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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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**93/100**

## INTRUCTIONS

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

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

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

## ANSWER ALL THE QUESTIONS

### QUESTION 1

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

#### Question 1.1

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

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

Select the correct answer:

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

#### Question 1.2

Select the correct answer:

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

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

- (b) the debtor is divested of his or her estate, which estate vests in the Master until a trustee has been appointed, whereupon the estate will vest in the trustee. ✓
- (c) the debtor is divested of his estate which estate will vest in the Master until the final liquidation and distribution account has been approved.
- (d) The debtor is divested of his estate which estate will vest in the division of the High Court that granted the sequestration order.

**Question 1.3**

**Select the correct answer:**

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

- (a) forms part of the trustee's insolvent estate.
- (b) does not form part of the trustee's personal estate.
- (c) does not form part of the trustee's personal estate, save as far as the trustee is also a trust beneficiary. ✓
- (d) vests in the Master and, after their appointment, in the trustee of the insolvent estate.

**Question 1.4**

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

- (1) The family home.
- (2) Clothing and bedding of the insolvent.
- (3) Household furniture.
- (4) Antique furniture.
- (5) Property of third parties.
- (6) Tools and other means of subsistence as the creditors or the Master determine.

**Select the correct answer:**

- (a) (1), (2), (3), (4) and (6) are correct.
- (b) (2), (3), (5) and (6) are correct.

(c) (1), and (4) are correct. ✓

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

#### 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[19]

#### QUESTION 2

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

Any payments due will be owed to the insolvent estate or trustee v and the trustee can call upon all persons indebted to the estate to make payment thereof (Section 77 of Insolvency Act)

If debtor to the estate made payment to the insolvent the obligation will terminate v if the debtor can prove that he acted in good faith and had no knowledge of the sequestration.  
v[3]

#### QUESTION 3

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

In voluntary surrender applications a positive proof of advantage is required, v whereas in the compulsory sequestration only a reasonable prospect v of an advantage to creditors is required.[2]

#### QUESTION 4

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

A witness must be subpoenaed at a reasonable time before attendance is required. Subpoenas are prepared by the insolvency practitioner or a legal representative and submitted to the presiding officer for signature. If the subpoena is for the insolvent or his/her spouse the need of interrogation is obvious, for all other witnesses a proper submission regarding their evidence is required. Fees and allowances prescribed in Magistrates' Courts Act must be prepaid otherwise witness is not obliged to attend. v Travelling expenses and accommodation expenses must also accompany the subpoena. v The subpoena can be served by the insolvency practitioner or his clerk. v[3]

Commented [CJ1]: Discuss procedure.

#### 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)

There are three questions to ask, namely:

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

Certain provisions cannot apply, such as rehabilitation and exclusion of assets from an insolvent estate.

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

When dealing with a company unable to pay its debts the insolvency law shall apply as far as it is applicable as per Section 339 of the Companies Act 1973.

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

If company is unable to pay its debts and the Companies Act does not specially provide for the matter in question then the Insolvency Act applies.

#### QUESTION 6

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

If the partnership estate is sequestrated the court must at the same time sequester the private estate ✓ of each and every member of the partnership except if the partner is not residing in the Republic, or who have undertaken to pay the debts of the partnership within a determined time and have given security for the payment. [1]

**Commented [CJ2]:** Private estate sequestrated simultaneously but separate from 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)

After the publication of the notice of surrender all sales in execution are stayed. ✓ It is unlawful to sell any property which has been attached under a writ of execution. The Master (if amount is less than R5000) or the court (if amount exceeds R5000) may authorize to continue with the sale of execution.

A curator bonis ✓ may be appointed by the Master to control the estate as a safeguard that the debtor does not dissipate his assets. Creditors may approach the Master stating reasons for such appointment.

If debtor fails to lodge statement of affairs or lodge a statement that is incorrect or incomplete or does not apply for the notice of surrender to be properly withdrawn he

commits an act of insolvency<sup>v[3]</sup> and a creditor will be entitled to apply for compulsory sequestration of the debtor's estate.

#### 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)**

No, she can recover for her own benefit any pension she is entitled to for services rendered by her as per Section 23(7) of the Insolvency Act. <sup>v</sup> According to Section 3 of the General Pensions Act 29 of 1979 also state that pension is protected and will not form part of the assets if an estate is sequestrated.

However, if this pension was paid before sequestration it will not be protected and it will form part of the insolvent's estate. <sup>v[2]</sup>

#### 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 1998<sup>v</sup> the entire sum of a life insurance policy is protected if that protected person<sup>v</sup> or the spouse of that person is the life insured and the policy has been in force for at least three years and the policy does not serve as security for a debt of the debtor during that person's lifetime. <sup>v</sup> Upon the death, if survived by a spouse child, stepchild or parent, not be available for the purpose of payment of his or her debts. If the policy benefits are payable to them as nominated beneficiaries in terms of the relevant policy, section 63 does not apply. <sup>v</sup>

In *Pieterse v Shrosbee NO & Others*, as well as *Shrosbree NO v Love and Others*, <sup>v</sup> the Supreme Court of Appeal decided that section 63 of the Long-Term Insurance Act does not regulate the payment of the proceeds of the insurance policies since the appointment of a beneficiary has the effect that payment of the proceeds will be made to the beneficiary and not to the estate of the deceased. <sup>v</sup>

Protection shall apply to policy benefits and assets acquired solely with the policy benefits for a period of five years from the date when the policy benefits were provided. <sup>v</sup>

The onus is on the person claiming protection<sup>v</sup> to prove on a balance of probabilities that the protection is afforded to him or her under this section (Section 63). <sup>v</sup>

Policy benefits will also not be protected if it can be shown that the policy was taken out with the intention to defraud creditors. ✓[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)

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

Section 20(1)(b) of the Insolvency Act provides that any civil proceedings instituted against or by the insolvent are stayed until a trustee is appointed, except proceedings ✓ in terms of Section 23 ✓ where it is instituted by the insolvent for his own benefit or may be instituted against the insolvent. Exceptions refer to proceedings not affecting the insolvent estate, such as relating to status or assets that do not form part of the insolvent estate. ✓[5]

Section 75 of the Insolvency Act provides that any civil proceedings instituted before sequestration shall lapse after a period of three weeks after the first meeting of creditors, unless the person who instituted the proceedings has given notice within that period to the trustee or the Master that he intends to continue the proceedings and after three weeks of the notice prosecute those proceedings with reasonable expedition. If the court is of the opinion that there was a reasonable excuse for such failure as to when notice was not given, the court may permit the continuation of the proceedings on such conditions as it may think fit.

#### 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)

Section 143 of the Companies Act deals with the remuneration of the business rescue practitioner. As per Section 143(1) ✓ the practitioner is entitled to charge an amount to the company in accordance with the tariff prescribed in terms of Section 143(6). I.t.o. Section 143(2) the practitioner may propose an agreement with the company for further

remuneration, additional to that in section 143(1), to be calculated on basis of a contingency related to the adoption of a business rescue plan at all, or within a particular time or the inclusion of any particular matter within such a plan; or the attainment of any particular result or combination of results relating to the business proceedings. ✓

This section, section 143(3) requires an agreement to be approved at a meeting ✓ called for the purpose of considering the proposed agreement and without the approval at a meeting called for this purpose such a fee is invalid. ✓

Once an application for winding-up is presented to court, the company is precluded from making payments to third parties, including the business rescue practitioner and any disposition made in such circumstances will be void unless otherwise ordered by the court.

The Supreme Court of Appeal held in *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* ✓ that section 143 only applies to the remuneration of business rescue practitioners by the company under business rescue and does not deal with fee arrangements concluded between practitioners and third parties. It further held that there is nothing in section 143 that suggests that an agreement not falling within its ambit is void. ✓ The court noted that the Companies Act 2008 does not penalize the conclusion of remuneration agreements with third parties and does not contain language entitling a court to draw an inference that the legislature intended to invalidate such fee agreements. ✓

Accordingly the Supreme Court of Appeal held that remuneration agreements, or so-called success fee or special fee agreements, concluded between business rescue practitioners and third-parties outside the ambit of section 143 are neither prohibited, 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)

Insolvency Act treats the estates of a partnership and the partners as separate entities. ✓ The sequestration of one of the partners will not sequester the partnership or the estates of the other partners, ✓ but it will dissolve the partnership or the partnership will terminate and it will be wound-up. The assets from the winding-up of the partnership will be divided amongst the partners, either in terms of an agreement or the common law, ✓ and the assets due to the partner who is insolvent will vest in the trustee of the insolvent partner's estate. ✓[4]

#### QUESTION 13

In 2010, Mr X and Mr Y entered into a civil partnership in terms of the Civil Union Act 2006. On 1 March 2011, Mr X donated certain immovable property to Mr Y. Soon thereafter, the property was registered in Mr Y's name in the Deeds Office. On 1 February 2022, Mr X's



estate was finally sequestrated. Two months before his sequestration, Mr X donated his Land Rover Defender to Mr Y. Mr Y approaches you for advice.

Answer the questions below.

### Question 13.1

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

Section 22 of Matrimonial Property Act legalized the donations between spouses. ✓ If considered that the civil union entered stipulated provisions to be out of community of property the solvent spouse's property (Mr Y) will vest in the insolvent estate as dealt with in Section 21 ✓ of the Insolvency Act. Mr Y will have to prove that he is entitled to the property in terms of Section 21(2) and the trustee can only release the property if it was acquired during the marriage by a title valid against creditors. It has to be a valid and a real donation and cannot be a donation designed to defeat the rights of creditors. ✓

The immovable property was transferred to Mr Y and was registered in the Deeds Office. The donation of the immovable property to Mr Y appears to be a real donation and can therefore be released. ✓

The trustee can still challenge this real donation in terms of Section 26 of the Insolvency Act or in terms of the action Pauliana provided that the invalidity of donations between spouses not relied upon. In the case of the immovable property the disposition was made more than two years before sequestration, ✓ and this can only be set aside if the trustee can prove that immediately after the disposition the liabilities of the insolvent exceeded his assets. ✓ (Section 26(1)(a) of the Insolvency Act). ✓

The Land Rover Defender will fall into the insolvent's estate, it cannot constitute a real donation as it was shortly before the sequestration of Mr X and cannot be released. ✓ This disposition is a disposition made without value and may be set aside. ✓ The disposition was made within two years of the sequestration (two months before), unless it can be proved that immediately after the disposition was made the assets of the insolvent exceeded his liabilities. (Section 26(1)(b) of the Insolvency Act) ✓ **[10]**

### 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)**

In terms of Section 21(13) the word "spouse" has an extended meaning and includes a wife or husband married according to any law or custom as well as persons living together as husband and wife, though not legally married. ✓ The Civil Union Act legalized civil unions

between same-sex partners which now has the same legal consequences as any marriage in any other law. ✓ "Spouse" therefore includes a "civil union partner" in terms of the Civil Union Act. ✓ Mr Y will qualify as a spouse in terms of Section 21 and are therefore subject to the provisions thereof. ✓[4]

However, due to their civil union not stipulating otherwise it will be assumed that it is a union in community of property. Section 21 can only apply where there is a solvent spouse. Due to marriage in community of property the joint estate of spouses is sequestrated and Section 21 cannot apply.

#### **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 contract of employment will be suspended. ✓ During the time of the suspension he will not be required to work but will also not be remunerated. ✓ In terms of the Unemployment Insurance Act Thabo will be entitled to unemployment benefits. ✓ His contract of employment may be terminated if the liquidator consults with employee representatives on measures to save the business or part thereof. ✓ His contract may be terminated 45 days after the appointment of the liquidator if no agreement is reached on continued employment. ✓[5]

##### **Question 14.2**

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

Thabo has not been paid for the months of February, March and April 2022, thus 3 months salary not paid.

Thabo will have a claim for the following:

Salary:  $R10\,000 \times 3 = R30\,000$  of which R12 000 will be a preferent claim and the remaining R18 000 will be a concurrent claim. The R12 000 is a statutory preferent claim i.t.o. Section 98A of the Insolvency Act.

Leave Pay in amount of R3 500 (Preferent claim) (can claim to max of R4 000) i.t.o. Section 98A of the Insolvency Act.

If the contract of employment is terminated he will also be entitled to severance benefits i.t.o. Section 38 read with Section 98A of the Insolvency Act as well as a concurrent claim as far as he might have suffered damages due to the premature termination of the contract. **v[3]**

### QUESTION 15

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

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

The trustee must prove the following requirements in terms of Section 29 of the Insolvency Act in order to have a disposition set aside as a voidable preference:

1. The disposition was made by the insolvent within six months prior to the sequestration. In the above matter it was 20 days before sequestration. **v**
2. That the effect of the disposition was to prefer one creditor above the others. **v**
3. That immediately after making such disposition the debtor's liabilities exceeded the value of his assets. **v**

Referring to the above there is a fair chance the trustee can set aside the settlement of debt by John. **v**

Where the settlement of the debt is voidable, Section 33(1) of the Insolvency Act provides that the person who in return for any disposition which is liable to be set aside has parted with any property or security which he held shall, if he acted in good faith, not be obliged to restore any property or the benefit received under such disposition unless the trustee indemnified him for parting with such property or security. Joe may rely on the statutory defence and may be able to avoid the setting aside of the disposition. **v**

Joe will have to prove that the disposition was made in the ordinary course of business ✓ and there was no intention to prefer one creditor above another. ✓ He will have to prove that the way in which he received payment was not in a roundabout way and must be legal and valid. John can, if he is a reliable witness, testify to the facts whether there was any intention or preferring or just a friendship relationship.[8]

**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.