



INSOL
INTERNATIONAL



PROGRAMME IN SOUTH AFRICAN INSOLVENCY LAW AND PRACTICE 2023

Summative Assessment (Examination): Paper 1

Date: 23 - 24 November 2023

Time limit: 24 hours (from 13:00 SAST on 23 November to 13:00 SAST on 24 November 2023)

EXAMINER

Ms B Bennett

MODERATORS

Ms R Bekker Dr D Burdette Ms J Calitz Mr Z Cassim Mr E Levenstein

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.

MARKS AWARDED 89/100

INSTRUCTIONS

1. This assessment paper will be made available at **13:00 (1 pm) SAST on Thursday 23 November 2023** and must be returned / submitted by **13:00 (1 pm) SAST on Friday 24 November 2023**. 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.Paper1Summative**. An example would be something along the following lines: 202223-336.Paper1Summative. **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 or Brenda Bennett at **brenda.bennett@insol.org** or by WhatsApp on +27 66 2282 010. Please note that enquiries will only be responded to during UK office hours (which are 9 am to 5 pm GMT, or 11 am to 7 pm SAST).

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. If you submit your assessment by e-mail, a statement to this effect should be included in the e-mail.
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 summative assessment (examination), please note that a re-sit assessment will only be given if there are exceptional circumstances that prevent the candidate from completing or submitting it (such as illness). Feedback on the final assessment will be provided within four weeks of the paper having been written - please do not enquire about your marks before four weeks have elapsed.
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.

PART 1 - MULTIPLE CHOICE QUESTIONS (20 MARKS)

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. Each of the 20 questions count 1 mark.

Question 1.1

Select the **correct** statement:

Which of the following **does not** constitute an act of insolvency?

- (a) If the debtor makes, or attempts to make, any disposition of any of his property which has, or would have the effect of prejudicing his creditors or preferring one creditor above another.X
- (b) If the debtor removes, or attempts to remove, any of his property with intent to prejudice his creditors or to prefer one creditor above another.
- (c) Where judgment is given against the debtor and it appears from the return by the office that he has not found sufficient disposable property to satisfy the judgment (*nulla bona* return).
- (d) A debtor who is over-indebted and unable to pay his debts and has applied for debt review.

Question 1.2

Select the **correct** statement:

Indicate which of the following courts have jurisdiction to sequestrate an estate of a debtor:

- (a) Magistrate's Court.
- (b) Regional Court.

(c) Local or Provincial Division of the High Court. ✓

(d) Both (a) and (c).

Question 1.3

Select the **correct** statement:

The granting of a winding-up order:

(a) Suspends all civil proceedings until the appointment of a liquidator. ✓

(b) Has no effect on pending civil proceedings.

(c) Suspends all civil proceedings until the winding-up process has been completed.

(d) Immediately ends all pending civil proceedings which must be instituted again after the winding-up process has been completed.

Question 1.4

Select the **correct** statement:

Property acquired by an insolvent after sequestration of his estate:

(a) Generally forms part of the insolvent estate. ✓

(b) Does not form part of the insolvent estate.

(c) Vests in the division of the High Court that granted the sequestration order.

(d) Vests in the Master and, after his or her appointment, in the trustee of the insolvent estate until an offer of composition has been accepted.

Question 1.5

Indicate the **incorrect** statement:

(a) The insolvent is not entitled to enter into contracts after sequestration. ✓

(b) The insolvent may, with the written consent of the trustee enter into a contract by which he or she disposes of property of his or her estate.

(c) The insolvent may enter into an engagement contract after sequestration.

(d) The insolvent may enter into a contract if it does not affect his estate negatively.

Question 1.6

Select the **correct** statement:

Which of the following statements accurately reflects the treatment of municipal debts related to immovable property under the Insolvency Act and the Local Government: Municipal Systems Act 2000?

- (a) Municipal debts incurred within three years immediately preceding the date of sequestration are considered as part of the costs of realising the property.
- (b) Municipalities have the authority to embargo the transfer of property until all outstanding municipal debts, irrespective of the two-year period, are fully settled.
- (c) Section 118(2) of the Local Government: Municipal Systems Act takes precedence over section 89(1) of the Insolvency Act, determining the applicable period for calculating municipal debts.
- (d) The Court in *City of Johannesburg v Kaplan NO* clarified that all service charges, basic fees, and refuse removal fees are considered taxes under section 89(5) of the Insolvency Act. ✓

Question 1.7

Select the **correct** statement:

- (a) The trustee's remuneration (fee) is determined by a tariff which is laid down by statute, but which must thereafter be taxed by the Master or the Registrar.
- (b) The trustee's remuneration (fee) is determined by a tariff which is laid down by statute, but which must thereafter be taxed by the Registrar.
- (c) The trustee's remuneration (fee) is determined by a tariff which is laid down by statute, but which must thereafter be taxed by the Master. ✓
- (d) The trustee's remuneration (fee) is determined by a tariff which is laid down by statute, but which must thereafter be taxed by the Master or the Court.

Question 1.8

Select the **correct** statement:

Section 44(1) of the Insolvency Act deals with the time limit for proof of claims. Which case decided that the time limit of three months after the closing of the second meeting, except with the leave of the court or the Master, also applies to liquidations?

- (a) *Stone & Stewart v Master of the Supreme Court*;
- (b) **Mayo v De Monthlehu**; ✓
- (c) *Wishart v BHP Billiton Energy Coal South Africa Limited*;
- (d) None of the above.

Question 1.9

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

Confidentiality is a defence that can be raised by a witness who has been subpoenaed to an enquiry.

- (a) True
- (b) **False**; ✓

Question 1.10

Select the **correct** statement:

The property of the insolvent's spouse, married out of community of property to the insolvent:

- (a) **Vests in the Master and thereafter in the trustee after his appointment as such.** ✓
- (b) Does not vest in the Master or the trustee of the insolvent.
- (c) Vests in the division of the High Court that granted the sequestration order.
- (d) Only vests in the trustee when the High Court on application by a creditor of the estate grants an order for the vesting of the property.

Question 1.11

Select the **correct** statement:

In terms of section 346 of the Companies Act 1973, an application for the winding-up of an insolvent company by court order may be made by:

- (a) The company itself.
- (b) One or more of its creditors (including contingent or prospective creditors).
- (c) A shareholder.
- (d) Jointly by any or all the parties in (a), (b) or (c). ✓

Question 1.12

Select the **correct** statement relating to special meetings of creditors:

- (a) The primary purpose of a special meeting is to allow creditors to vote on important matters related to the insolvent estate. The trustee must convene a special meeting when requested by the insolvent, regardless of expenses.
- (b) Special meetings are convened for creditors to prove their claims, and the trustee must convene one if requested by an interested person who tenders payment of all expenses related to the meeting. ✓
- (c) The main objective of a special meeting is to finalise the distribution of assets to creditors and must be convened by the trustee after the second meeting.
- (d) A special meeting cannot be convened for the purpose of interrogating an insolvent as the primary purpose of a special meeting is to prove claims.

Question 1.13

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

The perfecting of a general notarial bond can go as far as the bondholder being allowed to take over the debtor's business as a going concern.

- (a) True ✓
- (b) False

Question 1.14

Select the **correct** statement:

Which of the following statement is correct in relation to a compromise between a company and its creditors in terms of section 155 of the Companies Act 71 of 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) Paragraphs (a) and (c) are correct.
- (e) Paragraphs (a), (b), (c) and (d) are correct. ✓

Question 1.15

Select the **correct** statement:

Under what circumstances can a mortgage bondholder insist on selling immovable property free from a lease entered into prior to sequestration?

- (a) The bondholder, as a secured creditor, can always insist on selling the property free from a lease, regardless of when the lease was entered into.
- (b) If the lease was entered into after the registration of a mortgage bond, the bondholder may insist on selling the property free from the lease, provided the sale subject to the lease did not realise enough to pay the bondholder's secured claim. ✓
- (c) The property must always be sold subject to the lease, regardless of when the lease was entered into.
- (d) If the property is sold without reference to a lease concluded after the registration of a mortgage bond, the sale is valid even if it did not realise enough to pay the mortgage bond in full.

Question 1.16

Select the **correct** statement:

There are three steps that must be taken to determine whether a specific provision of the Insolvency Act 1936 applies to the liquidation of a company. These steps include:

- (a) Whether the provision is capable of being applied in a winding-up.
- (b) Whether the matter is specifically provided for by the Companies Act.
- (c) Whether the provision applies to the type of winding-up.
- (d) Only paragraphs (a) and (c) are correct.
- (e) Paragraphs (a), (b) and (c) are correct. ✓

Question 1.17

Select the **correct** statement relating to rehabilitation:

- (a) Rehabilitation is also available to partnerships, companies and other legal entities, allowing them to apply for a fresh start.
- (b) Automatic rehabilitation occurs after a period of 10 years from the date of provisional sequestration, unless ordered otherwise by the court upon application by an interested person. ✓
- (c) Since the insolvency of an individual affects a person's status, any Court may grant a rehabilitation order.
- (d) When an insolvent applies to the court for rehabilitation, the insolvent is not expected to repay a contribution that creditors had to pay, as rehabilitation results in the release of an insolvent person from their pre-sequestration debts and affords the insolvent the opportunity to make a so-called "fresh start".

Question 1.18

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

There is no provision in the Companies Act 1973 determining that the liquidator's report, or resolutions that the liquidator wishes to adopt, must be posted to creditors. The provisions of section 81(1)*bis* of the Insolvency Act do not apply to companies.

- (a) True ✓
- (b) False

Question 1.19

Select the **incorrect** statement relating to a partnership:

- (a) A partnership is a legal entity, at common law, having an existence separate from the individual partners. ✓
- (b) The “assets” of the partnership are indistinguishable from the assets of the partners.
- (c) The “partnership debts” are in law the debts *in solidum* (jointly and severally) of all partners.
- (d) A partnership creditor can sue the partners, if necessary, the one after the other, for the partnership debt.

Question 1.20

Select the **correct** statement:

Which of the following statements 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

**** END OF QUESTION 1 ****

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QUESTION 2 FOLLOWS ON NEXT PAGE / ...

PART 2 - SEQUESTRATION (40 MARKS)

QUESTION 2

Questions 2.1 - 2.9 are based on the set of facts provided below. Answer ALL the questions.

Mr and Mrs Solar were married to each other out community of property in 2012. They reside in a four-bedroom property in an upmarket country estate on the beautiful east coast in Ballito, KwaZulu-Natal. The immovable property is subject to a mortgage bond in favour of ABC Bank. The marital home is fully furnished and the Solar's acquired some beautiful luxury and antique furnishings during the course of their marriage. In the latter part of 2021 Mr Solar donates a valuable and timeless Victorian sofa and server to his wife which she proudly exhibits in the home. The remaining furniture and antiques have been paid for in cash, apart from the photocopier in the home office which is subject to a lease agreement concluded with Speedy Copiers (Pty) Ltd by Mr Solar.

Mr Solar also owns a small apartment in Florence, Italy where the family enjoy spending their annual holiday.

Mr Solar drives a 2022 BMW X5 which was purchased on instalment sale agreement and financed by FCM Vehicle Finance Ltd. Mrs Solar drives a 2016 Hyundai i20 which Mr Solar purchased from Mr Green in terms of an ordinary credit sale agreement. The agreement was concluded on 5 August 2022. Mr Solar paid a deposit in the sum of R20,000 and by agreement ownership in the vehicle had passed on delivery. The balance of R80,000 is due to be paid by way of monthly instalments of R10,000 each until the balance is paid, to date, Mr Solar has paid R40,000 in terms of the agreement.

On 5 December 2022 and after being pressured by Mr Hasty, an irate creditor who loaned Mr Solar money, Mr Solar delivers one of his valuable antique clocks to him to settle his debt in full.

On 5 January 2023 an application for the sequestration of the estate of Mr Solar is filed in the KwaZulu-Natal High Court Division, Durban at the instance of Axit Finance in respect of an unpaid personal loan. Mr Solar's estate is provisionally sequestrated on 15 January 2023 and the order is made final on 20 February 2023.

On the date of sequestration Mr Solar is a director of an accounting firm, Sum-It-Up (Pty) Ltd and earns a generous salary of R120,000 per month. Mrs Solar works at the local high school as a teacher and earns R25,000 per month.

Two months after the final order of sequestration is granted, Mr Solar inherits R500,000 from his father, which inheritance he accepts on 1 May 2023. Mrs Solar decides to resign from her position at the local school and receives a pension pay out of R600,000. Mr Solar has a life-insurance policy in terms of which he is the life insured. The surrender value of the

policy is R800,000 and the policy has been in force from 1 February 2018. In December 2022 a job opportunity as a sale representative, earning an average income and just sufficient for Mr Solar to support his family, becomes available to Mr Solar and the Solar family decide to relocate to Gauteng.

Ms Abel is appointed as the provisional trustee of Mr Solar's estate and the trustee's appointment is made final at the first meeting of creditors on 10 April 2023. The second meeting of creditors is held on 5 June 2023. Axit Finance fails to lodge its claim at either the first or second meeting and approaches Ms Abel on 6 September 2023 to prove its claim.

Question 2.1

On the date of the sequestration order of Mr Solar, the principle known as *concursum creditorum* will apply. Explain the concept of *concursum creditorum* and how this will affect the creditors of the estate. In your answer refer to relevant case law. (4)

The process of winding up of an insolvent's estate in South African law is creditor driven. ✓ The concept of *concursum creditorum* was explained for us by the court in the case of *Walker v Syfret* 1911 AD 141. ✓ The court in this case stated that once a sequestration order is granted by the relevant court such an order has the effect of crystallising ✓ or solidifying the position of the insolvent. ✓ As a result, all the creditors of the insolvent have to be dealt with together, no transaction can be concluded by the insolvent or on the insolvent's behalf with a single creditor to the prejudice of the general body of creditors. ✓

Concursum creditorum basically means that once the sequestration order is granted, the rights of the general body of creditors has to be taken into account when dealing with the estate of the insolvent.

Concursum creditorum has inter alia the below effects on the creditors of the estate:

1. After a winding up order has been granted by the courts, the principle of offset can no longer apply when a creditor of the insolvent estate is also a debtor of the insolvent estate. The creditor cannot keep monies owed by it to the insolvent estate to set off money owed to it by the insolvent estate.
2. A creditor is not entitled to have a contract concluded with the insolvent before insolvency rectified after insolvency, should such rectification have the effect of increasing the preferent claim of the creditor. 4

Question 2.1

Write a short paragraph and explain what possible remedy is available to Ms Abel to deal with the antique clock which Mr Solar delivered to Mr Hasty in full and final settlement of

his claim. In your answer refer to the relevant section of the Insolvency Act that will apply and what requirements must be met. (7)

The possible remedy available to Ms Abel is found in Section 29 of the Insolvency Act, which deals with the setting aside of voidable preferences. A voidable preference, inter alia, is a disposition made by a debtor in favour of a creditor which has the effect of that creditor receiving full payment of a debt owed to them prior to the sequestration of the debtor.

Ms Abel must prove:

1. Mr Solar had more than 1 creditor at the time;
2. Property belonging to Mr Solar was disposed of;
3. Within 6 months prior to the sequestration of Mr Solar;
4. Which had the effect of preferring one creditor over another/others; and
5. That immediately after the disposition the liabilities of Mr Solar, the debtor/insolvent, exceeded his assets.

In this case we see that Mr Solar, the debtor, gave to Mr Hasty, the creditor, an antique clock in full and final settlement of the debt owed to him, immediately prior to the sequestration of Mr Solar's estate. We are shown that exactly 1 month after the disposition was made another creditor brought a sequestration application against Mr Solar due to an unpaid loan.

Undue Preference s 30 Section 30(1) deals with undue preferences (1) - the trustee must prove (1) - (a) that there was a disposition of property (1) - (b) that was made any time before sequestration (1) - (c) at a time when the insolvent's liabilities exceeded his assets (1) - (d) that the disposition was made with the intention of preferring one of his creditors above another (1) - (e) the trustee must also prove the subjective intention of the debtor, which can be shown that the debtor was aware of the debtor's insolvent estate or contemplated sequestration but nevertheless made the disposition (1)

Question 2.2

Axit Finance, as the applicant creditor seeking a provisional order of sequestration against Mr Solar, must meet specific requirements outlined in section 10 of the Insolvency Act. Write a short paragraph setting out the requirements that must be met. (5)

Section 10 of the Insolvency Act states the requirements that must prima facie be proved by an applicant creditor in a compulsory sequestration. Axit Finance must prove firstly that it has a liquidated claim of at least R100 against Mr Solar. A liquidated claim is one where the quantum is easily ascertainable as it is set by a contract, an order of court, by agreement or any other reason. We see that Axis Finance's claim is liquidated as it is a personal loan, which would be a quantifiable amount. Axit Finance must secondly prove that Mr Solar either factually insolvent or has committed an act of insolvency. Factual insolvency means that the debtor/insolvent's liabilities exceed his assets. Lastly, Axit Finance must prove that there is a reason to believe that the sequestration of Mr Solar will be to the advantage of the general body of his creditors. 5

Question 2.3

With regards to the inheritance that Mr Solar receives from his father after the sequestration order, explain whether the R500,000.00 inheritance will vest in the insolvent estate. In your answer refer to relevant case law. (3)

An inheritance received prior to the rehabilitation of an insolvent vests in the Trustee of the insolvent's estate. √Furthermore, we see from the Wessel NO vs De Jager NO case,√ that a right to inheritance only vests in an insolvent upon acceptance of that inheritance. √As such, upon acceptance of the inheritance by the insolvent, the inheritance will then vest in the Trustee of the insolvent's estate. In this case, Mr Solar's inheritance vests in the Trustee of the insolvent estate as it is received prior to the rehabilitation of Mr Solar and such inheritance was duly accepted by him. 3

Question 2.4

For the purpose of this question, assume that Mr and Mrs Solar are married **in community of property** and their joint estate was sequestrated. Explain whether the pension pay-out of R600,000 that Mrs Solar receives will vest in the joint insolvent estate. In your answer refer to the applicable section of the Insolvency Act that applies. (2)

If Mr and Mrs Solar were married in community, they would both be insolvent and the of property their joint estate would vest in the Trustee. √ However according to Section 23(7) √of the Insolvency Act any pension an insolvent is entitled to for services rendered does not form part of the assets in their insolvent estate. Therefore, Mrs Solar's pension payout would not vest in the insolvent estate. 2

Question 2.5

With reference to the motor vehicle driven by Mrs Solar, briefly explain whether ownership of the vehicle vests in the insolvent estate at the date of sequestration. Additionally, discuss whether Mr Green would have a claim against the estate in respect to the vehicle and, if so, specify the type of claim he would have. (4)

We are shown that this is a credit sale agreement. √The general rule is that a transaction is a credit sale where there transfer of ownership of the goods takes place on delivery, √but the payment of the purchase price is postponed over a period of time. The transaction in this case was between Mr Solar and Mr Green as we are shown the Mr Solar was the purchaser. Ownership of the car passed to Mr Solar upon delivery of the car. There are 2 requirements for transfer of ownership to take place:

1. parties must intend for ownership to pass; and
2. there should be delivery. √

From the set of facts, we see that both these requirements are met, it was agreed that ownership would pass to Mr Solar upon delivery, and we see that delivery was effected as Mrs Solar was driving the car. As such Mr Solar was the owner of the vehicle at date of sequestration and as such it falls into his insolvent estate at date of sequestration. ✓ **4**

As ownership has passed to Mr Solar, Mr Green cannot reclaim the return of the vehicle and he holds no security in this matter. As such he has a claim for the balance of the purchase price against the insolvent estate, and such claim is a concurrent one.

Question 2.6

Who must convene the first meeting of creditors and how is this meeting is convened? **(2)**

According to section 40(1) ✓ of the Insolvency Act, the first meeting of creditors is convened by the Master, by way of notice in the Government Gazette. ✓ **2**

Question 2.7

Ms Abel urgently needs to sell the movable assets of the insolvent estate, claiming that the sale cannot wait until she receives instructions from the creditors at the second meeting. What steps would Ms Abel need to take in order to sell the assets prior to the second meeting of creditors? Support your answer by referring to the necessary statutory provisions. **(4)**

The purpose of the second meeting of creditors is for the trustee to receive instructions from the creditors on how to handle the affairs of the insolvent estate. However, the Master has the power to authorise the sale of an insolvent's assets prior to the second meeting of creditors. ✓ As such Ms Abel would need to submit an application to sell the assets prior to the second meeting of creditors to the Master, in accordance with Section 80bis of the Insolvency Act. ✓ If the assets to be sold are subject to the rights of a secured creditor/s ✓ then Ms Abel must firstly seek the permission of the secured creditors in question. Once received, such proof of permission should be attached to the application to sell the movable property that Ms Abel is to make to the Master. It must be noted that if the sale is approved, it can be approved subject to certain conditions set by the Master and the Master also has the discretion to determine the manner in which the sale should take place. ✓ **4**

Question 2.8

Question 2.8.1

In relation to the foreign assets, indicate whether the immovable property in Italy automatically vests in the insolvent estate of Mr Solar and explain whether Ms Abel will be able to exercise control over the property. **(4)**

Answer:

The immovable property will not automatically vest in the insolvent estate of Mr Solar. ✓ Ms Abel will not be able to exercise control over the immovable property situated in Italy unless she seeks for an order, from the relevant court in Italy, ✓effectively recognising the sequestration order and recognising her as a trustee of the insolvent estate of Mr Solar. The exact procedure to be followed is entirely dependent on the laws of Italy, where the immovable property is situated. ✓

Ms Abel would need a Letter of Request from a South African High Court which is an order issued by the High Court, to the foreign court requesting the assistance of the foreign court in, inter alia, recognising the sequestration order issued by the South African court and in obtaining necessary evidence of the existence and details of assets of an individual who is suspected of owning assets in the foreign court's jurisdiction.

Once Ms Abel receives the recognition from the relevant foreign court in, the immovable property will vest in the insolvent estate of Mr Solar. However, should the recognition not be received, the immovable property will remain vested in Mr Solar. ✓ **4**

Question 2.8.2

Would your answer to the above question be different if the property located in a foreign country is movable property? **(2)**

Yes. ✓According to Viljoen v Venter, the common law position ✓is that the movable property of an insolvent which is based in a foreign country will automatically vest in the insolvent estate, if the estate is sequestrated by the court in whose jurisdiction the insolvent resides. We see that Mr Solar resides in the jurisdiction of the court that issued the sequestration order. However, this position is not practical in practice as it would be difficult for Ms Abel to deal with even movable assets in Italy without recognition by the court. **2**

Question 2.9

Question 2.9.1

Assuming that Mr Solar traded Sum-It-Up Accounting as a partnership, briefly explain how the partnership and the partners are treated in terms of the Insolvency Act when a provisional sequestration order is granted. **(2)**

According to the Insolvency Act the partnership and the partners are treated as separate and distinct entities. If the estate of a partner is sequestrated, the partnership ✓ and the separate estates of the other partners would not have to be sequestrated. However, the partnership would have to be wound up. Any partnership assets due to Mr Solar would then vest in his insolvent estate. ✓ **2**

Question 2.9.2

What effect would Mr Solar's sequestration have on the partnership? (1)

The partnership would be wound up. If the partnership had any debts the individual partners would be liable to settle those debts. ✓ 1

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**** END OF QUESTION 2 ****

QUESTION 3 FOLLOWS ON NEXT PAGE / ...

PART 3 - LIQUIDATION (40 MARKS)

QUESTION 3

Questions 3.1 - 3.10 are based on the set of facts provided below. Please answer ALL the questions.

RNH Plastics (Pty) Ltd (RNH) is a private company duly incorporated and registered under the applicable company laws of South Africa. RNH has been operating a profitable injection moulding operation for the past 13 years, manufacturing plastics chairs from a large industrial property in Willowton, Pietermaritzburg.

The Board of Directors consists of Mr Ronald, Mr Naseer and Ms Hlope. RNH occupies the industrial property under a lease agreement with The Willow Family Trust, which is set to expire in 2026.

RNH employs a significant number of staff members, including management, production, sales, maintenance, machine operators and administrative personnel. Most of RNH's employees are represented by MAWU (Moulding and Allied Workers Union), a registered trade union focusing on the interests of employees in the injection and moulding industry.

South Africa is currently facing a severe energy crisis, impacting RNH's manufacturing operations heavily. RNH relies on power to operate its large injection moulding machines, making generator usage economically unfeasible. As a result, RNH is struggling to meet customer demands and has faced contract terminations, further impacting their revenue. Cash shortfalls have hindered RNH's ability to repay creditors and suppliers, resulting in legal actions and judgments against the company, increasing the possibility of liquidation.

In December 2022, amidst the ongoing energy crisis, RNH urgently requires raw material to meet demand. They approach Rand First Bank for a loan, which is granted subject to them registering a general notarial bond over certain of the movable assets as security. The injection moulding plant is already subject to a special notarial bond. Additionally, RNH has a shipment of raw materials at the Durban harbour, but they need funds to pay customs and excise duty before it can be released.

RNH has recorded substantial losses in the 2021 and 2022 financial years, worsened by increasing repo rates and additional cash flow required for monthly repayments on vehicle and truck instalment sale agreements with SABA Bank.

Recognising the dire situation they are in, the Board decide to commence business rescue proceedings on 12 February 2023, and lodge the required documents with CIPC on 14 February 2023. The Board is not aware that an aggrieved creditor, who is owed a substantial sum of money for raw materials supplied, has already initiated a liquidation application against the company which was filed and served by the Sheriff of the High Court on an employee of the company on 11 February 2023. The employee unfortunately placed the documents in his desk drawer and failed to bring the application to the attention of management.

QUESTION 3.1

In the context of the liquidation of RNH, distinguish between commercial insolvency and factual insolvency and provide an example of each. In your answer state whether RNH is commercially or factually insolvent. **(max 5)**

Commercial insolvency is when a company due to being illiquid, or not having sufficient cash flow is unable to pay its debts. √ Whereas factual insolvency is when according to the company's balance sheet, the company's liabilities exceed its assets. √

An example of commercial insolvency is where RNH's monthly debit order payments to SABA in terms of the instalment sale agreements are unpaid due to insufficient funds being available in RNH's business bank account despite the company possibly having sufficient assets such as stock on hand, with enough value to settle the debit order payments. An example of factual insolvency is where RNH's auditors provide the company with its financial statements for the company's financial year end and even though the company has enough money in its bank account to settle √ its financial obligations for the next couple of months, its balance sheet shows that the liabilities of the company outvalue the assets owned by the company. √

RNH is commercially insolvent as we are shown that the company has cash shortfalls that have hindered its ability to repay creditors and suppliers, resulting in legal actions and judgments against the company. √ **5**

QUESTION 3.2

Under whose custody and control will the assets of RNH (the company) be once the provisional liquidation order is granted? **(1)**

The assets vest in the Master until a provisional liquidator is appointed, √ and then the assets will vest in the provisional liquidator. √ This is in terms of Section 361 of the Companies Act of 1973. **1**

QUESTION 3.3

Briefly discuss the general effect the provisional order of liquidation of RNH will have on the employees' contracts of employment. (3)

All employees' contracts of employment are suspended by the liquidator/provisional liquidator once the company is placed under provisional liquidation. This has the effect that the employees are not bound to render their services to RNH during this time. 3

QUESTION 3.4

Explain what effect the liquidation order of RNH will have on the lease agreement with The Willow Family Trust which will expire in 2026. In your answer discuss what statutory provisions will apply and discuss whether The Willow Family Trust will have any preference in respect of a claim against the liquidated estate for the arrear rental only. (6)

Liquidation does not automatically terminate a lease agreement. According to section 37 of the Insolvency Act read together with section 386(4) of the 1973 Companies Act, the liquidator can either immediately cancel a lease agreement or keep it in force. Should the liquidator elect to terminate the lease agreement, he/she must do so by written notice to the lessor, being The Willow Family Trust.

Should the liquidator not immediately terminate the lease agreement the lease agreement will automatically terminate after 3 months. The rent due for the 3-month period will form part of the cost of liquidation and will be a preferent claim.

The lessor remains with a common law damages claim against the insolvent estate for damages suffered due to the lost rentals for the remainder of the lease period.

With regards to arrear rent owing at the date of liquidation, the lessor enjoys a tacit hypothec over the movable property of the insolvent that is located on the leased premises according to Section 85 of the Insolvency Act. However, the lessor's secured claim based off of the tacit hypothec is limited to:

1. up to 3 months' rent maximum, in the case where rent is paid monthly;
2. up to 6 months' rent maximum, in the case where rent is payable less frequently than monthly but more frequently than every 3 months;
3. up to 9 months' rent maximum, where rent is payable less frequently than every 3 months but more frequently than every 6 month months; and
4. up to 15 months rent maximum in any other case. 6

QUESTION 3.5

Briefly discuss the overall effect that the liquidation order of RNH will have on civil proceedings that have commenced against the company prior to the provisional order being granted. (2)

According to S359(1)(a) of the Companies Act, the granting of a liquidation order suspends all civil proceedings against the company until the appointment of a liquidator. ✓
2

QUESTION 3.6

Section 402 of the Companies Act 1973 lists the matters that a liquidator must report on at the second meeting of creditors. Discuss any six aspects that Mr Hue should include in his report to creditors. (max 6)

1. the assets and liabilities of the company - He must list all the assets of the company, whether immovable or movable as well as all the liabilities of the company, detailing the secured, preferent and concurrent creditors. ✓
2. Causes of the company's insolvency - he would detail the events and circumstances leading to or causing the liquidation of the company. ✓
3. Books and records of the company - he should advise if the insolvent company appears to have kept a proper record of all its transactions. If it did not, then he should detail in what aspects the books and records kept were not properly kept. ✓
4. Personal liability of the director/s of the company - he should advise if or if not it seems at the current stage there is a need for the directors of the company to be held personally liable for any of the actions taken by the company. ✓
5. Any matters that require the further direction of creditors - he should advise the creditors if there are any matters he needs direction on from them with regards to the administration or realisation of the company's assets. ✓
6. Pending legal proceedings - he should advise if there are any pending legal proceedings instituted by or against the company. ✓ **6**

QUESTION 3.7

MAWU ask Mr Hue to explain the statutory preferent right of the employees to claim for arrear salaries, and other amounts) owing to them. Write a short paragraph advising MAWU of the position. (5)

The statutory preference granted to employees is found in Section 98A(1)(a) of the Insolvency Act, and the amounts at which the preference is capped are determined by the Minister of Justice. The preferent amounts are: for all salaries and wages due to employees, for a period not exceeding 3 months, up to a maximum of R12,000 per employee; all amounts due in terms of leave or holidays due to the employees which accrued to the employees as a result of their employment by the insolvent in the year of insolvency or the year preceding the insolvency, up to a maximum of R4,000 per employee; payments due in respect of paid leave of absence for a period not exceeding 12 month, up to a maximum of R4,000 per employee; and severance or retrenchment packages, including packages

due to the termination of contracts in terms of section 38 of the Insolvency Act, due to the employees by law, contract, agreement or wage-regulating measure, up to a maximum of R12,000. ✓The claims in respect of arrear salaries and wages rank above all the other listed preferences. All the other preferent claims listed rank equally. ✓ **5**

QUESTION 3.8

In order for a bondholder of a special notarial bond to confer a right of preference to the proceeds of the movable property covered by such bond, the Security by Means of Movable Property Act sets out three basic requirements to be met for such preference to be recognised. List these requirements. **(3)**

1. The bond must be registered in terms of the Deeds Registry Act; ✓
2. The movable property must be corporeal; and ✓
3. The movable property must be specified and described in a manner that enables it to be readily identifiable/recognisable. ✓ **3**

QUESTION 3.9

With regards to the raw material that is located at the Durban harbour, discuss the position of SARS in the hierarchy of creditors when enforcing a customs and excise lien over the assets under their control. **(4)**

According to section 114 ✓of the Customs and Excise Act, SARS enjoys a special security for the payment of customs and excise duty. In terms of this special security, ✓ SARS has the right to detain imported property belonging to the debtor and will vest a lien over the property until the customs and excise duty are paid. SARS is as such a secured creditor with regards to the detained property. ✓

If the value of the goods detained is however insufficient to fully satisfy SARS claim for customs and excise duty then the balance of the amount owing can still be claimed by SARS from the insolvent's ✓estate. SARS will in terms of section 99 of the Insolvency Act be treated as a preferent creditor in terms of its claim for the shortfall. **4**

QUESTION 3.10

Explain whether the Board of Directors will succeed in placing RNH into business rescue. In your answer discuss the concept of "initiation" of liquidation proceedings. Make reference to case law in your answer. **(5)**

The directors voluntarily attempted to place the company into business rescue. ✓However, according to Section 129(2)(a) of the 2008 Companies Act, ✓ a company is specifically

“prohibited from voluntarily placing itself under business rescue if liquidation proceedings have already been initiated by or against the company”. Once liquidation proceedings have been initiated, a company can only be placed under business rescue in 2 ways:

1. by an order of court, through a section 131 (2008 Companies Act) application by an affected person; or
2. by a court of its own volition during liquidation proceedings, as the court has the authority to choose to instead place the company under business rescue. This is according to section 131(7) of the 2008 Companies Act.

It is therefore important for us to determine if liquidation proceedings had been initiated in this case. According to Section 348 of the Insolvency Act, the winding up of a company i.e its liquidation, by the courts is deemed to commence at the time that the application for the winding up of the company is presented to a competent court. We can see from the facts of the case that a creditor had already initiated liquidation proceedings against the company, as a liquidation application was filed and served by the Sheriff of the High Court on one of RNH’s employees before the directors filed for business rescue on CIPC.

The courts are of the view that a company can be placed under business rescue even after liquidation proceedings have commenced, by application to a competent court. In *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd* an application for business rescue was brought by an affected person after liquidation proceedings had already been instituted. The court suspended the liquidation proceedings in order to adjudicate the business rescue application. The court in its judgment held that it is clear that the legislature recognised the significant collateral damage associated with liquidations and that the option of business rescue provides a prospect of serving public interest by salvaging a financially distressed company and in turn avoiding the adverse consequences of liquidations or alternatively providing a better return to creditors through the structured winding down of a company as opposed to a liquidation. The court held that a company will be placed in business rescue should there be a reasonable prospect that the company can be rescued or that there will a better return to creditors through placing the company under business rescue.

However, it is important to note that an application to place a company under business rescue once liquidation proceedings have been initiated can only be brought by a shareholder, employee, creditor or other affected person in terms of section 131 Of the 2008 Companies Act, and not by the directors of the company. As such the board of directors of RNH are not likely to succeed in their application for the company to be placed under business rescue. **2**

See case law the resolution will be a nullity. (1) *Tjeka Training Matters (Pty) Ltd v KPPM Construction (Pty) Ltd and Pan African Shopfitters (Pty) Ltd v Edcon Limited and others.* (1)

***** END OF ASSESSMENT *****

TOTAL MARKS: [100]