



INSOL
INTERNATIONAL



**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)

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

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.

85/100

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 [17]

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:

(1) and (2) are correct. ✓

- (a)
- (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.

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. ✓

(b)

(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.

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

(c)

(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.

(1), and (4) are correct. ✓
(c)

(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.

A company. ✓
(d)

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.

A High Court. ✓
(c)

(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.

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. ✓

(d)

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.

Both (a) and (b) are correct. ✓

(e)

(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.

True ✓
(a)

(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.

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

(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?

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 ✓

(a)

(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.

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

(c)

(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.

A company can be put into insolvent liquidation even if its assets exceed its liabilities. ✓

(d)

QUESTION 2

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

The debts remain due and payable. ✓

1)

The debts are to be paid to the trustee, following sequestration. ✓

2)

The debtor involved is not absolved from payment of the debts due if payment was made to the insolvent and he was aware of the sequestration. ✓[3]

3)

QUESTION 3

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

In voluntary sequestration, positive ✓[1] confirmation of the value/benefit must be proven towards the creditors, whereas in compulsory sequestration, only a benefit to creditors must be demonstrated.

Commented [CJ1]: Reasonable prospect see memo

QUESTION 4

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

- 1) Section 65(1)-The interrogation of a person, who was summoned at any creditors meeting.
- 2) Section 152 Insolvency Act-Summons by the master to appear before the master.
- 3) Section 417 Companies Act 1973-Summons by the master for examination.
- 4) Section 418 Companies Act 1973-Summons by Commissioner for examination.
- 5) Section 423 Companies Act 1973-Enquiry by court in promotor, director or officer of company.

Commented [CJ2]: Discuss the process 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)

Determine whether the provision can be applied to the winding-up. ✓

1)

Is the matter specifically provided for by the companies act. ✓

2)

Does the specific provision apply for in the mode of Liquidation. ✓[3]

3)

QUESTION 6

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

Should a partnership estate be sequestrated, the respective estates of each member of the partnership must be sequestrated simultaneously. ✓[1]

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 the publication of the notice is as follows;
A immediate stay of sales in execution, preventing the continuation of sale of assets, unless otherwise authorised. ✓

1)

The master may appoint a curator bonis to temporary control the estate. v[2]

2)

3) Condonation of procedural mistakes.

Commented [CJ3]: Act of insolvency

QUESTION 8

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

Pension funds fall under the provision of Section 23(7) v of the Insolvency Act. The Pension was released one month after her date of sequestration. The insolvent may recover such amounts for services rendered. v[2]

1)

2) Furthermore, Section 3 of the General Pensions Act 1979 clearly states that such benefit does not fall part of the assets of a sequestrated 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)

In interpreting Section 63 (1) of the Long-Term Insurance Act 1998, v it is clear that any benefit that may accrue to a individual or a beneficiary as a result of Life Insurance, v

Disability or related health policies v of registered institutions, does not form part of the insolvents estate, cannot form part of a judgement of a court, or can be attached in any manner. v

It is imperative to note that such policy as referred above, must be in full force for a period of three years. v

If it can be proven that a policy as mentioned above has been specifically acquired for the purpose of defrauding other creditors. Section 63 does not apply, and the trustee can apply to court to include such policy benefits in the estate of the insolvent. v

Furthermore, Section 63(1)(b) stipulates that, any such proceeds accrued to a surviving spouse as a result of death of the insolvent, can also not be applied or attached by a trustee, in pursuance of settlement of a insolvents estate ✓

. This stance has been enforced in the matter of Pieterse v Shrosbee No & Others, ✓[10] ruled that all benefits that accrue to a nominate beneficiary, as a result of a licensed policy, is not attachable by a trustee for the settlement of creditors of a insolvent estate.

Furthermore, in the matter of Malcolm Wentzel Discovery ✓
life limited and others, it was ruled that a insolvent surviving spouse that benefited from a insurance policy in terms of being nominated as a beneficiary, will enjoy the exclusion of such a benefit from the insolvent surviving spouse, if the insolvent surviving spouse enjoys the protection in terms of Section 63(1) being the policy holder. ✓

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)

When a sequestration order is granted, it is the duty of teh registrar of the highcourt to issue a notice to every sheriff and messenger that holds property of the debtors estate. ✓

The execution of a judgment is stayed as soon as the sheriff becomes aware of a sequestration of the insolvent estate, unless other presided on by court. ✓

1)

As a point of departure, Section 20 ✓ of the Insolvency act states that all civil proceedings instituted by or against a insolvents estate arer stayed, until the appointment of a trustee, save for the provisions of Section 23 of the Insolvency Act. ✓ No preferential right is vested by a creditor or the sheriff, merely as a result of attachment, other than the sheriffs fees. The effect of sequestration is the divestment of the estate of the insolvent to vest to the Master, until a trustee is appointed. ✓ In instances where a debtor is sequestrated prior to the execution of the sale of immovable or transfer of immovable property by the sheriff, the trustee is entitled to the property or the proceeds thereof. ✓

With referance to legal proceedings against the insolvents estate, any proceedings instituted against a debtor before the sequestration of his estate shall lapse within three weeks ✓

after the date of the first creditor meeting, unless notice of intention to proceed with the proceedings has been issued to the Master or trustee. Section 75 (2) however does allow for legal proceedings to be instituted in terms of a dispute of claim against the insolvents estate after the date of sequestration, but not after the publication of the distribution account, unless allowed so by court. ✓

[10]

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)**

When referring to the allowable fee that may be charge by a business rescue practitioner, one must refer to Section 143 of the Companies Act 71 of 2008. ✓

Subsection (1) ✓

makes reference to the prescribed fee as defined in regulation 128 of the Companies Act 71 of 2008, which regulates the prescribed fee and the experience level of the business rescue practitioner in accordance with the PI Score of the company. ✓

Section 150 requires a fee agreement in respect of the abovementioned to be included as an annexure to the proposed business rescue plan. ✓

Regulation 128 stipulates that a business rescue practitioner may become entitled to additional remuneration over and above the prescribed fee, subject to the remuneration being declared and the creditors voting thereon. Furthermore, the business rescue practitioner is entitled to reimbursements of expenses forgone. ✓

Section 143(2) of the companies act stipulates that an agreement relating to further remuneration must be published to affected persons, and voted on as a separate resolution by the holders of the majority voting interest present at the Section 151 meeting. ✓

In the matter of Caratco (PTY) LTD vs Independent Advisory (PTY) LTD, ✓
the court was clear that it is imperative that further remuneration proposed must be voted on at a separate meeting of creditors or the Section 151 meeting, to vote on the plan. ✓

Furthermore, Section 135(3) ✓

defines the order and preference of payment of post-commencement financiers, the BRP and related expenses standing 1st inline, then the employees and then the sequence of the payment waterfall.

In the matter of Montic Diary and others vs Mazars, it became apparent that any expenses paid to the Business Rescue Practitioners, after a winding up order has been applied for, such payments will be classified as a voidable disposition and such fees will be repayable to the estate of the insolvent.

Lastly, In instances were the Business Rescue Practitioner was not fully remunerated at the time that a business rescue was converted to liquidation, the business rescue practitioner shall enjoy a preference following the cost of Section 97 of the Insolvency Act has been

concluded. This matter has been reiterated in the matter of Diener NO vs Minister of Justice.
√[10]

QUESTION 12

Write a brief note on what happens to the solvent partners' estates and the partnership estate where the estate of a partner is sequestrated? (4)

The sequestration of a partner does not automatically constitute the sequestration of the partnership. √

The sequestration of a partnership does however lead to the dissolution of a partnership. √

The so called dissolution, will result in the winding-up and liquidation of the partnership. Should the partnership be sequestrated as a result of the dissolution √, the partners become jointly and severable liable for the payment of the liabilities of the partnership as a result of same. √[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)

There is a distinction in the treatment of the matter in respect of marriage in-community of property and marriage out of community of property, In the instances of a marriage/ civil union, √

If one partner or spouse has been declared insolvent, √ both partners will automatically be sequestrated, and the estate of both partners will vest in the Master, until a trustee has been appointed. √

Section 21 of the Insolvency Act specifically refers to when a civil union marriage was concluded, out of community of property. √

In this case both of the partners estate shall vest in the master, or alternatively the Trustee, once appointed. The onus will be placed on the solvent partner, to prove to the abovementioned that he/she is the rightful owner of the property, and that same should be released from the Master/ Trustee.

The trustee shall as soon as practicably possible, after his appointment, take possession of the solvents estate subject to ascertaining a warrant and after the sheriff has concluded a comprehensive inventory.

A trustee shall not dispose of any property of a solvent estate, until the expiry of six weeks after such notice has been issued. Such notice will also be published in local newspapers and the Gazette, in a effort to invite creditors to submit their claims. The creditors will be require to prove their claims in the ordinary provisions of the act, and be paid from the available proceeds for distribution, after the realization cost has ben catered for. ✓

In the instances where a antenuptial contract exist, Section 27 ✓ of the Insolvency Act states that no property delivered before three months of marriage shall be regarded as a voidable disposition without value, unless the insolvent was sequestrated within 2 years of the signature of such a contract. ✓

With reference to the immoveable property that Mr X donated to Mr Y, Section 22 of the Matrimonial Property Act, ✓ does not classify a transfer of property as automatically void. A valid transfer of title has been executed and registered in the deeds office in March 2011 and thus the property lawfully is property of Mr Y's estate and thus not fall in Mr X insolvent estate.

With regards to the Land Rover Defender, it is likely that Mr X was insolvent 2 months to the sequestration, and that the transaction can potentially be considered a voidable disposition in terms of Section 26, 30 and 31 of the Insolvency Act, if it can be proved that the disposition resulted to insolvency. ✓[9]

Commented [CJ4]: ?

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)

As a point of departure, the Civil Unions Act 17 of 2006 ✓ has legalized same sex unions in South Africa and the term "spouse" ✓ now includes same. The abovementioned has given effect that a civil union carries the same matrimonial and patrimonial consequences in terms of the Marriage Act 25 of 1961. ✓

From the abovementioned, it is therefore clear that Mr Y will be regarded as a spouse, and the process as set-out in section 13.1 shall be followed accordingly. v[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)

During the consultation with Mr Kekana, the following will be explained, Section 38 of the Insolvency Act applies. v

- 1)
- 2) All employment agreements are suspended on the date that the order was granted on 3 May 2022.

The employees are not required to render services in terms of the employment agreement. v

3)

The employees are not entitled to remuneration in regards to the employment agreement. v

4)

The employees are entitled to claim Unemployment Insurance Benefits. v

5)

Due process needs to be followed to terminate the respective employment agreements, following extensive consultation with all relative stakeholders. v[5]

6)

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)

Employees are entitled to a preferred claim ✓

- 1) per Section 98A of the Insolvency Act.
- 2) Mr Kekana may claim up to 3 months salary limited to R10 000.00 per month, and leave pay, to a maximum of R4 000.00.

Mr Kekana, would as a result be entitled to claim his full outstanding salary and leave pay as a preferred claim in the liquidation. ✓[2]

3)

QUESTION 15

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

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

- 1) Section 26, 29, 30 and 31 of the Insolvency Act applies.
- 2) As a point of departure, Joe Bond is regarded as a secured creditor, given the rights that arise from a pledge.
- 3) The transaction is not considered a disposition without value given the fact that when the pledge was paid, the solvency of the debtor did not change to the detriment of the other creditors.
- 4) On payment of the loan, the asset that was pledged was returned to the debtor's estate.
- 5) Assumingly the disposition did not prefer a single creditor as the asset was returned at value, and the transaction took place in the ordinary course of business.

The time period of the transaction is however problematic given the fact that the transaction was concluded within 6 months ✓

of the sequestration, and Mr Bond will have to rely on the fact that he, as a creditor was not preferred, and that the estate fell insolvent as a result of the transaction. ✓[2]

6)

In conclusion, I would advise Mr Bond, to challenge setting aside on the basis of a voidable transaction.

TOTAL MARKS: [100]

Commented [CJ5]: Be specific there can only be one answer.

*** 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.