



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 83/100

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)

Concursum creditorum, as per provisions of the *Walker v Syfret 1911 AD 141* case, provides that the sequestration order crystallises the position of the insolvent, whereby the hand of the law is laid upon the estate of the insolvent and the rights of the general body of creditors have to be taken into consideration (and rank in priority over the interests of the individual creditor). As such:

- No transaction can be entered into with regards to the estate by any one of Mr Solar's creditors which will prejudice the general body of creditors
- The claim of each creditor of Mr Solar's creditors must be dealt with as they existed at the issue of the sequestration order
- The distribution of proceeds from the realisation of the insolvent assets must be carried out according to the order of preference as per the law of insolvency 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 delivery of the antique clock to Mr Hasty by Mr Solar constitutes a voidable preference, whereby the disposition of the antique clock by Mr Solar preferred Mr Hasty as a creditor above the other creditors - where he received full payment prior to the sequestration of Mr Solar. In terms of section 29(1) of the Insolvency Act, the disposition can be set aside as a voidable preference if it appears that due to their dire financial position, the debtor was unable to pay all their creditors in full but still favoured a particular creditor (for instance and in the case with Mr Hasty, by payment of Mr Solar's pre-existing debt).

To have the disposition set aside as a voidable preference, Ms Abel must prove the following:

- The disposition was made by the Mr Hasty 6 months prior to sequestration
- The effect of the disposition was the preference of one creditor (Mr Hasty) above the others
- Immediately after making the disposition, Mr Solar's liabilities exceeded the value of his assets

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)

In terms of section 10 of the Insolvency Act, Axit Finance must prima facie prove that they qualify as a creditor who may bring the application for the compulsory sequestration of Mr Solar, by proving that they have a liquidated claim of at least R100 (or a total of not less than R200 in aggregate if the application is jointly with 2 or more creditors). Axit Finance must also prima facie prove that Mr Solar is factually insolvent/ (that his liabilities exceed his assets) or that he has committed an act of insolvency. √ Lastly, Axit Finance must prima facie prove that there is reason to believe that the sequestration would be to the advantage of creditors. √ 4 prima facie

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 will immediately vest in the trustee of the insolvent estate if the right of inheritance accrued before the the rehabilitation of the insolvent. √As such, Mr Solar's inheritance will vest in the insolvent estate, as provided for in Brown v Oosthuizen 1980 2 SA 155 (O). 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)

Section 23(7) of the Insolvency Act provides that the insolvent may recover for their benefit any pension to which they may be entitled to for services rendered. Therefore, the pension benefits Mrs Solar receives will not form part of the joint insolvent estate if Mr and Mrs Solar are married in community of property and their joint estate is sequestrated. 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)

Section 21 of the Insolvency Act provides that the property of the solvent spouse who has not been sequestrated will vest in the Master and thereafter in the trustee. Therefore, the ownership of Mrs Solar's vehicle will vest in the insolvent estate at the date of sequestration. Mrs Solar will then need to claim release of the vehicle from the trustee.

Mr Green would have a claim against the estate. Mr Green would acquire a hypothec over the vehicle and would have a secured claim. 1 **Although the last instalment is still to be paid and by agreement ownership passed on delivery (1) – Mr Green lost ownership in the vehicle since it is a credit sale in terms of the common law (1) – in terms of a credit sale, ownership of the property passes to the purchaser on delivery and the vehicle therefore belongs to Mr Solar's insolvent estate (1) – Mr Green merely has a concurrent claim for the outstanding purchase price owing to him. (1)**

Question 2.6

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

Upon receipt of the final order of sequestration, the Master will convene the first meeting. The first meeting is convened by notice in the Government Gazette not less than 10 days before the date of the scheduled 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 Abel would need to apply to the Master for the urgent sale of the assets. ✓ Where permission is granted by the Master, the assets may be sold before the second meeting in the manner in which Ms Abel applied. 1 Discuss s 80 bis Ms Abel cannot sell the assets without the prior permission of the Master (1) – an application to sell the assets must be made to the Master in terms of section 80bis of the Insolvency Act (1) – if the property is subject to the rights of a secured creditor, permission by such creditor to sell the property must accompany the application (1) – 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. (1)

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 in Italy does not automatically vest in the insolvent estate of Mr Solar upon sequestration. ✓ To gain control of the immovable property, Ms Abel must obtain recognition of the appointment ✓ as trustee from the foreign court, failure of which, the immovable property will remain vested ✓ in Mr Solar. The court may also impose conditions on the trustee to safeguard the rights and interests of local creditors. ✓ 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 - ✓ In the case of movable property, and according to common law, ✓ the movable property will vest in the insolvent estate if the estate is sequestrated by the court 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)

The Insolvency Act treats the estates of the partnership and its partners as separate entities, treating the partnership as a separate entity which may be sequestrated as if it were a natural person. ✓ Separate files for each estate can thus be opened by the Master, with appointments, meetings, accounts, etc for each account. ✓ 2

Question 2.9.2

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

The sequestration of Mr Solar will terminate the partnership. The partnership would then be wound up and the assets divided amongst the partners (with the assets due to Mr Solar vesting in the trustee). ✓ 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 relates to where the liabilities of the debtor exceed the assets of said debtor ✓ (for example, where RNH has more amounts due and payable relating to outstanding loans and trade and other creditor payables (including for example amounts due and payable to suppliers and other service providers, the landlord, SARS, employees), which exceeds its assets (including for example cash and cash equivalents, the inventory of plastic chairs and raw materials, machinery, and vehicles). ✓

Commercial insolvency is the state of illiquidity where the debtor is unable to pay its debts ✓ in the ordinary course of business and remain buoyant, even though the assets of the debtor may exceed the liabilities of said debtor (for example, where RNH is unable to pay amounts to outstanding loans and trade and other creditor payables (including for example amounts due and payable to suppliers and other service providers, the landlord, SARS, employees) as they become due, even though its assets (including for example cash and cash equivalents, the inventory of plastic chairs and raw materials, machinery, and vehicles) exceed the amounts due and payable. ✓

RNH is commercially insolvent ✓ as it is unable to pay its debts as they become due and payable, including hinderances in RNH's ability to pay creditors and suppliers and the lack of funds to pay customs and excise duty for the shipment of raw materials at the harbour (both impacting its ability to generate revenue), as well as increased monthly repayments on vehicle and truck instalment sale agreements due to the increasing repo rate (which all contribute towards RNH's illiquidity).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)**

Once the provisional liquidation order is granted, the assets of RNH will be under the custody and control of the Master, and then the provisional liquidator once one has been appointed and has assumed office. Custody and control of the assets passes to the final liquidator upon appointment. **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 provisional liquidation order will suspend the employment contracts of RNH's employees from the date the provisional liquidation order is granted. During their suspension, the employees are not required to tender their services, and are also not entitled to their remuneration and other employee benefits (with the exception of unemployment benefits in terms of the Unemployment Insurance Act 1966). The employees also have an unliquidated concurrent claim against RNH for damages due to breach of contract. **Terminate within 45 days 2**

The final liquidator may terminate the employment contracts after consultation with required parties, and if the liquidator and employees have not agreed to continue the employment, all suspended contracts are terminated 45 days after the appointment of the final liquidator.

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)**

While leases are not automatically terminated by the liquidation order, the liquidator may cancel the contract through a written notice, and subject to section 386(2) of the Companies Act 1973, may terminate the lease any time before a general meeting is convened for the first time (subject to the Master's consent).

The Willow Family Trust will obtain a tacit hypothec over the movable property on the leased property, which secures its claim for rent in arrears due before date of liquidation, and operates for as long as rent is owing. The tacit hypothec will not include the injection moulding plant (which is already subject to a special notarial bond) as movable property under a previously registered special notarial bond is not included in a tacit hypothec.

Section 85 of the Insolvency Act provides that the landlord's legal hypothec (tacit hypothec) will confer a preferent right against RNH, and the landlord's claim will be secured limited to the outstanding rental prior and up to the date of liquidation (i.e. 3 months if rental payable

monthly / shorter intervals than a month, 6 months if rental payables at intervals greater than 1 month and less than 3 months, 9 months if rental payable in intervals greater than 3 months and less than 6 months, and 15 months in any other case). ✓

Any claim above the relevant limit will be an unsecured 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) ✓of the Companies Act 1973 provides that the granting of the provisional order will suspend the civil proceedings against✓ RNH (which were as a result of RNH's inability to pay creditors and suppliers) until a liquidator is appointed. Should the creditors and suppliers wish to continue the civil proceedings, three weeks notice of the intention to proceed should be given to the final liquidator within four weeks of their appointment. If no notice is provided, the proceedings are abandoned unless otherwise directed by the court.**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)**

- Mr Hue should report on the assets and liabilities of the estate and the cause of the debtor's insolvency. ✓
- Mr Hue should report on whether any former or current director or officer (consisting of Mr Ronald, Mr Naseer and Ms Hlope) appear to be personally liable for damages or compensation to RNH. or for any debts or liabilities of RNH as provided in the Companies Act 1973. ✓
- Mr Hue should report on the legal actions and judgments against the company which were a result of RNH being unable to pay creditors and suppliers. This is as liquidators are required by Section 402 of the Companies Act 1973 to report on "any legal proceeds by or against the company which may have been pending at the date of the commencement of winding-up or which may have been or may be instituted". ✓
- Mr Hue should report on whether or RNH has kept the required accounting records (as per section 284 of the Companies Act 1973 (and if not, the respects to which the requirements of the section of the Act have not been complied with). ✓
- Mr Hue should report on whether further enquiry, in his opinion, is desirable regarding any matter in relation to the promotion, formation or failure of RNH, or the conduct of its business. ✓

- Mr Hue should report on the progress of the winding-up / liquidation process, any prospects relating to the process, as well as any other matters for which he may desire directions from the creditors. v 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)

Section 98A(1)(a) of the Insolvency Act provides that employees will be entitled to preferences subject to the certain maximum amounts which are determined by the Minister of Justice by notice in the Government Gazette from time to time. The maximum amounts for which the preferent claims are subject to are: 1) R12,000 for any salary or wages due to an employee for a period not exceeding 3 months (which have preference over the claims from the following claims in (2) - (4), while the claims in (2) - (4) rank equally); 2) R4,000 for any payment in respect of any leave period / holiday due to an employee which has accrued as a result of employment in the year of insolvency or the previous year, whether or not the payment is due at the date of liquidation; 3) R4,000 for any payment due in respect of any paid absence for a period not exceeding 3 months prior to the date of liquidation; and R12,000 for any severance / retrenchment pay due to an employee in terms of any law, agreement, contract or wage-regulating measure. Section 98A(1)(a) of the Insolvency Act provides that following the payment of the above claims, a preference is then given for any contributions payable by RNH in respect of the employees to any pension, provident, medical aid, sick pay, holiday, unemployment or training scheme or fund, or any other similar scheme or fund (which claims rank equally), at a maximum of R12,000 for an employee. 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 bond must be registered in terms of the Deeds Registries Act. v
- The movable property must be corporeal / tangible. v
- The movable property must be specified and described in the bond in such a way that makes it readily recognisable. v 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 that SARS may detain the imported property (raw materials in the case of RNH) for which customs and excise duties have not been paid, and will vest a lien over the property until the customs and excise duties debt has been paid, making SARS a secured creditor. In the case that SARS did not vest a lien before the liquidation or the detained assets do not fully cover its claim for outstanding customs and excise duties, SARS will then be paid as a statutory preferent creditor from the free residue (under section 99(2) of the Insolvency Act). 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)

As liquidation proceedings have already been initiated against RNH by a creditor, the business rescue resolution cannot be adopted, so to prevent the adoption of business rescue proceedings in bad faith by the board following the initiation of bona fide liquidation applications against the company.

In the case of Pan African Shopfitters (Pty) Limited v Edcon Limited and Others (10652/2020) [2020] ZAGPJHC 158 (10 July 2020), the meaning of the word 'initiated' used in s 129(2)(a) of the Companies Act 71 of 2008 was determined and it was also provided for as per section 129(2) that '[a] resolution contemplated in subsection (1)- (a) may not be adopted if liquidation proceedings have been initiated by or against the company; and (b) has no force or effect until it has been filed'. In the Tjeka Training Matters (Pty) Ltd v KPPM Construction (Pty) Ltd and others 2019 (6) SA 185 (GJ) para 22, it was decided that '[t]he liquidation proceedings contemplated in s 192(2) of the 2008 Act must be served on the company, not merely issued, to meet the requirements of the section'. The liquidation papers were served by the Sheriff of the High Court on a RNH employee of the company on 11 February 2023, even though the employee placed the documents in his desk drawer and failed to bring the application to the attention of management - the papers were still served and thus the business rescue application will not succeed as the liquidation proceedings have already been initiated against RNH by a creditor. 5

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*** END OF ASSESSMENT ***

TOTAL MARKS: [100]