



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.

77/100

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. ✓[18]

QUESTION 2

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

Debts that were due to the insolvent debtor before their sequestration will now, after sequestration, vest in the Master and then, once appointed, the trustee. ✓The debts must be paid to the trustee or the obligation is not deemed to be settled, ✓unless the payee can prove that he was bona fide and had no knowledge of the sequestration. ✓[3]

QUESTION 3

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

In voluntary surrender, the applicant (the debtor or representative) must be able to prove that there is a reasonable prospect that the sequestration would be to the advantage of the group of creditors as a whole, and that it would not prefer any single creditor.

Commented [CJ1]: Positive proof.

In a compulsory sequestration, the applicant (usually a creditor) must include an affidavit in their application which states that there is reason to believe that the sequestration would be to the advantage of the group or creditors as a whole, no prove is required.

Commented [CJ2]: Reasonable prospect. “may” see memo.

QUESTION 4

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

The Master must issue the initial summons to the witness
The summons must be served ✓by hand/personal delivery by the sheriff of the court, or the insolvency practitioner ✓or the insolvency practitioner’s clerk ✓
If served by the sheriff, the manner of service must be set out in the return of service ✓
If served by the insolvency practitioner or his clerk, the manner of service must be set out in an affidavit. ✓[5]

QUESTION 5

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

1. Determine whether the section can apply to a winding-up ✓
2. Determine whether the Companies Act specially deals with or provides for the matter ✓
3. Determine whether the provision of the Insolvency Act applies to the matter: if the Companies Act does not deal with the matter, and the company is commercial insolvent, the provisions of the Insolvency Act will apply ✓[3]

QUESTION 6

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

The Insolvency Act treats the estates of the partnership and its partners as separate entities. ✓ Generally each individual partners' estate will be sequestrated alongside the partnership estate according to section 13(1) of the Insolvency Act. ✓[2] This does not apply to partners who have undertaken to pay the debts of the partnership or given security for the partnership's debt or who is protected under the Moratorium Act.

QUESTION 7

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

Publication of a notice of surrender in the voluntary surrender of a debtor's estate has the following effects:

1. If the debtor does not continue with the application of the voluntary surrender, the publication of the notice of surrender is considered an Act of Insolvency meaning that creditors can then apply for the compulsory sequestration of the debtor's estate ✓
2. All sales in execution are stayed ✓ and no proceeds from the sales can be paid to creditors
3. The Master can decide to appoint a Curator Bonis to control the estate temporarily ✓[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)

No, the pension will not fall into Mrs A's insolvent estate. Section 23(7) of the Insolvency Act allows Mrs A to recover the pension for services provided for her own benefit as it was received after the sequestration of her estate.

QUESTION 9

Section 63 of the Long-Term Insurance Act 1998 affords protection of policy benefits under life insurance policies where the protected person's estate is sequestrated. **Write an essay** in which you analyse the relevant provision. Also refer to relevant case law. (10)

Where a debtor's estate is sequestrated, section 63 of the Long-Term Insurance Act 1998 affords the debtor with protection of policy benefits under life insurance policies, and the full value of said policy benefits are excluded from the debtors' insolvent estate, provided various conditions are met.

The policy benefits provided, or to be provided, to the debtor are protected if they comply with the various provisions of section 63. Firstly, the policy benefits must be provided to the debtor under one or more assistance, life, disability or health policy (as set out in Table 1 of Schedule 2 of the Long-Term Insurance Act) in which the debtor or its spouse is the life insured. Secondly, the policy must have been in force for at least 3 years on the date of sequestration.

If the above provisions are complied with, then the policy shall be protected in terms of section 63 of the Long-Term Insurance Act, and other than for payment of any debt secured by the policy, the proceeds from the policy will be protected and therefore excluded from the debtor's insolvent estate during the debtor's lifetime. On the death of the debtor, the policy benefits will not be available to settle the debtor's debts if she/he is survived by a spouse, child, step-child or parent. The person claiming the protection (debtor or spouse, child, parent etc) must be able to prove on a balance of probabilities that the protection is afforded to them under section 63 of the Long-Term Insurance Act.

The legal precedent for this is evident in case law; for example in *Pieterse v Shrosbee NO & Others*; *Shrosbee NO v Love and Others*, the Supreme Court of Appeal ruled that the payment of the proceeds of a protected policy will be paid to the beneficiary and not to the deceased debtor's estate. The trustee of the deceased debtor's estate has no claim to the policy proceeds.

According to section 63(2) of the Long-Term Insurance Act, the protection contemplated above shall only apply to assets acquired solely with the policy benefits for a period of five years from the date which the policy benefits were provided. Furthermore, if a policy was

taken out to defraud creditors, the policy benefits will not be protected under this section.

✓[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)

Sequestration of a debtor has far reaching implications, we will now consider the effect of sequestration on the execution of judgments and other civil proceedings.

Section 20 of the Insolvency Act provides that the estate of the insolvent, ✓ which includes all attached property, vests in the trustee. As such, the Registrar of the High Court must ensure that a copy of the sequestration order is transmitted to every sheriff and messenger who holds property of the insolvent under attachment, ✓ and that they are made aware of the sequestration of the insolvent. If the insolvent is sequestrated before the sheriff has sold movable property subject to attachment, or transferred immovable property and paid the proceeds, then the trustee will be entitled to the property or its proceeds.

As soon as the sheriff becomes aware of the sequestration, section 20(1)(c) ✓ provides that an execution of judgement is stayed, unless the court directs otherwise. The court may require the execution to be continued if it will not prejudice the general body of creditors and provided that it is expedient and necessary. ✓ The proceeds of any execution that are continued must be paid to the Master or the trustee.

The effect of sequestration of an estate on civil proceedings is that any civil proceedings instituted by or against the insolvent are stayed from the date of sequestration, until the trustee is appointed. However, any proceedings that, in terms of section 23, ✓ may be instituted by the insolvent for their own benefit or as may be instituted against the insolvent; i.e. proceedings that have no impact on the insolvent estate for example assets that are not included in the insolvent estate. Section 75 states that civil legal proceedings that were instituted before sequestration will lapse three weeks after the first meeting unless the person who instituted the proceedings gives notice to the trustee/Master that they intend to continue with the proceedings and expects to finalise the proceedings within 3 weeks of the notice. ✓ If no notice is given, the court may allow for the proceedings to continue if it is of the opinion that there was a valid reason for not giving notice. ✓[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)

A business rescue practitioner is entitled to charge the company an amount for the remuneration and expenses incurred by the business rescue practitioner during the business rescue process. ✓

Section 135(3) of the Companies Act provides that the expenses of the business rescue practitioner and expenses that arise from business rescue are the first expenses to be paid in a business rescue proceeding. ✓

Remuneration is dealt with in section 143; the business rescue practitioner is entitled to charge an amount in accordance with the tariff prescribed in section 143(6) however, in terms of section 143(2) the business rescue practitioner can come to an agreement with the company to provide for further remuneration on a contingency basis based on one of the following contingencies: ✓ a) the adoption of the business rescue plan at all, or within a period of time, or the inclusions of a matter in the plan, b) ✓ the attainment of particular result(s) from the business rescue proceedings. ✓ If the business rescue practitioner and the company agree to a form of additional contingency remuneration, this is, according to section 143(3) required to be approved at a special meeting i.e. "a meeting called for the purpose of considering the proposed agreement". ✓ If it is not approved, the contingency remuneration is invalid. ✓

Contingency fee/ success fee agreements concluded between business rescue practitioners and third parties are not considered to be within the ambit of section 143, as ruled by the Supreme Court of Appeal in *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*. ✓ The Supreme Court of Appeal ruled that section 143 only governs remuneration of business rescue practitioners by the company under business rescue. However, the court noted that although the agreement does not fall within the ambit of section 143, there is nothing in the Insolvency Act that says that it is therefore void. Such agreement between a business rescue practitioner and a third party is also not penalized in terms of the Companies Act, nor is there any language in the Companies Act to suggest that such an agreement would be invalid. As such contingency fee agreements between business rescue practitioners and third parties are outside the ambit of section 143 of the Insolvency Act but are not invalid, illegal, prohibited 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)

The Insolvency Act treats the estates of the partnership and its partners as separate entities. ✓ The sequestration of one of the partner's estate, will result in that partner's contribution being withdrawn from the partnership, and the termination of the partnership. ✓ While the

partnership is dissolved, the partnership estate, and those of the other partner(s) are not sequestrated. ✓[3]

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 X and Mr Y are considered to be spouses in terms of the Insolvency Act. According to section 21 of the Act, the solvent spouse (Mr Y's) property will vest in the Mr X's trustee and the onus is on Mr Y to prove that the property claimed is in fact his property. ✓

Mr Y should be able to claim Land Rover from the trustee, as it is a true donation that was made by Mr X to Mr Y. However the trustee could try prove that the donation is an impeachable transaction, i.e. a disposition without value, to reclaim the Land Rover from Mr Y.

The trustee may try to set aside the transaction by relying on Actio Pauliana ✓ - which is a transaction where a debtor aims to defraud the creditors by reducing the value of the estate by getting rid of assets without receiving adequate value in return. The donation diminished the debtors assets. [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)

Yes, Mr Y will be considered a spouse in terms of the Insolvency Act. A civil partnerships ✓ in terms of the Civil Union Act 2006 is considered to have the same legal effect as a marriage in any law, including the Insolvency Act. ✓[2]

QUESTION 14

Generators Africa (Pty) Ltd, a company that manufactures generators for the lucrative South

Commented [CJ3]: See criteria discussed in notes. Land Rover not a true or real donation? And immovable property?

Commented [CJ4]: Also discuss s 21(13) definition?

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)

From the date of the winding-up order of the company, all employment contracts are suspended, ✓ meaning that Thabo will no longer have a valid employment contract with Generators Africa from that date. ✓

While Thabo's contract is suspended, he will not be required to tender his services but will also not be entitled to any remuneration or employment benefits from the company. ✓

The contract can be finally terminated ✓ by the liquidator or in terms of section 38 of the Insolvency Act, in consultation with

- A person designated in terms of a collective agreement
- A workplace forum
- A registered trade union
- An employee representative for Thabo

If the liquidator and Thabo do not agree to continued employment, then the suspended contract will terminate after 45 days after the appointment of the 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:

- R12000 for his salary due and owing prior to liquidation
- R3 500 for leave pay due and owing ✓

Thabo will have a concurrent claim for the balance of his salary due and owing (R18 000)

Thabo will have a preferential claim for severance benefit in terms of section 41 of the Basic Conditions of Employment Act of up to R12 000 and in terms of section 38(1) of the Insolvency Act Thabo may have a concurrent claim ✓[3] for damages suffered due to the premature termination of the employment contract Thabo will also have a concurrent claim for damages as a result of suspension of the contract

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 main voidable dispositions provided for in the Insolvency Act include

1. Disposition without value
2. Voidable preference
3. Undue preference
4. Collusion

The transaction was not a disposition without value as the assets of the estate was not diminished. It is not a voidable preference or collusion as the creditor, Joe Bond, is a secured creditor. It is unlikely to be undue preference as Joe Bond is secured.

The Master of the High Court would not order the set off of the transaction, despite it being within the 6 month period prior to sequestration, as it happened in the ordinary course of business.

Commented [CJ5]: Decide which of the provisions are applicable and discuss. Answer too general.

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.