations under remuneration agreements to the detriment of affected persons notwithstanding their duties to the company and affected persons.

The question however is if remuneration agreements or “success fee” agreements can be entered into with third parties (including creditors) or if the entering into of such remuneration agreements with third parties outside of the scope of section 143 are (or should be prohibited), are illegal or are against public policy. This precise scenario was dealt with recently by the court in *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* (Case no 982/18) [2020] ZASCA 17 (25 March 2020), wherein the SCA was tasked with determining specifically whether such remuneration agreements (including so called “success fee” agreements) concluded between BRPs and third parties, including creditors of the company, outside the ambit of section 143 were void for illegality or otherwise contrary to public policy. In this case, Caratco pleaded in summary at [11] as follows:- v

*“5.3 The consensus is illegal, alternatively, contrary to public policy and accordingly void and the Court should declare the agreement void under the provisions of section 218 of the Act; alternatively, the agreement is unenforceable;*

*5.3.1 In terms of section 145 of the Act, the plaintiff (as the business rescue practitioner) has powers to manage and control the company, but has the responsibilities, duties and liabilities of a director as set out in sections 75 to 77 of the Act.*

*5.3.2 In terms of section 75(3) of the Act, a business rescue practitioner may not approve or enter into any agreement in which he/she or a related person has a personal financial interest; or determine any other matter in which the person or a related person has a personal financial interest.*

*5.3.3 Section 76 prohibits the business rescue practitioner from gaining an advantage for itself.*

*5.3.4 A business rescue practitioner is not entitled to earn a special fee from a third party in consequence of acting as the business rescue practitioner, such special fee not being one in terms of section 143 of the Act.*

*5.3.5 Properly construed, section 143 of the Act is the only means by which a practitioner can be remunerated for her services in business rescue proceedings.”*

In considering the above the court held *inter alia* that:-

1. section 143 only applies to the remuneration of BRPs by the company under business rescue and does not deal with arrangements between third parties;

2. neither section 143 nor any other provision of the Companies Act 2008 penalized the conclusion of remuneration agreements with third parties nor suggest that an agreement not falling within the ambit of section 143 is void or agreements with third parties are invalid;

As such the position in law is now clear, remuneration agreements concluded between BRPs and third parties outside the ambit of section 143 are neither prohibited nor illegal nor contrary to public policy. ✓[10]

#### 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)

Under the common law, a partnership is not a legal entity existing separately from the partners. ✓ The assets of the partnership are indistinguishable from the assets of the partners and likewise the debts of the partnership are debts *in solidum* of all of the partners. ✓

The Insolvency Act, for the most part departs from the common law position. Under section 92(5) of the Insolvency Act, the partnership and partners are separate entities requiring separate trustees' accounts for the partnership estate and the estate of each partner whose estate is under sequestration. Additionally, section 49 provides that claims against the partnership are distinct from claims against the partners. ✓

Where one of the partners to a partnership is sequestrated, it does not follow that the partnership estate or the estates of the other solvent partners are sequestrated. ✓[4]

However, the sequestration of one of the partners' estates will terminate/dissolve the partnership as the sequestrated partners insolvency will lead to the cessation of that partners' contributions to the partnership. As such the partnership will be wound up. When the partnership is wound up, the partnership assets are divided amongst the partners in terms of either the partnership agreement or common law.

The portion of the partnership assets that would be due to the insolvent partner vest in the trustee of the insolvent partners' estate.

#### 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)**

As the above scenario refers to Mr X's estate being finally sequestrated, and no mention is made of Y's estate or their joint estate, the assumption will be made by the writer that Mr X and Mr Y were married out of community of property. Additionally as Mr X's estate has been finally sequestrated, it will be assumed that a trustee has been appointed by the Master. ✓ As such, this question shall be answered under such assumptions.

Section 21 of the Insolvency Act ✓ deals with the position in respect of a marriage out of community of property and provides for the effect of sequestration on the property of the spouse of an insolvent. ✓ In terms of section 21 of the Insolvency Act, the additional effect of sequestration of the separate estate of one of the two spouses shall be to vest in the Master (and thereafter upon appointment the trustee) all of the property of the spouse whose estate has not been sequestrated (i.e. the solvent spouse) as if it was the property of the sequestrated spouses estate. ✓ Accordingly, initially both the immovable property and the Land Rover Defender ("the Land Rover") which have been donated to Mr Y will vest in the trustee. ✓ Note the trustee cannot simply dispossess a solvent spouse of their property, the trustee needs a warrant to take the property. ✓

The Insolvency Act places the burden of proof on the solvent spouse to prove that they are entitled to the property vesting in the trustee. In accordance with section 21(2) of the Insolvency Act, the trustee shall release any property of the solvent spouse to them if such property is proved:-

1. to have been the property of the solvent spouse before the marriage; ✓
2. that the property was acquired under a marriage settlement;
3. that it was property acquired during the marriage by a title valid against creditors;
4. that it was property protected under the Long Term Insurance Act 52 of 1998;
5. that it was acquired with property under (a) - (d) (1 to 4 herein) or the income of proceeds thereof.

As to donations between spouses, donations between spouses were legalized in terms of section 22 of the Matrimonial Property Act 88 of 1984 ("the Matrimonial Property Act") which states that subject to the provisions of the Insolvency Act, no transaction effected

before or after the commencement of the Matrimonial Property Act is void or voidable merely because it amounts to a donation between spouses. ✓

It should be noted that donations between spouses can be considered to be real donations or simulated donations. The distinction being that a simulated donation does not provide a valid title. A real donation on the other hand constitutes a true transaction that does indeed confer a legally valid title on the donee spouse. There is a requirement of good faith and the donee spouse will need to prove (in good faith) that the donation was a true transaction and was not a donation made with the intention of defrauding, dispossessing or otherwise defeating the rights of creditors. ✓

In the appropriate circumstances, the trustee may still challenge and set aside a donation between spouses (even if the property has been released) as a voidable transaction in terms of Insolvency Act and particularly sections 26, 30 and 31 thereof or in terms of the *actio pauliana* provided that the invalidity of donations between spouses is not relied upon.

As to the property that Mr X had donated to Mr Y, Mr Y would have to claim that such property was acquired during the marriage by a title valid against creditors (i.e. in terms of section 21(2)(c) of the Insolvency Act or 3. above).

As to the immovable property, this donation is a real donation and is easily proved as such by Mr Y as the property is registered in his name in the Deeds Office (and the donation and transfer took place 12 years prior to the sequestration of Mr X's estate). It must be noted though that under section 26(1) of the Insolvency Act, a disposition not made for value may be challenged at any time if it can be shown that immediately after making the disposition, the liabilities of the debtor exceeded their assets as a result of the disposition, therefore, in theory, if it can be shown that Mr X's liabilities exceeded his assets after donating the immovable property to Mr Y the court may set aside the donation in terms of section 26(1)(a) of the Insolvency Act but this is very unlikely in this case. ✓

The transfer of the Land Rover shortly before the sequestration of Mr X's estate however most likely does not constitute a real donation and the Land Rover therefore cannot (or should not) be released. ✓[10] The trustee would in all likelihood challenge the donation under section 31 of the Insolvency Act. Section 31 pertains to collusive dealings before sequestration which at a high level allows the court to set aside a transaction entered into by the debtor before the sequestration whereby he, in collusion with another person, disposed of property belonging to him in a manner which had the effect of prejudicing his creditors or preferring one creditor above another.

### 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 will be regarded as a spouse in terms of the Insolvency Act. Mr X and Mr Y entered into a civil partnership in terms of the Civil Unions Act 17 2006 ("the civil Unions Act"). ✓ The

term "spouse" has an extended meaning and includes same-sex partners married in terms of the Civil Unions Act. The Civil Unions 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. ✓[3]

Commented [CJ3]: Mention def in s 21.

#### 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)

The effect of the liquidation of Generators Africa (Pty) Ltd on Thabo's contract of employment is governed by section 38 of Insolvency Act. ✓

In terms of section 38, Thabo's contract of employment will not be terminated but will be suspended ✓ with effect from the date of granting of the sequestration order. ✓

During the period of suspension of his contract, Thabo is under no obligation to go to work and render his services in terms of his contract but similarly, no employment benefit will accrue to him in terms of his suspended contract of employment.

If he qualifies he is entitled to receive his UIF benefits. ✓

Once the liquidator has been appointed he must consult with the employees or their trade unions for the employees' or trade unions to see if there are any proposals forthcoming to rescue the business (note there is no obligation on the liquidator to try and rescue the business). The employees or trade unions must submit written proposals to the liquidator within 21 days of their appointment. If the liquidator is of the view that there is no prospect of rescuing the business, the liquidator has the statutory authority in terms of section 38(5) to terminate Thabo's employment contract. ✓ Unless terminated earlier by the liquidator, or agreed otherwise, Thabo's suspended employment contract will in any event automatically terminate 45 days after the appointment of the final liquidator in terms of section 375 of the Companies Act of 1973. ✓[5]

If the business is sold as a going concern, under 197A of the Labor Relation Act, the new employer automatically replaces the old employer and Thabo's contract that was terminated before transfer will revive.

#### 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 will have a preferential claim ✓ in terms section 98A of the Insolvency Act for :-

R12000 for his salary due and owing prior to the date of sequestration (Thabo is able to recover a maximum of 3 months' unpaid salary subject to a maximum of R12000 preferentially); and

R3500 for leave pay owing. ½

Thabo will also have a concurrent claim for the remaining R28 000 owing to him in terms of his unpaid salary. [1 ½]

#### 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)

In the above scenario, the settlement of the loan, i.e. the payment of the R45 000 by John to Joe is considered by the trustee to be a disposition.

In order for the trustee to claim that the payment of R45 000 is a voidable disposition, he would have to show that the disposition was either:-

1. a disposition without value in terms of section 26(1) of the Insolvency Act;
2. a voidable preference in terms of section 29(1) of the Insolvency Act; ✓
3. an undue preference to a creditor in terms of section 30 of the Insolvency Act;
4. a collusive dealing between Joe and John before John's sequestration in terms of section 31 of the Insolvency Act.

It is unlikely that the trustee would claim the repayment of the loan was a disposition without value in terms of section 26(1) as the repayment of the loan was not made at a discount and

clearly had value. As such, the trustee would likely focus on sections 29, 30 and perhaps 31 as Joe and John are friends.<sup>[2]</sup>

It must be noted that the writer is unaware based purely on the scenario provided, what the total amount of John's liabilities are making it difficult to determine if in fact at any stage either prior to repaying the loan or immediately after repaying the loan John's liabilities exceeded the value of his assets.

To succeed in terms of section 29, the trustee would have to prove that:-

1. immediately after repaying the loan John's liabilities exceeded the value of his assets; and
2. the repayment of the loan had the effect of preferring Joe over John's other creditors

To succeed in terms of section 30 the trustee would have to prove that:-

1. John repaid the loan at a time when his liabilities exceeded his assets; and
2. he had the intention of preferring Joe over his other creditors and after repaying the loan his estate was sequestrated.

To succeed in terms of section 31 the trustee would have to prove that Joe and John colluded to enter into the transaction (i.e the loan and repayment thereof) with either:-

1. the effect of the repayment of the loan preferred Joe over John's other creditors; or
2. the intent to prefer Joe over John's other creditors.

Notwithstanding that Joe and John are friends, there is no indication of any untoward collusion in the scenario as presented, accordingly, section 31 is not applicable.

This leaves both sections 29 and 30 as potentially being applicable to the trustee. Due to the time periods stipulated in the above scenario, both sections 29 and 30 are able to be used by the trustee as section 29(1) requires that the disposition be made within 6 months prior to John's sequestration (section 30 has no prescribed time period).

Under section 29, Joe would have two statutory defenses:-

1. that the disposition was made in the ordinary course of business; and
2. that the disposition was made without the intent to prefer Joe over John's other creditors.

Whether the disposition was made in the ordinary course of business or not is a factual inquiry. The court is required to consider all relevant circumstances. From the scenario provided it does not appear that the loan and repayment thereof was made in the ordinary course of business.

The test for the second leg of Joe's defense however is a subjective test, i.e. looking at the circumstances surrounding the repayment of the loan can it be shown that the disposition

**Commented [CJ4]:** Clearly describe the remedy and relevant provisions 29. See memo.



was made with the intent of preferring Joe to John's other creditors. I believe having reference to the scenario provided that John did not make the disposition with the intent to prefer Joe over his other creditors. Note however that as alluded to above, I do not know if the sequestration of John's estate was looming or contemplated by John. I shall assume for the purposes of this answer that it was not notwithstanding the short time period in which his estate was sequestrated after the repayment of the loan.

It is also important to take cognizance of the fact that following the repayment of the loan, the generator pledged as security was returned. The value of the generator (fairly valued) was R70 000, which amount exceeds the value of the disposition (i.e. R45 000).

Accordingly, in my view under section 29(1) the trustee will fail to succeed with his claim against Joe.

As to section 30, I am not sure whether at the time of repaying the loan John's liabilities exceeded his assets (particularly taking into account the return of the generator), but as above I do not believe based on the scenario in question that the repayment of the loan was intended to prefer Joe over John's other creditors. Accordingly under section 30 the trustee would fail to succeed with his claim against Joe.

**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.**