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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.

TOTAL AWARDED 81/100
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.
- (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

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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 *Walker v Syfret*, the court explained the key concept of *concursum creditorum* as follows: "The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regards to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order".

This means that any transaction entered into after the date of sequestration can be challenged and possibly be validated by the court. 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)

Mr Able has got a fair chance of setting aside the settlement of debt in exchange for the Antique clock to Mr Hasty using s29 of the Insolvency Act - Voidable preference. All the requirements of s29 seem to be present in this transaction, namely:

- A disposition (settlement) was made by the insolvent within six months prior to his sequestration;
- The effect of the disposition was seemingly to have preferred one creditor above others;

- In view of the dire financial position of Mr Solar at the time of the settlement, it should be reasonably possible to prove that immediately after such disposition the Mr Solar's liabilities exceeded the value of his assets.

In terms of section 82 (6) of the Insolvency Act, clothing, bedding and household furniture, tools and other essential means of subsistence as the creditors or the master determine does not fall into the insolvent estate. However, luxuries such as antique furniture are not included. Thus, Antique clock would fall part of the insolvent estate. **0**

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)**

Axit Finance request must meet the following requirements:

Formal Requirements:

- Axit Finance must provide security to the Master to pay costs of sequestration till the trustee is appointed.
- Master must issue certificate not more than 10 days before the date of the application confirming security was provided.
- Certificate must be filed with application for sequestration.
- Axit Finance furnish copy of the application to interested parties, including, registered trade unions, employees, SARS and debtor.

Substantive requirements:

- Axit Finance must have liquidated claim of not less than ZAR100 (i.e qualified creditor).v
- Mr Solar must be factually insolventv or committed an act of insolvency. v
- There must be a reason to believe that sequestration will be to the advantage of creditors as a group. v **3**

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 R500,000.00 inheritance, if it accrues before rehabilitation of an insolvent, will fall into the insolvent estate. ✓ However, it will only vest in the trustees on acceptance by the insolvent heir -✓ Wessels NO v De Jager. ✓

Mr Solar has accepted the inheritance on 1 May 2023, well before his rehabilitation. Therefore, this inheritance will be included in the insolvent estate. **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)**

The pension pay-out of R600,000 that Mrs Solar received will form part of the joint insolvent estate. Section 37B of the Pension Fund Act 1965 provides, *inter alia*, that if the estate of any person entitled to a benefit payable in terms of the rules of the registered fund is sequestrated or surrendered, such benefit shall not be deemed to form part of the assets of the insolvent estate of that person.

However, s37B only applies in respect to pension benefits of a person whose estate was already under sequestration when he/she received the benefit. As soon as the benefit was paid, the beneficiary ceased to be a member of the pension fund and the money ceased to be a benefit in terms of the Act.

0 S 23 = own benefit

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)**

Section 21 of the Insolvency Act provides the position in respect of a marriage out of community of property. It provides that, the additional effect of the sequestration of the separate estate of one of two spouses shall vest in the Master, and upon appointment in the trustee, all the property of the spouse whose estate has not been sequestrated as if it were property of the sequestrated estate. Thus, the motor vehicle driven by Mrs Solar will vest in the insolvent estate at the date of sequestration.

The purchase of a 2016 Hyundai i20 from Mr Green in terms of an ordinary credit sale agreement is not an instalment agreement ✓in terms of the National Credit Act. Therefore, s84 of the Insolvency Act does not apply. The transaction is a normal credit sale in terms of the common law and therefore the ownership passes to the purchaser upon delivery and the vehicle then belongs to Mrs Solar by extension Mr Solar's insolvent estate. ✓ As such,

Mr Green merely has a concurrent claim for the outstanding purchase price (R40,000) owed to him. ✓ **3**

Question 2.6

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

The Master is obliged to convene the first meeting of creditors. ✓

The meeting is convened by notice in the Government Gazette and a notice published simultaneously in an English and Afrikaans newspapers.

The notice in the Gazette must appear 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)**

Ms Able cannot sell the assets without the prior permission of the Master. ✓ An application to sell the assets must be made to the Master in terms of s80bis of the Insolvency Act. ✓

If the property is subject to the rights of a secured creditor, permission by such creditor to sell the property must accompany the application. ✓ If the master grants permission to sell the property, he may lay down conditions in connection with the sale and determine the manner in which the sale must 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:

For immovable property in Italy, Ms Abel cannot gain control ✓ of the asset unless and until she obtains recognition of the appointment as trustee ✓ from the foreign court. ✓ If she fails to obtain this recognition, the immovable property remains vested in the insolvent. ✓ **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)

For movable property of the insolvent in a foreign country will, according to the common law, √ vest in the insolvent estate if the estate is sequestrated by the court where the insolvent is domiciled. It is not necessary for Ms Able to obtain recognition of her appointment. √ 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)

The Insolvency Act, for the most part, treats the estate of the partnership and its partners as separate entities. √ Partnership is treated as a separate entity with an estate which may be sequestrated as if it were a natural person. √ 2

Question 2.9.2

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

The insolvency of Mr Solar will result in the dissolution of the partnership but it does not cause the partnership estate to be sequestrated. √ 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 where a company's liabilities exceed its assets. ✓

Commercial Insolvency is a position in which a company is in such a state of illiquidity that it is unable to pay its debts, even though the assets may exceed its liabilities. ✓

One of the creditors who owed a substantial sum of money for raw materials supplied has already initiated a liquidation application against the company. This indicates that the RNH is unable to pay its debts. ✓ Thus, it is commercially insolvent. ✓ **4**

QUESTION 3.2

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

Company remains the owner of its assets after winding-up. Only the control of assets pass to the Master and then to the liquidator after it has been 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)**

The effect will be that:

- The contract of employment will be suspended; ✓
- Employees will not be required to work during the period of suspension, but they will also not be remunerated; ✓
- Employees will be entitled to unemployment benefits during this period of suspension in terms of the Unemployment Insurance Act;

- Employees contracts of employment may be terminated if the liquidator consults with employees representatives on measures to save the business or part thereof;
- If no agreement is reached on continued employment, employees contracts may be terminated 45 days after the appointment of a final 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)**

Section 37 of the Insolvency Act applies:

- The lease agreement with The Willow Family Trust is not automatically terminate. ✓
- The trustee may cancel the contract through written notice to the lessor; ✓
 - This must at the back of an instructions of the creditors;
 - Due to the cancellation, the estate loses right to claim any compensation for improvements unless lessor agreed to improvement.
- If the trustee doesn't terminate the contract; ✓
 - Lease agreement will automatically terminate three months after appointment of the trustee, unless the trustee notifies lessor of the intention to continue. ✓
- If the trustee continues with the lease; ✓
 - Then the trustee is bound by all conditions relating to prohibition on transfer of the lessee's rights.

The Willow Family Trust will have a secured claim for a arrear rental that was outstanding up to and until sequestration. Any excess will be a concurrent claim. ✓ **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)**

Section 359(1)(a) ✓ of the Companies Act provides that the making of a winding-up order suspends all civil proceedings 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)**

In the second meeting of creditors, the liquidator must report on the following:

1. The assets and liabilities of the estate; ✓
2. The cause of the debtor's (RNH) insolvency; ✓
3. The question whether RNH appears to have contravened this Act or to have committed any other offence; ✓
4. Any business which he may have been carrying on behalf of the estate, any goods he may have purchased for that business, and the results of carrying on that business; ✓
5. Any legal proceedings instituted by or against the insolvent which were suspended by the sequestration of the estate which may be pending or threatened against the estate; ✓
6. Any matter in regard to the administration or realization of the estate requiring the direction of the creditors. ✓ **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)**

MAWU must refer to s98A(1)(a) which stipulates that, an employee who was employed by the insolvent is entitled, ✓/subject to the maximum amounts determined by the Minister of Justice by notice in the Government Gazette from time to time, to a preference for:

- Any salary or wages, ✓/for a period not exceeding three months, due to an employee - up to a maximum of R12,000; ✓
- Any payment in respect of any period of leave or holiday due to the employee which has accrued as a result of his employment by the insolvent in the year of insolvency or the previous year - up to a maximum of R4,000; ✓
- Any payment due in respect to any other form of paid absence for a period no exceeding three months prior to the date of sequestration of the estate - up to a maximum of R4,000; ✓
- Any severance or retrenchment pay due to the employee in terms of any law, agreement, contract or wages-regulateing measure - up to a maximum of R12,000.

✓ **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)**

The three requirements for the special notarial bond to be recognised are:

- The bond must be registered in terms of the Deeds Registries Act; ✓
- It must cover corporeal movable property; and ✓
- The property must be specified and described in a way that makes it readily 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)**

Section 114 ✓ of the Customs and Excise Act 1964 provides a special security right for SARS to secure the payment of certain import taxes (customs and excise duties). SARS ✓ can detain the imported property to which the import tax relates, and upon such detention of the property, SARS will vest a "lien" over the property until the debt is paid. ✓

SARS will then be a secure creditor with reference to such detained assets. Importantly, SARS's lien cannot vest over property not belonging to the customs debtor, which used to be possible before the Constitutional Court declared it unconstitutional. ✓ **4**

If SARS did not vest a lien before sequestration or the assets detained do not cover its full claim, SARS will be paid as a statutory preferent creditor from the free residue.

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 initiation of liquidation proceeding is to establish whether the company is solvent or insolvent. The Companies Act of 2008 does not define the terms "solvent" or "insolvent" and initially there was some uncertainty whether a company would be regarded as insolvent if it was unable to pay its debts (commercial insolvency) or if its liabilities exceeded the value of its assets (factual insolvency) or both.

Supreme Court of Appeal in Boschpoort Ondernemings (Pty) Ltd vs ABSA Bank Ltd, where it was held that the solvent company is one that is commercially solvent, in other words, it is able to pay its debts when due. This was confirmed in Murray NO and Others vs African Global Holdings (Pty) Ltd where Supreme Court held that a company that was unable to

pay its debts because its banking facilities had been terminated and it could not therefore not access its liquid assets, was commercially insolvent and therefore had to be wound-up under the Companies Act.

Therefore, the Board of Directors of RNH will not succeed in placing RNH into business rescue given the fact that the company is commercially insolvent. The company will therefore be put in liquidation as per the creditors application.

As far as insolvent liquidations are concerned, s339 of the Companies Act 1973 is of vital importance. It reads as follows: "in the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied mutatis mutandis in respect of any matter not specifically provided for by this Act". 0

In this instance the Board will not succeed in placing the company in business rescue as liquidation proceedings have already been initiated (1). - Section 129 of the Company Act 1973 deals with resolution to begin business rescue proceedings - resolution contemplated in subsection (1) - may not be adopted if liquidation proceedings have been initiated by or against the company (1) - initiated deemed to be the filing and service of the application papers on the company - 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)

34/40

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

TOTAL MARKS: [100]