



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.

81/100

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.[16]

QUESTION 2

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

Debts that are due to the insolvent debtor before sequestration are payable to the trustee^v in terms of section 22^v of the Insolvency Act. If such a payment is paid to the insolvent debtor, the obligation is not discharged unless the third party debtor can prove that he was unaware of the sequestration of the insolvent debtor and had no ulterior motives. ^v[3]

QUESTION 3

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

In voluntary surrender, the sequestration should result in some payment to the general body of creditors. In this case, the onus is on the applicant to prove that the sequestration is to the advantage of creditors as a group, see Ex Parte Erasmus, 2015(1)SA 540 GP. While the same principle applies to compulsory sequestration, what is required to be proved by the applicant is that a reasonable prospect ^v[1]exists that the sequestration will be to the advantage of the creditors.

Commented [CJ1]: Positive proof

QUESTION 4

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

Section 152 of the Insolvency Act gives the master the power to summon any witness to any insolvency inquiry. The initial summons is issued by the master. The summons is usually prepared by an attorney and issued in the Magistrate Court. ^v[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)

A three-part test has to be applied to decide whether a specific provision of the Insolvency Act applies to the liquidation of companies, namely;

1. the first step is to determine whether the of the Insolvency Act is capable of application in a winding up. ✓
2. then next is to determine whether the matter is specifically provided for by the Companies Act, and ✓
3. in the event the Companies Act does not specifically provide for the matter in question and the company is unable to pay it its debts, the provisions of the Insolvency Act applies with the necessary changes. ✓[3]

QUESTION 6

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

At common law a partnership is not a legal entity having a separate existence from its individual partners. However, the Insolvency Act has departed from this position. A partnership, in terms of the Insolvency Act, is treated as a separate entity with an estate which may be sequestrated as if it were a natural person. ✓ Section 13(1) of the Insolvency Act provides that if the court sequestrates the estate of a partnership it must simultaneously sequestrate ✓[2] the estate of every member of the partnership, except those partners who are not liable to outsiders for the partnership's debts or who have undertaken to pay the debts of the partnership and have given security for the payment.

QUESTION 7

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

Once a valid notice of surrender has been published and the debtor does not continue with it's application or fails to lodge the statement of affairs or lodges an incomplete or incorrect statement, such a publication of the notice of surrender qualifies as an act of insolvency ✓ and can be used by any creditor to apply for the compulsory sequestration of the affected debtor's estate.

The publication of this notice also has the effect of staying ✓ all sales in execution but not attachments.

Thirdly, the Master in his discretion, may appoint a *curator bonis* to temporarily control the estate of the affected debtor. ✓[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)**

In terms of section 23(7) of the Insolvency Act the insolvent may, for his own benefit, recover any pension to which he or she may be entitled to for services rendered. **✓** Separately, section 37B of the Pension Funds Act 1965 provides, amongst others, that if the estate of any person entitled to a benefit payable in terms of the rules of a registered fund is sequestrated, such a benefit shall not be deemed to form part of the assets of the insolvent estate of that person. **✓[2]** Therefore, the pension benefit paid to Mrs A in this case, enjoys the above protection and shall not form part of the insolvent 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)**

Section 63 of the long-term Insurance Act 1998 protect the entire sum of a life insurance policy from forming part of an insolvent estate, if:

1. he protected person or his spouse is the life insured; **✓**
2. such a policy has been in force for at least three years, **✓** and the policy does not serve as security for a debt of the debtor during that person's lifetime or upon his death, **✓** if he is survived by a spouse, child, step-child or parent provided that the policy benefits devolve upon these persons. **✓**

In the case of *Pieterse v Shrosbee NO & Others, Shrobree NO v Love & Others* 2005 (1)SA 309 SCA **✓** it was held that if the policy benefits are payable to these persons (certain close family members) as nominated beneficiaries in terms of the said policy, then section 63 protection would not apply. **✓**

The protection afforded in terms of section 63 applies to policy benefits and assets acquired solely with the policy benefits for a period of five years from the date when the policy the benefits were paid out. **✓**

An insolvent debtor claiming protection in terms of this section must also be able to prove, on a balance of probabilities, that the protection is afforded to him under this section of the Act. **✓** Lastly, if the insolvent debtor's intention was to defraud creditors when this policy was taken out, the benefits payable thereof shall not be protected in terms of section 63 of the Long Term Insurance Act. **✓[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 of the Insolvency Act provides that the estate of the insolvent, including property under attachment, vests in the trustee. ✓ This section further provides that the execution of a judgment is stayed as soon as the sheriff concerned becomes aware of the sequestration unless the court orders otherwise. ✓ The court may still order that execution be continued with if it is necessary and the general body of the creditors will not be prejudiced. In such a case, the proceeds must be paid to the Master or the trustee. ✓

Section 20(1)(b) ✓ of the Insolvency Act provides further that any civil proceedings instituted by or against the insolvent are stayed until a trustee is appointed except for those matters instituted by the insolvent for his own benefit or as may be instituted against the insolvent. ✓ These exceptions refer to proceedings that do not affect the insolvent and may include proceedings relating to his status or his assets that do not form part of the insolvent estate. ✓

In terms of section 75 of the Insolvency Act any civil action or application instituted before sequestration shall lapse three weeks after the first meeting of the creditors unless the person who instituted those proceedings has given notice within that period to the trustee, in his absence, to their Master that he or she intends to continue the proceedings and after three weeks from the notice prosecutes those proceedings within a reasonable period of time. The court always has a discretion to allow the continuation of proceedings on such conditions as it may think fit if notice has not been given and only if there is a reasonable ground for such failure. ✓[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)**

Section 143 of the Companies Act 2008 makes provision for the business rescue practitioner's (BRP) remuneration. ✓ This is the first expense, amongst others, to be paid in business rescue proceedings and it is in accordance with a tariff prescribed in terms of the Act. ✓

A BRP may in terms of section 143(2) propose an agreement with the company to make provision for his remuneration in addition to the remuneration mentioned above. Such additional remuneration would be calculated on the basis of a contingency in relation to -

- i) the successful adoption of a business rescue plan, or approval thereof at an agreed deadline, or with specific performance indicators to the business rescue proceedings, or a combination of all these factors; or ✓

- ii) the achievement of any particular result or combination of results relating to the business proceedings. ✓

A special meeting would have to be convened to consider and approve the proposed agreement.

The case of *Montic Diary (Pty) Ltd (In Liquidation) & Others v Mazars Recovery & Structuring (Pty) Ltd & Others* 2021 (3) SA 527 WCC made an order the effect of which is that once an application for winding up is presented to the court by the BRP, such a company is prohibited from making payments to third parties including the BRP's fees. Any such payment made under the circumstances will be void unless a court orders otherwise.

In *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 SCA, the Supreme Court of appeal concluded that section 143 only applies to the remuneration of BRPs by the company under business rescue and does not deal with fee arrangements concluded between BRPs and third parties. It went on to pronounce that remuneration agreement or contingency fee agreement or special fee agreement, concluded between the BRPs and third parties, including creditors, outside the ambit of section 143 are neither prohibited, illegal nor contrary to public policy. ✓

Any portion of or the whole of the BRP's remuneration and expenses that is not fully paid during the course of the business rescue proceedings, will rank in priority before the claims of all other secured and unsecured creditors. ✓[10]

Commented [CJ2]: Not applicable to question.

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)

Common law has been changed or amended by the Insolvency Act to the effect that a partnership is treated as a separate entity with an estate which may be sequestrated as if it were a natural person. ✓ However, the effect of the sequestration of one partner's estate is that the partnership itself will terminate and as such wound-up. In such an instance, the partnership assets are divided amongst the partners in terms of either the partnership agreement or common law. Any partnership assets due to the insolvent partner, flowing from the termination of the partnership, vests in the trustee of the insolvent partner's estate.

✓ After the dissolution of the partnership, each partner becomes liable jointly and severally for the debts of the partnership and maybe sued for the whole of such debts without the necessity of the creditors taking action against the other members or assets of the partnership. ✓ [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)**

Since X and Y are regarded as spouses in terms of the extended meaning afforded to civil unions entered into in terms of the Civil Union Act, an insolvent spouse's estate vests in the Master and upon appointment in the trustee as if it were the property of the sequestrated estate. The solvent spouse may in terms of section 21 of the Insolvency Act claim the release of the assets if it is proved:

1. that it was the property of the spouse before the marriage;
2. that it is the property acquired under a marriage settlement;
3. that it was the property acquired during the marriage by a title valid against creditors;
4. that it is the property protected under the Long Term Insurance Act 52 of 1998;
5. that it was acquired with the property under 1 to 2 above or the income or proceeds thereof.

In terms of decided cases, what is key is that the transaction in terms of which the solvent spouse acquired the property was not designed to defeat the rights of creditors of the insolvent spouse. In terms of section 22 of the Matrimonial Property Act, donations between spouses are legal. As a result a valid and real donation will therefore afford the solvent spouse a legally valid title against the creditors of the insolvent spouse. Therefore, the donation made by X of the immovable property to Y qualifies as a valid donation of affording a valid title against creditors. On the other hand, the donation of the Land Rover Defender, made two months before the sequestration of X, does not constitute a real donation and as such will not be released by the trustee.

Even if the motor vehicle were to be released by the trustee to Y, the trustee may still set aside such a donation as a voidable transaction in terms of the Insolvency Act. **[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)**

In terms section 21(13) of the Insolvency Act the term "spouse" has been given an extended meaning and it includes a wife or husband married according to any law or custom and also persons living together as husband and wife though not legally married. As a result of the Civil Union Act, which legalized civil unions between same-sex partners who now have the same legal consequences as any marriage in any other law including the common law. Consequently, X and Y, being civil-union partners, are included in the extended definition of a spouse in terms of the Insolvency Act. [4]

QUESTION 14

Generators Africa (Pty) Ltd, a company that manufactures generators for the lucrative South African market, is placed in liquidation by an order of the High Court on 3 May 2022. One of the company's employees, Thabo Kekana, approaches you for advice on the effect that the liquidation of the company will have on his contract of employment. Thabo has not been paid since the end of January 2022, his salary being an amount of R10,000 per month. In addition, he has R3,500 leave pay owing to him for the preceding year.

Advise Thabo Kekana regarding the questions below.

Question 14.1

What effect will the liquidation of the company have on Thabo's contract of employment? (5)

In terms of section 38 of the Insolvency Act, Thabo's contract of employment has been suspended on the commencement of the liquidation proceedings of the company, effective from the 3rd May 2022. As a result, Thabo is not obliged to tender his services to the company. His contract may ultimately be terminated by the liquidator after having consulted with the employees, including Thabo, or the employees' recognized trade union on options available to rescue the business. As of the 3rd May 2022, Thabo will be entitled to claim unemployment benefit in terms of section 35 of the Unemployment Insurance Act, 1966. [4]

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 a claim for arrear salaries of R40 000. However, his claim will be limited to R12,000 and this portion of his claim will enjoy statutory preference. The balance thereof will be treated as a concurrent claim.

With regard to his leave due, his claim of R3500 will be accepted in full. [3]

In the event his contract of employment is terminated, Thabo will also be entitled to claim severance benefit but only limited to a maximum of R12,000.

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)

In terms of the Insolvency Act a disposition means any transfer or abandonment of rights to property. This includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation, or any contract providing thereof. As a result of this definition, the repayment of R45,000 by John to Joe constitute a disposition. For this disposition to be attacked successfully by the trustee, the disposition has to fall into one of the four categories stipulated in terms of the Insolvency Act, namely - Disposition without value, voidable preference, undue preference or collusion in terms of section 21, 34(voidable sale of business), 46(set-off), 84(2)(instalment agreement) and 88(invalid mortgages).

In this case, the trustee will not succeed with his claim since the repayment had a bona fide underlying liability that was settled.

Should the trustee succeed with his claim, Joe would have a secured claim against the insolvent estate of John on the strength of the pledge he had over the generator.

Commented [CJ3]: S 29 of the Act. Read question identify applicable provision and discuss.

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.