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**PROGRAMME IN SOUTH AFRICAN INSOLVENCY LAW AND  
PRACTICE 2022**

Practice Assessment: Paper 1

Date: 6 - 7 October 2022

**Time limit: 24 hours (from 13:00 on 6 October to 13:00 on 7 October 2022)**

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**EXAMINERS**

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It is imperative that all candidates read and take cognisance of the examination instructions on the next page.

All candidates are expected to comply with ALL the instructions.

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## INTRUCTIONS

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

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

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

## ANSWER ALL THE QUESTIONS

### QUESTION 1

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

#### Question 1.1

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

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

Select the correct answer:

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

#### Question 1.2

Select the correct answer:

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

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

(b) the debtor is divested of his or her estate, which estate vests in the Master until a trustee has been appointed, whereupon the estate will vest in the trustee. ✓

(c) the debtor is divested of his estate which estate will vest in the Master until the final liquidation and distribution account has been approved.

(d) The debtor is divested of his estate which estate will vest in the division of the High Court that granted the sequestration order.

### Question 1.3

Select the correct answer:

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

(a) forms part of the trustee's insolvent estate.

(b) does not form part of the trustee's personal estate.

(c) does not form part of the trustee's personal estate, save as far as the trustee is also a trust beneficiary. ✓

(d) vests in the Master and, after their appointment, in the trustee of the insolvent estate.

### Question 1.4

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

(1) The family home.

(2) Clothing and bedding of the insolvent.

(3) Household furniture.

(4) Antique furniture.

(5) Property of third parties.

(6) Tools and other means of subsistence as the creditors or the Master determine.

Select the correct answer:

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

(b) (2), (3), (5) and (6) are correct.

(c) (1), and (4) are correct. ✓

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

#### Question 1.5

Indicate which of the following estates **cannot** be sequestrated:

- (a) The insolvent estate of a deceased person.
- (b) The estate of an individual incapable of handling their own affairs;
- (c) A partnership.

(d) A company. ✓

#### Question 1.6

Which of the following courts **has jurisdiction** to issue a sequestration order?

- (a) A Magistrate's Court.
- (b) A Small Claims Court.

(c) A High Court. ✓

(d) A Criminal Court.

#### Question 1.7

Indicate the **incorrect** statement:

(a) A provisional sequestration order may not be appealed.

(b) A provisional sequestration order may not be rescinded. ✓

(c) An order refusing acceptance of a voluntary surrender of an estate may not be appealed.

(d) There is no provision for the suspension of a provisional sequestration order by the court.

#### Question 1.8

Indicate the **correct** statement:

- (a) The grounds for setting aside a sequestration order or a winding-up order are found in the common law.
- (b) A sequestration order may be set aside based on the common law, but a final winding-up order may be set aside only on statutory grounds contained in the Companies Act 2008.
- (c) A sequestration order may be set aside on the grounds contained in the Insolvency Act but the grounds for setting aside a final liquidation order are found in the common law.
- (d) The grounds for setting aside a sequestration order or a winding-up order are contained in the Insolvency Act and the Companies Act 1973, respectively. ✓

#### Question 1.9

Select the **correct** answer:

Claims submitted for proof against an insolvent estate must-

- (a) Be liquid.
- (b) Be proved before the estate can be finally distributed.
- (c) Be secured claims
- (d) Only be proved at the first meeting of creditors.
- (e) Both (a) and (b) are correct. ✓
- (f) Both (c) and (d) are correct.

#### Question 1.10

Indicate whether the following statement is **true or false**:

Section 44(7) of the Insolvency Act provides for the examination of a claim before it is proved.

- (a) True ✓
- (b) False

#### Question 1.11

Indicate whether the following statement is **true or false**:

Only the Master of the High Court may preside at a section 417 (of the Companies Act 1973) enquiry.

(a) True

(b) False ✓

#### Question 1.12

A common requirement for all the prescribed statutory voidable dispositions is that a disposition of his or her property by a debtor will become voidable where one creditor is preferred above others.

Select the **correct** answer:

(a) The statement is correct, since sections 26 to 31 of the insolvency Act prescribe this requirement in all instances.

(b) The statement is correct since the requirement is limited to only one preferred creditor.

(c) The statement is not correct since the preference of one creditor above others is not prescribed in the case of dispositions for value, as dealt with in section 26 of the Insolvency Act. ✓

(d) The statement is correct since this requirement is also prescribed for the common law *actio Pauliana* and was taken up as such in the Insolvency Act.

#### Question 1.13

Where the court orders the setting aside of a statutory voidable disposition, such as a disposition without value or a voidable preference, the court will order restitution of the disposed property and, where it is no longer available in the hands of the recipient, the court may order the recipient to return the value of such property as it was on the date of the disposition by the debtor.

Select the **correct** statement:

(a) The statement is correct since section 32 of the Insolvency Act provides for the return of the value of the property at the date of the dispositions, as mentioned in the statement above.

(b) The statement is not correct since the court may only order the return of the disposed property.



(c) The statement is not correct since section 32 of the Insolvency Act provides for the return of the value of the property at the date of the court order setting aside the disposition.

(d) The statement is not correct since section 32 of the insolvency Act requires that the court must declare that the trustee is entitled to recover the property itself, or the value thereof at the date of disposition, or at the date on which the disposition was set aside, whichever is the greater. ✓

#### Question 1.14

Where the trustee or liquidator of an insolvent estate decides not to continue with an unexecuted / uncompleted contract entered into by the insolvent party prior to commencement of sequestration or liquidation, the solvent party may, in terms of the general rule applicable to this situation, claim specific performance against the insolvent estate.

Select the **correct** statement:

(a) The statement is not correct since in terms of the general rule specific performance cannot be claimed in such an instance, even though the trustee or liquidator's repudiation of the contract amounts to breach of contract. ✓

(b) The statement is correct since specific performance is always available to the solvent party in a case of breach of contract by the trustee or liquidator.

(c) The statement is correct since case law has confirmed that the solvent party may claim specific performance in these circumstances.

(d) The statement is correct since the election of the trustee or liquidator in fact amounts to cancellation of the contract.

#### Question 1.15

X purchases a car from W on 10 May 2022 in terms of an ordinary credit sale agreement. Although the last instalment is only due to be paid on 10 November 2022, by agreement ownership in the car had already passed on delivery. The estate of X is sequestrated on 7 July 2022.

Select the **correct** answer:

(a) W may reclaim the car if he has not been paid in full.

(b) W has lost ownership of the car since it is a credit sale in terms of the common law. ✓

(c) W enjoys a tacit hypothec that secures the balance of this claim.

- (d) W enjoys a preferential claim against the estate of X regarding any damages that he may have suffered.

**Question 1.16**

Alpha Limited has recently been placed under business rescue in terms of an order of court as contemplated in section 131 of the Companies Act 2008. Mr Thobejane is an employee of Alpha Limited (in business rescue). He is concerned that his employment with Alpha Limited is about to come to an end by virtue of the commencement of business rescue proceedings. He approaches you for advice.

Which of the following statements **correctly** describes the position of employees during business rescue proceedings?

- (a) During a company's business rescue proceedings, employees of the company immediately before the beginning of those proceedings continue to be so employed on the same terms and conditions, except to the extent that changes occur in the ordinary course of attrition, or the employees and the company agree on different terms and conditions of employment, in accordance with applicable labour laws ✓
- (b) During a company's business rescue proceedings, the business rescue practitioner can unilaterally vary the employment terms and conditions of the employees of the company immediately before the beginning of those proceedings, subject to the approval of the company's creditors at the first meeting of creditors
- (c) During a company's business rescue proceedings, all employment contracts that existed immediately before the beginning of those proceedings are automatically suspended
- (d) All of the above

**Question 1.17**

Which of the following statements is / are **correct** in relation to compromises between a company and its creditors in terms of section 155 of the Companies Act 2008?

- (a) A proposal for a compromise in terms of section 155 is adopted by the creditors of the company, or a class of creditors, if it is supported by a majority in number representing at least 75% in value of the creditors or class present and voting in person or by proxy.
- (b) Section 155 does not apply where a company is under business rescue proceedings.
- (c) A liquidator, where a company is being wound up, may propose an arrangement or a compromise of the company's financial obligations.

(d) All of the above statements are correct. ✓

**Question 1.18**

Select the **correct** answer:

What are the aims or goals of the business rescue process as set out in Chapter 6 of the Companies Act 2008?

- (a) The development and implementation of a business rescue plan to rescue the financially distressed company, which plan has the aim of allowing the company to continue in existence on a solvent basis.
- (b) To provide a better return for the financially distressed company's creditors or shareholders than would result from the immediate liquidation of the company.

(c) Both statements (a) and (b) are correct. ✓

(d) None of the above statements are correct.

**Question 1.19**

Select the **correct** answer:

- (a) Only the provisions of the Companies Act 2008 apply to the liquidation of solvent companies.
- (b) Only the provisions of the Companies Act 2008 and the Companies Act 1973 apply to the liquidation of solvent companies.
- (c) Some provisions of the Insolvency Act also apply to the liquidation of solvent companies. ✓

**Question 1.20**

Select the **correct** answer:

- (a) A voluntary winding-up by the company is possible only if the company has no unpaid debts.
- (b) In a solvent voluntary winding-up by the company, the shareholders have the right to appoint the liquidator.
- (c) From the moment of commencement of a solvent voluntary winding-up by the company, the company stops being a juristic person.

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

v

## QUESTION 2

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

In accordance with Section 22v of the Insolvency Act 24 of 1936 (“**Insolvency Act**”) the legal position after sequestration regarding debts that were due to an insolvent debtor prior to their sequestration is payable to the trustee. v In the event payment is made to the insolvent, the obligation is not terminated save for the debtor being able to prove that he/she was *bona fide* and had no awareness of the sequestration. v[3]

## QUESTION 3

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

In regards to both Voluntary Surrender and Compulsory Sequestration there is a substantive requirement that there needs to be an “advantage to creditors”. The difference is outlined hereunder.

### Voluntary Surrender

In regards to Voluntary Surrender the Applicant on a balance of probability should prove there is an advantage to creditors.

Commented [CJ1]: Positive proof

### Compulsory Sequestration

In regards to Compulsory Sequestration the Applicant in terms of Section 10 of the Insolvency Act in terms of a final order needs prove that sequestration will be to the benefit of creditors as a group. It is also important to note that in terms of a provisional order there needs to be *prima facie* view that sequestration will be to the benefit of creditors as a group.

Commented [CJ2]: Reasonable prospect. Wording very specific 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)

A witness to an insolvency enquiry may be subpoenaed in two (2) key manners. Taking that into account, and for context purposes it is worth noting that a witness whom is capable of providing crucial information into the business dealings and affairs of the entity in liquidation in all probability will be subpoenaed to attend the enquiry and testify as to his/her knowledge. In regards hereto, Section 64(2) and (3); Section 65(1) and (2) and

Section 152 of the Insolvency Act should have reference. In expansion thereof, the subpoena may request the witness to solely provide documentary evidence. This is known as a *Subpoena Duces Tecum*. Alternatively the subpoena may request the witness to appear before the commissioner/master to present oral evidence. This is known as a *Subpoena Ad Testificandum*. There are instances where the subpoena will incorporate the request to provide both the presentation of documentation and oral testimony. ✓

In conclusion, the subpoena can be authorized by the Master or Court in terms of Section 417 of the Companies Act, Act 61 of 1973 ("**Old Companies Act**") alternatively by a Commissioner in terms of Section 418 of the Old Companies Act.

It is crucial that the individual issuing the subpoena (i.e. the Master, Court or Commissioner) ensure they comply with the requirements and formalities of issuing the subpoena. In particular the subpoena must conform to Form 24 ✓prescribed in Annexure 1 of the rules issued in terms of the Magistrates Court Act to ensure it is served lawfully. ✓ In addition thereto reference should be made to the provisions of Sections 64 of the Insolvency Act and Section 414(2) of the Old Companies Act for the category of individuals whom may be subpoenaed in terms of a *Subpoena Duces Tecum*. Lastly the manner of service must be set out by the sheriff ✓ in his return of service alternatively by in the insolvency practitioner or his/her clerk in an affidavit. ✓[5]

#### **QUESTION 5**

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

The three (3) steps can be listed as follows:-

1. The first step is to ascertain whether the provision is capable of application in a winding-up; ✓
2. The second step is to ascertain if the matter is specially provided for by the Old Companies Act; and ✓
3. The third step is to ascertain if the Old Companies Act does not specially provide for the matter in question and the entity is unable to pay its debts the provisions of the Insolvency Act applies. ✓[3]

#### **QUESTION 6**

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

This answer falls squarely within the ambit of Section 13(1) of the Insolvency Act.

In accordance with Section 13(1) ✓ "If the court sequestrates the estate of a partnership (whether provisionally or finally or on acceptance of surrender), it shall simultaneously sequester the estate of every member of that partnership other than a partner en commandite or a special partner as defined in the Special Partnerships' Limited Liability Act, 1861 (Act 24 of 1861) of the Cape of Good Hope or in Law 1 of 1865 of Natal, who has not held himself out as an ordinary or general partner of the partnership in question: Provided that if a partner has undertaken to pay the debts of the partnership within a period determined by the court and has given **security** for such payment to the satisfaction of the registrar, the separate estate of that partner shall not be sequestered by reason only of the sequestration of the estate of the partnership." ✓[2]

**(underlining for emphasis purposes)**

Thus subject to the exceptions stipulated above it can be held that the effect of sequestration of a partnership estate will simultaneously sequester the estate of every member of the partnerships in their personal capacities

#### QUESTION 7

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

**(3)**

This answer falls squarely within the amid of Section 5 of the Insolvency Act. In brief the effects of the publication of a notice of surrender are as follows:-

1. Stay of sales in execution –all sales in execution are stayed. It is important to note this does not include attachments ; ✓
2. Appointment of *curator bonis* (where appropriate) – the master may in certain circumstances appoint a *curator bonis* to temporarily control the estate; and ✓
3. Publication of the notice constitutes an act of insolvency if the debtor fails to carry on with the application, fails to lodge a statement of affairs, or lodges an incomplete or incorrect statement of affairs. ✓ [3]

#### QUESTION 8

Mrs A was an employee of the Vaal University. On 1 September 2022 her estate was sequestered. A month later she took early retirement and became entitled to an amount of R2 million as pension in return for the services she provided to the University. **Advise** Mrs A, who approaches you for legal advice. She wants to know whether the pension she became entitled to will fall into her insolvent estate. **(2)**

No. The reason for the answer is due to what is stipulated in Section 3 of the General Pensions Act 29 of 1979 ("**Pension Act**"). In accordance with Section 3 "*the annuity received under any pension law by any person whose estate is sequestrated, shall not form part of the assets in his insolvent estate.*" ✓[1]

Commented [CJ3]: S 23 ?

#### 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 1998 ("**Long-Term Insurance Act**") ✓ affords protection of policy benefits under life insurance policies where the protected person's estate is sequestrated. This will be briefly discussed hereunder. ✓

In accordance with Section 63 of the Long-Term Insurance Act the entire sum of a life insurance policy is protected on the following proviso: (i) the protected person otherwise his/her spouse is the life insured; (ii) the relevant policy has been in force for a minimum of three (3) years; ✓ and (iii) the policy does not serve as security for a debt of the debtor during that individual's lifetime or upon his/her death in the event he/she is survived by a spouse, ✓ child, stepchild or parent (See: Section 63(1)(ii) of the Long-Term Insurance Act); so long as the policy benefits devolve upon the latter individuals. ✓

Accordingly, if the policy is payable to the abovementioned individuals as nominated beneficiaries in terms of the applicable policy ✓, Section 63 of the Long-Term Insurance Act will not apply. In regards hereto, reference should be had to the case of **Pieterse v Shrosbree NO and Others; Shrosbree NO v Love and Others** 2005 (1) SA 309 (SCA). ✓

Delving deeper, it must be noted that an individual claiming protection in accordance with Section 63 of the Long-Term Insurance Act must be able to prove on a balance of probabilities, that the protection is afforded to him/her under the formentioned section. ✓

In conclusion, it is essential to note that, policy benefits will not be protected in accordance with what is stated above ✓, in the event it can be displayed that the policy in question 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)

### Effect of Sequestration on Judgements

In accordance with Section 20(1)(c) of the Insolvency Act the execution of judgements is stayed as soon as the relevant sheriff becomes aware of the sequestration, save for the Court directing otherwise. ✓ Nonetheless, it should be noted that a Court may order that the execution of a judgment be continued if this is advantageous and deemed necessary. ✓ Moreover, if the execution of a judgment is to be continued the general body of creditors must not be prejudiced and the proceeds of the execution must be paid to the Master or the trustee. ✓

### Effect of Sequestration on Civil Proceedings

Section 20(1)(b) ✓ of the Insolvency Act provides that the effect of the sequestration of the estate of an insolvent is to stay any civil proceedings instituted by or against the insolvent; with the exception such proceedings as may in terms of Section 23 ✓ of the Insolvency Act be instituted for their own benefit or as may be instructed against the insolvent. In regards hereto Section 73 of the Insolvency Act should have reference. It should be noted that there are exceptions. ✓ In regards hereto, proceedings that do not affect the insolvent estate akin to proceedings relating to status or assets that do not form part of the insolvent estate. [6]

## QUESTION 11

**Write an essay** on the remuneration of business rescue practitioners, making specific reference to the issue of remuneration agreements (sometimes referred to as "success fee" or "contingency fee" agreements) concluded between business rescue practitioners and third parties, and provide insight, with reference to case law, as to whether such agreements are prohibited or contrary to public policy. (10)

Section 143 of the Companies Act, Act 71 2008 ("**New Companies Act**") deals with the business rescue practitioner's ("**BRP**") remuneration. ✓ In terms of Section 135(3) of the New Companies Act, the BRP is entitled to be paid first along with the associated expenses arising from the business rescue proceedings itself. ✓ That being said and delving deeper into Section 143 of the New Companies Act, in specific Section 143(1), a BRP is allowed to charge an amount to the company as his remuneration and expenses in accordance with the tariff prescribed in Section 143(6) of the New Companies Act. ✓

Nonetheless in terms of Section 143(2) of the New Companies Act, the BRP can engage the company and enter into an agreement providing for further remuneration in addition to that contemplated in Section 143(1) of the New Companies Act. ✓ The basis of the agreement (contingency agreement) is often related to (i) the adoption of a business rescue plan at all, or within a specified period of time, alternatively the inclusion of a particular matter within such a plan or (ii) the attainment of any particular result or combination of results relating to the business rescue proceedings.



It ought to be noted however that Section 143(3) explicitly requires an agreement for further remuneration must be approved "at a meeting called for the purpose of considering the proposed agreement", failing which such fee would be declared invalid. In addition thereto Regulation 128 prescribes the tariff of fees for practitioners. It is held that it would not be right for a BRP who although technically in control was not truly in control of the dealings/control of the company, to charge the company for remuneration as a BRP. In regard hereto reference should be had in the matter of **Alderbaran (Pty) Ltd and Another v Bouwer and Other** [2018] JOL 39938 (WCC).

Having the above in mind, a pinnacle case which comes to mind in regards to the above mentioned is that of **Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd 2020 (5) SA 35 (SCA)**. In this case the Supreme Court of Appeal ("SCA") determined whether remuneration agreements concluded between BRP's and third parties (including creditors) outside the ambit of Section 143 of the New Companies Act were prohibited, void for illegality or otherwise contrary to public policy. [10]

The SCA came to the decision that Section 143 of the New Companies Act only applies to the remuneration of BRP's by the company under business rescue and does not deal with fee arrangements concluded between BRP's and third parties. The SCA further held that there is nothing in Section 143 of the New Companies Act that indicates that an agreement not within the scope of such section is void. It must also be noted that the New Companies Act does not penalize the conclusion of remuneration agreements with third parties and moreover there is no reference permitting a court to draw an inference that the legislature intended to invalidate such fee agreements.

Thus the SCA held that remunerations agreements concluded between BRP's and third parties (including creditors) outside the ambit of Section 143 of the New Companies Act are neither prohibited, illegal nor contrary to public policy.

## 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)

Due the fact that the Insolvency Act on the whole treats the estates of a partnership and its partners as separate entities; where a partner of a partnership is sequestrated the knock on effect is that the partnership will need to be dissolved. This is due to the fact that the sequestration of the said partners estate leads to the withdrawal of their contributions. However, it is imperative to note this will not cause the partnership estate to be sequestrated. In terms of the solvent partners (and partnership as a whole), and in accordance with Section 49 and 92(5) of the Insolvency Act, will not result in the solvent partners estates having to be sequestrated. That being said, the partnership will unfortunately have to be wound-up. The partnership assets will be divided amongst the partners in accordance with the partnership agreement or the common law. The assets

due to the insolvent partner in accordance with the termination of the partnership, vests in the trustee of the insolvent partner's estates. ✓[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)

At the outset it must be noted that Section 22 of the Matrimonial Property Act 88 of 1984 ("**Matrimonial Property Act**") allows donations between spouses. ✓

Mr X will be able claim release of the immovable property due to the fact he will be able to prove that the property was acquired by him by a title valid against the creditors of the estate in accordance with Section 21 of the Insolvency Act. ✓ In expansion thereof and on the backbone of case law Mr X will be able to prove that the manner in which he acquired the immovable property (i.e 11 years prior to Mr Y being sequestrated), was a valid and real donation and was not simulated or designed to defeat the rights of creditors. ✓ Thus, I am of the opinion Mr X will have a legally valid title and the donation of the immovable property to him by Mr Y must be released. ✓

In terms of the Land Rover Defender ("**motor vehicle**"), the donation to Mr X was very shortly before the sequestration of Mr Y's estate (i.e. 2 months). ✓ Thus Mr Y's donation of the motor vehicle to Mr X was not a real and valid donation and was clearly simulated or designed to defeat the rights of creditors. Thus the motor vehicle cannot be released. In regards hereto Section 29 of the Insolvency Act should have reference. ✓

That being said it is essential for Mr X to take into account that despite the immovable property being released, it may still be set aside by the trustee as a voidable transaction in terms of the Insolvency Act. Once again, Section 29 of the Insolvency Act should have reference. ✓[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)

Commented [CJ4]: Well structured answer.

Due to the fact that the Civil Union Act 2006 ("**Civil Union Act**") legalized civil unions between same-sex partners as in the case of Mr X and Mr Y, it now has the same legal consequences as any marriage in any other law, ✓ including the common law. ✓ The consequences thereof is that the term spouse includes a civil union partner in terms of the Civil Union Act. ✓ Having the foresaid in mind and owing to the fact that Mr X and Mr Y entered into a civil partnership in terms of the Civil Union Act, Mr Y will be considered a spouse. ✓[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)

Thabo's contract of employment will be suspended ✓ (not terminated) by the liquidator on commencement of Generators Africa (Pty) Ltd ("**Generators Africa**") liquidation. Thabo will thus not need to tender his services, ✓ however he must note will not receive his full salary (whether he tenders his services or not). ✓ He nonetheless will be entitled to his employment benefits such as that from the Unemployment Insurance Fund ("UIF") in the event he is entitled to same in accordance with Unemployment Insurance Act 63 of 2001 ("**Unemployment Insurance Act**"). ✓

Moreover, once the liquidator has been appointed, he/she ought to consult with Thabo (and his trade union if applicable) to ascertain whether there are any proposals to rescue Generators Africa. ✓[5] In the event the liquidator believes there is no prospect of rescuing Generators Africa he may terminate Thabo's contract of employment in accordance with Section 38 of the Insolvency Act.

Thabo must however note, within 45 days of the final appointment of the liquidator his contract of employment will automatically terminate unless terminated earlier or agreed otherwise.

##### **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)

In accordance with 98A(1)(a)(v) of the Insolvency Act and Section 41 of the Basic Conditions of Employment Act 1997 ("**Basic Conditions of Employment Act**"), Thabo will have a limited statutory preferential claim prior to liquidation for his unpaid salary and associated benefits thereto up to R12 000.00 for salary not exceeding three months due and owing prior to the date of sequestration. For the balance, he will have to lodge a concurrent claim in terms of Section 38(10) of the Insolvency Act. Thus in terms of his salary he will have a statutory preferential claim for R12 000.00 and a concurrent claim for the balance of R28 000.00.

Thabo will also have a concurrent claim in so far as he has suffered damages due to the premature termination of his employment contract with Generators Africa in terms of Section 38 of the Insolvency Act. v[3]

In terms of his leave pay due to the fact it is under R4 000.00 and it accrued to him in the previous year it will be paid out in full. In regards hereto, Thabo's claim is considered a statutory claim in terms of Section 98A of the Insolvency Act.

#### 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 pinnacle discussion to ascertain whether the trustee will succeed with his claim against Joe Bond ("**Mr Bond**") is to look at the relevant legal source(s) for setting aside impeachable transaction and dispositions aside in addition to understanding how disposition is defined in the Insolvency Act. v

In regards hereto Section 29 of the Insolvency Act is of utmost importance taking into account that disposition can be defined as "*any transfer or abandonment of rights to property. This includes a ..... pledge or any contract providing therefore.*" v

Having that in mind, the trustee will need to take into account that there may be a case of preferential disposition of property by the debtor in that there was a pre-existing liability that has been settled by John Jack ("Mr Jack") and therefore the estate is not financially worse off. v

In expansion thereof, the trustee in my opinion would have a reasonable chance of setting aside the settlement of the debt due to the fact the scenario gives the impression that the requirements for voidable preferences as prescribed by Section 29 of the Insolvency Act are presented. ✓ Mr Jack's disposition (settlement) was made within six months prior to his sequestration. Based on the time frame between Mr Jack paying Mr Bond and Mr Jack's subsequent sequestration appears that Mr Jack has preferred one creditor above others. ✓ Given the short period of time (20 days) from repayment of the balance of the loan to Mr Bond and Mr Jack's sequestration it appears as if he was in a dire financial position at the time of settlement and it can be reasonably possible to prove that immediately after such disposition Mr Jack' liabilities exceeded the value of his assets. ✓

Where Mr Bond may also find himself in trouble is based on his friendly relationship with Mr Jack. The trustee in regards hereto may claim that there was collusion in the disposition and Mr Bond and Mr Jack actively co-operated with one another to the prejudice of creditors. In regards hereto reference to Section 31 of the Insolvency Act should have reference. Mr Bond need to in regards hereto be aware that due his collision with Mr Jack be called upon to pay damages and a kind of punitive damages . ✓

Mr Bond in all likelihood will have the payment of R45 000.00 impeached and have to rely on the statutory defense that payment was done in the ordinary course of business and with no intent to benefit him above other creditors. ✓[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.