



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.

71/100

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. X

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. x
- (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.** x

(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. ✓

[17]

QUESTION 2

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

[Debts owing to the insolvent at date of sequestration will vest as an asset in the estate and the debts will now become due and owing to the insolvent estate unless such debts have prescribed. ✓ The appointed trustee will be in a position to recover amounts previously owed to the insolvent as these debtors have now become debtors of the estate. If necessary and with directions given by the Master in terms of Section 80(bis) or by creditors at a second meeting of creditors, the trustee will be in a position to institute legal action to recover outstanding debts.][1]

Commented [CJ1]: Position re debts not assets.
S 22 of Act
If payment to insolvent obligation not terminated
Bona fide

QUESTION 3

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

[An advantage to creditors remains a requirement in both instances however in the case of voluntary surrender advantage to creditors must have be proved prior to sequestration order being granted.]

As for the compulsory sequestration , there must only be a reasonable prospect that it will be to the advantage of creditors .][1] ✓

Commented [CJ2]: Positive proof

QUESTION 4

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

[A witness may be subpoenaed in the following manners:
For a confidential interrogation in an insolvent estate of a natural person is in terms of section 152 of the insolvency act .
For a confidential interrogation in a company or close corporation is in terms of 417 and 418 of the Companies Act 1973 .
A witness may be subpoenaed if the witness has matters relating to the insolvent or the insolvent's business in terms of section 65 of the insolvency Act.
A witness can be subpoenaed if the witness was part of management of the company in terms of section 423 of the Companies Act 1973 .
A witness can also be subpoenaed if a Second meeting of creditors was postponed for the purpose of holding an enquiry.] [0]

Commented [CJ3]: Manner or process or procedure followed when serving. See memo.

QUESTION 5

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

[1. To establish if the provision is capable of applying in a winding up of a company;
2. Establish whether a certain matter relating to the estate is provided for in the Companies Act, if not Section 339 of the Companies Act √makes provision for the incorporation of the Insolvency act;
3. Establish what type of liquidation commenced, as the provisions of the Insolvency Act will only apply to companies unable to pay their debts. √ [2]

Commented [CJ4]: Provision capable of being applied. See memo.

QUESTION 6

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

[Section 13(1) of the insolvency act 1936 - if the court sequestrates the estate of the partnership whether provisionally or final or acceptance of surrender , the estate of every member of that partnership √will be sequestrated except n partner en commandite or a special partner defined in the Special Partnerships Limited liability act ,1861 (act 24 of 1861) of the Cape of Good Hope.] [1]

Commented [CJ5]: Each estate of partner individually and separate from estate.

QUESTION 7

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

[Stay of sales in execution √
Appointment of curator bonis (to temporarily control the assets ect..) √
If the debtor does not continue with the application , lodge incomplete statement of affairs or fails to lodge any statement of affairs the publication of notice will form as an act of insolvency.] √[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 , √it does not form part of her estate. Section 23(7) √of the insolvency act 1936- Insolvent may for their own benefit recover any pension which they may be entitled for the services rendered .][2]

QUESTION 9

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

[In Section 63 of the Long-Term Act 1998, √ the limit was removed and the full value of the policy benefit is now protected if The 'Protected person' or his or her spouse is the life insured √,The relevant policy has to be in force for at least three years,√ and This policy does not serve as security for debt a debtor. √

During the insolvents lifetime √the policy benefits will not form part of his or her estate and this policy benefit is only to provide protection to certain close family members of the deceased. √ Policy benefits will not be provided to the deceased protected person and the beneficiary will be entitled to the full benefit form the insurer. See Pieterse v Shosbree and others and others ; Shosbree NO v Love and Others 2005 (1) SA 309 (SCA). √A person Claiming protection in terms of section 63 of the Long-Term insurance act , must be able to prove , on probabilities that the protection is afforded to him . √Policy benefits will not be protected if they can prove that the benefit that was taken out will not defraud the creditors . √The protection applies to the policy benefits and assets acquired solely with the benefits for a period of five years from the date when the benefits were provided. Risk only policy cannot be an asset to the joint estate - Naidoo v Discovery Life Limited and Others [2018] JOL 39960 (SCA) ,para[12]. √ The court may not order the owner to repay premiums with the intent to benefit a person on the expense of a creditor .][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 execution is stayed as soon as the sheriff becomes aware of the sequestration unless court directs otherwise. The court may order that execution be continued if this expedient and necessary and the general body of creditors will not be prejudiced, but the proceeds must be paid to the Master or to the trustee.]

Section 20 of the insolvency act provides that any civil proceedings institute by or against insolvent is stayed, until trustee is appointed. Section 23 of the insolvency act may be instituted by the insolvent for his own benefit or against the insolvent. Section 75 of the insolvency act provides that any civil legal proceedings shall lapse three weeks after the first meeting. [4]

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 (1) of the companies act the company has the right to pay the business rescue practitioner's remuneration and expenses in accordance with the established tariff. The practitioner may suggest an agreement with the company that would provide for additional remuneration that would be determined by a contingency relating to (a) the adoption of a business rescue plan or (b) the attainment of any particular result relating to the business rescue proceedings. When a business rescue practitioner applies to court to discontinue the business rescue proceedings and placing the company in liquidation, any payments towards fees or disbursements of a business rescue practitioner will be considered to be a void disposition in terms of section 341(2) of the companies act 1973. The company is prohibited from paying third parties, including business rescue practitioners, after an application for the winding-up is filed with the court. Such disposition will be void, unless a court otherwise orders - Montic Diary (PTY) Ltd (in liquidation) and Others v Mazars Recovery & Restructuring (Pty) Ltd and Others.]

In Caratco (Pty) Ltd v Independent Advisory (pty) Ltd, the supreme court was tasked with deciding whether alleged success fee agreements, reached between business rescue practitioners and third parties outside the ambit of section 143 of the companies act 1973, were prohibited, void for illegality or contrary to the public. This section only applies to the remuneration of business rescue practitioners by company under business rescue and does not deal with fee agreements between business rescue practitioners and third parties.

Commented [CJ6]: Not applicable to question.

√The Supreme court of Appeal held that It was decided that success fee agreements reached between business rescue practitioners and third parties that were not covered by Section 143 are neither prohibited , illegal , nor contrary to public policy.]√ [7]

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)

[If a partner's estate is sequestrated, it does not necessarily mean that the partner's estate will be sequestrated as well. √The partnership itself will come to an end and be wound up as a result of the sequestration of one partner's estate √.According to the terms of their partnership agreement, partners share the assets of the partnership. √ The trustee of the insolvent estate receive any assets due to the insolvent partner as a result of the partnership's termination.]√ [4]

QUESTION 13

In 2010, Mr X and Mr Y entered into a civil partnership in terms of the Civil Union Act 2006. On 1 March 2011, Mr X donated certain immovable property to Mr Y. Soon thereafter, the property was registered in Mr Y's name in the Deeds Office. On 1 February 2022, Mr X's estate was finally sequestrated. Two months before his sequestration, Mr X donated his Land Rover Defender to Mr Y. Mr Y approaches you for advice.

Answer the questions below.

Question 13.1

What is the legal position in regard to the immovable property and the Land Rover Defender? Will the assets fall into X's insolvent estate? Refer to the relevant provisions of the Insolvency Act and other relevant legislation in your answer. (10)

[The trustee will take control of all assets. In terms of section 21,√ Mr Y may claim release,√ if he is able to prove the relevant immovable property was acquired by the solvent spouse by title valid against the creditors of the estate,√- Snyman v Rheeder 1989 (4) SA 496 (T) 5051 . Donations between spouses were legalised by section 22 of the matrimonial Property act . √A valid and real donation of the property will therefore afford the solvent spouse a legally valid title . √The donation of the immovable property to MR Y appears to be a real donation and may be released. The donation of the Land Rover Defender shortly before the sequestration of Mr X estate **does not** constitutes a real donation and thus means the Land Rover Defender will not be released . Some donations even if the relevant property has been released , may still be set aside as a voidable transaction in terms of the insolvency act . √] [5]

Commented [CJ7]: See memo

Commented [CJ8]: Identify the legal principles and then apply the requirements mentioned in Act. See memo.

Question 13.2

Advise Mr Y regarding the question as to whether he will be regarded as a "spouse" in terms of the Insolvency Act. (4)

[The term spouse has a wider meaning and includes a wife or husband who is married by law or custom and also a person who lives together as husband and wife but who are not legally married. √ The Civil Union Act legalised civil unions between same-sex partners and has the same consequences as any marriage in any other law √. Spouse therefore includes a civil union partner √ in terms of the Civil Union Act - Motala and Another NNO v Moller and Others 2014(6) SA 223 (GSJ) para[24].] √ [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)

[The contract employment of Thabo will be suspended. √
Thabo will not be required to work during the period of the suspension and will not be remunerated. √
Thabo will be entitled to unemployment benefits during the suspension in terms of the unemployment Insurance act. √
Thabo's employment contract may be terminated if the liquidator consults with employee representative on measures to save the business. √
Thabo's employment contract may be terminated automatically 45 days after the appointment of a final liquidator if no agreement is reached on the continued employment. √] [5]

Question 14.2

What possible claims does Thabo have against the insolvent company? Thabo also wants you to explain to him what the nature of these claims will be. (3)

[Thabo will be able to recover the max of 3 months unpaid salary and the max amount of R12 000. This is a statutory preferent claim, in terms of section 98A of the Insolvency Act. The rest of the value exceeded the R12 000 will be a concurrent claim.]
Thabo can claim for the unpaid leave owing to him to the max of R4000 , the value exceeded will form part of the concurrent claim in terms of section 98A. The balance of the rest of Thabo's leave pay will be a concurrent claim . Thabo will however be entitled to a claim against the estate in terms outstanding salary, leave and severance.] [3]

QUESTION 15

Joe Bond made a loan of R50,000 to his friend, John Jack. As security, John put up his generator (worth approximately R70,000) as a pledge. The generator was delivered to Joe who kept it on his premises. A few months later, John repaid the remaining balance of the loan (being R45,000) and Joe handed back the generator, the loan now having been settled. However, John's estate was sequestrated 20 days after he settled the loan with Joe. The trustee appointed in John's estate now claims the payment of R45,000 back from Joe as a voidable disposition.

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

[Yes the trustee will succeed because of the following :

1. The disposition can be set aside in terms of section 26 of the insolvency act , as the disposition is one without value ;
2. The disposition falls within the two year period before date of sequestration and
3. The trustee can prove that immediately after the disposition was made , John's estate became insolvent.
4. Joe will not be able to prove that the assets of John's estate exceeded its liabilities after the disposition was made .
5. A pledge as counter-performance to serve as surety , this transaction have been held to be in ordinary course of business . - Van Eeden's Trustee v Pelunsky & Mervis 1922 OPD 144.
6. The surety agreement could cause the liabilities of John's estate to exceed its assets therefore the disposition must be set a side .

Commented [CJ9]: Section 29. see memo.

As the transaction recured within six months before the date of sequestration and it had the effect of preferring on creditor above the other and John's liabilities exceeded his assets a mere 20 days after date of disposition, such disposition can be set aside in terms of section 29 of the insolvency Act as this constitutes a voidable preference. [2]

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.