



**INSOL**  
INTERNATIONAL



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

Practice Assessment: Paper 1

Date: 6 - 7 October 2022

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

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**EXAMINERS**

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**MODERATORS**

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

All candidates are expected to comply with ALL the instructions.

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### INTRUCTIONS

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

7. Enquiries during the time that the assessment is written must be directed to David Burdette at david.burdette@insol.org or by WhatsApp on +44 7545 773890. Please note that enquiries will only be responded to during office hours.
8. While the assessments are open-book assessments, it is important to note that candidates **may not receive any assistance from any person** during the 24 hours that the assessment is written. **Answers must be written in the candidate's own words; answers that are copied and pasted from the text of the course notes (or any other source) will be treated as plagiarism and persons who make themselves guilty of this will forfeit the assessment and disciplinary charges will follow.** When submitting their answers, candidates will be asked to confirm that the work is their own, that they have worked independently and that all external sources used have been properly cited.
9. Once a candidate's assessment has been uploaded to their student portal (in line with the instructions in the Course Handbook), a confirmatory e-mail will be auto-generated confirming that the assessment has been uploaded. If the confirmatory e-mail is not received within five minutes after uploading the assessment, candidates are requested to first check their junk / spam folders before e-mailing the Course Leader to inform him that the auto-generated e-mail was not received.
10. If a candidate is unable to complete this practice assessment, please note that the practice assessments (mock examinations) are not compulsory and no further opportunity will be provided to complete it. The marking guide for the two practice assessments (Paper 1 and Paper 2) will be uploaded to the course pages after Paper 2 has been written and submitted.
11. You are required to answer this paper by typing the answers directly into the spaces provided (indicated by text that states [Type your answer here]). For multiple-choice questions, please highlight your answer in yellow, as per the instructions included under the first question.
12. Unless otherwise indicated, all references to sections are references to sections of the Insolvency Act 1936.
13. Prior to being populated with your answers, this assessment consists of **15 pages**.

## ANSWER ALL THE QUESTIONS

### QUESTION 1

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

#### Question 1.1

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

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

Select the correct answer:

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

#### Question 1.2

Select the correct answer:

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

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

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

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

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

### Question 1.3

Select the correct answer:

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

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

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

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

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

### Question 1.4

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

(1) The family home.

(2) Clothing and bedding of the insolvent.

(3) Household furniture.

(4) Antique furniture.

(5) Property of third parties.

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

Select the correct answer:

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

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

(c) (1), and (4) are correct. ✓

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

#### Question 1.5

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

(a) The insolvent estate of a deceased person.

(b) The estate of an individual incapable of handling their own affairs;

(c) A partnership.

(d) A company. ✓

#### Question 1.6

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

(a) A Magistrate's Court.

(b) A Small Claims Court.

(c) A High Court. ✓

(d) A Criminal Court.

#### Question 1.7

Indicate the **incorrect** statement:

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

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

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

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

### Question 1.8

Indicate the **correct** statement:

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

### Question 1.9

Select the **correct** answer:

Claims submitted for proof against an insolvent estate must-

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

### Question 1.10

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

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

- (a) True
- (b) False ✓

### Question 1.11

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

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

(a) True

(b) False ✓

### Question 1.12

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

Select the **correct** answer:

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

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

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

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

### Question 1.13

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

Select the **correct** statement:

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



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

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

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

#### Question 1.14

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

Select the **correct** statement:

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

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

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

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

#### Question 1.15

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

Select the **correct** answer:

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

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

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

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

#### Question 1.16

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

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

(a) During a company's business rescue proceedings, employees of the company immediately before the beginning of those proceedings continue to be so employed on the same terms and conditions, except to the extent that changes occur in the ordinary course of attrition, or the employees and the company agree on different terms and conditions of employment, in accordance with applicable labour laws ✓

(b) During a company's business rescue proceedings, the business rescue practitioner can unilaterally vary the employment terms and conditions of the employees of the company immediately before the beginning of those proceedings, subject to the approval of the company's creditors at the first meeting of creditors

(c) During a company's business rescue proceedings, all employment contracts that existed immediately before the beginning of those proceedings are automatically suspended

(d) All of the above

#### Question 1.17

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

(a) A proposal for a compromise in terms of section 155 is adopted by the creditors of the company, or a class of creditors, if it is supported by a majority in number representing at least 75% in value of the creditors or class present and voting in person or by proxy.

(b) Section 155 does not apply where a company is under business rescue proceedings.

(c) A liquidator, where a company is being wound up, may propose an arrangement or a compromise of the company's financial obligations.

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

#### Question 1.18

Select the **correct** answer:

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

(a) The development and implementation of a business rescue plan to rescue the financially distressed company, which plan has the aim of allowing the company to continue in existence on a solvent basis.

(b) To provide a better return for the financially distressed company's creditors or shareholders than would result from the immediate liquidation of the company.

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

(d) None of the above statements are correct.

#### Question 1.19

Select the **correct** answer:

(a) Only the provisions of the Companies Act 2008 apply to the liquidation of solvent companies.

(b) Only the provisions of the Companies Act 2008 and the Companies Act 1973 apply to the liquidation of solvent companies.

(c) Some provisions of the Insolvency Act also apply to the liquidation of solvent companies. ✓

#### Question 1.20

Select the **correct** answer:

(a) A voluntary winding-up by the company is possible only if the company has no unpaid debts.

(b) In a solvent voluntary winding-up by the company, the shareholders have the right to appoint the liquidator.

(c) From the moment of commencement of a solvent voluntary winding-up by the company, the company stops being a juristic person.

(d) A company can be put into insolvent liquidation even if its assets exceed its liabilities.  
v[19]

#### QUESTION 2

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

Upon sequestration, debts payable to the insolvent become payable to the Trustee. v[1]  
The Trustee is entitled to recover the debt from the debtor for the benefit of the general body of creditors. In terms of section 77 of the Insolvency Act, the Trustee shall, when notifying of his appointment in the Government Gazette, call upon all persons to pay their debts within a period and at a place mentioned in the notice. In the event of any debtor failing to make payment, the Trustee is entitled to forthwith recover the debt, if needs be by the institution of legal proceedings against such debtor.

Commented [CJ1]: Section 22 of the Act?

#### QUESTION 3

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

The burden of proof by an insolvent in a voluntary surrender is higher (or put differently, more onerous) than that required in a compulsory sequestration.

Whereas-

- a) in the case of compulsory sequestration, sections 10 (c) and 12 (1)(c) of the Insolvency Act require that the Court be satisfied that a sequestration order be granted if it is of the opinion that, prima facie, **there is reason to believe** that such an order will be to the advantage of creditors if the debtor's estate is sequestrated (ie:- a reasonable prospect); v
- b) Section 6 specifically requires the court to be satisfied in a voluntary surrender that **it will be** to the advantage of creditors to grant an order sequestrating the estate (ie:- actual proof v[2]). The burden of proof is higher as a result of an abuse of process by individuals surrendering their estate.

#### QUESTION 4

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

The witness can be subpoena'd by way of a summons issued either by the Court, the Master or by a Commissioner with the authority to do so in terms of a Court Order, provided the summons is accompanied by payment of the prescribed witness fees.

**Commented [CJ2]:** Discuss procedure. See memo.

The summons is usually served on the witness by the sheriff of the court. ✓[1]

#### 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)

1. Whether the provision is capable of application in the winding-up of a company. ✓
2. Whether the matter is specially (or specifically) provided for in the Companies Act. ✓
3. Whether the provision applies to the mode of liquidation in question. ✓[3]

#### 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 deals with this.

The sequestration of a partnership estate necessarily means that each individual partner's (of that partnership) estate is simultaneously ✓sequestrated by the Court, except a partner who has undertaken to pay the debts of the partnership within a period determined by the Court and has provided security for such payment to the satisfaction of the registrar. ✓[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)

All sales in executions are stayed ✓- section 5 (1) of the Insolvency Act.

The Master has a discretion whether to appoint a curator bonis to the debtor's estate - section 5 (2) of the Insolvency Act. ✓

Publication of such a notice constitutes an act of insolvency in terms of section 8 (f) of the Insolvency Act if the debtor fails to continue with the application, or fails to lodge a statement of affairs, or lodges an incorrect or incomplete statement of affairs, enabling creditors to bring an application for the compulsory sequestration of such debtor's estate.

✓[3]

#### 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)

Given that Mrs A became entitled to her pension benefit *after* her sequestration for services rendered, she will, in terms of section 23 (7) ✓ of the Insolvency Act be entitled to the pension pay-out for her own benefit. Such pension will not form part of the assets in 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 of the Long-Term Insurance Act 1998 ("the LTI Act") ✓ affords protection to a person (also known as a "protected person") who benefits under a policy as contemplated in this section. ✓

Such policy benefits will not form part of the insolvent's estate provided the criteria in section 63 of the LTI Act are met, and are therefore protected against creditors of the insolvent's estate. ✓

The policy benefits are protected if -

- They devolve upon the spouse, child, , step child or parent of the person referred to in s63(1) in the event of that persons death, which must be proved on a balance of probabilities. ✓

Policy benefits will not be protected if it is proven that the policy was taken out with the intention to defraud creditors (s63(4)). ✓

The policy must have been in place for at least 3 years. ✓

Malcolm Wentzel v Discovery Life and others found, wrongly, that the proceeds of a life policy did form part of the insolvent's estate. v[7]

#### 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)

Once a sequestration order is granted, any execution of a judgment against the insolvent is stayed in terms of section 20 (1) (c) of the Insolvency Act ("the Act") v, unless a Court directs otherwise. vA court may direct otherwise if it would be for the benefit of the general body of creditors and they will not be prejudiced, provided the proceeds of any execution are paid to the Master or the Trustee.<sup>1</sup>

In terms of section 20 of the Act, all property of the insolvent, which will necessarily include property under attachment, vests in the Trustee. v

Any attachment of the insolvent's property does not confer any preference to a creditor. v

Similarly, section 20 (1) (b) of the Act, all civil proceedings instituted by or against the insolvent after sequestration are stayed until the appointment of a trustee, save for such proceedings mentioned in section 23, which can be instituted by the insolvent for his own benefit or against the insolvent.

Section 23(6) v entitles an insolvent to sue or be sued in own name without reference to the trustee if the subject matter of such proceedings relate to his or her status (eg: a divorce), or any right which does not affect his estate, or in respect of any claim due to or against the insolvent in terms of the aforesaid claims. v[6]

The insolvent may -

1. for his own benefit recover any pension to which he may be entitled for services rendered in terms of section 23 (7) of the Act; and
2. for his own benefit recover any compensation for any loss or damage which he or she may have suffered, whether before or after sequestration, for defamation or personal injury in terms of section 23 (8) of the Act.

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<sup>1</sup> See *Warricker NO v Senekal 2009 (1) SA 509 (W)*

In terms of section 75 of the Act, any civil proceedings instituted against the insolvent prior to sequestration shall lapse 3 (three) weeks after the first meeting of creditors if the claimant (or plaintiff) in such proceedings gives notice to the trustee within the aforesaid period, or where no trustee is appointed, to the Master, that such person intends to proceed with such proceedings. Such person is obliged to prosecute such proceedings with reasonable expedition. In the event of a failure by the claimant to give such notice, the court may condone the non-compliance and allow such person to continue with the proceedings on such conditions as it finds fit if it is satisfied that there is a reasonable excuse for the failure to give such notice.

Nothing prevents a creditor who has already instituted action before sequestration to prove a claim in the estate of the insolvent.

In terms of section 44 (3) of the Act, a creditor who's claim was rejected at a meeting of creditors is entitled to institute legal proceedings for the recovery of its claim, subject however to the proviso in section 75 (2) which prohibits a person from instituting legal action after the confirmation of a trustee's account in respect of a claim which arose before sequestration, unless the court finds that there was a reasonable excuse for the delay in instituting such legal proceedings. .

**Commented [CJ3]:** Not relevant. Answer too long. Be guided by mark allocation.

#### 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)**

A business rescue practitioner's remuneration is statutorily governed by section 143 of the Companies Act of 2008 ("the Companies Act").

In terms of the Companies Act -

- a business rescue practitioner ("BRP") is entitled to charge the company for his or her remuneration and expenses (in terms of section 143 (1)) at a rate as determined by the Minister (defined as the member of Cabinet responsible for companies) who may make Regulations prescribing a tariff of fees and expenses which the BRP is entitled to charge (section 143 (6)). ✓ Regulation 128 prescribes the tariff of fees which a BRP is entitled to charge. ✓
- The BRP may propose an agreement with the company for his remuneration to be more than the tariff amount to be calculated on the basis of a contingency related to -



- the adoption of a business rescue plan at all , or within a particular time, or the inclusion of any particular matter in such plan [s143 (2) (a)]; or
  - if the BRP attains any particular result or combination of results relating to the business rescue proceedings [s143 (2) (b)].
- Any agreement to remunerate the BRP envisaged in section 143 (2) ✓ at a higher rate is final and binding on the company if it is approved by –
- the holders of a majority of the creditors' voting interests as determined in accordance with section 145 (4) to (6), present and voting at a meeting called for the purpose of considering the proposed agreement [s143 (3)(a)] and
  - the holders of a majority of the voting rights attached to any shares of the company that entitle the shareholder to a portion of the residual value of the company on winding-up, present and voting at a meeting called for the purpose of considering the proposed agreement [s143 (3)(b)].
- In the event that approval is not obtained in accordance with the aforesaid, any such fee contemplated in such agreement is invalid. ✓
- Any creditor or shareholder who voted against the agreement to pay the BRP a higher rate than that determined in s143 (1) is entitled to make an application to Court within 10 business days after the date upon which the proposal was voted on, for an order setting aside the agreement [s143 (4)]. ✓ The grounds that such an applicant must establish is that the agreement is not just and equitable, or that the higher remuneration provided in the agreement is unreasonable considering the financial circumstances of the company [s143(4)(a) and (b)].

The Courts have also dealt with the question whether a remuneration agreement concluded between a BRP and third party outside the scope of section 143 of the Companies are prohibited or against public policy. ✓

In *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*<sup>2</sup> ✓the Court was specifically requested to deal with this issue. The Court found that section 143 of the Companies Act only applies to remuneration agreements between the BRP and the company under business rescue, and not third parties. The Court reasoned that there was nothing in the Companies Act to suggest that a remuneration agreement concluded between a BRP and third parties outside the ambit of s143 of the Companies Act is void, ✓or that such Act contained any provisions which penalize such an agreement, or that an inference could be drawn by the Court to find such an agreement invalid. Accordingly, the Court found that such

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<sup>2</sup> 2020 (5) SA 35 (SCA)

agreements (which would include a "success fee" agreement or contingency fee agreement) are neither prohibited, or illegal, nor 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)

Contrary to the position where a partnership is sequestrated, where each of the individual partners in the partnership are also simultaneously sequestrated, the position is different where the estate of a partner is sequestrated.

Where a partner's estate is sequestrated, it does not mean that the remaining (solvent) partner's estate is also sequestrated. ✓

Where the insolvent partner is sequestrated, this brings about a termination of the partnership. The partnership will then be wound-up.

✓

In the winding-up process of the partnership, the assets of the partnership are distributed to the partners either in terms of the common law or in terms of a partnership agreement (if applicable). ✓

The assets in the partnership to which the solvent partner is entitled pursuant to the termination of the partnership will remain such partners assets. On the contrary, the assets to which the insolvent partner is entitled will vest in the trustee of the insolvent partner's 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 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)

Mr Y is regarded as a spouse for the purposes of section 21 of the Insolvency Act (please see the answer to the next question giving an explanation of this). ✓

In terms of section 21(1) of the Insolvency Act, all of the property (which includes both immovable and movable property) of the solvent spouse vests in the Master upon sequestration of the insolvent spouse and then in the Trustee upon their appointment. ✓

As such, both the immovable property and the Land Rover will vest in the Master with effect from 1 February 2022. x

The Master and the Trustee are entitled to deal with such property as if it were the property of the sequestrated estate of Mr X.

Mr Y has the burden of proving that he is entitled to the immovable property and the Land Rover (in which event the Trustee must release the property to Mr Y) and must prove either

- that it was his property before the marriage (s21(2)(a); or
- that the property was acquired by him under a marriage settlement (s21(2)(b); or
- that it was property acquired by him during the marriage by a title valid as against creditors of the insolvent (s21(2)(c); or
- that it is property protected under the Long Term Insurance Act 52 of 1998 (s21(2)(d); or
- that it was acquired with any such property aforesaid or with the income or proceeds thereof (s21(2)(e).

Commented [CJ4]: Apply to your answer?

Given that both the immovable property and the vehicle were donations, Mr Y will not be able to prove any of the above requirements to entitle the release of the property to him.

As such, both the property and the motor vehicle will be dealt with as if they were assets in the insolvent estate of Mr X.

Commented [CJ5]: Immovable prop real donation -see s 22 of Matrimonial Prop Act? Land Rover not valid donation.

In addition, a donation is included in the definition of a disposition in the Insolvency Act.

The donations of the property and the motor vehicle by Mr X to Mr Y were not for value and may be set aside by the Trustee in terms of section 26 of the Insolvency Act. [2]

### 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)

Mr Y will be regarded as a "spouse" in terms of the Insolvency Act. ✓  
In terms of the Civil Union Act 2006 ("the Civil Union Act"), a "civil union" includes a marriage or a civil partnership registered in terms of such Act. ✓  
A "civil union partner" means a **spouse** in a marriage or a partner in a civil partnership concluded in terms of the Civil Union Act.

Section 21 (13) of the Insolvency Act refers to a "spouse" as being a wife or husband married according 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. ✓

Section 13 (1) of the Civil Union Act extends the legal consequences of a marriage contemplated in term so the Marriage Act of 1961, to that of a civil union. In terms of section 13(2)(b), spouse includes a civil union partner. ✓[4]

As such, Mr Y is regarded as Mr X's spouse.

#### 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)

In terms of section 38 of the Insolvency Act, Thabo's contract of employment will be suspended ✓with effect from 3 May 2022 (ie: - the date of the winding up order).

During the period of suspension -

- Thabo will not be required to render his services in terms of his employment contract and will not be entitled to any remuneration (✓section 38(2)(a)); and ✓
- He will not be entitled to any employment benefits in terms of his contract of service (s38(2)(b). ✓

- He will be entitled to unemployment benefits in terms of the Unemployment Insurance Act 1966 from the date of suspension, subject to the provisions of that Act (s38(3)). ✓

The liquidator may not terminate Thabo's contract of employment unless they have -

- Consulted with any person which the company in liquidation was obliged to consult prior to its liquidation in terms of a collective agreement;
- Consulted with a workplace forum;
- Consulted with a registered trade union in respect of which Thabo is a member;
- Consulted with Thabo, or his representative.

In the event that Thabo and the liquidator do not agree on his continued employment, his contract under suspension will terminate 45 days after - ✓[5]

- The date of appointment of the liquidator; or
- If a co-liquidator is not appointed, the date of the first meeting of creditors.

#### **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 has the following preferential ✓ claims -

- An amount of R12 000 in respect of his salary (his salary for February, March and April are limited to such maximum amount in terms of section 98A of the Insolvency Act); and
- He will be entitled to the full benefit of R3500 owing to him for leave pay as it relates to the year preceding the liquidation. ✓

Thabo's claims set out above are preferential claims.

The balance owing to Thabo in terms of his salary, being an amount of R18 000 [R30 000 less R12 000] is 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)**

Given the short period of time (20 days) when John's estate was sequestrated after repaying the loan to Joe, this suggests that John's estate was insolvent at the time of such repayment.

The Trustee will succeed in the claim to set aside the disposition as a voidable preference ✓ in terms of section 29 ✓ of the Insolvency Act if he can prove that -

- The disposition was within 6 months of John's sequestration. ✓ This is established from the given facts;
- The effect of the disposition was to prefer one creditor above the others. Joe was paid in full. This reduced the amount available to the other creditors upon sequestration and has the effect of prejudicing them. Manifestly, and given that Joe was paid in full, he was preferred above the other creditors; ✓
- Immediately after the disposition, John's liabilities exceeded the value of his assets. Given the short period between the time John paid Joe and the date of John's sequestration, it is probable that his liabilities exceeded his assets after the payment to Joe. ✓

In terms of section 30 of the Insolvency Act, it appears that John repaid Joe at a time when John's liabilities exceeded his assets and with the intention of preferring Joe over his (John's) other creditors. The Court may set aside the disposition in terms of section 30(1) of the Insolvency act. ✓

Also, the repayment by John to Joe had the effect of prejudicing John's other creditors or preferring Joe over such creditors. It also appears that John and Joe colluded with one another and in terms of section 31 of the Insolvency Act, the court may set aside the transaction (of R45 000).

As such, the trustee will succeed in his claim against Joe. ✓[5]

**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.