



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.

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[15]

QUESTION 2

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

All the debts payable to the insolvent would be payable to the trustee after sequestration. v If any payment is made directly to the insolvent, the obligation to pay, v is not terminated v[3] unless the debtor involved can prove that he/she had no knowledge of the sequestration and the payment was a bona fide payment.

(The course notes were used in framing the above response)

QUESTION 3

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

With voluntary surrender it must be proven that the sequestration **would be to the advantage of the creditors as a group** (See Ex Parte Erasmus 2015 SA(1) SA 540 (GP paragraph 7) and the decision vests in the court to decide whether the sequestration is indeed to the advantage of the creditors and positive proof is required v- whilst with a compulsory sequestration, the test would be **whether there is reason to believe** that the sequestration would be to the advantage of the creditors. v[2]

(The course notes were consulted in crafting the above response)

QUESTION 4

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

The purpose of an insolvency enquiry has been termed to be a “fact-finding mission” to determine inter alia certain facts that would aide in the insolvency process. Interrogation (of directors and or insolvent and or witnesses) has been found as an efficient manner to undertake during insolvency proceedings.

If reasons exists that a witness would be necessary to provide evidence, a witness could be subpoenaed to provide evidence. The witness subpoena should conform to Form 4 of the Magistrates Court Act for civil proceedings and the following information should be clear in terms of the subpoena: v

- what the witness would be required to testify about;

- the subpoena must be very specific as to the identity of the person who is to provide evidence and the name and full detail of the person should be included on the subpoena and one cannot just state that “ a banker at Standard Bank” for example should come and testify;
- the date and time should be reflected and the place where the enquiry would be held should be clearly reflected;
- the subpoena should be delivered well in advance - at least six weeks is regarded as a reasonable period. v[2]
- the various rights of the person summoned should be contained in the subpoena i.e. the right to legal representation and the entitlement to have access to his /her evidence.

It has been confirmed in case law , that the subpoena should not amount to an abuse of power, but should serve the ultimate purpose of establishing the insolvency and value of the estate. In the Roering matter a subpoena was issued to attend to an enquiry and the liquidators were of the view that the witness could provide important information about a claim. The witness however claimed that the enquiry would amount to abuse of process and it might place the liquidators in an advantageous position with regard to other claims. contended that the enquires was an abuse of process and her examination may result in the liquidators acquiring an unfair advantage in a future matter. The subpoena was set aside but the decision was overturned in the Supreme Court of Appeal, where the court referred to the Bernstein and Others versus Bester matter where the Constitutional Court held that the liquidator is entitled to obtain information as same was in the best interest of the creditors.

The position of interrogation of witnesses is governed by Section 64 to Section 67 of the Insolvency Act and Section 414 to 416 of the Companies Act.

The Master may require a witness to be interrogated and be present at an enquiry under Section 417 and the powers of the Master of the Court in insolvency enquiries are the same as a court

Section 417(1) stipulates as follows:

“the Master or the Court may, at any time after a winding-up order has been made, summon before him or it any director or officer of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person whom the Master or the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company.”

Section 417(2)(b) states that a witness may not decline to answer questions that may lead to self-incrimination. This section has an internal limitation that the Master may only oblige a witness to respond and answer questions of the Director of Public Prosecutions have been consulted.

When summoning a witness is it also imperative that the witness fees (if the person would be away from his duty station) be paid and that he/she be compensated for travelling expenses.

The subpoena should also be clear when the witness is to present documentary evidence, and this should be done specifically with a subpoena duces tecum.

(The course notes were consulted in framing the above response)

Commented [CJ1]: Question deals with procedural matters and not substantive. 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)

Firstly, it should be determined if Insolvency Act provision is capable of being applied in a winding up e.g., provisions relating to rehabilitation cannot apply to a company; ✓
Secondly, it should be determined whether the matter is specifically provided for by the Companies Act; and ✓
Thirdly, whether the provisions apply to the particular form of liquidation in question, i.e., if the Companies Act does not provide for the matter in question and the company is incapable of paying its debts, the provisions of the Insolvency Act shall apply. ✓[3]

QUESTION 6

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

Generally, the Insolvency Act regard the estate of the partnership and its partners as separate entities, but Section 13 (1) of the Insolvency Act ✓[1] provides that if the estate of a partnership is sequestrated, the estate of every member of the partnership also must be sequestrated. There are exceptions though i.e., that those partners who are not liable to outsiders for partnership debts or have undertaken to pay the debts of the partnership and have provided security for payment.

Commented [CJ2]: Partners sequestrated simultaneously but separately form estate

QUESTION 7

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

The publication of the notice of surrender has the following effects:

- All sales in execution (not attachments) are stayed; ✓
- A *curator bonis* may be appointed to temporarily take control of the estate – the Master has the discretion to appoint the *curator bonis*; ✓
- Publication of the notice constitutes an act of insolvency if the debtor does not continue with the application, fails to lodge the statement of affairs, or lodges an incomplete or incorrect statement of affairs. ✓[3]

(The course notes were consulted for the above)

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, ✓ an insolvent can recover any pension money they may be entitled to for services rendered. The General Pension Fund Act, in terms of Section 3, further provides that any benefit received under any pension by a person whose estate is sequestrated does not form part of the assets in the insolvent estate. Mrs. A received her pension after her estate was sequestrated but given the provisions of the General Pension Fund Act, Mrs. A's pension does not form part of her insolvent estate. ✓[2]

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 affords a policy holder protection to policy benefits under certain long term insurance policies. ✓ Before the Financial Services General Amendment Act of 2013 came into operation on 28 February 2014, the protection under Section 63 was limited to an aggregate amount of R50 000. The amended section 63 removed this limit and now the full benefit is protected. ✓

The policy benefits provided to a "protected person" - and that is If a person or spouse of that person is the life insured and the policy has been in force for at least 5 years, the policy benefits will not form part of the insolvent estate, and upon death of the insolvent, if there is surviving spouse, child or parent, the policy benefits will not be available for the purposes of the payment of the debts. ✓ The entire sum of the life insurance is protected by Section 63 and the protected person, or his spouse are the life insured.

It is important to mention that the policy should not serve as security for a debt of the insolvent during his lifetime or upon his or her death if the insolvent is survived by a spouse, child, stepchild, or parent provided that the policy benefits devolve upon the latter persons as the security provided in terms of the policy ✓, has to be satisfied. Therefore, if the policy benefits are payable to them as nominated beneficiaries in terms of the relevant policy, Section 63 does not apply. The above position was confirmed in Pieterse v Shrosbee NO and Others Shrosbee NO v Love and Others ✓ matters where the Supreme Court of Appeal decided that section 63 of the Long-Term Insurance Act does not regulate the payment of proceeds on the insurance policies that was taken out, since the appointment of a beneficiary has the effect that the payment of the proceeds will be made to beneficiary and not the estate of the insolvent. The effect of the decision is that all benefits under life

insurance policies can be protected against creditors of an insolvent estate by nominating beneficiaries under the policies. But, where the estate of the holder of a policy is sequestrated before acceptance of the policy benefits, the decision of the Pieterse matter does not apply. ✓

In the Malcom Wentzel V Discovery Life Limited and Others: in Re Botha and Others NNO v Wentzel, ✓ Mrs. Wentzel life was insured in the event of death. Mr. Wentzel was appointed as beneficiary and Mr. Wentzel's life was also insured in the event of death. The estate was sequestrated before Mrs. Wentzel's death and the issue the court had to consider was whether the unrehabilitated insolvent, who is the nominee beneficiary in terms of a life insurance policy, is entitled to the proceeds of the policy or whether it vested in the trustees of the insolvent estate. The court did not consider Section 63 of the Long-Term Insurance Act as it appeared that the court believed the section did not apply and that the policy benefits were not protected as it did not devolve upon Mr. Wentzel but was payable to him as the nominated beneficiary. Consequently, the court applied section 20(2) and 23 of the Insolvency Act and the proceeds fell into the insolvent estate for the benefit of the creditors. The rationale of the court was that pursuant to the sequestration of the couple joint estate in 2012, they both became insolvent and when Mrs. Wentzel died, the estate did not cease to be insolvent. ✓

There is some criticism levied on the approach the court followed in the Wentzel case as it was argued that Mr. Wentzel was a protected person under Section 63 as he was the appointed beneficiary in the insurance policy and the policy was older than 5 years and did not serve as security for any other debt, upon the death of Mrs. Wentzel. ✓

The above-mentioned protection applies to policy benefits and assets acquired solely with policy benefits for a period of 5 years ✓ from the date when the policy benefits were provided. A person claiming protection in terms of Section must also be able to prove **on a balance of probabilities** that the protection is afforded to him/her under the section and that the policy was not taken out with the intention to defraud creditors. ✓[10]

QUESTION 10

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

Section 20(1) of the Insolvency Act provides that the execution of judgments is stayed as soon as the relevant sheriff becomes aware of the sequestration, ✓ and unless the court directs otherwise. ✓ The aforementioned therefore implies that judgments may not be executed. The court may however order that execution be continued if it is necessary, and if the general body of creditors will not be prejudiced, but the proceeds of the execution of the judgment must be paid to the Master or the Trustee.

Section 20(1)(b) ✓ of the Insolvency Act also prescribes that all civil proceedings instituted against the insolvent are stayed, and therefore no civil action can be continued with. There

are exceptions though and these relate to proceedings that may be instituted by the insolvent for his/her own benefit or proceedings as may be instituted against the insolvent. ✓ The latter would include proceedings that do not affect the insolvent estate as per Section 23 of the Insolvency Act. ✓

The Court in Engler Earthworks (Pty) Ltd v Marais held that Section 23 did not contain an exhaustive list of cases where the insolvent had standing to litigate, and each matter will therefore be assessed on its own merits. ✓[6]

(The course notes were consulted)

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 deals with the business rescue practitioner’s remuneration.

Section 143 (1) stipulates that the business rescue practitioner is entitled to charge an amount for remuneration and expenses in accordance with the prescribed tariffs and he may propose an agreement with the company to provide for additional remuneration to be calculated based on contingencies for the adoption of a business rescue plan or the attainment of a particular result or both. ✓

Section 135(3) of the Companies Act specifically provides that the first expenses to be paid in a business rescue proceeding is those of the business rescue practitioner and the expenses arising from the business rescue proceedings itself. The business rescue practitioner is entitled to charge an amount to the company for the remuneration and expenses of the practitioner in accordance with the tariff prescribed in terms of section 143(6). ✓

In terms of section 143(2), the practitioner may propose an agreement with the company providing for further remuneration, ✓ additional to that as stipulated in section 143(1), to be calculated based on a contingency related to –

- the adoption of the business rescue plan; or
- when a particular result or combination of results are achieved.

Section 143(3) specifically requires that an agreement for the payment of further fee must be approved at a meeting and if not agreed at a meeting, ✓ the fee shall not be valid. ✓ The issue of payment of success fees was extensively discussed in the Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd 2020(5)(SA35 (SCA) (“Caratco”) matter. In the aforementioned matter, the Supreme Court of Appeal (“SCA”) ✓ was tasked to determine

whether remuneration agreements, and “success fees” agreements concluded between business rescue practitioners and third parties were prohibited, void for illegality, or otherwise contrary to public policy. ✓ The SCA held that Section 143 only applies to the remuneration of business rescue practitioners by the company under business rescue and does not deal with fee arrangement concluded between the practitioners and third parties. The court held further that there is nothing in Section 143 that suggests that an agreement not falling within its ambit is void. ✓ The court further noted that the Companies Act 2008 does not penalize the conclusion of remuneration agreements with third parties and does not contain language that entitles the court to draw an inference that the legislature intended to invalidate such fee arrangements. The court therefore held that special fee arrangement concluded between business rescue practitioners and third parties (including creditors), outside the ambit of section 143 of the Companies Act are neither prohibited, illegal and or contrary to public policy. ✓[10]

In the *Caratco* matter, the agreement provided that the appellant would make payment of a sum of money to the respondent once the joint practitioners had implemented the business rescue of the financially distressed company. After complying with their obligations in terms of the “success fee” agreement, the respondent invoiced the appellant for payment of the special fee. The appellant ignored the respondent’s invoice as well as their subsequent demand for payment. As a result, the respondent brought the matter before the court. The court *a quo* held that the appellant had failed to establish any of its defences, and ordered the appellant to pay the success fee to the respondent in terms of their agreement. After being denied leave to appeal by the court *a quo*, the appellant applied for leave to appeal to the Supreme Court of Appeal.

In its application for leave to appeal, the appellant relied on three main arguments. Firstly, the appellant argued that:

- the special fee agreement was illegal on the basis that fees agreed upon outside the parameters of section 143 of the Companies Act were impliedly prohibited by the Companies Act and should be declared void;
- the joint practitioners had breached their responsibilities and duties in terms of section 140(3)(b) of the Companies Act. The appellant specifically relied on sections 75(3) and 76 of the Companies Act, and alleged that since the joint practitioners had failed to fulfil the responsibilities and duties incumbent upon them, the special fee agreement ought to be declared void.
- thirdly, that the success fee agreement was contrary to public policy, as the practitioners failed to act independently and impartially towards the company, by entering into the agreement.

In the judgment, the court found that that there was no substance to the appellant’s “illegality” complaints. Secondly, the court held that the appellant’s reliance on sections 75(3) and 76 of the Companies Act had no merits as the appellant failed to plead facts to bring the conclusion of the fee agreement within the ambits of these sections. Furthermore, as to section 76, the appellant failed to plead the specific sub-section on which it relied. Accordingly, the Supreme Court of Appeal rejected the appellant’s second argument regarding the breach of the practitioners’ responsibilities and duties

Lastly, on the issue of public policy, the court held that the appellant's submissions were without merit as it was not supported by evidence as the facts indicated that the "success fee" agreement was such that it did not cause any prejudice to the body of creditors, as it did not affect the distribution paid to them. The court accordingly concluded that the appellant's public policy defence was also without any merit. The appellant therefore had to pay the fee.

(See article written on 7 April 2020 by Kgosi Nkaiseng referenced Business Rescue, Restructuring and Insolvency, Newsletter, Issued By Cliffe, Decker And Hofmeyer where the above was referenced)

In conclusion, it can be stated that as the practitioners are given wide power including management of the company, it is imperative that they conduct themselves with integrity and honesty and fees paid by third parties must not be for an improper purpose and it should not impact the duties of the practitioner to act in good faith.

QUESTION 12

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

The Insolvency Act has departed from the common law position and predominantly treats the estates of the partnership, and its partners as separate entities. ✓ A partnership can therefore be sequestrated, and the Master would open separate files for each of the estates. ✓

It is important though to note that if the estate of a person who is a partner is sequestrated, it does not necessarily mean that the partnership estate, or the individual estates of the remaining partners, need to be sequestrated. ✓ But given the fact that the effect of the sequestration of one partner's estate is that the partnership itself will terminate and as such the partnership will be wound up. In the latter instance, the partnership assets would be divided amongst the partners as per the partnership agreement or the common law. ✓[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)

Firstly, Mr. X and Mr. Y married under the Civil Union Act and thus Mr. Y is regarded as a spouse of Mr. X and thus the insolvency of Mr. X has implications for Mr. Y. ✓

The trustee of the insolvent estate is allowed in terms of Section 69 (1) to take possession of all **movable** property belonging to the estate (the Land Rover), but before taking such possession the sheriff should have made an inventory in terms of Section 19. ✓ The sheriff can then obtain a warrant from a magistrate under Section 69 (3) to take possession of the property. It is apparent from the fact that the Land Rover was only donated two months prior to the insolvency and that is when the estate was already in distress and could be seen as a disposition without value within six months prior to insolvency and therefore it would be easy to prove that the transaction is voidable. ✓

With regard to the **immovable** property, the solvent spouse can utilize the provisions of Section 21 (2) of the Insolvency Act, and claim release of the property by proving that the property was acquired during marriage by a title valid against creditors. From the facts it is evident that the property was registered in the Deeds office more than 10 years prior to the insolvency. ✓ If the trustee refuses to release the property, then Mr. Y would also have the option to approach the court. ✓ In *Hawkins versus Cohen* it was accepted that the release of the trustee to release assets under Section 21 (2) are not prerequisites for an application to court for the release of assets, but it appears that the trustee first has to be approached. ✓

It would also be necessary to consider the decision in the matter of *Kilburn v Estate Kilburn* (this was before the 1984 matrimonial Act was enacted). The position was held that if property had been obtained during the marriage as a donation (as the house in this particular matter), ✓ then the property would form part of the husband's insolvent estate and the solvent party did not acquire it by a title valid against creditors, but Section 22 of the Matrimonial Property Act now provides that subject to the provisions of the Insolvency Act, no transaction made before or after the coming into operation of the 1984 Matrimonial Act shall be void or voidable merely because it amounts to a donation between spouses. ✓ The requirement of good faith remains paramount, and it would be possible to prove in the stated scenario that the donation was done in good faith. ✓[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 term spouse includes a husband and wife married according to any law or custom. ✓ The Civil Union Act legalized marriages ✓ between same sex partners and this has the effect

that the marriage between Mr. X and Mr. Y would be regarded as a legal union and they are regarded as civil union partners and thus Mr. Y will be regarded as a spouse. ✓[3]

Commented [CJ3]: Mention def in s 21(13). See memo.

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, ✓ and he will not be required to work, but he will also not be entitled to remuneration. ✓ Thabo will however be entitled to receive unemployment benefits under the Unemployment Insurance Act. ✓
The contract of employment may further be terminated if the Liquidator consults with employee representatives ✓ on possible measures to save the company but if no agreement is reached the contract may be terminated 45 days after the appointment of the 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 be entitled to three (3) months unpaid salary to a maximum of R12 000 and he will also be entitled to recover unpaid leave to a maximum of R4000, he will thus be entitled to receive the full leave payment of R3500. ✓ Both these claims are regarded as preferent claims ✓ in terms of Section 98 A of the Insolvency Act. The balance of the salary claim would be a concurrent claim. ✓[3]

QUESTION 15

Joe Bond made a loan of R50,000 to his friend, John Jack. As security, John put up his generator (worth approximately R70,000) as a pledge. The generator was delivered to Joe who kept it on his premises. A few months later, John repaid the remaining balance of the loan (being R45,000) and Joe handed back the generator, the loan now having been

settled. However, John's estate was sequestrated 20 days after he settled the loan with Joe. The trustee appointed in John's estate now claims the payment of R45,000 back from Joe as a voidable disposition.

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

The trustee will have a possible chance of setting aside the settlement of the debts since it appears the requirements for a voidable preference as prescribed by Section 29 of the Insolvency Act are present i.e., that the disposition was made by the insolvent within six months prior to the sequestration and secondly that the settlement preferred one creditor above the other creditors. As Jack was sequestrated only 20 days after the settlement, his estate must have already been in distress, and this could constitute the third element of the test of voidability in that it should be reasonably possible to prove on a balance of probability that immediately after such disposition the liabilities of the John exceeded his value of his assets (at the date of the disposition). The trustee should also note that on objective estimate of the liabilities of the insolvent's liabilities, for which proven claims against the estate can provided a value , could provide a sense of the state of the financial affairs. The trustee would thus succeed in the claim against Joe to claim the R45 000,00 as a voidable disposition.

The trustee should also be aware that Joe might have the defense of indicating that the payments was made in the ordinary course of business and not with the intent to specifically benefit Joe. **[5]**

TOTAL MARKS: [100]

***** End of assessment *****

GENERAL FEEDBACK:

o 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.