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INTERNATIONAL



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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**

Ms R Bekker Prof A Boraine Prof J C Calitz Prof H Coetzee Ms N Harduth  
Dr E Levenstein Prof A Loubser Dr M Roestoff

**MODERATORS**

Dr D Burdette Mr Z Cassim

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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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**87/100**

## 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.[16]

#### QUESTION 2

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

[After sequestration the debtors estate vests in the Master before a trustee is appointed. After a trustee is appointed the estate of the insolvent debtor vests in the trustee.

- All debts payable to the insolvent are payable to the trustee. ✓
- In terms of section 22 of the Insolvency Act ✓ debts that were due before sequestration should be paid to trustee after sequestration, however if payment is made to insolvent debtor this obligation is not excused unless the debtor can prove that payment was genuine without intention to deceive and without knowledge of the sequestration] ✓[3]

#### QUESTION 3

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

- [Advantage of creditors in terms of voluntary surrender: debtor applying must show on a balance of probabilities that there is an advantage to creditors as a group.]
- Advantage of creditors in terms of compulsory sequestration:  
In terms of section 10 of the Insolvency Act if the court is of the opinion that Prima Facie (based on 1st impression) 10(c) there is a reasonable belief that sequestration is to the advantage of the creditors as one of the conditions they may issue a provisional sequestration order  
However in terms of a final sequestration order it must be shown that on a balance of probabilities there is reason to believe that sequestration will be to the advantage of creditors as a group.]

Commented [CJ1]: Positive proof onerous burden of proof

Commented [CJ2]: Reasonable prospect = see memo. Very specific wording in the Act.

#### QUESTION 4

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

[Interrogations assist insolvency practitioners to understand the dealings and affairs of an insolvent debtor estate.]

- In terms Section 64(2) of the Insolvency Act at any meeting of the creditors the presiding officer may summon any person who is believed to have property or knowledge of property belonging to the insolvent debtors estate. The person may be summoned to appear for interrogation in terms of section 65 ]
- The presiding officer may also summon any person believed to be in possession of a book or document containing information required in terms of section 64(2) of the Insolvency Act at any meeting
- Summonses for witnesses are normally prepared by the insolvency practitioner then submitted to the presiding officer for signature ✓
- The Master is to issue initial summons, subpoenas may be objected to before appearance
- All witnesses do not have an obligation to attend interrogations, and will not be arrested if they fail to attend unless the fees and allowances prescribed in terms of the magistrates Act have been prepaid for attending as a witness to civil proceeding.
- The manner of service of a subpoena must be set out by sheriff in a return of service. ✓ if served by the insolvency practitioner then they should show manner of service in an affidavit ✓
- Interrogations of witnesses can be public or confidential
- Presiding officer or creditor with proved claim or the insolvency practitioner may interrogate a witness in terms of sections 65(1) on the debtors property or books or documents
- If a person summoned under section 64 fails to appear or does not stay for the meeting presiding officer may issue a warrant for the person to be apprehended by police and be brought forth. ✓[3]

**Commented [CJ3]:** Discuss procedure in which a witness may be subpoenaed and not the 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)

[Section 339 of the Companies Act 1973 states that when winding up an insolvent company provisions relating to insolvency shall apply in as far as they can be applied, they should be applied mutatis mutandis (taking into account necessary changes) in respect of matters not addressed in the old companies act.

Three steps to be taken to determine whether a specific provision of the Insolvency Act applies to the liquidation of a company are as follows:

1. Consider if the section can be applicable to a winding up for example rehabilitations can not apply to a company ✓
2. Consideration should be made to determine if the matter has been provided for in the companies Act for example matters relating to late proof of claims are treated differently between the Insolvency Act and Companies Act. Therefore with regards to companies matters specifically provided for in the Companies Act should be dealt with in terms of the Companies Act and not the Insolvency Act ✓
3. Consider if the provision in the Companies Act does not specifically deal with a matter at hand and the company is insolvent then the provisions of the Insolvency Act or common law which applies to individuals can be applied to the company with whatever changes are necessary ✓[3]

### QUESTION 6

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

[Effect of the Sequestration of a partnership estate on the individual partners in their personal capacities is as follows:

- In terms of section 13 of the insolvency Act if the courts sequester the estate of a partnership then the estates of the members of the partnership will be simultaneously v sequestered with exceptions of such as a partner not liable to outsiders for debt or a partner that undertakes to pay partnership debts v [2]
- In terms of Section 49 of the Insolvency Act when the estates of the partnerships members are being sequestered simultaneously as well as the Partnership is being sequestered then the creditors of the Partnership are not entitled to prove their claims against the Partnerships members estates and also the creditors of the partnerships members are not entitled to prove their claims against the Partnership estate.
- Balance after payment of creditors from the Partners (individual estates) is to be utilised by the trustee of the partnership to satisfy any partnership debts that still need to be paid
- The trustees of the partners estates are entitled to balance of the Partnership estate after creditors payments, each partner is entitled to the portion they would have been entitled to had the partner estate not been sequestered
- Partnership is terminated on sequestration of estate

### QUESTION 7

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

[The effects of a publication of a notice of surrender are as follows:

- In terms of section 8(f) of the Insolvency act publication of a notice of surrender will be considered an act of insolvency v if the debtor does not lodge a statement of affairs or if the lodged statement of affairs is incorrect or incomplete
- If it is considered appropriate the Master may appoint a curator bonis v
- Sales in execution are stayed v [3]

### 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)

[In terms of the Insolvency Act section 23(7) v[2]the insolvent may retain for their own benefit any pension which may be due to them for services rendered. v  
In terms of the General Pensions Act 1979 benefits received under any pension by any person whose estate is sequestrated will not form part of the assets of the Insolvent.

The benefit will therefore not form part of Mrs. A's estate.

#### 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)

[After sequestration order the estate of the insolvent debtor vests in the Master, then after trustee is appointed the estate vests in the trustee. vAll property of the debtor vests in the trustee once appointed with some exceptions. One of the exceptions is policy benefits under a life insurance policy. vThe conditions are set out in terms of Section 63 of the Long-Term insurance Act to be able to exclude the policy benefits from the estate of the insolvent. v

In terms of section 63 of the Long term Insurance Act 1998 the entire sum of the insurance policy proceeds is protected with the conditions that life insured is the debtor (protected person) or the spouse of the debtor. v  
The relevant policy must have been in force for at least three years vThe policy must not have been taken out to be security for debt of the debtor in their lifetime. The policy must be with a registered insurer. v

Upon death if the protected person is survived by a spouse, child, stepchild, or parent the policy should not be available for payment of the deceased policy holders' debts. v

In Pieterse v Shrosbree NO & Others: Shrosbree No v Love and Others vThe Supreme court of appeal decided that section 63 of the The Long term Insurance Act does not regulate the payment of proceeds of the insurance policies in casu, since the appointment of a beneficiary has the effect that proceeds are paid directly to the beneficiary and not to the estate of the deceased. Therefore, proceeds are paid directly to nominated beneficiaries, the trustee of the deceased policy holder's insolvent estate will have no claim to the proceeds of the policy.

The protection of policy benefits in terms of this section shall apply to assets acquired solely with the policy benefits for a period of upto five years vfrom the date on which policy benefits were provided.

Person claiming this protection must be able to prove on a balance of probabilities that protection afforded is in terms of this section.

This protection will not be granted if it can be shown that policy was taken out 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)**

[The effect of sequestration on civil proceedings is that in terms of Insolvency Act section 20(1)(b) **v** shall be to stay any civil proceedings until a trustee is appointed. **v**

This is with the exception of section 23 of the Insolvency Act **v** whereby the civil proceedings can be instituted by the insolvent for their own benefit or instituted against insolvent. This is for proceedings that do not affect the estate of the insolvent.

In terms of section 20(1)(C) **v** of the Insolvency Act **v** as soon as sheriff is aware that a debtor's estate is sequestrated then the judgment is stayed unless the courts directs otherwise. The court may allow execution of judgment to continue if it is expedient and necessary and does not affect negatively affect the general body of creditors. Proceeds from such execution must be paid to the Master or trustee. **v[6]**

In terms of section 75 of the Insolvency Act any civil legal proceedings instituted against the debtor before debtors' sequestration shall lapse after three weeks of the first meeting of creditors of that estate, unless the creditor gives notice to the trustee/Master within the three weeks of first creditors meeting stating they would continue with legal proceedings. If they do continue with said legal proceedings, they should prosecute within three weeks of the notice to trustee or master with reasonable expedition.

The court may allow proceedings to be continued as they see fit where notice was not given but only with a reasonable excuse from the person who instituted the legal proceedings

In terms of section 72(2) of the Insolvency Act no legal proceedings may be instituted against the insolvent debtor's estate relating to debt that arose before sequestration after the Trustees account is confirmed in terms of section 112 of the Insolvency Act unless the courts find that there was a reasonable excuse for delay in such 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)**



[In terms of the Company's Act 2008 section 143(1) ✓the practitioner is entitled to charge an amount to the company for remuneration and expenses of the practitioner in terms the tariff prescribed as per section 143(6).

Regulation 128 currently determines tariff of fees for business rescue practitioners. In terms of section 135(3) practitioners remuneration and expenses referred to in section 143 should be paid before other claims. ✓

Section 143(2) of Company's Act 2008 provides that the practitioner may make a proposal to the company for additional remuneration, that is in addition to the fees as per section 143(1) calculated on a contingency basis relating to the adoption of the business rescue plan at all or within a certain time or the inclusion of any matter in the plan or contingency relating to attaining a certain result from the business rescue proceedings. ✓

In terms of section 143(3) of Company's Act 2008 subject to the provisions of section 143(4) an agreement in terms of section 143(2) for contingent fees is final and binding on the company if it is approved by majority of creditors and the majority of the shareholders. ✓

In terms of section 143(4) Company's Act 2008 a creditor or shareholder that voted against contingent fee arrangement can apply to court with ten days after voting date to have order setting aside the agreement on the ground that it is not just and equitable or the remuneration provided for in the agreement is unreasonable having regard to the financial circumstances of the company. ✓

(Below is referencing to the Companies Act)

With reference remuneration agreements concluded between business practitioners and third parties a case was dealt with by the Supreme Court of Appeal in Caracto (Pty) Ltd v Independent Advisory (Pty) Ltd. ✓

In this case the Supreme court of Appeal had to determine whether the payment of special fees/" success fees" by creditors to the Business Rescue practitioners was prohibited, void for illegality or otherwise contrary to public policy. ✓In this case Caracto being the creditor of a financially distressed company entered in to a "success fee" arrangement with Independent Advisory Ltd (the business rescue practitioners' company).

In this case the creditor Caracto argued the success fees arrangement was illegal because it was outside the scope of section 143, secondly Caracto argued that the practitioners had breached section 140(3)(b) whereby the practitioners had responsibilities, duties and liabilities of a director of the company in terms of sec 75 to 77 they relied specifically on sec 75(3) and 76 and alleged since the joint practitioner's had failed to fulfill responsibilities and duties incumbent upon them the special fee arrangement ought to be made void and lastly Caracto alleged that success fee arrangement was contrary to public policy on the basis that practitioners subverted the democratic vote of the majority of creditors and breached their duties to act independently and impartially towards the company by entering into the agreement. ✓

However it was found by the courts that the special fee agreement was not invalid, illegal or otherwise contrary to public policy and dismissed the case based on the facts that section 143 of the Companies Act 2008 applies to remuneration of practitioners by the company under business rescue and does not deal with fee arrangements concluded between business rescue practitioners and 3<sup>rd</sup> parties, furthermore there is nothing in section 143 that suggests that agreements not falling within section 143 are void and also the

companies act does not penalize the conclusion of such agreements nor does it contain language entitling a court to draw an inference that the lawmaker intended to invalidate such agreements, therefore the supreme court of appeal found that there was no substance to Caractos illegality complaints. v[10]

Section 75(3) did not apply as Caracto failed to show that the distressed company had an interest in the fee arrangement.

Section 76 did not apply as Caracto failed to plead the specific sub section on which it relied on.

On the matters of public policy Caractos allegations were without merit and no evidence to support this. The success fee did not cause any prejudice to the body of creditors as it didn't affect the distribution to them thereby the public policy defense was without merit.

However, this case is not a blanket treatment, in certain cases acceptance of success fees by practitioners could possibly constitute a breach of practitioner's responsibility and duty including responsibility to act in good faith, this can result if payment of said fees impacts practitioners impartiality or independence towards the court, creditors or the company.

Practitioners must always consider their role to act in good faith in terms of section 140(3) when it comes to third party fees] \*\*\*\*

\*\*\*SOURCE:<https://www.werksmans.com/legal-updates-and-opinions/success-fees-to-business-rescue-practitioners-important-aspects-to-consider/accessed> 06/10/2022

## 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)

[The insolvency act treats Partners and Partnerships for most parts as separate estates. v

Where the estate of a partner is sequestrated, the Partnership does not get sequestrated, and the solvent Partners estates do not get sequestrated. v

However, when a partnership is sequestrated in terms of section 13v of the Insolvency act then the estates of the individual partners also get sequestrated unless the partner makes necessary partnership payments, or the partner is not involved in partnership debts.

If a partner's estate is sequestrated, then the Partnership will terminate and partnership will be wound up. Partnership assets are then distributed to the partners in terms of their partnership agreements or common law. v[4]

The partnership assets due to the insolvent debtor after partnership is wound up vest in the trustee of the insolvent debtor]

### QUESTION 13

In 2010, Mr X and Mr Y entered into a civil partnership in terms of the Civil Union Act 2006. On 1 March 2011, Mr X donated certain immovable property to Mr Y. Soon thereafter, the property was registered in Mr Y's name in the Deeds Office. On 1 February 2022, Mr X's estate was finally sequestrated. Two months before his sequestration, Mr X donated his Land Rover Defender to Mr Y. Mr Y approaches you for advice.

Answer the questions below.

#### Question 13.1

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

[In terms of section 21 of the Insolvency Act if the property of the solvent spouse is taken over by the trustee, solvent spouse may claim release of this property. If the solvent spouse in this case Mr Y can prove that property was acquired by Mr Y during the marriage with Mr X (insolvent debtor) by a title valid as against creditors of the insolvent then Mr Y could be entitled to said donations. With reference to case law this would mean that Mr Y would need to prove that donation was in good faith, a real donation then he will be afforded a legally valid title.]

In terms of the Matrimonial Property Act subject to the insolvency Act, no transactions entered between spouses is void simply because it is a donation.

The donation of the immovable property appears to be a real donation, however donation of the Land Rover two months before sequestration does not appear as a real donation and therefore this donation could be set aside in terms of Insolvency Act section 26. **[5]**

In terms of section 26(1) of the Insolvency Act every disposition not made for value may be set aside by the court, if disposition was made more than two years before sequestration then it must be proved by trustee that after that disposition was made the liabilities of the debtor exceeded the assets of the debtor. In a case where the disposition was made within two years before the sequestration then the person that benefited from disposition must prove that after the disposition the liabilities did not exceed the assets of the insolvent.

Where disposition is set aside in terms of section (26) of the Insolvency Act the beneficiary cannot compete with creditors of the estate.

In both cases there is disposition without value (donation)

With regards to the first donation of the immovable property to Mr Y, it is a disposition without value as there was no quid pro quo to Mr X. As this transaction occurred more than two years before sequestration of Mr X's estate then the courts can only set the transaction aside if trustee can prove that after said donation in 2011 Mr X's liabilities exceeded his assets. Onus is on trustee to prove, however as this transaction occurred over 10 years ago and property registered under Mr Y it is unlikely transaction can be set aside, as it is highly

unlikely trustee would be able to prove that over ten years ago Mr Xs liabilities exceeded his assets soon after said donation. And it does appear to be a real donation as.

In the case of the Land Rover donated two months before sequestration, as this transaction occurred within two years before sequestration then it can be set aside unless the benefiting person in this case Mr Y can prove that immediately after disposition of the Land Rover the insolvent debtors' liabilities did not exceed the assets. Onus is on Mr y to prove this.

Even if Mr X and Mr Y entered in to a Antenuptial contract in terms of section 27 of the insolvency act which allows donations by a man to his wife if estate is not sequestrated within two years, they would not be able to rely on this section as it appears section does not apply to same sex marriages but to when a husband gives his wife.

In conclusion it is likely that Mr Y can keep the immovable property, but the Land Rover would be set aside as a voidable disposition. The trustee could have transaction for the Land Rover voided and thereby include the vehicle in the estate of Mr X.

**Commented [CJ4]:** Read question carefully. S 22 of matrimonial Prop Act is applicable. See memo.

### 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 the Insolvency act section 21(13) spouse does not only relate to husband and wife in the legal sense but it also means wife and husband by virtue of marriage in terms of any law or custom and applies to a woman living with a man as his wife and a man living with a woman as her husband.

The civil union act legalized Civil unions between same sex partners which therefore has the same legal consequences as a marriage in any other law including the common law. Spouse therefore also includes a civil union Partner in terms of the Civil Union Act

Based on this Mr Y is regarded as a spouse in terms of the Insolvency act as he is married to Mr Y in terms of the Civil Union Act 2006] [4]

### QUESTION 14

Generators Africa (Pty) Ltd, a company that manufactures generators for the lucrative South African market, is placed in liquidation by an order of the High Court on 3 May 2022. One of the company's employees, Thabo Kekana, approaches you for advice on the effect that the liquidation of the company will have on his contract of employment. Thabo has not been paid since the end of January 2022, his salary being an amount of R10,000 per month. In addition, he has R3,500 leave pay owing to him for the preceding year.

Advise Thabo Kekana regarding the questions below.

**Question 14.1**

What effect will the liquidation of the company have on Thabo's contract of employment?  
(5)

[When it comes to winding up of a company determination must be made to see if winding up is of a solvent or insolvent company. In this case it appears that liquidation is a result of an insolvent company as the company has not managed to pay salaries since January. In this case the provisions of the 1973 companies act will apply, in terms of the companies act 1973. In terms of the companies act 1973 section 339 the Insolvency act can apply to matters not specifically dealt with. In this case the insolvency act applies as follows:

- Section 38(1) of the Insolvency act states that contracts of service of employees ,whereby employer is sequestrated are suspended with effect of the sequestration order being granted. Thabos contract of employment is therefore suspend when company is liquidated.
- Section 38(2) goes on to state that in the period the contract of service is suspended employee is not required to render services in terms of the suspended contract and thereby also not entitled to remuneration in terms of suspended contract. Also no employment benefits accrue while contract of service is suspended. Thabo does not have to render any services in terms of suspended contract and will also not receive a salary and no benefits accrue to Thabo.
- Thabos contract will be suspended as of 3 May 2022, from this date he is entitled to Unemployment Insurance benefits in terms of the Unemployment Insurance Act.
- In terms of Section 38 of the Insolvency Act the trustee may terminate the contract of service after consultations are done with various parties such as the registered trade union, workplace forum, representative of employees, person designated in terms of a collective agreement.
- If Liquidator and Thabo do not agree to continue with employment then the contract of service will terminate 45 days after appointment of the final liquidator.
- The liquidator can also enter into a short term employment contract with Thabo and pay Thabos' salary as salary of an individual engaged by the liquidator.
- Thabo is entitled to claim compensation from the insolvent estate of Generators Africa (Pty) for loss resulting from suspension of contract and if terminated he can claim also for losses incurred due to termination of contract. [5]
- Thabo has a preferential claim of up to a maximum of R12 000.00 for a maximum of 3 months salary due before sequestration date. In this case Thabo will only get 12 000 despite his outstanding salary exceeding this amount. The balance of his salary will be a concurrent claim.
- With regards to the leave pay Thabo is entitled to get the full R3500.00 as statutory preference claim, the maximum that can be claimed for leave pay is R4000.00]

**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.

[Thabo has the following claims against the insolvent company: (3)

- Thabo has a statutory preferential claim this is determined in terms of section 98A of the insolvency Act. Thabo is entitled to salary upto a maximum of three months before liquidation order, amount cap is determined by the Minister in a gazette of upto a maximum of R12 000.00. In this case Thabo will only get R12 000 despite his outstanding salary exceeding this amount. The balance of his salary will be a concurrent claim ✓ paid out of the free residue.
- With regards to the leave pay Thabo is entitled to get the full R3500.00 as statutory preference ✓ claim, the maximum that can be claimed for leave pay is R4000.00
- If Thabo's contract is terminated he will be entitled to severance or retrenchment pay not exceeding R12 000.00 ✓ [3]
- Thabo can claim damages suffered as a result of early termination or suspension of contract, but the claim will be a concurrent claim paid out of the free residue.]

#### 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 terms of Insolvency act, a disposition is defined as any transfer or abandonment of rights to property. This includes sale, lease, mortgage, delivery, pledge, payment, compromise, donation or any contract provided therefore, this excludes dispositions that follow court orders.

The main voidable dispositions in terms of the insolvency act are

- Collusion
- Undue preference
- Voidable preference
- Disposition without value

In terms of section 29 of the Insolvency act ✓, every disposition made by the debtors not more than six months before the sequestration of his estate which has had the effect of preferring one creditor ✓ over another maybe set aside by the court if immediately after such disposition the liabilities of the debtor exceeded the value of his assets unless the persons in whose favor disposition was made in the ordinary course of business and that it was not intended to prefer one creditor over another ✓

With respect to Payment(disposition) by John lack to Joe Bond, Trustee has a possibility of setting aside transaction. Trustee has to prove that the requirements of section 29 of the insolvency Act are present that is :

- Disposition was made not more than 6 months before sequestration(Disposition was made 20 days before sequestration) ✓
- It seems there was preference of a creditor over another in this case Joe Bond and John are friends. ✓
- Immediately after such disposition,the value of liabilities of the debtor exceeded the value of the assets,it should be reasonably possible to prove that after paying the loan of Johns liabilities exceeded the assets.This can be difficult to prove however an objective estimate of proven claims versus available assets can help in showing that liabilities exceed assets after disposal ✓

Based on the above it would appear as if the transaction is voidable in terms of section 29

There are however statutory defences which are that debtor could state that disposition was in the ordinary course of business and also that disposition was not intended thereby to prefer one creditor over another.However trustee can apply objective tests to determine if transactions are in the ordinary business ✓ but in this case it can be proved it was not in the ordinary course of business as it a loan to a friend also there was preference of one creditor over another due to them being friends. ✓

The trustee in this case must institute proceedings to set aside this impeachable disposition,if trustee fails to do so any creditor may institute the proceedings,provided creditor indemnifies trustee. ✓

It is likely that trust will succeed in voiding this transaction.] ✓[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.