



INSOL
INTERNATIONAL



PROGRAMME IN SOUTH AFRICAN INSOLVENCY LAW AND PRACTICE 2022

Practice Assessment: Paper 1

Date: 6 - 7 October 2022

EXAMINERS

Ms R Bekker Prof A Boraine Prof J C Calitz Prof H Coetzee Ms Nastascha Harduth
Dr E Levenstein Prof A Loubser Dr M Roestoff

MODERATORS

Dr D Burdette Mr Z Cassim

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.

MARKING GUIDE

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. 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. The assessment paper is set in English and should be answered in English; however, if there are candidates who wish to answer in Afrikaans, they may do so.
13. Unless otherwise indicated, all references to sections are references to sections of the Insolvency Act 1936.
14. 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.

QUESTION 2

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

Answer:

In terms of section 22 of the Insolvency Act the debt is payable to the trustee. (1) If payment is made to the insolvent, the obligation is not terminated (1) unless the debtor can prove that he was *bona fide* and had no knowledge of the sequestration. (1)

QUESTION 3

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

Answer:

Voluntary surrender requires positive proof of advantage for creditors. (1)
Compulsory sequestration requires a reasonable prospect that sequestration will be to the advantage of creditors. (1)

QUESTION 4

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

Answer:

Service by way of Deputy Sheriff (1). Can be personal service or served on a person older than 16 years and is in attendance at the address or by way of affixing the subpoena to a gate if no access can be attained (1). Can be served by the trustee or his clerk (1). Must be personal service (1). Affidavit is the return of service (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)

Answer:

- Is the provision capable of being applied in a winding-up?
- Is the matter specifically provided for by the Companies Act?
- Does the provision apply to the type of winding-up?

QUESTION 6

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

Answer:

The private estates of partners will be sequestrated simultaneously (1) but separately from the partnership estate. (1)

QUESTION 7

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

Answer:

- The notice constitutes an act of insolvency (1)
- The publication stays all sales in execution (1)
- The Master may appoint a *curator bonis* (1)

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)

Answer:

In terms of section 23(7) of the Insolvency Act the insolvent may for his own benefit recover any pension to which he may be entitled for services rendered. (1) The pension benefits to which Mrs A becomes entitled to will therefore not form part of the joint insolvent estate. (1)

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)**

Answer:

The **entire sum** of a life insurance policy is protected in terms of **section 63** of the Long-Term Insurance Act 1998 if: (1)

- the "protected person" or his or her spouse is the **life insured**; (1)
- the relevant policy has been in force for at least **three years**; (1) and
- the policy does not serve as **security** for a debt of the debtor (1)
 - during that person's *lifetime*; (1) or
 - upon his or her *death*, if he or she is survived by a spouse, child, stepchild or parent, provided that the policy benefits *devolve* upon the latter persons. (1) Therefore, if the policy benefits are payable to them as nominated beneficiaries in terms of the relevant policy, section 63 does not apply - see *Pieterse v Shrosbee NO & Others*; *Shrosbee NO v Love and Others*. (1)
- The above-mentioned protection applies to policy benefits and assets acquired solely with the policy benefits for a period of **five years** from the date when the policy benefits were provided. (1)
- A person claiming protection in terms of section 63 must furthermore be able to **prove**, on a balance of probabilities, that the protection is afforded to him or her under this section. (1)

Policy benefits will not be protected as indicated above if it can be shown that the policy in question was taken out with the intention to **defraud** creditors. (1)

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)**

Answer:

Section 20(1)(c) of the Insolvency Act provides that the execution of a judgment is stayed as soon as the sheriff concerned becomes aware of the sequestration, unless the court directs otherwise. (1) However, the court may order that execution be continued if this is expedient and necessary and the general body of creditors will not be prejudiced, but the proceeds must be paid to the Master or the trustee (1) - see the discussion in para 11.4 of the Notes. In terms of section 20(1)(b) of the Insolvency Act any civil proceedings instituted by or against the insolvent are stayed, until a trustee is appointed, except such proceedings as may in terms of section 23 be instituted by the insolvent for his own benefit or as may be instituted against the insolvent. (1) The exceptions refer to proceedings that do not affect the insolvent estate, such as proceedings relating to status or assets that do not form part

of the insolvent estate. (1) Section 75 of the Insolvency Act provides that any civil legal proceedings instituted before sequestration shall lapse three weeks after the first meeting, unless the person who instituted those proceedings has given notice within that period to the trustee or, if no trustee has been appointed, to the Master, that he or she intends to continue the proceedings and after three weeks from the notice "prosecutes those proceedings with reasonable expedition". (1) The court may permit the continuation of the proceedings on such conditions as it may think fit if notice has not been given, if it is of the opinion that there was a reasonable excuse for such failure. (1)

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)**

Answer:

- Section 143 of the Companies Act deals with the remuneration of business rescue practitioners (1)
- A business rescue practitioner may propose an agreement with the company providing for further remuneration and that is to be calculated on the basis of a contingency related to (a) the adoption of a business rescue plan at all, or within a particular time, or the inclusion of any particular matter within such a plan; or (b) the attainment of any particular result or combination of results relating to the business rescue proceedings (2)
- Section 143(3) specifically requires an agreement for further remuneration to be approved "at a meeting called for the purpose of considering the proposed agreement". Without the approval at a meeting called for the purpose to approve the agreement, such a fee is invalid. (2)
- *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) (1)
- The Supreme Court of Appeal held that section 143 only applies to the remuneration of business rescue practitioners by the company under business rescue and does not deal with fee arrangements concluded between practitioners and third parties (1)
- There is nothing in section 143 of the Companies Act that suggests that an agreement not falling within its ambit is void (1)
- The Companies Act does not penalise the conclusion of remuneration agreements with third parties, and does not contain language entitling a court to draw an inference that the legislature intended to invalidate such fee agreements (1)
- The Supreme Court of Appeal held that remuneration agreements, or co-called success fee or special fee agreements, concluded between business rescue practitioners and third-parties (including creditors), outside the ambit of section 143 are neither prohibited, illegal, nor contrary to public policy (1)

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)**

Answer:

It is important to note that if the estate of a person who is a partner is sequestrated, it does not necessarily follow that the partnership estate, or the individual estates of the remaining partners, need to be sequestrated. (1) However, the effect of the sequestration of one partner's estate is that the partnership itself will terminate, and as such, the partnership will be wound-up. (1) Where a partnership is wound-up, the partnership assets are divided amongst the partners in terms of either the partnership contract or the common law. (1) Any partnership assets due to the insolvent partner pursuant to the termination of the partnership vests in the trustee of the insolvent partner's estate. (1)

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)**

Answer:

Section 21 of the Insolvency Act applies. (1) It provides that the additional effect of the sequestration of the separate estate of one of two spouses shall be to vest in the Master, and upon appointment in the trustee, all the property of the spouse whose estate has not been sequestrated as if it were property of the sequestrated estate. (1) In terms of section 21 the solvent spouse may claim release (1) if he or she is able to prove that the relevant property was acquired by the solvent spouse by a title valid against the creditors of the estate. (1) According to case law this means that the transaction in terms of which the solvent spouse acquired the property was not simulated or designed to defeat the rights of creditors. (1) Donations between spouses were legalised by section 22 of the Matrimonial Property Act. (1) A valid and *real* donation will therefore afford the solvent spouse a legally valid title. (1) The donation of the immovable property to Mr Y appears to be a real donation and may thus be released. (1) However, the donation of the Land Rover shortly before

sequestration of Mr X's estate clearly does not constitute a real donation and can thus not be released. (1) It should be noted that any donation, even if the relevant property has been released, may still be set aside by the trustee as a voidable transaction in terms of the Insolvency Act. (1)

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)

Answer:

The term "spouse" has an extended meaning, and 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 (section 21(13) of the Insolvency Act) (1). The Civil Union Act legalised civil unions between same-sex partners which now has the same legal consequences as any marriage in any other law, including the common law. (1) The term "spouse" therefore includes a "civil union partner" in terms of the Civil Union Act. (1) Mr Y will therefore be regarded as a spouse in terms of the Insolvency Act. (1)

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)

Answer:

The contract of employment will be suspended in terms of section 38 of the Insolvency Act (1); Thabo is no longer obliged to offer services (1) but is entitled to UIF (1) - until fate of contract of employment has been determined (terminated (1) or transferred to new owner as provided for in s 38 of the Insolvency Act read with Labour Relations Act (1).)

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)

Answer:

- Claim for salaries in arrears (½) - limited amount preferential (½)
- Claim for leave payments (½) (limited amount preferential) (½)
- Over and above the preferential amounts, concurrent / non-preferential claims for salaries, etc in arrears (½) and damages (½)

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)

Answer:

It appears that the repayment of the loan by John to Joe is a voidable preference in terms of s 29 of the Insolvency Act, (1) since the following elements are present:

- The payment (disposition) occurred within six (6) months prior to the sequestration of John's estate. (1)
- Joe was preferred as he received full payment of the loan. (1)
- Accept that John was insolvent after he made the payment. (1)

However, since Joe abandoned his security, the generator, (1) in exchange for the full settlement of the debt one month before John's sequestration, (1) Joe would be entitled to claim indemnification from the trustee (1) before he repays the amount received to the insolvent estate. (1)

TOTAL MARKS: [100]