



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.

MARK AWARDED 86

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.
- (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.X
- (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

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

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 sales 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)

In terms of *Walker v Syfret*, the concept of *concursum creditorum* is explained by the court as follows:

On the date the sequestration order is issued, the position of the insolvent crystallises and the hand of the law is placed on the insolvent's estate. The rights of the general body of creditors must then immediately be taken into consideration.

No single creditor can enter into a transaction i.t.o the estate, that would prejudice the general body of creditors and each creditor's claim must be dealt with as it existed at the time the order was issued. 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)

In terms of section 29 of the Insolvency Act, the transaction can be seen as a voidable preference and can therefore be set aside as an impeachable disposition.

In order for the remedy to be applied, the following requirements must be met & proven by the trustee:

- Property was disposed of within 6 months before sequestration;
 - Disposition took place on 5 December 2022 & provisional sequestration date on 15 January 2023.
- Thereby preferring one creditor before another; and

- Mr. Hasty was paid in full before sequestration, seemingly without security right over the clock.

- Where the debtor's liabilities exceeded his assets immediately thereafter;

- Not enough information to confirm, Ms Abel would need to prove the point.

Should the last point be proved by the trustee, the disposition can be set aside and she can declare that she is entitled to recover the asset or the value thereof as at date of disposition or date set aside, whichever is higher.

UNDUE preference 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)**

In order for an applicant to bring an application for the compulsory sequestration of a debtor i.t.o. section 10 of the Insolvency act, and the onus will be on the applicant to prove-

- that they qualify as a creditor who can bring the application for sequestration - the applicant must be an existing creditor that bears a liquidated claim of at least R100.00 or R200.00 where a joint application by more than one creditor; ✓

- the debtor is factually insolvent, ✓ or has committed an act of insolvency (s 8 of the Insolvency Act); and ✓

- that there is reason to believe that creditors would be advantaged by the sequestration. ✓

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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)**

The inheritance received by Mr Solar will indeed vest in the insolvent estate, ✓ as the right of inheritance only accrued after sequestration but before rehabilitation and therefore the benefit immediately vested in the trustee, this was established in Brown v Oosthuizen 1980 2 SA 155 (O).

Mr Solar inherited the money from his father 2 months after sequestration had already commenced.

1 See Wessels v de Jager

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)

Pension benefits do not vest in an insolvent estate, as they are specifically excluded i.t.o. s 23(7) of the Insolvency Act. 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)

The vehicle was sold on credit/√ not √ defined as an instalment sales agreement i.t.o. the National Consumer Act. by Mr Green to Mr Solar on 5 August 2022 and it was stipulated per the agreement that ownership transferred on delivery. As such, Mr Green cannot reclaim the vehicle as he is no longer the owner thereof (s 36(4) of the Insolvency Act), √ but he does have a concurrent claim for the balance of the purchase price not paid on date of sequestration as per Common Law, i.e. R40,000.00. √

The vehicle will therefore vest in the insolvent estate as the ownership thereof transferred to Mr Solar on delivery. The trustee will have the discretion whether or not to abide by the contract. 4

Question 2.6

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

The Master of the High Court/√ convenes the first meeting immediately once final sequestration order is received. This is done by the Master publishing a notice in the Government Gazette, not less than 10 days before the date of the meeting. √ 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 Master may at any time before the second meeting of creditors authorise the sale of property on such conditions and in such manner as the Master may direct." ✓ - Insolvency Act, s 80*bis* and Companies Act 1973, s 386(2A) and (2B). ✓

Ms Abel would need to approach the Master to authorise the sale of the property in Mr Solar's estate, as she may not do so without the Master's authorisation (s 18(3) of the Insolvency Act), and provide the necessary notices and dispose of the property subject to the conditions directed by the Master.

3 Permission by secured creditor

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:

For the immovable property to vest in the insolvent estate, control over the asset must be established. As the asset is in a foreign jurisdiction, control over the asset cannot be gained until Ms Abel has applied for and received recognition of her appointment as trustee from the foreign court. ✓

Therefore the property does not automatically vest in the estate and should Ms Abel fail to receive recognition, ✓ the property will remain vested in Mr Solar. ✓ **3**

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, ✓ movable property automatically vests in the insolvent estate as it is deemed to be present in the jurisdiction where the insolvent is domiciled. ✓ **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)

In terms of s 13(1) of the Insolvency Act, ✓ if the estate of an individual partner is sequestrated the estate of the partnership and other partners aren't necessarily sequestrated as well as the Insolvency Act views the partnership as a separate entity to the partners. ✓ 2

Question 2.9.2

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

The partnership will be terminated and wound-up, with partnership assets distributed between the partners. ✓ 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)**

Factual insolvency is when the value of a debtor's liabilities exceed the value of his assets, ✓ e.g. the value of the company's loans are higher than the value of its movable and immovable property and other sources of value. ✓

Commercial insolvency is where the debtor is unable to repay his debts, ✓ irrespective of whether the value of his assets exceed the value of his liabilities, e.g. the company has sufficiently valuable assets that exceed the value of its loans, but the company's liquidity position is such that there is insufficient cash to pay debts as they fall due. ✓

RNH would fall into commercial insolvency, since the value of the manufacturing equipment; debtors and raw materials would be high, even though the company is struggling to gather enough cash to just release raw material at the Durban harbour. ✓ **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)**

Control of the company vests in the Master and then in the liquidator once appointed. ✓ **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)**

Employment contracts is technically classified as unexecuted contracts i.t.o. sec 38 of the Insolvency Act, meaning that the provisional order will not immediately terminate/ the employment contracts. The liquidator has to elect whether to abide by the contracts or

terminate them, after consulting with employees and MAWU and providing proposals to rescue the business. ✓

If the liquidator does not agree on continued employment contracts with the employees and MAWU, all suspended contracts will automatically terminate 45 days after appointment of the liquidator. ✓ **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)**

Sec 37 of the Insolvency Act provides for the sequestration/liquidation of the lessee and provides that the lease agreement does not automatically terminate with the issue of the liquidation order. ✓ The liquidator may elect to cancel the contract or not, by way of written notice to the lessor. ✓

The lease will terminate automatically three months after the appointment of the liquidator, unless the liquidator notifies the lessor of his intention to continue. ✓

The Willow Family Trust will receive a landlords legal hypothec over moveables of the lessee on the property for arrears rentals accrued before commencement. ✓ RNH's agreement is in monthly instalments so the value of the claim is limited to 3 months worth of arrears rentals ✓ (s 84 of the Insolvency Act). A landlords legal hypothec constitutes a secured claim against the estate, but only if perfected by suing the tenant for payment of any outstanding rentals. ✓ **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)**

The issue of the liquidation order stays all civil proceedings against the company at date of commencement. ✓ Civil proceedings instituted before liquidation will lapse 3 weeks after the first creditors meeting, unless the interested party(ies) state their intention to proceed. ✓ **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)**

The following matters should be included in Mr Hue's report:

- All assets that form part of RNH's estate, as well as the liabilities of the estate; ✓
- The cause of RNH's insolvency, such as continued losses and the impact of loads/hedding; ✓
- Whether RNH appears to have contravened any section of the Insolvency Act or any other offence by the company; ✓
- As all civil proceedings against RNH would have been suspended on liquidation, Mr Hue would need to note each of these and which ones still threaten the estate by way of the interested parties informing the liquidator that they would proceed; ✓
- Any matters regarding the administration or realisation of assets that would need the creditors of RNH's input or direction; ✓
- Mr Hue would need to communicate his intentions regarding the existing lease to The Willow Family Trust i.t.o. s 37 of the Insolvency Act. ✓ **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)**

s 38 of the Insolvency Act provides that the liquidator has the right to terminate employment ✓ contracts after consultation with employees and MAWU (as the registered trade union). Should the contracts be terminated by Mr Hue, the following would be the effect to the employees: ✓

- Each employee who's contract is terminated will have a preferent claim against RNH's estate for severance ✓ benefits equal to one week's remuneration for each year of continuous service (s 35). This payment shall not exceed R12,000.00. ✓
- Each employee will also have a preferent claim with regards to arrears salaries or wages up to a maximum of R12,000.00 or not exceeding 3 month's worth of salary or wages. ✓
- Employees may also claim payment in respect of any period of leave due to them in the year of or prior to insolvency to the maximum amount of R4,000.00.
- Lastly, employees will be able to claim payment i.r.o. any other form of absence due to them within three months of liquidation of the company and not exceeding R4,000.00.
- Any claims that are higher than the limits set out above and with regard to damages for breach of contract would constitute a concurrent claim. ✓ **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)

For a Special Notarial Bond to be valid, the following requirements must be met:

- The bond must be registered in the Deeds Office; ✓
- The assets must be classified as movable, tangible assets; ✓
- The movables that the bond is registered over must be specified and properly described to ensure that it can be identified. ✓ 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)

Section 114 ✓ of the Customs and Excise Act 1964 provides a security right to SARS in the form of a customs and excise lien over imported property within its control, against the payment of outstanding import taxes. As the raw materials are still located at the Durban harbour and in control of SARS, ✓ SARS can detain the assets during liquidation which will vest a lien over these raw materials until its debts are paid. ✓

This will effectively make SARS a secured creditor in the liquidation of RNH and will allow SARS to be repaid directly from the proceeds of the detained raw materials, any amount not covered by the sale of such will be paid from free residue as a statutory preferent creditor. ✓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)

S 129(2)(a) of the Companies Act 2008 ✓ states that the special resolution by the directors of a company cannot be adopted if insolvency proceedings have already been initiated against the company, as they have by the supplier a day prior to the board's passing of the resolution. ✓

In Afrgi Operations Ltd v Hamba Fleet Management (Pty) Ltd, the Supreme Court of Appeal established the following around the initiation and opposing of liquidation proceedings:

- The discretion of the court to refuse to grant a winding-up order, to an unpaid creditor with a claim against the company that has not been discharged, is very narrow. ✓
- However, should one or more creditors oppose the liquidation, a narrow approach to the court's discretion would be inappropriate and the court would be allowed to consider the interests of all creditors and what would be to their best advantage.

In terms of RNH

- The application by the supplier to the court to initiate the liquidation of RNH on the assumed grounds of the company being unable to pay its debts would therefore have been difficult to refuse; but
- Should one or more creditors oppose the order the court would be able to consider the wider interests of all creditors and might refuse a final order.

Therefore the only avenue for the company to enter into business rescue proceedings would be if the provisional liquidation order issued on 11 February 2023 is opposed by one or more creditors and refused by the court, which would allow directors to adopt the special resolution. **3**

See case law *Tjeka Training Matters (Pty) Ltd v KPPM Construction (Pty) Ltd and Pan African Shopfitters (Pty) Ltd v Edcon Limited and others*. (1)

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

TOTAL MARKS: [100]