



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 87/100

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 is a coming together of creditors in a sequestration or liquidation scenario, where all creditors are treated equitably and fairly and no one creditor can prejudice or gain advantage over the rights of any creditor/body of creditors. ✓

The concept protects the rights and security of creditors on date of sequestration (15 January 2023).

The *Walker v Syfret* case ✓ explained this concept indicating that "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 account. No transaction can thereafter be entered into with regard 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." ✓ 4

Impact:

Concursum creditorum places a stay on legal proceedings against the debtor's (insolvent's) estate and ensures that creditors are paid (after realisation of property) in order of preference (per legislation).

This means that no one creditor can gain advantage through the process of execution, receive full payment of its claim at the expense of the claims of other creditors after the 15th January 2023. The concept protects concurrent (unsecured) creditors who would have otherwise most likely not received any dividend from free residue had this concept not been available.

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 Solar disposed of property in his estate shortly before sequestration for the benefit of a specific creditor. This action meets the definition of *disposition* per section 2 of the Insolvency Act, which includes *the transfer or abandonment of rights to property*.

The Insolvency Act allows in sections 26-33 for the setting aside of transactions that occurred prior to sequestration which resulted in dispositions without value (prejudiced creditors) or gave preference to one creditor over another/the general body of creditors.

In the above-mentioned matter, the disposition by Mr Solar of the antique clock to Mr Hasty amounts to a voidable preference per s29 of the Insolvency Act because it met the following requirements (which the trustee must prove):

The insolvent debtor:

- disposed of property of the estate = the antique clock;
- within 6 months prior to sequestration or liquidation = 05 January 2023, which is 10 days prior to sequestration;
- thereby preferring one creditor above another = Mr Hasty was fully settled before other creditors; and
- immediately thereafter, insolvent's liabilities exceeded assets (insolvent).

Remedy:

Ms Abel, the trustee, may apply to court for the setting aside of the transaction unless Mr Hasty (beneficiary) can prove that that:

- the disposition was made in the ordinary course of business; and
- it was not intended thereby to prefer one creditor above another.

The settlement with Mr Hasty was by force and premature and cannot be seen to be in the ordinary course of business. The action preferred Mr Hasty over the general body of creditors in that he got fully settled prematurely before other creditors of the estate.

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

Question 2.2

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

Section 10 of the Insolvency Act states that the court may make an order provisionally sequestrating the estate of a debtor if the applicant can prove, at face value, the following:

- That the applicant qualifies as a creditor who may bring such an application, i.e. has a liquidated claim of at least R100, or when 2 or more creditors apply jointly have combined claims of at least R200; ✓
- The debtor has committed an act of insolvency is insolvent; ✓ **and or factual insolvent**
There is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated. ✓

In the case of Axit Finance:

- If the outstanding personal loan value (quantifiable and certain amount) as at sequestration is greater than R100 (for Axit Finance as a single creditor applicant), then they qualify as a creditor that may bring the provisional sequestration application;
- The debtor is factually insolvent, vi.e. unable to pay their debt as the personal loan is unpaid. The Mr Hasty settlement is a possible voidable preference and is an act of insolvency per section 8 of the Insolvency Act; and
- Because the debtor has preferred one creditor over the general body of creditors, it will be to the advantage of all creditors that the debtor is provisionally sequestrated as sequestration will protect the creditors rights and allow them to be treated fairly. **5**

Question 2.3

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

A right to inheritance accrues that before rehabilitation of the insolvent immediately vests in the trustee of the insolvent estate - *Brown v Oosthuizen* 1980 2 SA 155(O). It was held in the *Wessels NO v De Jager NO* case that *prior to the acceptance of an inheritance or insurance benefits, the beneficiary had no rights to the benefits but merely a "competence" to inherit. Therefore the refusal to accept the inheritance of insurance benefit by the insolvent does not constitute a voidable disposition* ✓- source: Course Notes. ✓

In contrast the acceptance of the inheritance created a right to it resulting in the vesting of it in the insolvent estate.

With regard to Mr Solar, he accepted the inheritance therefore the R500 000 will vest 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)**

Where Mr and Mrs Solar are married in community of property, when one party in the joint estate is sequestrated, the other is deemed to be an insolvent as well.

Per section 23(1) of the Insolvency Act, all property acquired by the insolvent shall belong to the insolvent estate, and exception in sub-section 7 states that the insolvent may for their own benefit (therefore not part of the insolvent estate) recover any pension to which he may be entitled for services rendered by him.

Mrs Solar received a pay-out as an insolvent, this would normally form part of the insolvent estate, but Mrs Solar earned the pension from her employment (services rendered) at the local school, this will therefore not form part of the insolvent estate. ✓ 1

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 Hyundai was purchased through a normal credit sale/ agreement where ownership passed on delivery of the vehicle - per the agreement/common law. ✓

Mr Solar is the purchaser in the transaction and subsequent to the delivery of the vehicle (where ownership passed to Mr Solar) was sequestrated before the full payment of the purchase price. ✓

The vehicle therefore vests in the insolvent estate as it is owned by the insolvent - Mr Solar. ✓

Mr Green Claim?

Mr Green will not be able to claim the vehicle, even when the full purchase price has not been paid to him. Therefore Mr Green only has a concurrent claim ✓ on the outstanding balance of R40 000 owed to him by Mr Solar, unless the credit sale agreement specifically indicated that ownership will only pass once the full amount is paid, which is not the case.

4

Question 2.6

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

The Master convenes the first meeting of creditors.

Per section 40(2) of the Insolvency Act, the Master shall publish a notice in the Government Gazette no less than 10 days prior to the meeting date, and the notice must include the time and place at which the meeting is to be held. 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)**

Per section 18(3) of the Insolvency Act, a provisional trustee may not sell property of the estate without the authority of the Master/court. After the first meeting Ms Abel was appointed as a final trustee - therefore has powers of a final trustee. ✓

Section 80bis ✓of the Insolvency Act states that a final trustee may not sell property ✓ (movable or immovable) of an insolvent estate without the authority of the Master. The Master shall direction on the conditions and manner in which the property should be sold. ✓

Steps?

The trustee must make a written recommendation to the master for the sale of the immovable property, stating why they recommend an urgent sale. **3**

Permission from 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:

Property as defined in section 2 of the Insolvency Act includes all movable and immovable property situated in the Republic of South Africa but excludes the contingent right of a fideicommissary heir or legatee. All property as defined vests in the insolvent estate/trustee, in addition - an insolvent debtor (natural person) loses control of their estate once sequestrated.

Immovable property in a foreign country by default vests in the insolvent debtor, ✓ unless the trustee obtains recognition of their appointment in that foreign country, ✓ (Italy). The apartment is not property as defined, there does not vest in the trustee unless the above condition is met. ✓

Where the trustee fails to obtain the required recognition in Italy, the property remains vested in Mr. Solar. ✓ Control on the other hand has been lost as mentioned above, therefore Mr Solar cannot exercise control over the apartment. ✓**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)**

With regard to vesting, YES. ✓ Movable property in a foreign country vests in the insolvent estate if the estate is sequestrated in the court where the insolvent is domiciled (lives). Mr Solar is sequestrated in South Africa, where he lives, therefore the movable property will vest in the insolvent estate. ✓

Regarding control of the movable property, the answer remains the same - control is lost to the insolvent estate/trustee. **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 estate of the partnership and those of each partner as separate entities - this is different to common law which doesn't separate the two (partnership and the partners). ✓

Therefore when a partner in a partnership is sequestrated, the partnership itself will cease to exist, be dissolved and will therefore be wound-up. It should be noted that the partnership is not sequestrated as a result. ✓

The partners on the other hand become jointly and severally liable for the debts of the partnership following its dissolution. **2**

Question 2.9.2

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

When a partner in a partnership is sequestrated, the partnership itself will cease to exist, be dissolved and will therefore be wound-up. It should be noted that the partnership is not sequestrated as a result. ✓ **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)**

In the liquidation of company, it is important to distinguish whether the company is solvent or insolvent - this will determine which Companies Act (2008/1973) will govern the liquidation of the company.

The Companies Act of 2008 does not define "solvent" or "insolvent". In the South African context there are two types of insolvency and are defined as:

- factual/ balance sheet insolvency: where the liabilities of a company exceed its assets.
- commercial insolvency: where the company is unable to pay its debts as and when they fall due.

Examples

Factual Insolvency - where the total value of RNH's liabilities (e.g.R2 million) exceed the total value of its assets (e.g. R1.7 million). ✓

Commercial insolvency - where the company is unable to pay its debts when they fall due e.g. the inability of the company to release the raw material supplied due to liquidity/cash constraints. ✓

The *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* v Supreme Court of Appeal case helped define "solvent" where it was held that a solvent company is one that is commercially solvent.

The inverse therefore, "insolvent", would be a company that is commercially insolvent i.e. unable to pay its debts as and when they fall due. ✓

RNH is commercially insolvent as it is unable to pay its debts as and when they fall due. ✓ **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)

Per section 361(1) of the Companies Act of 1973, custody and control of the company's assets will vest in the Master, then the provisional liquidator after their appointment and assumption of office.

The company will retain the ownership of the assets. 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)

Section 38 of the Insolvency Act states that the employment contracts of employees whose employer has been sequestrated are suspended with effect from the date of granting of a sequestration order. These were previously terminated before the amendment of the section.

In relation to RNH, the suspension of the employment contract is effective from commencement of liquidation - the date of the provisional liquidation order.

In addition, subsection 2 indicates that during the suspension period mentioned above:

- (a) any employee whose employment contract is suspended is not required/obliged to render services in term of the contract and is not entitled to any remuneration in terms of the contract; and/
- (b) no employment benefit accrues to an employee in terms of the contract of service which is suspended.

The employment contracts can be terminated by the final liquidator. 45 days 2

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)

The liquidation of RNH (lessee) will not impact/terminate the lease agreement/ - this is according to section 37(1) of the Insolvency Act. The liquidator may, before a general meeting is convened for the first time, terminate the lease agreement (where the insolvent company is the lessee) with the consent of the Master /- Section 386(2) of the Companies Act of 1973. /

Where the liquidator does not provide notice to the lessor of a termination of the lease contract, it will automatically terminate 3 months after the appointment of the liquidator. ✓

At liquidation, the contract is uncompleted as the term has not expired (2026). The lessor therefore has the following claims available to them should the lease be cancelled:

- A tacit hypothec ✓over the movable property on the premises brought onto the premises by the lessee – section 85(2) of the Insolvency Act. ✓This shall create a preference with regard to any rentals in arrears up to the liquidation date. The preferent claim will be limited to 3 months' worth of rental (section 85(2)(a)) as the this is a monthly lease. Any arrear amount above this limit will not enjoy preference and will become a concurrent claim.
- Rental after commencement of liquidation enjoys preference as costs of liquidation, this is per section 37(3) of the Insolvency Act – no limit is applicable. **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)**

Liquidation proceedings have the effect of placing a stay/suspension on civil proceedings against the estate of the insolvent company until the appointment of a liquidator - this is per section 359(1)(a) of the Insolvency Act. **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)**

Matters to be included in the liquidator's report to creditors includes, amongst others:

- A progress update and prospects of the winding-up – this includes an update on the liquidator taking control and realising the assets of the company, and the distribution of cash to creditors. ✓
- A report on whether the company has kept accounting records required per section 284, and if not, an indication of the requirements not complied with. ✓
- A report on any legal proceedings by or against the company which may have been pending or instituted at the date of commencement of liquidation. ✓
- A report on the company's amount of issued capital (equity) and the estimated amount (value) of its assets and liabilities. This will give an indication to creditors of any shortfall/factual insolvency and the risk of a contribution by creditors. ✓
- A report on whether on not any director (current or former) appears to be liable for damages or compensation to the company or for any debts or liabilities of the company, therefore personal liability of the directors. ✓
- Where the company has failed, a report on the cause of its failure. ✓ **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)

In a liquidation scenario, employees' contracts are suspended from commencement of liquidation and will thus not have any employment benefits/remuneration accruing and being owed to them from this date - sections 38(1) and (2) of the Insolvency Act.

The liquidator may terminate the employment contracts only if in compliance with Sections 38(5) of the Insolvency Act. Where the contracts are terminated the employees have the following claims available to them:

- Per section 98AV – employees are afforded a limited statutory preferent claim for salaries and any other earnings which accrued to them before the commencement of liquidation. The limits in summary are:
 - Accrued salaries and wages v up to the lower of 3 months' earnings or R12 000; v
 - Accrued leave pay up to R4000; v
 - Accrued payment in terms of any other form of paid absence up to the lower of 3 months' earnings or R14 000; v
 - Accrued severance pay per any law/agreement and up to R12 000. v **5**

The above will be paid from free residue before the consideration of concurrent claims.

Any amount over the above limits will be paid together with all concurrent claims should funds be available.

- A claim for damages for losses suffered due to the suspension/termination of employment – available under section 38(10); and
- A severance pay where there is a suspension/termination of employment - available under section 38(11).

QUESTION 3.8

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

1. The bond must be registered in terms of the Deeds Registries Act; v
2. The movable property must be tangible; and **corporeal**
3. The movable property must be specified and described in the bond such that it can be readily recognised/identifiable. v **2**

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)

In a situation where SARS is a creditor of the company and it is owed customs and excise duties, SARS can invoke section 114 of the Customs and Excise Act 1964 which provides SARS with a security right in the form of a lien - this is to secure the payment of the relevant duties.

Section 114 allows SARS to detain the property (raw materials) until the tax debt is paid, this therefore makes SARS a secured creditor in relation to the detained property (raw materials).

Where SARS has not vested a lien (before liquidation), or the value of the raw materials is inadequate to cover the tax debt - SARS will be a preferent creditor (ranking above concurrent creditors) to be paid from 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)

Voluntary commencement of business rescue proceedings is available to the board of directors of a company (through a resolution) that is financially distressed and there appears to be a reasonable prospect of rescuing the company - per s129(1) of the Companies Act of 2008 ("Companies Act").

Financial distress is defined in the Companies Act, while "reasonable prospect" is not, thus case law is relied upon on the latter.

In relation to RNH, liquidation had already been initiated against the company, therefore voluntary business rescue by the board is no longer available - section 129(2)(a).

"Initiation" of liquidation proceedings is defined in the below mentioned court cases as proceedings which are initiated once a liquidation application is issued and served on the company.

- *Tjeka Training Matters (Pty) Ltd v KPPM Construction (Pty) Ltd and Others. ("Tjeka") v*
- *Pan African Shopfitters (Pty) Ltd v Edcon Ltd and Others. v*

The liquidation application was served by the Sheriff on the company, albeit through an employee of the company. The company can thus not argue that it was *unaffected in law until made formally aware of the steps being taken against it* (Liquidation) – Tjeka.

The board of directors will thus not be successful in placing the company in business rescue as section 129(2)(a) fully applies. ✓ **5**

38/40

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

TOTAL MARKS: [100]