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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?

#### **ONLY CHOOSE ONE ANSWER!**

(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. ✓[13]

#### QUESTION 2

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

[The debts owing to the insolvent debtor become assets in the insolvent estate and should be realized by the trustee and utilized toward the payment of creditors. ✓ Normally, these will appear in the trustee's account and he will list all such debts due to the insolvent estate and will further state why such debts have not been realized.] [1]

Commented [CJ1]: S 22 of the Act? See memo.

#### QUESTION 3

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

[The requirement basically states that there must be some form of advantage to the general body of creditors that they will receive some sort of benefit should the sequestration be granted. Although in both instances there must be a reasonable prospect that there will be a noticeable benefit to creditors, in voluntary surrender there must be positive proof of this advantage, ✓ while in compulsory sequestration the burden of proof lies on the applicant to prove a reasonable prospect that sequestration will be to the advantage of creditors] ✓[2]

#### QUESTION 4

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

[The master may issue a subpoena for a witness to appear at the insolvency inquiry. The Subpoena may be issued in the same manner as a subpoena in civil proceedings and served on the witness by the sheriff of the court. In terms of the companies act any person who may be able to furnish information or may have - in their possession - any book or document that may be beneficial to the investigation into the company's affairs. The Insolvency Act makes the same provisions, in terms of section 152 the master may issue a subpoena for either the insolvent or any other person who can provide information on the insolvent estate and its administration.]

Commented [CJ2]: Discuss procedure not substantive law. see memo.

### QUESTION 5

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

[The first step is determining whether the section can apply to a winding up a company; ✓the second step is determining whether this is specifically provided for or set out in the act; ✓and the third step is determining whether the provision applies to the mode of liquidation which is being undertaken] ✓[3]

### QUESTION 6

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

[When a partnership estate is insolvent and consequently sequestrated, the estates of the partners individual estates are also sequestrated. ✓ This is in terms of section 13(1) ✓ of the Insolvency Act and the section applies to all the estates of the partners in a partnership.] [2]

**Commented [CJ3]:** Simultaneously but separate from estate of partnership

### QUESTION 7

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

[If the insolvent, having published a notice of surrender, then fails to lodge a statement of affairs or the statement so lodged is incorrect or incomplete, the publication of the notice will then constitute an act of insolvency ✓ and will allow the creditors to bring an application for the compulsory sequestration of the estate.] [1]

**Commented [CJ4]:** Read question and be guided by mark allocation. 3 marks usually 3 facts. See memo.

### 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 the Pension Funds Act the pensionable interest of a person whose estate has been sequestrated does not form part of their insolvent estate.] [1]

**Commented [CJ5]:** S 27 of Act

### 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)**

[Section 63 of the Long-Term Insurance Act was amended by the General Law amendment Act during 2014 and as a result the cap in the protection afforded by the section, which was previously R50 000.00, has been lifted and/or removed by the amendment. Traditionally this includes policies like the insolvent or sequestrated person's life and disability covers and also includes investment policies like life annuities and the like. The policy concerned need to either cover the insolvent - as the life insured - or their spouse and need to have existed for more than 3 years to fall into the ambit of the application of this section. And the person who claims that the policy or its pay-out is protected under this section bears the burden of truth to prove this, and further such pay out must have accrued to the insolvent's spouse, child or parent.]

In the Pieterse matter the apex court held that this section does not dictate the procedure for the payment of policy benefits and further stated that because the policy had a nominated beneficiary and the proceeds would be paid to such beneficiary, the trustee of the deceased and insolvent estate had no claim for the recovery of the said benefit from the policy's nominated beneficiary. In a somewhat contrasting but more interesting discussion the apex court was faced with a similar situation in the matter of Malcom Wentzel where in that matter the insolvent was in fact a beneficiary in terms of their deceased spouse's life insurance policy. Before the passing of Wentzel's spouse the party's joint estate was finally sequestrated and at the time of her passing, the policy benefit accrued to the parties and Wentzel's insolvent estate as the beneficiary. The apex court had to decide whether an unrehabilitated insolvent who was a beneficiary to a policy was entitled to the protection in terms of section 63, and although the court did not specifically mention section 63, in dealing with the matter the section was considered as the court mentioned that the policy benefit did not devolve upon him but was payable to him as a nominated beneficiary under the policy. In this situation it is trite that the protection in Pieterse did not apply. In this instance the court distinguished Wentzel from the Pieterse matter and found that subsections 20(2) and 23 applied, and that the proceeds from the policy accrued to Wentzel's insolvent and could be realized to the benefit of his creditors as he remained as an unrehabilitated insolvent.]

The decision in Wentzel is somewhat criticised as the court failed to pay attention the explicit provisions of section 63 which, if fully considered and applied, would recognize the policy as being provided or to be provided to a person being Mr. Wentzel; in which that person or their spouse is the life insured, this provision is particularly important as the lives of both spouses were covered in terms of the policies. For these reasons it is opined that the provisions of section 63 did in fact apply to Wentzel's policy and the benefit should have been recognized and protected in terms of section 63.] [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)

[Upon the granting of a sequestration order, the Registrar must transmit a copy of the order to all the sheriffs who attached property of the insolvent under a writ issued by the court. In terms of the Insolvency Act the property of the insolvent, including goods under attachment, vests upon the trustee. In terms of the judgment in Kalianjee the court found that the establishment of the general body of creditors took preference should it have preceded the sale in execution, and it was found that the trustee was entitled to have the sale set aside.]

[3]

**Commented [CJ6]:** See memo. S 20 and 23 of the Act.

#### 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)

[The remuneration of the Business Rescue Practitioner (the "BRP") is dealt with under the provisions of the Companies Act. In terms of the provisions of the Act, the remunerations of the BRP together with the expenses that arise from the rescue proceedings are to be paid as the first expenses during the proceedings. The fees that the BRP may charge for his services are legislated and set out in a tariff in the Companies Act, specifically subsection 143(6) of the Companies Act. The BRP may further enter into agreements with the company to provide further remuneration to the BRP - what is described as the contingency or success fee - which remuneration would be contingent or based on either the adoption of a business rescue plan or the inclusion of a specific matter within the plan itself; or based on the BRP achieving a certain outcome or result which could be achieved by the BRP during the rescue proceedings.]

In the Caratco case the apex court had to determine whether the contingency fee agreement between the BRP and third parties which could be creditors, were prohibited in law as they were either against the law or against public policy. The court found that the relevant section of the Act deals with agreements between the BRP and the business, and although it does not make provisions for agreements that fall outside its ambit, their non-regulation does not make such agreements invalid or against legislation or public policy and were further not punishable in terms of the companies act or the common law.]

Once a business rescue practitioner concludes the rescue proceedings and converts them into liquidations proceedings, all payments made after this - including payments to the BRP and payments for the expense of the expenses relating to the rescue proceedings, could

be regarded as voidable preferences. This position was confirmed by the court in *Montic Diary (Pty) Ltd*, which emphasised that once the provisions of section 141(2) had been invoked the company is precluded from making payments to its creditors or anyone else - including the BRP. ] [7]

Commented [CJ7]: Read question. Not applicable.

## 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)

[As a consequence of the sequestration of one partner, it does not automatically follow that estates of the other individual partners and the partnership estate must also be sequestrated, however as a natural consequence of one partner's sequestration the partnership itself must be wound up and the partnership assets realized and divided between the partners. The assets due to or accrue to the sequestrated partner will vest with the trustee of the insolvent partners estate. After the dissolution of a partnership, as a natural consequence, each of the partners become jointly and severally liable for the debts of the partnership and the creditors can recover such debts from any partner individually and without pursuing the other partners. The trustee of the insolvent estate will have a claim against the other partners for their proportionate share of the partnership's debts which have been paid out of the insolvent estate as a result of the creditor proving a claim against the sequestrated partner. ] [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)

[A person may enter into a valid agreement with another person with a view of disposing of their property, both movable and immovable, which agreement could result in a decrease of the value of their estate. There are different types of such agreements, however both donations made by Mr. X to Mr. Y can be defined as disposition not made for value as Mr. X did not receive any consideration or value in exchange for the assets. In terms of the law, such a disposition can be set aside if two things are proven by the trustee. If the



disposition was made more than 2 years before the date of sequestration the trustee must prove that immediately after the disposition the debtor's estate was immediately insolvent; and, if the disposition was made within 2 years before the debtor's sequestration, the person who received the property of the debtor must show that immediately after making the disposition the debtors assets exceeded their liabilities. If it can be proved that after the disposition the liabilities of the debtor did exceed his assets, but not by the full amount of the disposition, the difference between the shortfall shall be recoverable from the beneficiary and payable to the estate.

**Commented [CJ8]:** See memo. Read question carefully. S 29?

The immovable property falls into the first category of discussed above. In order for the trustee to void the disposition the trustee would have to show that immediately after make the donation to Mr. Y, Mr. X's estate became insolvent. ✓ Only in this instance would the trustee be able to void the disposition made to Mr. Y in the case of the immovable property. ✓ It is important to note that the burden of proof vests with the trustee in this instance, and because they allege, they must prove that immediately after the disposition Mr. X's estate became insolvent, and only then would the immovable property fall into Mr. X's state. ✓ The Range Rover however is a different matter and falls into the second class of dispositions discussed above. In order for the Range Rover to be excluded from Mr. X's estate, ✓ Mr. Y would have to prove that immediately after making the disposition Mr. X's assets exceeded his liabilities. In this instance it is Mr. Y who must prove that Mr. X's estate was in fact factually solvent and not the trustee who must prove. However, of equal consequence as the Insolvency Act is the Matrimonial Property Act in the above scenario. If Mr. X and Mr. Y did not conclude an antenuptial contract, they are in fact married in community of property, and automatically by operation of law the assets of both parties belong to and form part of the joint estate and consequently when Mr. X is sequestrated, the joint estate will also be sequestrated and the assets will nonetheless form part of the joint insolvent estate [4]

### 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)

[Mr. Y will be regarded as being a spouse for the purposes of the Insolvency Act, as a result of the enactment of the Civil Unions Act, ✓ all marriages in terms of that act bear the same consequences as marriages in terms of the Civil Marriages Act and consequently the Matrimonial Property Act applies to them equally - ✓ this however speaks to their marital regime. In terms of the Insolvency Act the terms spouse includes spouses married in terms of the Civil Unions Act] ✓ [3]

**Commented [CJ9]:** S 21 def as well

### 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)

[When Generators Africa (Pty) Ltd was placed under liquidation, Thabo's employment was suspended from the date of the order and not from the date of the actual application. During this period, whilst the contract is suspended Thabo will not be expected to render services to his employer and in such reciprocal fashion Thabo will not be entitled to any remuneration or benefits in terms of the suspended employment contract, but they will be entitled to unemployment benefits. Thabo will become a concurrent creditor, being an employee, and shall have a claim against his employer's insolvent estate for a claim of breach of contract. v[4]

#### 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 respect of the following claims against his employer:

1. R12 000.00 against the estate, this being for unpaid wages, this amount cannot exceed his 3 month's salary and should have accrued to him before the date of sequestration;
2. R3 500.00 in respect of the leave due to him, which accrued to him in the previous year.

And the amount of R18 000.00, being the remainder of his unpaid salaries, shall be a concurrent claim v[1] which Thabo shall have against his employer.]

#### 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.

Commented [CJ10]: Nature of claim?

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

(8)

[A voidable preference is an act by the insolvent which resulted in one creditor being preferred or receiving full payment before the other creditors before the sequestration of the debtor. In order to succeed with his claim, the trust would have to prove that the preference was made in the 6 months immediately before the debtors sequestration that the effect of the preference was to prefer one creditor before all the others - to show this the trustee has to establish that as a result the creditors were not all treated the same during the distribution of assets; and that immediately after the payment the debtor became factually insolvent, in that his liabilities exceeded his assets. It is more likely than not that the trustee would succeed in proving the 3 requirements mentioned above and would succeed in having the disposition set aside as a voidable preference. That said, Joe would raise a Defence being that the disposition/payment was made to him in the ordinary course of business, and further that the payment did not have the effect of preferring him above other creditors as he already had a secured claim which had been perfected and secured against movable property when the payment was made to him. However, this Defence would not succeed][7]

**Commented [CJ11]:** Always mention the provision in the Act.

**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.

- o **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.**