



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

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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.

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

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. ✓[15]

QUESTION 2

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

The legal position regarding debts after sequestration is that any debts due to the insolvent will after sequestration fall due and payable to the trustee. ✓ These debts will not be payable to the insolvent personally. See Section 22✓ of the insolvency act, and where payment is made to the insolvent personally, the obligation does not terminate unless the debtor can show and/or prove that he had no knowledge of the sequestration and was *bona fides* in his payment to the insolvent personally. ✓[3]

QUESTION 3

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

The requirements for voluntary surrender and compulsory sequestration must be met however the burden of proof will differ as between voluntary surrender and compulsory sequestration. In compulsory sequestrations only a reasonable prospect✓ that sequestration will be to the advantage of creditors is a requirement whereas positive proof of advantage is required in voluntary sequestration. ✓[2]

QUESTION 4

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

A witness may be summoned to appear and to produce books, documents, or any document relevant to an enquiry specified with reasonable clarity and relevant to the issues. Witnesses to an insolvency enquiry may be subpoenaed in terms of section 152 of the insolvency act where the master may summon the insolvent, the trustee or any other person who is able to give any information concerning the insolvent or the estate. Further, in terms of section 381(2) of the Companies Act 1973 the master may at any time examine any person on oath concerning the winding up. Section 417 and 418 of the Companies Act 1973 equally provides for examination by the master or court any in winding up of a company to investigate fully the validity of any claims. In terms thereof the commissioner or

master may subpoena any witness to give evidence under oath. Further, Section 423 of the companies' act provides that the court may enquire into the conduct of a director or officer of a company in the course of its winding up and may subpoena witnesses in this regard.

Commented [CJ1]: Discuss procedure not substantive law. See memo.

QUESTION 5

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

The three-part test to determine whether any part of the insolvency act applies to liquidations of a company, is as follows:

1. Firstly, can the section apply a winding up? ✓
2. Secondly, is the matter specifically provided for in the companies act? ✓
3. And thirdly, does the provision apply to the mode of liquidation ✓ [3] in question.

QUESTION 6

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

Section 13(1) of the insolvency act states that if the court sequestrates the estate of a partnership, it shall simultaneously sequester the estate of every member ✓ of that partnership other than a partner *en commandite* or a special partner (as defined per the act), 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 the partner shall not be sequestered by the sequestration of the estate partnership. Therefore, if a partnership estate is sequestered the court must simultaneously sequester the estate of every member of the partnership save as excluded per Section 13(1) above. ✓ [2]

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 publication of a notice to surrender in the voluntary surrender of a debtor's estate in terms of Section 4 of the insolvency act, has the effect of constituting an act of insolvency which may enable creditors to apply for compulsory sequestration. The publication of a notice of surrender will also stay any sale in execution in terms of Section 5 of the insolvency Act, however, will not impact the attachment of property of the debtor.

QUESTION 8

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

In terms of section 23(7) of the Insolvency Act Mrs. A may for her own benefit recover and retain the pension monies which she receives or is entitled to for services rendered. Equally, Section 37B of the pension funds Act 1965 provides that a person entitled to a benefit payable in terms of the rules of the registered pension fund is sequestrated, such benefit will not be deemed to form part of the assets in the insolvent estate. Therefore, her pension benefits will not form part of her insolvent estate and she will be entitled to retain this.

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)

As is stated, section 63 of the long-term insurance act 1998 affords policy holders protection to policy benefits under certain long term insurance policies. ✓ This protects that person or the spouse of that person whose life is insured, and which policy has been in effect for more than 3 years ✓ and ensures that the policy benefits do not form part of the insolvent estate during the insured's lifetime or upon their death, if survived by a spouse, child, stepchild or parent, and will not be available for payment of his/her debts provided that the policy devolves upon the spouse, child, stepchild or parent. ✓ The policy and benefits therefrom are equally not served as security for any debts of the deceased's estate. The amended Section 63 removed the limit as previously promulgated by the financial services general amendment act of 2013 of R50 000 and now protects the full value of the policy benefit. ✓ The policy protection applies to policy benefits and assets acquired by the benefits of any policy for a period of 5 years ✓ from the date when the policy benefits were provided. Any person claiming protection under Section 63(1) must prove on a balance of probabilities that this section affords him or her the requisite protection. If the intention of the policy is to defraud creditors, then those policy benefits will not be protected. As per *Pieterse v Schrosbee N.O. & others; Schrosbree NO v Love & others 2005 (1) SA 309 (SCA)*, ✓ it was held that in terms of Section 63 of the long-term insurance Act, that the appointment of a beneficiary means that the proceeds and payment thereof will be made to the beneficiary and not the estate of the deceased. ✓ The proceeds go directly to the beneficiary and the estate of the deceased has no claim thereto. ✓ Notably however, where the estate of the policy holder is sequestrated before acceptance of the policy benefits the case aforementioned will then not apply nor the protection offered therein. ✓ [10]

QUESTION 10

With reference to the relevant provisions of the Insolvency Act, **write an essay** in which you discuss the effect of sequestration on the execution of judgments and other civil proceedings. (6)

Section 20(1)(C) of the insolvency act provides that execution of a judgment is stayed when the sheriff becomes aware of the sequestration unless as may be otherwise directed by a court. ✓ Therefore, the registrar of the high court must notify the sheriff and send a copy of the liquidation or sequestration order to every sheriff who holds property of the insolvent estate under attachment. A notice of surrender or publication thereof can stay a sale in execution that has not taken place, however, will not stay the transfer of property after the sale in execution. ✓ In terms of the insolvency Act Section 98(2), attachment does not confer any preference after sequestration save a preference for costs. Returning to Section 20 of the insolvency act, the estate of the insolvent, including any property under attachment, vests in the trustee and the execution of any judgement must be for the benefit of the general body of creditors, ✓ any proceeds to be paid to the master or trustee. In this regard see Fourie and Another NNO v Edkins 2013 (6) SA 576 (SCA) and Kalianjee NO and Another v Ramlotan and Others. If the sequestration has taken place before the sale in execution the trustee is entitled to the property or the proceeds. In terms of section 20(1)(b) of the insolvency act any civil proceedings instituted by or against the insolvent are also stayed until a trustee is appointed. Section 23✓ states however that any proceedings instituted for the benefit of the insolvent or against that insolvent, and the exceptions contained therein are permissible in so far as they do not affect the estate of the insolvent. Section 75 of the insolvency act also states that any proceedings instituted against the insolvent prior to sequestration shall lapse 3 weeks✓ after the first meeting of the creditors unless the person actioning such proceedings has given notice to the master or trustee of their intention to continue such proceedings and prosecutes such proceedings with reasonable expedition. In the absence of notice the court may permit continuation of any proceedings on conditions as it deems meet, if reasonable explanation for the failure to give notice is provided. ✓[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)

The Companies Act 2008 section 135(3) provides that business rescue practitioners and the expenses arising from the business rescue proceedings must be paid first and foremost. Thereafter Section 143 of the Companies Act 2008 deals with remuneration of practitioners. ✓ Therein the practitioner is entitled to charge an amount as per the prescribed tariff per section 143(6) for remuneration and expenses. Remuneration agreements may also take the form of contingency related agreements as per 143(2) ✓ and may be related to either the adoption of a business rescue plan within a certain period of time or at all, and the

inclusion of any particular matter within such plan, ✓ or the attainment of a result or combination of results in relation to the business rescue proceedings. Any such agreement as per 143(2) is final and binding as per Section 143(3) if approved at a meeting called for the purpose of considering the proposed agreement. ✓ Absent such approval at a meeting to discuss such agreement, the fee agreement is invalid. ✓ In so far as success fee agreements are concerned the case of Caratco (Pty) Ltd v independent advisory board (Pty) Ltd 2020 (5) SA (SCA) ✓ bears reference. Therein the SCA was tasked with determining whether such success fee agreements between business rescue practitioners and third parties, and which fell outside the ambit of Section 143 were prohibited, void for illegality or contrary to public policy. ✓ The court held that Section 143 does not make reference to or deal with fee agreements concluded between practitioners and third parties, nor is there anything within the ambit of Section 143 which suggests that such agreements are void. The court felt precluded or did not feel that the companies act made any provision for the court to invalidate such agreements and that such agreements outside the ambit of Section 143 are neither prohibited, illegal or contrary to public policy. On the issue of public policy, the SCA found that the success fee agreement was such, in this case, that it did not cause any prejudice to the general body of creditors and that it did not or would not affect any distribution paid to the creditors. ✓ The findings of the SCA however were situational and based on the specific facts of the matter at hand and therefore a different decision may well be reached if any success fee agreement was to constitute a breach of the responsibilities or duties, including that of the utmost good faith. This may well take place, or a breach of good faith may be prevalent where the business rescue practitioner cannot act with impartiality or any independence towards the body or creditors, the courts or the distressed company, or where any payment thereto impacted upon the distribution paid to the creditors. Therefore, whilst the case of Caratco validates the success fee agreement specific to that set of facts, it may very well be the case and perhaps should be the case, that such an agreement will be contrary to public policy ✓ in the event that the business rescue practitioner is compromised and is unable to act with the utmost good faith or any integrity. An improper success fee agreement which has the potential to undermine the general body of creditors and impact the role of business rescue practitioner as per section 140(3) of the Companies act 2008, would then perhaps mean the invalidation of any success fee agreement as well as mandate the removal of any business rescue practitioner. In these instances, were the success fee agreement impacts the ability of the business rescue practitioner to render services in terms of the act and/or diminishes his/her capacity to act with the utmost good faith, such success fee agreement may well be contrary to public policy. ✓ [10]

QUESTION 12

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

Firstly, the partnership estate is separate or is a separate entity from that of the individual partners and the assets of the partners distinguishable from the assets of the partnership. ✓ The partnership debts are jointly and severally liable to all the partners. ✓ however. Section 13(1) of the insolvency act states that if the court sequestrates the estate of a partnership

then it must equally sequester the estate of the individual partners save where the partners are not liable to third parties or outsiders for partnership debts. ✓ In addition, partners who have undertaken to pay the debts of the partnership and given security for same, will not be sequestered. Notably however, where the estate of a person who is partner is sequestered, the estate of the partnership will not automatically follow, nor the other individual estates of the other partners. The sequestration of a partner's estate will result in the termination of the partnership and the partnership will be wound up. Where the partnership is wound up the partnership assets or estate will be divided or shared among the partners in terms of partnership agreement or in terms of the common law, and any partnership assets due to the insolvent partner will vest in the trustee of the insolvent estate. ✓[4]

QUESTION 13

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

Firstly, the civil union between Mr X and Mr Y will have no effect on the advices given as the civil union act ensures that civil unions have the same legal consequences as any other marriage in law. ✓ "Spouse" includes a civil union partner. ✓ In order to advise Mr Y one must consider the donations both in terms of the immovable property from Mr X to Mr Y, and the vehicle from Mr X to Mr Y. Section 22 of the matrimonial property act dictates that subject to the provisions of the insolvency act, no transaction is void or voidable simply because it is a donation between spouses. ✓ A donation may provide valid title albeit this must be proved by the solvent spouse. The requirement of good faith will still be a requirement and the donation must be real, not simulated. The onus will fall on the solvent spouse to prove the transaction was valid. ✓ Where the insolvent spouse makes a true donation to the solvent spouse prior to sequestration then the solvent spouse will be able to claim this property from the trustee. ✓ The trustee would have to prove that the donation amounted to an impeachable transaction in order to reclaim the property. One must have regard to section 21 of the insolvency act in this regard. Therefore, the immovable property donated by Mr X to Mr Y in 2011, some 11 years before the sequestration of the estate of Mr X would appear to be a valid donation, ✓ and Mr Y would be able to prove same as the title deed registered at the deed's office should reflect a deed of donation. ✓ Mr Y will therefore be able to prove a valid title to the immovable property. In relation to the donation of the Land

Rover from Mr X to Mr Y some 2 months before the sequestration of the estate of My X, My Y will have to prove and meet the requirement of good faith and that that donation was not simulated. ✓ In light of the timing of the donation My Y will have to prove that the transaction and/or donation is valid in order to confer a valid title. ✓ In the event that Mr Y cannot prove same the donation may very well be a disposition not made for value and therefore an impeachable transaction. ✓[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)

The civil union act legalized civil unions between same sex partners ✓ This has the same effect or consequences as any marriage in terms of any other law, including common law. Spouse is therefore read to include civil union partner in terms of the civil union act. ✓ The insolvency act Section 21(13) however bears reference and states that "the word spouse means not only a wife or husband in the legal sense but also a wife or husband by virtue of a marriage accordingly to any law or custom and also a woman living with a man as his wife or a man living with a woman as her husband, ✓ although not married to one another." As Mr X and Mr Y are in a civil partnership as per the civil union act Mr Y will be considered a spouse even in terms of Section 21(13) and the definition therein. ✓[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)

The contract of employment of Thabo will be suspended ✓ as per Section 38 of the insolvency act. ✓ The contract of employment will be suspended from the date of winding up during the suspension of the contract of employment thabo will not be required to render any services ✓ however will not be entitled to remuneration or employment benefits

✓in terms of Section 38(2) of the insolvency act. Thabo will remain entitled to unemployment benefits during the suspension period of the contract in terms of the Unemployment insurance act. Thabo's contract of employment may be terminated after consultation by the trustee or liquidation with a person designated in terms of a collective agreement, a workplace forum, a registered trade union or a representative of the employees on measures to save or rescue the business in terms of section 38(2) of the insolvency act. If continued employment is not agreed, all suspended contract of employment are terminated 45 days after the appointment of a final liquidator. ✓[5]

Question 14.2

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

Thabo will have a preferential claim ✓for his salary, not exceeding 3 months and up to the maximum value of R12000. Thabo will also have a preferential claim in respect of leave pay up to a maximum of R4000, both preferential claims in terms of Section 98A of the insolvency act. The balance of Thabo's unpaid salary will be a concurrent claim✓. Thabo may also have a claim for severance benefits and in terms of section 38(10) of the insolvency act, he will have an unliquidated concurrent claim for damages due ✓[3]to the suspension or termination of the contract prior to expiration, not exceeding R12000.

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)

Firstly, the trustee will see the payment of the R45 000, namely the balance of the loan to Joe Bond as a voidable disposition. ✓In order to have the disposition set aside the trustee must show and prove in terms of Section 29✓ of the insolvency act that (1) ✓ the disposition was made by the insolvent within 6 months prior to the sequestration or death, (b) that the effect of the disposition was to prefer ✓one creditor above the others and✓ (c) that immediately after making such disposition the debtors liabilities exceeded the value of his assets, namely at the date of disposition. Joe has a statutory defense and will have to prove that (a) ✓ the disposition was made in the ordinary course of business and (b) that it was not intended to prefer any one creditor above the other. ✓ In this instance the trustees will be able to show that the requirements to set aside the disposition have been met, whereafter joe may rely on the requirement that the payment was not intended to prefer one creditor

over another. However, this is a subjective test and in the surrounding circumstances, it would appear that the disposition would have been made by the insolvent without considering the sequestration, which took place some 20 days later. ✓ This disposition would be to the detriment of the general body of creditors in the face on impending sequestration and therefore must be said to prefer Joe above other creditors. It would appear therefore that the trustee will succeed in his claim against Joe. ✓ Further, the payment to Joe may equally amount to an undue preference in terms of Section 30(1) of the insolvency act as the payment may very well have preferred Joe to the other creditors where John knew or was aware of his insolvent estate and/or contemplated sequestration but made the disposition any way. Ordinarily delivery of the property to the creditor will make the creditor a secured creditor, for as long as that creditor remains in possession of the property. Possession will therefore ensure security for a claim. Loss of possession prior to the appointment of a trustee will ordinarily terminate security. Therefore, the trustee will succeed in his claim against Joe and Joe will lose his security. ✓ [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.**